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IN THE EQUALITY COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NUMBER EQ 01/2012

IN THE MATTER BETWEEN

APPLICANT	SOUTH AFRICAN HUMAN RIGHTS COMMISSION obo SOUTH AFRICAN JEWISH BOARD OF DEPUTIES
REPRESENTED BY:	MR C BESTER
ASSISTED BY:	MR M SEAPE
INSTRUCTED BY:	CLIFFE DEKKER HOFMEYR INC Ref: Mr B Meyer / Ms N Meyer
AND	
1 ST RESPONDENT	BONGANI MASUKU
2 ND REPENDENT	CONGRESS OF THE SOUTH AFRICAN TRADE UNIONS
REPRESENTED BY:	MS A DE KOK SC
INSTRUCTED BY:	CHEADLE THOMPSON & HAYSOM INC Ref: Ms K Norval

BEFORE

THE HONOURABLE MR JUSTICE MOSHIDI

HELD ON

DAY 1 - 7

6 FEB 2017 - 14 FEB 2017

PAGES 1 - 810



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TABLE OF CONTENTS

DAY	DATE	PAGES	WITNESS
1	06 Feb 17	001 - 109	Benjamin Shulman
2	07 Feb 17	110 - 171	Benjamin Shulman
3	08 Feb 17	172 - 284	Dr David Simon Hirsh
4	09 Feb 17	285 - 429	Dr David Simon Hirsh Dr Gregory Howard Stanton
5	10 Feb 17	430 - 570	Bongani Masuku
6	13 Feb 17	571 - 684	Prof Steven Friedman
7	14 Feb 17	685 - 810	Arguments

1 [PROCEEDINGS ON 6 FEBRUARY 2017]

2 [10:37] MR BESTER: May it please the court,
3 M'Lord. I appear together with Mr Seape for the South
4 Africa Human Rights Commission.

5 COURT: Thank you.

6 MS DE KOK SC: May it please you, M'Lord,
7 I appear on behalf of the respondents.

8 COURT: Thank you. Mr Bester, before we
9 get to start with these matters, it was said in discussions
10 in chambers and I've been assured that the matter won't be
11 interrupted despite the problem with witnesses who are not
12 here tomorrow and until Wednesday. I just want to make
13 that assurance, that we'll finish in 10 days' time. That's
14 all.

15 MR BESTER: We will certainly endeavour
16 to do so. The position simply is, is that we intend to
17 lead our factual evidence today and it may be that there's
18 some overlap tomorrow, depending on the cross-examination
19 no doubt.

20 COURT: Yes.

21 MR BESTER: But as indicated in chambers
22 to Your Lordship the expert evidence which we intend
23 calling, those expert witnesses are only available to
24 testify from Wednesday morning, both come from abroad, and
25 that's the only logistical problem we are confronted with.

1 COURT: Yes, and that is confirmed by
2 counsel for the respondents as well.

3 MS DE KOK SC: Indeed, M'Lord.

4 COURT: Then I've got just a few
5 housekeeping issues to attend to. The first one is this,
6 Ms Stenographer, can you please make sure we're recording?
7 If there is any problem about the recording please stop us,
8 let's - I don't want a recording which is not there when we
9 want it later on. The second issue related to that, I have
10 not canvassed with the parties whether they have reached
11 agreement regarding making available to the court a copy of
12 the transcript as well as a cost contribution on either
13 side.

14 MR BESTER: We have no difficulty from
15 our side in making the transcript available to the court.

16 COURT: Ja, we don't know what's going to
17 happen hereafter, how long and, you know -

18 MS DE KOK SC: I think we're also in
19 agreement, M'Lord.

20 COURT: Thank you. Then I must also
21 enquire at this stage if any of the parties intend to call
22 or to use interpreters.

23 MR BESTER: Certainly not from our side,
24 M'Lord.

25 COURT: Yes.

1 MS DE KOK SC: Not from our side, M'Lord.

2 COURT: Ja. The final thing which I do
3 not require to be attended to immediately is that on
4 certain of the documents in the file - I can't recall
5 precisely whether it is the founding affidavit to the
6 complaint or the answering affidavit - some annexures are
7 missing, but I intend to get to that when we deal with it.
8 I think it's, it could be Adv Mushwana's response or
9 something which mentions a lot of annexures or something.

10 MR BESTER: M'Lord, perhaps it would be
11 opportune for us just to uplift the court file during -

12 COURT: At some stage, ja.

13 MR BESTER: - the adjournment, just to
14 confirm that and supplement whatever needs to be added to
15 the court file.

16 COURT: Yes.

17 MR BESTER: To the extent that there are
18 any documents that need to be added.

19 COURT: Yes, and - right, there's
20 something else. I will raise that as we go on. Yes, Mr
21 Bester, you may proceed.

22 MR BESTER: M'Lord, by way of a brief
23 opening address, before I get there let me also just from
24 our side deal with some brief housekeeping matters, if I
25 may. The first point is reference will be made during the

1 course of these proceedings to the Promotion of Equality
2 and Prevention of Unfair Discrimination Act. May I just
3 beg leave to hand up a copy of the statute for Your
4 Lordship's convenience?

5 COURT: Yes.

6 MR BESTER: The second -

7 COURT: Is this the up to date version of
8 it?

9 MR BESTER: I believe so, M'Lord.

10 COURT: With all the amendments, hey?

11 MR BESTER: Indeed so, M'Lord.

12 COURT: Yes, thank you.

13 MR BESTER: Then second point of
14 housekeeping is a matter we did touch on in chambers and
15 that is the parties are now ad idem as to the transcript of
16 what was said at the meeting of the 5th of March 2009 and
17 that recording, which both parties had input in preparing a
18 transcript of that recording, the most recent version which
19 we are ad idem on Your Lordship will find from page 257 of
20 the trial bundle. That is the, that really is the key
21 portion of the transcript from page 257 to page 269.

22 COURT: 257, 269, yes.

23 MR BESTER: In fact we now also beg leave
24 to hand up to Your Lordship the trial bundle, all the trial
25 documents.

1 COURT: I think that is a complete
2 bundle?

3 MR BESTER: It is complete as it is now.

4 COURT: Documents have been filed for -

5 MR BESTER: Yes.

6 COURT: - the whole of last year up to -

7 MR BESTER: Yes. Yes, indeed.

8 COURT: Thank you. Can we mark that as
9 exhibit A then, the trial bundle, at the outset.

10 MR BESTER: Indeed so. Then M'Lord, at
11 the outset I did touch on the legislation. The genesis of
12 this case is the Promotion of Equality and Prevention of
13 Unfair Discrimination Act 4 of 2000. The statute, as Your
14 Lordship will no doubt be alive, gives rise to the
15 jurisdiction of this special court and in particular deals
16 with the prohibition of hate speech in section 10, which
17 really is the statutory cause of action upon which the
18 complaint and referral to this court by the South African
19 Human Rights Commission is premised. I'm not going to read
20 out the section. Your Lordship will be familiar therewith,
21 but in short what it does seek to address is to prevent
22 hate speech when it is premised on one or more of the
23 prohibited grounds, although what those prohibited grounds
24 are Your Lordship will see in the definition section of the
25 legislation they inter alia deal with race, gender, sex,

1 pregnancy, marital status, ethnicity, which is important
2 for this case, social origin, colour, sexual orientation,
3 age, disability, religion, belief, culture, language and
4 birth.

5 The legislation Your Lordship will also know was
6 premised to give effect to the right of equality enshrined
7 in section 9 of the Constitution and importantly for
8 purposes of this case I must just briefly refer to the
9 powers and functions of this court under section 21 because
10 at the outset, M'Lord, it is important to make this
11 submission, that Your Lordship is sitting as an equality
12 court judge, does not sit with the same powers as a normal
13 judge sitting in civil trial litigation. In fact what the
14 legislation contemplates in section 21 is the holding of an
15 inquiry. Section 21 speaks of "An equality court before
16 which proceedings are instituted in terms of or under this
17 act must hold an inquiry in the prescribed manner and
18 determine whether unfair discrimination, hate speech or
19 harassment, as the case may be, has taken place as
20 alleged."

21 Importantly the words "inquiry" in our submission
22 M'Lord, means something quite different from the ordinary
23 adversarial litigation conducted by way of trial action in
24 the High Court on a day-to-day basis in this court. It
25 does allow for Your Lordship to play a far greater part in

1 the proceedings as opposed to simply playing the role of a
2 passive arbiter as it were, and we will argue in due course
3 that there's a specific purpose behind that, and that is to
4 enable presiding officers to deal with complaints of this
5 nature in an expeditious and in an efficient manner without
6 the normal processes which we are so accustomed to as
7 lawyers in ordinary adversarial litigation.

8 The relief that is sought here is premised on two
9 events. The first was a blog post on the worldwide web
10 which Mr Masuku authored on 6 February 2009 and then just
11 over a month later on the 5th of March 2009 he made certain
12 remarks at the University of the Witwatersrand, which we
13 will deal with in due course, and it's in respect of those
14 remarks which the transcript becomes important. The relief
15 that is sought, M'Lord, which we will argue is competent
16 relief under the Equality Act, is an order declaring that
17 the remarks from Mr Masuku constitute hate speech, that
18 such relief, it's competent, M'Lord, appears from section
19 21(2) of the act, which allows the court to make a
20 declaratory order, section 21(2)(b), and coupled with that
21 section 21(2)(j), an order that an unconditional apology be
22 made. The legislation also provides for that.

23 Even though the act does make provision, M'Lord,
24 for the awarding of costs, I should point out that we did
25 not approach this court on the basis of seeking a cost

1 order. The matter is not about financial or monetary gain
2 or seeking economic redress of any kind. It really
3 pertains to the principle to serve as a deterrence and to
4 discourage people from subjecting themselves whereby they
5 make these remarks.

6 Now Your Lordship will be told during the course
7 of these proceedings that this case really is one which
8 seeks to in its proper guise prevent legitimate criticism
9 of the State of Israel, its practices and its policies.
10 Let me simply say this at the outset to dispel any
11 confusion as there might be; my client does not for one
12 moment believe that the State of Israel is somehow immune
13 from criticism. Criticism that is legitimate is of course
14 permissible. We do live in a constitutional state where
15 there must be robust engagement. However, in the context
16 of these proceedings Mr Masuku has unfortunately gone far
17 over and above that which would be regarded as legitimate
18 criticism. We will argue in due course that he has brought
19 himself specifically and squarely within the ambit of
20 section 10 of the Equality Act, being the hate speech
21 prohibition.

22 Very briefly, if Your Lordship has regard to the
23 exhibit A to the trial bundle, page 111 -

24 COURT: I'm there, thank you.

25 MR BESTER: This is the founding

1 affidavit deposed to by the Human Rights Commission, by its
2 then chairperson Mr Mushwana, page 111, paragraph 6.2.1,
3 that is the first complaint advanced by the Human Rights
4 Commission. We say there on page 111, paragraph 6.2.1,
5 "That on 6 February 2009 Mr Masuku made a series of remarks
6 on the internet site Supernatural.blogs.com stating, 'As we
7 struggle to liberate Palestine from the racist, fascist and
8 Zionist, we belong to the era of their friend Hitler. We
9 must not apologise. Every Zionist must be made to drink
10 the bitter medicine they are feeding our brothers and
11 sisters in Palestine. We must target them, expose them and
12 do all that is needed to subject them to perpetual
13 suffering until they withdraw from the land of others and
14 stop their savage attacks on human dignity.'" Then Your
15 Lordship will be referred to the transcript - I'm not going
16 to go to the transcript now. Key to this case would be the
17 events of the 5th of March 2009 at which time during a rally
18 of the Palestinian Solidarity Committee held at the
19 University of the Witwatersrand Mr Masuku again was present
20 and made certain remarks. Just quoting from paragraph
21 6.2.1, "COSATU has got members here; even on this campus we
22 can make sure that for that side it will be hell," is what
23 he said.

24 If I could just ask Your Lordship to flip back to
25 page 68 of the bundle. This is Mr Masuku's response to the

1 complaint by the South African Human Rights Commission
2 dated 4 June 2009, paragraph 6 of his response, he concedes
3 having made these remarks which I've just quoted to Your
4 Lordship. He says, "It is true that I stated during the
5 lecture," and then he goes on and effectively quotes the
6 passage I have just quoted to Your Lordship from Mr
7 Mushwana's affidavit. So there is no confusion there. We
8 will no doubt in the fullness of time debate as to what the
9 context and to what it meant and what proper meaning needs
10 to be ascribed to these words and how they fit within the
11 ambit of section 10, but from where we stand there is no
12 dispute that those are the words that Mr Masuku used, and
13 then the same would apply, if Your Lordship goes back to
14 page 112 of the bundle, at the same rally Mr Masuku said,
15 paragraph 6.2.3, "The following things are going to apply;
16 any South African family - I want to repeat it so that it
17 is clear for anyone - any South African family who sends
18 its son or daughter to be part of the Israeli Defence Force
19 must not blame us when something happens to them with
20 immediate effect." And that Your Lordship will find in the
21 transcript on page 260 and it goes on to page 261. I'm not
22 going to turn Your Lordship to that portion now, but again
23 there is no dispute that those remarks were made by Mr
24 Masuku.

25 Then paragraph 6.2.4 on page 112 he says, "COSATU

1 is with you. We will do everything to make sure that
2 whether it's at Wits, whether it's at Orange Grove, anyone
3 who does not support equality and dignity, who does not
4 support the rights of other people must face the
5 consequence, even if it means that we will do something
6 that may necessarily cause what is regarded as harm."

7 [10:57] Again this also appears from the transcript on
8 page 260 of the paginated papers making up exhibit A.

9 Then, M'Lord, just by way of further background on page 262
10 of the transcript Mr Masuku also at the end of page 261,
11 page 262 of the transcript Mr Masuku says, "We can talk
12 when it comes to talking. We can fight when it comes to
13 fighting. No one must entertain the assumption that he
14 possesses a monopoly over violence.

15 We don't want to warn everyone. We are just
16 talking now because we can talk but when it comes to
17 physical fighting no one must entertain an illusion. We
18 have been there in the trenches against apartheid and we
19 can still do it so let us not entertain the assumption that
20 if someone has a different view let's talk. But if someone
21 wants to fight we will do that. COSATU has got members
22 here even in this plenary."

23 And then it goes on. So with respect, M'Lord, by
24 way of a very brief outline Your Lordship will look at the
25 various passages which for the most part are common cause

1 and then consider their meaning against the context of the
2 events that took place. Because the parties are certainly
3 in agreement on this point and that is context is
4 everything. Words are not uttered in a truly clinical
5 laboratory situation.

6 Words are uttered in the ground during the course
7 of particular events and that context is going to be
8 critical in determining we submit the gloss or the final
9 interpretation which the court places on those words. So
10 once the meaning of the words are determined the next step
11 will be to determine their application against the
12 principles of - the legal principles and the requirements
13 set out in section 10 of the Act.

14 And then finally if Your Lordship is then
15 satisfied that it is indeed within the ambit of the Act it
16 will be to the respondents in this case, Mr Masuku and
17 COSATU, to put before this court facts or circumstances
18 which take it out of the application of section 10. And on
19 that score I can simply refer Your Lordship back to section
20 10 which renders the application of the section subject to
21 the proviso in section 12 of the Act.

22 "No person may disseminate or broadcast any
23 information, publish or display any advertisement or notice
24 that could reasonably be construed or reasonably understood
25 to demonstrate a clear intention to unfairly discriminate

1 any person," and this is the key part, "provided that bona
2 fide engagement in artistic creativity, academic and
3 scientific inquiry, fair and accurate reporting in the
4 public interest or publication of any information,
5 advertisement or notice in accordance with section 16 of
6 the Constitution is not precluded by this section."
7 Clearly what the legislature had in mind was to create some
8 form of balance between the prohibition of speech outlined
9 in section 10 and the rights enshrined in section 16
10 insofar as it concerns freedom of expression.

11 But ultimately it is up to the respondents to
12 discharge which we submit is a substantive onus. It's not
13 simply an evidential onus. It will be up to the
14 respondents to discharge the substantive onus of bringing
15 themselves within the ambit of the proviso in section 12.
16 Your Lordship will also during the course of the
17 proceedings no doubt hear a great deal of subject matter
18 and evidence pertaining to issues that are complex, that
19 are nuanced insofar as conflicts in the Middle East are
20 concerned between Israel and Palestinian people.

21 And my submission on that score is simply this.
22 It's not going to be an issue which Your Lordship needs to
23 decide. The court is not required to make any finding of
24 any nature against any of the parties involved in that far
25 greater dispute. Ultimately the court sits as we see it

1 simply as an equality court and the framework of the issues
2 in dispute simply stand to be determined with reference to
3 section 10 of the Equality Act.

4 Your Lordship is therefore not required to make
5 findings insofar as the geopolitical battles and conflicts
6 that play themselves out far away from this country in the
7 Middle East. Finally, M'Lord, insofar as the witnesses
8 that we intend calling we will briefly deal with factual
9 witnesses insofar as what was said by Mr Masuku both in
10 relation to the blog post and who can testify as to the
11 events of the 5th of March 2009.

12 Naturally they would've had to have been present
13 there. And then over and above that, M'Lord, we will also
14 deal with some expert evidence. There will be the
15 testimony from Dr David Hirsch and he will deal in the main
16 with the distinction between Zionism and anti-Semitism.
17 I'm not going to go through his expert summary now. But
18 there will also be the testimony of Mr Stanton from the
19 United States who will really deal with the importance of
20 drawing a line in the sand and preventing hate speech of
21 this kind from being uttered.

22 Because the consequence of allowing speech like
23 this to simply flow without bringing an end thereto in
24 certain instances becomes quite problematic in the sense
25 that it has certain consequences which may very well in the

1 end of the day give rise to violence and often according to
2 his own studies and the work he's undertaking in other
3 jurisdictions of the world the end result may very well be
4 a genocide. And that's the rationale for why we need to
5 bring an end to what is considered as hate speech.

6 M'Lord, then without further ado unless there are
7 any further issues which Your Lordship wishes to clarify at
8 this stage we are ready to commence with our case and the
9 calling of the first witness.

10 COURT: Yes, before you do that could I
11 understand at this stage that the - for purposes of this
12 inquiry the provisions of sections 10 and 12 are not in
13 issue. The constitutionality of those sections is not in
14 issue at all as in other matters that came before this
15 court. There's no challenge against section 10.

16 MR BESTER: Not from our side. There is
17 some reference in our learned friend's papers to the
18 constitutionality of the provision but I believe it's more
19 of an interpretation point. They haven't challenged the
20 provision.

21 COURT: Yes.

22 MS DE KOK SC: M'Lord, if I may be
23 permitted to clarify the respondent's attitude in this
24 regard.

25 COURT: Yes.

1 MS DE KOK SC: M'Lord, the complaint
2 which is before Your Lordship is defined in a very specific
3 and restricted way in the complaint in what we - the
4 equivalent of the pleadings. If Your Lordship has regard
5 to paragraph 7.3 of Advocate Mushwana's affidavit at page
6 12 of the pleadings after setting out the four statements
7 that the complaint relates to Advocate Mushwana says, "It
8 is clear that given the context in which the first
9 respondent made the statements complained of that they were
10 directed towards Jewish people and to" -

11 COURT: Sorry, I'm not with you.

12 MS DE KOK SC: M'Lord -

13 COURT: Page 12 of the bundle.

14 MS DE KOK SC: Of the pleadings bundle.

15 I think Your Lordship is perhaps, has the trial bundle in
16 front of Your Lordship.

17 COURT: Yes, paragraph 7.3.

18 MS DE KOK SC: 7.3.

19 COURT: Yes.

20 MS DE KOK SC: This is the complaint.

21 This is what is being brought before this court. Advocate
22 Mushwana says, "It is clear that given the context in which
23 the first respondent made the statements complained of,"
24 which is the four that Your Lordship has heard of, "that
25 they were directed towards Jewish people and to propagate

1 hatred and violence towards Jewish people.”

2 COURT: Yes.

3 MS DE KOK SC: Your Lordship will recall
4 my learned friend has mentioned that the prohibited grounds
5 that we find in the definition of the - I'll call it the
6 Equality Act as shorthand - has a range of categories that
7 are much wider than the Constitution.

8 COURT: Ja.

9 MS DE KOK SC: But the complainant has in
10 this case pinpointed the complaint to ethnicity and
11 religion. So the - and has said that the words demonstrate
12 a clear intention to propagate hatred. Now, M'Lord, the
13 propagation of hatred against an ethnic group based on
14 ethnicity or religion is in accordance with section 16 of
15 the Constitution. So the vexed question that arises in
16 some other matters about whether the Equality Act is
17 unconstitutional because it goes much further -

18 COURT: Yes.

19 MS DE KOK SC: Defining the categories
20 and using vague language like hurtful - none of that
21 applies in this matter because here the case that we are
22 meeting is a case that these words were based on the Jewish
23 ethnicity or religion and that it demonstrated an intention
24 to propagate hatred.

25 COURT: So it's not applicable here.

1 MS DE KOK SC: But I just wanted to make
2 sure that Your Lordship understands why we are not
3 challenging it in the proceedings.

4 COURT: Yes, thank you.

5 MS DE KOK SC: Thank you, M'Lord.

6 COURT: Mr Bester, sorry, you -

7 MR BESTER: I'm indebted to my learned
8 friend.

9 COURT: You made some thought provoking
10 statements just now when you summarised your opening
11 address.

12 MR BESTER: Yes, M'Lord.

13 COURT: I think towards the end you told
14 the court that I need not concern myself with what's
15 happening in the political field between the nations of
16 Israel and -

17 MR BESTER: In other words, Your
18 Lordship, as enticing and as interesting as those issues
19 may be if one listens to the news every now and then -

20 COURT: Ja.

21 MR BESTER: Your Lordship fortunately
22 does not sit in some or other international law capacity
23 where Your Lordship is required to pronounce on any of the
24 actions of the various parties. The words used by Mr
25 Masuku in the blog post 6th of February and the words

1 uttered by him on the 5th of March 2009, those are really as
2 we see the case the starting and the end points of the
3 litigation without it being required for the court to opine
4 or express any view as to the, call it the geopolitical
5 situation as it plays out between Israel and the
6 Palestinian people on a daily basis. That is not something
7 which Your Lordship in our view is required to consider or
8 to make any finding on.

9 COURT: Yes, it therefore means that even
10 if the expert witnesses testify on that I should ignore it
11 completely because we can't say now what their evidence
12 would be.

13 MR BESTER: We can't say with certainty
14 what the evidence will be but a lot will depend on the
15 context within which they seek to contextualise the
16 parameters of the debate because the debate is going to be
17 one where my client will come to this court and say that
18 the attack was one directed expressly or implicitly towards
19 Jewish people whereas the respondents will no doubt come
20 and say that it was in fact of a different kind. It wasn't
21 limited to Jewish people per se. It was in fact directed
22 at the Zionist movement which they regard and consider as a
23 racist movement in their construction.

24 So that really is going to be the only call it
25 fault line where the experts will battle it out and engage

1 with one another is that differential. But at best those
2 are intellectual matters of ideology perhaps in a sense,
3 perhaps some historical context and anthropology perhaps as
4 well but it certainly is not, does not require the court to
5 make any dare I use the word findings which could be
6 construed as being of a political nature one way or the
7 other as to which party is right and which party is wrong.
8 That is not something for Your Lordship to do. The experts
9 may well in passing make reference to the conflict.

10 COURT: And they may be cross-examined as
11 well.

12 MR BESTER: And they may well be cross-
13 examined on some of the things they say but it will really
14 be done in order to give light to the context within which
15 these proceedings are taking place and more specifically
16 the context within which the words were uttered and why
17 they are problematic and why if left unattended there are
18 certain consequences which could easily evolve into an
19 unwanted situation whereby minority groupings in any given
20 country, I'm not just referring specifically to South
21 Africa, find themselves exposed to persecution or hatred by
22 other members of their community. So that really is as far
23 as we see the political dimension of this case. It is not
24 something which looms large from a quantitative or
25 qualitative point of view but it is only relevant insofar

1 as the context is concerned. M'Lord, perhaps it would now
2 be convenient and I'm really in Your Lordship's hands if we
3 listen to the recording of the 5th of March 2009 events at
4 this juncture. I do however see it is already quarter past
5 11. I know we started a little later but we're really in
6 Your Lordship's hands.

7 COURT: Well, it's Monday morning. We
8 need a cup of coffee to get on and so I'm going to go for
9 tea and come back.

10 MR BESTER: As the court pleases.

11 [COURT ADJOURNS COURT RESUMES]

12 [11:39] COURT: Yes, Mr Bester?

13 MR BESTER: M'Lord, then before we listen
14 to the recording if I can just add one, just make reference
15 to one aspect which I had omitted to refer to before the
16 commencement of the tea adjournment and that is insofar as
17 the standing of the South African Human Rights Commission,
18 it brings these proceedings both on behalf of the Jewish
19 Board of Deputies but also on its own behalf. It certainly
20 also has the jurisdiction to institute proceedings under
21 this Act, acting in its own name, as appears from section
22 20(1)(f) of the Equality Act.

23 COURT: But that is not in dispute here,
24 is it?

25 MR BESTER: There were some -

1 COURT: It may have been in further
2 particulars or requests or something like that.

3 MR BESTER: It's something - yes, it was
4 something that was canvassed with my learned friend.

5 COURT: Yes.

6 MR BESTER: I suppose from their
7 perspective they requested clarity on the issue insofar as
8 the order of costs is concerned. Again we're not asking
9 for costs, so we'll argue at the end of the day that
10 whichever way the matter goes, it's not the appropriate
11 sort of matter for costs to be awarded against either party
12 but also just for purposes of further clarity, the SAHRC
13 also can institute proceedings on behalf of any other
14 person. But Your Lordship is quite correct, we don't
15 believe much will ultimately turn on that, subject to
16 further arguments which my learned friend may wish to
17 address to the court.

18 COURT: I'm sure if there is, I should
19 hear about it now.

20 MS DE KOK SC: M'Lord, we accept that the
21 Human Rights Commission has the standing to bring
22 proceedings in its own name. We sought clarity as to
23 whether is that what it is doing, is it bringing it in its
24 own name or is it bringing it on behalf of someone else.

25 COURT: Yes.

1 MS DE KOK SC: And that has now been
2 supplied.

3 COURT: Yes. And at some stage it also
4 bothered me, especially in the light of the fact that the
5 Commission had already heard a similar complaint.

6 MR BESTER: I beg your pardon, M'Lord?

7 COURT: It already had heard a similar
8 complaint and made a finding.

9 MR BESTER: Yes, yes. Of course as the
10 Commission pointed out in its own papers, the finding they
11 made doesn't carry the force of law in the sense that it's
12 not like the Public Protector's report which carries
13 binding effect, hence the decision to commence with
14 proceedings de novo before the Equality Court.

15 COURT: Yes.

16 MR BESTER: In order to render those
17 findings really with the force of law and to make sure that
18 they carry legal weight, as it were. I just wanted to
19 clarify that aspect, I'm indebted to you.

20 COURT: Thank you, Mr Bester.

21 MR BESTER: M'Lord, then without further
22 ado if we may then take this opportunity to listen to the
23 recording of the Wits meeting which Mr Masuku addressed on
24 the 9th March 2009. There are three recordings but the one
25 we're going to be listening to really is the only one

1 which, in our view, is germane to these proceedings in its
2 essence because the utterances which we rely on in our
3 pleaded case all stem from this recording and that will be
4 - if Your Lordship wishes to follow the nature of the
5 recording, it will start at page 257.

6 COURT: Of the trial bundle?

7 MR BESTER: Of the trial bundle. In fact
8 my learned friend has just indicated to me that they would
9 like to listen to the other two as well. We don't believe
10 much turns on that but perhaps now would also be the
11 opportune moment for us to listen to all three, to get that
12 process out of the way.

13 COURT: You mean they've never before
14 listened to them?

15 MR BESTER: No, no, they have listened to
16 them before.

17 COURT: Yes.

18 MR BESTER: But they would just like them
19 to be placed on the record in addition to the main
20 recording which we will be relying on for purposes of our
21 case.

22 MS DE KOK SC: M'Lord, our position is
23 simply that this is one speech. You can't just take a
24 recording out of one little bit of the speech. He must
25 listen to it, its entire context includes the entire

1 speech. The other parts are apparently quite short so this
2 shouldn't lengthen the process much, but we think that it
3 is proper for Your Lordship to judge the matter in context,
4 to listen to whatever recording there is available of the
5 entire speech.

6 COURT: Well, I think it does make sense
7 in the main to have full context and -

8 MR BESTER: Indeed so, M'Lord, we have no
9 difficulty from our side.

10 [AUDIO PLAYED]

11 COURT: Sorry, I mean - start it over
12 again.

13 MR BESTER: Yes.

14 COURT: Please. We will give it a chance
15 and see how it affects -

16 MR BESTER: M'Lord, just to clarify, this
17 recording is the one that starts on page 257.

18 COURT: 257.

19 MR BESTER: And the actual transcription
20 of this recording will start at the top of page 259. Once
21 we are done with this recording we will assist Your
22 Lordship with the other two, the shorter versions.

23 COURT: Yes, thank you. You may proceed.

24 [AUDIO PLAYED]

25 [11:59] MR BESTER: M'Lord, if I may, the next

1 transcript starts on page 270 with the actual wording at
2 272 -

3 COURT: Thank you.

4 MR BESTER: - in respect of the recording
5 we're going to listen to now.

6 COURT: 271?

7 MR BESTER: 272 is where it starts.

8 COURT: Thank you.

9 [AUDIO PLAYED]

10 MR BESTER: The last recording starts on
11 page 278, M'Lord.

12 COURT: Thank you.

13 [AUDIO PLAYED]

14 COURT: Is that it?

15 MR BESTER: That is it, M'Lord. Without
16 further ado, unless there's anything that Your Lordship
17 wishes to raise at this point, I beg leave to call Mr Benji
18 Shulman to the witness stand.

19 COURT ORDERLY: Please state your full
20 name and surname.

21 MR SHULMAN: My name is Benjamin Shulman.

22 COURT ORDERLY: Do you have any objection
23 in taking the oath?

24 MR SHULMAN: I do not.

25 COURT ORDERLY: Do you swear that the

1 evidence you're about to give will be the truth, the whole
2 truth and nothing but the truth? If so, please raise your
3 right hand and say, "So help me God."

4 BENJAMIN SHULMAN: So help me God.

5 COURT: Can you just spell your surname?

6 MR SHULMAN: M'Lord, it's S-H-U-L-M-A-N.

7 COURT: Shulman.

8 MR SHULMAN: Correct.

9 COURT: Thank you. Your witness, Mr
10 Bester, you may proceed.

11 EXAMINATION BY MR BESTER: Mr Shulman,
12 you'll find there is a copy of exhibit A, the trial bundle,
13 which we may refer to from time to time. I just want to
14 make sure that you have that particular file. You have
15 also the pleadings bundle, but for present purposes the
16 trial bundle is more important.

17 MR SHULMAN: I believe I do have it.

18 MR BESTER: Right. Right, then if I can
19 ask you during 2009 what were you doing at the University
20 of the Witwatersrand?

21 MR SHULMAN: I was a student at the time.
22 I was doing my Masters in Geography.

23 MR BESTER: Now when did your studies
24 commence at Wits?

25 MR SHULMAN: I commenced studies at

1 university at 2005.

2 MR BESTER: And 2009 you would have been
3 obviously at a postgraduate level. When did you leave
4 Wits?

5 MR SHULMAN: I would say 2014.

6 MR BESTER: Right, and what is it that
7 you do at present?

8 MR SHULMAN: I work for the South African
9 Israel Forum.

10 MR BESTER: What is the nature of your
11 work at the forum?

12 MR SHULMAN: We take niche groups to
13 Israel and the Palestinian territories that have an
14 interest in understanding that society.

15 MR BESTER: And if you can cast your mind
16 back to your time at Wits around 2009, what, if any, was
17 your involvement in student politics at the time?

18 MR SHULMAN: At the time I was the
19 chairman of the South African Union of Jewish Students,
20 which is the representative body for Jewish students in the
21 country.

22 MR BESTER: And can we use the acronym
23 for that body, SAUJS?

24 MR SHULMAN: It's widely referred to as
25 SAUJS, yes.

1 MR BESTER: SAUJS, okay.

2 COURT: What is that?

3 MR SHULMAN: SAUJS, Your Lordship.

4 MR BESTER: Just assist us, it's S-A-U-J-
5 S. Is that correct?

6 MR SHULMAN: That is correct.

7 MR BESTER: Right. And what role does,
8 or what role did SAUJS play at the time at university
9 campuses across South Africa?

10 MR SHULMAN: The role of the South
11 African Union of Jewish Students (SAUJS) is to deal with
12 the needs of the Jewish students on campus. So that could
13 be a variety of things. It could include assisting with
14 access to religious food perhaps or religious pastors, also
15 cultural events, social events so that Jews can meet with
16 one another, but a key thing that is a requirement of SAUJS
17 is to deal with any issues of anti-Semitism that arise on
18 the campus at any time.

19 MR BESTER: And what is the association
20 between SAUJS and the South African Jewish Board of
21 Deputies, if any?

22 MR SHULMAN: SAUJS is an affiliate of the
23 South African Jewish Board of Deputies. That is to say it
24 sits on the council with a variety of other Jewish
25 organisations at meetings and policy formation events.

1 MR BESTER: And to the extent that you
2 know, just tell his lordship what does the South African
3 Jewish Board of Deputies do in South Africa?

4 MR SHULMAN: To the extent of my
5 knowledge the South African Jewish Board of Deputies is the
6 organisation that deals specifically with anti-Semitism and
7 also with representing issues concerning the Jewish
8 community to the government.

9 MR BESTER: Right, so as chairman of
10 SAUJS would it be fair to assume that you are Jewish?

11 MR SHULMAN: That is correct.

12 MR BESTER: And do you practice the
13 Jewish faith?

14 MR SHULMAN: I do.

15 MR BESTER: Now you'll be familiar with
16 the nature of the complaints in this matter. Can I ask you
17 before we deal with the events of March 2009 at the
18 University of the Witwatersrand, before we get there I'd
19 like you to turn to page 3 of the trial bundle, paginated
20 page 3.

21 MR SHULMAN: I'm asking what am I looking
22 for?

23 MR BESTER: You're looking for a blog
24 post.

25 MR SHULMAN: Okay, I have the blog post.

1 MR BESTER: Are you there?

2 MR SHULMAN: Yes.

3 MR BESTER: Right, before we deal with
4 the post itself, at the top of the page it says, "It's
5 almost Supernatural." Now would that be the name of the
6 particular blog forum?

7 MR SHULMAN: That is correct.

8 MR BESTER: And tell us a little bit
9 about Supernatural and what did it do at the time.

10 MR SHULMAN: The blog acted as a place
11 for members of the Jewish community and others to
12 congregate around issues pertaining to Jews in the public
13 sphere - media, politics. It was before the age of social
14 media and these two bloggers who run the blog would write
15 articles or get in guest articles written that talked about
16 issues that were facing the Jewish community of South
17 Africa at the time.

18 MR BESTER: And who were the two bloggers
19 that you've referred to?

20 MR SHULMAN: There were two bloggers.
21 The one's name was Michael Kranstorf and the other one's
22 name was Steve Maggid.

23 MR BESTER: Just repeat their names if
24 you will, just so we can make sure everybody's got it. If
25 you can spell it that would be very useful.

1 MR SHULMAN: To the best of my knowledge
2 Michael Kranstorf's name is M-I-C-H-A-E-L, Kranstorf is K-
3 R-A-N-S-T-O-R-F, and Steve Maggid is S-T-E-V-E, surname M-
4 A-G-G-I-D.

5 MR BESTER: If you can assist us, is it,
6 you said it's before the era of social media, but would a
7 blog post be something which is open to anyone to leave a
8 comment or to make a contribution of some or other sort?

9 MR SHULMAN: That blog was completely
10 open to anyone from the public who wished to make a
11 comment.

12 MR BESTER: How often at the time did you
13 access the worldwide web to see what was posted on that
14 particular blog?

