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

REPRESENTATIVES
Adv Varney (SC) – The Calata Group
Adv D Pillay – The Calata Group
Ms A Thakor – The Calata Group
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PROCEEDINGS ON 17 FEBRUARY 2026

ADV SEMENYA: Chair, Commissioners, I am requested to advise that Ms Moraga is running slightly late.

CHAIRPERSON: Thank you. Mr Varney?

ADV VARNEY: As the Commission pleases. Good morning, Commissioners. Today we wish to lead the evidence of Yasmin Sooka, who is present with us in the witness box.

CHAIRPERSON: Ms Sooka, please state your full name for the record.

MS SOOKA: Yasmin Louise Sooka.

CHAIRPERSON: Thank you, ma'am. Do you swear - are you going to take an oath or an affirmation?

MS SOOKA: The oath is fine, thank you.

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

MS SOOKA: So help me God.

CHAIRPERSON: Thank you, (indistinct)

ADV VARNEY: As the Commission pleases. Ms Sooka, thank you so much for taking time out of your busy schedule to be with us here today. I understand that you have put up two sworn affidavits dealing with the subject matter of this Commission, and I would like you to confirm both affidavits. Let us start with the affidavit you made before this Commission, which is dated 4 November 2025. And, Commissioners, I hope that you have before you bundle 5 of the

Calata Group volume, and that affidavit is at pages 10 to 11. Ms Sooka, in that affidavit, firstly, do you confirm that that is your affidavit?

MS SOOKA: Yes, I do.

ADV VARNEY: I note that at paragraph 5 of that affidavit you confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025, in the matter of Calata and others versus Government of South Africa and others, 2025, case 5245, in the Gauteng Division. Do you confirm that you confirm that affidavit insofar as it pertains to you?

MS SOOKA: Yes, I do.

ADV VARNEY: Thank you. And, Commissioners, you are aware that that affidavit is in bundle 1. And then at paragraph 6 you confirm the contents of the supporting affidavit you made in that litigation, dated 18 November 2024. And that affidavit has also been provided, Commissioners, in bundle 5 at pages 1 to 9. That affidavit is dated 18 November 2024. Do you confirm the contents of that supporting affidavit?

MS SOOKA: I confirm that.

ADV VARNEY: Thank you. Perhaps we can then kick off, Ms Sooka, by asking you to tell us a little bit about yourself. And I see you have helpfully provided some highlights of your illustrious career in paragraph 4 of your 18 November 2024 affidavit, and that is at page 3 of bundle 5. Can you take us through some of the highlights of your career, please?

MS SOOKA: I... Sorry, I have to find it.

ADV VARNEY: Sure. So it is that supporting affidavit, and it is in your bundle 5. It will be the first affidavit in that bundle.

MS SOOKA: Oh, yes, thank you. So thank you, Chairperson. I served as a Commissioner on the Truth Commission as the Deputy Chair of the Human Rights Violations Committee from 1995 to 2001. And in the period between 2001 and 2003 I chaired the little committee that was responsible for the final reports which were handed to President Mbeki in March 2003.

I was subsequently appointed by the United Nations as one of three international Commissioners on the Truth Commission for Sierra Leone, where I served between 2002 and 2004. I was also, you know, I went from the Truth Commission to the Foundation for Human Rights, where I was employed between 2001 and 2019.

In the intervening period I was appointed by the UN Secretary General in 2010 to a three-member panel advising him on accountability for war crimes in Sri Lanka committed during the final stages of the war.

I was also in 2015 appointed by the Secretary General to serve as a member of the independent review panel investigating allegations of sexual abuse by French military forces in the Central African Republic, as well as looking at the conduct of UN officials in response to the allegations.

In 2018 I was appointed by the UN Human Rights Council to chair the Commission on Human Rights for South Sudan, a position

that I still hold, and where we monitor the human rights situation and investigate allegations of war crimes with the purpose of setting up the hybrid court for South Sudan, which will look into criminal accountability by those who bear the greatest responsibility.

I also served as a high-level expert for the United Nations looking at Resolution 13/25 on the question of women, peace, and security, and I continue to work on accountability for Sri Lanka. I serve as the Executive Director of the International Truth and Justice Project, an independent non-profit organisation which is based in London, looking at questions of justice and accountability, and I serve as an advisor to the Programme on Unfinished Business at the FHR, so, ja, that would cover it.

ADV VARNEY: Thank you. The FHR, that being the Foundation for Human Rights?

MS SOOKA: Yes, yes, yes.

ADV VARNEY: And you have had a long relationship with that organisation. Can you just briefly describe that?

MS SOOKA: Yes, I was appointed as executive director of the Foundation for Human Rights in 2001, and I served as the director until 2019. The Foundation for Human Rights is a very interesting organisation. It was established as one of the transitional babies, really, by the government of South Africa in 1996.

The agreement was signed between the government and the European Union, and it was really to begin to promote human rights in South Africa, to deal with the questions of past violations and

injustices, to promote a culture of human rights, and to do so using the Constitution. And really, it is in that context that one of the key programmes of the foundation was dealing with victims of political violence of the past, and so it was not only dealing with current and future violations, but it dealt with the questions of political violence.

And in that context, the foundation was supporting many of the victims of apartheid-era crimes, you know, trying to ensure that the recommendations of the Truth and Reconciliation Commission were in fact implemented, and of course really looking at the questions of prosecutions and reparations.

ADV VARNEY: And am I correct in saying that before you retired as executive director, you started a programme called the Unfinished Business of the Truth and Reconciliation Commission?

MS SOOKA: Ja, I mean, it was quite interesting because it was not called that initially, and it almost grew out organically from the fact that the foundation was being requested by many family members to actually assist them to look into what the NPA was doing with their cases. And before we knew it, we in fact had a number of family members who were being supported by us, and it was very clear that what we were dealing with in fact was the unfinished business. And I think that in the middle of the programme, that is when that title was given to this programme.

ADV VARNEY: And you still have an ongoing relationship with the Foundation?

MS SOOKA: Yes. I think I am very grateful for the fact that both of

my successors, Hanif Vally and Zaid Kimmie, in fact continued to support the programme, and in fact expanded on the programme that we had established right from the outset. And I served as a board member of the Foundation, and actually am an advisor on the Unfinished Business programme. So I am usually consulted on much of the steps that are taken to promote this question of justice and accountability.

ADV VARNEY: And according to your statement, you still sit on the supervisory board of the Foundation itself?

MS SOOKA: Yes.

ADV VARNEY: Thank you, Ms Sooka. Can you assist us by helping us to understand where the Truth and Reconciliation Commission comes from, and in particular, how was it that that Commission was imbued with the authority to issue amnesty? It would be good to hear why that was decided, and if you could also highlight the key recommendations that the Commission made in relation to accountability, that would be a helpful start.

MS SOOKA: Thank you, Chair. I was a member of civil society in the period going right up to the 1990s, and I think it was around 1993 when discussions in South Africa began around what would actually happen in a post-South Africa, post-apartheid South Africa to those who had perpetrated gross human rights violations. And at the time, I recall, you know, the discussions were taking place around whether there should be Nuremberg-style trials or what kind of mechanism we should have going forward.

I think it was a shock to many of us in the human rights community when we woke up one morning, and I think we discovered that in fact the liberation movements had agreed that there would be an amnesty. The saving grace, I think, of that commitment was that the amnesty would be negotiated by the new government when it came to power.

So in a way, there was a recognition that those who had signed the negotiated agreement did not really have, I think, the complete authority to actually sign all of our rights away. But I recall phoning our then Minister of Justice, Dullah Omar, and Dullah was a mentor to many of us young lawyers, and saying to him, they had sold us out, and they had actually sold out the rights of victims.

And I, you know, Dullah was not a harsh man, and in his own quiet way he just said to me, well, you guys, you can stand outside and you can scream and shout as much as you want, or you can actually come and assist us in the process and help us to open the process and make it an accountable one. And I think that that is something that we sometimes forget, that in fact the amnesty could have been one behind closed doors, and in fact it could have been a blanket amnesty.

Instead, it was a conditional one, and, you know, there was a group of us in the human rights community under the leadership then, I think, of Alex Boraine, who became the Deputy Chair of the Truth Commission, who engaged in a process which brought scholars from across the world and transitional justice practitioners to participate in

the discussion in South Africa on what kind of amnesty we would have in South Africa.

The Latin American experiences, of course, were quite different, but in Latin America, in fact, the military dictatorships had given themselves a self-styled blanket amnesty, and they then passed through to civilians. And in that context, I think both in Chile and Argentina, there were attempts then to prosecute those who were responsible, and in the context of that, I think you saw the president of Argentina almost losing power.

And so in South Africa I think there was a real concern that in the kind of power construct that we were sitting with, would we be able to move to a peaceful transition if we did not find some way to accommodate perpetrators, and that was the tenor of the discussions that took place.

And so when you look at the conditional amnesty, it was very clear that you would have to apply for amnesty individually. It had to be by way of individual application. You had to prove that your actions were in pursuit of the political objectives of the State or its agencies or the liberation movements, and your actions should not have been motivated by malice or greed, and the primary goal, of course, was full disclosure.

Now, the full disclosure was, of course, also tied to the rights of victims, that victims were entitled, in fact, to be able to access the truth about what had happened to their loved ones. And so the amnesty was seen almost as an exchange of truth for them being

able to actually, once they had made full disclosure and received amnesty, not to be prosecuted or imprisoned, or if they were imprisoned, to be let out free. And, of course, there would be no civil claims for damages against them by families.

So this was really the sort of background and the basis for the structure of the Truth Commission Act. And, of course, one of the big questions was, how do we find a way in which people who come from different backgrounds, and given the kind of repressive, brutal past of oppression that we had, how would they find ways to live together?

And so the Truth Commission was really seen as that vehicle to lay the basis, in fact, for what would be nation building and reconciliation. Now, it took one year, actually, for the Truth Commission Act to be passed in Parliament. And, of course, during that period there were parliamentary hearings, and many of us appeared before the Portfolio Committee. Justice was sitting ...(intervenes)

COMMISSIONER KGOMO: One year? Which year was that now?

MS SOOKA: This was 1995.

COMMISSIONER KGOMO: Yes.

MS SOOKA: 1995. And the Act was debated in Parliament, and there was a very interesting turn of events, because one of the issues that we had raised was that the proceedings of the Truth Commission should take place in public. And in an interesting way, the former National Party managed to slip back into the legislation, the draft

legislation that the proceedings of the Truth Commission should be *in camera*.

Victims around the country protested vociferously about that, and then that section was changed, and the way in which the legislation was drafted ensured that, in fact, the proceedings of the Truth Commission would take place in public, except in those situations where the Commission itself deemed that, in fact, it was necessary to hold what we called "*in camera* proceedings", and that was allowed in terms of section 29 of the Act.

This was, of course, one of the first transitional institutions which was set up by the new government. And as civil society, we also went to the Minister of Justice and we said to him that it was so important, you know, when you looked at the construction of who would be sitting on this Commission, that we thought he should open the process and, in fact, have a public process in which people would have to present their views around these issues. And that from that, a short list should be drawn to be presented to the president for appointment to the Commission.

And President Mandela graciously agreed to that proposal, and that committee was, in fact, chaired by his own legal advisor, Fink Haysom, who interestingly now serves as the UN Commissioner for South Sudan, so he has gone on to work in the UN. But Fink Haysom chaired that committee, Dullah Omar had his own representatives on the committee, and you had a number of civil society members, as well as members of the religious community,

and each political party had a representative.

And so it was a very open process in terms of which commissioners were nominated, interviewed, and finally selected. A list of 25 names was given to President Mandela, and from that he chose 15, and he went outside of that list to appoint another two based on representativity.

But one of the concessions that the National Party managed to secure was that the amnesty committee would be made up of judges of the Supreme Court. They did not actually trust the commissioners and said that they would be biased, and even though the Commission was made up of, you know, people who belonged to the former National Party and to one of the right-wing parties, nevertheless, I think there was still this perception that they had to safeguard against that.

The irony, of course, was that the government had a hard time finding judges who had not made rulings which sent people to the gallows during the apartheid years, and I think it was only Judge Andrew Wilson who actually passed master. And then, of course, two new judges, newly appointed Judge Hassan Mall and Judge Bernard Ngoepe were appointed with Judge Wilson to the amnesty committee.

And so you had three committees, really, the Human Rights Violations Committee, which I was the deputy chair of and the archbishop chaired, and that was really the "engine room" of the Commission. That committee was responsible for really collecting

and verifying victim statements, for conducting the thematic and institutional hearings, looking at the questions of patterns of abuse in terms of the violations, setting up a process of corroboration in terms of the information that was coming through, it had a research unit.

The Commission was also fortunate to have the powers of search and subpoena, and that enabled it to, in fact, ensure that it was able to secure information and, of course, to subpoena people to come to the Commission.

And the committee was, of course, tasked with establishing a complete picture of what had happened in the country during that period, determining whether the gross human rights violation, as defined in the Act, had been committed, and this included killings, torture, abductions or severe ill treatment associated with the political objective. It also had to identify the victims and make findings that, in fact, they qualified for, you know, and they could then be referred to the reparations committee.

I think a major departure from any Commissions that had gone before in other parts of the world was the fact that it had to identify the institutions and individuals who bore responsibility for perpetrators, and then it also had to look at the context and patterns of abuse.

The reparations and rehabilitation committee, of course, were there to really look into the circumstances of the harms and the violations that victims had suffered, and to, in fact, develop reparations and rehabilitation policy, which was then going to go to

government as a recommendation.

They were also responsible for dealing with interim reparations, and so played quite a critical role in ensuring that victims were accompanied through the process, because the Commission was about ensuring that victims had a safe space to come and speak about what had happened to them and their loved ones.

And, in fact, you know, the Commission also decided that it would be a traveling Commission and that it would go across the landscape to the smallest towns in South Africa to actually invite victims to come forward and to speak about what had happened to them.

The Commission had, you know, a really interesting set of powers, the committee, and one of them was the power, in fact, to subpoena. And the understanding, I think, of those who had set up the truth Commission was that there would be a "carrot and stick" approach, that the legal system would continue to do its work, and that indictments would take place of perpetrators, and that, in fact, would drive people into the amnesty process.

The challenge, of course, was that I do not think that the D'Oliveira unit at the time understood that their job was to continue to prosecute, and so you almost see a moratorium also by that unit at that point, even where trials were in process. In a way, what happened was that they stopped once people had applied through the amnesty process.

But there is no doubt that the D'Oliveira unit's work,

particularly around the Eugene De Kock case, if it had not been for that, I am not sure the truth Commission would have had the kind of access to material about what had happened in the past. And the Goldstone Commission's reports also were an important contribution to the work of the truth Commission. So ...(intervenes)

ADV VARNEY: Ms Sooka, can you just explain to the commissioners what the D'Oliveira unit was?

MS SOOKA: In the period before the Truth Commission was set up, Jan D'Oliveira was in charge of a unit, and I stand to be corrected here, but that unit was dealing with the political crimes of the past. And in fact, I would say that from my own recollection at the time when the Commission began its work, they had prepared a number of dockets where in fact they were ready to prosecute.

And one of them that the Commission, I think, constantly asked about was the docket pertaining to Krappies Engelbrecht. And the D'Oliveira unit were incredibly successful in doing their work and in supporting the Goldstone Commission in their investigations.

COMMISSIONER KGOMO: Can you recall who served in that unit, the D'Oliveira unit?

MS SOOKA: Jan D'Oliveira, of course, was the head, and I think he had a deputy. Her name escapes me now, but I think that Anton Ackermann and Torie Pretorius also served in that unit. But it is a long time ago, so I cannot remember, but I do know that his deputy, I think her name was Antoinette, but I do not remember what her surname is. But we met with them quite frequently as the Human

Rights Violations Committee, and they did know what they were doing, and they were doing a pretty good job at the time.

COMMISSIONER KGOMO: Thank you.

ADV VARNEY: Commissioners, we will do some research on the D'Oliveira Unit. We do make reference to it in passing in the Calata founding affidavit, but we will compile a short memo and try to establish who was on that committee. There were also some leading investigators, including Frank Dutton, who subsequently became involved in these cases as well.

Ms Sooka, perhaps you can then turn to the recommendations that the Truth Commission made in respect of accountability, and in particular what to do about the cases in which amnesty had not been applied for, or in which amnesty was denied?