15 MR SHULMAN: That blog was really the
16 only source of information on a local context where one
17 could access this very kind of specific niche issue, so I -
18 in my capacity as the South African Union of Jewish
19 Students I would regularly access the blog to find out what
20 was going on or just to understand the debate in more
21 depth.

22 [12:19] MR BESTER: Now you've mentioned the word
23 niche. Let me just understand, niche in relation to which
24 particular community would that be?

25 MR SHULMAN: It was very specifically

1 focussed on the Jewish community.

2 MR BESTER: Right, so let's - if I can
3 ask you, Mr Shulman, to have regard to page 3. In that
4 block at the top of the page it says Bongani, "Hi guys,
5 Bongani says hi to all, to you all as we struggle to
6 liberate Palestine." We'll get to the content in due
7 course but are you familiar with this particular blog
8 entry?

9 MR SHULMAN: I am.

10 MR BESTER: And if you can cast your mind
11 back when more or less would you have read it for the first
12 time?

13 MR SHULMAN: Very likely before the event
14 of March 6.

15 MR BESTER: March 6. In fact it's common
16 cause that the blog post itself was on the 6th of February
17 2009. The March events which we'll deal with in due course
18 would've been just under a month later. Is that your
19 understanding?

20 MR SHULMAN: Correct.

21 MR BESTER: So perhaps you can tell His
22 Lordship what was the specific context that gave rise to
23 this blog post by Mr Masuku on this particular blog
24 website?

25 MR SHULMAN: Your Lordship, it's

1 important I think to understand the context of the work
2 that was happening on the campus at the time. There were
3 groups, the PSC in particular, who were very active and
4 hostile activists on the campus and I would spend a lot of
5 my time as the South African Union of Jewish Students
6 chairman dealing with anti-Semitism that flowed from those
7 events.

8 MR BESTER: Perhaps you can just pause
9 there and let's take it a little slower. The PSC, you've
10 mentioned that name. That is obviously an acronym for
11 something. What does it stand for?

12 MR SHULMAN: That is the Palestinian
13 Solidarity Committee.

14 MR BESTER: And what was the nature of
15 their work on campus?

16 MR SHULMAN: They were an activist group
17 according to them highlighting issues dealing with the
18 Israeli Palestinian conflict.

19 MR BESTER: Right. You can continue
20 where I interrupted you.

21 MR SHULMAN: So we would deal with anti-
22 Semitic incidents that flowed from events of this campus
23 organisation on a regular basis. It pretty much happened,
24 you know, on a continuous basis, their activities at least.
25 And as I said I would have to take stuff to the authorities

1 of the campus or deal with issues as they arose. However
2 during particular periods it would get particularly
3 aggressive or particularly active given whatever the
4 political circumstances were at the time and at the time
5 there was a war going on in the Middle East and activity
6 was very, very high not just on the campus but around the
7 country. In fact I would say that in my ten years plus of
8 doing this activism and others that I've never seen such a
9 large amount of activity that was so aggressive and so
10 disturbing to myself and the Jewish community.

11 MR BESTER: Sorry, if I can just
12 interrupt, as I understand you, you made reference to
13 political conflict that as I understand you gave rise to
14 heightened tensions. Where would this political conflict
15 have played itself out?

16 MR SHULMAN: Are you asking me if the
17 political conflict - you mean in South Africa or in the
18 Middle East?

19 MR BESTER: Well, it's really up to you
20 to tell us but the main conflict in respect of which the
21 various parties were adopting contrary positions, in
22 relation to what conflict were they adopting these
23 positions?

24 MR SHULMAN: There was a war between
25 Israel and Hamas in the Gaza Strip which was at the time

1 playing out and when that happened a variety of players in
2 the South African scene then got involved including
3 government ministers, trade unions, civil society. It was
4 a very tense time in the general South African body
5 politic.

6 MR BESTER: Right, would you care to
7 elaborate on that insofar as your own experiences are
8 concerned in the period leading up to and during this
9 particular blog post around February 2009?

10 MR SHULMAN: As I say it was a very, very
11 tense and quite scary time. There was a deputy foreign
12 minister, Fatima Hajag, who was the deputy foreign minister
13 at the time and she made some very anti-Semitic comments
14 referring to how Jews control the world and how they
15 control America. And there was an enormous amount of anger
16 and engagement from the board of deputies and the ANC. I
17 believe she was forced to apologise eventually. So that
18 was happening around that time. There was also a
19 unprecedented either before or since march on the Jewish
20 community offices in Raedene. Normally -

21 MR BESTER: Sorry, if I can just ask you
22 to pause there. When did that march that you are referring
23 to now, when did that take place?

24 MR SHULMAN: I can't be certain of the
25 time. However if you look at the blog post they actually

1 have the date which was February 9th. It would've been
2 during that period.

3 MR BESTER: And who would've been the
4 people who marched to the community offices?

5 MR SHULMAN: It was, community offices,
6 it included COSATU, included the PSC, included numerous
7 Muslim groups, other civil society members, some
8 parliamentarians to the best of my knowledge, a range of
9 parties.

10 MR BESTER: And were you present at the
11 offices of the Jewish community as it were at the time of
12 that march?

13 MR SHULMAN: I was.

14 MR BESTER: If you say offices of Jewish
15 community what do you mean by that? Who represents this?
16 Whose offices are we referring to here?

17 MR SHULMAN: So the Jewish community
18 organisations have for I imagine purposes of economics all
19 of their main organisations that deal with various issues
20 clustered in one building. That includes the students.
21 That includes the board of deputies, Union of Jewish Women,
22 the Jewish environmental services, Jewish library, etcetera
23 are all placed in that building.

24 MR BESTER: And what accounted for your
25 presence there at the day?

1 MR SHULMAN: I worked there.

2 MR BESTER: I beg your pardon?

3 MR SHULMAN: I worked there.

4 MR BESTER: Was that under the auspices
5 of SAUJS?

6 MR SHULMAN: Correct.

7 MR BESTER: And you mentioned that this
8 was an unprecedented march. What do you mean by that?

9 MR SHULMAN: Very often when there are
10 people who look to make a point about what is going on in
11 the Middle East they'll march on the Israeli embassy
12 because that is the representative structure of the Israeli
13 state in South Africa. And those kinds of marches are
14 reasonably common. This was to say the least unusual
15 because there was an active march, highly aggressive,
16 brandishing swastikas, all sorts of things marching
17 illegally as it happened on the Jewish community offices,
18 so in other words South African citizens, on the Sabbath in
19 a Jewish area. That's not something that has ever happened
20 before.

21 MR BESTER: Right, so where would the
22 Israeli embassy's offices be located?

23 MR SHULMAN: In Pretoria.

24 MR BESTER: And which particular suburb
25 in Johannesburg would this march have taken place at?

1 MR SHULMAN: It is in a very small suburb
2 called Raedene which backs onto two of the major Jewish
3 enclaves in the city, one being Linksfield and the other
4 one being Orange Grove.

5 MR BESTER: Right, well, then will you
6 explain to us what it is that you personally observed the
7 day of the march?

8 COURT: Sorry, between Orange Grove and
9 what?

10 MR SHULMAN: It's between Orange Grove
11 and Linksfield, Your Lordship.

12 COURT: Oh Linksfield, thank you.

13 MR SHULMAN: Glen Hazel. That would be
14 probably the other one.

15 COURT: Thank you.

16 MR BESTER: So on the day in question you
17 were at the community offices whilst working as the
18 chairperson of SAUJS. Will you tell His Lordship what it
19 is that you observed during the course of this march?

20 MR SHULMAN: The march itself was
21 declared illegal and there was very deep concern to my
22 remembrance by the Jewish community leadership that first
23 of all if the Jewish community was to go out onto the
24 street that they would then be in turn creating their own
25 illegal march but also that that march had a very high

1 potential for violence.

2 MR BESTER: Why do you say that?

3 MR SHULMAN: The crowd was extremely
4 aggressive. There was a lot of anger at the time. I
5 understand that I never saw them which I'll come to now but
6 that there were sort of small weapons and there was a deep
7 sense that if people were coming into a Jewish area to
8 march on the Jewish offices and that they were particularly
9 hyped up that this could be a potential if they were met on
10 the other side by angry Jewish residents for a violent
11 incident.

12 MR BESTER: Now in relation to the people
13 who participated in the march where would you have been
14 positioned at the time?

15 MR SHULMAN: So due to the legal problems
16 and the concern around violence the Jewish leadership
17 requested that people who wanted to make their voices heard
18 on this issue would be allowed to but to do it inside the
19 parking lot of the building itself and that is where I was
20 situated.

21 MR BESTER: And what is it that separated
22 the marchers from the people in the parking lot?

23 MR SHULMAN: A police cordon and a wall.

24 MR BESTER: And a wall.

25 MR SHULMAN: Yes.

1 MR BESTER: What kind of wall would that
2 have been?

3 MR SHULMAN: It's a wall that has an
4 electric fence around it. It's large and concrete.

5 MR BESTER: From what you were able to
6 observe what was the principal complaint of those who
7 participated in the march? What were they hoping to
8 achieve by marching to the community's premises?

9 MR SHULMAN: Our sense was that this
10 march was intended to intimidate the community, was
11 intended to show them that they weren't welcome in the
12 country.

13 MR BESTER: Why do you say that?

14 MR SHULMAN: They were carrying symbols
15 which were not specific to the conflict. They were
16 carrying swastikas. And when they couldn't get past the
17 police cordon they went outside the shul that I go to, my
18 own synagogue, they burnt a flag outside there and then
19 demonstrated outside the synagogue. That's a very specific
20 idea that we were the ones who were being targeted.

21 MR BESTER: Let's just pause there. What
22 is the significance for a Jewish person like yourself if
23 someone brands a swastika?

24 MR SHULMAN: It evokes an immediate
25 emotional reaction. An enormous amount of the Jewish

1 community in South Africa and indeed worldwide would've
2 lost people in the holocaust, family members, which
3 obviously was connected to the swastika because that was
4 the emblem of the Nazis who carried that. Myself
5 personally my grandmother got on one of the last boats out
6 of Germany before immigration to South Africa was stopped
7 and so she was safe but the rest of my family was wiped
8 out. And to see those sorts of symbols is a degrading
9 experience and where it's used because that's not the only
10 context, we would run into it on campus as well, it's a
11 dehumanising experience because you're suddenly confronted
12 with this symbol of one of the most evil regimes of the 20th
13 century.

14 MR BESTER: Now, before we turn to the
15 events on the campus I would ask you to please read out Mr
16 Masuku's blog entry on page 3 of the trial bundle. I will
17 stop you where necessary and then you can continue but
18 please continue.

19 MR SHULMAN: "Hi guys, Bongani says hi to
20 you all as we struggle to liberate Palestine from the
21 racists, fascists and Zionists who belong to the era of
22 their friend Hitler."

23 MR BESTER: Can I just ask you to stop
24 there? So having regard to that sentence that you've just
25 read and the reference to the phrase "their friend Hitler"

1 as a Jewish person how did it make you feel when you read
2 that?

3 MR SHULMAN: It's a very disturbing and
4 painful reference because in effect what this person is
5 trying to say by saying that is that somehow as a victim of
6 this genocide which was what the holocaust was, a third of
7 our people being wiped out, that in some way we were
8 responsible for it, that we connected to it and, you know,
9 we're not in Germany anymore. We're now South African
10 citizens and suddenly we're being, suddenly being compared
11 to the most evil group of people in the 20th century. It
12 seems to me that if the person who writes this can convince
13 other people that we're indeed friends of Hitler that it
14 would be a first step to ostracising Jews from the rest of
15 the society.

16 MR BESTER: Then if I can ask you then to
17 read the remaining part of the blog.

18 MR SHULMAN: "We must not apologise.
19 Every Zionist must be made to drink the bitter medicine
20 that they are feeding our brothers and sisters in
21 Palestine. We must target them, expose them and do all
22 that is needed to subject them to perpetual suffering until
23 they withdrawn from the land of others and stop their
24 savage attacks on human dignity. Every Palestinian who
25 suffers is a direct attack on all of us."

1 MR BESTER: Now, the words "must be made
2 to drink the bitter medicine they are feeding our brothers
3 and sisters in Palestine" what did you, what was your sense
4 when you read those words, Mr Shulman?

5 MS DE KOK SC: M'Lord, if I may, I'm
6 afraid that I have to object to this line of questioning
7 where my learned friend is - when he asks the witness what
8 was your sense of these words he's either asking the
9 witness to tell Your Lordship what these words mean to him
10 or what he feels about those words. Both those issues are
11 issues that are irrelevant and inadmissible evidence and
12 that is so, M'Lord, because the section, section 10,
13 requires Your Lordship to apply an objective test as to
14 whether something is hate speech or not. If Your Lordship
15 will bear with me for a minute because this is probably an
16 important issue that will arise throughout the trial so if
17 I can address Your Lordship on it. Does Your Lordship
18 still have the copy of the Act that my learned friend
19 handed up?

20 COURT: Yes.

21 MS DE KOK SC: If we turn to the
22 prohibition, "The prohibition on hate speech provides that
23 you may not publish, propagate, communicate and so forth
24 words based on one or more of the prohibited grounds that
25 could reasonably be construed to demonstrate a clear

1 intention to inter alia promote or propagate hatred."

2 [12:39] So what is in issue in the matter, M'Lord, is
3 what the words mean so that we can determine whether they
4 are based on one of the prohibited grounds and then whether
5 objectively, they can reasonably be construed to
6 demonstrate a certain clear intention. Now Your Lordship
7 will know that in the -

8 COURT: Sorry, just go back a step and
9 read me that prohibition quotation.

10 MS DE KOK SC: The second part is, well,
11 "Subject to the proviso, no person may publish, propagate,
12 advocate or communicate words based on one or more of the
13 prohibited grounds."

14 COURT: Is that section 10, sorry?

15 MS DE KOK SC: Yes. And that could
16 reasonably be construed to demonstrate a clear intention to
17 do certain things. So my submission to Your Lordship is
18 that in both instances we must find the meaning of the
19 words to decide, is it based on a prohibited ground.
20 That's an interpretation issue, M'Lord. No witness can
21 give Your Lordship any assistance as to what words mean.
22 Secondly M'Lord, we must - it's an interpretation issue to
23 see whether these words can reasonably be construed to
24 demonstrate a clear intention to have a certain
25 consequence.

1 Now in what is thus far the main judgment or the
2 most comprehensive judgment on the Act and this section of
3 the Act, your brother Lamont's decision in AfriForum v
4 Malema -

5 COURT: Yes.

6 MS DE KOK SC: - His Lordship dealt
7 specifically with the issue as to how one must approach the
8 task of determining the meaning of the words and he held,
9 M'Lord, that in paragraph 40 and 41 His Lordship held that
10 the approach must be akin to what one follows in a
11 defamation action, where one works with the notional
12 reasonable man. So you have this construct of a reasonable
13 man and you determine how the reasonable man, in that
14 context, would have interpreted the words. And on that
15 issue, M'Lord, if one has regard to the Constitutional
16 Court's decision in Le Roux v Day 2011(3) 274 where His
17 Lordship Mr Justice Brink - sorry, Brand - dealt with what
18 evidence, the proper approach and he said, "In establishing
19 the meaning, the court is not concerned with the meaning
20 which the maker of the statement intended to convey, nor is
21 it concerned with the meaning given to it by the persons to
22 whom it was published, whether or not they believed it to
23 be true or whether or not they thought less of the
24 plaintiff. The test to be applied is an objective one. In
25 accordance with this objective test the criteria is what

1 meaning the reasonable reader of ordinary intelligence
2 would attribute to the statement. The reasonable reader or
3 observer is thus a legal construct of an individual
4 utilised by the court to establish meaning. Because the
5 test is objective, the court may not hear evidence of the
6 sense in which the statement was understood by the actual
7 reader or observer of the statement or publication."

8 His Lordship Mr Justice Lamont in *AfriForum v*
9 *Malema* at paragraphs 40, 41, 103 and again in 109 held that
10 in the context of section 10 of the Equality Act, a similar
11 objective test must be applied to determine the meaning and
12 the effect. Otherwise, M'Lord, we will - I foresee a very
13 lengthy trial if we have witnesses who come and testify as
14 to what they thought the words meant and how they felt
15 about the words, then have to be cross-examined as to their
16 credibility in that regard, when ultimately at the end
17 your, the decision as to what the words mean and whether
18 they are based on a prohibited ground and whether they
19 reasonably construed, illustrate the requisite intention,
20 is a decision that only Your Lordship can take and the
21 witnesses' opinion or subjective interpretation or
22 subjective feelings about this are ultimately irrelevant.
23 So to open this door, M'Lord, I submit would lead us on a
24 lengthy road to nowhere. Those are the terms of my
25 objection, M'Lord.

1 COURT: Before I let Mr Bester respond I
2 just want to understand your objection properly in context.

3 MS DE KOK SC: M'Lord, the -

4 COURT: You mean when a court like this
5 enquires into the situation which we have today, hears
6 evidence from a Jewish person about remarks made by
7 Jewish - to Jewish people, the court may not want to hear
8 what and how he or she understood the statement to be -

9 MS DE KOK SC: Yes, but -

10 COURT: When a Jewish person says to me:
11 I read it, I saw it and this is how I feel about it, it's
12 not - I should not look at that, number 1. Number 2, what
13 you're saying to me now, does that not apply at the end of
14 hearing all the evidence, for the court then to look at
15 subjective evidence and not at this stage to listen to
16 piecemeal individual subjective comments. I've got a
17 difficulty there.

18 MS DE KOK SC: M'Lord, I hear Your
19 Lordship's difficulty -

20 COURT: So that I should decide at the
21 end of the day, objectively before me, credible evidence
22 which way.

23 MS DE KOK SC: Indeed M'Lord.

24 COURT: Yes.

25 MS DE KOK SC: I understand Your

1 Lordship's difficulty and one is, I suppose, often tempted
2 to say, well, rather let all of the evidence come in.

3 COURT: Mm.

4 MS DE KOK SC: The difficulty though,
5 M'Lord, that if the test is objective, which I submit it
6 is, then the evidence of a witness's understanding or
7 feeling or sense of the words can make no difference to
8 Your Lordship's outcome. But if this evidence is allowed I
9 am compelled to cross-examine this witness as to his
10 credit, as to whether he should have felt the way that he
11 felt and in that sense it lengthens the trial and it can
12 never be, play any role in the outcome.

13 If, M'Lord, objectively - if objectively this
14 speech is not speech based on the fact of someone being
15 Jewish, if objectively Your Lordship finds at the end in
16 the context that this is a political speech, it's to do
17 with Zionism as a political ideology, then the witness's
18 evidence that he perceived it to be an attack on Jews can
19 make no difference.

20 If Your Lordship finds that objectively in the
21 context this was, did demonstrate an intention to propagate
22 hatred, it's of no relevance that Mr Masuku comes and he
23 says, well, that's not what I intended. Similarly, if it
24 doesn't objectively illustrate an intention to propagate
25 hatred then it's neither here nor there that this witness

1 testifies that he felt hated.

2 COURT: Yes, can I try again? If your
3 expert witness comes here later on and tells me M'Lord, for
4 instance the evidence of Mr Shulman was about this and that
5 and that, and that's exactly the point I or she, the
6 expert, is trying to convey to the court, must I say to
7 your expert witness, that was not objective evidence, leave
8 it alone, your own counsel said I should not - or to put it
9 very bluntly now, are you saying there's no confidence in
10 the court at the end having to distinguish between
11 objective and subjective evidence?

12 MS DE KOK SC: Certainly not.

13 COURT: Okay. I think it's enough. Mr
14 Bester, there's an objection to the leading of questions.

15 MR BESTER: M'Lord, I'm indebted to my
16 learned friend and to the court. The objection can be
17 simply disposed of on this basis, my learned friend and I
18 are certainly ad idem that when it comes to the
19 interpretation of words, that's an objective test. The law
20 is uncontroversial on that score and I do not take issue
21 one moment with the Constitutional Court and in particular
22 Justice Brand's ruling in Le Roux v Day. But that said,
23 M'Lord, these proceedings are somewhat novel, the
24 proceedings are determined within the specific ambit of
25 section 10 of the Equality Act. These are not ordinary

1 trial proceedings. It's an inquiry, after all, and it
2 would be a rather alien proposition, to put it mildly, if
3 someone aggrieved from a particular community is then not
4 permitted to come to court and speak of the effect that the
5 words had on them.

6 Perhaps I should clarify my position. The line
7 of questioning certainly, and I apologise if any confusion
8 was caused, the line of questioning was not intended to ask
9 the witness to attribute a meaning to the words. We
10 understand that that's an objective test but certainly the
11 impact that the words had on a particular member of the
12 community, where one is dealing with grounds premised on
13 ethnicity or race, makes that very much part of the
14 inquiry. And if our learned friend is correct it would
15 mean that these matters never go to trial, that all of
16 these disputes would simply be decided on the basis of what
17 the common words used were and they could be disposed of
18 almost on exception stage, and that simply can never be
19 appropriate.

20 So with respect, M'Lord, we submit that the line
21 of questioning should be allowed to continue and at the end
22 of the proceedings it would be open to my learned friend to
23 address Your Lordship on the appropriate meaning to be
24 ascribed to the words and if she then wishes to make
25 submissions as to why she differs with the particular

1 witness's take or conclusion, on how he felt moved or
2 swayed by the words one way or the other, that's a line of
3 inquiry she most certainly can probe. But from where we
4 stand there is nothing that should, that ought to preclude
5 a witness from a particular community, under the auspices
6 of this particular sui generis legislation, from coming to
7 court and taking the witness stand on that very issue.

8 COURT: Yes, do you wish to reply,
9 Counsel De Kok?

10 MS DE KOK SC: I've made my submission,
11 thank you, M'Lord.

12 COURT: I think I should at this stage
13 allow the questioning to go, to proceed, subject to what
14 you said, Mr Bester, not to elicit -

15 MR BESTER: I beg your pardon, M'Lord?

16 COURT: Subject to what you conceded
17 yourself, not to elicit, expect any norm.

18 MR BESTER: No.

19 COURT: Yes.

20 MR BESTER: I'm indebted to Your
21 Lordship.

22 COURT: Do you still remember where you
23 were?

24 MR BESTER: I'm just gathering my
25 thoughts. Thank you, M'Lord, I'm now ready to proceed.

1 COURT: Yes.

2 MR BESTER: Mr Shulman, then we stopped
3 at that first portion of the second part of the blog entry,
4 "We must not apologise, every Zionist must be made to drink
5 the bitter medicine they are feeding our brothers in
6 Palestine." Now what impact did that have on you when you
7 read that?

8 MR SHULMAN: That seems to be, for me, a
9 threat. It's not talking about something that's happening
10 overseas, saying very specifically that it's looking to
11 target people in South Africa and it is quite scary.

12 MR BESTER: Now let's get to the part
13 that says, "We must target them, expose them and all that
14 is needed to subject them to perpetual suffering until they
15 withdraw from the lands of others and stop their savage
16 attacks on human dignity." When you read the words, "We
17 must target them," how did that make you feel?

18 MR SHULMAN: I think it's important to
19 understand the context in which the South African Jewish
20 community operates in understanding this because we're a
21 very small minority, there's only 60 to 70 000 of us in the
22 country and this person writing this blog post at the time
23 was at the head of an enormous organisation. I don't know
24 how big COSATU is but it's my understanding that it has
25 hundreds of thousands of members and the idea then that

1 such a large, potent organisation would be looking to
2 target, in some way, a South African grouping, was enormous
3 cause for concern for myself.

4 MR BESTER: Now to the extent that it is
5 said to you that the blog post only makes mention of
6 Zionists and does not refer to Jews, how would you respond
7 to that?

8 MR SHULMAN: My response is that, first
9 of all, there's a large Jewish community here that is
10 Zionist, so whether he likes that or not, it would have to
11 target Jews in order to do this. And secondly, again we're
12 not talking about what's going on over there, far away.
13 It's very specifically talking about South African citizens
14 here in this case that may or may not have any connection
15 to what's going on and one can only conclude that going
16 after the Jewish community is what he's intending to do.

17 MR BESTER: M'Lord, I see it's three
18 minutes to one on my watch. After the lunch adjournment I
19 will begin to cover some new ground, as it were. Perhaps
20 it would be appropriate for us to take the adjournment now
21 before I do so.

22 COURT: That's very considerate of you.
23 I shall take the lunch adjournment.

24 MR BESTER: M'Lord -

25 COURT: Adjourned.

1 [COURT ADJOURNS COURT RESUMES]
2 [14:14] COURT ORDERLY: Mr Shulman, you are still
3 under oath.

4 BENJAMIN SHULMAN: s.u.o.

5 COURT: Do you know, Counsel De Kok - is
6 it Mrs or Ms?

7 MS DE KOK SC: De Kok, yes.

8 COURT: Is it Mrs or Ms?

9 MS DE KOK SC: Mrs, yes.

10 COURT: Ms. I have been reviewing your
11 objection and my response thereto during the lunch hour,
12 the concept of fairness to both sides requires of a
13 presiding judge like myself to keep an open mind throughout
14 and I was just thinking that if you were correct in your
15 objection it would mean that when Mr Masuku comes into the
16 box, if he does, to give evidence he must not tell me what
17 he had in mind about this when he made those utterances
18 because that's exactly where the complaint comes from; what
19 did he mean, what should I interpret - how should I
20 interpret that and what was going on in his mind when he
21 made these comments. So I feel fortified that I was right.

22 MS DE KOK SC: As Your Lordship pleases.

23 COURT: But I'll keep an open mind. Yes,
24 Mr Bester.

25 EXAMINATION BY MR BESTER (CONTD.): As

1 the court pleases, M'Lord. Mr Shulman, before we move on
2 to the new theme I just want you to please briefly revert
3 to page 9 of the trial bundle. Are you there?

4 MR SHULMAN: I am.

5 MR BESTER: Then the middle of the page
6 there's an entry that says, a blog post actually begins, it
7 says "February 6, 2009. Urgent. Stand your ground against
8 COSATU," and let me read to you, "An e-mail from the South
9 African Zionist Federation has been distributed calling on
10 community members to join for a solidarity rally in
11 response to COSATU's illegal march against the Jewish
12 community. Yes, it's against the Jewish community, not
13 against Israel. If it were against Israel it would be
14 staged outside the embassy." What is your comment on that?

15 MR SHULMAN: I would say it's correct.

16 MR BESTER: And why do you think that's
17 correct?

18 MR SHULMAN: Once again this march that
19 was organised was done on Jewish area to a Jewish community
20 building before the onset of the Jewish Sabbath and not
21 anywhere near anything that was Israeli per se.

22 MR BESTER: Then "This is incitement
23 against the Jewish community inside our own neighbourhood
24 because of our political views. It signals a crescendo to
25 the recent pressure that has been placed on the Jewish

1 community in the press gesturing for us to distance
2 ourselves from Israel." Do you see that?

3 MR SHULMAN: I do.

4 MR BESTER: Would you like to comment on
5 that part I've just read to you?

6 MR SHULMAN: I'd say it's largely
7 correct. The idea of the march to my mind and other such
8 events that were connected were to clamp down on the
9 freedom of the speech of the community so that they could
10 represent their views.

11 MR BESTER: I see. Then if I can ask you
12 to turn backwards, well to the front part of the bundle to
13 page 3. I'm not going to take you through them, but there
14 were lots of entries then dealing with various views being
15 expressed by people on the blog post, and then there's the
16 - on top of page 3 there is the blog entry by Mr Masuku.
17 Do you see that?

18 MR SHULMAN: I do.

19 MR BESTER: And according to this
20 document it was posted on 10 February 2009, but let me just
21 ask you this; to the best of your knowledge was Mr Masuku
22 previously a regular contributor to this blog?

23 MR SHULMAN: Not to the best of my
24 knowledge.

25 MR BESTER: So would it be correct to say

1 that this is the only instance that you're aware of where
2 he made some or other contribution to the blog?

3 MR SHULMAN: Correct.

4 MR BESTER: And then with regard to the
5 march where people from COSATU attended according to you,
6 how do you know they were COSATU members?

7 MR SHULMAN: They announced it in the
8 media that they were marching.

9 MR BESTER: I see. Then if I can ask you
10 if we can then move forward to events that took place at
11 another geographical location, and that would be at Wits,
12 and you do touch thereon, to some extent in your earlier
13 testimony you did so, but let me perhaps ask you; will you
14 explain to his lordship what the mood was amongst Jewish
15 students at the University of the Witwatersrand around
16 February, March 2009?

17 MR SHULMAN: Your Lordship, at the time
18 the Jewish students were very much on edge, as was the rest
19 of the community. As I stated previously there were these
20 issues that were going on both outside the communal
21 offices. There were these issues to do with the Jewish
22 community and the government and it, the campuses in
23 general tend to be a place where these sorts of expressions
24 and feelings are particularly aggressively manifest, so
25 during that period there was quite a lot of concern about

1 what was going to happen, particularly because the
2 university calendar only gets started kind of into Feb, so
3 this was only the first month before things started
4 happening.

5 MR BESTER: Before we go further, to the
6 best of your knowledge how many Jewish students would there
7 have been on campus around February, March 2009?

8 MR SHULMAN: I can't say with any
9 certainty how many Jewish students would have been on
10 campus at the time. The general student population at Wits
11 is estimated at the time to have been about 800.

12 MR BESTER: 800 Jewish students?

13 MR SHULMAN: Correct.

14 MR BESTER: And SAUJS, just how many
15 members would it have had at the time?

16 MR SHULMAN: It fluctuates, but I would
17 say membership at that time probably sat at around 500.

18 MR BESTER: 500. Describe to his
19 lordship what would the nature of the interaction have been
20 between members of SAUJS and the PSC and its followers in
21 the time leading up to the events of the 5th of March.

22 MR SHULMAN: Already during the kind of
23 holiday period, which was December and January, there was a
24 lot of stuff happening where the PSC was mobilising its
25 support base and doing stuff like the march and vigils,

1 columns, whatever. There was a lot of mobilisation, let's
2 put it that way. However, this got particularly aggressive
3 as we got into that week of march because that is what's
4 called Israel apartheid week, it's an annual week of very
5 intense activism that takes place where you have a variety
6 of things that happen, public displays, very aggressive
7 activism, lectures, etcetera, and a whole bunch of these
8 things were happening on the campus and those when they
9 happen tend to inflame whatever tensions were going on. So
10 you would have Jewish students arguing with PSC students,
11 other students around perhaps taking an interest, perhaps
12 not, and so there would have already been a very heightened
13 atmosphere typically that week on the campus on any given
14 year since that week has begun, is always the most tense
15 between those two parties and highly emotional, always
16 highly charged.

17 MR BESTER: So Israel apartheid week,
18 would that be an annual week on the Wits student calendar?

19 MR SHULMAN: Yes.

20 MR BESTER: And what kind of activities
21 would the PSC be engaged in during the course of that week?

22 MR SHULMAN: It all depended on what they
23 were putting together, but you would have public displays,
24 for example perhaps having, take the great lawns at Wits
25 and having mock ceremonies for all the people who died

1 perhaps in the war, have lectures on boycotting Israel.

2 You would have art campaigns. You would have poetry

3 nights, all sorts of activism around the issue.

4 MR BESTER: And as the chairperson of
5 SAUJS how did you respond to all these events?

6 MR SHULMAN: As far as the university
7 rules were concerned at the time we weren't allowed to put
8 any countermeasures in place. You're not allowed to run
9 your own events, you're not allowed to do anything at that
10 stage during that time to say give over a different
11 perspective. So what tended to happen is that the Jewish
12 students would have been briefed that this would have been
13 happening. We would have provided them with material say
14 when they signed up for the organisation perhaps a couple
15 of weeks earlier, providing information, explaining that if
16 there was a problem they should call perhaps someone on the
17 committee and that was the extent and then the students
18 after that pretty much do their own thing in terms of going
19 out and engaging on the campus.

20 MR BESTER: Now when did you for the
21 first time learn that Mr Masuku would be attending Wits to
22 speak during the course of this week?

23 MR SHULMAN: The programme of the week is
24 always advertised, or generally advertised with a poster
25 that shows different things that are happening and

1 different dates and so if you went down the list you would
2 have eventually got to the day when Mr Masuku was speaking.

3 MR BESTER: And what informed the
4 decision to attend the event where he was to speak?

5 MR SHULMAN: It's common practice to
6 attend events in general. Once we saw Mr Masuku was
7 speaking, on further investigation we discovered more about
8 his background, the sorts of things that he had said
9 already, the kinds of actions that he had been involved in,
10 and we believed taken on the evidence of those
11 investigations that this person might be a problem in terms
12 of an anti-Semitic act.

13 MR BESTER: Now you mentioned the sort of
14 things that he had said already. What would you be
15 referring to in that regard?

16 MR SHULMAN: Well, it was our
17 understanding at the time that he had come to Beyachad n
18 the march, was -

19 MR BESTER: Sorry, he had come to?

20 MR SHULMAN: The march on the - excuse
21 me, on the Jewish community buildings they're called
22 Beyachad.

23 MR BESTER: Yes?

24 MR SHULMAN: The, it was from the
25 information that we had gathered he had been at the Fatima

1 Hajag event where she had made the anti-Semitic remarks.
2 We had the blog posts which he had already written. So,
3 and it was a COSATU event which, you know, meant that there
4 was more, you know, potential for problems than normal.

5 MR BESTER: So if I can ask you to turn
6 to page 33 of the trial bundle -

7 MR SHULMAN: Page 33, yes.

8 MR BESTER: Would you care to comment on
9 this photograph?

10 MR SHULMAN: A very standard, very
11 standard piece of PSC paraphernalia, if you like, the kind
12 of sign that would have been hung at any of their events,
13 generally pushing their particular political view.

14 MR BESTER: I beg your pardon?

15 MR SHULMAN: Pushing their particular
16 political view. That's the sign that would have been up at
17 the -

18 COURT: Sorry, where's page 33 marked on
19 this?

20 MR BESTER: It's page 33, M'Lord, it's a
21 little bit faint because it's a photograph, so the best
22 would be if Your Lordship started at page 29.

23 COURT: Well, where are the pages in
24 between?

25 MR BESTER: M'Lord, the photograph will

1 look like this, "Apartheid Israel week." Someone putting
2 up a banner.

3 COURT: Yes, thank you.

4 MR BESTER: Then if I can ask you what
5 time of day was this event held at?

6 MR SHULMAN: Generally those events of
7 the sort would have been held at lunchtime, quarter past 1
8 to quarter past 2.

9 MR BESTER: Is there any particular
10 reason for that?

11 MR SHULMAN: At that period there's no
12 classes that take place at Wits, so the maximum number of
13 people can attend.

14 MR BESTER: So then go back to page 30, a
15 few pages beforehand. Mr Shulman, do you identify - are
16 you able to identify these gentlemen?

17 MR SHULMAN: Yes.

18 MR BESTER: Who are they?

19 MR SHULMAN: On your left you have Mr
20 Mohamed Desai. At the time he was the chairperson of the
21 PSC. In the middle is Mr Mbuyiseni Ndlosi. I don't know
22 what his affiliation is. He may have been from the Young
23 Community League or one of the other, what's known as PYA
24 structures.

25 MR BESTER: P?

1 MR SHULMAN: PYA, Progressive Youth
2 Alliance, loosely is SASCO, the Young Communist League and
3 the ANC Youth League, which kind of operate as a unit even
4 though they're separate organisations, although I see here
5 he's wearing a Young Communist League T-shirt.

6 MR BESTER: And the -

7 MR SHULMAN: And then Mr Masuku is on the
8 right.

9 MR BESTER: And at this particular event,
10 if you could cast your mind back, do you recall how many
11 people were present?

12 MR SHULMAN: This wasn't done in the
13 normal lecture hall. It was kind of in a much smaller
14 venue normally used for postgraduates and I'd say at least
15 a hundred, more probably, with standing room only, a very,
16 very full event.