MS SOOKA: The Commission was actually very clear that, you know, the whole edifice of the Truth Commission had been built on the basis of a conditional amnesty. And an assurance that this was an exception, we set aside the rule of law for a particular time, but that once amnesty, the amnesty process was over, that the normal law, you know, the normal criminal justice system would, in fact, play a role.

And one should remember that at no time when the Commission was in process had the possibility of criminal prosecutions ever been set aside. I think that remained the discretion of the NPA at the time, and so the Commission talked about the state adopting a robust prosecution policy.

And, you know, one of the things that the Commission was really busy with in the period, I would say the last six months of 1998, was sending out section 30 notices to persons and institutions who were implicated in gross human rights violations.

And really giving them the opportunity to either respond to that in writing, or, in fact, to ask the Commission for an opportunity to address them on the violation, knowing that, in fact, the Commission was going to make findings which, in fact, would be included in its final report.

And so we, you know, sent out an instruction to all of the human rights committees in the region and the investigation team at a national level. And we asked them, in fact, to prepare a list of cases, which included cases where people had not applied for amnesty, cases where amnesty was still in process, because the Amnesty Committee continued after 1998, when the rest of the Commission went into suspension.

And, in fact, in cases where people had been implicated, and those lists were then consolidated, and the list was approved by the Commission, and a consolidated list, in my recollection, was sent to Advocate Bulelani Ngcuka, who was then the head of the NPA, and, of course, to the Minister of Justice at the time.

The subject was discussed at the Commission's meeting in 1998, I think, which took place on the 27 or 28 October, and then later, when the Commission met in March 2003, before handing over the report to, the final report to President Mbeki.

ADV VARNEY: So let us deal with the handover of the cases in some detail, and I am going to refer you to the affidavit of Lukhanyo Calata, which is in bundle 1, and if we can turn to paginated page 35 at paragraph 95? So it does seem that in October of 1998 the Commission prepared a letter which was addressed to the then NDPP, Bulelani Ngcuka, which was accompanied by a list of cases, and that letter and list was apparently transmitted to the NDPP towards the end of October, maybe 27 or 28 October. Do you have a copy of that letter and that original list?

MS SOOKA: No.

ADV VARNEY: No. Ja, so ...(intervenes)

MS SOOKA: I mean, the reason for that is also that in 1998 the Human Rights, you know, the rest of the Commission went into suspension, and so much of the material was actually moved already to the archives, and so we were never able to locate that letter, but we do know that it was received by the NDPP at the time.

ADV VARNEY: Yes. It is perhaps something that we can ask the evidence leaders to follow up with the NPA, alternatively with the National Archives. If we can then turn over the page to 36, and Mr Calata at paragraph 97 points out that in early 1999 the NDPP set up a group called the Human Rights Investigation Unit, which was apparently also an initiative of the then Minister of Justice, Dullah Omar, and the first head of that unit was Advocate Vincent Saldanha, and his deputy was Advocate Brink Ferreira, and they had a mandate to review, investigate, and prosecute TRC cases.

Now, it does seem that you and Commissioner, Advocate Dumisa Ntsebeza SC, held a meeting in February of 1999 with that unit, as well as NDPP in Ngcuka. Can you tell us what transpired at that meeting?

MS SOOKA: We were very pleased that Bulelani quite early on in the process agreed to meet to discuss how the NPA would actually handle these cases that had been referred to the NPA by the Truth Commission. We saw that as an important aspect of the commitment by the NPA to actually engage with their own responsibility around taking the cases forward.

It was at that meeting, of course, that Bulelani indicated that he had set up this particular Human Rights Investigative Unit, and, you know, the primary task of that unit was going to be to look into the TRC cases and, in fact, to identify those cases where prosecutions could then take place.

We, both Dumisa and I knew Advocate Saldanha because I think both of us had worked with him in (indistinct), so he was not a stranger to us, and I think he had been at LRC at the time when the Truth Commission was in operation, and so he understood what was actually at stake. So I think ...(intervenes)

COMMISSIONER KGOMO: Advocate Saldanha, is now Judge Saldanha.

MS SOOKA: He is Judge Saldanha, yes. We had all served in (indistinct) together during the apartheid years, and so he had also when he was at the LRC, you know, the LRC had also played a key

role in representing many victims' families during the Truth Commission, so he had a good understanding of the issues.

I think the purpose of that meeting was really to lay the basis for future engagements between the Truth Commission and the NPA around how to handle these cases, because one should remember that at the time there were many cases where amnesty had not, the amnesty hearings had not yet taken place.

And while some cases were already resolved and, in our view, were quite clear and could be taken up, at the same time there was a need to work through the cases, And so that meeting was really about discussing what methodology could be used going forward to assist them to, in fact, deal with the cases.

ADV VARNEY: So did you get a sense at that meeting that there was no reason to suspect that these cases would not be taken forward on a vigorous basis?

MS SOOKA: No, I think both Dumisa and I were quite excited about the fact that there was a great, I think, sense of enthusiasm about working through the cases, and quite clearly Bulelani was prepared to commit resources to making sure that the process going forward would work.

ADV VARNEY: Commissioners, there is a statement before the Commission made out by Judge Vincent Saldanha, and we will get you the reference where that can be located on the record shortly. Let us then turn to subsequent developments, and if you look at paragraph 99 of the Calata affidavit, also on page 36, it is mentioned

that on 8 or 9 March 1999, just a few weeks later, you met with Advocate Saldanha to discuss the report prepared by the TRC, dated 7 March 1999, and titled Report for the Office of the National Director of Public Prosecutions, and that report is annexed to the Calata affidavit as FA9. It can be found in bundle 1 page 360. Can you give an indication of what was set out in that report?

MS SOOKA: Thank you. You know, obviously the report flowed from the discussion that we had had with Vincent and Bulelani earlier, and that was really around this question of how we would begin to identify a way of dealing with potential cases, and in that report, in fact, we set out that we had begun a process of establishing mechanisms for identifying potential cases.

We also added that we had identified a range of categories and issues around which we believed prosecutions could be considered, and that, in fact, future discussion should be around looking at these categories to determine viability, but also to look at the question of prioritisation.

Now, one of the issues, and I think that is set out in 99.2, was torture, and that was because in a strange way the victims came forward, and they would speak about the torture that they had endured at the hands of the perpetrators.

But interestingly, when you go through the amnesty applications, there were not many perpetrators who actually applied for torture. The torture emerged in the course of the hearings, and so, you know, on the basis of the Human Rights Violations

Committee, the torture had become an important category.

The second, of course, was the post-Caprivi hit squads, the security force cover-ups, the unlawful destruction of documents, and here, together with lawyers for human rights, there had been an application to the courts to stop the destruction of documents.

Because there is no doubt that from the moment when the Commission began its work, the shredders were doing extraordinary duty, and so it was a case of, you know, trying to "close the door after the horse had bolted", but nevertheless, it was an important issue to look at.

The question of gun running, the question of targeted identification and assassinations, the issue of cross-border raids, and the recipients of section 30 notices, and persons who were the subject of section 29 investigative hearings, and amnesty applicants who had been denied amnesty.

The report also referred to other cases which were identified by the different regional offices, and attached preliminary work-in-progress lists from KwaZulu-Natal, the Eastern Cape, and the Western Cape regions, and I think copies of that are annexed to that report.

I think that the challenge has been to find the letter with a consolidated list. We do not have that, but the NPA should have that, and certainly at a national level the National Investigative Unit also added their own cases to the list as well.

ADV VARNEY: You made reference to section 30 notices and

section 29 investigative inquiries. Can you just advise us, you know, what are section 30 notices and what were the section 29 inquiries?

MS SOOKA: The section 29, you know, section 29 of the Act gave the Commission to hold special investigative hearings, and it was a tool that the Human Rights Violations Committee used to actually begin to extract amnesty applications.

And so to give you an example, for instance, you know, you had a student activist, Stanza Bopape, who went missing during that 1980s period. And initially the security branch denied that in fact they had abducted him and arrested him, and later on it actually transpired that they picked him up and they had held him incommunicado for quite a while.

Now, the Commission, you know, received a statement, obviously, from his family, and we were able then to call for the missing docket. And as a result of the information in the docket, we then, you know, issued 29 notices to these people to come to attend an investigative hearing.

On the morning that the hearing was supposed to take place, we were visited by two lawyers who represented a group of 10 alleged perpetrators, and the lawyers indicated that they were seeking a postponement because their clients intended applying for amnesty.

The amnesty applicants included even the Minister of Law and Order at the time and a number of police commissioners as well, and there were 10 amnesty applicants all in all, they applied for

amnesty. And so section 29 was a very useful way to conduct an *in camera* investigation, but of course also to bring perpetrators into the process, putting them on notice that in fact the Commission had information about them.

The amnesty process around Stanza Bopape was very interesting because they claimed that they, you know, he has had a weak heart, and they attached these wet, you know, these electric wires to his nipples with wet cotton wool, but that because of his weak heart, every time they cranked the electric wires, his body went into spasm and he suffered a heart attack. But they never actually call that, you know, torture, what they were doing was torture. They then claimed that they had taken his body and they dumped it in the Komatipoort River.

And in fact, you know, under the section 29 process we sent our investigators with, I think it was one of the captains from the Eastern Transvaal Division, Captain Loggerneberg, to point out how he had dumped this body. And we had a dead, you know, why do not they call these things, a replica, and we asked him to pick it up from the boat and he could not do that.

We also conducted sightings of bodies that had washed up in the Komatipoort River and found none, but it was one of those amnesty applications where they received amnesty for the abduction, but not for the fact that they were responsible for his disappearance and obviously his killing, but it is an example of how section 29 worked.

Section 30, in terms of section 30, if you were an implicated person, then you had to be given notice of the fact that you had been implicated by a particular witness. We had to ensure that you got a summary of the facts of the case and, you know, you were provided with information on how you had been implicated.

You were also given an opportunity to respond to the allegation either in writing, and during the time that hearings were taking place, if you so wanted to, you could ask the Commission for an opportunity to testify publicly. And of course you were advised that if you did not respond, there would be an adverse finding against you in the Commission's report.

And so, you know, in that period towards the end of 1998, the Commission was inundated with letters from legal advisors protesting why their clients' name should go into the Commission's final report, and we spent a lot of time having to respond to that.

You also know by now that on the eve of the handing over of the report, former president De Klerk applied to court to have the finding against him struck out, and the Commission was advised by its counsel to postpone the matter. And of course two years later in the Commission's final report we published that finding, but we were in a legal battle for, what is it, almost two years with President De Klerk.

On the day that the Commission was going to hand over its final report to president Mandela, that was also, I think, the night before, when the African National Congress also took the

Commission to court to demand that it should have another opportunity to make a submission to the Commission, that exhausted all of the opportunities anyway. The Commission did fight that battle and did succeed, and it handed over its reports to president Mandela, so the last period of the life of Commission, 1998, was quite eventful.

COMMISSIONER KGOMO: Can you remind us, and maybe for the benefit of the public as well, when the report was handed over to President Mbeki? Did he make a statement? Did he make any undertakings? Did he say what he has going to do with the report, final report, that is?

MS SOOKA: He did make a statement, and to be honest, I think a copy of his statement is probably in the bundle, but for the life of me, I cannot actually remember what he actually said on that day. I think, you know, I think all of us focused a lot more on the statement that he in parliament much later on, when he was dealing with having received the report. But I am sure counsel can help me to find that statement.

It was quite a traumatic period because, you know, the Commission had gone into suspension. The Commissioners were coming together a few days before to finalise everything and to make sure that the copies were ready to hand over to President Mbeki.

COMMISSIONER KGOMO: Yes, no, counsel will find it. You may continue on another aspect and come back to it.

ADV VARNEY: Thank you, Commissioner Kgomo. But just to answer that question, we also do not have a recollection of the

response of government to the handover of the initial report in 1998. But in relation to the final report which was handed over in March 2003, President Mbeki addressed both houses of parliament on the 15 April 2003. And we have annexed that speech from the *Hansard*, it is ANNEXURE FA21 to the Calata affidavit, and it can be viewed at bundle one, page 508.

COMMISSIONER KGOMO: Yes, thank you.

ADV VARNEY: Ms Sooka also referred to cases that had been identified by the regional offices, and that lists from three of the provinces, KwaZulu-Natal, Eastern Cape and the Western Cape regions had been attached to that 7 March 1999 report, and those were annexed to the Calata founding affidavit at FA10, 11, and 12. So FA10 can be viewed in bundle 1 at page 365, FA11 also in bundle 1 at page 370, and FA12 at bundle 1 at 379.

Ms Sooka, any recollection as to why there were only three provinces who put up lists at that point? So, for example, Gauteng and the Free State seemed to be missing.

MS SOOKA: I do not think that we did not put up lists for those provinces. I just think that we do not have copies of the lists, but, you know, they were the lists from each of the regions, and there was a national list as well, which brought all of that together, so I think it is just missing, not that we did not put up lists.

ADV VARNEY: And then at paragraph 100 in the Calata affidavit it reflects that on 11 March 1999 you sent a letter to Adv Saldanha seeking feedback regarding potential prosecutions, plus you made an

undertaking to obtain information that he had requested. And, commissioners, a copy of that letter is annexed, FA13 to that affidavit. It is also in bundle one at page 381. Do you recall getting any feedback from that letter?

MS SOOKA: No, I did not.

ADV VARNEY: Alright, we then know, and it is set out in the Calata affidavit, that the Human Rights Investigation Unit continued operations until 2000. It did not institute any prosecutions, and the dockets were then transferred to the Directorate of Special Operations, also known as the Scorpions. And within the DSO a fresh unit was set up called the Special National Projects Unit, which was then headed up by Adv McAdam. Did you have any dealings with that particular unit?

MS SOOKA: Yes, I do remember having met with Chris McAdam.

ADV VARNEY: And I am not asking you to recall back some decades, but did you get the impression that that particular unit was forging ahead with its investigations?

MS SOOKA: It is difficult for me to remember, but, you know, I do remember that when I did go to see Chris he had a whole lot of boxes on the floor of his office, and he did say to me that they were working on them. I think it was also the time in the commission where I had kind of handed over responsibility for engagement between them and the Commission to Martin Coetzee, who, I think, appointed Paddy Prior to deal with them directly, but I did not get the impression that they were not working on the cases then.

ADV VARNEY: Please explain who Martin Coetzee is?

MS SOOKA: Martin, you know, each of the committees had an evidence leader, and Martin Coetzee was the person responsible for the Amnesty Committee, and Paddy Prior was one of the advocates attached to the Amnesty Committee. You know, just to explain that the rest of the Commission went into suspension at the end of October 1998, and three of us were transferred to work alongside the Amnesty Committee.

Denzel Potgieter, who is now a judge, was transferred to the Amnesty Committee to sit on the Amnesty Committee, and the late Klingi Wenkizi and myself continued to perform our functions, human rights violation functions and reparations functions, but working alongside the Amnesty Committee, and of course there were already two commissioners. And then Chris De Jager and the chairperson were on the amnesty committee already.

ADV VARNEY: Thank you. So then let us proceed, and on paginated page 38 of the Calata affidavit at paragraph 102 it is reflected that Adv CB Ferreira of the NPA addressed a letter dated 31 August 2000 and date stamped 11 September 2000 to the TRC in relation to the cases.

Now it looks as if we are not in possession of that letter, and again we were hoping that the evidence leaders might be able to trace it for the Commission. But we do know that Adv Paddy Prior, who you have just referred to, you mentioned that he was attached to the amnesty committee, and he is described here as a TRC legal

advisor and evidence leader.

He responded by way of an undated letter, although it was possibly during September of 2000, titled "Human rights files and other relevant records". So Adv Prior acknowledged receipt of the NPA's letter and indicated that the TRC would respond in due course.

But then attached to Adv Prior's letter was a list of 226 cases for further investigation in table format, and a copy of Adv Prior's letter and table, commissioners, it is attached as FA14 to the Calata affidavit, and that can be seen in bundle 1 at page 382.

COMMISSIONER GABRIEL: What is that page again?

ADV VARNEY: 382.

COMMISSIONER GABRIEL: 382.

ADV VARNEY: Ms Sooka, it seems that this is probably the most comprehensive list at our disposal, and it also seems that this was, at least in terms of the available records, the last communication between the Commission and the NPA. Do you know per chance whether Adv Prior ended up responding further to the information requests from the NPA?

MS SOOKA: No, I have no knowledge of it, and it was also probably around the time that the Amnesty Committee was itself winding up its affairs. So it is likely that, you know, it might have been quite problematic at that stage, But I do not know.

ADV VARNEY: Yes. And again this is something that we would appreciate the Commission's help in tracing, as to whether there were further communications, and if so, whether they are on the record,

perhaps in the National Archives or within the NPA. But, commissioners, there is a statement made out by Adv PC Prior which is before the Commission and on the website under statements and then under NPA, and then under amnesty task team.

It is not clear to us why Mr Prior is listed under the amnesty task team because he was not a member of that team, but nonetheless, that is where you will find his statement. The documents under the NPA are not organised in volumes or bundles, but that is the best we can do to assist you in finding it.

The statement of Adv Prior essentially says that this was a very long time ago, and he has no further information than what we have discussed today. We did ask for him to be called before this Commission, although we understand that for the moment the evidence leaders do not plan on calling him.

And while we are on statements, Judge Vincent Saldanha has also made out a statement, and that can be found under the statements tab, and then if you go to NPA and then to NDPP, you will see the statements of C Saldanha.

So, Ms Sooka, we now reach the end of the information we have on hand in relation to what the TRC did to get cases over to the NPA, and, in fact, we know from the NPA annual report, I believe of 2006, that, sorry, the annual report of 2002/2003, that according to the TRC, some 459 cases were registered, relating to the TRC were registered with the Priority Crimes Litigation Unit at the NPA, and that we gleaned from the, as I said, the NPA's annual report of 2002/2003.

I think that annual report has been put up, and my team will tell me shortly where it can be found.

You mentioned when you were talking about your career that around that time you became the executive director of the Foundation for Human Rights, and that you and the Foundation then began some efforts to pursue accountability and justice and closure for survivors and families of apartheid era crimes. Can you give the Commission a sense of the efforts that you made at that time and in the ensuing years to try and have these cases attended to?

MS SOOKA: Thank you, Commissioner. Well, you know, I think one of the first people who approached us, in fact, was Thembi Simelane, and, you know, she asked us for assistance in dealing with, you know, trying to find out from the NPA what they were doing around her sister's case, and, you know, in that context we set up a number of meetings with the NPA, including with the PCLU.

I think we met on several occasions with Adv Ackermann, we met with Chris McAdam, we met with Torie Pretorius as well trying to find out, you know, what was going on in the NPA. It was quite clear that at that point, I would say, that there were already, you know, obviously developments behind the scenes which were making it very, very difficult for them to do their work. And I do recall that at one point Anton Ackermann said to me: "Get me investigators. If you get me investigators, we can do our work, but my hands are tied unless we get these investigators".

You know, another time when we went to see them we were also told that the investigations and prosecutions had been put on hold, and I think this was around 2004, and that, you know, the whole system of dealing with it was put on hold pending the formulation of amendments to the guidelines for prosecutions.

And I think the question that really worried me was, we asked them did they intend to consult with civil society around any potential amendments, and of course this did not happen, and the guidelines were then issued around 2005.

You know, we, I think, finally managed to obtain a copy of the prosecution guidelines, which we circulated quite extensively to civil society, and it became quite clear that when you looked at the amendments, it was really going to be another attempt to rerun the amnesty process under the form of guidelines.

And because, you know, the way in which they did it, they did not have to circulate it for public consultation, and so the way in which they dealt with it was quite sort of behind closed doors. And I think there was such outrage in civil society that we in fact decided that we would need to support an application to have the guidelines, the amendments actually set aside.

And so I remember going to Cape Town to also brief Archbishop Tutu on what was set out in the amendments, and he was quite appalled and also said that he would throw his support behind any application. And so, finally, in July 2007 Thembi Nkadimeng and the wives of the Cradock 4, the Centre for the Study of Violence and

Reconciliation and the International Centre for Transitional Justice filed an application to have the amendments declared unconstitutional and to also have that set aside. We also argued, I think, in the papers that in fact what this was going to do was actually guarantee and cement impunity in our country.

Judge Legodi, of course, of the High Court, in December 2008 he struck down the amendments, but he also made the point that this was a really impermissible rerun of the TRC amnesty process, and that Part C in particular should never feature in any kind of prosecutorial decision.

I think we were gobsmacked because, you know, in the discussions around amnesty one of the issues that came up before the promotion of national unity, the TRC law was passed was the question of whether perpetrators would need to show remorse. And I think all of us argued that remorse is not something you can legislate, and it should never feature as part of any assessment.

And at the time for the amnesty process, you will remember Professor Carl Norgaard of the European Union, the European Court of Human Rights, you know, he had developed guidelines for the indemnity process in Namibia, and those guidelines were also imported into the TRC legislation. And so one looked at the question of motive, the question of proportionality, but these were guidelines, but remorse never ever featured there.

But I wanted to say that in Part C of the amendments it talked about the degree of cooperation on the part of the alleged

offender. It raised the question of ill health or other humanitarian concerns. Now, I think it was Lukhanyo who said when you look at the German example, 90 year olds have been sent to prison, and nobody has taken into account whether they were ill or whether there were humanitarian concerns.

It was a question of accountability for the crime, these are grievous crimes, grave crimes that you committed. The other was credibility and then sensitivity to the need for restitution. I mean, between 1996 and 1998 there is not a single perpetrator who made restitution, but now we were giving them another opportunity.

Then the question of the renunciation of violence, the degree of remorse, but the one that the most, I think, awful was the degree of indoctrination and the extent to which the prosecution or non-prosecution may contribute, facilitate or undermine our national project of nation building through transformation, reconciliation, development and reconstruction within our society. So I think the victims were appalled, their families were appalled, and that is what was the basis for the determination to have those set aside.

ADV VARNEY: And while we are on the amendments to the prosecution policy which were promulgated under the Constitution in December of 2005, and came into operation in early 2006, if I can draw your attention to Part B, and the relevant parts are set out in the Calata affidavit bundle 1, paginated page 86 from paragraph 196 onwards.

So Part B of the amended policy set out so-called "procedural arrangements" for those wanting to make representations to the NDPP in relation to those crimes. And I just want to highlight the section in Part B where it says that, and here I am reading at 196.3:

> "The PCLU (Priority Crimes Litigation Unit) would be assisted in the execution of its duties by a senior designated official from the following State departments: the National Intelligence Agency, Detective Division of the SAPS, somebody from the Department of Justice and then someone from the DSO."

And if you flip over to the next page, at the top of the page Part B also says:

> "The NDPP must speak with the Minister of Justice before making public statements on any matter arising from the conflicts of the past."

And you have already alluded to Part C. So what is your response to this committee of designated officials from outside the NPA and the fact that the policy says the NDPP is not free to discuss these cases without first conferring with the Minister of Justice?

MS SOOKA: You know, we understood that to be a clear attempt on the part of the State, the government, really, to fetter the discretion of the NDPP, and in my view, that already constituted interference in the way in which the NDPP would be allowed to do his job and was

untenable. And I think that is why in our application we pointed out that it was completely unconstitutional and, in fact, violated the independence of that office.

ADV VARNEY: So once the so-called "guidelines", which we know were the amendments to the prosecution policy, were promulgated and came into effect, you had mentioned earlier in your evidence that the prosecutors in the PCLU were saying, well, their hands were tied until these guidelines came out, they did not have investigators. Once the prosecution policy had been amended, what changed, if anything?

MS SOOKA: Nothing, actually, nothing really changed, to my knowledge.

ADV VARNEY: So you mentioned earlier that you were having meetings on the Simelane case and others with the PCLU. Did you have many interactions with the NPA post the promulgation of the guidelines?

MS SOOKA: I cannot actually remember, but I do know that one of the issues that came up constantly in our conversations was the need to appoint an investigator for the Simelane case, and that, you know, that did not really happen. I also know that they were speaking from what they were saying, and, I mean they were talking to the police commissioner at the time to try and also look at this question of investigators, but I do not recall that we had an in-depth discussion.

ADV VARNEY: Well, we know from the evidence of Thembi Simelane, who was the first witness before this Commission, that she

did have various interactions, which included meetings at the Silverton offices in Pretoria, because there was an expectation that with the guidelines being promulgated, that investigations would then proceed.

MS SOOKA: Ja.

ADV VARNEY: And she said even post the guidelines, so post 2005 investigators were still not being assigned to her case or the others, and, in fact, she was informally advised that maybe she should rather go for an inquest rather than a prosecution. Do you have any recollections of that?

MS SOOKA: Yes, I do, and I know that we discussed that with the legal team about whether she should exercise that option. And I think that all of us would agree that there were sufficient evidence in her case to warrant a prosecution, and on that basis I think we advised them that she would not take up the inquest. We thought that was a way of them escaping their own responsibility to do the right thing.

ADV VARNEY: And then we know from the affidavits of Adv Vusi Pikoli and Anton Ackermann, who are both going to appear before this Commission at some future date, that there were a few cases which had already been investigated, you know, less than a handful, and they could proceed with them.

And one of them was the attempted murder by poisoning of the reverend Frank Chikane, and that ultimately resulted in a plea and sentence agreement in 2007, which appears to have precipitated in quick order changes at the NPA. Can you indicate to the

Commission, you know, your response to that plea and sentence agreement and what then transpired?

MS SOOKA: I think we were, you know, quite shocked that the plea bargain was going to take place, and I remember having this conversation with both Vusi and, I think it was Anton Ackermann and Torie Pretorius, because I think the question I asked them is, so there is going to be the plea bargain, but have any of them actually offered up the names of those who were responsible for the planning and authorisation, and they said no. And that surprised me, because at the end of the day, what were we actually securing?

I also remember going to court on the day that the plea bargain was going to be confirmed by the Court, and what struck me, and I think I was quite offended by the fact that the judge, obviously who came from the old order, under his breath he was muttering all the time about, you know, these guys should not be here before me, because he did not actually think that they should in fact have to make this plea bargain.

I also remember the Foundation asking for a transcript of the record, because I was hoping that we would be able to pick up from that what he had said, and we were not able to do that. But I do know coming out of court that I had quite an altercation with Adv Torie Pretorius, because I thought that this was cheap, the way in which this deal was being done, and that it was not going to advance any of the objectives of accountability.

They were getting off scot-free, and later on, you know, when the president set in motion his presidential pardons process, all of the guys who plea-bargained actually were on that list for a pardon, so it gave you a sense of how awful the deal was.

But, ja, I think it was only much later that I learned that even the plea bargain had caused so much problems for Vusi and Anton Ackermann in their office, and that Anton had got this call from Jan Wagner, who represented most of the security branch operatives, informing him in fact that, you know, he would not be able to carry on with the case, so, ja, that was my reaction actually.

ADV VARNEY: So that plea and sentence agreement was concluded in court on the 17 August 2007. Commissioners, it is set out in the Calata affidavit at paginated page 108. Ms Sooka, it will be the evidence, I believe, of both Adv Ackermann and Pikoli that that was the best they could achieve in that climate at that time, which was in their view restrictive.

And, indeed, just weeks later, on the 23 September 2007, Adv Pikoli, who was the then NDPP, was suspended from office by President Mbeki. and Adv Ackermann was relieved of his duties in relation to the TRC cases by the then acting NDPP chair, and that is set out in their different affidavits. It is summarised on page 112 of the Calata founding affidavit.

So that then brings us to, you know, the end of 2007, when conditions have changed quite dramatically, and both Adv Pikoli and Ackermann are now effectively off the scene. But you and the

Foundation continued your efforts post 2007. Do you recall whether anything changed in the years, you know, 2008, 2009, 2010, investigators were provided to the Simelane and other cases?

MS SOOKA: No, but, you know, the period was also, I think, when I think we just finished with having the guidelines set aside, when the president decided to use his presidential pardons process, in fact, to give perpetrators another opportunity to get off scot-free, and he announced a special pardons process for people who were convicted of political offences and were being denied amnesty.

And, you know, the reason he said was to resolve the unfinished, he used the word, the "unfinished business" of the Truth Commission. Now, the President, I think, appointed Dr Tertius Delport to chair a committee, and I think each political party had a representative on that committee.

What was interesting was that we engaged with Dr Delport to try and get him to meet with us and civil society, and he refused. He also refused to make the terms of reference for his committee available. I think we also asked him for the list of persons who in fact had applied to be part of this political pardons process.

I think finally through a leak we were able to secure the list, and I think there were 2 300 names on that list. We finally did meet with Mr Delport, and when we impressed upon him that even the amnesty process had allowed victims not only to have a voice but to be part of that, and in fact to have legal representatives to cross-examine perpetrators.

And, in fact that they were very much a part of the process, it was very strange then that he was not going to allow any avenue or opportunity for victims to have any role in the pardons process, and it was important that he consult with civil society to take into account their views.

He was dead against that, and it was quite a difficult process, and so again, I think it is around March 2009, we supported an urgent application to interdict President Mbeki from using the pardons process, and again we had to argue that this special dispensation that the President was using was again an impermissible rerun of the TRC's amnesty process.

Only in this instance it was being done quite secretly, and it went further by excluding the participation of victims, and, thankfully in April 2009, I think it was Judge Seriti who granted an interdict and prevented the President from using his presidential pardon discretion.

That was, of course, followed in 2009 by Ryan Albert, a member of the AWB, approaching the ConCourt to overturn the interdict on the political pardons, and interestingly, in this application he was joined by President Zuma. Now it does make you think about the role that he has been played by these two presidents in dealing with the political, you know, these cases of apartheid era political crimes.

In February 2010 the ConCourt ruled that no political pardon could be issued without first affording victims a hearing, and, you know, one of the strange things, and I remember that, you know,

Kulamani and the Centre for the Study of Violence and Reconciliation, they went through that list quite with a great deal of detail, and they found that there were people on the list who had not even applied for amnesty, and so it was such a bogus process, and I think that was a problem.

So in that period you have, you know, on the one hand the political process trying to give perpetrators another opportunity, and in the same period I think we were not able to get any investigators, and so you had no, you know, no notion of being able to do anything around the TRC cases, even though we were knocking on the doors of the NPA. And I think it is around 2012 when we take the decision that we probably ...(intervenes)

ADV VARNEY: Just before you get to 2012. Commissioners, the process that Ms Sooka has been describing, there is an overview of the special dispensation on political pardons, and that is provided in the Calata Affidavit at paginated page 116 from paragraph 289 onwards. And this was essentially to accommodate those individuals who have not applied for amnesty to somehow ensure that they would not have to face justice if they were given a pardon.

And, Ms Sooka, what is your response to the fact that the reference group of these politicians that had been set up by President Mbeki refused to disclose the names on the list of applicants, and that when eventually it was secured through a PAYA application, you and your colleagues discovered that people like Ferdie Barnard, a CCB operative who murdered WITS academic David Webster, former

apartheid Police Minister, Adrian Flock, and former Police General Johan Van der Merwe and the three co-accused who had received that plea bargain, and then AWB members who had gone on a rampage in Kuruman in 1995 violently assaulting black people and killing one? These were the people applying for amnesty, and that your organisations were not permitted to make representations in that regard.

MS SOOKA: I mean, we said quite, you know, at the outset that one of the rubrics really of the new constitutional democratic order was the consultation with civil society, and certainly in this instance, because it involved political crimes of the past, that victims and their families should have the right to have their views taken into account by the committee.

But the notion that, firstly, the committee did not want to meet and they were compelled to meet later on because of the public pressure, I think that in itself was shocking, the second, that they did not want to make that list available to us. And you will remember that even before the PAJA application there were already media leaks around the names of people who were on that list.

And so when we did get the list, I mean, that was scrutinised in a great deal of detail by Kulamani and the CSPR, and I think what was shocking to us was finding all of these people on the list. I think what was appalling, and it gives you a sense of, you know, the challenge around impunity.

You have Adrian Flock and co applying, making a plea bargain in, what was it, 2007, and by 2009 they are on a list where they are going to get a presidential pardon. So what was the punishment there, where was the accountability? And it gave you a sense of the absurdity of what you were dealing with, but I think it also raised another important point.

And this was the level to which those in political power would go to afford perpetrators another opportunity to get off scot-free, and I think it began to make a mockery, really, of the process of the Truth Commission. Because in effect what you were doing was entrenching impunity in the country, and at the same time you know, there were not that many opportunities for victims, and even the reparations process was in fact quite slow to get off the mark.

So when you compare the two situations you, I think perhaps already there was a sense that the State was going to turn over backwards to give perpetrators another opportunity to get off.

ADV VARNEY: And talking of political power, when President Mbeki announced in Parliament the establishment of the political pardons' special dispensation, he said it would remain true and faithful to the principles and standards of the TRC. So it would work in the same manner that the TRC had worked, and yet he was more than happy to make decisions coming out of the reference group that were entirely one-sided, only heard from the perpetrators and nobody else but the victims or the communities. What does that say about the political approach to this process?