17 MR BESTER: At least a hundred?

18 MR SHULMAN: Yes.

19 MR BESTER: Right, and how many Jewish
20 students would have been present?

21 MR SHULMAN: Not more than 10.

22 MR BESTER: And the 10 that were present,
23 what would have accounted for their presence at an event
24 like this?

25 MR SHULMAN: As SAUJS we were extremely

1 concerned, Your Worship, about the potential that Mr
2 Masuku's presence had on campus. In the normal course of
3 events when this particular issue is discussed typically
4 you have a lecturer who's talking, an academic, perhaps a
5 student who's wanting to make a point, and even at times of
6 extreme excitability if you like, these events do not tend
7 to attract large numbers of people. However, in this
8 particular instance you now have a very different
9 situation. Mr Masuku's presence on campus first of all
10 brings a very large authority figure, a demagogue, someone
11 who's likely to rile up a crowd. And also brings in groups
12 and parties that may only tangentially interested in this
13 particular issue.

14 [14:34] MR BESTER: Can I just ask you to pause
15 there. Explain to His Lordship why would you refer to Mr
16 Masuku as an authority figure.

17 MR SHULMAN: At the time Mr Masuku was
18 the head of the international affairs committee I guess of
19 COSATU so he held an official position in a trade union and
20 one that activist students on the campus would've taken
21 very seriously particularly if they were say from the Young
22 Communist League. COSATU is a tripartite alliance member.
23 And therefore anyone who is part of the PYA would've taken
24 seriously the fact that there was someone from an upper
25 level of leadership on the campus.

1 MR BESTER: Can I ask you to comment on
2 the composition of the rest of the people who were present?
3 Who would they have been?

4 MR SHULMAN: I didn't ask them who they
5 were but typically they did seem to be members of the PYA,
6 some Muslim students I imagine, some young black students.
7 I couldn't say anything else authoritatively on who they
8 were.

9 MR BESTER: Then if I can ask you to go
10 to page 38. Are you there?

11 MR SHULMAN: Yes.

12 MR BESTER: Now, just give us a sense of
13 the layout of the room where the speakers would've been
14 seated. If you turn to page 39 you'll see there's a much
15 better picture of the speakers area. So having regard to
16 page 39 just with reference to page 38 if you will just
17 give us an idea as to where the speakers would've been
18 seated.

19 MR SHULMAN: So you'll see the sign there
20 with the Palestinian and South African flags as a table.

21 MR BESTER: Yes.

22 MR SHULMAN: They were seated underneath
23 the sign.

24 MR BESTER: And where were you seated in
25 relation to that table?

1 MR SHULMAN: See on picture 38.

2 MR BESTER: Page 38, yes.

3 MR SHULMAN: The woman in the denim top,
4 I would've been seated a few rows back to the right.

5 MR BESTER: I beg your pardon, the woman
6 with the denim top right in front.

7 MR SHULMAN: Of this, on the picture.

8 MR BESTER: I see.

9 MR SHULMAN: So I would've been behind
10 her to the right of her towards the back.

11 MR BESTER: And how far would that have
12 been from where the speakers would've been seated?

13 MR SHULMAN: I don't know exactly but
14 you're talking 10 to 20 metres I would say.

15 MR BESTER: Now, if you'll explain to His
16 Lordship how is it that the meeting started off.

17 MR SHULMAN: We arrived at the event. It
18 was already very full. There were a lot of people there
19 already. Atmosphere was very tense.

20 MR BESTER: Why do you say that?

21 MR SHULMAN: There was a very excitable
22 atmosphere. When you have a lot of people in a room for a
23 political talk often it's like that.

24 MR BESTER: Yes, continue.

25 MR SHULMAN: There were a number of

1 speakers before Mr Masuku who spent time revving up the
2 crowd, getting them emotional. There was some heckling and
3 the tension of the crowd was raised in the process.

4 MR BESTER: Who would these speakers have
5 been?

6 MR SHULMAN: Mr Desai would've spoken.
7 Mr Mbuyiseni would've spoken.

8 MR BESTER: That's Mr Ndlosi.

9 MR SHULMAN: Correct.

10 MR BESTER: Yes, continue.

11 MR SHULMAN: Other members of the PSC may
12 have spoken.

13 MR BESTER: And this particular venue,
14 where on the Wits campus would this venue be situated at?

15 MR SHULMAN: I believe it's called the
16 south-west engineering building. If His Lordship is
17 familiar with the great hall there's a sort of corridor
18 between that and the road that runs through the middle of
19 Wits. And if you're walking from the road to the great
20 hall the south-west engineering building will be on your
21 right.

22 MR BESTER: Now, with reference to the
23 other speakers who you refer to in brief do you recall more
24 or less what it is that they said in the lead-up to Mr
25 Masuku taking the podium?

1 MR SHULMAN: I don't remember anything
2 particular that they said. They tended to shout political
3 slogans, Amandla, etcetera that was - and then perhaps
4 introducing the speakers but I can't be certain as to
5 anything else that they would've said.

6 MR BESTER: Then if I can ask you to turn
7 to page 66.

8 MR SHULMAN: I'm there.

9 MR BESTER: Right, this is the complaint
10 from the SAHRC dated 1 May 2009. You'll see under the
11 second paragraph there are a number of bullet points. I
12 want to refer to the first one where it's alleged that Mr
13 Masuku on that day, the 5th of March, whilst speaking at
14 Wits stated, "COSATU has got members here even on this
15 campus. We can make sure that for that side it will be
16 hell," when referring to COSATU's intentions regarding who
17 supported Israel. Okay, so if I can ask you then to turn
18 to page 68 paragraph 6 there's a letter from Mr Masuku in
19 response to the complaint. Then he says that it is true
20 that he stated during the lecture, "COSATU has got members
21 here even on this campus. We can make sure that for that
22 side it will be hell." Let's pause there. Now, what did
23 you feel when you heard Mr Masuku utter these words?

24 MR SHULMAN: That was very scary for us
25 in the room because it's very clearly targeted at us. He

1 makes reference to campus. He makes reference to that
2 side, in other words us in the room, and it was very
3 hectoring. It wasn't polite or relaxed. It was very
4 aggressive. And it made us feel quite disturbed and
5 worried about what might happen.

6 MR BESTER: Then if I can ask you insofar
7 as the statement reads, "COSATU has got members here even
8 on this campus," in your capacity as chair of SAUJS did you
9 ever previously interact with members of COSATU on the Wits
10 campus?

11 MR SHULMAN: I can't say that anyone
12 identifying as COSATU ever spoke to me or engaged but as
13 far as I understood at the time there were COSATU
14 affiliated unions that operated among the staff and I took
15 that to be what he was meaning.

16 MR BESTER: Then if I can ask you - you
17 can turn to page 257. At the bottom of page 259, just move
18 on a little bit if you will - before we get there just the
19 passage from line 20 where it says, "They suggest that we
20 make it difficult for anyone, whether it's in the meeting
21 or even in social life, anyone who supports Israel must
22 have his life as hell as the Gaza people who are suffering
23 in Israel." Do you see that?

24 MR SHULMAN: I do.

25 MR BESTER: When you heard these words

1 what did you feel?

2 MR SHULMAN: There was a definite element
3 of threat in what he was saying. The fact that he was
4 including, you know, the people in the meeting which was an
5 obvious reference to us but then also saying that even in
6 social life, in other words anywhere else in perhaps the
7 campus or elsewhere that we would have our lives made as
8 hell for me regard it as a definite threat and an
9 invitation to do harm.

10 MR BESTER: You said it was an obvious
11 reference to us. On what do you base that?

12 MR SHULMAN: If you saw in the earlier
13 one he talks about campus. He specifically says that we'll
14 make your life hell on campus. So that for me, we were the
15 ones who did activism on campus and therefore SAUJA was a
16 target as far as Mr Masuku was concerned.

17 MR BESTER: Now, insofar as the members
18 or rather the Jewish students who attended this particular
19 event would there have been any basis to identify a person
20 as a Jewish student in attendance at the meeting?

21 MR SHULMAN: Yes.

22 MR BESTER: And how would one go about,
23 how would one have gone about doing that?

24 MR SHULMAN: Well, there were people
25 wearing SAUJS T-shirts for one.

1 MR BESTER: Yes.

2 MR SHULMAN: People wearing yarmulkes.

3 COURT: What?

4 MR SHULMAN: Head coverings, Your
5 Lordship, Jewish head covering. Other than that I couldn't
6 tell you what - perhaps people who were shouting anything
7 or disagreeing.

8 MR BESTER: Now let's just go back to
9 page 36 if I can ask you.

10 MR SHULMAN: Yes.

11 MR BESTER: Mr Shulman, will you describe
12 to His Lordship what kind of T-shirt this is that this
13 individual was wearing?

14 MR SHULMAN: That is -

15 COURT: Wait, wait, wait, let me get
16 there.

17 MR SHULMAN: Sorry.

18 MR BESTER: Beg your pardon, M'Lord.

19 MR SHULMAN: Apologies.

20 COURT: Yes, thank you.

21 MR SHULMAN: That is a T-shirt - when one
22 signs up for SAUJS at the beginning of the year that's the
23 T-shirt that they give to new members.

24 MR BESTER: And you said others would've
25 been wearing -

1 MR SHULMAN: Yarmulkes.

2 MR BESTER: Yarmulkes. And just by way
3 of clarification what purpose does a yarmulke serve?

4 MR SHULMAN: For religious Jewish
5 individuals it's considered a commandment that one should
6 wear such an item of clothing.

7 MR BESTER: If you can then turn back to
8 page 259.

9 MR SHULMAN: Yes.

10 MR BESTER: Are you there? At the bottom
11 of the page Mr Masuku says, "COSATU is with you. We will
12 do everything to make sure that whether it's at Wits
13 University or whether it's at Orange Grove anyone who does
14 not support equality and dignity who does not support the
15 rights of other people in the world must face the
16 consequences even if it means," let's just pause there.
17 Now, we know from the transcript that he made reference to
18 two geographical locations. The first is Wits. The other
19 one is Orange Grove. Now, when you heard reference to
20 these two geographical locations during the course of his
21 speech, Mr Shulman, how did you feel about that?

22 MR SHULMAN: Well, it was quite scary,
23 very disturbing. Wits University was where the majority of
24 Jewish students go to university, the biggest university of
25 Jews in the country. And Orange Grove is understood to be

1 a place where Jews live. So for me I was taking as Mr
2 Masuku making a threat that COSATU would be mobilised in
3 effect to harass the community whether it was students
4 going to university or just the general population of the
5 community living in a residential area.

6 MR BESTER: Let's deal with Wits. As I
7 understand you you've said that the majority of Jewish
8 students attend Wits. How would you know that in your
9 capacity as chair of SAUJS?

10 MR SHULMAN: So first of all we can track
11 where Jewish students go to university because most of them
12 go to Jewish schools so we have an exit number of students
13 who go, who leave Jewish schools at a certain number. That
14 number is about 2 000 or it was at the time. And then the
15 schools also give us an indication around where those
16 students are going.

17 [14:54] And then there is only a few universities around
18 the country where Jews go, generally speaking, to
19 university for cultural, geographic or reasons to do with
20 curriculum and those can be measured off because some of
21 them are in Cape Town so you can kind of cut those out and
22 then you have the amount of sign-ups that we have for SAUJS
23 itself. So by triangulating all that sort of information
24 you can get an approximation of where the largest number of
25 Jews go in terms of universities.

1 MR BESTER: Let's continue then. And
2 then he says, "Even if it means that we will do something
3 that may necessarily cause what is regarded as harm,
4 because certainly there will be no tolerance for the fact
5 that there are people openly here in South Africa,
6 (indistinct). We will not accept that fact." Let's pause
7 there. So when you heard these words, Mr Shulman, how did
8 you feel about that?

9 MR SHULMAN: I have to say that this
10 particular meeting was unprecedented in my entire history
11 of activism on any issue, at university or outside. I've
12 been to lots and lots of talks by the PSC, some of which
13 made me very cross and very emotional and very angry, but
14 nothing, I've never come across instance where, for sitting
15 in the audience, you're being threatened. And that for me
16 was clearly what he was saying, right, that necessarily
17 cause what is regarded as harm. He's being very explicit
18 about what he intends to do and for me it was a direct
19 threat and I think you can see it in the transcript, that
20 the reaction of the students in the hall was one of shock
21 and fear.

22 MR BESTER: How many meetings would you
23 have attended in your student career where the PSC or a PSC
24 contingent would have been present?

25 MR SHULMAN: It's hard for me to say

1 exactly. Dozens.

2 MR BESTER: As I understand you, this
3 meeting stood out?

4 MR SHULMAN: Yes.

5 MR BESTER: Then further down the page,
6 line 18, "Support all (indistinct) and take our solidarity
7 to new heights and that solidarity means that if we are
8 involved in supporting the people of Palestine, if we are
9 involved in supporting the people of Burma or all the
10 people who are oppressed all over the world, our duty is to
11 make sure that we get them where it matters most. The
12 following things are going to apply, 1 Any South African
13 family - I want to repeat so that it's clear for anyone -
14 any South African family that sends its son or daughter to
15 be part of the Israeli Defence Force must not blame us when
16 something happens to them with immediate effect." Now
17 immediately beneath that you'll see there's a male voice
18 there, on the recording there was some intake of breath and
19 then a, "ooh-ooh." Do you have any idea who that would
20 have been?

21 MR SHULMAN: I don't know, I would have
22 to listen to the tape again. It could have been myself, it
23 could have been one of my friends, it could have been
24 someone who was sitting near us, but I can't be sure.

25 MR BESTER: This statement that I've just

1 read to you now, how did that make you feel at the time?

2 MR SHULMAN: It was deeply sinister.

3 Really, really it was. In effect Mr Masuku is taking a
4 case that he has an issue with a person, apparently here
5 that's one that's joining the Israeli Defence Force and he
6 is in effect going after the family, right, so going after
7 the people who are connected to this person. So the family
8 could have no - there's no recourse that you could have to
9 that family because his objection would be to the person,
10 so that's kind of a form of collective, a collective threat
11 to that family and again it's very sinister. You know,
12 when something happens, I don't know what that something
13 was but again you can see from the script that people
14 understood that immediately to be a highly threatening
15 statement.

16 MR BESTER: Mr Shulman, can I take it
17 that you have been to Israel?

18 MR SHULMAN: That's correct.

19 MR BESTER: Insofar as you are aware,
20 what ethnic group is likely to be a member of the Israeli
21 Defence Force?

22 MR SHULMAN: Mostly Jewish.

23 MR BESTER: Then if I can ask you to move
24 forward to page 261, the bottom of the page line 25, 24, I
25 beg your pardon. Are you there? Mr Shulman, are you

1 there?

2 MR SHULMAN: Yes.

3 MR BESTER: Mr Masuku says, "We can talk
4 when it comes to talking, we can fight when it comes to
5 fighting. No one must entertain the assumption he
6 possesses monopoly over violence. We don't want to warn
7 anyone, we are just talking now because we can talk but
8 when it comes to physical fighting no one must entertain an
9 illusion. We have been there in the trenches against
10 apartheid and we can still do it, so let us not entertain
11 the assumption that if someone has a different view, let's
12 talk, but if someone wants to fight we will do that.
13 COSATU has got members here even in this plenary. We can
14 make sure that anyone that" - and then it becomes a bit
15 blurred. So at this stage he would have been well into his
16 speech. How did you feel when you heard these words, Mr
17 Shulman?

18 MR SHULMAN: This was very worrying from
19 the perspective of no one had threatened any violence at
20 this stage. There wasn't anyone or anything that was
21 confronting Mr Masuku with an option of fighting. There
22 was at that point, as you can hear from the tape, a lot of
23 shouting. People were very upset because they were being
24 threatened but no one had, at any stage that I could see
25 from the transcripts or at the time, threatened Mr Masuku

1 and yet here he was now starting to talk about physical
2 actions against his opposition. And so that was a new
3 level of aggression against the people in the room.

4 MR BESTER: On page 264 line 10 Mr Masuku
5 says, "Then Palestine will be free, no matter how many e-
6 mails you write, whether you have Moses, whether you have
7 CIA, whether you have FBI, whether you have MI6, whatever
8 Gestapo can come out" and then it stops. Let's just pause
9 with Moses. Can you explain to His Lordship, to the extent
10 that you are able to do so, what is the significance of
11 Moses to religious Jews?

12 MR SHULMAN: Moses is a biblical figure,
13 it comes straight from the bible. You read about him in
14 the bible, we read about him in the bible this week if Jews
15 were at synagogue, and he is considered the founding
16 prophet of the Jewish people and the person who brought the
17 Jewish religious law to the Jewish nation and a very
18 important religious figure in terms of Jewish theology.

19 MR BESTER: Sorry, would you just repeat
20 that last sentence? A very important?

21 MR SHULMAN: Figure in terms of Jewish
22 theology.

23 MR BESTER: And then page 266, Mr Masuku
24 says, "I wrote to one Zionist" - at the top of the page, "I
25 wrote to one Zionist who wrote to me. I said I'm less

1 concerned about Semitism, whatever name you call it. All I
2 want is justice, if you can ask me." And then someone
3 says, "That's racist." And then he continues, "explanation
4 for whatever I do, I only owe the people who want justice
5 as to what I have done to assist them and I've only said
6 that we will do our part to assist; whether anti-Semitic or
7 not, it's none of my business and I don't care because
8 except the first person" and then it stops. So Mr Shulman,
9 when you heard Mr Masuku utter these words, how did you
10 feel about that?

11 MR SHULMAN: It's very clear to me from
12 this text at this point, Mr Masuku had issued all sorts of
13 threats, the room was extremely tense, people were quite
14 freaked out, feeling quite hurt, but for me what was
15 disturbing here was, he was not bounding any kind of action
16 that he was intending to do. He explicitly says here that
17 he doesn't care if whatever actions he take is anti-Semitic
18 or not, for him whatever actions he takes are appropriate,
19 there are no holds - no holds barred, if you like, no
20 restrictions on what he's intending to do from a targeting
21 of Jews perspective and that was a very concerning and
22 quite scary thing in the context of that room, said like
23 that.

24 MR BESTER: Now we could see from the
25 transcript and also on listening to the recording that

1 there was some heckling directed at Mr Masuku. How would
2 you comment on that?

3 MR SHULMAN: At one level this is student
4 politics, sometimes heckling happens and in fact the
5 university didn't used to take a particularly strong line
6 against hecklers, it was something that was considered part
7 of a discourse so in some respects it was a normal part of
8 how events are sometimes run in a student environment. On
9 the other hand, these comments were also not hecklements -
10 I don't know what the correct term is - that perhaps you
11 would hear in a parliamentary session, they were people who
12 were reacting very viscerally to what was going on around
13 them. They're not intelligent, they're people reacting out
14 of fear at what they perceive to be a highly threatening
15 situation and in that respect they're different from other
16 lectures that I've ever been in, in terms of this
17 particular issue.

18 MR BESTER: Well, let's briefly then
19 touch on other lectures that you've been in where, I'm
20 assuming, the same issues would have arisen insofar as the
21 conflict that played itself out and that still plays itself
22 out in the Middle East between Israel and the Palestinian
23 people to this very day. What would more - what would have
24 been more characteristic of the other meetings that you had
25 attended and how would you differentiate them from this

1 meeting in particular?

2 MR SHULMAN: It all depends on the
3 meeting. PSC may, I remember, have a meeting with an
4 academic who came to look at the history of Jews coming to
5 live in the land of Israel, for example, and from her
6 perspective saying why she thought it was wrong or
7 problematic. In that case there was no heckling at all.
8 So that would be one kind of lecture. Perhaps on a more
9 aggressive level, I can remember Mr Ronnie Kasrils coming
10 to the campus at one stage and that was a much more
11 aggressive lecture but even there, when the hecklers were
12 heckling him they were like correcting him on facts. So he
13 would say something and someone would shout out well, you
14 know, the name of the person is actually that or, you know,
15 you're wrong on this and it would be that kind of factual
16 engagement, even if it was much more heated, that was -
17 well, it was essentially a discussion about something
18 happening far away and nothing to do with the people in the
19 room per se or particularly commenting on people as South
20 African citizens.

21 MR BESTER: Now you mentioned, your first
22 example, the lecture which the academic gave. You said
23 there was no heckling there.

24 MR SHULMAN: None.

25 MR BESTER: Now why would that have been

1 the case?

2 MR SHULMAN: Well, as I indicated
3 previously, lecturers don't draw large crowds and the
4 presentations file is highly academic. You know, they
5 stick up a, something on the board and a few maps and then
6 they slowly, point by point, go through the argument that
7 they're making. It doesn't lend itself to a great deal of
8 excitability by the crowd.

9 MR BESTER: From the perspective of
10 SAUJS, if you disagree with the views expressed by an
11 academic of that nature, what would your approach be or
12 what would your approach have been at the time?

13 MR SHULMAN: Well, very often if the
14 academic was important enough we would send a delegation
15 who would ask questions, the idea being that you could
16 undermine the kind of things that said academic was putting
17 across by asking key questions and then when they didn't
18 have answers or good answers, then you could discredit
19 their view. That was one response or often post fact you
20 could write up a story about it, put it on a blog, put it
21 in a newspaper somewhere, criticising the particular view,
22 you know, saying why you thought it was wrong. You could
23 even hold an alternative event, you know, giving another
24 perspective. So there was a variety of ways to handle the
25 issue.

1 MR BESTER: Now in this case with
2 reference to the meeting in March 2009 at Wits, how did the
3 meeting then conclude?

4 MR SHULMAN: Mr Masuku gave his talk,
5 prepared to ask, answer questions which were then - people
6 were allowed to ask questions which then seemed to set him
7 off again and then after all of this shouting and whatever
8 was done, they closed the meeting and people dispersed to
9 go back towards their lectures. There were some who stayed
10 behind to argue on the steps and the Jewish students in the
11 room also then sort of congregated to regroup because a lot
12 of them were in a great deal of shock.

13 MR BESTER: How do you know that they
14 were in a great deal of shock?

15 MR SHULMAN: Well, I personally was in
16 shock myself and some of the students were very young at
17 the time, they were first years, they'd never seen anything
18 like this, they didn't know what to do with themselves.
19 They were highly agitated and some of them went home, they
20 told me the next day, and they just cried from the trauma
21 of it.

22 COURT: I think that latter part of that
23 answer is hearsay evidence.

24 MR BESTER: Indeed, so it is, M'Lord.

25 COURT: Yes.

1 MR BESTER: The witness doesn't have
2 personal knowledge as to whether they cried -

3 COURT: That must be discarded from, from
4 the record.

5 MR BESTER: Yes.

6 COURT: Unless of course you're going to
7 call them to come and -

8 MR BESTER: Certainly not, M'Lord.

9 COURT: - confirm. Thank you.

10 MR BESTER: If Your Lordship can just
11 give me a short indulgence.

12 COURT: Yes.

13 MR BESTER: I'm just -

14 COURT: Yes.

15 [15:14] MR BESTER: No further questions for the
16 witness, M'Lord.

17 COURT: Thank you. Cross-examination.

18 Are you ready to commence now -

19 MS DE KOK SC: Yes, I am.

20 COURT: - immediately, or do you need
21 time?

22 MS DE KOK SC: I doubt that we'll finish
23 this afternoon, but I'm certainly in a position to begin.

24 COURT: Yes, I think you may proceed
25 until we indicate otherwise.

1 CROSS-EXAMINATION BY MS DE KOK SC:
2 you. Mr Shulman, let's see if we can agree on some basic
3 facts. Not all Jewish people are Zionists.

4 MR SHULMAN: That's correct.

5 MS DE KOK SC: Not -

6 COURT: Not all Jewish people are?

7 MS DE KOK SC: Zionists.

8 COURT: Oh yes, thank you.

9 MS DE KOK SC: Not all Zionists are
10 Jewish.

11 MR SHULMAN: That's correct.

12 MS DE KOK SC: So being a supporter of
13 Zionism and being Jewish are not synonymous.

14 MR SHULMAN: That's correct.

15 MS DE KOK SC: Zionism connotes a
16 certain, or a particular political ideology.

17 MR SHULMAN: Not correct.

18 MS DE KOK SC: In what sense?

19 MR SHULMAN: People have attachments to
20 the land of Israel, religious connections to the land of
21 Israel. They connect with it culturally, historically.
22 None of those are ideological.

23 MS DE KOK SC: But Zionism supports the
24 existence of a Jewish state in the Middle East.

25 MR SHULMAN: Correct.

1 MS DE KOK SC: Yes, would you agree that
2 that is the core of Zionism?

3 MR SHULMAN: Yes.

4 MS DE KOK SC: And as you've indicated,
5 not all Jewish people support that core belief.

6 MR SHULMAN: Correct.

7 MS DE KOK SC: So turning then to the
8 blog, you say that you are familiar with this, it's Almost
9 Supernatural blog.

10 MR SHULMAN: Yes.

11 MS DE KOK SC: Do you know personally the
12 two - I don't know, do we call them administrators? Is
13 that what you are of a blog? Are you an owner or an
14 administrator?

15 MR SHULMAN: You're welcome to use
16 whatever term.

17 MS DE KOK SC: Okay.

18 MR SHULMAN: I know who they are.

19 MS DE KOK SC: You know the two of them,
20 this is now Mr Kranstorf and Mr Maggid, you know them
21 personally?

22 MR SHULMAN: I do.

23 MS DE KOK SC: Were they involved in any
24 Jewish structures, community or political structures?

25 MR SHULMAN: Not to my knowledge.

1 MS DE KOK SC: Now we unfortunately can't
2 see it at page 3 because you don't see the heading of the
3 blog, but if you call it up on the worldwide web and you
4 see the heading you'll see that the aim of the blog - and
5 I'll read it to you how it reads, it says "The aim is
6 exposing anti-Israel bias in the South African media and
7 promoting a balanced South African foreign policy towards
8 the Middle East."

9 MR SHULMAN: That's correct.

10 MS DE KOK SC: So the focus of this blog
11 was on Israel and foreign affairs.

12 MR SHULMAN: Not completely.

13 MS DE KOK SC: But according to its
14 heading this is what it says that it focuses on.

15 MR SHULMAN: That is what the heading
16 says.

17 MS DE KOK SC: So I just want to make it
18 clear, because you somehow created the impression in your
19 evidence that this blog was a blog for the Jewish community
20 which implies cultural and faith issues, whereas in fact
21 the focus is Israel.

22 MR SHULMAN: Israel and Jewish politics.

23 MS DE KOK SC: Yes, Israel and Jewish
24 politics. Now you testified that you were a regular
25 follower of the blog.

1 MR SHULMAN: That is correct.

2 MS DE KOK SC: And you testified that you
3 read the post or article where we see the blog, or the
4 South African Zionist Federation calling on Jewish people
5 to oppose the march by COSATU and others.

6 MR SHULMAN: That's correct.

7 MS DE KOK SC: That's what we see at page
8 9.

9 MR SHULMAN: Yes.

10 MS DE KOK SC: And if I understand it
11 correctly - you must correct me if I'm wrong - is we have
12 in the blog a quote, or a replication of the e-mail from
13 the Zionist Federation and then we have above that what the
14 author, the blog owner or administrator has written about
15 it.

16 COURT: If you could just take me along
17 in terms of which pages you are -

18 MS DE KOK SC: I'm sorry, M'Lord, it's
19 page 9 -

20 COURT: - then I can follow the evidence.

21 MS DE KOK SC: I'm sorry.

22 COURT: Page?

23 MS DE KOK SC: Page 9 of the trial
24 bundle.

25 COURT: Thank you.

1 MS DE KOK SC: So what we see in the
2 blog, the block at the bottom of the page is what the
3 Zionist Federation wrote. Above that where we see "Urgent.
4 Stand your ground against COSATU," that is - I think that's
5 Steve that would have written there, that, hey. If you
6 look at page 10, posted on February 6th in In Steve.

7 MR SHULMAN: Yes, I believe that's
8 correct.

9 MS DE KOK SC: Does that mean that Steve
10 was the author?

11 MR SHULMAN: Yes, I believe that's so.

12 MS DE KOK SC: So the blog was calling on
13 readers to stand, "Stand your ground against COSATU."

14 MR SHULMAN: Correct.

15 MS DE KOK SC: And then in the second
16 paragraph of what Steve was writing, he's saying, "Yes,
17 it's against the Jewish community, not against Israel."
18 That is now Steve's interpretation of the facts.

19 MR SHULMAN: I will agree.

20 MS DE KOK SC: And he bases this
21 interpretation on the fact that the march is to be held in
22 Orange Grove and not at the embassy.

23 MR SHULMAN: That it's being held at the
24 Jewish communal offices.

25 MS DE KOK SC: Okay, let's not quibble.

1 You say it's being held at the Jewish communal offices in,
2 is it in Orange Grove or is it in Raedene?

3 MR SHULMAN: Raedene.

4 MS DE KOK SC: Is that close to Orange
5 Grove?

6 MR SHULMAN: It's next-door.

7 MS DE KOK SC: Now Mr Shulman, as a
8 regular follower of this blog did you, were you aware of
9 the fact that Mr Masuku's comment, which is what we see at
10 page 3, that it had been precipitated by two other comments
11 that had been posted on the blog?

12 MR SHULMAN: I understood it to be an e-
13 mail chain.

14 MS DE KOK SC: Okay. If you - so you
15 knew that there was something that prompted Mr Masuku to
16 comment on a blog that he'd never visited before, that he'd
17 never commented on before?

18 MR SHULMAN: I had no idea why Mr Masuku
19 was commenting.

20 MS DE KOK SC: But you say that you were
21 aware of an e-mail chain.

22 MR SHULMAN: Ja, but I wasn't sure who
23 initiated it.

24 MS DE KOK SC: Okay. Could I ask you to
25 go to the other file that you have in front of you, which

1 is the pleadings and notices file. M'Lord, the notices
2 section.

3 COURT: Notices?

4 MS DE KOK SC: Yes. M'Lord, apparently
5 it's in the bundle that's still in the brown court file.

6 COURT: Yes, I thought so.

7 MS DE KOK SC: There should be a separate
8 volume for notices.

9 COURT: Is that expert notices?

10 MS DE KOK SC: No, just notices.

11 COURT: Yes, which page?

12 MS DE KOK SC: Page 6.

13 COURT: 6.

14 MS DE KOK SC: Have you seen this comment
15 before, Mr Shulman?

16 MR SHULMAN: I haven't.

17 MS DE KOK SC: This is a comment that was
18 posted on the It's Almost Supernatural blog by someone
19 calling himself Phillip. Can you read it for the record,
20 please?

21 MR SHULMAN: "Even when all the monkeys
22 in COSATU have died of AIDS, even those who were cured by
23 raping babies, I still won't return to SA. Jews should be
24 in Israel, supporting Israel. Friends, make Aliyah do it."

25 MS DE KOK SC: Now Mr Shulman, I'm not

1 going to ask you to comment on the meaning of this post, or
2 to ask you how it makes you feel. I'm just going to ask
3 you one thing that you may assist us on. The word
4 "Aliyah," you'll see it says "Jews should be in Israel
5 supporting Israel. Friend, make Aliyah do it." Perhaps
6 you can assist us in explaining what the word Aliyah means.

7 MR SHULMAN: Aliyah is a Hebrew word that
8 literally means to go up and in general parlance refers to
9 people, particularly Jews who immigrate to Israel.

10 MS DE KOK SC: So in this context the
11 author is saying the Jewish people in South Africa should
12 go up to or return to Israel, immigrate to Israel?

13 MR SHULMAN: Yes, that would be correct.

14 MS DE KOK SC: Now you say that you
15 haven't seen this before. If you go to page 3 of the trial
16 bundle, under the block where Mr Masuku's comment is
17 highlighted it says, "COSATU is a tripartite alliance
18 partner with the ruling ANC party. A vote for the ANC is a
19 vote for Bongani." Then it says, "Posted on February 10,
20 2009 in anti-Semitism Steve," and then there's Permalink
21 and then there's comments and in brackets 19. Now perhaps
22 you can help me because you're a younger man who knows more
23 about technology and the modern forms of communication than
24 I do, but if it says "comments" there, you would have to
25 click on there and then it would open up the comments. Is

1 that a correct understanding -

2 MR SHULMAN: Yes, that's correct.

3 MS DE KOK SC: - of how these things
4 work? So a comment doesn't appear in the body, but you
5 click and then you see the comments?

6 MR SHULMAN: That is correct.

7 MS DE KOK SC: So this comment by Phillip
8 that you've read for us, I'm going to call it the monkey
9 comment for shorthand, the monkey comment would have been
10 reflected under that comment section?

11 MR SHULMAN: I don't know where the
12 comment was made.

13 MS DE KOK SC: Okay. Mr Masuku if he
14 posted a comment on the blog it would also reflect only if
15 you open up the comment section?

16 MR SHULMAN: Correct.

17 MS DE KOK SC: Yes, but what has happened
18 in this case is that the owners of this blog, the
19 administrators, have taken Mr Masuku's comment from the
20 comment section and highlighted it at the top.

21 MR SHULMAN: Yes, that seems to be the
22 case.

23 MS DE KOK SC: Yes. It seems, Mr
24 Shulman, that the owner of the blog, well he has said that
25 he removed the monkey post a day after it was put up, but

1 you say you were not aware of that?

2 MR SHULMAN: That's correct.

3 MS DE KOK SC: Okay, so you were left
4 under the incorrect and false impression that Mr Masuku out
5 of nowhere, out of the blue posted a comment on this
6 Zionist blog?

7 MR SHULMAN: That would be correct.

8 COURT: Sorry, could I find out from both
9 counsel, is the court in possession of the comment section
10 of the blog column which is now being referred to? Is it
11 part of what I've seen or heard or something separate?

12 MS DE KOK SC: So what we have, M'Lord,
13 is the - page 6 of the notices is a response to a rule
14 35(3) request.

15 COURT: Yes?

16 MS DE KOK SC: So the respondents asked
17 of the applicant give us a copy of this deleted comment
18 which appeared.

19 COURT: Yes.

20 MS DE KOK SC: And this is what they've
21 given us, what I call the monkey post.

22 COURT: So I will find it there?

23 MS DE KOK SC: Your Lordship will find it
24 there.

25 COURT: Okay.

1 MS DE KOK SC: But in response to Your
2 Lordship's question of whether you have all the comments -

3 COURT: Yes.

4 MS DE KOK SC: - the other ones as well,
5 no.

6 COURT: Oh, okay.

7 MR BESTER: That is correct, M'Lord.

8 COURT: Yes, thank you.

9 MS DE KOK SC: All right. There is
10 another comment which preceded, or there's another comment
11 that was also deleted from the blog after a while.

12 [15:34] And that you'll find at page 16 of the trial
13 bundle. You see that? Now let me just explain to you. 16
14 is something that we again received from the applicant. It
15 is an e-mail from - I'm referring to the trial bundle. Is
16 that what you have as well?

17 MR SHULMAN: Yes, Ma'am.

18 MS DE KOK SC: Ja, okay. It's sent from
19 the almostsupernatural@gmail.com address so it must be from
20 the owner of the blog. And then you will see in italics,
21 do you see the bit in italics?

22 MR SHULMAN: Yes, Ma'am.

23 MS DE KOK SC: Okay, so that was also a
24 comment which was removed and can you just read that for
25 the record please?

1 MR SHULMAN: "Let us bombard the COSATU
2 offices with phone calls to let them know our anger. It is
3 harder to ignore phone calls than e-mails. Maybe we should
4 start a policy that Israel loyal Jews refuse to employ
5 COSATU members in retaliation for COSATU's evil actions."

6 MS DE KOK SC: Okay. All right. So what
7 we have is we have two comments posted on this blog and
8 then we have Mr Masuku's comment. These two comments are
9 deleted but Mr Masuku's is placed in the body of the blog.
10 Now, you've - I hadn't planned on asking you questions
11 about the meaning of Mr Masuku's blog post but given that
12 you have testified about it I'm going to, I'm afraid I'm
13 going to have to venture there as well. But before I do so
14 I want to just ask you a few questions about the broader
15 context of this blog, of this blog post. What was
16 Operation Cast Lead?

17 MR SHULMAN: That was the term used to
18 refer to the Israel side of the fight with Gaza.

19 MS DE KOK SC: As I understand it, it
20 refers to an operation that was launched in December 2008
21 by Israel.

22 MR SHULMAN: I believe that's correct.

23 MS DE KOK SC: And what it entailed was
24 initially air strikes from the Israelis against the Gaza
25 Strip and finally, well, it culminated or it led to

1 progress to a land invasion on the 3rd of January 2009.