MS SOOKA: It is a political approach that I think from the outset has favoured perpetrators, I think to the detriment of victims, and, you know, remember if you go right to the beginning when the amnesty process was crafted, South Africa also had to defend its position at an international level.

And I recall that, you know Dullah Omar and Prof Medard Rwelamira, they were also participating in the discussions and the finalisation of the Rome Treaty. And there was this conference in Syracuse, and Dullah Omar is very careful because he talks about the way in which the amnesty process has been calibrated.

Not to just let perpetrators off the hook, the way in which the amnesty is framed is conditional, so that upon making a full disclosure, upon showing that you committed that act in pursuit of the objectives of the State or political organisation, and, you know, and the fact that victims were in fact allowed to participate in the process, it would be a public hearing if it involved a serious crime. Victims have the right to object to it, they have the right to say that they did not want it to happen, and they cross-examined perpetrators.

In many ways that introduced some legality into the process. The fact that the criminal justice system remained operable and, you know, that once the amnesty process was over, the criminal justice system would take over. I think that in a way provides the balance for the restoration of the rule of law in a time when you have this extraordinary exception.

But now you have the continued attempts by the State itself to actually destroy that. You have first the question of the amendments to the prosecution guidelines, you know, impacting on the ability of the NPA's independent decisions to prosecute, you know, depriving them of the resources even then, which would enable them to do their work properly.

Once you have those amendments set aside, you then have this reversion to pardons using that kind of political power to set up a committee that will make decisions which have far-reaching implications for the lives of victims in our country, and you do not even afford them a voice.

That is a complete annihilation, really, of the constitutional order and democratic accountability that we were building in our country. So it was appalling, but it was giving you a sense already of how far the State was prepared to go.

I think what was striking then was that when Ryan Alberts applies to the Constitutional Court to set aside the entity, he is joined by another president, and so those two names feature constantly in this trajectory of 30 years of impunity in our country.

ADV VARNEY: So you were saying that investigations of the TRC cases were held in abeyance in the subsequent years, and we know from the affidavit of Adv McAdam that the attempts he made post-2007 to obtain investigators, he was told by the police that they would not investigate while the Ginwala Commission was ongoing.

And then when that was done, then along came the World Cup, and he was told that while the World Cup was busy, because that has big demands on the police, they would not be investigating the TRC cases either. So what ultimately did the foundation decide to do, because you were probably at your wit's end by that point?

MS SOOKA: The first thing we did of course was to, it was clear that we were not going to get investigations through the NPA or, you know, the SAPS at the time, and so we decided that we would retain the services of Frank Dutton, who had worked for the Goldstone Commission, he had also been part of the Scorpions, and he had a really good understanding of this kind of work.

And we brought Frank in, firstly, to work through all of the amnesty applications and, in fact, give us some advice on how we should proceed, and, secondly, I think we also brought him on board to begin to look into the Nokuthula Simelane case.

And I mean, Nokuthula's case was very interesting because, you know, at the time, and I am sure you will hear from him, but at the time when you had the amnesty applications for the Simelane case, you already had almost a complete docket by Captain Andrew Luus, who had done quite an amazing job, I have to say, before the Truth Commission even began its work.

And so this was, you know, the amnesty applications to some extent I think provide a lot more evidence on the case, but Frank was able to, you know, trace people using Thembi's assistance, and as a result of that we were able to put quite a good dossier

together. But we were forced actually to bring on board an investigator to in fact begin to do the work that the State should have been doing actually.

ADV VARNEY: So that comprehensive dossier, was it handed over to the NPA, and if so, what was the outcome?

MS SOOKA: I mean, it was handed over to the NPA, but even then, I mean, we did not really get very far on the matter, and I think we it is it is when we I think finally make a decision, that the only way to secure any kind of progress in this matter is to litigate against the State and, in fact, to compel them to make a decision on the matter.

I think this is also when they try and suggest that Thembi should in fact go for an inquest rather than a prosecution, and so finally I think we decide that we are going to bring an application to compel a decision in the matter.

ADV VARNEY: Yes, and we heard also from Minister Thembi Simelane that, in terms of the timing, at least, is this also your recollection that Frank Dutton was appointed around 2011, and that he submitted his comprehensive report to the NPA within a year or 18 months at that time, but that in the intervening years, between 2011/2012 all the way through to 2014/2015, because it appeared that there was no real progress. It was at that point that Thembi Simulani with the support of the foundation decided to approach the court to compel a decision.

MS SOOKA: Yes, that is correct.

ADV VARNEY: And then once that case had been launched, can you just give us a sense from your perspective as to what transpired?

MS SOOKA: You know, I think the application did shock the NPA at the time, and they had not expected us to go so far, and I think as counsels were discussing the question of how to deal with the matter, I think then the NPA, I am not sure if he was the acting head, Shaun Abrams, actually called, I think, and he was really begging them not to take the matter further.

And, in fact, he said that the matter could be settled by the NPA agreeing to indict the security branch officials who in fact had been implicated in the amnesty application, but had in fact not been, you know, not received amnesty. And so on the 14 March suddenly the NPA indicts, I think, four people, Coetzee, Pretorius, Maung and, of course, Radebe, and, you know, that is the beginning really of one of the first cases that we were willing to kind of go forward with that.

I remember that we, what was also interesting about Thembi, the case that Thembi brought is that you have Vusi Pikoli and Anton Ackermann filing these affidavits in support of the application, and that is, I think, then that you get a sense of how frustrating it must have been for them behind the scenes, and no doubt they will speak to these issues in their own evidence.

But I think for us it was a shock to get to know how far the State was prepared to go to, in fact, infringe really the independence of the NPA to allow perpetrators again another opportunity to, you know, to go scot-free. It just seemed to me that the intention at that

point was to interfere with the prosecution's independence, but also to ensure that there would be no investigations and prosecutions. So I think that is the first written confirmation you get beyond the pardons process and the amendments to the guidelines, that it was going to be this level of political involvement in the prosecutorial process.

ADV VARNEY: So the outcome of the Simelane litigation, and, commissioners, as mentioned previously, we refer to that matter as "Nkadimeng 2".

MS SOOKA: Ja.

ADV VARNEY: You seem to be describing that as something of a breakthrough because it resulted in indictments in early 2016. So what was the impact of that case on the other TRC cases?

MS SOOKA: I think that what it did do was give, you know, it inspired other families to begin looking at what could be done on their cases, and, in fact, that is when the foundation was also approached by a number of other families, including the family of Ahmed Timol. Imtiaz Khaji, I think up until that point had had his own dealings with the NPA, and I think referenced in these papers you have a sense of how he had been told at some point that the case had been closed, and so he also came to the foundation to seek assistance on dealing with his case.

You also, you know, I think around January 2016 our lawyers, Webbers, in fact rights to the NPA, to Shaun Abrams, I think, and to Torie Pretorius, and they asked for a meeting to discuss several cases, and this is really on the basis of the report that Frank

had prepared on which cases were in fact viable cases to take forward.

And so in January 2016 you have Frank, George Bezos, yourself and representatives from the Timol and Aggett families make a presentation to the NPA arguing for the reopening of some of these matters, and so 2016, post the Thembi case, you see I think a number of families feeling that they are enabled to in fact argue and advocate for their cases to be taken forward.

Then, of course, you have the fact that on the Timol case the NPA also does not really do its job. Again there are a number of delays, and so finally you have Weber Wenzel representing the Timol family threatening legal action against the NPA if a decision is not taken timeously to reopen the inquest.

And around October 2016 you have the PCLU confirming in a letter that they have written to the Minister of Justice to ask for a judge to be appointed to oversee the inquest, and so finally, I think in 2017 you have this historic reopening of the Timol inquest.

ADV VARNEY: Thank you, Ms Sooka. Commissioners, my attorneys have actually compiled a schedule of communications that various attorneys had with the NPA placing them on terms, letters of demands with making threats that court action would be taken if the NPA did not act. And with the leave of the Commission, we would like to hand up that schedule?

CHAIRPERSON: Yes, you may. What exhibit number should we allocate?

ADV VARNEY: So, commissioners, this would be bundle, this would be bundle 5. No, that is Yasmin Sooka's bundle, and it would be item 3.

CHAIRPERSON: Thank you.

ADV VARNEY: So by way of example, Ms Sooka has been referring to the Ahmed Timol case. There are some items here that are not strictly speaking letters of demand, so we will refer to them, for example, the communications by Frank Dutton. But on the 21 June 2016 Weber Wentzel sent a letter to the NPA placing it on terms, however, a decision was not taken to reopen the inquest. And in the next column we set out the references in the bundles where those letters can be found.

So, for example, bundle, that particular letter is in bundle 1, or rather it is referred to in the Lukhanyo affidavit at bundle 1, page 135 at paragraph 347, and the actual copies of these letters are contained in the contextual bundle that is also on the website, and at the end of the schedule we give the item numbers where those letters can be can be viewed.

But so, for example, in the Ahmed Timol case letters of demand containing threats of action were sent on the 21 June 2016, the 8 July 2016 and the 11 August 2016, and then a final letter of demand on the 23 August 2016. And similar letters were sent in the Neil Aggett, Husain Haffejee case, COSAS 4, Imam Haron, Cradock 4, Caiphus Nyoka.

Chairperson I see it is 11:00 AM. Would this be an appropriate time for the tea adjournment?

CHAIRPERSON: Yes, we will take a short tea adjournment and we will reconvene at 11:15.

ADV VARNEY: As the Commission pleases.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Mr Varney?

ADV VARNEY: As the Commission pleases. Ms Sooka, just before the tea adjournment, you made reference to the fact that you, Frank Dutton and the lawyers were now having interactions with the NPA, and I want to draw your attention to a potentially significant interaction in January 2018, and Commissioners, reference to that January 2018 interaction is reflected in the Calata affidavit on paginated page 158 at paragraph 413 where Mr Calata write that embolden by the outcome of the reopened team of inquest in 2017.

Webber Wentzel addressed a letter to the NPA dated 18 January 2018. Commissioners, a copy of that letter is annexed to the Calata affidavit at FA66 and can be seen on page 738 of bundle 1, and that this then resulted in a meeting later that month with the NPA and the DPCI at the NPA. Now before we get to that meeting, do you have a copy of the Webber Wentzel letter dated 18 January 2018 before you?

MS SOOKA: Yes.

ADV VARNEY: Yes, can I ask you just to give an indication of which

were the cases that were being highlighted by Frank Dutton through this letter? And you can just, I will not ask you to read the letter but if you can just highlight the individual cases, say for example on the third page where there is reference case one and so on, if you could just take us through the cases by listing them, please?

MS SOOKA: Commissioners, the first case that is referred to in the letter is the case of the late Nokuthula Simelane, and of course it is the case where the state has indicted Timothy, Radebe, Coetzee, Pieterse and Haron. The second case is the case of the late Ahmed Timol and the third case was that of the late Neil Aggett and the fourth case was that of Matthews Mabelane where in fact... [intervenes]

ADV VARNEY: Can we just pause for a second? So by then in relation to Ahmed Timol, the inquest had concluded but can you just give us a sense from that paragraph 4, why the team was still highlighting the Timol matter?

MS SOOKA: Well in that particular case at the end of the inquest, Judge Mothle had recommended that a criminal, the criminal charges be pursued against Sergeant Joao Rodrigues, Warrant Officer Neville Els and former Colonel [Indistinct] and so what we were wanting to do through the discussion, was in fact to engage in discussions on when these charges would be preferred and in fact you know, looking at the question of further investigations with a view to prosecutions. So it was really taking the Timol matter to the logical end after having found Rodrigues responsible for his death.

ADV VARNEY: Thank you. Please continue.

MS SOOKA: Then of course we were, we raised the case of the late Neil Aggett and I think the fact that extensive presentations had been made on the Neil Aggett case including with evidence and really what we were waiting for was you know, when the NDPP would recommend the Minister of Justice the need to reopen the inquest.

We also raised the case of the late Matthews Mabelane and Matthews Mabelane also fell to his death in very similar circumstances to Ahmed Timol and we wanted to assess what you know, progress had been made in the investigations to date. The fifth case we raised was that of the late Hoosen Mia Haffejee who died on the 3 August 1977 at the Brighton Police Station in Durban where according to the police, he committed suicide by hanging himself.

And while we understood that the NPA was seized with the matter, we again wanted to get a sense of progress. Then of course another case involved, the case of the late Babla Salojee where the police had also you know, claimed that in 1964 he had committed suicide by jumping from the 7th floor of Gray's Building and again we wanted to find out firstly if the matter was on the books and if so, what was the status of the investigation.

We also asked the NPA to advise if they were seized with any other matters from the TRC list and could they give us information around that, and when, because when we had met with Adv Abrahams after the launch of civil proceedings in the Nokuthula Simelane matter, he had informed us that they had 10 other matters

on the go and we wanted to find out from him what those, which cases they were.

We raised with them that Imtiaz Cajee had been in contact with the families of Nicodemus Kgoathe, Solomon Modipane, Jacob Monagotla and Dr Albert Luthuli, and we wanted to get a sense from them on how they were dealing with those cases. We also raised that there were possibly other cases that they could take up and the question of Imam Haron after we had been in contact with the family who had approached us to take the case up, then of course the case of Steven Biko and we wanted to get a sense from them, you know, following our own analysis of the amnesty applications, whether they would take up a number of other cases and these included the murders of Eustice Madikela, Ntshingo Matabane and Fanyana Nhlapo, also the murder of Sipho Charles Hashe, Qaqawuli Godolosi and Champion Galela.

We also looked at the murders of the Cradock Four and then of course the kidnapping, torture and disappearance of Peter Thabo Leka, the kidnapping and murder of Ntombikayise Khubeka, the murder of Richard Motasi and Irene Motasi, the kidnapping and disappearance of Moss Morudu, the kidnapping, torture and murder of Jameson Nxomezulu, the murder of Johannes Sweets Sambo, the murder of Adriano Louis Bambp, and the murder of Welcome Khanyile.

And we wrote in our letter that the potential accused in these cases were persons who had been denied amnesty by the Truth

Commission or in some instances had declined for to apply for amnesty. We also set out that the 11 cases set out in annexure A, were right for investigation and prosecution and should not have been for so many years, you know, and should have been so for many years.

So I think what we wanted to get a sense from them is to discuss each of these cases and the possibility of these cases being handled and that is the time when we began to raise the question of a dedicated team of investigators and prosecutors, because what we picked up in the Timol case and in fact in our dealings with them around the Aggett case, that you did not have a dedicated team and so this is the time that we also raised with them the need to begin to look at how to handle carefully selected investigations.

I think we had pointed out to them already that if they wanted to have success around the TRC cases, this is going to be a necessary step to take, so we raised it already at that period in 2018.

ADV VARNEY: Thank you, Ms Sooka. Commissioners, the annexure A that Ms Sooka referred to reflected in that letter, that was a memorandum compiled by the late Detective Frank Dutton and he gave an overview of the evidence and potential suspects in each of those 11 cases. It is not part of this particular annex, but we have provided it in the contextual documents bundle at item 17.

Now Ms Sooka, can you give the Commission an impression of how that meeting went at the NPA where you had senior prosecutors present, you also had senior officers from the DPCI? Did

you get a sense that they were keen to turn over a new page and get stuck into all these 21 odd cases?

MS SOOKA: Let us say I was cautiously optimistic.

ADV VARNEY: But then not so much longer after that, Detective Frank Dutton, a private investigator for the Foundation, brought to your attention that the investigators who were pulled together to deal with those cases, that one in fact was a former security branch officer and one had a possible connection to the Motasi case... [intervenes]

MS SOOKA: Ja.

ADV VARNEY: Which was on the list. What was your reaction to that?

MS SOOKA: It is the reason why I say I was cautiously optimistic. I think that on the one hand the NPA was saying that they wanted to do the right thing and that there should be a new beginning, on the other hand I think you, the fact that you could still have investigators seconded to work on these cases who were connected to the security branch and one who was deeply implicated in the Richard Motasi matter, gave you a sense that there was very little vetting and screening that was being done, and we brought this to their attention immediately. But it, you know, it gave you a sense that on, the commitment was stated but it was not really there.

ADV VARNEY: And to underscore that sentiment even though we know that for example the Aggett and Haffejee and the Haron cases were taken up, if one looks at the schedule of communications placing the state on terms, the one that we just handed up that is now

on bundle 5, item 3, we have spoken about the four letters of demand that had to be submitted in the Timol case but if one just casts one's eye over the schedule in relation to the Neil Aggett case, there was six threatening letters or letters of demand placing both the NPA and the Minister of Justice on terms and the last one threatening an urgent High Court application in August 2019.

And the two letters, such letters were written in the Haffejee case and then the Haron matter, there were three letters, similar letters written as well, what, what does that say to you about the steps that the families had to take to persuade the NPA and DPCI to act, that they had to threaten court action in these matters if they did not move forward?

MS SOOKA: Commissioners, my sense of the NPA and the DPCI was that they were brought kicking and screaming into the process, and that the only time that the families were able to achieve any kind of action, was when they litigated or they threatened litigation and that is the only time that things began to move.

I think what is incredibly shocking and if you just look at the trajectory of the Aggett inquest and I do not have the [indistinct] with me, you have the NPA after all of these letters, indicating that they are going to write to the Minister for the approval of an inquest, but of course the way they dragged their feet, you find in that period that you have one of the key perpetrators, Steven Whitehead, dying in that period and it is only after then that event that you would then have them actually getting that off the ground.

And so one does not get you know, one does not have a sense of an NPA and DPCI committed to the process of justice for the families and victims. I think the only time that you got anywhere was when you threatened them and that then produced some kind of result. If you also look at the way in which these inquests have been conducted, to be frank, it is the work that is being put in by our legal team that has really produced the kind of evidentiary basis for judges to actually find that the apartheid state was responsible for the death and detention of many of these activists.

It did not come because they actually did their work and I think that that is the tragedy of the process that they would tick the box, but then do everything in their power to actually delay getting on with implementing the necessary actions. It is quite tragic for the families.

ADV VARNEY: And so further examples of what the families had to do, being in some cases going beyond issuing letters of demand, so for example in the COSAS 4 case in September 2020, they had to launch a substantial application in the Krugersdorp Magistrate's Court for the disinterment and forensic examination of the bodies of the COSAS 4, because automatic communications, they had been told that post-mortem reports and the like could not be found and it was only thereafter, after lodging that application that that case started to move.

And similarly in Cradock Four in July 2021 as we heard from Lukhanyo Calata yesterday, they also had to launch a substantial

application to compel a decision. You know at such a late stage should families be having to take such action when they had been told that you know, the authorities were now pursuing these matters?

MS SOOKA: You know, it is completely untenable that in fact the families and the Foundation should actually take on the legal obligations of the state to hire private you know, investigators to in fact compile the kind of evidence that is necessary to proceed with these matters. I think that is a complete and utter violation of their rights. I think what was also quite disturbing for us, is that in the intervening period you had the appointment of the new National Director of Public Prosecutions in the form of Ms Batohi and so we were very excited in 2019.

You know, I led a delegation of family members and some legal representatives to have a meeting with her and we were really excited because she advised us in fact that she was deeply committed to ensuring justice for the families. The Foundation also offered to host a workshop for the prosecutors around the country to give them a sense of what was required in dealing with the cases of the Truth Commission and we had in my view, a very successful workshop.

So at that point we were quite excited about the idea that you would have a new era dawning. Unfortunately it was not to be and while I think the team worked alongside the NPA team quite well in the Aggett matter, I cannot forget that at one point they were getting to argue that in fact, it was an assisted suicide and not a

killing and I think it was George Bizos who told them that you know, that is absolute nonsense to go down that trajectory.

In you know, so you have this intervention and you begin to think that things are going to change, but actually very little does and I think that one of the fatal moments came when in, I think it was around January when the National Prosecutions adopts a decentralised policy and cases are being found out to the provinces with incredibly lack lustre results, so much so that if you actually look at some of the submissions we made to them and to the Portfolio Committee much later on, we raised the fact that under these decentralised authority, there was no real head and even though they set up what they called this TRC component which I am sure we will come to at some point, nobody took responsibility.

So if you dealt with a prosecutor in the province and you tried to get a decision, they would refer you to head office and head office would then refer you back to the province and so it was like a Ping-Pong battle with nobody held responsible, and so for me that began I think to show that in fact we were no better off now that we had been before. The only thing is that the NPA had showed up, you know they said that they had set up this unit, it was defused in terms of authority, so we were ticking boxes.

But in terms of real action, nothing was actually happening. To place an example and you have heard extensively from Lukhanyo Calata, but I recall in 2019 us doing a presentation with the legal team to Adv Rodney de Kock and his team setting out all of the

persons of interest, all of those who played a direct role in the killing of the Cradock Four, those who were responsible for the planning and authorisation, all of that, that PowerPoint is still available. But you know what happened?

Nothing happened after that and in the end you know, the family had to resort to an application before a decision was made to move on the case. So it is just another example of no movement, you know. So I would you know, probably and this is something that the Commission will need to look at, while there may not have been direct political interference I think in this period after 2019, but you have to ask the question of dereliction of duty if you do not proceed with the cases. So many perpetrators died and so many family members died and yet these were cases which were ripe to take on either through a prosecution or an inquest.

ADV VARNEY: So just returning to that list of cases that were submitted, the 22 matters referred to in that January 2018 letter and subsequent meeting, Mr Calata in his affidavit at page 160 of bundle 1, he points out and this is at the end of 2024 which was some six years after that interaction of the 22 cases that were highlighted, only a handful had actually been concluded and these were the Aggett, Haffejee, Dipale and Haron inquest, and since the end of 2024 there have been a few more matters concluded, perhaps most notably the Luthuli inquest.

But in respect of all the other matters, they either have not been attended to or they are still a work in progress and some of

them have been long delayed. So when Mr Calata in his affidavit when he speaks of the period after the Timol inquest and he says well, we are not accusing the NPA or any other authority of political interference of being subjected to political interference post 2017, but he says that the impact of the interference has been devastated and that it still lingers into the era up to today. Would you agree with that assessment?

MS SOOKA: Yes, I would agree because you know, it is a complete violation of the rights of victims, so not only were their rights violated by the apartheid state and in a sense their rights were infringed upon by the amnesty period as well, but then you have a democratic state responsible for ensuring that their rights are upheld and that their right to the truth to justice and accountability where nothing happens in the state and its institutions that violated their rights, and there is a question to be asked about whether the impunity of that period has also fit into the overall impunity of the system in South Africa today.

I would trace that back to the fact that the institutions meant to uphold the criminal justice system, did not deal with the political crimes of the past which brought the new state into being, then that begins to impact on everything else that comes afterwards. We should not be sitting here and we are sitting here because of that endemic impunity.

ADV VARNEY: So from around 2019, am I right in saying that you and the Foundation for Human Rights approached the NPA in writing and I believe through meetings with the proposal that the NPA in

collaboration with the police, set up a dedicated or specialised unit to deal coherently with these TRC cases, given that they were old cold cases and the window of opportunity was fact closing, can you describe the efforts that you made to try and persuade the NPA to change course from its decentralised approach which you earlier said was not so working that well?

MS SOOKA: Ja, I mean we looked at you know, the success of prosecutions post the kind of truth seeking mechanism in other countries, meaning in particular we looked at countries like Chile and Argentina, and I think we in fact found that the success was due to the fact that there was a centralised unit that dealt with these investigations and prosecutions and in fact, investigations where a prosecutor led with a special independent prosecutor and we have done like quite a number of opinions, you know, of comparative research looking at the issue.

So not only did we write to the NPA, but I think we also sat down with the NPA to inform her that in fact this was a possibility and you know, this would work well. But what you needed was a commitment to have this kind of specialised unit and I think we said that in a very short period we would be able to deal with a number of cases. We suggested what those strategy should be, but I am afraid that once they had adopted that particular course of action, they were not going to turn away from that.

And you see that and you know, I think we much later would do a submission to the Portfolio Committee and I think we have it

probably somewhere in the bundle, and we point out how, because you do not have a dedicated investigator or prosecutor, people are busy with so many other matters that they cannot pay attention to a particular case and I think that has been a fatal flaw.

You also do not have somebody at the helm who has accountability for the decision making and if you do not have that, then you have what has happened in these cases and you can see that, a complete lack of attention to what should have, what could have been possible in that period between 2019 and now. You know, there have been of course some prosecutors who have been incredibly courageous and I think that you know, one of them that we have to mention is I think Adv Molojwa who was here in Gauteng and you know, we should not have had to argue the question of prosecutions under apartheid as a crime against humanity.

This was another area where we furnished the NPA with several opinions on how important it was to prosecute under that rubric and that did not happen and they fought from head office to the nail that the COSAS 4 charges should not be done under that rubric, but Molojwa stuck to his guns and it is the one case where in fact, you know, the charges of being preferred under the crime of apartheid.

And I think it was last year that Judge Dosio to dealt with all of the objections to prosecuting under that rubric and I think his judgment is outstanding in terms of confirming apartheid as a crime against humanity and as a frame in fact, for prosecutions in the

future. So you have had people who have been extraordinary brave, but you know, they stand against what was happening in head office.

ADV VARNEY: Thank you, Ms Sook. And of course, that judgement of Dosio J, the crimes against humanity charges and then the COSAS 4 indictment is currently before the Supreme Court of Appeal. Just returning to the efforts that the Foundation made to call for a change in the approach on how these cases were being dealt with, Commissioners, an overview of these efforts are set out in the Calata affidavit in bundle 1 from page 173 under the heading, "Call for a change in approach" from paragraph 449 onwards.

And then Ms Sooka, it appears that the Foundation in September 2020 presented a memorandum to the President, the NPA and SAPS and various Ministers, titled, "Proposed new approach to apartheid era prosecutions" and that provided a comparative overview and you already mentioned examples from Chile and Argentina where they had dedicated units dealing with these cases.

And then at paragraph 452, the Foundation then followed up with a legal opinion in January 2021, titled, "Exploring legal options for the establishment of a special capacity to investigate and prosecute apartheid crimes" and that was supplied to the NPA and the Minister of Justice.

It is not attached to the Calata affidavit but it is in the contextual documents under item 34 and that opinion looked at how in terms of our current law, a special approach could be pursued, for example the setting up of a special unit under a special director just

like you have for specialised commercial crimes and sexual offences. So it seems that very strenuous efforts were made. What was the approach, what was the response from Adv Bahoti and the NPA?

MS SOOKA: Well I do not think they were in favour of the proposal and in fact, I think it was later in that year that they together with the DPCI, issued a joint press statement in which they announced a new approach to dealing with the investigations and prosecutions of the TRC and they have talked about the establishment of a dedicated capacity, but they certainly did not adopt the recommendations that we made in the opinion and in fact as the experience will show, this dedicated capacity was not really a dedicated capacity at all. So they rebuffed the approaches that we had made.

ADV VARNEY: And just to conclude the efforts to get a special unit perhaps under a special director, am I correct in saying that eventually in 2025 after Lukhanyo Calata and the other families had launched their application that that Adv Bahoti in a letter to the attorneys indicated that she was at that point persuaded to consider the appointment of a special director?

MS SOOKA: Ja, that is correct, too little too late.

ADV VARNEY: That correspondence is not currently before the Commission, but my attorneys will ensure that a copy is placed on the record and carries the, you know, that was welcomed by the families but what transpired?

MS SOOKA: Nothing actually and she did not do that, and in fact when pressed around it, we had argued that this could have been a

legacy issue for her and she actually said that she did not want to bind her successor. So nothing came from the fact that interventions had been made on the basis of very powerful evidence about how this was working in other countries, lots of discussions around it and then finally you know, I think a concession by her that this is something she would do and then nothing happened before she left office and in fact, she just said you know, she was not prepared to bind her successor. So what is the word, bereft of proper ideas to proceed actually. It is not rocket science.

COMMISSIONER KGOMO: But if you do the right thing, why would be, would it be wrong to bind your successor?

MS SOOKA: Commissioner, I think that is the question that should be put to the NPA, that every official in a senior position makes decisions that in effect binds those who come afterwards and if those decisions are wrong, then steps will be taken to set them aside, but it is about the courage and having the boldness to actually admit you were wrong in what you did before and saying we think this is the right direction to go. And I am afraid listening to the saga around the country of what was going on, there seems to be a challenge.

ADV VARNEY: Ms Sooka, we can move to another topic. It appears that you led the charge on behalf of the Foundation and the families as well as the former TRC Commissioners to call for an independent Commission of Inquiry into the measures that were taken that ultimately blocked the bulk of the TRC cases from, I am going ahead, and Commissioners, the Calata affidavit does provide an overview of

these different calls and letters from page 184 of the Calata affidavit, paragraph 483 onwards. Ms Sooka, can you take us through the various communications that you spearheaded?

MS SOOKA: Yes, I think the first letter that we sent as Commissioners, was on the 5 February 2019 and I think there were two points that we made in the letters. The one was that we called upon the President to actually apologise to victims for both the political interference and for the delays really, I mean in dealing with their cases. And the second of course was, we asked for the appointment of a Commission of Inquiry to investigation the suppression of the TRC cases.

One should remember that by then, we had the Nkadimeng 2 application and in that application, you already had references by two senior members of the NPA, Vusi Pikoli and Anton Ackermann referencing the political interference in their jobs and also the way in which they had been denied the resources and the tools needed for them to do their jobs.

Then of course you had the case of Ahmed Timol and where Joao Rodrigues applies to the High Court in Gauteng for the stay on his prosecution, we had the filing of further affidavits by Adv Chris Macadam and Adv Tori Pretorius, and again in their… I mean it was quite shattering to read that since 2003 there had been a moratorium in place in terms of investigations of the TRC cases.

This was set out in Chris Macadam's affidavit and it made you, I think for all of the families it was about here we are dealing with

an institution, talking to them constantly, but you never were really told that behind the scenes there is an active campaign to make sure that these cases never really get off the ground.

And you know, you also had, I think all of the issues that had been raised around the political interference set out in these affidavits, the notion of a secret Amnesty Task Team which I think you are going to have to go into greater detail, I mean receive the evidence of Vusi Pikoli and Anton Ackermann and the fact that you know, hardly any investigations had taken place and in fact pretending to us that investigations were taking place, I mean in the Timol matter we all thought that they were doing their work and then in fact we found that you know, nothing was actually happening in these cases.

So in a sense I think it was our outrage at the way in which not just the state but its institutions, were dealing with these questions of the apartheid era crimes, that compelled us then to write this letter. One, I think we wanted an acknowledgment from the head of state that in fact people's rights had been violated. And to be frank, as Lukhanyo and Thembi both said, could anybody be sitting in government had it not been for the sacrifice of their family members?

And so this was clearly, I think we were trying to get you know, the President to acknowledge in fact that wrong had been done to the victims of families and that in fact, the state and those who represent it, had compromised their rights. We also set out in that document why it was necessary to look at this question of political

interference and you know we, I think at that point we were so anxious to grasp at straws that we even said to him in that letter that he could actually instruct Judge Zondo and the Zondo Commission to also look at the TRC cases as an aspect of the work that he was doing.

And in fact later on, you know, Lukhanyo Calata files an application to the Zondo Commission for Judge Zondo take up that matter. And so those were the factors at that particular point which in fact resulted in us stepping out of, I guess it was going to former Commissioners and saying I know this is not what you are doing now, but will you be willing to put your name to such a letter? And I think we were very fortunate that so many of them who were available, were willing to sign up onto the letter because they all were outraged by what was happening to the families of victims.

CHAIRPERSON: Who are these Commissioners, Ms Sooka?

MS SOOKA: Firstly Chairperson, the archbishop agreed to put his signature there, then Adv Dumisa and Ntsebeze, Ms Mary Burton, Ms Glenda Wildschut, Dr Fazel Randera, Mr Richard Lyster, Reverand Bongani Finca, Adv Denzil Potgieter, Dr Wendy Orr.

There were also committee members, Dr Russel Ally and Prof Piet Meiring and then there were also a number of organisations, the Centre for the Study of Violence and Reconciliation, the Khulumani Victims Support Group, the Institute for Justice and Reconciliation, the Foundation for Human Rights and the Ahmed Timol Family Trust, the Legal Resources Centre, the South African

History Archives.

And then there were number of individuals as well, Imtiaz Cajee, the Imam Haron Family, Mr Muhammed Haron, Ms Fatima Haron Masoet from the Imam Harong Family, Mr Lukhanya Calata, Ms Jill Burger, the sister of Neil Aggett, Ms Shirley Gunn, Mr Hugo van der Merwe, Ms Valdi van Reenen-le Roux, Ms Maxine Rubin, Ms. Judy Seidman, Mr Stanley Henkerman, Ms Sufiya Bray, Mr Piers Pigou. And these were all individuals who were also working at many of the institutions at the time.