2 MR SHULMAN: I'd say that's correct.

3 MS DE KOK SC: Yes. So the Israelis
4 called it Operation Cast Lead. Other people called it
5 other things. Many of the, well, the people in Gaza, many
6 in the international community referred to it as the Gaza
7 massacre.

8 MR SHULMAN: I believe that people may
9 have referred to it as that, yes.

10 MS DE KOK SC: During this three-week war
11 many Palestinians in Gaza were killed. Accept that as a
12 uncontroversial fact.

13 MR SHULMAN: Yes.

14 MS DE KOK SC: This included many
15 civilians.

16 MR SHULMAN: Yes.

17 MS DE KOK SC: And this included many
18 women and children.

19 MR SHULMAN: Yes.

20 COURT: I'm losing you, Madam.

21 MS DE KOK SC: I'm sorry, M'Lord?

22 COURT: I'm losing you. You're lowering
23 your voice.

24 MS DE KOK SC: Me or the witness, M'Lord?

25 COURT: You, you.

1 MS DE KOK SC: Should I perhaps just go
2 back a few questions?

3 COURT: Yes, start from during the three
4 weeks of the war. You said something towards the end which
5 I did not get.

6 MS DE KOK SC: I put to the witness and
7 thus far he had agreed with me, M'Lord, that during the
8 three weeks of the war there were many Palestinian
9 casualties. Many amongst them were women and children.

10 COURT: Yes.

11 MS DE KOK SC: Yes. And Mr Shulman, many
12 in the international community condemned Israel's actions.
13 Do you agree with that?

14 MR SHULMAN: Yes, I believe that to be
15 the case.

16 MS DE KOK SC: You personally, did you
17 support Israel's actions?

18 MR SHULMAN: I did.

19 MS DE KOK SC: If you go to page 280 of
20 the trial bundle, this refers to a or this is a statement
21 or an open letter which is published on 11 January 2009 but
22 it refers to a statement issued by the Jewish Board of
23 Deputies, the Zionist Federation and the chief rabbi. Do
24 you recall such a statement being issued by those three
25 parties?

1 MR SHULMAN: I do recall that, yes.

2 MS DE KOK SC: Yes, so unfortunately we
3 haven't put in the bundle the original letter from those
4 three entities. But what we can see from this letter in
5 the third paragraph immediately after the highlighted
6 portion there's a quote from the statement. Do you see
7 that? And what the letter says in the last sentence of the
8 third paragraph is that, "South African Jewish community
9 firmly supports the decision of the government of Israel to
10 launch a military operation against Hamas in the Gaza
11 Strip."

12 MR SHULMAN: It says that, yes.

13 MS DE KOK SC: Yes. So the Jewish Board
14 of Deputies, the Zionist Federation and the chief rabbi
15 published a statement where they say we support the war in
16 Gaza.

17 MR SHULMAN: Correct.

18 MS DE KOK SC: Correct. That is a
19 political statement, is it not?

20 MR SHULMAN: That's correct.

21 MS DE KOK SC: And what we then see at
22 page 280 is this open letter which is apparently from a
23 group of Jewish people. Is that correct?

24 MR SHULMAN: I'd say that is correct,
25 yes.

1 MS DE KOK SC: Okay, and they say we need
2 to write this to make it clear that you cannot say the
3 South African Jewish community supports this war because we
4 are a part of the South African Jewish community and we
5 certainly don't support the war. That's the essence of
6 what they say.

7 MR SHULMAN: That's correct.

8 MS DE KOK SC: Okay. They say in the - I
9 think it's the one, two, three, fifth paragraph - perhaps
10 you can just read for the record what they say, the
11 paragraph that starts with, "We are dismayed."

12 MR SHULMAN: That's the third paragraph,
13 Ma'am.

14 MS DE KOK SC: Yes, in fact you're right.
15 You're right. I kept on reading the other two incorrectly
16 but that is the third paragraph.

17 MR SHULMAN: "We are dismayed by the
18 disproportionate use of force by the Israeli military in
19 Gaza. So far over 750 Palestinians and 13 Israelis have
20 been killed. Many of the Palestinian casualties are
21 civilians unarmed and uninvolved in any operations against
22 Israel. We deplore all the lives lost whether in Sderot or
23 in Gaza. We're acutely aware that while parts of southern
24 Israel have lived under constant threat from Hamas rockets
25 the resident of Gaza are experiencing significantly greater

1 terror and destruction.”

2 MS DE KOK SC: In the fifth paragraph
3 they write, “As members of the Jewish community we
4 recognise that Israel’s response is an inhumane and
5 disproportionate collective punishment prohibited under
6 international law. We also condemn the long siege Israel
7 has inflicted on the people of Gaza and call for this to be
8 immediately lifted to allow food, medical suppliers, fuel,
9 electricity and foreign aid to reach credible agencies.”
10 The letter that we have at page 280 to 282 purports to be
11 signed by 89 people.

12 MR SHULMAN: Right.

13 MS DE KOK SC: But I think you, can you -
14 are you okay, Mr Shulman?

15 MR SHULMAN: I will be fine. It just
16 went down the wrong way, Ma’am.

17 MS DE KOK SC: Do you want to have a sip
18 of water?

19 MR SHULMAN: That’s what caused the
20 problem.

21 MS DE KOK SC: At this stage the letter
22 is signed by 89 people but eventually it’s signed by I
23 think 310 or thereabouts. Do you recall that?

24 MR SHULMAN: I don’t recall the exact
25 number but, yes, the letter looks familiar.

1 MS DE KOK SC: Yes, and signed by many
2 prominent and well-known Jewish people.

3 MR SHULMAN: Yes.

4 MS DE KOK SC: In fact I recognise quite
5 a few names there as being colleagues of mine at the bar.

6 MR SHULMAN: Correct.

7 MS DE KOK SC: Then if you can turn to
8 page 283. It's a document which runs from 283 to 292. So
9 it has a - you will see it's again an open letter. It has
10 name after name of it seems academic people, professors and
11 so forth.

12 MR SHULMAN: That would seem to be the
13 case.

14 MS DE KOK SC: In the United Kingdom.

15 MR SHULMAN: Yes.

16 MS DE KOK SC: Whereas the other letter
17 that I referred you to was signed only by Jewish people
18 this seems to be signed by all sorts.

19 MR SHULMAN: That would seem to be the
20 case.

21 MS DE KOK SC: Yes. And if you can
22 perhaps just read for the record what - before the
23 signatures start just what the body of the letter says.

24 MR SHULMAN: Ma'am, you have to guide me
25 here.

1 MS DE KOK SC: So it says, "Growing
2 outrage at the killings in Gaza."

3 MR SHULMAN: Okay, so you want me to read
4 -

5 MS DE KOK SC: 283, ja. And you'll see
6 that it's posted on 16 January 2009.

7 MR SHULMAN: Okay.

8 MS DE KOK SC: From there on please.

9 MR SHULMAN: "The massacres in Gaza are
10 the latest phase of a war that Israel has been waging
11 against the people of Palestine for more than 60 years.
12 The goal of this war has never changed, to use overwhelming
13 military power to eradicate the Palestinians as a political
14 force, one capable of resisting Israel's ongoing
15 appropriation of their land and resources. Israel's war
16 against the Palestinians has turned Gaza and the West Bank
17 into a pair of gigantic political prisons.

18 There is nothing symmetrical about this war in
19 terms of principles, tactics or consequences. Israel is
20 responsible for launching and intensifying it and for
21 ending the most recent lull in hostilities. Israel must
22 lose. It is not enough to call for another ceasefire or
23 for more humanitarian assistance. It's not enough to urge
24 the renewal of dialogue and to acknowledge the concerns and
25 sufferings on both sides.

1 If we believe in the principle of democratic
2 self-determination, we affirm the right to resist military
3 aggression and colonial occupation then we are obliged to
4 take sides against Israel and with the people of Gaza and
5 the West Bank. We must do what we can to stop Israel from
6 winning its war. Israel must accept that its security
7 depends on justice and peaceful co-existence with its
8 neighbours and not upon the criminal use of force.

9 We believe Israel should immediately and
10 unconditionally end its assault on Gaza and end the
11 occupation of the West Bank and abandon all claims to
12 possess or control territory beyond its 1967 borders. We
13 call on the British government and the British people to
14 take all feasible steps to oblige Israel to comply with
15 these demands starting with a programme of a boycott,
16 disinvestments and sanctions."

17 MS DE KOK SC: Thank you. So Mr Shulman,
18 clearly and obviously you disagree deeply with everything
19 said in this letter.

20 MR SHULMAN: That would be correct.

21 MS DE KOK SC: Yes. You support or you
22 supported the actions of Israel at the time.

23 MR SHULMAN: That would be correct.

24 MS DE KOK SC: COSATU found themselves on
25 the opposite side of that international debate in that they

1 also opposed the invasion of Gaza.

2 MR SHULMAN: Correct.

3 MS DE KOK SC: And in doing so they were
4 certainly not alone. There were many people in the world
5 who viewed the actions as a massacre.

6 MR SHULMAN: Correct.

7 MS DE KOK SC: And what we then have is
8 the South African Zionist Federation expressing support for
9 this war and the Israeli cause.

10 MR SHULMAN: Correct.

11 MS DE KOK SC: Would it then be
12 legitimate for COSATU and other people who feel strongly
13 about this to march to the South African Zionist Federation
14 to protest?

15 MR SHULMAN: I don't believe so.

16 MS DE KOK SC: You think it would be
17 legitimate, yes.

18 MR SHULMAN: I don't believe it would be
19 legitimate.

20 MS DE KOK SC: Oh I'm sorry. I misheard
21 you. You say it's illegitimate.

22 MR SHULMAN: Correct.

23 MS DE KOK SC: So this SA Zionist
24 Federation has expressed a political view that a war is
25 correct, a particular war, the actions of one party is

1 correct. There are other people who disagree, deeply
2 disagree. How would you proscribe the limits of their
3 right to express this view?

4 MR SHULMAN: It seems to be at a
5 practical level that they have a problem with Israel so
6 they should go to the Israeli embassy.

7 MS DE KOK SC: So they have a problem
8 with the fact that the South Africa Zionist Federation has
9 come out in public support of the conduct of Israel. Does
10 that now mean they are immune to any sort of criticism or
11 consequence?

12 MR SHULMAN: It does not.

13 MS DE KOK SC: And this, the community
14 hall that you refer to where the march was at it's also the
15 offices of the South African Zionist Federation, is it not?

16 MR SHULMAN: It is.

17 MS DE KOK SC: Yes, did you mention that
18 in your evidence in chief?

19 MR SHULMAN: I don't recall. I may have,
20 may not have. But it is the case regardless.

21 MS DE KOK SC: You wouldn't want to gild
22 the lily or create an impression of anti-Semitism where
23 none exists.

24 COURT: Sorry, I can't hear you. I'm not
25 hard of hearing but it becomes worse this time of the day.

1 MS DE KOK SC: I'll try my best, M'Lord.

2 You would not want to exaggerate and to create an
3 impression of anti-Semitism where none should exist.

4 MR SHULMAN: That would be correct.

5 MS DE KOK SC: Yes. So in order for us
6 to understand fully the context of the march which you
7 dealt with in detail in your evidence it would be important
8 for you to disclose that these were also the offices of the
9 South African Zionist Federation who had come out publicly
10 in support of Israel's war in Gaza.

11 MR SHULMAN: It is correct that that is
12 the office and they did come out.

13 MS DE KOK SC: Okay.

14 COURT: Should I adjourn until tomorrow?
15 It's almost 4 o'clock.

16 MS DE KOK SC: Yes, it is, M'Lord, and
17 then hopefully I can get some of my voice back.

18 COURT: I don't know what to say but I
19 hope it happens tomorrow. Court will adjourn.

20 [COURT ADJOURNED]

21 .

22 .

23 .

24 .

25 .

1 [PROCEEDINGS ON 7 FEBRUARY 2017]

2 [10:18] COURT: Sorry we are a bit late today,
3 slightly. I've got no clerk or registrar today. As I
4 understood yesterday Mr Bester, we are not sitting
5 tomorrow, hey?

6 MR BESTER: We will be sitting tomorrow,
7 M'Lord. We will not be sitting once we have finished the
8 proceedings in respect of this particular witness. This
9 will be the only factual witness. What will happen is that
10 we then will intend calling our expert witnesses. The one
11 arrives tomorrow morning, M'Lord. The one was supposed to
12 - the other one was supposed to arrive in South Africa this
13 afternoon at 5. I was notified this morning that he missed
14 his flight from Washington DC yesterday, last night, so
15 that means he'll also only be arriving tomorrow, but we
16 will definitely be sitting tomorrow. I must however point
17 out that it might well be that because of the fact that the
18 other witness who was always going to arrive Wednesday
19 morning only touches down well after 8 o'clock that I do
20 not believe it will be a realistic prospect for us to
21 commence with proceedings at 10 o'clock exactly. It may -

22 COURT: Tomorrow?

23 MR BESTER: Yes, it may then well mean
24 that we will start at 11:30 at the earliest, it seems to
25 me, on my current estimation of where we are in terms of

1 the time, M'Lord.

2 COURT: I just want to arrange my affairs
3 to do some applications for leave to appeal if we're not
4 sitting.

5 MR BESTER: Indeed, M'Lord.

6 COURT: From about half past 9 tomorrow.
7 Anyway, let's see how it goes. Mr Shulman, you're still
8 under oath from yesterday afternoon when we adjourned.

9 BENJAMIN SHULMAN: Thank you, M'Lord.

10 COURT: You understand that, and cross-
11 examination, you may proceed, please.

12 MS DE KOK SC: Thank you, M'Lord.

13 MR BESTER: M'Lord, just one matter of
14 housekeeping; the transcript of yesterday's testimony has
15 been typed out and I beg leave to hand up a copy for Your
16 Lordship's convenience.

17 COURT: Thank you. I'm indebted to you
18 and whoever was involved in doing that. Another
19 housekeeping; I think we commenced the trial yesterday
20 without heads of argument because the parties wanted to
21 await the conclusion of the evidence. Is that so?

22 MS DE KOK SC: Yes.

23 COURT: But I did not have both practice
24 notes. I think I had one. It's not so crucial. You can
25 check amongst yourselves and we can have it later on.

1 MS DE KOK SC: We'll do so, M'Lord.

2 MR BESTER: We'll do so, M'Lord.

3 COURT: Yes, you may proceed.

4 CROSS-EXAMINATION BY MS DE KOK SC (CONTD.):

5 Thank you, M'Lord. Mr Shulman, just to tie up a few loose
6 ends from yesterday, you'll recall that I read to you the
7 heading that appears on this Supernatural blog.

8 MR SHULMAN: I recall.

9 MS DE KOK SC: Yes. I've now placed in
10 the bundle in front of you, at page 326, a printed version
11 which reflects this heading.

12 COURT: Did somebody have my bundle
13 overnight?

14 MS DE KOK SC: It was lying there on the
15 desk this morning.

16 COURT: Oh, yes.

17 MS DE KOK SC: Yes, and we've inserted
18 these documents.

19 COURT: Oh, I couldn't find it last
20 night, but you're referring us now to page 326, is it?

21 MS DE KOK SC: Page 326.

22 COURT: Yes.

23 MS DE KOK SC: Are you there, Mr Shulman?
24 Finally, yes. I just wanted to show you that so that you
25 could see for yourself that I wasn't making it up. That is

1 the heading of the blog.

2 MR SHULMAN: That's correct.

3 MS DE KOK SC: Then if you can turn to
4 page 318, you will recall that I showed you a letter, an
5 open letter signed by a number of prominent Jewish people,
6 but the letter that I showed you had at that stage been
7 signed by about, I think it was 89 persons.

8 MR SHULMAN: I recall, yes.

9 MS DE KOK SC: Yes, and you will recall
10 that I put it to you that it was ultimately signed by more
11 than 300.

12 MR SHULMAN: That's correct.

13 MS DE KOK SC: So what you have in front
14 of you at page 318 to 324 is the final version of that open
15 letter. Do you see that?

16 MR SHULMAN: I do.

17 MS DE KOK SC: And it's signed by 315
18 people.

19 MR SHULMAN: Correct.

20 MS DE KOK SC: This is at page 318 to
21 324. Then if you turn to page 327 you'll see that this is
22 an open letter by a Mr Ostroff to Justice Chaskalson and if
23 we turn to the next page 328 and you look at the right-hand
24 side towards the bottom of the page, the second paragraph
25 there where it says, "As South African Jews we wish to

1 identify ourselves with the sentiments expressed in the
2 statement by over 300 South African Jews entitled," and
3 then it quotes the heading of the other letter. You see
4 that?

5 MR SHULMAN: I do.

6 MS DE KOK SC: Yes. And then if you turn
7 to page 329 you'll see the signatories to this letter,
8 commencing with Justice Arthur Chaskalson and then some
9 others.

10 MR SHULMAN: Yes, I see this.

11 MS DE KOK SC: So Mr Shulman, it is
12 clear, or you will accept that not all Jewish people
13 supported the position taken by the Zionist Federation to
14 support Israel's actions in Gaza?

15 MR SHULMAN: Yes.

16 MS DE KOK SC: At Wits University where
17 you were the chairman of the Student Union, you said that
18 you estimated that there were about 800 Jewish students at
19 Wits at the time and there were about 500 of them who were
20 members of the Student Union.

21 MR SHULMAN: That's correct.

22 MS DE KOK SC: So there were on those
23 estimates about 300 out of the 800 who did not want to be,
24 or chose not to be associated with the union.

25 MR SHULMAN: They chose not to sign up.

1 MS DE KOK SC: Ja. So if we then go back
2 to Mr Masuku's comment on the blog, we've already
3 established that his -

4 MR SHULMAN: Sorry, which page is that?
5 I apologise.

6 MS DE KOK SC: It's at page 3 of that
7 bundle. We've already established that the comment on the
8 blog as well as the meeting at Wits takes place in the
9 broader context of this war in Gaza.

10 MR SHULMAN: That's correct.

11 MS DE KOK SC: And we've already
12 established that COSATU amongst many others, including
13 Jewish people, were strongly opposed to Israel's actions.

14 MR SHULMAN: That's correct.

15 MS DE KOK SC: But the South African
16 Jewish Board of Deputies and the Zionist Federation chose
17 to join this, the political fray, by declaring their
18 support for Israel in the war.

19 MR SHULMAN: That's correct.

20 MS DE KOK SC: And subsequent on them
21 declaring publicly their support COSATU and a number of
22 other organisations marched to the offices of the Zionist
23 Federation to make their views heard.

24 MR SHULMAN: That's correct.

25 MS DE KOK SC: If we look at the blog

1 post at page 9, the authors of this post, or the author
2 exclaim, "Urgent. Stand your ground against COSATU." This
3 is a battle cry, is it not?

4 MR SHULMAN: Yes.

5 MS DE KOK SC: How many people responded
6 to this battle cry? How many Jewish people turned out to
7 protest against COSATU?

8 MR SHULMAN: It would be difficult for me
9 to say exactly. I seem to recall a number of about 250.

10 MS DE KOK SC: Okay. So out of a Jewish
11 community of you say between 60 and 70 000 in the country,
12 about 250 decided that they needed to go and stand their
13 ground?

14 MR SHULMAN: That's correct.

15 MS DE KOK SC: Mr Shulman, there were no
16 incidents of violence at this march and counter march as
17 far as you're aware of, were there?

18 MR SHULMAN: I wasn't outside. It would
19 be difficult for me to comment on what happened outside.

20 MS DE KOK SC: Okay. So you're not aware
21 of any incidents.

22 MR SHULMAN: There were some stuff that
23 was reported in the press, but I can't speak to exactly
24 what they were.

25 MS DE KOK SC: All right. Because in the

1 blog which I think we can accept is a highly partisan blog,
2 in other words just telling the story from one perspective,
3 there's only one incident mentioned in the blog and that is
4 an incident of one of the Jewish people throwing a plastic
5 bottle at the marchers, or at the bus.

6 MR SHULMAN: The blog does mention that,
7 yes.

8 MS DE KOK SC: Yes, and I think we can
9 assume that if there was any violence shown by the marchers
10 against the Jewish persons, this would have indeed been
11 highlighted.

12 MR SHULMAN: Yes.

13 MS DE KOK SC: If we look at the blog
14 post at page 6 -

15 MR SHULMAN: Yes?

16 MS DE KOK SC: - in the third paragraph
17 it says, "The Jewish community outside of the Beyachad" -

18 MR SHULMAN: Beyachad, Ma'am.

19 MS DE KOK SC: Beyachad. "The Jewish
20 community outside of the Beyachad building was incensed to
21 the extent that some of the Muslim protest leaders needed
22 escorts through the crowd in order to get to their cars."
23 Did you witness this?

24 MR SHULMAN: I did not.

25 MS DE KOK SC: Can you think of why the

1 crowd would have been, why are the Muslim protest leaders
2 singled out here in need of protection?

3 MR SHULMAN: I couldn't say, Ma'am. I
4 wasn't outside.

5 MS DE KOK SC: Mr Shulman, there were a
6 diverse group of people who attended this march. It wasn't
7 just COSATU.

8 MR SHULMAN: That's correct.

9 MS DE KOK SC: Yes, there were some
10 Muslim organisations. The South African Council of
11 Churches also had a delegation or representation there.
12 Did you know that?

13 MR SHULMAN: I've no knowledge of the
14 South African Council of Churches' connection to the march.

15 MS DE KOK SC: Okay. You said in your
16 evidence that the march was illegal. How do you know that?

17 MR SHULMAN: At the time the police to my
18 recollection declared it illegal.

19 MS DE KOK SC: The police?

20 MR SHULMAN: That's correct.

21 MS DE KOK SC: How did they do that?

22 MR SHULMAN: To my understanding the
23 police had the power to declare marches legal or illegal.

24 MS DE KOK SC: But did they do so in your
25 presence?

1 MR SHULMAN: They did not do so in my
2 presence.

3 MS DE KOK SC: So when you say the police
4 had declared it illegal, is this something that you have
5 knowledge of or is this what you were told?

6 MR SHULMAN: There was a report in the
7 media at the time talking about how police stopped some
8 protestors from coming because the march was illegal.

9 MS DE KOK SC: So let's just make it
10 clear; your evidence that the march was illegal is based on
11 a report written by someone else?

12 MR SHULMAN: Reported in the media, yes.

13 MS DE KOK SC: You have no personal
14 knowledge of this statement that it was illegal?

15 MR SHULMAN: I've never spoken any, to
16 any police on the matter, no.

17 MS DE KOK SC: So we've spoken about how
18 many people there were, that it wasn't just a COSATU march,
19 but now this case is really concerned with Mr Masuku. So
20 tell us what did Mr Masuku do to your knowledge?

21 MR SHULMAN: I've no knowledge of Mr
22 Masuku's engagement with this march.

23 MS DE KOK SC: Okay. So when you talk
24 about aggression and burning of flags and the like, you
25 can't - you don't want to create the impression in his

1 lordship's mind that Mr Masuku did any of that because you
2 don't know?

3 MR SHULMAN: Never testified to that
4 fact.

5 MS DE KOK SC: Mr Shulman, you testified
6 that there were signs of swastikas at this march, to which
7 you take great offence. If you look at page 3, is that the
8 sign that you're referring to?

9 MR SHULMAN: Yes.

10 MS DE KOK SC: Were there others that you
11 recall, or was this the swastikas that you refer to?

12 MR SHULMAN: I do seem to remember
13 others, but this would be the one that sticks out in my
14 mind.

15 MS DE KOK SC: Okay. It says "Holocaust
16 2009," and then it has Gaza and on either side of Gaza
17 there's a Star of David and there's a swastika.

18 MR SHULMAN: That's correct.

19 MS DE KOK SC: Mr Shulman, you ventured
20 some views as to why this is offensive and what this means,
21 so in light of that I must put to you that what this sign
22 connotes is someone's opinion that what had happened in
23 Gaza in 2009 is a holocaust.

24 [10:38] Now you obviously disagree with that opinion. Mr
25 Shulman, the record doesn't pick up if you only nod.

1 MR SHULMAN: You haven't asked me a
2 question.

3 MS DE KOK SC: Well you were nodding, I
4 thought that you wanted to agree, or yes, I'm so sorry.

5 MR SHULMAN: I'm just listening, Ma'am, I
6 apologise.

7 MS DE KOK SC: I'm sorry. It connotes an
8 opinion, someone's opinion that what is happening there in
9 the war is a holocaust. Do you agree or disagree that it
10 expresses such an opinion?

11 MR SHULMAN: I would agree it expresses
12 such opinion.

13 MS DE KOK SC: Sorry, you said you agree?

14 MR SHULMAN: I agree.

15 MS DE KOK SC: You agree. And you think
16 that that opinion is wrong.

17 MR SHULMAN: That's correct.

18 MS DE KOK SC: But you would surely
19 recognise the right of someone else to hold a contrary
20 opinion to yours.

21 MR SHULMAN: I would recognise that
22 right.

23 MS DE KOK SC: And then it has, it
24 juxtaposes next to Gaza these two signs, sorry you nodded.
25 Do you agree?

1 MR SHULMAN: It does juxtapose those two
2 signs yes.

3 MS DE KOK SC: Yes and I put it to you
4 that what it connotes is the opinion that what is happening
5 in Gaza in 2009 is similar to what happened in Nazi
6 Germany.

7 MR SHULMAN: I would agree, that's part
8 of the opinion.

9 MS DE KOK SC: And so it expresses the
10 opinion that both are wrong. Nazi Germany is wrong and
11 evil and what Israel is doing in Gaza in 2009 is wrong and
12 evil.

13 MR SHULMAN: I would agree.

14 MS DE KOK SC: Yes. So when you
15 testified that you feel, these references to Nazi Germany,
16 makes you feel, as a Jew, that you are being blamed for the
17 holocaust. I think that was your evidence.

18 MR SHULMAN: I don't believe I said that.

19 MS DE KOK SC: Okay well then let me
20 withdraw that, perhaps I misinterpreted what you're saying.
21 But let me put to you, Sir, that this sign is an expression
22 of a political opinion and is not aimed at the Jewish faith
23 or Jewish ethnicity.

24 MR SHULMAN: I would disagree.

25 MS DE KOK SC: Okay. All right so to go

1 back to Mr Masuku's blog, we know the broader context, we
2 know the context of the march, we know that this blog
3 accused COSATU of marching against the Jewish community.
4 And then we know that there were two comments written in
5 response to the blog. The comment from the - the one
6 comment saying that COSATU's actions are evil and that
7 employers should fire employees who belong to COSATU and
8 the comment which says that members of COSATU are monkeys
9 and rape babies. That is also part of the context, not so?

10 MR SHULMAN: Correct.

11 MS DE KOK SC: And in that context Mr
12 Masuku now writes what we see at page 3. If you can just
13 turn to page 3 again he says "Bongani says hi to you all as
14 we struggle to liberate Palestine from the racist, fascist
15 and Zionist that belong to the era of their friend Hitler."
16 Mr Shulman, do you consider that Palestine is free?

17 MR SHULMAN: That's a complicated
18 question, Ma'am. There's certainly a complicated conflict
19 going on.

20 MS DE KOK SC: Okay it's complicated yes.
21 But so you don't take issue with Mr Masuku saying we must
22 struggle to liberate Palestine.

23 MR SHULMAN: He's welcome to that
24 opinion.

25 MS DE KOK SC: He's welcome to that

1 opinion. Thank you. He then describes who Palestine
2 should be liberated from and it should be liberated from
3 the racist, fascist and Zionist. He describes he's of the
4 opinion that the Israeli state and the Zionist ideology is
5 racist because it discriminates and oppresses -
6 discriminates against the Palestinian people. Do you agree
7 that it conveys that?

8 MR SHULMAN: Agree.

9 MS DE KOK SC: Again you don't have to
10 agree with the content of his opinion but you accept his
11 right to hold that opinion.

12 MR SHULMAN: I do.

13 MS DE KOK SC: And when he says belong to
14 the era of their friend Hitler, he is saying these people,
15 the people who are oppressing Palestine, are acting like
16 Hitler. Do you agree?

17 MR SHULMAN: I don't.

18 MS DE KOK SC: Do you think it means
19 something else?

20 MR SHULMAN: I do.

21 MS DE KOK SC: And what do you think it
22 means?

23 MR SHULMAN: The reference here is belong
24 to the era of their friend Hitler. So he's making a direct
25 comparison -

1 COURT: Making what?

2 MR SHULMAN: Direct comparison.

3 COURT: Comparison.

4 MS DE KOK SC: Mr Shulman I'm not going
5 to debate with you the meaning of the words, I just want to
6 challenge what you've said in your evidence in chief. Then
7 we rest, we must not apologise. Every Zionist must be made
8 to drink the bitter medicine that they are feeding our
9 brothers and sisters in Palestine. You'll recognise that
10 as a metaphor, not so?

11 MR SHULMAN: Yes.

12 MS DE KOK SC: And then it calls on the -
13 we must target them, expose them and do all that is
14 necessary to subject them to perpetual suffering until they
15 withdraw from the land of others. So Mr Masuku is talking
16 about a campaign which would have as its aim the withdrawal
17 by Israel from the occupied territories. Do you agree with
18 that?

19 MR SHULMAN: I do not.

20 MS DE KOK SC: Now, Sir, this blog post
21 or this comment rather makes no mention of the Jewish faith
22 or the Jewish ethnicity. Do you agree?

23 MR SHULMAN: I agree.

24 MS DE KOK SC: The post is concerned or
25 the comment is concerned with the occupation of Palestine

1 and those who support that.

2 MR SHULMAN: I would disagree.

3 MS DE KOK SC: Why do you disagree on
4 that?

5 MR SHULMAN: There's nothing in this post
6 that suggests anything to do with the occupation.

7 MS DE KOK SC: Well it says we struggle
8 to liberate Palestine, we say we must - until they withdraw
9 from the land of others.

10 MR SHULMAN: That could mean any number
11 of things.

12 MS DE KOK SC: Sorry that could mean?

13 MR SHULMAN: Any number of things, it
14 doesn't say anything about the occupation.

15 MS DE KOK SC: Tell me why you say this
16 is an attack on Jewish people.

17 MR SHULMAN: I never said that.

18 MS DE KOK SC: So do you then now accept
19 that this post was not aimed at Jewish people in
20 particular?

21 MR SHULMAN: I do not agree.

22 MS DE KOK SC: I'm sorry.

23 MR SHULMAN: I do not agree.

24 MS DE KOK SC: So what is your definitive
25 version on this? Is this post aimed at Jewish people?

1 MR SHULMAN: I believe this post targets
2 the South African Jewish community.

3 COURT: Sorry just lift your voice and
4 let me hear you.

5 MR SHULMAN: Myself -

6 COURT: Yes -

7 MR SHULMAN: Excuse me, I believe that
8 this post does target the South African Jewish community.

9 COURT: Does what?

10 MR SHULMAN: Target -

11 COURT: Target.

12 MS DE KOK SC: And why is that?

13 MR SHULMAN: His references to Hitler and
14 our friends i.e. the people, we were somehow connected to
15 Hitler and also his very broad notion of the idea of every
16 Zionist which could include South Africans.

17 MS DE KOK SC: Well, Mr Shulman, I will
18 argue at the end of the matter that there is no reasonable
19 interpretation or that what you've put forward doesn't
20 support any reasonable interpretation that this a statement
21 based on race or religion ethnicity.

22 COURT: You say what you put forward is
23 not?

24 MS DE KOK SC: Cannot justify an
25 interpretation that this blog post is a statement based on

1 race or religion or ethnicity.

2 COURT: She says she will argue at the
3 end of the day.

4 MR SHULMAN: Very well, Your Lordship.

5 COURT: You can't stop her from doing so.
6 So you've got no comment on that.

7 MR SHULMAN: I have no comment, Your
8 Lordship.

9 COURT: Yes.

10 MS DE KOK SC: M'Lord, I would not
11 ordinarily ask the witness or put to the witness about the
12 meaning of words, but given that it has been dealt with in
13 his evidence I think in fairness I should also put to him
14 what I will argue.

15 COURT: You're perfectly entitled to do
16 that.

17 MS DE KOK SC: Mr Shulman, what time did
18 this march take place, the march in Orange Grove?

19 MR SHULMAN: To my recollection, Ma'am,
20 it was the late afternoon on a Friday.

21 MS DE KOK SC: If we then go to the
22 speech or the events at Wits.

23 MR SHULMAN: Yes, Ma'am.

24 MS DE KOK SC: - the speech took place as
25 part of Israel apartheid week, you've testified to that.

1 MR SHULMAN: That is correct.

2 MS DE KOK SC: And you've said that this
3 Israel apartheid week is an annual event.

4 MR SHULMAN: That is correct.

5 MS DE KOK SC: It happens more or less
6 this time of the year.

7 MR SHULMAN: That is correct.

8 MS DE KOK SC: And it's a global event is
9 it not? It happens at universities all over the world.

10 MR SHULMAN: That is correct.

11 MS DE KOK SC: And it forms part of -
12 well it is driven by people who believe that the system in
13 the occupied territories are akin to apartheid.

14 MR SHULMAN: I would disagree.

15 MS DE KOK SC: Okay, how would describe
16 the movement?

17 MR SHULMAN: They believe the existence
18 of Israel is like apartheid, it has nothing to do with the
19 territory.

20 MS DE KOK SC: Mr Shulman, Mr Bester has
21 indicated that he's having difficulty hearing you. So if
22 you can perhaps just raise your voice a bit.

23 MR SHULMAN: Apologies, is this any
24 better?

25 MS DE KOK SC: I don't think the

1 microphone has the effect of - it's not an amplifier -

2 MR SHULMAN: Oh okay I see. Right I
3 apologise, I will try and speak up.

4 COURT: Thank you.

5 MS DE KOK SC: So you obviously disagree
6 completely with the belief that is behind the Israel
7 apartheid week.

8 MR SHULMAN: Yes I would disagree.

9 MS DE KOK SC: Yes, but you recognise and
10 respect the right of those people to hold that opinion.

11 MR SHULMAN: I do indeed.

12 MS DE KOK SC: Now you testified that in
13 2009 the mood on campus was tense.

14 MR SHULMAN: That's correct.

15 MS DE KOK SC: Or you said, in fact I
16 think the words that you used you said that the Jewish
17 students were on edge.

18 MR SHULMAN: Yes.

19 MS DE KOK SC: And that was presumably
20 because there was a war going on in Gaza and Israel was
21 being roundly condemned by many people for the way it was
22 conducting itself. Did that contribute to them being on
23 edge?

24 MR SHULMAN: Contributed yes.

25 MS DE KOK SC: And then you referred to

1 aggressive activities by the PS -

2 MR SHULMAN: PSC.

3 MS DE KOK SC: PSC.

4 MR SHULMAN: Yes.

5 MS DE KOK SC: And what were these
6 aggressive activities?

7 MR SHULMAN: As I said in my testimony
8 public displays, lectures, guerrilla theatre, that kind of
9 stuff.

10 MS DE KOK SC: What is aggressive about
11 any of that, aren't those all recognised forms of
12 expression?

13 MR SHULMAN: It can still be aggressive.

14 MS DE KOK SC: I want to understand, why
15 are you saying it was aggressive?

16 MR SHULMAN: In my testimony I was not
17 referring only to that week, I was talking generally about
18 PSC activities. So for example it was very common during
19 the time that I was at Wits to come across people being
20 tortured on the library lawns, supposedly as some sort of
21 re-enactment.

22 MS DE KOK SC: I'm not sure that I follow
23 you. Is that now theatre I suppose?

24 MR SHULMAN: Yes.

25 MS DE KOK SC: So a student would enact a

1 Palestinian being tortured.

2 MR SHULMAN: Correct.

3 MS DE KOK SC: And why is that
4 aggressive?

5 MR SHULMAN: It wasn't play, play, Ma'am.
6 It was aggressive, if you are a student who is coming to do
7 your studies and you see someone effectively looking like
8 they're being tortured that is quite a thing to see on a
9 campus.

10 MS DE KOK SC: Mr Shulman, I must
11 disagree with you, there's nothing aggressive about a piece
12 of theatre, protest theatre. Okay, you testified at length
13 as to why you decided to go to this meeting.