ADV VARNEY: So as I understand it Ms Sooka, there, that was the letter dated 5 February 2019 on behalf of all those that you mentioned. Commissioners, that is annexure FA68 and at the Calata affidavit it can be seen in bundle 1 at page 746. But there were further efforts for the communications with the President on this issue. Courd you take us through, through the other two letters that the former Commissioners addressed to the President?

MS SOOKA: Chairperson, the second letter that we sent was on the 25 March 2021 and I think the context around that letter is that we had been made aware I think, that the Zondo Commission was not going to be able to look into this particular case. And so again we wrote to the President, but this time around we did not ask for an apology, I think we realised we were not going to get one.

But we again raised the question of the need to investigate the suppression of the TRC cases and we referred to our letter, the earlier letter that we had sent. We also referred to letters that had

been sent by a number of families on the 23 June 2019 and the 23 June 2020, and this was from the families of Chief Albert Lethuli, the Family of Steve Biko, the Cradock Four, the Nokuthula Simelane Family, Ahmed Timol, the Neil Aggett Family, Imam Haron, the Family of Matthes Mabelane and I think if I recall correctly and I stand to be corrected, I think Philip Mabelane, the father of Matthews, had died in that period before getting a decision from the NPA, the Family of Hoosen Haffejee, Ashley Kriel, Nicodemus Kgoathe, Solomon Modipane, the Jacob Monagotla Family, Mapetla Mohapi and Mxolisi Dicky and then Caiphus Nyoka, Anton Fransch, Moshin Jeena, Haroon Aziz, Coline Williams and Robert Waterwitch.

And I think in their letters, these families expressed their pain and anguish of having denied, deeply denied truth and justice and they also called for a Commission of Inquiry. Sadly of course, their letters like our letters, were ignored and so in that letter we said that in the light of the President's failure to respond, you know, the representatives of several families had approached the State Capture Commission for the request that it enquired into the NPA, the capture you know, of these state institutions meant to pursue justice in respect of the TRC cases.

And we raised the fact that the Zondo Commission had indicated that it was unable to complete its investigations into this matter and that it would close on the 30 June and that the remaining period of office that they had, would be devoted to the preparation of their final report. And so because of that, because that avenue had

closed, we in fact renewed our call for a standalone independent Commission of Inquiry to investigate the suppression of around 400 serious cases and we pointed out that these involve murders and disappearances for, from South Africa's past.

In our letter of course we pointed out that there was no longer a dispute in factors as far as we were concerned, around the political interference and that that had blocked several hundred cases in which amnesty had been denied or not sought. And we pointed in fact to the fact that senior officials representing the NPA, had admitted under oath in 2019 that the NPA had succumbed to political interference in respect of the TRC cases and the reference of course to that is in our letter. And I think counsel can probably give you, I think it is listed throughout here, the affidavits of the NPA officials.

We also had Vusi Pikoli's affidavit and that of Anton Ackermann which they provided in the Nkadimeng 2 matter, and we pointed out that in fact the full bench in the Rodrigues matter expressed its dismay and asked the question, how could such interference takes place in a new constitutional order? And it in fact called on both the Executive and the NPA to take up appropriate action to ensure that such breaches of the Constitution to not recur.

At that point of course, neither government nor the NPA had done anything. Of course later the NPA appointed I think my colleague, Adv Dumisa Ntsebeze under very narrow terms of reference to look into these issues. And so we pointed out in the letter that whilst some evidence had become available, we were also

concerned about the fact that you had the secret Amnesty Task Team created by the Director-Generals Forum in early 2004 to explore not means of dealing with the accountability.

But actually where you begin to look at it, it is the means of guaranteeing further impunity for apartheid era perpetrators and that the departments involved were multiple, the Department of Justice and Correctional Services, National Intelligence. What is National Intelligence doing in dealing with this kind of matter?

The NPA, SAPS and of course the Department of Defence, and you know, from the available evidence it was quite clear that at a very senior level politicians and cabinet ministers, senior civil servants, police officers and prosecutors were all involved in efforts to ensure that the TRC cases never saw the light of day. And we pointed out that we did not think that it would be sufficient for individual departments to run internal inquiries, it had gone beyond that and that is why there was the need for this kind of Commission.

And I mean I am not going to read the entire letter, but we actually point out the cumulative harm that victims in fact have suffered and we pointed out to the President that while, you know, I know there is a fatigue in South Africa around Commissions but what Commissions of Inquiry can be our investigate tools which the President may invoke for purposes of investigating matters of public concern. And I think we believe that this was a matter of public concern.

And we see that the further objective is to also reveal the

truth pertaining to the suppression of the cases, which would give it a deeper public person and we, I mean I think there was a question to Lukhanyo Calata about what is public interest and what is national interest? I think in our letter we point out that the notion of public concern should be interpreted to promote the spirit, purport on objects of the Bill of Rights and to underscore the emphatic values of human dignity, quality and freedom, and that in respect of the suppression of the TRC cases, those democratic values have been obliterated.

And we talked about how deeply offended families have been, because their right to equality before the law has been grossly disrespected. The TRC cases have been treated differently from other serious criminal cases and at that point in our letter we say, “For the purposes of serving undisclosed political and ulterior ends and such brazen arbitrariness should have no place in South Africa’s constitutional order”.

We also quote I think from the late Justice Arthur Chaskalson in our letter and he said I think a few months after South Africa’s democratic elections in 1994, “We need to remember that once the first incursion into rights is often the most damaging; that once inroads are permitted, the will to resist subsequent incursions is lessened". And we, I think at that point said that if we did not hear from him and received an indication, this intention to establish a Commission of Inquiry, we would refer this matter to our attorneys to look at how we could vindicate the constitutional rights of families of

apartheid era crimes and bring an appropriate application to court.

And I think that is the question, what Judge Chaskalson said when you begin to look at the incursion of rights following the amnesty process, and this is when the criminal justice system must play its role. So from the outset we have a political incursion into rights. I mean if you look at where we are today, look at the number of cases, it is quite shocking that out of 400 hardly any of them had been dealt with. So that was the tenure of the letter of the 25 March 2021.

ADV VARNEY: And Commissioners, that is, that letter is annexed to the Calata affidavit at FA74 and it can be seen in bundle 1 at page 783. And Ms Sooka, I see that you now want to move to the next letter.

MS SOOKA: Yes.

ADV VARNEY: Please go ahead.

MS SOOKA: The, it is not you know, in a way it is not really a letter, it is a public statement from the former Commissioners and that is dated the 9 November 2021. And it takes place against the backdrop of I think the then Minister of Justice, Minister Ronald Lamola who was invited to address the inaugural you know, launch of the Fort Calata Foundation's memorial lecture.

And in his speech on the 5 November 2021, the Minister indicates that he had already appointed an inquiry to investigate the suppression of the cases and he indicated in his address, his public address, that the investigation would be presided over by a judge.

The Minister did not of course talked about what would be the terms of reference and neither did he indicate the identity of the judge.

He also gave no indication of how the judge was appointed and under what legal authority. And when he was asked the question about whether this inquiry would be opened or closed, the Minister said he would have to discuss this with the judge in question, and he declined in the question time to give his own view on the matter, stating that it would amount to a policy statement.

So his response to our previous letters is his own thing. Judge, inquiry, we do not know the terms of reference, we do not know if it is going to be closed or opened, but no consultation, whatever. And we point out in our statement that since the President is not involved in the appointment and no mention was made of the Commissions Act, it seemed to us that the envisaged inquiry would be an internal one behind closed doors and what we had intended to be an open and transparent process, was not actually going to happen.

And you know, we, the fact that he hesitated on the question of open or close, I think for us was quite telling. And normally, I mean judges are not just appointed, I mean you would have to have some kind of inquiry by the Executive and it had to be asked why the Minister had taken this extraordinary step forward.

And I think the, I think his decision obviously must have been a direct response to the fact that we had sent these previous letters which had been ignored and it, we could only deduce then that aside

from the acknowledgment, you know, he had announced this inquiry because he did not want to hold a classic Commission of Inquiry and that it appeared to us that the state wanted to avoid an open and public inquiry into the suppression of the TRC cases. And honestly we think that it must have been for purposes of damage control.

We also in our public statement, you know, provided links to both our letters and the letters that had been sent, you know, by the families as well and I think we also had a kind of chronology of the political interference. So we then you know, also noted that it would be important to know whether the Commissions Act was going to be applied because we pointed out that Commissions do have the power of public hearings, about to suspend, to subpoena witnesses, the fact that they could call witnesses, cross-examine and that you would have the participation of victims and other stakeholders.

And while it was possible that attempts would be made to deflate criticism by allowing victims to make submissions and requiring the judge to issue a report, nevertheless it would remain a closed inquiry and so effectively we and the families would be shut out of the inquiry. And I mean we pointed out that an inference would almost certainly be drawn that the inquiry had been so designed to protect powerful elements in society and shield them from scrutiny and embarrassment.

We also pointed out that you cannot have the Executive investigating themselves and that is effectively what this kind of inquiry would be and so you know, we are saying the suppression of

the TRC cases involved multiple entities and individuals across the public sector, including the Department of Justice, National Intelligence, the NPA, SAPS and the Department of Defence, and we said that the available evidence suggested politicians, cabinet ministers, senior civil servants, police officers and prosecutors were all involved in efforts to ensure that the TRC cases never saw the light of day.

And so an internal inquiry cannot hope to get to the bottom of a problem of this magnitude and sensitivity, and that an internal investigation will not be able to deliver the full history of interference as it unfolded over time over multiple departments and within and outside of government.

And to be frank, it was quite absurd and we also, I mean I am not going to go through all of it, but we said that the track record of SAPS and the NPA speak for itself and in these circumstances it is really disturbing that the Minister had seen it fit to reject a public Commission of Inquiry to favour an internal investigation. And on, we said that members of the Executive will be expected to investigate their own colleagues, such an inquiry will have little or no credibility and in the eyes of the public and the gloss of an oversight drill of a judge will not change that.

I think we also pointed out and I think this is a question for judges, you cannot link your name to inquiries of this kind, it also brings the judiciary into disrepute and so the fact that the judicial offices require to bring judicial legitimacy to an investigation

conducted by the Executive, I think is problematic and harmful to the institution and is a breach of the separation of powers, a principle rendering such an appointment unconstitutional.

And then of course we go back to our plea, the need for a proper Commission of Inquiry. We point out that there is no longer any dispute, that political interference block several hundred serious criminal cases and that you know, again we reiterate all of the senor officials in the NPA who made affidavits and provided evidence along the lines of that. I cannot remember all the references and we point out that while we know a lot, we certainly need to trace this line properly and we need to understand what was behind it.

Again we point out that the subject matter is of great public concern and that perhaps more than any other class of cases, the suppression of the TRC cases has been almost total in its impact and virtually all the cases were blocked and most of the cases cannot be resuscitated as perpetrators, witnesses and family members have died over the past number of years. And the impact visited on the families is incalculable.

The harm demands, we point out that the harm done to them demands an expeditious thorough and credible inquiry into the [indistinct] that resulted in such a massive denial of justice. And I mean it is, we point out in the press statement that it is a critical matter of restoring public confidence in the government as a whole and the institutions implicated in the suppression of the TRC cases, the victims already having lost faith in the government, especially

SAPS and the NPA and an investigation held behind closed doors is likely to destroy all confidence and trust in the state.

We also you know, talked about the anxiety that this would lead to for families and communities and that it could again deeply violate their rights to human dignity, equality and the rule of law, and that the refusal to hold an open and public Commission of Inquiry would only exacerbate the violation of their rights.

In the letter, I mean quite realistic, that it could be argued that the country is suffering Commission fatigue and cannot afford yet another Commission of Inquiry, particularly after the State Capture Commission and we put out the cost at 1-billion, but we said that such an argument would be deeply insulting to the families who endured apartheid era crimes, their loved ones laid down their lives for our democracy and its enshrined freedoms. And we said not only has the post-apartheid state turned its back on them and suppressed their cases, but in raising such an argument it would say that they are not worthy of you know, having such a Commission of Inquiry.

So that was the press statement that we sent to, that we also circulated and sent again to the President and Minister of Justice.

ADV VARNEY: No, thank you, Ms Sooka. So Commissioners, that press statement is annexes to the Calata affidavit as FA79 and it is in bundle 1 at page 806. So Ms Sooka, you seem to be saying through these different communications, that the state at that time was willing to hold, in your words, “an internal inquiry”, which you feared would be state managed, but that you were not getting a positive response

in relation to an independent or credible standalone inquiry that could not be interfered with by outsiders. And what did that say to you about the approach of the government?

MS SOOKA: I think the, you know, we were a nuisance and irritant because we were sending these letters to the President and the Minister of Justice, and we were making them quite public. And then of course we produced this media statement which I think, well the media statement comes afterwards but I think that the letters obviously were irritating for the government and a nuisance, and so one, where they thought they could get rid of us was let us do this, let us set up an inquiry.

We say it will be chaired by a judge, but we were not allowed to be a fully-fledged Commission of Inquiry and that way these people will go away, only I think the families, the victims were fairly tenacious and persistent and they were not going to allow that to happen. And so immediately I think we heard, you know, what the Minister had said at the launch of the inaugural lecture, that is when we released the media statement.

ADV VARNEY: And in your earlier evidence I recall you saying that in relation to some of the cases, the authorities had to be dragged, kicking and screaming. Given that the families in this matter had to launch a substantial, a massive application to court before President Ramaphosa was agreeable to appointing a Commission of Inquiry, would that same description be at, in relation to his conduct?

MS SOOKA: Absolutely. You know it is, what do you say, you have

a tick box approach, so the one thing to go away, so you say well I am going to do something but what I am going to do will fall far short in what you really want, but it will satisfy our need to show we actually did something. So I think it was very much along those lines and it was problematic.

ADV VARNEY: You mention in your description that the letters had referred to certain developments and in particular the fact that there had been affidavits filed by the NPA in the Rodrigues case. You mentioned that Rodrigues had been charged with murder of Ahmed Timol, that he sought a permanent stay of prosecution because of the long delay. I want to put to you extracts from the affidavit of Adv TP Pretorius SC.

He filed a supplementary affidavit in this case after the families had put up all the evidence that you spoke about in relation to what was in the statements of Advocates Pikoli and Ackermann, but they referred to the interference. And I will just paraphrase what he says, it is, it can be seen on pages 139 to 140 of the Calata founding affidavit from paragraph 360 onwards. The affidavit of Adv Pretorius is annexed to the Calata affidavit as FA50 at pages 624.

And I am reminded that the full papers in that matter, the Rodrigues matter, has been supplied in the contextual documents bundle at item 21. So Mr Pretorius in his supplementary answering affidavit and I will paraphrase just to save time, he says that the NPA does not deny that the executive branch took steps which can be

described as political steps to manage the conduct of criminal investigations and these cases such as that of Mr Timol.

But he stressed to say that this was not the doing of the NPA, they did not act out of any malice, it was simply a result of the pressure interference that they were subjected to and that none of these, these incidents that were set out by Pikoli and Ackermann, were created or initiated by the NPA. And he then called on the court to send a clear message to political office bearers to stop interfering with prosecutorial decisions.

Now what is your response to what the NPA said in that matter which is essentially yes, it happened, but it was not our doing, we did not act out of malice, this was the work of somebody else? What is your response to that?

MS SOOKA: You know, he paints himself and prosecutors as if they are victims. The real victims are the victims of apartheid era crimes and their families and you know, the only two who were courageous enough I think at the outset to take action, were Vusi Pikoli and Anton Ackermann. The rest of them just acquest and went along and I think that really raises a question for us on is that the kind of institution you want? Is that the kind of independence that should be displayed by the National Prosecutorial Authority? And they dragged like sheep along without objecting, without raising their voices.

I did not see anything in his affidavit where he said that cannot do his work, unlike Vusi Pikoli's memorandum to the Minister of Justice in which he sets out how untenable it has become for him

to do his work. We do not see a similar set of circumstances here and so I do not think that is good enough. And you know, it reminds you of many of the soldiers who were involved in committing grave violations when they argued obedience to orders.

Is this what we are having? A public institution where the officials infested by the state to act independently or dragged along by politicians? I do not think that is what our expectations are of the NPA and I think that really raises I think profound questions about how we begin to show up this question of independence and how we build fearless prosecutors who are not afraid to take on the state.