14 MR SHULMAN: Yes.

15 [10:58] MS DE KOK SC: Now, I want to make it
16 clear that I do not for one moment challenge your right to
17 have gone to the meeting and to have screamed and shouted
18 as much as you wanted to, but I just want to interrogate
19 some of the reasons advanced by you. What was the topic of
20 the speech that Mr Masuku was due to make at this meeting?

21 MR SHULMAN: I don't recall the title,
22 ma'am.

23 MS DE KOK SC: And you said, if I
24 understood you correctly, that you saw in the programme
25 that Mr Masuku was due to speak.

1 MR SHULMAN: That is correct.

2 MS DE KOK SC: And how long before the
3 lecture or the meeting did you see this programme?

4 MR SHULMAN: It was a long time ago,
5 ma'am, but typically posters for IW tend to be put up maybe
6 a week in advance.

7 MS DE KOK SC: So are you sure that you
8 saw Mr Masuku's name on this programme?

9 MR SHULMAN: Yes.

10 MS DE KOK SC: Because you see Mr Masuku
11 wasn't initially meant to be speaking at the meeting. It
12 was in fact the secretary-general, who was Mr Vavi at the
13 time, the general secretary who was meant to speak and when
14 he became unavailable Mr Masuku stepped into the breach.

15 MR SHULMAN: That might very well be the
16 case, ma'am.

17 MS DE KOK SC: So it might be that you
18 did not see his name on the programme.

19 MR SHULMAN: I can't imagine anywhere
20 else I would have seen it.

21 MS DE KOK SC: So we know that - well,
22 you say that there were about 500 members of the Jewish
23 Student Union at WITS.

24 MR SHULMAN: That's correct.

25 MS DE KOK SC: And you said there were 10

1 Jewish people, not more than 10 at the meeting.

2 MR SHULMAN: That's correct.

3 MS DE KOK SC: Did you know the names of
4 the other Jewish students who were there?

5 MR SHULMAN: Some of them, yes.

6 MS DE KOK SC: Some but not all?

7 MR SHULMAN: Yes.

8 MS DE KOK SC: Were you wearing your
9 union T-shirt?

10 MR SHULMAN: I don't recall that I was.

11 MS DE KOK SC: But some, some people
12 were.

13 MR SHULMAN: Yes.

14 MS DE KOK SC: And did all of you stay
15 till the end of that meeting?

16 MR SHULMAN: Yes.

17 MS DE KOK SC: So we know objectively, Mr
18 Shulman, that the Jewish students who went to the meeting
19 were happy to openly declare that they were Jewish.

20 MR SHULMAN: That is correct.

21 MS DE KOK SC: So whatever the atmosphere
22 at the university may have been, and I'm not accepting your
23 evidence in that regard - what we do know objectively is
24 that the Jewish students weren't fearful of being
25 identified as Jewish.

1 MR SHULMAN: That's correct.

2 MS DE KOK SC: We have a transcript -
3 well, we've listened to a recording of the parts of the
4 meeting. We have three recordings, one is quite lengthy
5 and then there are two other shorter recordings and it's
6 from these that the transcripts have been made. Were you
7 in court yesterday when we played the three recordings?
8 Were you here?

9 MR SHULMAN: I was, ma'am.

10 MS DE KOK SC: Yes, okay. So you've also
11 listened to them. Mr Shulman, you didn't make these -
12 you're not the maker of the recordings, am I right?

13 MR SHULMAN: I'm not.

14 MS DE KOK SC: Do you know who made these
15 recordings?

16 MR SHULMAN: I know where one of them
17 have come from.

18 MS DE KOK SC: Which one is that?

19 MR SHULMAN: I couldn't tell you. I just
20 know that - I know someone who recorded one of them.

21 MS DE KOK SC: I don't quite follow you.
22 You know of one person who recorded.

23 MR SHULMAN: That's correct.

24 MS DE KOK SC: Is that what you say?

25 MR SHULMAN: Yes and their recording was

1 used for the trial. I couldn't tell you which one of the
2 recordings he recorded, if that helps.

3 MS DE KOK SC: Alright. And that person,
4 who was that person?

5 MR SHULMAN: The person's name is Daniel
6 Lipschitz.

7 MS DE KOK SC: And did Mr Lipschitz sit
8 close to you during the meeting?

9 MR SHULMAN: I believe he was fairly
10 close, yes.

11 MS DE KOK SC: Because did you see him
12 record?

13 MR SHULMAN: Yes.

14 MS DE KOK SC: But the other two clips
15 that we have, the shorter ones, you say they didn't come
16 from Mr Lipschitz, they'd come from somewhere else as far
17 as you know.

18 MR SHULMAN: To the best of my knowledge,
19 yes.

20 MS DE KOK SC: So if we then - if we then
21 go to the transcript, if you go to page 259, this is the
22 longest of the three recordings.

23 MR SHULMAN: Yes.

24 MS DE KOK SC: But we can see that it
25 doesn't start - it starts somewhere in the middle of

1 something.

2 MR SHULMAN: That seems to be the case,
3 yes.

4 MS DE KOK SC: It starts in the middle of
5 a sentence because it starts with, "racism and apartheid"
6 but it also seems to start in the middle of - this doesn't
7 seem to be the first, Mr Masuku's opening remarks. Do you
8 agree?

9 MR SHULMAN: Yes.

10 MS DE KOK SC: So somewhere in his speech
11 we have this.

12 MR SHULMAN: Mm, correct.

13 MS DE KOK SC: The other three recordings
14 that we have and that you listened to, the one you'll find
15 at 272, it starts at 272.

16 MR SHULMAN: Okay.

17 MS DE KOK SC: And then the other one is
18 just a one pager, it's at page 278.

19 MR SHULMAN: Yes.

20 MS DE KOK SC: You remember that. Mr
21 Shulman, can you help us to identify in what order we must
22 read these three transcripts? In other words, what came at
23 the beginning of the meeting, what came at the end or have
24 you no idea?

25 MR SHULMAN: Ma'am, the only thing I

1 could say for certain is that the third transcript on page
2 278 seems to be during question time. So that would have
3 come presumably towards the end.

4 MS DE KOK SC: Okay.

5 MR SHULMAN: Where the other two fit
6 between one another I couldn't tell you.

7 MS DE KOK SC: Your description of the
8 events were that there were first some other speakers who
9 introduced Mr Masuku and who invoked some slogans, I
10 suppose - yes, slogans.

11 MR SHULMAN: Correct.

12 MS DE KOK SC: You testified that in
13 doing so they got the crowd riled up, I think those were
14 your words.

15 MR SHULMAN: Correct.

16 MS DE KOK SC: Or emotional.

17 MR SHULMAN: Yes.

18 MS DE KOK SC: Mr Shulman, I am sure that
19 you are - would agree that it is rather customary for such
20 meetings to be, to start off with the cries of "Amandla
21 Awethu."

22 MR SHULMAN: Yes.

23 MS DE KOK SC: You must have been at many
24 meetings where that happened.

25 MR SHULMAN: Sometimes, yes.

1 MS DE KOK SC: And there's nothing
2 sinister about it, it's not meant to rile people up.

3 MR SHULMAN: I believe in this context it
4 was.

5 MS DE KOK SC: Why?

6 MR SHULMAN: Because that's the point of
7 these meetings.

8 MS DE KOK SC: You also said there was
9 some heckling which increased the tensions.

10 MR SHULMAN: I said there was heckling,
11 yes.

12 MS DE KOK SC: No, but you specifically
13 said that that contributed to the tense nature of the
14 meeting. I'll get the portion. It's almost tea, but I'll
15 get the portion in the transcript where you said that.

16 MR SHULMAN: Okay.

17 MS DE KOK SC: But what I just want to
18 find out with you factually is, who was doing the heckling?

19 MR SHULMAN: The Jewish students.

20 MS DE KOK SC: And only the Jewish
21 students?

22 MR SHULMAN: Yes.

23 MS DE KOK SC: Yes. Now sir, do you
24 recall that right at the beginning of Mr - or early, early-
25 early in Mr Masuku's speech there were cries of "Heil

1 Hitler."

2 MR SHULMAN: I recall that, yes.

3 MS DE KOK SC: From the Jewish students
4 aimed at Mr Masuku.

5 MR SHULMAN: That's correct.

6 MS DE KOK SC: Were you one of those
7 crying at him or shouting at him, "Heil Hitler?"

8 MR SHULMAN: Yes.

9 MS DE KOK SC: And what did you mean to
10 convey with that?

11 MR SHULMAN: There was no meaning in what
12 I was doing. It was completely off instinct.

13 MS DE KOK SC: I'm sorry, it was
14 completely?

15 MR SHULMAN: Off instinct, it came out of
16 nowhere.

17 COURT: It was completely what?

18 MR SHULMAN: It came out of nowhere, Your
19 Lordship, it was on instinct. There was no -

20 COURT: Instinct?

21 MR SHULMAN: Instinct, yes.

22 COURT: Oh, instinct.

23 MS DE KOK SC: Instinct.

24 MS DE KOK SC: Are you happy with the -

25 MS DE KOK SC: Sir, you've testified

1 about how offensive the reference to Hitler is.

2 MR SHULMAN: I have, yes.

3 MS DE KOK SC: So should Mr Masuku not
4 take offence if he is called Hitler?

5 MR SHULMAN: I don't believe anyone
6 called him Hitler.

7 MS DE KOK SC: Well, whatever. To whom
8 does the slogan or the greeting "Heil Hitler" relate in
9 that context?

10 MR SHULMAN: I just said it. It was
11 wrong, it was unacceptable, I shouldn't have done it.

12 MS DE KOK SC: Now sir, if I look at this
13 transcript I see from Mr Masuku's side two references,
14 express references to Jewish people. The one you will find
15 at page 267 where he's talking about, "I appreciate the
16 letters that are from ordinary Jews in Israel who said, who
17 continue to say the Zionists are leading us Israelis in a
18 destructive way." Now sir, you have testified liberally as
19 to how you felt at various stages of the speech. How did
20 you feel when Mr Masuku said this?

21 MR SHULMAN: It was fairly late, it
22 seems, in this thing. I was very angry at the time.

23 MS DE KOK SC: I'm sorry, I don't follow
24 your response. You're saying that this made you feel
25 angry?

1 MR SHULMAN: No, no, I'm just -

2 MS DE KOK SC: You were angry.

3 MR SHULMAN: I was then very riled up.

4 MS DE KOK SC: You were already angry.

5 MR SHULMAN: Yes.

6 MS DE KOK SC: But you will agree with me

7 that where Mr Masuku refers specifically to Jewish people,

8 where he uses the word "Jew" at page 267, he is not

9 expressing any hatred against Jewish people.

10 MR SHULMAN: That's correct.

11 MS DE KOK SC: And then there's the

12 reference at page - it starts off, the sentence starts off

13 at 272, it again starts in the middle of a sentence, "who

14 wants a democratic front, that's why I appreciate the Jews

15 like Kasrils and many others who has said the murder of his

16 own brother's people, it is not done in our name, we are

17 Jews of decency, we've got a conscience, we are human

18 beings, we build and respect them" -

19 MR SHULMAN: I apologise, ma'am, I'm

20 just - I'm struggling to find you on the page.

21 MS DE KOK SC: 273.

22 MR SHULMAN: 273, sorry. Right.

23 MS DE KOK SC: So this is the second

24 instance that I have been able to find where Mr Masuku

25 refers specifically to Jewish people by name. I know you

1 say that it is implied everywhere but where he talks about
2 Jewish people.

3 MR SHULMAN: I believe on page 272 he
4 does it, ma'am.

5 MS DE KOK SC: Where in 27 -

6 MR SHULMAN: 17.

7 MS DE KOK SC: Oh, oh yes, yes. "She was
8 a defender of Jews, whether it's 170%" - I don't quite
9 understand what that means.

10 MR SHULMAN: Simply a reference, ma'am.

11 MS DE KOK SC: Yes, thank you. Thank you
12 for pointing that out but where we have the reference at
13 273 from the first line on, there's an express reference to
14 Jewish people.

15 MR SHULMAN: Correct.

16 MS DE KOK SC: And will you agree with me
17 that it is not expressing any hatred against Jewish people.

18 MR SHULMAN: That is correct.

19 COURT: Can we interrupt you and take the
20 tea break or do you want to -

21 MS DE KOK SC: No, I was going to suggest
22 it - well.

23 COURT: Thanks. The court will adjourn
24 for tea.

25 [COURT ADJOURNS COURT RESUMES]

1 [11:43] COURT: Mr Shulman, you're still under
2 oath. You confirm that?

3 MR SHULMAN: Yes -

4 COURT: Don't nod, say something.

5 MR SHULMAN: Yes, Your Lordship.

6 COURT: Ja. Mrs De Kok, you're still
7 busy.

8 CROSS-EXAMINATION BY MS DE KOK SC (CONTD.):

9 Thank you, M'Lord. Mr Shulman, I put it to you that where
10 there is an express reference to Jewish people by Mr Masuku
11 those references are not hateful ones but in fact positive
12 ones.

13 MR SHULMAN: Agree.

14 MS DE KOK SC: And when we look at the
15 transcript -

16 COURT: Sorry, I missed a word there.
17 You say the references are not expressing hatred and what?
18 Your question to him.

19 MS DE KOK SC: Yes, it was they are not
20 hateful ones but positive ones.

21 COURT: Oh, thank you. He has answered?
22 He has answered the -

23 MS DE KOK SC: Yes, and he's agreed with
24 that, M'Lord. And Mr Shulman, if we look at the transcript
25 and if we listen to the recordings it appears that all the

1 references to Jewish people, express references, were
2 uttered by the Jewish students.

3 MR SHULMAN: Ma'am, I disagree.

4 MS DE KOK SC: Right, let's go to page
5 259. Have you got 259?

6 MR SHULMAN: I have got it.

7 MS DE KOK SC: Yes, that's the
8 transcript.

9 MR SHULMAN: Right.

10 MS DE KOK SC: That's the - it's not the
11 beginning, but that's the -

12 MR SHULMAN: That's correct, yes.

13 MS DE KOK SC: - part that we have where
14 Mr Masuku is talking about racism and apartheid in South
15 Africa. He's talking about people who do not accept that
16 other people must live in peace and that other people
17 deserve dignity, deserve food, so he's talking about
18 ideology and conduct. Do you agree?

19 MR SHULMAN: Agree.

20 MS DE KOK SC: Yes. And then we see at
21 line 15 someone interjects and says, "Including Jews."
22 It's got an exclamation at the end, so I assume that it's
23 shouted. Do you see that?

24 MR SHULMAN: I do, Ma'am.

25 MS DE KOK SC: And that male voice is the

1 voice of one of the Jewish students, not so?

2 MR SHULMAN: It is.

3 MS DE KOK SC: So where up to now Mr
4 Masuku was talking about beliefs and conduct, this person
5 is now making it about Jews.

6 MR SHULMAN: That's correct.

7 MS DE KOK SC: Then Mr Masuku goes on and
8 he talks about the campaign from the trade unions in
9 Australia. You see that?

10 MR SHULMAN: Yes, I do, Ma'am.

11 MS DE KOK SC: That there must be a
12 campaign of boycott, disinvestment and sanctions against
13 Israel, and this is "the Australian are suggesting we must
14 make life difficult for anyone who supports Israel." You
15 see that?

16 MR SHULMAN: I do.

17 MS DE KOK SC: So again Mr Masuku is
18 talking about ideology and conduct. Agree?

19 MR SHULMAN: Agreed.

20 MS DE KOK SC: And then we have another
21 interjection from the male voice, "Especially Jews," and
22 that's an interjection by one of the Jewish students, not
23 so?

24 MR SHULMAN: Correct.

25 MS DE KOK SC: So again whereas Mr Masuku

1 did not talk about Jews, it's the Jewish student who wants
2 to make it about Jews.

3 MR SHULMAN: Correct.

4 MS DE KOK SC: Now Mr Shulman, you
5 testified as to how you perceived some of the words to be
6 scary.

7 MR SHULMAN: That's correct.

8 MS DE KOK SC: Yes. But we know that you
9 didn't leave the meeting.

10 MR SHULMAN: That's correct.

11 MS DE KOK SC: Neither did any of the
12 other Jewish students.

13 MR SHULMAN: That's correct.

14 MS DE KOK SC: You stayed till the end
15 and you were vocal till the end.

16 MR SHULMAN: That's correct.

17 MS DE KOK SC: So objectively, if we just
18 look at the objective facts, they don't indicate that you
19 or any of the other students felt scared or intimidated.

20 MR SHULMAN: I don't agree.

21 MS DE KOK SC: Why not?

22 MR SHULMAN: Leaving a room is not an
23 indication of scaredness or other, not.

24 MS DE KOK SC: Do you know Mr Klevansky?

25 MR SHULMAN: I do, yes.

1 MS DE KOK SC: How and where do you know
2 him from?

3 MR SHULMAN: He was a student at the
4 time.

5 MS DE KOK SC: Okay, you're still in
6 contact with him?

7 MR SHULMAN: I haven't been in contact
8 with Mr Klevansky for many years.

9 MS DE KOK SC: Oh, so you've lost
10 contact?

11 MR SHULMAN: Was never in contact, Ma'am.

12 MS DE KOK SC: Okay. All right. So you
13 knew him at the time.

14 MR SHULMAN: That's correct.

15 MS DE KOK SC: Now if you go to page 55
16 of the bundle - or let me first ask you, was Mr Klevansky
17 at that meeting, the meeting of 5 March?

18 MR SHULMAN: Yes, he was, Ma'am.

19 MS DE KOK SC: Was he a member of the
20 Student Union, SAUJS?

21 MR SHULMAN: I couldn't tell you, Ma'am.

22 MS DE KOK SC: Can't remember?

23 MR SHULMAN: I don't know.

24 MS DE KOK SC: Have you found page 55?

25 MR SHULMAN: Apologies. I'm looking for

1 page 55, Ma'am?

2 MS DE KOK SC: 55, yes. It's immediately
3 after the photographs.

4 MR SHULMAN: The letters page.

5 MS DE KOK SC: Ja.

6 MR SHULMAN: Okay.

7 MS DE KOK SC: M'Lord, it's the page
8 immediately after the last photo. So the -

9 COURT: The very small print?

10 MS DE KOK SC: Yes. This is the letters
11 page of the South African Jewish Report for the period 13
12 to 20 March 2009. Do you see that?

13 MR SHULMAN: I do, Ma'am.

14 MS DE KOK SC: And you confirm that that
15 is what it is?

16 MR SHULMAN: That is correct.

17 MS DE KOK SC: You see there's a letter
18 there from Jani Klevansky?

19 MR SHULMAN: That is correct.

20 MS DE KOK SC: Did you see it at the
21 time?

22 MR SHULMAN: I did.

23 MS DE KOK SC: Did you read this letter
24 at the time?

25 MR SHULMAN: I did.

1 MS DE KOK SC: Mr Klevansky says that "On
2 March 5 I attended the Wits PSC talk with COSATU's Bongani
3 Masuku, part of the Israel apartheid week campaign on
4 campus. The content of his talk was unsurprising. It was
5 filled with the same rhetoric that has been circulating
6 through the media since the recent Gaza conflict, as well
7 as the same content that I as a fourth-year student at Wits
8 was experienced the PSC's ongoing campaigns have become
9 familiar with." Now firstly I just want to ask you
10 something. You've testified that this meeting was unlike
11 anything that you've ever encountered before.

12 MR SHULMAN: That is correct.

13 MS DE KOK SC: It seems that Mr Klevansky
14 didn't experience it like that. He said it was same old
15 hat.

16 MR SHULMAN: He hasn't expressed an
17 opinion on any lectures, Ma'am.

18 MS DE KOK SC: No, no, he says "The
19 content of his talk was unsurprising." So he didn't think
20 that it was anything unusual.

21 MR SHULMAN: Okay.

22 MS DE KOK SC: "However, the reason I
23 left the talk with a feeling of embarrassment, disgust and
24 overall frustration was not due to the call to boycott
25 Israel from COSATU and the PSC. This I expected. What I

1 did not expect was the behaviour of a large portion of
2 Jewish students present. From the beginning of the talk
3 this behaviour was apparent. Following the 'Amandla
4 Awethu" and "Forward with the resistance, forward" chants,
5 loud and clear "heil Hitler" was shouted out by" - and then
6 I'm afraid there's a hole through my, a, it could be "a
7 Jewish student," or - ja, I think it's "a Jewish - this set
8 the tone for the rest of the address which was repeatedly
9 interrupted by loud shouting, sarcastic comments and
10 remarks, all of which were aimed at disrupting Masuku's
11 speech, which never succeeded as he ignored the comments
12 and continued his speech." Now you've already confirmed
13 that from the beginning of Mr - or right at the beginning
14 of Mr Masuku's address you amongst others shouted "heil
15 Hitler."

16 MR SHULMAN: Correct. It was just me,
17 Ma'am.

18 MS DE KOK SC: Was it just you?

19 MR SHULMAN: Yes.

20 MS DE KOK SC: Oh, so you are the Jewish
21 student referred to here?

22 MR SHULMAN: Correct.

23 MS DE KOK SC: Yes, and this was done
24 before Mr Masuku could even have said anything -

25 MR SHULMAN: That's correct.

1 MS DE KOK SC: - have said anything that
2 could have offended you.

3 MR SHULMAN: That's correct.

4 MS DE KOK SC: Yes, okay. Okay, then Mr
5 Klevansky says that, "Aside from showing no respect for the
6 forum or the speaker, the childish behaviour of these
7 students, some of which were SAUJS members, is in my
8 opinion indicative of a broader problem within the Jewish
9 community. Instead of making full use of the event and
10 using question time to pose well thought-out probing and
11 hard-hitting questions to Masuku that undermines his and
12 the PSC's flawed view on the subject, these students
13 preferred this strategy of being highly disruptive in order
14 to incite Masuku to make a blatantly anti-Semitic comment
15 that can be used against him." And then Mr Klevansky says
16 in brackets, "(I was informed of this by one such student
17 before the talk.)" Now Mr Shulman, was there such a
18 strategy to try and provoke Mr Masuku into saying something
19 that could be described as anti-Semitic and used against
20 him?

21 MR SHULMAN: There was not.

22 MS DE KOK SC: So if one student told Mr
23 Klevansky that, it wasn't you? You couldn't have been that
24 student?

25 MR SHULMAN: It certainly wasn't me.

1 MS DE KOK SC: Mr Klevansky then says,
2 "All too often the prevailing view in the community,
3 particularly on campus, is that harsh criticism of Israel
4 is rooted in anti-Semitic sentiment. I dare not deny that
5 this is the case in many instances, but where it is not, as
6 in this case, we are obliged to provide opposition to these
7 critics that deals with actual content which shows up their
8 factual errors that recognises the complexity of the
9 situation as opposed to mere public disruption made in the
10 name of anti-Semitism." So what we can see here is that Mr
11 Klevansky did not perceive the events at the meeting as
12 being anti-Semitic.

13 MR SHULMAN: That seemed to be his
14 position, yes.

15 MS DE KOK SC: Mr Shulman, you testified
16 about Mr Masuku's reference to families sending their sons
17 or daughters to fight in the Israeli army. Remember that
18 statement?

19 MR SHULMAN: That's correct, yes.

20 MS DE KOK SC: Do you know any South
21 African citizens who have gone to do military service in
22 Israel?

23 COURT: Who do what?

24 MS DE KOK SC: Who have gone to do
25 military service in Israel?

1 MR SHULMAN: I do.

2 MS DE KOK SC: Have you heard of the
3 Regulation of Foreign Military Assistance Act?

4 MR SHULMAN: I have.

5 MS DE KOK SC: And what do you know about
6 the act?

7 MR SHULMAN: Ma'am, you'll appreciate I'm
8 not a lawyer.

9 MS DE KOK SC: No. Your layman's
10 interpretation of it.

11 MR SHULMAN: That it's an act designed to
12 deal with mercenary activity.

13 MS DE KOK SC: Okay, so that's your
14 layman's interpretation?

15 MR SHULMAN: That's correct.

16 MS DE KOK SC: Okay. There's another
17 interpretation of course, an interpretation which says that
18 it prohibits a South African citizen from serving in the
19 army of another country without prior permission. I'm sure
20 you've heard that there are many people who say that that
21 is what the act means.

22 MR SHULMAN: I believe that could be
23 possible, yes.

24 MS DE KOK SC: Yes. And if that
25 interpretation is correct then South Africans who elect to

1 go and serve in the Israeli army would be - without this
2 prior consent would be committing an offence?

3 MR BESTER: M'Lord, with respect, it
4 seems to me that the question is of a legal nature. It's
5 not for this witness to come up with an answer - he's a
6 factual witness - to come up with an answer as to whether
7 certain kinds of conduct stand to be criminalised under
8 that particular statute. It's perhaps a matter best left
9 for argument, but I'm not sure it's appropriate for my
10 learned friend to pose a question which really requires the
11 witness to express a legal opinion on something which he's
12 simply not capable of doing.

13 COURT: But can't the witness be asked to
14 indicate whether something is allowed by law or not without
15 going into details or the purpose of the legislation in
16 whole.

17 [12:03] But whether something is right or wrong, a
18 factual witness I am sure can do that. What anybody in the
19 room would be asked, for example, if you drink and drive is
20 it wrong or right in the law. It doesn't have to refer to
21 the relevant statute or something. Is it not something
22 which is mundane?

23 MR BESTER: M'Lord, that would be - Your
24 Lordship is correct insofar as that analogy, that example
25 is concerned.

1 COURT: Yes.

2 MR BESTER: The drunken driving scenario.

3 COURT: Yes.

4 MR BESTER: Because that is a notoriously

5 mundane fact which every member of the public will know

6 about. However, one is dealing here with a specialist

7 piece of legislation which is not something which is

8 notorious and generally known within the public remit.

9 It's therefore on that basis already distinguishable but it
10 goes further. What the question presupposes is some sort

11 of interpretation really on the part of the witness of the

12 legislation. One, he does not have the statute in front of

13 him and, two, it's not for the witness to interpret the

14 statute to say whether certain forms of conduct fall within

15 the ambit of the statute and therefore stand to be

16 criminalised. That's the point of distinction. So from

17 where we stand, and I will leave it at that, this line of

18 questioning is not appropriate in relation to this witness.

19 COURT: Ms De Kok, there is an objection

20 to your -

21 MS DE KOK SC: M'Lord, the purpose -

22 COURT: - line of questioning.

23 MS DE KOK SC: The purpose of the

24 question is not to ask the witness to interpret the

25 legislation, but Your Lordship will recall that he

1 testified about the statement that Mr Masuku had made to
2 say that if any family sends their son or daughter to serve
3 in the Israeli Army they must be - they must not be
4 surprised if something happens to them. The witness
5 testified that that thing is sinister and I want to explore
6 with him whether that thing isn't merely a reference to
7 possible criminal prosecution or culpability. So he
8 doesn't have to say yes, it is illegal or it's not illegal.

9 COURT: This particular legislation under
10 discussion, has it not got some international
11 interpretation or violation by South African citizens by
12 going elsewhere to become members of a foreign country's
13 military? In other words, it's not a local piece of
14 legislation only, it's got foreign law implications, isn't
15 it? But I hear what you say, overall I think I should
16 overrule your objection.

17 MS DE KOK SC: Thank you, M'Lord.

18 COURT: Mr Bester.

19 MR BESTER: As the court pleases, M'Lord.

20 COURT: Yes.

21 MS DE KOK SC: So Mr Shulman, do you want
22 me to remind you of what the question was?

23 MR SHULMAN: Please, ma'am.

24 MS DE KOK SC: Yes. So the question was
25 that if it is found that it is illegal to, for a South

1 African citizen to go and fight in the army of another
2 country, then people involved in that would be liable to
3 criminal prosecution.

4 MR SHULMAN: My understanding in this
5 instance is that it wouldn't be considered legal - excuse
6 me, that it wouldn't be considered illegal but I do
7 understand that interpretation is out there.

8 MS DE KOK SC: Yes. No Jewish person
9 living in South Africa is obliged to serve in the Israeli
10 Army, not so?

11 MR SHULMAN: I'd say that's not correct.
12 Excuse me ma'am, sorry - please repeat the question?

13 MS DE KOK SC: A South African citizen
14 living in South Africa who is Jewish is not obliged to go
15 and fight in the Israeli Army?

16 MR SHULMAN: That is correct, they're not
17 obliged.

18 MS DE KOK SC: So if they do do so, they
19 do so voluntarily and as a result of a conscious decision
20 to do so.

21 MR SHULMAN: That's not true.

22 MS DE KOK SC: Why is that?

23 MR SHULMAN: Someone may very well be
24 that if they moved to Israel then they would be
25 conscripted.

1 MS DE KOK SC: Yes. No, I understand
2 that there's conscription for Israelis - well, for Jewish
3 Israeli citizens, not for all Israeli citizens, only for
4 Jews.

5 MR SHULMAN: Correct.

6 MS DE KOK SC: But I'm talking about a
7 South African citizen who lives here.

8 MR SHULMAN: Yes, that would be the case.

9 MS DE KOK SC: If that person goes and
10 fights in the Israeli Army, that is a conscious decision
11 that that person is taking.

12 MR SHULMAN: Correct.

13 MS DE KOK SC: And if it is a young
14 person, a person of 17 or 18, someone who goes after school
15 - have you come across that, that young Jewish men leaving
16 school go to the army in Israel first?

17 MR SHULMAN: Yes.

18 MS DE KOK SC: You've come across that.

19 MR SHULMAN: Yes.

20 MS DE KOK SC: If they choose to do so
21 then surely their families would be involved in that
22 decision, would support that decision.

23 MR SHULMAN: I couldn't possibly comment.

24 MS DE KOK SC: Yes, but it would seem
25 unlikely that a 17 or 18 year old would go to Israel to

1 fight in the army without support from their parents.

2 MR SHULMAN: I just couldn't possibly
3 comment, ma'am.

4 MS DE KOK SC: No, but what I -

5 COURT: I think the question is clearly
6 anticipating a speculative answer.

7 MS DE KOK SC: I withdraw the question,
8 M'Lord, but what I want to just put to the witness, Mr
9 Shulman, is that when Mr Masuku talks about a South African
10 family who sends their daughter or son, he is talking about
11 families here who consciously decide, South African
12 families who decide that they will support or send off
13 their son or daughter to voluntarily go and fight in that
14 army.

15 MR SHULMAN: I can't comment on what Mr
16 Masuku means.

17 MS DE KOK SC: Right. And sir, if you
18 are of the opinion, as Mr Masuku is, that the Israeli Army
19 has committed war crimes, then you would - you would expect
20 him to criticise a decision to voluntarily go and join such
21 an army.

22 MR SHULMAN: I agree.

23 MS DE KOK SC: Mr Shulman, I'm not - you
24 testified about what you believed certain of the statements
25 to mean. I'm not going to debate that with you. I just

1 want to put to you that none of these statements of which
2 you complain can reasonably be read as being based on
3 Judaism as a religion or Jewishness as a race or ethnicity.

4 MR SHULMAN: Not directly, no.

5 COURT: Sorry?

6 MR SHULMAN: Not directly, Your Lordship.

7 COURT: Yes, anything further?

8 MS DE KOK SC: If Your Lordship will just
9 bear with me for one minute.

10 COURT: Yes.

11 MS DE KOK SC: I have no further
12 questions, M'Lord.

13 COURT: Thank you. Re-examination, Mr
14 Bester?

15 RE-EXAMINATION BY MR BESTER: Thank you,
16 M'Lord. Mr Shulman, during your cross-examination you told
17 His Lordship that the Jewish communal offices also house
18 the Zionist Federation of South Africa, do you recall that?

19 MR SHULMAN: I do.

20 MR BESTER: How many other Jewish
21 organisations share the same premises?

22 MR SHULMAN: Perhaps a dozen.

23 MR BESTER: Would you care to list some
24 of these organisations, to the extent that you can?

25 MR SHULMAN: There's the Jewish Board of

1 Deputies, the South African Union of Jewish Students, the
2 accounting department for the Beyachad Building, the UCF -
3 the United Communal Campaign - there's the Jewish National
4 Fund, there's Beit Holochem.

5 MR BESTER: Sorry, what is Beit Holochem?
6 What is that and would you spell that, please?

7 MR SHULMAN: It's B-E-I-T - oh, I
8 apologise, Mr Bester. It's a difficult spelling. I could
9 try and get it for the court.

10 MR BESTER: No, that's fine. Just to
11 assist His Lordship.

12 COURT: Yes, thank you, thank you for
13 that, Mr Bester. I've got half an answer here. B-E-I-T.

14 MR SHULMAN: I'm scared I've got the
15 wrong spelling.

16 COURT: Just pronounce it, let's try and
17 make sense of it?

18 MR SHULMAN: Holochem, H-O -

19 COURT: H-O-

20 MR SHULMAN: l -

21 COURT: L?

22 MR SHULMAN: C-H -

23 COURT: C-H.

24 MR SHULMAN: E-M.

25 COURT: E-M, thank you.

1 MR BESTER: I'm indebted to Your
2 Lordship.

3 MR SHULMAN: The Magen David Adom which
4 is an ambulance service.

5 MR BESTER: Would that be an ambulance
6 service that takes Jewish people to hospital and so forth?

7 MR SHULMAN: Yes.

8 MR BESTER: Continue.

9 MR SHULMAN: Beit Hatfutsach - sorry,
10 Your Lordship. B-E-I-T.

11 COURT: Again?

12 MR SHULMAN: H-A-T.

13 COURT: H-A-T.

14 MR SHULMAN: F-U-T.

15 COURT: F-U-T.

16 MR SHULMAN: T-A-C-H.

17 COURT: T-A-C-H. How do you pronounce
18 that?

19 MR SHULMAN: Beit Hatfutsach.

20 COURT: Is that a German word?

21 MR SHULMAN: I believe it's Yiddish, Your
22 Lordship.

23 COURT: Oh, thanks.

24 MR SHULMAN: It's a historical society
25 devoted to conducting historical analysis of Jewish

1 history. There is something called the Israel Centre which
2 is housed there, there is - I'm trying to think what else
3 might be located - something called WIZO, which is the
4 Women's International Zionist Organisation. There is a
5 library, a Jewish library, Jewish archive, video centre.

6 MR BESTER: If I can just pause you
7 there. The Jewish library, what kind of books would that
8 then house?

9 MR SHULMAN: A range of books dealing
10 with everything from Jewish religion to Jewish history to
11 Jewish sociology to Jewish thinkers which includes Zionist
12 thinkers. Basically a broad spectrum of Jewish related
13 literature.

14 MR BESTER: Now we know that this or
15 these premises, rather, are located in Raedene, if I
16 understand it, which is in Johannesburg close to Orange
17 Grove.

18 MR SHULMAN: That's correct.

19 MR BESTER: If I understand you. Now
20 which community's interests do all these institutions and
21 bodies serve and promote?

22 MR SHULMAN: The South African Jewish
23 community.

24 MR BESTER: Then if I can ask you to
25 briefly turn to page 279.

1 MR SHULMAN: Yes.

2 MR BESTER: This is the public letter
3 penned by Nathan Geffen and various others. I understand
4 you to have said that ultimately plus-minus 310 people
5 signed up to this letter, is that correct?

6 MR SHULMAN: That's correct.

7 MR BESTER: According to your information
8 that you're aware of, how many Jews are there in total in
9 South Africa?

10 MR SHULMAN: Between 60 and 70 000.

11 MR BESTER: Now if I can ask you to go to
12 page 3, you were referred to, by my learned friend, to the
13 photograph of the march on the Jewish communal offices and
14 there was the Star of David. Do you see that in the
15 photograph?

16 MR SHULMAN: I do.

17 MR BESTER: So the Star of David is a
18 symbol of what?

19 MR SHULMAN: Jews.

20 MR BESTER: Jews?

21 MR SHULMAN: Yes.

22 MR BESTER: And then do Zionists have a
23 separate symbol that they use?

24 MR SHULMAN: Not that I'm aware of.

25 MR BESTER: If you go up to the page,

1 obviously we've dealt both during examination in chief and
2 cross-examination extensively with the reference to the -
3 reference to the word "Hitler," but in the main insofar as
4 it concerns you, who did Hitler kill in concentration camps
5 in Germany?