And you know, it reminds you of prosecutors in many other countries, if you look at the Pinochet case for instance. You know, originally Chile was not so keen to take on the case and it required a prosecutor from Spain to bring the case under universal jurisdiction in the UK courts and that prompted I think the Chileans to actually deal with their matter.

So similarly here, I mean you have Vusi writing to the Minister, saying that the way in which this process is unfolding, I cannot do my job, and nevertheless he continues to do his job and he is fired for that. I mean he is suspended because of the TRC cases and when you look at the initial charges at the Genoa Commission, one of them was the TRC cases, but that was later dropped. So if he had the courage to stand up, why did the rest of them not follow?

So I do not find his arguments acceptable. I think it is quite shameful, actually. The real victims in our country are the families

who had been left behind and that is something that we need to acknowledge. Also you know, it goes to, I think that there was a briefing when the former President Thabo Mbeki released the statement saying that they did not do their job and that they need to answer for what they did, but I think he needs to answer also for the person in command responsibility, having superior responsibility.

What did he do after so many years around knowing that nothing happened on these cases? So there is an obligation on a whole range of state actors, because the head of the NPA, it says the acting heads that were so obedient then, but also the President of the country, the Minister of Justice, these were people in command of superior responsibility. When they knew what was happening, what action did they take to remedy it? And the answer is nothing.

ADV VARNEY: You brought up the interesting analogy of soldiers who committed atrocities and they have to take orders. What is interesting is that in the affidavit of Adv Pretorius and this is summarised at paragraph 362 of the Calata affidavit on page 141, Pretorius SC says that you know, the NPA had little choice in the matter because the NPA prosecutes on behalf of the state. What is your reaction to that?

MS SOOKA: The NPA prosecutes on behalf of us, the people. It is their constitutional obligation to uphold the Bill of Rights and the Constitution, and that interest is ours, and so even a head of state should be capable of being prosecuted by the NPA.

ADV VARNEY: So in your view when pressure was applied on the

prosecutors in respect of the TRC cases, what should have they, what should they have done at that time?

MS SOOKA: Lots of actions opened to them, they could have resigned in mass, they could have jointly got together and made a public statement and demanded in fact that parliament do something about it, so there are many things that they could have done instead, acquiescence for what is it, 30 years? Crazy.

ADV VARNEY: Could they even have invoked the Constitution and… [intervenes]

MS SOOKA: Ja.

ADV VARNEY: And approached a court in this matter?

MS SOOKA: That would have been the best course of action.

COMMISSIONER KGOMO: Yes, you know the statement, you prosecute on behalf of the state, actually in other countries it could be the people of South Africa versus So-and-So, not so much the state, the people.

MS SOOKA: The people, ja.

COMMISSIONER KGOMO: Do you not agree?

MS SOOKA: Yes, I do.

COMMISSIONER KGOMO: Okay.

MS SOOKA: I do.

ADV VARNEY: Ms Sooka, before we conclude, I understand that you would like to make a concluding statement.

MS SOOKA: Thank you Chairperson, with your indulgence. I want to say Chair and Commissioners, that I am profoundly grateful that

this Commission was established and that its proceedings actually got off the ground despite I think numerous attempts to derail it. Its very existence affirms a principle that lies at the heart of our constitutional democracy, that the state must answer when it has failed the most fundamental duty to protect the rights of its citizens and to ensure justice for grave crimes.

The families of those who were tortured, killed and forcibly disappeared under apartheid, have walked a long lonely road since the Truth and Reconciliation completed its work. They came forward in good faith, they gave their testimony publicly, often at great personal cost, but they did so in reliance on a solemn promise, a constitutional compact that the truth would be followed by accountability and that their suffering would not be rendered invisible through official inaction.

This compact created binding constitutional and legal obligations on the democratic state. Victims relinquished their ordinary entitlement to insist upon immediate prosecution in reliance on a lawful process that preserved accountability. So when the state failed to investigate and prosecute cases where amnesty was not granted, it breached the constitutional bargain at the heart of South Africa's democratic transition and it violated the legitimate expectations it had created.

It was not supposed to be like this. The democratic statement, you know, that their loved ones helped to bring into being often at the cost of their own lives, was meant to stand as the

guarantee of their rights, not as the custodian of their abandonment. The conditional amnesty regime established under the Promotion of National Unity and Reconciliation Act was expressly designated as a mechanism of accountability within a transitional constitutional framework.

It was an exceptional measure, carefully circumscribed by law and embedded within a broader legal architecture that preserved and did not displace the ordinary operation of criminal justice. Amnesty as we know is not automatic or collective, it could only be granted where perpetrators made full disclosure and satisfied strict legal requirements. Where they did not apply or where amnesty was refused, criminal liability remained intact and the legal duty of the state to investigate and prosecute was neither extinguished nor diminished.

This duty arises directly from the Constitution which requires that the State uphold the rule of law and respects, protects, promotes and fulfil the rights to equality, dignity and equal protection of the law. I would argue that when we talk about equality, the perps seem to have enjoyed more equality. So failure to investigate and prosecute is therefore itself a violation of the Constitution.

This framework was crafted carefully by those who negotiated our transition. The late Minister of Justice, Dullah Omar, made clear that conditional amnesty was never intended to extinguish accountability. It formed part of the justice system and was not an escape from it. Those who came forward and told the truth, would be

considered for amnesty, but those who did not would remain subject to investigation and prosecution under the ordinary criminal law.

The logical consequence of this legal structure was clear and unavoidable, individuals who failed to apply or whose applications were refused, remained subject to criminal investigation and prosecution, and when the state failed to act on these cases, it did not merely delay justice, it violated constitutional obligations, it denied victims their right to effective remedy, it denied them their right to dignity and it denied them the right to equal protection of the law.

But it also violated South Africa's binding obligations under international law, including the duty to investigate and prosecute torture, extrajudicial killings and enforced disappearances, and these are not discretionary, they are mandatory, legal obligations. The consequences for victims and their families have been profound, it has meant three decades of uncertainty, unresolved grief and the corrosive knowledge that those responsible for the worst crimes, walk freely among them.

Their loved ones gave their lives in struggle to bring into being a democratic constitutional state founded on the rule of law, yet that very state has failed to vindicate their rights. For perpetrators the message has been equally clear, delay has become *de facto* impunity, silence has carried no legal consequence. The passage of time has been allowed to shield criminal responsibility and this failure has not remained confined to the past, it has weaken the authority of the law in the presence and it has contributed to a culture in which

those who abuse power, may reasonably doubt whether accountability will ever follow and the human cost of this failure is immeasurable.

The failure has also inverted the moral and constitutional order instead of vindicating the rights of victims. The passage of time has operated to the advantage of perpetrators, instead of reinforcing accountability, state in action has entrenched impunity and undermined confidence in the rule of law.

For nearly three decades, victims and their families have waited for that duty to be fulfilled. They placed their trust in the institutions of the democratic state, instead they have encountered delay, obstruction and political interference that has subverted the course of justice.

As Lukhanyo Calata testified before this Commission, the failure of the democratic state is compounding the original injustice. He spoke not only as the son of Fort Calata, but as part of a generation that placed its faith in the Constitution. He told this Commission and I quote, “We believe that the democratic state would do what the apartheid state never did, respect the law and prosecute those responsible. Instead we have been betrayed by the very state our parents died to create”.

His testimony captures the profound constitutional injury that has occurred. The failure to prosecute is not only denied justice for past crimes, but it has eroded the constitutional promise for which their parents sacrificed their lives and has perpetuated the violation of

victims' rights into the present.

I recall last year how after a deeply frustrating court hearing, Thembi Simelane approached the perpetrators in the recess and she asked them simply, "Please tell me and my mother where my sister's body is buried". She did not ask for vengeance, but for truth so that her family could lay their child to rest with dignity. They callously brushed her aside and that moment reflected not only personal cruelty, but the structural cruelty of the system that has allowed silence to prevail where the law required accountability.

The right to truth, to justice and the right to dignity are not abstract ideals, they are binding legal rights and when the state fails to investigate and prosecute crimes, itself becomes complicit in the continuing violation of those rights and each day that accountability is deferred, constitutes a continuing violation.

The Constitution requires not passive acknowledgment, but active enforcement of accountability and so the Commission unfortunately for you, you carry a profound constitutional responsibility and you must affirm that the rule of law applies equally to all and that the passage of time does not extinguish accountability and you have to affirm that the rights of victims remain enforceable, binding and deserving of protection.

Accountability is not only about addressing the past, it is about restoring the integrity about Constitution, about affirming the dignity of victims and it is about ensuring that the promise made at the birth of our democracy, that justice would follow truth, remains

real, enforceable and alive, and it can send an unequivocal message that in South Africa no perpetrator, no matter how powerful and no matter how much time has passed, is beyond the reach of the law.

So it is an awesome responsibility for which I thank you.

ADV VARNEY: Thank you, Ms Sooka. I have no further questions, Commissioners.

CHAIRPERSON: Thank you, Mr Varney. Ms Rantho, any clarificatory questions?

ADV RANTHO: Thank you Commissioners, there is not clarification from the [indistinct] side.

CHAIRPERSON: Ms Moroka?

ADV MOROKA: Good morning, good afternoon, Commissioners. None is sought from us but we will approach the Commission with an application to cross-examine. Thank you.

CHAIRPERSON: To?

ADV MOROKA: Cross-examine.

CHAIRPERSON: To cross-examine for the DSO, for the DoJ? Yes, madam?

ADV MOROKA: No, she is not, she is my junior.

CHAIRPERSON: Oh, she is your junior. Mr Semenya?

ADV SEMENYA: Chair, with your indulgence, can we commence our part just after lunch? I see it is almost 5 minutes to.

CHAIRPERSON: Yes. Can we agree that we will then reconvene at 13:50?

ADV SEMENYA: We indulgence, Chair.

CHAIRPERSON: We are adjourned until 13:50.

ADV VARNEY: As the Commissioner pleases.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Mr Semenya?

ADV SEMENYA: Chair, we thank you for the indulgence and I must indicate that we do not intend to be long and this section will be handled by my learned colleague, Mr Soni.

CHAIRPERSON: Yes, Mr Soni.

ADV SONI: Thank you, Chairperson. Afternoon to you, Ms Sooka.

MS SOOKA: Good afternoon.

ADV SONI: Maybe you could change chairs or switch. Oh, okay. That is an easier way, yes. Ms Sooka, I want to begin by noting the following. First, it is clear from your background that you have been involved in securing solace and justice for the victims of the atrocities of apartheid for a period long before the TRC process was conceived. And for this, Ms Sooka, we all applaud you. Thereafter, Ms Sooka, you were involved intimately in doing the same during the TRC process itself. For this, Ms Sooka, we all thank you. Now, this morning, you instructively reminded us that the TRC would not grant amnesty until the truth was disclosed and other criteria set out in the TRC Act had been met and whatever else this would provide, the truth itself would provide some solace for the victims of those atrocities and those who were cruellest atrocities and their families. It is perhaps also worth recording, Ms Sooka, why that painful decision

to grant amnesty to the perpetrators of the most heinous of crimes was taken. That was pointed out by the Constitutional Court in the AZAPO matter, where the Court pointed out that such a process would perhaps be more successful in securing truth for the victims than a prosecution process, especially in the absence of evidence, which in all probability was destroyed during the dark apartheid days and because these crimes took place where there was a system of no accountability. I am just placing that on record because it is necessary to know how we actually got here. Do you agree with all of that, Ms Sooka?

MS SOOKA: I think that we could have quite a debate around some of the assertions at the time and I can tell you that as a member of civil society who was part of the discussions around the question of an amnesty and also really looked at the AZAPO case properly, I think AZAPO, when we look at it, is a political judgment, and it is a political judgment in the context of the time of the transition. And I think that many of the assertions that were made by Justice Mahomed writing for a majority, one could have an issue with, and I would argue that that probably needs almost a separate debate because I would beg to differ around the assertion that in almost all cases there was no evidence. So I think that is one part of the AZAPO judgment. I also think that, you know, remember in the Act they used the word full disclosure because the notion of what is the truth depends on which perspective you look at it from. And I think it was Judge Albie Sachs when he was dealing with the question of his

own testimony before the Human Rights Violations Committee, he came up with this notion that is being used in many other transitional contexts today, that you have many different kinds of truth, and, you know, there is the dialogical truth which emerges from a process like the Truth Commission, but that, you know, we have also had the situation where people thought that the forensic truth that you get from court cases, that that was enough. And now we know today that many people lied to the courts during the apartheid period as well. So I think the Act deliberately uses the word full disclosure and not the truth, although victims and many people talk about it as the truth. But I think that all of us accept, and I think that was a bitter acceptance, that it was necessary to go down this road in order to ensure that we would have a peaceful transition. And the only reason that we accepted it was because we were assured that the rule of law would follow its course once the amnesty process was over. And so the amnesty is what we call an exception in time, only permitted in certain circumstances. And today, when you look at the normative framework around the world, amnesties are prohibited for serious international crimes, and it would include all of the crimes that are listed as gross human rights violations in the TRC legislation. So I think it was an incredibly generous moment. And if people chose not to make the best use of it, if they chose not to make full disclosure, then I think that is when the law falls into place and that is why the imperative to investigate and prosecute is such an inviolable part of the deal. So yeah, so it is a bitter pill to swallow, but accepted as

necessary at the time. But we, you know, and in the negotiations, when we tried to look at closing all of the loopholes, I mean, you cannot foresee everything. And I think, you know, these are some of the bitter lessons that we have learned over the years.

ADV SONI: I think the AZAPO judgment does deal with that in the sense that at the end of the day, that was a choice that was made by the leaders of the different factions in South Africa at that time.

MS SOOKA: That is why I call it a political judgment for the time.

ADV SONI: Yes, no I understand. But notwithstanding what was envisaged in the AZAPO case, and the difficulties that were presented there, in your evidence this morning, you pointed out something that, and that is why I mentioned the difficulties in the AZAPO case. You pointed out that you and Mr Nsabeza took lists to Mr Bulelani Ngcuka, and now Judge Saldana, of what had happened, what possible investigations there were. So all the difficulties that had been set out in the AZAPO case, certainly in respect of those lists, not necessarily all the difficulties, but many of those difficulties would have vanished because you had something to work from in pursuing a meaningful investigation.

ADV SONI: Yeah, I concede that, that in many ways there are elements of the amnesty process, which did create the basis for, you know, proper investigations in the future. But I would also venture to say that when you look at the work that was done by the D'Oliveira Unit, and you look at the work that was later done by the Goldstone Commission, I would say that there are a vast number of cases

which, if the NPA had been left to just exercise the authority without the Truth Commission, that could have also proceeded without the amnesty process. But the amnesty process was useful in giving many families a leg to stand on.

ADV SONI: Well, in addition to the progress made by, for example, the Goldstone Commission and the D'Oliveira unit, what we do have is the amnesty process created by the TRC which also brought further information, admittedly not as much as one would have liked, but it did bring that further information and as I understand your evidence, and correct me if I am wrong, part of the concern, and that is just putting it mildly, that you raise is, notwithstanding all of this information that was existing and that the TRC process had brought, we are still here today with a handful of completed investigations, fewer prosecutions, and a couple of inquests which do not require much investigation. Would I be correct in saying that is part of the concern you expressed?

MS SOOKA: Yeah, and I think the reason we are here at this Commission, I mean, to ask the question why, you know, when you look at the fact that the amnesty process did bring to bear a whole load of information, and if you couple that with, you know, what the other two bodies did, and remember there were other trials that took place in the country as the Commission was setting up and before the Commission, for instance in KwaZulu-Natal as well, I do think that with that kind of archive of information, it does beg the question, why was it so hard then to advance prosecutions? And maybe just an

example of one, I mean, when you look at the Cradock Four case and you look at Neville Zietsman, he may not have named the security branch officers, but he did attribute responsibility, and so from that point on, it was not rocket science to do more work. I think that emerges in the Amnesty Committee, and so one has to ask the question, when the amnesty judgment came in, why was that matter not seized upon and indictments issued. And it could go to a range of, you know, other cases, including that of Simelane, including that of Timol. So, I think with a little bit of diligence and perhaps more courage, you could have had a very different response.

ADV SONI: What, as I understand your evidence, based on the different cases that you referred to and based on generally what happened, you say that this lack of success is due to the suppression of the Selatse cases. That is how I understand your evidence. But would that be a correct description of the general tenor of your evidence?