6 MR SHULMAN: Jews.

7 MR BESTER: Then if I can ask you,
8 insofar as the actual march is concerned, you were in the
9 parking lot, as I understand from what you indicated.

10 MR SHULMAN: That's correct.

11 MR BESTER: Now from where you stood was
12 there anything that you observed that indicated to you that
13 the marchers were specifically targeting the South African
14 Zionist Federation?

15 MR SHULMAN: No.

16 MR BESTER: On what do you base that?

17 MR SHULMAN: That I saw nothing that
18 suggested that they were targeting the Zionist Federation.
19 There were no signs, there was nothing that I recall that
20 even said anything about the Zionist Federation.

21 MR BESTER: And then finally, you were
22 referred to South Africans who joined the Israeli Defence
23 Force. Let me understand, those that you are aware of who
24 have done that, what ethnic group do they emanate from?

25 MR SHULMAN: Jews.

1 COURT: Only the Jews?

2 MR SHULMAN: Only Jews.

3 COURT: Thank you.

4 MR BESTER: I've no further questions for
5 this witness, M'Lord.

6 COURT: Thank you. Mr Shulman, thank you
7 for your evidence, you are excused.

8 MR SHULMAN: Thank you, Your Lordship.

9 [NO FURTHER QUESTIONS - WITNESS EXCUSED]

10 COURT: Mr Bester, what is the further
11 conduct of the trial now?

12 MR BESTER: M'Lord, as I indicated at the
13 commencement of proceedings this morning, the one expert
14 witness unfortunately missed his flight to South Africa in
15 the late hours of last night from Washington DC. The
16 position is that he will then most likely be arriving
17 tomorrow afternoon late. However, the other expert
18 witness, as I indicated, arrives tomorrow morning, until
19 shortly after nine. The result is that he will then be
20 brought to court directly from the airport. I have
21 canvassed this issue with my learned friend already during
22 the tea adjournment.

23 The proposal that we have come up with is that,
24 to avoid any delays once he touches down in South Africa,
25 that we then adjourn the proceedings and commence again at

1 noon tomorrow. That will certainly leave him enough time
2 to go through customs and immigration, take the Gautrain
3 and then - all the way to Park Station and then get a cab
4 to be brought to court. It also will avoid the risk of us
5 hoping for the best and then starting at 11:30 and then
6 there might be a slight delay, but we're confident that a
7 noon start will at least leave us that extra window of
8 opportunity to make sure that we then can start properly
9 with this particular witness. And the other expert will
10 then either be - well, he will then have to roll over until
11 Thursday now.

12 [12:23] No doubt given that he'll only arrive in South
13 Africa tomorrow afternoon later, after the close of court
14 time.

15 COURT: Mrs De Kok, I have a request at
16 this stage to adjourn the proceedings until tomorrow about
17 midday and which has been discussed with you. Are there
18 any objections?

19 MS DE KOK SC: No, M'Lord, I've already
20 agreed with my learned friend that subject to Your
21 Lordship's approval and convenience we will agree to that
22 as well.

23 COURT: Mr Bester, if I look further
24 ahead you're going to call two expert witness.

25 MR BESTER: Two expert witnesses, the one

1 who missed his flight deals with a very narrow issue.

2 COURT: Yes.

3 MR BESTER: So we don't envisage, M'Lord,
4 that his testimony will be all that long. The other one
5 will be a little bit longer, but those will be our two
6 expert witnesses and we don't intend calling any further
7 factual witnesses. So we will then no doubt close our case
8 after those witnesses have concluded their testimony.

9 COURT: That will put us more or less
10 towards end of Thursday, possibly into Friday depending on
11 cross-examination and we have until Monday.

12 MR BESTER: Tuesday.

13 COURT: Tuesday.

14 MR BESTER: Yes we have the full benefit
15 of Tuesday.

16 COURT: To finalise the trial. Will you
17 fit into that, for us to complete the trial as scheduled?

18 MS DE KOK SC: M'Lord, from our side we
19 have the one expert.

20 COURT: I don't want to prejudge issues,
21 I just want to have an indication, our program is tight
22 here from this week, we're moving to something else next
23 week like full bench appeals and other things which require
24 reading. I just want to get a feel are we really
25 realistically still on track if that happens, which you're

1 requesting me to do, both of you.

2 MS DE KOK SC: M'Lord, it's difficult
3 from my side to judge how much time is still needed because
4 I am not sure how my learned friend is going to lead the
5 experts, whether they'll be going in detail through their
6 reports or not. So I don't want to - I'd prefer not to
7 commit myself to say to Your Lordship there's no reason for
8 concern, we will definitely finish. I can't do that. But
9 the other alternative, the other alternative, my learned
10 friend is in a position where both his witnesses are
11 unavailable for this afternoon and tomorrow. And I am not
12 going to say to Your Lordship well that means he can't call
13 them or he must close his case, I'm not going to do that.
14 So that's the position we find ourselves in.

15 COURT: Well unfortunately this is a kind
16 of matter where I cannot call upon the respondents to
17 commence with their evidence before the conclusion of the
18 applicants. If I could do that I would call upon you to
19 proceed with your witnesses in the interim, but then the
20 picture becomes a bit cockeyed.

21 MS DE KOK SC: Yes.

22 COURT: Well reluctantly, Mr Bester, I'm
23 going to adjourn these proceedings until tomorrow by noon,
24 tomorrow being the 8th of February 2017 and hope for the
25 best, that there's no missing of an Uber from the airport

1 to Johannesburg High Court tomorrow. Court will adjourn.

2 [COURT ADJOURNED]

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1 [PROCEEDINGS ON 8 FEBRUARY 2017]

2 [12:00] COURT: Yes, Mr Bester.

3 MR BESTER: May it please the court,
4 M'Lord. Just a small matter of housekeeping before we
5 commence with the next witness. The transcript of
6 yesterday's proceedings is now available and I beg leave to
7 hand up a copy for Your Lordship's convenience.

8 COURT: Thank you.

9 MR BESTER: M'Lord, it transpires that
10 there's already a copy in your court file, but be that as
11 it may, we can perhaps just take that back and that will
12 then avoid confusion. My apologies for that.

13 COURT: Yes.

14 MR BESTER: If I may then call to the
15 witness stand Dr David Hirsh.

16 COURT ORDERLY: Please state your full
17 names for the record.

18 DR HIRSH: My name is David Simon Hirsh.

19 COURT ORDERLY: Do you affirm that the
20 evidence you are about to give is the truth, the whole
21 truth, and nothing but the truth? If so say "I do."

22 DAVID SIMON HIRSH: I do.

23 COURT ORDERLY: Witness sworn in.

24 COURT: Your witness. You may proceed.

25 EXAMINATION BY MR BESTER: Dr Hirsh, you

1 can be seated. Dr Hirsh, before we start, you will have
2 two files with you. The one will be marked on the spine
3 trial bundle. You can put that aside for the moment. The
4 other one will be marked pleadings, notices, discovery
5 affidavit and expert notices. That's the one that we are
6 going to be referring to and if you open that file, if you
7 go just about two-thirds down the way you'll find a file
8 divider marked expert notices and summaries, if you can
9 just make your way down there and then specifically to page
10 11 of that section of the file.

11 COURT: These notices are not in the
12 trial bundle, is it?

13 MR BESTER: No, M'Lord, they'll be in the
14 pleadings bundle.

15 COURT: Pleadings.

16 DR HIRSH: It's not quite marked, the
17 page numbers. 11, okay.

18 MR BESTER: Page 11.

19 DR HIRSH: Okay, this is my statement,
20 yes.

21 MR BESTER: Your expert summary, yes.

22 DR HIRSH: Okay.

23 COURT: I'm a bit lost now.

24 MR BESTER: Certainly, M'Lord, perhaps if
25 I can be of assistance. It should read, it starts off with

1 "Index to expert notices and summaries."

2 COURT: Thank you.

3 MR BESTER: Dr Hirsh, where do you live?

4 DR HIRSH: I am in London.

5 MR BESTER: And what is it that you do
6 there?

7 DR HIRSH: I am an academic. I teach
8 sociology and I write about sociology at the, at Goldsmith,
9 which is a college of the University of London.

10 MR BESTER: Very briefly I'm just going
11 to deal with your qualifications, if I can just ask you
12 your witness summary, if you can turn to page 29.1 thereof,
13 there should be a -

14 DR HIRSH: My CV.

15 MR BESTER: - copy of your CV.

16 DR HIRSH: Yes.

17 MR BESTER: Do you confirm that to be a
18 true and correct copy of your CV?

19 DR HIRSH: Yes.

20 MR BESTER: I notice that you have a MA
21 in Philosophy and Social Theory and you also have a PhD in
22 Sociology, I should say. Is that correct?

23 DR HIRSH: Ja, PhD in Sociology, MA is in
24 Philosophy and Social Theory.

25 MR BESTER: And you've written a book,

1 Law against Genocide: Cosmopolitan Trials.

2 DR HIRSH: Yes, that was a published
3 version of my PhD thesis.

4 MR BESTER: I see. And then you also
5 appear to have participated in various fora at the OSCE
6 Conference on Combating Anti-Semitism -

7 DR HIRSH: Yes,

8 MR BESTER: - at the German Parliament in
9 Berlin in 2008, the London Conference for Combating Anti-
10 Semitism in 2009, and the Inter-parliamentary Conference on
11 Combating Anti-Semitism in Ottawa Canada in 2010. Is that
12 all correct?

13 DR HIRSH: Ja, that is correct.

14 MR BESTER: And then you were also a
15 visiting research associate at Yale University in the
16 United States in 2006/2007.

17 DR HIRSH: Yes, that is correct.

18 MR BESTER: Then just finally, you
19 published scholarly peer reviewed journal articles and book
20 chapters on anti-Semitism. Is that so?

21 DR HIRSH: Yes.

22 MR BESTER: How many of those have you
23 published, if you could just remember off-hand?

24 DR HIRSH: Specifically peer reviewed?

25 MR BESTER: Yes.

1 DR HIRSH: Well, in fact the most
2 important thing is that I've just finished writing my book,
3 which has been accepted for publication by Routledge, which
4 is a good academic publisher, which really brings together
5 a lot of this work. Also forthcoming is a paper which was
6 from a collection from the Sheffield Hallam Bristol
7 colloquium on contemporary anti-Semitism about defining
8 anti-Semitism, the Hirsh 2016, how raising the issue of
9 anti-Semitism puts you outside of the community of the
10 progressive is an important piece of my work, which is
11 published as part of a book collection from the United
12 States -

13 MR BESTER: If I can just interrupt you
14 there; the book that's forthcoming, what is the principle
15 theme of that book?

16 DR HIRSH: The book is about the
17 relationship between hostility to Israel and anti-Semitism.

18 MR BESTER: I see. Now if I can ask you,
19 we are going to cover a number of themes as part of your
20 witness summary, but the first I would like to touch on
21 with you, Dr Hirsh, starts at the bottom of page 12.

22 DR HIRSH: I'm going to that, ja.

23 MR BESTER: And that is really how one
24 goes about identifying racism. On the top of page 6 -
25 sorry, I beg your pardon, page 13, paragraph 6, let me

1 clarify that - you make the statement that racism is an
2 objective social phenomenon, not simply or necessarily a
3 subjective feeling. Would you care to explain that to his
4 lordship?

5 DR HIRSH: Sure. So some people have a
6 kind of common sense notion that racism is simply a feeling
7 of hostility towards black people or towards Jews or to
8 whoever is the object of the racism and that is often part,
9 one aspect of racism, but I think it's very important that
10 you can have racism without that feeling of hostility, so
11 you can have racist ways of thinking. You can have racist
12 institutions. You can have racist practices. The big
13 famous case in the United Kingdom in Britain was a case in
14 which the Metropolitan Police was eventually found by a
15 judge in an inquiry to be institutionally racist, which
16 specifically meant that police officers weren't motivated
17 by an intention to harm black people or weren't motivated
18 by hatred or an antipathy to black people, but there was a
19 problem with the way in which the police operated, the way
20 it thought, its practices and the rest of it. So it's
21 quite an important distinction. Very much contemporary
22 racism is not open. Look at for example Donald Trump's
23 election campaign; it wasn't openly racist, but there was
24 much in it that many people have understood as racist. So
25 in order to think that there was a problem of racism or

1 xenophobia in Donald Trump's election campaign you don't
2 have to prove that he himself hates Mexicans or hates
3 Muslims.

4 MR BESTER: If I could just pause you
5 there -

6 DR HIRSH: All you've got to prove is
7 that there's a way of thinking which he's pushing, which we
8 as people -

9 MR BESTER: Dr Hirsh, if I can just pause
10 you there.

11 DR HIRSH: Sure.

12 MR BESTER: You're perhaps going a little
13 bit too fast, perhaps take some smaller steps in your
14 testimony.

15 DR HIRSH: Okay, sorry.

16 MR BESTER: If I can ask you. So if it
17 is objective, as you say, what relevance, if any, does one
18 attach to the motive behind a speaker or a writer of racist
19 language?

20 DR HIRSH: Sure. Well, motive can be
21 very important. If a person is motivated by hatred and
22 they express hatred then that's very simple, but quite
23 often we have forms of racism in which people say things or
24 do things which are not consciously motivated by hatred.
25 So a person can be kind of honestly believe themselves not

1 to be bigoted, but in fact what they do or what they say
2 ends up we might judge as racist or having racist outcomes
3 or having racist overtones or racist meanings, even if they
4 themselves don't, aren't motivated or are not conscious of
5 their own racism.

6 MR BESTER: Then if I can ask you, you
7 say in paragraph 7 of your summary, you say, "Identifying
8 racism requires knowledge of racism and it requires
9 judgment." Then you move on to say, "Spotting racist
10 speech requires an understanding of the context." Now just
11 very briefly, what do you mean by knowledge, judgment, and
12 then we'll get to context thirdly.

13 DR HIRSH: Ja, so very often the argument
14 about racist speech or racist action is the people who are
15 doing it deny that it's racist and the people who are
16 worried about it say that there's a problem of racism. So
17 there's a disagreement about understanding something to be
18 racist or not to be racist. So what I'm saying here is
19 that whether we're going to understand something is racist
20 requires knowledge -

21 COURT: Knowledge on the part of who?

22 DR HIRSH: Of the person who's making the
23 determination, on the person who's looking at a speech or
24 an outcome or an action, they have to understand something
25 about the nature of racism. I could give you an example if

1 you like.

2 MR BESTER: Perhaps continue and then
3 move on with judgment.

4 DR HIRSH: Okay. So they need some
5 knowledge of how racism operates. They need judgment to
6 look at a particular incident to see what was meant, to see
7 what the effect was, to see how it might have been heard,
8 and which leads into context. The context of a racist
9 action or racist speech is very important. So one needs to
10 make a judgment about whether somebody is racist or not.
11 And there's disagreement over it, you know.

12 MR BESTER: Now when you refer to context
13 specifically, I just want to pause there; with reference to
14 context how does the position which the speaker or the
15 writer -

16 DR HIRSH: Ja.

17 MR BESTER: - of racist speech, the
18 position that he occupies in society, how does that come to
19 define context?

20 DR HIRSH: I think it speaks to the
21 importance of the fact of a particular racist speech or
22 action. So if somebody is somebody with great authority,
23 moral authority or political authority, a public figure,
24 somebody who's looked up to, then I think it's more
25 significant than if it's for example a kid in the

1 schoolyard. You know, both could be concerning, but a
2 public figure, somebody who's respected as a political
3 figure I think is likely to be more concerning if they are
4 judged to be making racist speech than somebody else.

5 MR BESTER: Then if I can ask you, you
6 then deal with the identification of anti-Semitism at the
7 base of page 13. So in your definition how would you go
8 about defining anti-Semitism?

9 DR HIRSH: Well, I think anti-Semitism
10 has a lot in common with other forms of racism. It has
11 some differences, but generally I would consider anti-
12 Semitism to mean racism against Jews and I would consider
13 it to be a phenomenon similar to anti-black racism or anti-
14 Muslim racism, what people might call Islamophobia, or
15 other forms of racism.

16 MR BESTER: And then if I can ask you,
17 you say it's a form of racism, but how does anti-Semitism
18 relate to racism? Just explain the relationship between
19 the two.

20 DR HIRSH: Well, they're similar. So
21 anti-Semitism, it's a racism against Jews, it's a way of
22 thinking about Jews which leads to people thinking badly
23 about them or to actions against them or to their
24 oppression. There's also historically of course a link
25 between racism and anti-Semitism, especially from Europe.

1 In the early modern period Europe was going outwards and
2 finding colonies and creating racist ways of thinking about
3 people outside of Europe, and at the same time it was
4 creating anti-Semitic, anti-Jewish ways of thinking about
5 people within Europe. So historically there's a
6 relationship and there's a relationship in the sense that
7 they're similar phenomena.

8 MR BESTER: Then if you can turn the page
9 over to page 14, Dr Hirsh -

10 DR HIRSH: Ja.

11 MR BESTER: Your summary then deals with
12 different forms of anti-Semitism. In paragraph 10 you list
13 Christian anti-Semitism. Do you see that?

14 DR HIRSH: Yes.

15 MR BESTER: Paragraph 11 you refer to
16 right-wing or conservative anti-Semitism.

17 DR HIRSH: Yes.

18 MR BESTER: And you explain what that is,
19 and then also further down, paragraph 13 you refer to Nazi
20 anti-Semitism.

21 DR HIRSH: Yes.

22 MR BESTER: But in your view what are the
23 different subsets of anti-Semitism, if you could explain
24 that?

25 DR HIRSH: Well, so anti-Semitism is very

1 old, but I think that anti-Semitism has a different form in
2 different times and different places. I think it's a
3 mistake to think of it all as one thing over history in
4 every place. So early Christian anti-Semitism focussed a
5 lot on the Jews as the people who rejected Christ. Indeed
6 some of them said that the Jews murdered Christ, which of
7 course is a huge charge, the idea that they murdered God.
8 They refused to accept God even though - so goes the story
9 - they were the people who were the closest to Jesus and
10 should have accepted him the most readily, and it's not
11 only to their detriment that they rejected and killed God,
12 but it's to the universal detriment. So the actions of the
13 Jews in some Christian theology was bad for everybody, not
14 just for the Jews. So the Jews are seen as a kind of key
15 problem which made life bad for everybody, which prevented
16 everybody finding redemption.

17 MR BESTER: Then if I can ask you,
18 paragraph 11 -

19 DR HIRSH: Yes.

20 MR BESTER: - the next form of anti-
21 Semitism that you address is right-wing or conservative
22 anti-Semitism.

23 DR HIRSH: Yes.

24 MR BESTER: Very briefly, what would that
25 be?

1 DR HIRSH: So there's, I am thinking for
2 example of in the United States at the beginning of the 20th
3 century.

4 [12:20] There was a feeling that Jews were foreigners or
5 somehow disgraceful, that we didn't want them in our
6 country clubs, we didn't want them in our universities.
7 They were religiously, culturally inferior, they were
8 thought of as foreigners. There was conspiracy theory
9 around Jews and the idea that they were greedy and all of
10 these kind of old-fashioned stereotypes.

11 MR BESTER: Then let's move down,
12 paragraph 13. We've briefly touched on that already and
13 that is Nazi anti-Semitism where you say, "It provided the
14 impetus for a campaign to select and murder the Jews of
15 Europe and, if possible, all the Jews."

16 DR HIRSH: Yes.

17 MR BESTER: Let's just pause there.
18 Would you care to elaborate on that?

19 DR HIRSH: So the Nazis created this
20 totalitarian movement, I would call it. They had a
21 universal project for the whole of mankind. It was a
22 bigger project than simply a German nationalism, it was a
23 kind of universal project to remake mankind and so often
24 projects require another, an enemy, and the Jews fitted in
25 as being portrayed as their enemy quite well because you

1 could portray the Jews as being international, secret,
2 powerful and so the Nazi movement found the Jews to be
3 their key enemy. The Nazi movement certainly had other
4 enemies but the Jews were their key enemy and in the end
5 they organised this campaign to sweep the whole of Europe,
6 to select people on the basis of their Jewishness, to
7 decide who was Jewish and who wasn't. Of course it wasn't
8 the Jews who decided who was Jewish and who should be
9 shipped off to the east, it was the Nazis who decided who
10 was Jewish and should be shipped off and murdered.

11 So there was this campaign to murder all of the
12 Jews, initially of Europe but hopefully - from the point of
13 view of the Nazis - all of the Jews, full stop.

14 MR BESTER: Then the very last sentence
15 that begins in paragraph 13 on page 14, it starts with,
16 "Anti-Semitism has been a significant phenomenon in Arab
17 nationalist politics and also Islamist politics since the
18 first half of the 20th century." So as I understand you
19 that's the next subset of anti-Semitism. Would you care to
20 elaborate to what you regard or refer to rather as Arab
21 nationalist anti-Semitism?

22 DR HIRSH: So there was a rise of Arab
23 nationalist movements in the 20th century. They were anti-
24 colonial movements. There was British, French, other
25 colonial powers in the Middle East and in North Africa and

1 one of the responses to that was an Arab nationalism and
2 it's a kind of standard response to colonialism and to kick
3 out the colonial powers. And it was rather successful,
4 variants of Arab nationalism, and within that politics,
5 many variants of it, many parts of it also had a focus on
6 Jews and in particular a focus on the fact, the idea that
7 the Jews were foreigners in the Middle East.

8 So the idea of Arab nationalism was to create
9 Arab states, to create states which were defined around the
10 ethnicity of Arabs. So Arab nationalist was often rather
11 hostile to minorities who weren't Arabs - to Kurds, to
12 Jews, to Yazidis, to Persians, for example. So there's a
13 whole history of Arab nationalism. It's complicated
14 history, there's a lot in Arab nationalism that one might
15 want to support but there's also a history of anti-Semitism
16 being part of those movements.

17 MR BESTER: Then the concluding sentence
18 in paragraph 13 -

19 DR HIRSH: Sorry, I didn't deal with
20 Islamist politics.

21 MR BESTER: Yes, sorry, I beg your
22 pardon.

23 DR HIRSH: Islamist politics was related
24 to Arab nationalism. In a sense it was related because it
25 was also an anti-West and anti-colonial movement. It was

1 actually, Islamist movements were in kind of very strong
2 competition with Arab nationalist movements. So in Egypt,
3 for example, where the Muslim Brotherhood emerged in the
4 1920s they were repressed and suppressed when the Arab
5 nationalists came to power, the Nasser regime, and you've
6 seen to this day the struggle in Egypt and other places
7 between Arab nationalism and Islamism - the point being
8 that Islamist politics, Islamist movements also, in fact
9 more so even than Arab nationalism, have a long and rather
10 deep tradition of anti-Semitism. They don't like Judaism,
11 they don't like Jews being in the Middle East. So I can
12 talk more about that tradition but we're aware of, I think,
13 the Islamists and the jihadists having certain traditions
14 which are anti-Semitic.

15 MR BESTER: Then if I can ask you, you
16 make the point in the concluding sentence in paragraph 13,
17 you say as follows, "These anti-Semitists sometimes
18 manifest themselves as propaganda against Israel or
19 Zionism. Sometimes the distinction between hostility to
20 Israel" -

21 COURT: You are saying, sorry, page 30 or
22 1-3?

23 MR BESTER: I beg your pardon. It's the
24 concluding sentence of paragraph 13, M'Lord.

25 COURT: 13?

1 MR BESTER: Ja, it's on page 15, the
2 concluding sentence of paragraph 13.

3 COURT: Oh, I see. Yes, thank you.

4 MR BESTER: Dr Hirsh, you make the point
5 in that last sentence, you say, "These anti-Semitists
6 sometimes manifest themselves as propaganda against Israel
7 or Zionism." And then you go on to say, "Sometimes the
8 distinction between hostility to Israel and hostility to
9 Jews is felt to be important, sometimes it is not."

10 DR HIRSH: Correct.

11 MR BESTER: So would you care to explain
12 that?

13 DR HIRSH: Well, simply that some
14 movements in the Middle East that are hostile to Israel and
15 hostile to Zionism, sometimes they're very concerned to
16 make a distinction between Zionists and Jews. Sometimes
17 they say, we're hostile to Zionists and we're not hostile
18 to Jews but very often there are other tendencies within
19 Arab nationalist and Islamist politics which haven't been
20 very interested in making the distinction between being
21 against Zionists and Jews. There are many currents of
22 Islamist politics in particular which use the words
23 "Zionist" and "Jew" interchangeably. So very
24 straightforwardly, some kinds of hostility to Israel and to
25 Zionism feel it's important to make the distinction between

1 hostility to Israel and Jews and many forms of hostility to
2 Israel and Zionism don't make that distinction. They're
3 against Israel, they're against Jews, they're against
4 Zionists and they're happy that it's all one thing.

5 MR BESTER: I then want to move on to the
6 next heading and that is, "Criticism of Israel and anti-
7 Semitism." Now the last sentence in paragraph 15 you say
8 the following, you say, "Some kinds of criticism of Israel
9 are anti-Semitic while other kinds are not." And then you
10 say, "It requires knowledge" - and I'm reading from
11 paragraph 16 - "It requires knowledge, judgment and an
12 appreciation of the context to make the distinction between
13 legitimate criticism and racist demonization." Would you
14 care to explain to His Lordship what do you mean by that?

15 DR HIRSH: Sure. I think it's something
16 that we're used to in political discussion, political
17 debate, political activism, we're very, very used to doing
18 it. If we want to make a critique of Zimbabwe, for
19 example, and the government of Robert Mugabe, there are
20 perfectly legitimate critiques to be made of the government
21 on the one hand but on the other hand some people will make
22 the critique of Zimbabwe and Mugabe in a racist way. So
23 either they'll single out Zimbabwe as being a key evil on
24 the planet or they'll use imagery which is racist or
25 they'll use stereotyping which is racist that, you know,

1 ideas about it being impossible for Zimbabwe to rule itself
2 because black people can't rule themselves. So it's very
3 clear that we're very used to the idea that some kinds of
4 criticism are legitimate and that some kinds of criticism
5 are demonising and racist. I could give you another
6 analogy -

7 MR BESTER: Perhaps we can just move on
8 for now.

9 DR HIRSH: Okay.

10 MR BESTER: If I can ask you then, we've
11 already dealt with knowledge, judgment and an appreciation
12 of context but over and above those three factors which
13 we've dealt with previously under the rubric of racism, is
14 there anything else you'd like to comment on then with
15 reference to the identification of anti-Semitism, or are
16 you happy with the remarks you've made already on
17 knowledge, judgment and appreciation of context.

18 DR HIRSH: Well, there is the - there is
19 a definition of anti-Semitism which was originally the
20 European Union Monitoring Commission's definition, which
21 has evolved slightly but not in any particularly
22 substantial way and is now, in a slightly different form is
23 now called the International Holocaust Remembrance
24 Association's definition.

25 MR BESTER: If I could just ask you to

1 pause there. You are here referring to paragraph 17 where
2 you say that, "The European Union Monitoring Commission
3 working definition of anti-Semitism provides a useful
4 framework which assists in making a judgment concerning
5 what kinds of hostility to Israel would be anti-Semitic."

6 DR HIRSH: Correct.

7 MR BESTER: If I could just ask you to
8 turn to that appendix which you will find at page 28 of
9 your summary and that's where the working definition is.

10 DR HIRSH: Ja.

11 MR BESTER: And is in fact set out. Are
12 you there?

13 DR HIRSH: Yes. Can I just make clear
14 that - so this statement was made, I think, three years ago
15 or something like that and it's moved on a little, so now
16 there's a slight reworking of the definition which is not
17 different in any important way, which is - which has been
18 accepted and adopted by lots of people, including recently
19 the British government.

20 MR BESTER: We'll come to the reworking.

21 DR HIRSH: Okay.

22 MR BESTER: Just shortly I just want you
23 to, for present purposes, focus on page 28.

24 DR HIRSH: Right.

25 MR BESTER: And that working definition

1 that is set out there. Before we get there, this
2 particular working definition, can you tell the court when
3 this was accepted or adopted?

4 DR HIRSH: I believe, from memory, this
5 was something like 2003. I'm not sure, I can check the
6 date. It's sometime around that time.

7 MR BESTER: I see.

8 DR HIRSH: I should remember it, I've
9 written on it but I think it's around that time.

10 MR BESTER: Then if we look at page 28,
11 the working definition reads, "Anti-Semitism is a certain
12 perception of Jews which may be expressed as hatred towards
13 Jews. Rhetorical and physical manifestations of anti-
14 Semitism are directed towards Jewish or non-Jewish
15 individuals and/or their property, towards Jewish community
16 institutions and religious facilities." And then there's
17 an add on to that which says, "Such manifestations could
18 also target the state of Israel, conceived as a Jewish
19 collective." Let's just pause there. Based on what I've
20 read to you so far, is there any further comment that you
21 have over and above the definition, but also insofar as the
22 add on being that it could also target the state of Israel?

23 DR HIRSH: Well, I think the definition
24 in bold is fairly self-explanatory. I think I can help if
25 I need to. the second point which says, "In addition, such

1 manifestations could also target the state of Israel,
2 conceived as a Jewish collectivity" - I think what that is
3 bringing to the fore is that anti-Semitism is not only a
4 movement against individual Jews, it's also certainly a
5 movement against Jewish communities and there can certainly
6 be anti-Semitic hostilities to Israel.

7 MR BESTER: What do you mean with the
8 phrase - just explain this perhaps, "conceived as a Jewish
9 collective?"

10 DR HIRSH: Well, Israel is a Jewish
11 project. I mean who are the Jews? The Jews are the people
12 who came out of Egypt, out of slavery with Moses, the Jews
13 tell lots of stories about themselves, the story of the
14 Jews in the 20th century is one of anti-Semitism and
15 oppression and genocide amongst, you know, from the Nazis
16 and the Soviet Union and in the Middle East. And part of
17 the story of the Jews is that they established a state in
18 the Middle East. So in that sense Israel is part of the
19 story of the Jews, it is a Jewish collectivity and could
20 certainly be subjected to anti-Semitism.

21 MR BESTER: But if I can ask you, you
22 made reference to the EUMC definition having been reworked.

23 DR HIRSH: Yes.

24 MR BESTER: More or less when did this
25 happen?

1 DR HIRSH: As far as I know it is quite
2 recent. I think it's within the last year or so. I can
3 check the dates. There was a - of course this is a
4 contested definition and the reason it's contested is that
5 the people who say that any kind of hostility to Israel is
6 completely distinct from anti-Semitism, don't like it,
7 they've never liked it. The reason they don't like it is
8 because the definition says that in certain contexts and
9 according to certain - it could be the fact, it could be
10 the case that hostility to Israel could be anti-Semitic.
11 So it's a contested definition, it's not an agreed
12 definition. So it emerged in, I think, 2003 in the
13 European Union. The Fundamental Rights Agency of the
14 European Union, which is what the EUMC became, rather when
15 they didn't put it front and centre, they took it off their
16 website but then other institutions began to adopt it and
17 to endorse it, like the Parliamentary Commission on Anti-
18 Semitism in Britain and the Global Inter-parliamentary
19 Committee on Anti-Semitism and the OSCE.

20 MR BESTER: What is the OSCE?

21 DR HIRSH: The Organisation for Security
22 and Co-operation in Europe. I could tell you a whole story
23 about how the OSCE became important after the cold war but
24 it's all a bit of a digression. Also the United States of
25 America adopted it, the State Department adopted it as

1 their definition. 31 states that are part of the IHRA, the
2 International Holocaust Remembrance Association, adopted
3 the definition and the -

4 MR BESTER: How many states did you say?

5 DR HIRSH: 31.

6 MR BESTER: 31.

7 DR HIRSH: And the British Government
8 explicitly adopted it very recently, a couple of weeks ago.

9 MR BESTER: Then if we can just go back
10 to page 28. In the middle of the page it says there,
11 "Contemporary examples of anti-Semitism in public life, the
12 media, schools, the workplace and in the religious sphere
13 could, taking into account the overall context, include but
14 are not limited to" - and then a couple of examples are
15 listed - "calling for, aiding or justifying the killing or
16 harming of Jews in the name of a race, radical ideology or
17 an extremist view of religion" and then, "making
18 mendacious, dehumanising and demonising or stereotypical
19 allegations about Jews, accusing Jews as people of being
20 responsible for real or imagined wrongdoing committed by a
21 single Jewish person or group or even for acts committed by
22 non-Jews." I just want to pause here where there's
23 reference to the part of the definition that accuses Jews
24 for real or imagined wrongdoing committed by a single
25 Jewish person or group. Would you just clarify that for

1 us, please?

2 DR HIRSH: Which, is that -

3 MR BESTER: It's the third one.

4 COURT: The third one?

5 DR HIRSH: Could I just say something
6 first?

7 MR BESTER: Yes.

8 DR HIRSH: If I may. The paragraph that
9 introduces this list is very important. The paragraph
10 makes clear that judgment is still required, that this list
11 isn't going to be an automatic list, it's not going to
12 define what's anti-Semitism and what isn't, but one might -
13 taking into account the overall context. So these criteria
14 will help us but we still need to take into account the
15 overall context and this may include, but are not limited
16 to. In other words what I want to say is that this
17 definition is not an automatic machine for judging what is
18 anti-Semitic and what is not. This definition is a set of
19 criteria which can help us to make those judgments.

20 [12:40] But those judgments still very importantly
21 require us to think about context and hang on, contemporary
22 examples - so and I'm not limited to the following. So I
23 think that's a very important point. Let me go on to
24 answer your question.

25 MR BESTER: Yes so -

1 COURT: Sorry could I just follow from
2 now onwards? In essence you're telling us that your
3 definition is not exhaustive at all.

4 DR HIRSH: What I'm say is that one could
5 not -

6 COURT: It's just a way of allowing us to
7 try and identify the problem areas -

8 DR HIRSH: Correct. One couldn't make a
9 machine to judge what's anti-Semitic and what isn't. But
10 of course we're used to that, one couldn't make a machine
11 to judge what's sexist and what isn't sexist. One might
12 have criteria, but one needs to have knowledge and
13 political judgement in order to do so. So what this
14 definition does is it aids people, I mean it was written to
15 aid people in the emerging eastern European countries,
16 police officers, people who didn't know very much about
17 anti-Semitism. It was written to help them to determine
18 what might be an anti-Semitic incident and what might not.
19 In fact at the time for the purposes of collecting data, so
20 it was written to assist local law enforcement in people to
21 make these judgements.

22 COURT: Sorry, Mr Bester, if I may just -

23 MR BESTER: Certainly, M'Lord.

24 COURT: If I may ask then, Professor,
25 written by whom?

1 DR HIRSH: So, it was written by the
2 European Union Monitoring Commission for anti-Semitism.

3 COURT: Initially.

4 DR HIRSH: Initially. It was written
5 after a consultation with a number of different
6 organisations, a number of Jewish NGOs in particular. It
7 was written following the conference actually in South
8 Africa, the global conference at Durban which was well
9 known for having been a global conference in which there
10 was a big problem about the muddying of the distinction
11 between anti-Semitism and criticism of Israel. So a lot of
12 the Jewish NGOs and a lot of the European Union was worried
13 about that, about events that had happened at Durban and
14 they went away and they said what we need is definition
15 which helps to take these issues into account. So as I
16 said, this is a contested definition. It's contested
17 because this discussion is polarised. Some people see it
18 this way, some people see it that way. So this came out of
19 a long political process really of governments and NGOs and
20 Jewish NGOs. They wanted to collect data, especially in
21 the new Europe. This is following the end of the cold war,
22 they wanted to collect data of anti-Semitic incidents. So
23 they needed to help people to judge what was anti-Semitic
24 and what wasn't, that was the history of the definition.

25 COURT: And it has evolved since then -

1 DR HIRSH: It has evolved a little and
2 it's also been adopted by a number of states and it's also
3 moved from that quite narrow usage which was to aid law
4 enforcement people encountering anti-Semitic incidents and
5 it's been used by those people in a wider way to help us
6 make judgements about what is anti-Semitic and what isn't
7 anti-Semitic.

8 COURT: Thank you, you may continue.

9 MR BESTER: Thank you, M'Lord. If I can
10 then ask, you say it was adopted by various states, just
11 give us some ideas to who these states are who have adopted
12 the reworked definition.

13 DR HIRSH: We could find a list for you,
14 I'm not sure of the list, I think the IHRA, the
15 International Holocaust Remembrance Association is largely
16 European, it's largely the European states. It's largely
17 both eastern and western European although I mean we could
18 easily find the list and then we'll know. I'm kind of
19 remembering. It's been adopted formally by the State
20 Department of the United States of America. It was
21 recently adopted formally by the British government. It's
22 been adopted, as I said, by a number of international
23 organisations so it has an inter-parliamentary coalition
24 for opposing anti-Semitism which adopted it. I believe the
25 OSC, the Organisation for Security - OSCE, the Organisation

1 for Security and Co-operation in Europe has adopted it too.

2 MR BESTER: I see. Then - and will you
3 tell His Lordship to what extent has there been change or a
4 reworking of the definition, insofar as the substance is
5 concerned, what has changed?

6 DR HIRSH: The reworking is negligible,
7 it's just in a slightly different order, but the new
8 definition the IHRA definition is I think in all functional
9 ways the same as the EUMC definition.

10 MR BESTER: Then if we can just go back,
11 on page 28, the third bullet point listed one example of
12 accusing Jews as a people of being responsible for real or
13 imagined wrongdoing committed by a single Jewish person or
14 group. Do you see that?

15 DR HIRSH: Correct.

16 MR BESTER: So just clarify what is meant
17 by that.

18 DR HIRSH: Correct, so from the paragraph
19 at the top "Contemporary examples of anti-Semitism could,
20 taking into account the overall context, include but are
21 not limited to" and then we have this paragraph "accusing
22 Jews as a people of being responsible for real or imagined
23 wrongdoing committed by a single Jewish person or group or
24 even for acts committed by non-Jews." So a classic example
25 would be you might have a Jewish banker, somebody who works

1 for Goldman Sacks, somebody who gets caught fiddling the
2 books, stealing money and then if somebody was to say Jews
3 in general are responsible for the actions of this single
4 person then this definition would say that might be a
5 reason to judge that this was anti-Semitic.

6 MR BESTER: Then if we can go back to
7 page 16 of your summary.

8 DR HIRSH: Yes.

9 MR BESTER: I beg your pardon, I do
10 apologise. If we can just go back to page 28 and stay
11 there for the moment. At the bottom of the page there are
12 again a few examples albeit non-exhaustive examples, of
13 anti-Semitism where it manifests itself with regard to the
14 state of Israel. The first sub-bullet there, the last one
15 on the page in fact reads "Denying the Jewish people their
16 right to self-determination. Example, by claiming that the
17 existence of the state of Israel is a racist endeavour.

18 DR HIRSH: Yeah. So very importantly we
19 look at the preceding paragraph. Examples of the ways in
20 which anti-Semitism manifests itself with regard to the
21 state of Israel, taking into account the overall context,
22 could include, so it doesn't say that anything which does
23 this is anti-Semitic. It offers this bullet point as an
24 example which might in a certain context constitute anti-
25 Semitism and the example is denying the Jewish people their

1 right to self-determination for example by claiming that
2 the existence of a state of Israel is a racist endeavour.

3 So there will be some people who will say that
4 it's generally recognised that states have the right to
5 self-determination or that people have the right to self-
6 determination. And if somebody picks out the Jews and
7 their state in Israel as the only state which shouldn't
8 have the right to self-determination, if somebody says that
9 Israel must, by definition, be a racist state, if someone
10 says that if the Jews had to have self-determination it
11 must be a racist endeavour, whereas all other peoples have
12 self-determination. And most people regard that as
13 perfectly reasonable then that might be a way that we would
14 judge a claim to be anti-Semitic. So if you judge Jewish
15 self-determination or Jewish national liberation or Israeli
16 self-determination in a way that's completely different
17 from which you judge all other nationalisms, in particular
18 the Jewish self-determination must inevitably be racist
19 then this definition would point you to that being a
20 possible example of anti-Semitism.

21 MR BESTER: If I - sorry.

22 DR HIRSH: Well I was just going to say
23 of course all nationalisms have a possibility of a racist
24 edge. Yes, all nationalisms have an exclusive quality as
25 well as an inclusive quality. So all nationalisms have a

1 racist moment and all nationalists also have a communal
2 liberating safe-keeping moment. But if you say that Israel
3 is by definition and must be by definition racist, any
4 state of Israel, a state of Israel must be racist then
5 you're applying criteria to the state of Israel which is
6 different from the criteria you apply to everybody else.

7 MR BESTER: Then if I ask you to go page
8 29. Another example is listed there, in the second last
9 bullet point. Drawing comparisons of contemporary Israel
10 policy to that of the Nazis.

11 DR HIRSH: Yeah.

12 MR BESTER: So why is that that would
13 then be regarded as a form of anti-Semitism?

14 DR HIRSH: Go again back to the preamble,
15 this could, in certain context include drawing comparisons
16 of contemporary Israeli policies to that of the Nazis. Now
17 I think the point of this is that to compare what the
18 contemporary Israeli state does to what the Nazis did is
19 beyond all reason.

20 MR BESTER: Why do you say that?

21 DR HIRSH: The Nazis had a racist
22 ideology by which they determined to eradicate all Jews
23 from the face of the earth and they set about this in a
24 Europe wide meticulous factory driven way to kill the Jews.
25 Israel, of course, does some bad things, but Israel does

1 not do anything which could be in the same ballpark as
2 selecting the Jews from a whole continent of people, of
3 nations and putting them on trains and taking them to gas
4 chambers and murdering them. So it seems to me that the -
5 it seems to me that - so often one uses the Nazis in
6 political discourse. So if there's somebody you don't like
7 you might say oh he's like the Nazis, he's like the Nazis.
8 It seems to me that if you're going to accuse Jews of being
9 Nazis then that's a particularly vile thing to do.

10 The Nazis were the people who did murder the
11 Jews, who did murder all, you know, all Jewish children,
12 all Jewish women, whole Jewish communities, so the force of
13 accusing Jews of being like their own persecutors is over
14 and above the force of general kind of rather silly use of
15 you know you're a Nazi, you're a Nazi I think. I think
16 it's not an analogy that has any reason to it and I think
17 the effect is to bait Jews. I think if you tell Jews that
18 they're like Nazis, if you tell Israel that it's like Nazi
19 Germany I think because it's so far removed from any kind
20 of rational analogy I think it could only be understood as
21 Jew baiting.

22 MR BESTER: What do you mean by Jew
23 baiting?

24 DR HIRSH: So Jew baiting is the classic
25 anti-Semitic part of the oppression of Jews, of making Jews

1 feel uncomfortable where they live, making Jews the target
2 of attacks. It goes back a long way for many Jewish
3 communities, in Europe, in Russia, in the Middle East.
4 Jews were accused of all sorts of things which they were
5 not even close to being guilty of, blood libels and things
6 like that. And conspiracy and they were baited in that way
7 and it seems to me that it's the comparison of Jews with
8 the Nazis is far removed from any kind of rational
9 discourse that it can only be understood in that way. I
10 would say one other thing if I may. There have been two
11 enquiries about anti-Semitism recently in the United
12 Kingdom and both of them, I think there were problems with
13 both them, but what they both agreed on very clearly was
14 that there's no place for accusing Israelis or Zionists or
15 Jews of being like Nazis, that it's completely irrational
16 and it's - and people should just not do it. And the
17 reason people should just not do it is because it
18 constitutes Jew baiting and it's an anti-Semitic thing to
19 do. It demands - if I say that the Jews are like Nazis it
20 demands that the get treated like Nazis. If I say that the
21 Jews on campus are really Nazis or the union of Jewish
22 students group on campus are really like Nazis then what it
23 means is that they should be treated like Nazis. They
24 should be shunned, we should defend ourselves against them,
25 they should be treated as people who want to kill us.

1 MR BESTER: If I can ask you -

2 DR HIRSH: If you treat Jews in that way
3 then you're treating them in an anti-Semitic way.

4 MR BESTER: M'Lord, I see it is just
5 about time for the lunch adjournment.

6 COURT: Yes.

7 MR BESTER: Would it perhaps be an
8 opportune moment for us to then take the lunch adjournment
9 now?

10 COURT: Ja, I was going to suggest that
11 we work into lunch or earlier before 2 o'clock because of
12 the time we lost. But I have not consulted all role
13 players especially on the part of the staff. So I'd rather
14 take - be on the safe side at this stage and take the
15 customary lunch break. The court will adjourn.

16 [COURT ADJOURNS COURT RESUMES]

17 [13:59] COURT ORDERLY: [Inaudible].

18 DAVID SIMON HIRSH: Ja.

19 COURT: Thank you.

20 MR BESTER: May it please the court,
21 M'Lord.

22 COURT: You interrupted yourself before.

23 MR BESTER: Indeed so, M'Lord.

24 COURT: I do not think there's something
25 which was unfinished on that particular aspect that you

1 were dealing with before the adjournment.

2 MR BESTER: Yes.

3 COURT: But I want to follow this
4 evidence. It is an inquiry. I cannot wait until later,
5 but - do I call you professor or doctor?

6 DR HIRSH: Doctor.

7 COURT: Doctor, yes.

8 DR HIRSH: I'm not yet a professor,
9 hopefully.

10 COURT: Yes, Doctor, before the
11 adjournment you were dealing with the various policies, the
12 Nazi policy, Israeli policy and something else. Can there
13 be a comparison between the Nazi policy, the Israeli policy
14 and nearer home, in the past in South Africa the apartheid
15 policy? Is there a difference, distinction, and if so,
16 why?

17 DR HIRSH: Well, one of the reasons, one
18 of the clear distinctions is that it's quite different to
19 say that white racist colonialists in South Africa are like
20 Nazis than it is to say that Zionists, that is the
21 overwhelming majority of living Jews are like Nazis. So
22 that's one distinction. To say that Jews are like Nazis
23 has a different content. Another distinction - to be
24 honest, I still wouldn't be happy comparing Nazism to
25 apartheid. I think Nazism was exterminatory, Nazism was

1 universal, it aimed to take over the whole world. It was a
2 totalitarian movement. It built death camps. It built an
3 infrastructure of murder. So I think that there are
4 specifics which define Nazism which are quite different
5 from apartheid. There might of course always be aspects
6 which one might compare, but if one wants to say that any
7 kind of racism, or any kind of racist discourse is like the
8 Nazis, I think that would also be inappropriate. Racism is
9 actually a very common phenomenon throughout society,
10 throughout Western society, throughout the world, and to
11 find racism and to say it's the same as Nazism I think
12 would be quite wrong. That would be a second distinction.
13 The third distinction is that Israel was a - it was itself
14 a national liberation movement. It was a movement of Jews
15 who were wiped out from Europe. It was the undead of
16 Europe, the remnants of the genocide from Europe, the Jews
17 who were escaping from the Soviet Union, Soviet anti-
18 Semitism, Eastern Europe anti-Semitism, the Jews who were
19 escaping from Middle Eastern anti-Semitism, the Jews who
20 were driven out of the great cities of the Middle East,
21 Cairo, Damascus, Beirut, Bagdad, Teheran, in all of these
22 cities there were Arab nationalist or Islamist movements
23 which found no place for the Jews. So that's another key
24 distinction.

25 Now I think it's true that in some ways Israel is

1 very strong compared to the Palestinians and in some ways
2 of course the Palestinians did not have an easy time, but
3 if you look at the Jews in the context of the whole of the
4 Middle East or the whole of Europe or the whole of the
5 world you will see that the Jews are a very small and much
6 persecuted minority, and they're a very small minority who
7 plenty of people wish to do damage to, and the idea that
8 Jews in Israel feel the need to be able to defend
9 themselves if they have to, i.e. to have an army, I think
10 is entirely legitimate and is nothing compared to Nazism or
11 to apartheid.

12 COURT: Thank you for now. You may
13 proceed.

14 EXAMINATION BY MR BESTER (CONTD.): I'm
15 indebted to Your Lordship. Dr Hirsh, on page 29 of that
16 particular bundle, we're still with the appendix.

17 DR HIRSH: Ja.

18 MR BESTER: We've dealt with the second
19 last bullet point, being the drawing of comparisons,
20 contemporary Israeli policy to that of the Nazis.

21 DR HIRSH: Ja.

22 MR BESTER: We've already dealt with
23 that. The next bullet point I wish to address with you is
24 the one that reads, "Holding Jews collectively responsible
25 for the actions of the State of Israel."

1 DR HIRSH: Correct.

2 MR BESTER: So why in your view would
3 that then constitute some form of anti-Semitism?

4 DR HIRSH: Well, this relates back and is
5 in a sense in parallel to the one we had earlier, which was
6 accusing Jews as a people for being responsible for the
7 crimes of any individual Jews, and we say that was about,
8 an example was accusing Jews in general of being
9 responsible for Jewish bankers or Jewish whatever. So this
10 one doesn't hold Jews responsible for any individual
11 banker, but it holds Jews collectively responsible for the
12 actions of the Israeli State as a whole, and sometimes that
13 isn't clear. Sometimes people use the term Zionism or
14 Zionists as a way of holding all Zionists collectively
15 responsible for the actions of the State of Israel, but
16 what we can see is that sometimes that kind of use of the
17 term Zionists which holds all Zionists responsible for the
18 actions of the State of Israel, sometimes what it actually
19 means in practice is the overwhelming majority of Jews. So
20 two points; firstly it's wrong to hold Jews collectively
21 responsible for the actions of the Israeli State.

22 Secondly, that can be done using language which doesn't
23 make it completely clear, which needs some interpretation.

24 MR BESTER: Then the last point on page
25 29, the point is made, "However criticism of Israel similar

1 to that levelled against any other country cannot be
2 regarded as anti-Semitic."

3 DR HIRSH: Correct.

4 MR BESTER: So let me understand that by
5 way of an analogy, if the criticism is levelled against for
6 instance practices of the United States, for instance would
7 that be a fair analogy and how would you construe that with
8 reference to this very last sentence in the appendix?

9 DR HIRSH: Absolutely. It's very
10 important because sometimes opponents of this definition
11 say that the definition is attempting to prohibit criticism
12 of Israel, but this last sentence is explicit in that it
13 doesn't say that. This definition doesn't attempt to
14 prohibit criticism of Israel because the definition is
15 clear and explicit, it says criticism of Israel which is
16 analogous to the kind of criticism that you might make of
17 any state cannot be regarded as anti-Semitic.

18 MR BESTER: Is there a question Your
19 Worship was pondering about?

20 COURT: Maybe I should not say. Proceed.

21 MR BESTER: As the court pleases. Then
22 if I can ask you return then if you will to -

23 COURT: If I may interfere, let's come to
24 the present case of all this.

25 MR BESTER: Yes, certainly, M'Lord. Then

1 if I can ask you, page 16, paragraph 18 -

2 DR HIRSH: Yes.

3 MR BESTER: - you say, "Criticism of
4 Israel may be anti-Semitic in motivation if hostility to
5 Israel is used to hide or legitimise a pre-existing
6 hostility to Jews."

7 DR HIRSH: Correct.

8 MR BESTER: "Criticism of Israel may be
9 anti-Semitic in quality if it takes forms which mirror
10 older anti-Semitic stereotypes."

11 DR HIRSH: Correct.

12 MR BESTER: "And criticism of Israel may
13 be anti-Semitic in quantity if it portrays Israel as being
14 essentially and uniquely evil on a different scale to other
15 evils in the world." Is there anything that you need to
16 add and elaborate on over and above what you've said there?

17 DR HIRSH: I think that's clear.

18 MR BESTER: Then if we can move on. Page
19 18, paragraph 26 -

20 DR HIRSH: Yes.

21 MR BESTER: So what in your view would be
22 the appropriate definition of Zionism?

23 DR HIRSH: Well, I don't think there's a
24 single appropriate definition of Zionism. I think one of
25 the problems is that the term Zionism is used by many

1 different people in profoundly different ways. So as a
2 sociologist I can tell you what the different ways are and
3 I can tell you what flows from them, but I can't tell you
4 which is right or which is wrong. What I do think is very
5 clear is that very many Jews today both inside of South
6 Africa and outside of South Africa are comfortable thinking
7 of themselves in one way or another as a Zionist, and for
8 sure people mean quite different things by that. Some
9 people are Zionist because they think it's part of their
10 religious observance. Some people are Zionist because they
11 think it's part of the national liberation movement of
12 Jews. Some people - you know, some people are Zionist in
13 that they have a vision of a peace agreement between the
14 Israelis and the Palestinians. Other people are Zionist in
15 different ways. So many people, the - I think most Jews
16 are comfortable thinking of themselves as Zionist, although
17 what is meant by that is sometimes quite different things.
18 There are different politics.

19 MR BESTER: Well, can I ask you then to
20 turn to the next page, page 19, paragraph 28. You give one
21 perspective there. You say, "The expert will further
22 testify that according to him the term Zionism refers more
23 comfortably to the pre-1948 movement for a Jewish State" -

24 DR HIRSH: Ja.

25 MR BESTER: - "than it does to anything

1 after Israeli independence." Why do you give that
2 particular meaning to the term?

3 DR HIRSH: Well, I think Zionism as a
4 politic, Zionism as a movement was important before the
5 Second World War as one of the possible ways that Jews
6 could adopt in order to oppose anti-Semitism.

7 COURT: You mean it was an ideology?

8 DR HIRSH: Yes.

9 COURT: Yes.

10 DR HIRSH: At that time it was an
11 ideology. There were others. There was Buddhism, there
12 was socialism. There were various ideas that Jews had ways
13 of opposing or defending themselves against anti-Semitism.
14 I think today I feel it rather differently. I think if you
15 go to Israel, you go to Tel Aviv and you say to somebody
16 are you a Zionist, they're quite likely to say well my
17 great grandmother was a Zionist, she came to Israel in the
18 1920s, but I think it's a mistake to regard contemporary
19 Israeli policy as an ideology. I think Israel is a state
20 like other states. It has a government which perceives
21 that it follows the interests of the state. There's a
22 democratic process. Israel is a state. It's not a
23 political movement. It's a state and a nation, it's not a
24 movement for a state or a nation.

25 MR BESTER: Then if I can ask you, you

1 say in paragraph 30, "The danger is that Jews find
2 themselves being forced into a stark choice; either
3 explicitly disavowing any connection to Israel in terms of
4 which are demanded of them, or defined as a supporter of
5 Israel and therefore as a racist and as a fascist and as a
6 friend of Hitler." What do you mean by that?

7 DR HIRSH: So I've said that many Jews
8 are comfortable defining themselves as Zionism and what
9 they mean by that are many different things. What we have
10 in this case is somebody who's very hostile to Zionism,
11 defining it in their own way. So in this case we have
12 somebody defining Zionism in terms of being pro-Hitler and
13 racist and Zionism as an evil. Now the problem then of
14 course is that people who do consider themselves to be
15 Zionist, when faced by somebody who's making a speech about
16 how awful Zionists are they then get constructed in that
17 way. Let me give you an example actually. I could talk
18 about myself, I'm a sociologist, I'm an intellectual and
19 that's what I want to be, but when I started writing and
20 thinking about these issues, sometimes I was defined not as
21 a sociologist or an intellectual but as a Jewish
22 sociologist or a Zionist sociologist, and so the term was
23 put upon me from outside in a way that I didn't choose and
24 in a way that I didn't want. So of course this is true
25 with all social identity; one has one's own identity, one

1 has one's own identity as black or as a woman, but if it's
2 imposed on you in a hostile way it's a different issue. Am
3 I making myself clear?

4 COURT: Yes, you may proceed. If we have
5 questions we'll ask.

6 MR BESTER: Then Dr Hirsh, the next theme
7 that you address in your summary is the connection between
8 Jews, or rather the Jews and their connection to Israel.
9 Now how would that fit into - before we deal with that
10 particular theme, how does that fit into Zionism, this
11 connection between Jews and Israel?

12 DR HIRSH: Well, I think that the
13 overwhelming majority of Jews have some kind of connection
14 to Israel as a part of their Jewish identity and that might
15 be the same connection that other people would declare is
16 Zionist. I think the, you know we can look at the figures
17 and the surveys which, in which 80 or so percent of Jews
18 will say that they have a strong or a medium attachment to
19 Israel, people have family in Israel. Jews in South Africa
20 or in England or in America might just as easily have found
21 asylum in Israel as they did in other places. It was all
22 rather arbitrary. People were fleeing, sometimes for their
23 lives, and so I think Jews feel that Israel is part of
24 their own Jewish identity.

25 MR BESTER: But if you had to define that

1 connection what would be the components or the various
2 different components that would make up that connection?

3 DR HIRSH: I'm not sure I'm quite clear
4 on the question.

5 MR BESTER: You say in paragraph 31, you
6 say, "Many Jews have a religious connection" - that's one
7 kind of connection -

8 DR HIRSH: Oh, correct. Absolutely.

9 MR BESTER: So what are the components
10 that account for this connection that you refer to?

11 DR HIRSH: Right, so Jews' religious
12 practice and ritual is it includes reading from the Jewish
13 religious text, from the Torah every week. Every week
14 there are stories about the people that Jews consider to be
15 their ancestors and they are not just hanging in air but
16 they are placed, they are stories which happened in
17 particular places, in particular towns, in particular
18 villages, and many -

19 MR BESTER: Sorry, could I just pause
20 there? These places, just to clarify, that would be
21 situated in what is today Israel. Is that correct?

22 DR HIRSH: Correct. Well, some of them
23 situated in what is today Israel and some of them situated
24 in what is today the Palestinian territories.

25 MR BESTER: You can continue.

1 DR HIRSH: So some Jews feel Zionist,
2 feel - some Jews have a religious Zionism other Jews have a
3 different kind of commitment.

4 [14:19] You might call it cultural commitment, people
5 have family. People under that they might have been
6 Israeli, people have connections, people - some Jews feel
7 that the existence of Israel is very important as a
8 guarantee of their own safety, so that if Jews needed
9 asylum - which they needed before and found it very
10 difficult to get - if Israel exists then Jews can find
11 asylum. So that's important for some people.

12 MR BESTER: Then if I can ask you, let's
13 turn the page over to page 21. Page 21, paragraph 34.

14 DR HIRSH: Yes.

15 MR BESTER: "The overwhelming majority of
16 living Jews are Zionists, if what is meant by the term that
17 they do not support campaigns to delegitimize Israel and to
18 disband it against the will of most Israelis." Is there
19 anything you need to add to elaborate on that point?

20 DR HIRSH: No. If what we mean by
21 Zionism is thinking that Israel has the right to exist and
22 not to be abolished from outside, then nearly all Jews are
23 Zionists, not all but nearly all and actually nearly all
24 democratic people are Zionists in that sense, in the sense
25 that they think that Israel has the right to exist and not

1 to be conquered.

2 MR BESTER: If I can then ask you, you
3 say in paragraph 35 - and we've already dealt with this -
4 that for a very large number of Jews, some kind of
5 attachment to Israel is an aspect of their Jewish identity.
6 So if I had to come up with, perhaps an imprecise word and
7 I had to call it Jewishness, would that be - would that be
8 inaccurate?

9 DR HIRSH: Yes. Sorry, no, that would be
10 accurate. I think that some kind of attachment to Israel
11 is, for most Jews, a part of their Jewishness. I think
12 it's non-contingent, I've written it's non-contingent,
13 meaning that it is profoundly related to that identity and
14 it's rationally intelligible, it's not mad. You know,
15 there are sensible, good reasons why many Jews feel that
16 attachment to Israel. So it's an important part of their
17 identity and it's not irrational or bad or mad or anything
18 like that. Those are the two points that I'm making in
19 that paragraph.

20 MR BESTER: How do you respond to the
21 criticism or rather the perspective I should rather say,
22 the viewpoint that, at best, Zionism really is a political
23 ideology? How do you respond to that?

24 DR HIRSH: I think Zionism contains
25 within it many different politics. So, you know, there is

1 politics in Israel, there are some people, some Zionists,
2 some self-defined Zionists who want to withdraw from the
3 occupied territories, who want a peace agreement with the
4 Palestinians. There are other Zionists who are afraid of
5 that, sometimes for reasons which may be rational and
6 sometimes for reasons which we might find awful. So there
7 is no politics which is Zionism. There is politics within
8 Zionism. So Zionism is not any longer a political moment.
9 Indeed, people who are hostile to Zionism often want to
10 paint Zionism as a political movement and then they can
11 ask, is it right or is it wrong? But if you think of the
12 state of Israel not as a movement but as a state, a nation,
13 there's no sense in asking is it right or wrong. Is France
14 right or wrong? Is Italy right or wrong? It doesn't make
15 any sense. It's a nation, a state that exists. We hope
16 it's a state with a good policy.

17 MR BESTER: You then in paragraph 36, you
18 make reference to a report published by the Institute for
19 Jewish Policy Research in 1999 in relation to South African
20 Jews and their attachment to Israel and you say that four
21 choices were given strong attachment, moderate attachment,
22 no special attachment and negative feelings. You say 54%
23 felt a strong attachment, 33% a moderate attachment to
24 Israel, while 87% express special feelings of attachment to
25 Israel -

1 DR HIRSH: 54 plus the 33.

2 MR BESTER: Yes. Just under 1% expressed
3 negative feelings.

4 DR HIRSH: Yes.

5 MR BESTER: Is there anything that you
6 want to elaborate on insofar as those findings were
7 concerned?

8 DR HIRSH: Those are the findings that I
9 would expect to find, they don't surprise me. For sure
10 there are some Jews who have an extremely hostile position
11 towards the existence of Israel. Indeed for them the
12 hostility to Israel is a part of their Jewish identity, but
13 in this survey it was 1% of Jews who felt that. So of
14 course anti-Zionist Jews exist, they can exist, they do
15 exist but they're a minority, in this survey a very small
16 minority.

17 MR BESTER: And then you say in paragraph
18 37 that these figures are similar to those found in the
19 United Kingdom and the USA and then again with a reference
20 to South Africa, the next sentence of paragraph 37 you say,
21 "59% of the South African sample had visited Israel at
22 least once in the previous 10 years." And then you refer
23 to the Kaplan Centre for Jewish Studies and Research at the
24 University of Cape Town who published the figures for the
25 same questions asked in 2005. So that was a few years

1 later.

2 DR HIRSH: Yes.

3 MR BESTER: After the '99 survey and in
4 2005, 80% of South African Jews expressed either a strong
5 or a moderate attachment to Israel, while 55% reported as
6 having visited Israel during the previous 10 years.

7 DR HIRSH: Yes.

8 MR BESTER: Just in brief, what do these
9 statistics tell you, what conclusion do you draw from these
10 statistics?

11 DR HIRSH: I think these statistics are
12 part of the story which show that some kind of attachment
13 to Israel is a non-contingent part of most Jews' identity
14 and I also think it's entirely unsurprising. If you looked
15 at Pakistanis who lived in London and you said, do you have
16 some kind of attachment to Pakistan, they'd say sure. Do
17 you have family in Pakistan, yes. Do you want Pakistan to
18 be conquered, no. Do you agree with everything the
19 Pakistani government does, no. And so I think in that
20 sense the feeling that Jews have towards Israel is a pretty
21 standard diasporic response.

22 MR BESTER: Then briefly we are going to
23 deal with a next theme and that is the claim that Zionism
24 is racism. I'm not going to read out paragraph 39 because
25 you've already given some views here in your summary, but

1 in brief is there anything that you need to add to what
2 you've already stated in paragraph 39, Dr Hirsh?

3 DR HIRSH: No, I think paragraph 39
4 gives, it gives the argument that Zionism is racism and
5 then I try to deal with it and critique it, is that right??

6 MR BESTER: Yes, well let's move on to
7 page 23, paragraph 40. You deal here with the 1975
8 resolution by the General Assembly of the United Nations in
9 terms of which Zionism was declared a form of racism and
10 racial discrimination and then you make the point at the
11 foot of page, of paragraph 40, that that resolution was
12 ultimately revoked in 1991. Is there anything you need to
13 add there?

14 DR HIRSH: What I would say is that the
15 vote to say that Zionism is racism was a vote that was
16 pushed by the Soviet Union, by the Communist face of
17 Eastern Europe, by a number of states which consider
18 themselves to be Arab states and which were very hostile to
19 Israel. They weren't - this resolution wasn't supported by
20 democratic states, by states who had a commitment to
21 opposing anti-Semitism or to multiculturalism. I think it
22 was a really, really bad determination and later on it was
23 revoked.

24 MR BESTER: Right, then the next heading
25 that we will touch on briefly is the analogy between Nazis

1 and Zionism, paragraph 45 on page 24. You first in
2 paragraph 45 just give a brief explanation of the practices
3 of the Nazis in relation to various people including, you
4 say, a particular and central hatred of Jews and it
5 succeeded in murdering six million Jews from all over
6 Europe and the process was rationalised - just so far, is
7 there anything that you need to add where you wish to
8 elaborate on the remarks in paragraph 45?

9 DR HIRSH: I think I've said what I need
10 to say on that, unless somebody wants to ask further.

11 MR BESTER: Paragraph 46 I believe you've
12 already also covered a little earlier in the afternoon,
13 where in fact it may have been in response to His
14 Lordship's question in drawing comparisons between Nazism
15 and the state of Israel. I do believe you've dealt with
16 that already but just by glancing at paragraph 46, anything
17 that you need to say there?

18 DR HIRSH: The first bit is very clear,
19 that there has been conflict between Israel and its
20 neighbours and Israel and the Palestinians, there have been
21 conflicts in which Israel behaved badly, but there's never
22 been anything and nobody has ever planned or dreamed of
23 anything like a genocide against the Palestinians, of
24 picking out all of the Palestinians across Israel and the
25 occupied territories and perhaps further afield, and

1 killing them.

2 No Zionist that I know of has - well, there might
3 be the tiniest fringe group of really racist people who
4 call themselves Zionists but absolutely, mainstream Zionism
5 has never thought or dreamt of doing that and that includes
6 the rather right-wing Zionists who were settling the West
7 Bank and things like that. Murdering the Palestinians is
8 not something that anyone has ever even thought of or
9 dreamed of, as far as I know.

10 MR BESTER: If I could ask you, if we can
11 go back to paragraph 21.

12 DR HIRSH: Page 21, paragraph 21?

13 MR BESTER: It's paragraph 21 and I will
14 give you the page now, it's page 16 of your summary.

15 DR HIRSH: Yes.

16 MR BESTER: Really in short, as I
17 understand it, the theme that you address here is a
18 critique or a response to the allegation that when someone
19 raises a complaint of anti-Semitism, it's really made in
20 bad faith or dishonestly by people who do not believe that
21 valid and legitimate criticism against Israel is justified
22 and whose end goal really, or objective, is to silence
23 criticism against Israel.

24 DR HIRSH: Right.

25 MR BESTER: How do you respond to that in

1 general?

2 DR HIRSH: So it's very important, very
3 often when people raise the issue of anti-Semitism in
4 connection to Israel, very often they're not - people don't
5 respond to it by saying, I think you're wrong, I think
6 you've made a misjudgement or I think, given the history of
7 oppression of the Jews, I can understand why you're over-
8 sensitive. People don't respond in that way and people
9 haven't responded in that way in this case. They've
10 responded in quite a different way. They've responded by
11 saying, you say there's a problem of anti-Semitism but I
12 say that you're lying, I say that you don't really believe
13 that, I say that you're only saying that in order to
14 silence legitimate criticism of Israel.

15 So there is this allegation of bad faith against,
16 largely, Jews who raise the issue, who worry about anti-
17 Semitism and when Jews raise the issue of anti-Semitism or
18 worry about anti-Semitism, very often they're told, not
19 that they're wrong or mistaken or that they've made a
20 misjudgement, but that they're lying, they're doing so
21 dishonestly in order to try to silence legitimate
22 criticism. And this very allegation of bad faith is
23 actually part of the anti-Semitic pressure that is put onto
24 Jews in this respect. So whenever Jews, or very often when
25 Jews raise an issue of anti-Semitism, people respond to

1 them by saying you're lying. You're not just wrong, you're
2 not just over-sensitive but you're lying for an ulterior
3 motive.

4 MR BESTER: Well, that then takes us to
5 page 45 which is the witness statement of Prof Friedman.

6 DR HIRSH: 45?

7 MR BESTER: 45 of this bundle.

8 DR HIRSH: Yes.

9 MR BESTER: Because his opening criticism
10 is really something similar. He says on page 45, "Hirsh's
11 submission is not a neutral discussion of anti-Semitism.
12 It is a highly partisan attempt to silence critics of the
13 Israeli state by labelling them anti-Semites, people who
14 harbour hatred of the Jewish people. This has always been
15 a key strategy of the Zionist movement but has been given
16 added momentum in recent years by governments and
17 politicians in Europe and North America who, in their
18 desire to protect the Israeli state, have sought to
19 suppress legitimate and non-violent action which seeks to
20 pressure it to change its policies. It has become
21 increasingly common for these states to use the law to
22 prevent BDS campaigners from exercising their right by
23 claiming that they are engaged in racist activity, a
24 practice which has been described, without justification,
25 as a serious threat to free speech in western countries."

1 Then he refers to the famous journalist who assisted Edward
2 Snowden, Glenn Greenwald. But in short, how do you respond
3 to this charge?

4 DR HIRSH: Well, firstly, this is not the
5 way that scholars normally relate to each other. Scholars
6 normally relate to each other with argument and with
7 reasons. I think you've made an error here, I think you've
8 taken this argument wrongly, I think you've brought this
9 evidence in incorrectly and I think you've come to the
10 wrong conclusion. That's not what it says here. What it
11 says here is that I've come to South Africa today to lie to
12 you. That's what this paragraph says, that I'm pretending
13 that I'm concerned about an issue of anti-Semitism but
14 really I have an ulterior motive and the ulterior motive I
15 have, according to this paragraph, is that I want to
16 delegitimize and silence all criticism of Israel.

17 MR BESTER: Let me just understand this,
18 if I may, before you continue. You work at the University
19 of London.

20 DR HIRSH: Yes.

21 MR BESTER: Goldsmith College. What kind
22 of institution is that?

23 DR HIRSH: It's a legitimate institution,
24 Goldsmiths has one of the biggest and actually most radical
25 sociology departments. I've been teaching there for 14

1 years, I taught yesterday morning and this allegation that
2 I, that my intellectual and my teaching life is a lie, is
3 actually - well, it's really problematic. They're not
4 saying I get it wrong, they're not saying I'm stupid or I
5 make mistakes, they're saying that I'm dishonest and they
6 don't offer any evidence as to my character or my honesty
7 or my real motivations, apparently real motivations.
8 There's no evidence offered at all that I'm lying, but it's
9 a very standard response to people who raise the issue of
10 anti-Semitism.

11 The second sentence then says, it starts talking
12 about me and then it says, "This has always been a key
13 strategy of the Zionist movement." So I'm not addressed as
14 a scholar or an academic or a teacher, albeit one who may
15 have got it wrong or right, I'm not addressed as a scholar,
16 I'm addressed as something else, as part of the Zionist
17 movement and I'm pushing a strategy in this courtroom.
18 That's what is being claimed.

19 MR BESTER: If I can just ask you, if it
20 was put to you that you really are sitting in this court
21 dressed up as an expert but truly a member of the Zionist
22 movement, how do you respond to that?

23 DR HIRSH: Well, if a student said that
24 to me I'd certainly use it as a teachable moment. I think
25 it's - the problem with it, well, one of the problems with

1 it is it's something that we see a lot. So if we were on
2 the rational terrain, you think this statement is anti-
3 Semitism, I don't think this statement is anti-Semitism,
4 let's debate it, let's find the evidence, let's look at it.
5 That would be fine and some things we'd agree one way, some
6 things we'd agree the other way, some things we'd disagree.
7 But this is impossible to agree because it's simply a
8 charge of dishonesty. The Jews allege anti-Semitism for
9 their own dishonest tribal motives and I do object strongly
10 to being identified in that way personally as an
11 individual, and also certainly as - it's probably no secret
12 that I'm Jewish too.