MS SOOKA: Yeah, but I mean, when I say suppression, I mean that suppression includes the deliberate political interference that went with it, and I think that there you have the evidence of members of the National Prosecutorial Authority themselves making those admissions in affidavits before to the court process, and I think that when one looks at that, then I think that leads one to the inference that there was suppression and political interference. But there is a question, though, and maybe incorrect of me to say that, but like, there could have been a lot more work done, even if there was political

suppression, and the question of what one did was also dependent on how committed you were to dealing with your own responsibilities, because it is a question of responsibility.

ADV SONI: And I think, Ms Sooka, if I can be so bold as to suggest that it took the efforts or the lack of effort of a whole range of players for us to come to this point where victims are still, as Mr Calata put it, there with holes in their souls, and that was his graphic description of how he feels not knowing what happened for once, and not being able to say that when the perpetrators were alive and they were not prosecuted, he was denied justice. I am just giving one example. But the points you make is that it was not a single group of people. It took a range of people from different parts of government to arrive at this sad state of affairs we find ourselves in now.

MS SOOKA: I think it is a question of the institution. Government and its institutions. At one level there are politicians, your senior civil servants, but when you look at the three, maybe two key institutions that are meant to uphold criminal accountability, the National Prosecutorial Authority, and then of course supported by the South African Police in the form of whatever investigative units they have, these are institutions, but they are also, and I mean that is where I raise the question of if you align that to the question of accountability at a command level, the head of state, the head of a particular institution bears superior responsibility. Because I mean, they knew from the outset that nothing was happening. What action did they take to change the situation?

ADV SONI: And if I could add to that, Ms Sooka, Parliament too must take its blame. One looks at the appearance of different persons like the NDPP, the prosecuting authorities, the ministers, and so on, and one hears the Lofty principles being set up, and then two years later exactly the same thing is said in those hallowed chambers of Parliament, and nothing is done.

MS SOOKA: I mean, in a way it goes to the question of the institutions, which are meant to preserve democracy. On the one hand, you have the executive, and then of course you have Parliament, and you have all of these institutions, and to be honest, in this particular instance, had it not been for civil society, there would be no accountability. And so Parliament too at some point has to accept its responsibility, and it is quite interesting because when you go to the period preceding the setting up of the Truth Commission, the two houses, the NCOP and Parliament, they sat together in a joint sitting, and when you look at the kind of engagement that took place on these important questions, you get a very different picture from what you have seen. Although I think that in recent times you have seen the Portfolio Committee try to engage with the issues, and since they have been a lot more serious about keeping the accountability going, it has been different, but I mean it has not changed the situation for the victims.

ADV SONI: If I may just point out, that is in a sense part of what the Zondo Commission found, that had there been the oversight, the rigorous oversight role that Parliament was required to play, there

would not have been state capture. In a sense, this too has been called a form of capture, because as I understand it, when the Zondo Commission was approached, part of the approach was based on the fact that the prosecuting authorities and perhaps the police had been captured in a similar way to other government bodies, I mean other government institutions in the grand play of state capture.

MS SOOKA: Yeah, I mean I think, it is a very tricky question, because I think up until the GNU, I think when you have a very strong government with one political party in ascendancy, unfortunately that does mean that both the institutions in Parliament too, that particular perspective will hold, and so when it comes to checks and balances, it is very difficult, and I think you saw that in Zondo, and you probably seen it here as well.

ADV SONI: Now, I just want to suggest to you, Ms Sooka that to see this Commission purely as the failure or the lack of effort on the part of the police and the NDPP would be to misconstrue the perilous state, if I can put it that way, and perhaps it is putting it too strongly, in which our entire democracy is.

MS SOOKA: And it is why, I think some of us have said that when you look at the Commissions that have been set up in the recent period, I think the Zondo Commission was about state capture, the Madlanga Commission is about the security forces, police particularly, but when you look at this Commission, this Commission is about the institutional heartbeat of our country, and that is why it is so important, it has to go beyond the notion of two institutions, but to

look at the edifice of government and why this was possible.

ADV SONI: And would I be correct, partly that is because of the centrality of the principle of the rule of law, and the supremacy of the Constitution.

MS SOOKA: Yeah, I mean, if you, you know, when you look at the debates that took place in Parliament, I mean, this is one issue, how do we ensure that as a new fledgling state, South Africa does not flout the rule of law, and so that is why all of these safety guards were put into the process, and when you look at, you know, Dalai Omar's speech at the Syracuse conference, he was basically arguing with his peers around the world, around why South Africa should not be seen as an outlier state, and the only basis on which he could do that was because it was premised on the notion of a form of accountability, and within the context of a transition, in which the rule of law would still remain uppermost, and that this was within the sanction of the Constitution, because I think that was so critical. I mean, it is a very clever, when you look at the negotiation of the 34 constitutional principles, I think there is a recognition that the liberation movements and the apartheid government do not have the legitimacy to complete the process, and so that is why this is then left to constitutional assembly to begin the drafting of the law, and so one of the first acts that they begin to get onto is the TRC legislation, with the notion that all of the accountability measures that are put into it, consultations, widespread hearings, before the finalisation of the law.

ADV SONI: And it perhaps will not be amiss to point out, in our

present history, that unless our democracy is nurtured, it will face the same challenges that many recent democracies are facing at the moment, because we have the notion of populist power, persons who ought to safeguard society against such abuses, not having the courage to do what they are required to do as public representatives.

MS SOOKA: Yes, I think that in that sense, South Africa is incredibly different, and I want to say that when you look at South Africa's position on the world stage, particularly when you relate that to the conflict in Gaza, South Africans were standing alone initially, but because of their courageous stance, suddenly you had many other governments in the West also beginning to indicate that they supported that stance, and that is why I believe there is an enormous amount of hope in our society. The fact that our judicial system works, the fact that almost every single political party, when they feel aggrieved, they take their disputes to the court, and in a sense, having that and having a civil society that is active and courageous, I think these are important steps in a sense nurturing what we have, and we have a Constitution. You know, we have seen in the United States, for instance, the way in which particular leadership tried to subvert the Constitution, but you also, and I think you have seen in the last six months, how many organisations are beginning to fight back, and I think these are important steps in asserting the notion that in the end, the people know what they want, and I think South Africa is very similar in that regard. You just have to look at the victims who have come to this Commission, and you see their understanding of

what the rule of law means for them.

ADV SONI: And of course, with all the challenges that victims and organisations like the FHR faced from 2003, and begging for a public hearing of what ails the system, we now have a Commission of this nature that has been established. Whatever else, and of course, whether you succeed or not is another point, but what we do have is we are here today so that these concerns of the forgotten victims of apartheid are expressed in public.

MS SOOKA: And that is why I think in my closing address, I think I said that it is such an important assertion of constitutional values to have this Commission. I would only say one thing, and that is that we have some very powerful elements who are also people with an interest in this Commission, but I was struck by the fact that once again, they do not take the time out to listen to the plight of families and victims, and I hope even if they were not sitting here, that they are watching the live stream so that they understand the pain and suffering of families. I think that that is what equality actually means, and so we have invested a great deal of hope in this Commission, because we think it is an assertion of the values of our society.

ADV SONI: Ms Sooka, I had been hopeful that we would be able to say to you today that in response to your affidavit, and not only your affidavit, but as your evidence unfolded today, which emerged in many of the documents annexed to the papers, that we would be able to say to you that the government's response or the state's response to you is as follows. That is, Ms Sooka, I want to place on record, not

due to lack of effort on our part. We have circulated these affidavits to all institutions who, as you have rightly pointed out, bear accountability for where we are today. They have unfortunately not responded. I am just going to point out, perhaps to you and again to the world at large, that at the end of the day, our Constitution, in allowing for the President to establish a Commission of this nature, and the Commission's Act which gives power to the Chairperson of the Commission and the Commission itself, that those coercive powers, it may be necessary to exercise them so that, as you put it, the silence, the resounding silence that greets evidence like yours, Mr Calata's and Mr Simelane's, is not allowed to prevail in the face of the accountability of all who are responsible for the delays and interference in the prosecution or the necessary prosecution of perpetrators or the search for the truth as to what happened to our many heroes, Chief Luthuli, Steve Biko, Fort Calata and many, many others, Ahmed Timol, all of them, their stories deserve to be told to the world so that the world, but especially us as South Africans, know what really happened and that the perpetrators will not be able to escape the sanction of history at some stage.

MS SOOKA: Thank you.

CHAIRPERSON: Thank you, Mr Varney. Before you proceed, Ms Gabriel has a question for Ms Sooka.

COMMISSIONER GABRIEL: Ms Sooka, thank you for your evidence. You have taken us through chapter and verse of certainly the period before 2019 where you have pointed to what you have

described as political interference. What is exercising my mind and is a deep question, which I hope you, came to some understanding about in your head is why. Did you come to any understanding in your own head?

MS SOOKA: I think it is the million-dollar question, why. And maybe, I mean, it is pure speculation on my part. You know, at the time when the negotiations took place, I think we made the assumption that everybody believed that there should be Nuremberg style trials, right? And when they did not get that, then of course some people opted for the conditional amnesty. But I honestly believe, and you know, when you look at many individuals and you look at the fact that they were impatient, even with a body like the Truth Commission, I think it is because there is this belief that we were fighting a war. And in a war, you have collateral damage and civilians are collateral damage. And so now, it is all over. We are in a new country. We should all move forward. So I think that is one, you know, one angle, that there are people who do not believe that there should have been this kind of accountability framework. I think that you also have what is set out in the papers in, like, I mean, the sort of books of Michael Schmidt and the sort of interviews that Ali Boupendza conducted, and something that we always had a debate about with the De Klerk Foundation, that there was another deal, and that sort of deal would fall into that category of we were all fighting a war, and so why are we going down this route? And maybe that is, you know, that element. But I also think that often when you spoke to

ministers and senior officials, you were told that, well, if we go for them, then they are going to go for us. And, I mean, the real issue should be, like, if you committed these kinds of serious violations, then there was an option open to you, apply for amnesty. And if you did not get it, then obviously you would have to face the might of the law. So I can only speculate, you know, as to what that reason is, and I hope that somebody is going to illuminate this sort of question, which I think a lot of us have funded for many, many years.

COMMISSIONER GABRIEL: And then after 2019, where you say it is less clear, you describe what you call a culture of endemic impunity. Help me understand that a bit more. What do you have in mind?

MS SOOKA: I think that, you know, South Africa fell into a point where because of the way in which these institutions had been denuded, that even where political will may have existed to do something, you see the way in which the capacity, the question of the quality of being able to do stuff, I think that has just promoted impunity, because it is very difficult in that environment to pursue accountability. So I think that is the culture that I am talking about.

COMMISSIONER GABRIEL: Thank you.

CHAIRPERSON: Mr Varney?

ADV VARNEY: Thank you, Chairperson. We do not have any follow-up in relation to this witness, but in discussion with the evidence leaders this morning, we felt it appropriate to place certain aspects of the evidence of Adv Dumisa Ntsebeza SC, who, as we

have indicated previously, is not able to testify at this stage. But given the logical flow of the evidence and what he would have said, we think it is appropriate to place certain aspects of his affidavits on the record. And if the Commission agrees and gives us leave, we would like to do so now.

CHAIRPERSON: Yes, you may proceed.

ADV MOROKA: If I may, Madam Commissioner, can I understand what is being sought to do by Mr Varney?

CHAIRPERSON: Mr Varney?

ADV VARNEY: So, Adv Dumisa Ntsebeza SC, was also a member of the Truth Commission and the head of the investigation team. So normally speaking, his evidence would have gone straight after the evidence of Ms Sooka. So, for example, he also was involved in the handover of cases to the Truth Commission. And his related evidence, we think, should be placed on the record now so that it is in the minds of the Commission and those involved in the Commission. There is a possibility that if Adv Ntsebeza, if his health improves, that we could potentially call him to testify before this Commission closes. But there is a possibility that he will not be able to testify. And so we felt the need to put his evidence on the record and to highlight aspects that we think this Commission should be seized with.

ADV MOROKA: I still do not understand, Chair, if I may. Is Mr Varney proposing that he is going to read the affidavit by Mr Ntsebeza as if it is evidence tendered or I see that Ms Sooka has not been excused. Is that going to be done through Ms Sooka? I am trying to

understand.

CHAIRPERSON: Sorry, Ms Moroka. Ms Moroka?

ADV MOROKA: I am sorry, Chair, I thought you heard me. I was saying I still do not understand, is Mr Varney … [intervenes]

CHAIRPERSON: Because you have not been here, we have previously been informed that Mr Ntsebeza, who was due to give evidence after Ms Sooka, is not in a position to do so as he is ill.

ADV MOROKA: No, that I understand, Madam Chair. I understand that Mr Ntsebeza is ill-disposed. What I am trying to understand is what does Mr Varney want to do now, today? To read his affidavit, which is part of the record or what does he intend doing? Doing it through Ms Sooka or doing it himself? I do not understand that.

CHAIRPERSON: Thank you. Mr Semenya?

ADV SEMENYA: This is an inquisitorial forum and proceedings. Rules tell us without doubt that the state appearances to laws and rules of evidence still apply. If Mr Ntsebeza is ill-disposed throughout, we intend to read the contents of that affidavit into the record. What cogency they must carry out here is a matter for argument.

CHAIRPERSON: Yes, thank you.

ADV MOROKA: Chair, when Mr Semenya says "we" what is he talking about?

ADV SEMENYA: Me, if you want, first person.

CHAIRPERSON: Meaning the evidence leaders.

ADV MOROKA: That is what I wanted to understand, Chair. And I do not know why Mr Semenya is getting worked up about it. All I

want to know is what is the process that is going to happen today so that we understand it?

CHAIRPERSON: Yes.

ADV MOROKA: I do not understand what Mr Varney is … [intervenes]

CHAIRPERSON: I still have to rule on Mr Varney's request.

ADV MOROKA: I understand that, Chair, all I wanted to do was to understand what is going to happen.

CHAIRPERSON: Yes.

ADV VARNEY: Chair, perhaps before you rule, if I could respond. To save time I do not intend to read all three affidavits into the record. I will simply paraphrase, draw the Commission's attention to matters we think It should pursue further and there will be certain paragraphs that I think are important, which I will read *verbatim* but they will not be that many of them.

CHAIRPERSON: Yes, Mr Varney, I think Ms Sooka is still giving her evidence and we are still dealing with her testimony. We have got to excuse her first before we can attend to you.

ADV VARNEY: Yes, I agreed, Chairperson.

CHAIRPERSON: Yes. Mr Sooka, we profoundly thank you for having made time to come and give evidence to this Commission, which we think will greatly assist the Commission in discharging its function. We know you have a hectic schedule, but to make sure that you make time to come and give evidence for that, we thank you. You are excused as a witness. You may you may be called again to

be cross-examined in due course.

MS SOOKA: Thank you, Chair.

NO FURTHER QUESTIONS

CHAIRPERSON: Thank you. Mr Varney?

ADV VARNEY: As the Commission pleases. Chair, can I assume that you have ruled on the matter and I may proceed.

CHAIRPERSON: Yes. No, I have not, I have not. I thought you had indicated that you do not know the condition of Mr Ntsebeza right now.

ADV VARNEY: He is presently undergoing treatment.

CHAIRPERSON: Yes.

ADV VARNEY: He has indicated he is not in a position to testify, while he is being treated and that he would have to assess his condition at the end of the treatment.

CHAIRPERSON: Yes. Should we not wait until that assessment has been done?

ADV VARNEY: Chair, the only issue is that that could be weeks or months away. The Commission might have concluded its work by the time his treatment is done. It is an open question.

CHAIRPERSON: Yes. Are you not in a position to assess that by Friday?

ADV VARNEY: Chair I did speak to him yesterday and he said that he, within the near future, he is not in a position to testify and certainly not this week and at the point where his treatment comes to an end and he is in the hands of his medical team in that regard.

CHAIRPERSON: Mr Varney, we are of the view that it is too soon to decide to place his evidence on record now. We will have to defer it until next week to assess what his position is.

ADV VARNEY: As the Commission pleases.

CHAIRPERSON: Yes. That being the order of the day we are adjourned until tomorrow at 9 o'clock.

ADV VARNEY: As the Commission pleases.

INQUIRY ADJOURNS UNTIL 18 FEBRUARY 2026

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CERTIFICATE OF VERACITY

We, the undersigned, hereby certify that **as far as it is audible**, the aforegoing 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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- ***Where no information provided, names transcribed phonetically.***
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