13 MR BESTER: If I can ask you to -

14 COURT: Mr Bester, I'm getting a little
15 bit concerned here, maybe you must assist me. The final
16 duty in a matter of this, of determining whether an expert
17 is reliable, well-grounded, founded, reasoned and all, is
18 ultimately with the court and this kind of spat of saying
19 so and so is not scholarly or wrong or - it worries me a
20 bit because I must listen to their presentations on both
21 sides, how they reason it and how and on what they ground
22 it.

23 [14:39] And are the opinions more probable than the
24 other, but I'm not here to say so and so is not a good
25 scholar. Am I right or wrong or -

1 MR BESTER: Your Lordship is quite -

2 COURT: - or am I over-sensitive?

3 MR BESTER: Your Lordship was correct,
4 that is indeed the test, it's the court's ultimate
5 discretion as to what weight it attaches to the expert
6 witnesses from expert Y or expert Z.

7 COURT: And if they differ I must
8 understand and appreciate why they differ, on what grounds
9 and the conflicts in their opposing testimony. But to hear
10 bad about the other witness, I don't think that's evidence
11 for me to consider. I must make a judgment that that
12 witness did not impress me and his opinion is not helpful
13 to the court at all and as a way of separating the two now
14 let's move onto -

15 MR BESTER: M'Lord, the reason why it is
16 raised, why we've specifically addressed it now because it
17 is something which confronts us openly from the very first
18 line of Professor Friedman's summary. The summary doesn't
19 start necessarily with the contestation of the underlying
20 intellectual ideas, it is a direct attack launched against
21 Doctor Hirsh. And from that perspective we will not have
22 another opportunity to call witnesses to rebut whatever
23 Professor Friedman says. And therefore once that challenge
24 or that particular issue has been placed into dispute to
25 suggest that he in fact is not legitimate in that sense it

1 is something that we believe must be dealt with and must be
2 dispelled.

3 So that where it comes from, it is not something
4 that we raise in isolation, it's in response to something
5 which was raised specifically right from the opening
6 sentence of the Friedman witness summary. And of course,
7 Your Lordship would have seen in our witness summary page
8 16, paragraph 21 there's a theme there that deals with the
9 allegation that charges of anti-Semitism are made in bad
10 faith. So that really is part of the same overarching
11 theme. It's something which we say commonly arises in
12 instances of this nature where a charge of anti-Semitism is
13 levelled. There's a response of bad faith, so it is very
14 much part of the, how should I say, the contested terrain
15 in disputes of this nature where there will be a charge of
16 anti-Semitism and this will evoke the most likely response.
17 And it is in that perspective that Doctor Hirsch was taken
18 to Professor Friedman's summary where he, right at the
19 outset, levels that very same charge which is what we
20 anticipated in the portion of the witness statement filed
21 by us which I've just showed Your Lordship.

22 COURT: So the witness is rebutting also
23 called hitting back on that.

24 MR BESTER: Your Lordship would have
25 noticed what I did with the questioning. I specifically

1 addressed as a theme the allegation that sometimes the
2 charge of anti-Semitism is labelled as having been made in
3 bad faith because that ties in with the charge made by
4 Professor Friedman right at the outset of his witness
5 summary. In fact I'm not going to take Your Lordship there
6 now, Your Lordship can simply make a note, Mr Masuku in
7 response to the complaint by the South African Jewish Board
8 of Deputies makes exactly the same accusation to say that
9 it is a charge made in bad faith. He uses words to the
10 effect that the cry of hate speech has become extremely
11 tiresome, wasteful of resources and is trivialising the
12 serious charge of hate speech, effectively a suggestion
13 that it's brought with bad faith. So that is unfortunately
14 as in matters of this nature a sub-theme which often does
15 find expression in these sorts of disputes as it has found
16 in this very instance. So it's something that we do feel
17 strongly that we are obliged to deal therewith.

18 COURT: Maybe later, but I would have
19 expected that more relevant parts of the expert witness
20 currently in the witness stand as to deal with the remarks
21 made by Mr Masuku and to tell us what you think and at the
22 end would tell us why he does not agree with Masuku's
23 expert witness. That's really what we're here for.

24 MR BESTER: I understand Your Lordship's
25 concern -

1 COURT: Yes.

2 MR BESTER: - but the meaning of the
3 words is ultimately an objective test. That is something
4 which is a subject of interpretation with the result that I
5 have been very careful not to - it's a deliberate decision
6 which I have taken based on the prevailing body of case
7 law. It's a decision that I have taken not to ask him what
8 the meaning of the words are because that is ultimately an
9 objective test. It's for the court to decide and not
10 something which any expert can give any input into. What
11 experts can do in a matter of this nature and my
12 submission, M'Lord, is that they can set the theme, scene
13 insofar as context, the greater political cultural, call it
14 ideological debate, that in informs the context within
15 words are made. They can perhaps assist in defining from a
16 social political point of view certain terms to assist the
17 court in understanding what is the ambit or the parameters
18 of certain words like anti-Semitism anti-Zionism because it
19 is such a heavily contested terrain. But ultimately the
20 very purpose of an interpretation exercise, we submit, is
21 one which Your Lordship will be conducting at the end of
22 this case. And no doubt the court will have the assistance
23 of counsel from both sides as to what the words mean
24 insofar as we are concerned. But Your Lordship will be the
25 final arbiter as it were in deciding what the words mean.

1 COURT: Yes I hear you. Mrs De Kok, I
2 suppose I can call upon you at this stage to - I was just
3 merely expressing my concern. You may have your say later
4 on.

5 MS DE KOK SC: Thank you, M'Lord.

6 COURT: Yes. We've taken some time, but
7 you may proceed.

8 MR BESTER: I'm indebted to Your
9 Lordship. Then if I can ask you to turn the page, page 46,
10 Professor Friedman's summary. He makes the point,
11 unfortunately his paragraphs aren't numbered, but let's
12 just work from the third paragraph on that page where he
13 says Zionism was not a religious movement. Do you see
14 that?

15 DR HIRSH: Yes.

16 MR BESTER: He says it was a political
17 ideology which argued that Jews were a nation and therefore
18 entitled to a nation state. Well as I understand you
19 you've already contested that and you don't believe Zionism
20 stands to be defined strictly as a political ideology. Do
21 I understand you?

22 DR HIRSH: Absolutely.

23 MR BESTER: Well let's move on. Then
24 this idea was influenced by political thinking in Europe at
25 the time, not by the Jewish religion. The early Zionists

1 were in fact hostile, some saw it as a threat to the Jewish
2 religion's belief that Jews could only live in their own
3 state when the Messiah came. Many Jews, who were not
4 religious, also rejected Zionism for a variety of reasons.
5 Even within the Zionist movement there were thinkers who
6 rejected the idea of a state for Jews only. Let me just
7 pause there and ask you to give me your comment on that.

8 DR HIRSH: Look the early Zionist
9 movement was a very rich political movement. It lived in a
10 world where there was debate between itself and the
11 socialists and the Buddhists and different Zionists had
12 different positions, different politics, different
13 attitudes, some of them were religious, some of them were
14 not. So these rather sweeping statements about, you know,
15 Zionism is this and not that I find it all a bit partial
16 really. There are, you know, the overwhelming majority of
17 Jews are in some sense Zionists and Jews disagree with each
18 other on the how, on their politics, on what particular way
19 their Zionism translates into politics. I mean I can go
20 through it in more detail if -

21 MR BESTER: Please go ahead.

22 DR HIRSH: So the early Zionists were in
23 fact hostile to the Jewish religion, well some were and
24 some weren't. There have always been religious Zionists,
25 there have always been Zionists who were hostile to the

1 religion, but there have always been Zionists who had every
2 position in between. So I would contest that really
3 because this is a plural movement, a living movement, a
4 social movement. It's not that simple. The vast majority
5 of religious Jews therefore rejected Zionism. Well I'm not
6 sure exactly when that was, but I think it's not true. I
7 think so - there have always been religious Jews for
8 example who lived in the land of Israel and Jerusalem.
9 Many religious Jews had a very strong attachment to the
10 land of Israel and for some of them that became a Zionism,
11 you know in the decades before the state of Israel it
12 became a political project to build a state. But I think
13 these are plurality of views and politics which is being
14 rather glossed over. Some Jews saw Zionism as a threat,
15 the threats of the Jewish religion's belief that Jews could
16 live in their own state when the Messiah came, that's true.
17 Some Jews thought that, but I wouldn't have thought that
18 many of the Zionist pioneers thought anything like that.

19 MR BESTER: Then if I can ask you, at the
20 end of that page there's a sentence that starts which I
21 would like to direct your focus to. It says "Some Jews
22 reject the idea of a state which serves only one ethnic
23 group and moral or political, on moral or political rather
24 than religious grounds."

25 DR HIRSH: Yes.

1 MR BESTER: I beg your pardon.

2 DR HIRSH: Right at the bottom of the
3 page.

4 MR BESTER: Yes and it goes over to page
5 47.

6 DR HIRSH: Some Jews reject the idea of a
7 state which serves only one ethnic group. I think that's a
8 mischaracterisation of the Zionist project before 1948 and
9 of the state of Israel after 1948. I don't think - I think
10 almost nobody, almost no Jews had a conception of creating
11 an Israel which serves only one ethnic group. I think that
12 was never a mainstream position in Zionism and it actually
13 still isn't mainstream position in Zionism.

14 MR BESTER: Then if I can just interject
15 there. The overwhelming majority of anti-Zionists support
16 the right of Jews to live in what is today the state of
17 Israel with full civil and political rights. However, they
18 oppose the current arrangement in which these rights are
19 exercised in a state created to serve only Jews. What is
20 your comment on that?

21 DR HIRSH: Well again I think it's a
22 mistake to characterise Israel as a state created to serve
23 only Jews. Israel is a Jewish state, it's a state for the
24 Jews, it's a state for the Jew to live there, it's also a
25 state for all its citizens. Israel is also a state for the

1 Palestinians and other minorities who live there. It's a
2 complex situation. So I think it's a mischaracterisation
3 of Zionism, but there's the substantive point too which is
4 the claim that the overwhelming majority of anti-Zionists
5 support the right of Jews to live in what is today the
6 state of Israel with full civil and political rights. So
7 there's no evidence or detail given there. Now it seems to
8 me very clear that many anti-Zionists don't support the
9 right of Jews to live in what today is the state of Israel
10 with full political and civil rights. For example Hamas
11 which is one of the most important anti-Zionist movements
12 against the state of Israel. It's an Islamic movement with
13 a very clear commitment to an exterminatory anti-Semitism
14 in its constitution, in its founding document. So Hamas
15 certainly doesn't qualify as that. Hezbollah is a Islamic
16 organisation, military organisation to the north of Israel,
17 in the south of Lebanon, a Shia organisation linked to the
18 Iranian state. Again there's no sense at all in which
19 Hezbollah defend anybody's right to live with full civil
20 and political rights. There are many anti-Zionist
21 movements in the Middle East and further afield which do
22 not take civil and political rights seriously. Of course
23 there are some anti-Zionists, individuals of movements
24 which do. In my experience is a rather western anti-
25 Zionist movement which does have this aspiration, it has

1 this aspiration that Jews continue to live in the - but I'm
2 just contesting that - I'm absolutely contesting the claim
3 that the overwhelming majority of Zionists support the
4 rights of Jews to live in what is today the state of Israel
5 with full civil and political rights. I just don't think
6 that's true, I think there's many millions of anti-Zionists
7 and powerful anti-Zionists movements which do not want
8 that.

9 MR BESTER: Then if I can ask you if you
10 will move down. There's one further paragraph on this page
11 I need you to just focus on and that is the next paragraph
12 where he says "There's a clear distinction between anti-
13 Semitism and anti-Zionism. The former is racial hatred
14 directed at an ethnic group. The latter is opposition to a
15 political ideology while it is obviously possible be both
16 anti-Semitic and anti-Zionist it is also possible to be
17 both anti-Semitic and to support Zionism. And it is
18 certainly possible to be anti-Zionist and not anti-Semitic
19 which helps to explain why there are Jewish anti-Zionists."

20 DR HIRSH: Well to take the first point
21 there's a clear distinction between anti-Semitism and anti-
22 Zionism. There is for some people, for some anti-Zionists
23 they make a very clear distinction and they take it
24 seriously. So they say we're against the state of Israel
25 but we're not against Jews. Many other anti-Zionists do

1 not take that distinction seriously, they don't think it's
2 important. Often there's rhetoric, I'm not a scholar of
3 Arabic, but often the same word is used for the Zionists
4 and for the Jews and many, many people are - many, many
5 people have an anti-Zionism which is simply against the
6 Jews living in the Middle East. I'm not saying that that's
7 this expert witness's position, it's clearly not. But he
8 seems to discount it as an important phenomenon and I think
9 he shouldn't.

10 MR BESTER: Then if I can ask you, the
11 next point in that paragraph I need you to comment on. He
12 says "This point" where says really it's possible to be
13 anti-Zionist and not anti-Semitic. He says "This point
14 remains valid even when opposition to Zionism is expressed
15 in aggressive or even violent terms."

16 DR HIRSH: Yeah.

17 MR BESTER: "As long as the attack
18 distinguishes clearly between the ideology and the state
19 which implements it on the one hand and the Jewish people
20 on the other it is not anti-Semitic regardless of how
21 extreme the reaction may appear to be." What is your
22 comment on that?

23 DR HIRSH: Well I think it is possible for there to
24 be a thoughtful, critical, engaged anti-Zionism which isn't
25 anti-Semitic. I'm not so convinced that a violent and

1 aggressive and extreme anti-Zionism could be not anti-
2 Semitic because I think that very many ways in which such
3 an anti-Zionism would express itself would be anti-Semitic
4 if it targeted Jews outside Israel and held them
5 responsible for Jews in Israel. If it indulged in
6 conspiracy theory which said that the Zionist movement
7 controls various states or western states or the United
8 States, there are very many ways in which an aggressive and
9 violent anti-Zionism I think would be quite different from
10 a sort of scholarly, thoughtful, critical anti-Zionism. So
11 I think it goes much too quickly to saying to the claim
12 that an aggressive, violent, extreme anti-Zionism could be
13 not anti-Semitic.

14 [14:59] I think - I'm sceptical about that.

15 MR BESTER: Then go to page 49, if you
16 will, Dr Hirsh. The middle paragraph on that page, the big
17 paragraph, let me very briefly read it, "Hirsh's purpose in
18 this section is to establish," and he's dealing with your
19 identifications of racism and anti-Semitism, let me just
20 clear that. Then he says, "Hirsh's purpose in this section
21 is to establish a basis for labelling as anti-Semitic
22 statements which criticise Zionism or the Israeli State
23 rather than Jews. The aim is to show that criticism of a
24 state can be anti-Semitic even when the words used by the
25 speaker contain no negative attitude to Jews. He comments

1 firstly that identifying racism requires judgment because
2 statements and attitudes which appear not to be racist may
3 express racist assumptions or attitudes, but he gives no
4 idea of how that judgment should be used since he gives no
5 definition of the set of criteria for determining how to
6 tell whether a seemingly non-racist statement is really
7 racist." Well, let's just pause there. How do you respond
8 to that?

9 DR HIRSH: Well, I do offer a set of
10 criteria which can help us and that's the definitions that
11 we were discussing earlier. So I certainly do offer a set
12 of criteria which I think can help, but I think that, as I
13 said that set of criteria isn't magic, it can't do the work
14 for us. We still have to make a judgment, and we can, you
15 know, we can discuss rationally whether this or that is
16 anti-Semitic, but the problem again is we have this claim
17 that I'm not in the business of discussing rationally or
18 being right and wrong, but actually what I'm trying to do
19 is to prohibit criticism of Israel.

20 MR BESTER: Then - sorry, if there's
21 anything you want to add on that?

22 DR HIRSH: Well, I'm not in the business
23 of prohibiting criticism of Israel.

24 MR BESTER: Then he says, "But unless we
25 are told clearly how we are to judge the racism of a

1 comment or attitude which appears not to be racist, we are
2 in effect being told that we should simply leave this task
3 to people who consider themselves specialists. This cannot
4 possibly be valid because it means that racism can be
5 anything which the specialist in question says it is. In
6 effect it gives a blank cheque to anyone who wishes to
7 define racism in a way which suits their purpose, which
8 does not stand up to critical scrutiny." How do you
9 comment to that?

10 DR HIRSH: Well, but of course not. I
11 would be - you know I can make some arguments about what I
12 think constitutes anti-Semitism about whether I think this
13 or that thing is anti-Semitic. Other experts can and will
14 offer their own view which will be different, and actually
15 it's up to the court to make that decision. It doesn't put
16 the experts in a position of dictator at all. What it does
17 is it brings this discussion into the realm of rational
18 debate rather than the realm of sort of you're part of a
19 conspiracy to silence Israel - sorry, to silence criticism
20 of Israel.

21 MR BESTER: Then I want you to turn to
22 page 53, if you will. The second paragraph from the top
23 says, "If Hirsh's purpose was simply to enable the reader
24 to identify anti-Semitism he would surely have mentioned
25 that anti-Semitism might be found in all political creeds

1 and movements, including as the response has shown,
2 Zionism. He might also have mentioned that it is also a
3 problem in liberal democracy such as the United States,
4 which currently support the Israeli State, and where to
5 name but one example Ivy League Universities impose quotas
6 to limit the number of Jews who could enrol." Would you
7 please comment on that portion of that I read to you?

8 DR HIRSH: Well, again it begins with
9 this extraordinary suggestion that my purpose isn't what I
10 say it is and what I say my purpose is, is to help the
11 reader to identify anti-Semitism. The suggestion is that's
12 not at all my purpose, my purpose is something else, and he
13 says if that was my purpose I would have mentioned other
14 kinds of anti-Semitism which could be found in different
15 political creeds, different movements, in the United
16 States, in the Ivy League Universities in the 1960s. I
17 just don't think that's true because I don't think anti-
18 Semitism in the Ivy League Universities in the 1960s is
19 relevant to this case. This case is about this kind of
20 anti-Semitism. It's not about the kind of anti-Semitism
21 which was important in the Ivy League Universities in the
22 United States in the 1960s. So the structure of this
23 argument is extraordinary. If I was arguing in good faith
24 then I would have talked about the Ivy League Universities
25 and the anti-Semitism there - I don't accept any of that.

1 MR BESTER: Then the last paragraph on
2 this page, the criticism is levelled against you as
3 follows; "Hirsh begins by distancing himself from the crude
4 view often advanced by some Zionists that any criticism of
5 the State of Israel is anti-Semitic. He acknowledges that
6 some criticism is not. This is obviously not true.
7 Critics who direct their criticism purely at the state, the
8 political system it serves and the ideology which sustains
9 it are not anti-Semitic, while those who lay the blame at
10 the door of the Jews rather than the system are anti-Jewish
11 racist." Well, let's just pause there. What is your
12 response to that?

13 DR HIRSH: Well, the thing that he says
14 is obviously not true is the thing that he's already
15 conceded I haven't said, which is - okay, and the second
16 thing that strikes me about this is the claim, the claim is
17 often advanced by some Zionists - often advanced by some
18 Zionists - that any criticism of the State of Israel is
19 anti-Semitic, and I'm not sure who actually advances that.
20 I think of course Jews and Zionists disagree about what is
21 anti-Semitic and what isn't, but I don't know of - I can't
22 really think of anyone at all who would say that any
23 criticism of Israel is anti-Semitic. I think it's a straw
24 man. I think, you know I think people worry about anti-
25 Semitism because they're worried about anti-Semitism, not

1 because they're trying to delegitimize criticism.

2 MR BESTER: Then on page 54 he deals with
3 your EUMC definition in the middle paragraph under the
4 heading "The EUMC." I just would like to take you down to
5 more or less in the middle of that paragraph where it says,
6 "But the EUMC is not an academic institution." Do you see
7 that?

8 DR HIRSH: Ja.

9 MR BESTER: "But the EUMC is not an
10 academic institution and its work is not an academic
11 project. It is a commission established by the European
12 Union and therefore reflects the political views of
13 European governments who belong to the EU, some of whom as
14 noted above insist that opposition to the State of Israel
15 is anti-Semitic. Given the political context it comes as
16 no surprise that the EUMC's definition does far more to
17 serve the interests of the Israeli State than to provide a
18 useful definition of anti-Semitism." You see that?

19 DR HIRSH: Ja.

20 MR BESTER: Well, what is your response
21 to that?

22 DR HIRSH: I can't think of any European
23 governments who belong to the European Union who insist
24 that opposition to the State of Israel is anti-Semitic.

25 MR BESTER: Why do you say that?

1 DR HIRSH: I can't think of - well,
2 depending on what you mean by opposition, sure, people
3 might think that a project to destroy the State of Israel
4 against the wishes of the Israelis who live there might be
5 anti-Semitic, but I don't know of any European states who
6 think that all criticism of Israel is anti-Semitic. The
7 EUMC actually did involve a lot of academic discussion. It
8 also involved input from non-governmental organisations and
9 also from states and of course the European states have a
10 particularly intimate relationship to anti-Semitism. It
11 was in Europe where the holocaust happened, right across
12 Europe, and even later than that in the time that I think
13 the EUMC's definition and its emergence is connected to the
14 end of the Cold War and under communism anti-Semitism is
15 very important in Poland, in East Germany, in the Soviet
16 Union. So even as late as the 60s and the 70s anti-
17 Semitism was very important and these discussions were
18 partly about addressing the new Europe, what is the new
19 Europe going to be like, how is the new Europe going to
20 make guarantees against anti-Semitism and against racism.
21 So the idea that it's somehow illegitimate, the European
22 states, to discuss it and to take this issue seriously I
23 find eccentric.

24 MR BESTER: Then on page 56, if I can ask
25 you to turn there, page 56, the second paragraph, "The EUMC

1 also claims that it is anti-Semitic to require of Israel
2 behaviour not expected of any other democratic nation.
3 This claim is both logically and empirically flawed."
4 Well, how do you respond to that construction by Prof
5 Friedman?

6 DR HIRSH: Well, I think the point made
7 in the EUMC definition is very simple, which is that we
8 have, we should have if we're a trade union or if we're a
9 state or even if we're an individual, we should have a
10 coherent and consistent way of dealing with human rights
11 abuses. So one of those is international law. One of
12 those is - so the idea of international law is that the
13 same standards are applied to all states and what the
14 EUMC's definition says here is that if a trade union or
15 anyone else applies different standards to Israel, harsher
16 standards, if it says Israel is a racist state because
17 Israel does things that other states also do and the other
18 states are not denounced with anger and aggression as
19 racist states, then I think it's almost a banal point that
20 one should judge human rights abuses in Israel by the same
21 measure that one judges human rights abuses anywhere else.

22 MR BESTER: Well, then to add on to that,
23 if I may, so when there is a claim of anti-Semitism made by
24 someone, levelled against someone else, in your view and on
25 your understanding as an academic how should that be dealt

1 with?

2 DR HIRSH: Sorry, say the question again.

3 MR BESTER: What I'm asking is in your
4 view as an academic when there is a charge, a complaint
5 rather -

6 DR HIRSH: Yes.

7 MR BESTER: - of anti-Semitism levelled
8 against another party, how should that complaint be
9 addressed?

10 DR HIRSH: Well, I think that depends
11 entirely on what kind of thing we're talking about. If it
12 was a student of mine in a class, if a student said
13 something anti-Semitic it would be a teachable moment. We
14 would discuss it, we would look at the context. We'd have
15 a reasoned debate about it. Hopefully the student might
16 come to see it in a different way. If on the other hand it
17 was a sort of vicious anti-Semitic attack then it might be
18 a legal issue. I think there are many different ways of
19 addressing anti-Semitism. The key one that I'm interested
20 in as an educator is to say look, there's a problem here,
21 there's a problem with what's been done, we should discuss
22 it, we should get other people involved who take anti-
23 racism seriously. We should have a discussion and we
24 should try to move on and we should also take seriously
25 what the representative institutions of the Jewish

1 community say. That doesn't mean we have to believe
2 everything they say as a matter of principle, but we should
3 have a civil society discussion about whether this or that
4 is appropriate. I mean I would be much happier in general
5 of course if it stayed out of the courts.

6 MR BESTER: M'Lord, no further questions
7 for the witness.

8 COURT: Thank you. It's time for cross-
9 examination. Yes.

10 CROSS-EXAMINATION BY MS DE KOK SC: Thank
11 you, M'Lord. Dr Hirsh, have you heard of an organisation
12 or a campaign or movement - I'm not sure what it is called
13 - Engage?

14 DR HIRSH: Yes.

15 MS DE KOK SC: And what is it?

16 DR HIRSH: It's a campaign that I was
17 involved in.

18 COURT: What is the campaign?

19 MS DE KOK SC: Engage. E-N-G-A-G-E.

20 COURT: E?

21 MS DE KOK SC: N-G-A-G-E.

22 COURT: The normal engage?

23 MS DE KOK SC: Yes, the normal engage.

24 DR HIRSH: It was a campaign which I was
25 part of setting up at the time when people first started

1 talking about an academic boycott of Israel. They first
2 started talking about excluding Israeli academics and only
3 Israeli academics from campuses in Britain and around the
4 world, and we set up a network and a website to try to
5 engage with that movement and try to suggest better ways of
6 doing solidarity with the Palestinians and to try to engage
7 over the issue of anti-Semitism.

8 MS DE KOK SC: And are you still involved
9 with Engage?

10 DR HIRSH: Yes.

11 MS DE KOK SC: So in addition to your
12 activities as a scholar and a teacher, which is what you
13 said is what you do and love to do, you are also, you also
14 take the role of an activist to promote something that you
15 feel strongly about?

16 DR HIRSH: Yes.

17 MS DE KOK SC: And if I look at your CV
18 it seems that you have written many, many articles, and
19 many of them are either aimed at criticising the BDS
20 campaign and many of these articles are devoted to the
21 theory that in a particular case anti-Zionism equates to
22 anti-Semitism.

23 DR HIRSH: In a particular case.

24 MS DE KOK SC: Yes.

25 DR HIRSH: So there are some cases in

1 which I think anti-Zionism has a relationship to anti-
2 Semitism, yes. I don't think it equates.

3 MS DE KOK SC: Okay, but I haven't come
4 across - I haven't read all of your articles, but I've
5 tried to read some of your writings. I haven't come across
6 one where you concluded that you know what, in fact here
7 the anti-Semitism charge is falsely made, there's no anti-
8 Semitism here.

9 DR HIRSH: Well, there's a lot of
10 criticism of Israel on the Engage website and elsewhere,
11 some of it made by me, which evidently I don't consider to
12 be anti-Semitism. Engage was concerned with that kind of
13 criticism of Israel which we did think was anti-Semitic.
14 So -

15 MS DE KOK SC: Okay, and in those
16 instances - or that explained why you wrote articles about
17 those instances?

18 DR HIRSH: Ja.

19 MS DE KOK SC: How did it come about - or
20 let me first ask you this; I see in your CV you mention
21 times where you have appeared as an expert witness.

22 DR HIRSH: Yes.

23 MS DE KOK SC: One particular instance
24 that I could see -

25 DR HIRSH: In Cape Town.

1 MS DE KOK SC: In Cape Town, yes.

2 DR HIRSH: Yes.

3 MS DE KOK SC: Have you testified in
4 other tribunals or court cases?

5 DR HIRSH: Not as an expert witness.

6 MS DE KOK SC: Not as an expert, but as a
7 lay witness?

8 DR HIRSH: Yes, as a witness of fact.

9 MS DE KOK SC: Correct. You testified in
10 a matter in the Employment Tribunal in the United Kingdom.

11 DR HIRSH: I did.

12 MS DE KOK SC: A matter of Mr Fraser
13 against the University & College Union.

14 DR HIRSH: Yes.

15 MS DE KOK SC: And it was a matter which
16 implicated the English equivalent of what we have here as
17 the Equality Act.

18 DR HIRSH: Yes.

19 MS DE KOK SC: Yes, and Mr Fraser
20 complained - and I'm really summarising, he had many
21 complaints, but he complained that certain conduct of the
22 University & College Union, of which he is was a member,
23 harassed him or was detrimental to him on the basis of him
24 being a Jew, in a nut -

25 DR HIRSH: Yes, that's right.

1 MS DE KOK SC: In a nutshell.

2 DR HIRSH: Yes.

3 MS DE KOK SC: In the judgment the court
4 quoted from the heads of argument, or the written opening
5 address of counsel for Mr Fraser, who was the claimant, and
6 it said Mr Julius - he was his representative apparently -

7 DR HIRSH: Yes.

8 MS DE KOK SC: Yes, that "The claimant
9 has a strong attachment to Israel. This attachment is a
10 non-contingent and rationally intelligible aspect of his
11 Jewish identity."

12 DR HIRSH: Yes.

13 MS DE KOK SC: And it struck me that
14 those are the very same words you used in paragraph 35 of
15 your summary.

16 DR HIRSCH: Yes.

17 [15:19] MS DE KOK SC: So did Mr Julius base this
18 on your evidence or did you base your evidence upon Mr
19 Julius's submissions in that matter?

20 DR HIRSH: I think we had many
21 discussions about the relationship between Jewish identity
22 and hostility to Israel or Zionism. We came to a position,
23 I think we probably came to that position together,
24 including discussing it with other people. I don't know, I
25 think -

1 MS DE KOK SC: Mr Julius, though, is an
2 attorney.

3 DR HIRSH: Yes.

4 MS DE KOK SC: Ja. So you can't remember
5 who the original author was of those words, you or him or
6 the two of you together?

7 DR HIRSH: I think the author of those
8 words was probably Anthony Julius but it was - we were
9 wrestling with the issue together.

10 MS DE KOK SC: How does it come about
11 that you give evidence in this case? Who approached you?

12 DR HIRSH: The - Wendy, Wendy Kahn, the
13 leader of the - what is she, the president of the South
14 African Jewish Board of Deputies, I think. She will tell
15 us.

16 MS DE KOK SC: And who is paying for you
17 to be here, for your flight tickets and so forth?

18 DR HIRSH: I don't know, I assume - I
19 don't know, either the South African Jewish Board of
20 Deputies or the Human Rights Council or the - actually I
21 don't know.

22 MS DE KOK SC: You don't know.

23 DR HIRSH: I haven't had any discussion
24 with them about payment either. I probably ought to.

25 MS DE KOK SC: But you didn't pay for

1 your ticket -

2 DR HIRSH: No.

3 MS DE KOK SC: - getting here.

4 DR HIRSH: No.

5 MS DE KOK SC: And at least you made your
6 flight.

7 DR HIRSH: Yes.

8 COURT: Is he not the one who missed -

9 MS DE KOK SC: No, the American expert
10 missed, M'Lord.

11 COURT: Oh, he's still coming. Yes.

12 MS DE KOK SC: Right. Dr Hirsh, you've
13 made it clear - I'll deal with the definition aspect of the
14 case, I'll deal with a bit later but it's clear to me from
15 your evidence that you also accept that whether something
16 is racist or not must be adjudged in the context of the
17 particular events.

18 DR HIRSH: Yes.

19 MS DE KOK SC: It's very context
20 specific.

21 DR HIRSH: Yes.

22 MS DE KOK SC: And that context, I'm sure
23 you'll accept, includes not only the immediate context of
24 what is said and where it's said but also a broader
25 historical, geopolitical context.

1 DR HIRSH: Yes.

2 MS DE KOK SC: So in this case, as I'm
3 sure you know, there is a complaint that four statements
4 made by Mr Masuku were hate speech directed against Jewish
5 on the basis of their ethnicity or religion.

6 DR HIRSH: Yes.

7 MS DE KOK SC: One of these statements
8 was made in a blog and the other three were made during a
9 meeting and perhaps you can just help us on the context,
10 the broader context. This - the statements were made early
11 in 2009. In 2008 there was a war in Gaza, not so?

12 DR HIRSH: Yes.

13 MS DE KOK SC: Yes, which the Israelis
14 called Operation Cast Lead.

15 DR HIRSH: Yes.

16 MS DE KOK SC: The other people in other
17 parts of the world called it other things. It was referred
18 to as the Gaza war or the Gaza massacre and then there were
19 also Arabic references that -

20 DR HIRSH: I don't think it was a
21 massacre, I don't think that would be an accurate way of
22 referring to it. I think it was a war.

23 MS DE KOK SC: No, no, I'm not asking you
24 to judge right or wrong at the moment.

25 DR HIRSH: Okay.

1 MS DE KOK SC: I'm just asking you to
2 give us a neutral perspective of international views.

3 DR HIRSH: Yes, some people said it was a
4 massacre.

5 MS DE KOK SC: Perhaps you can just tell
6 us also, the Gaza blockade, what is that? When did it
7 start and what did it entail?

8 DR HIRSH: I'm not sure of exact details
9 and exact dates. Gaza has two borders, it has a border
10 with Egypt and it has a border with Israel.

11 MS DE KOK SC: Yes.

12 DR HIRSH: So Israel withdrew from Gaza.
13 Israel had settlements in Gaza, Israel took control of Gaza
14 in the 1967 war.

15 MS DE KOK SC: Yes.

16 DR HIRSH: After Egypt, amongst other
17 states, made an attempt to invade Israel and to obliterate
18 Israel -

19 MS DE KOK SC: I'm sorry -

20 DR HIRSH: Egypt at that time with -

21 MS DE KOK SC: If I could just stop you.

22 DR HIRSH: Sorry?

23 MS DE KOK SC: If I could just stop you
24 there for a moment.

25 DR HIRSH: Yes.

1 MS DE KOK SC: I don't want us to go into
2 too much detail regarding the facts because - not because
3 I'm not interested, but it seems to me that many of these
4 facts are contested facts. You say the '67 war was caused
5 because Egypt was planning an attack. There's a school of
6 thought which disagrees with that, so there is no - there
7 are different versions even on these historical facts.

8 DR HIRSH: I don't think there's a
9 version of the events that led up to the '67 war which
10 legitimately or reasonably deny that Egypt and other Arab
11 states were trying to obliterate Israel. I don't think
12 that's a matter of opinion or contestation, I think that's
13 a matter of history.

14 MS DE KOK SC: Alright, well, I really
15 don't want to be in a position to call witnesses to talk
16 about the historical facts, so let's just try and keep it
17 narrow. You're saying the Gaza - you were saying the Gaza
18 blockade.

19 DR HIRSH: Yes.

20 MS DE KOK SC: Israel withdrew from Gaza,
21 that we know.

22 DR HIRSH: Yes, Egypt occupied Gaza, in
23 the '67 war Israel then took control of Gaza. Israel
24 withdrew, it withdrew its settlements, it withdrew its
25 civilians, it withdrew its soldiers and then Hamas power in

1 Gaza - Hamas is an Islamist and anti-Semitic movement that
2 I mentioned before and -

3 MS DE KOK SC: In your view therefore,
4 like Donald Trump would say, bad dudes.

5 DR HIRSH: No, I don't say bad dudes. I
6 am not Donald Trump. I would say that this is an anti-
7 Semitic organisation.

8 MS DE KOK SC: Yes, that's - yes.

9 DR HIRSH: And they had state power in
10 Gaza. So I'm not sure of the exact details of what you
11 call the Gaza blockade. I don't think there was ever a
12 blockade of Gaza. I think goods and food and materials and
13 trade went in and out of Gaza. I think from Israel and I
14 think also from Egypt and I think there might have been
15 times when that was stopped. Of course Hamas was trying to
16 bring in weapons into Gaza and materials with which they
17 could build tunnels from which they could make attacks into
18 Israel, so there was a kind of standoff and a rather cold
19 peace, if one could call it that. This is not my area of
20 expertise but I believe that there was always trade.

21 MS DE KOK SC: Okay.

22 DR HIRSH: There was always goods going
23 in and out of Gaza, I think from Israel, I think also from
24 Egypt.

25 MS DE KOK SC: Apart from the land

1 borders, Gaza has an ocean, a sea front.

2 DR HIRSH: Correct.

3 MS DE KOK SC: Yes and does it have free
4 access to - does it have a port where it can receive goods
5 or send goods from?

6 DR HIRSH: No, I don't think so. I don't
7 think so.

8 MS DE KOK SC: And why is that?

9 DR HIRSH: I think the - I'm not 100%
10 sure on this story. I presume that the Israelis want to
11 make sure that weapons and missile systems and things like
12 that aren't being freely exported into Gaza -

13 MS DE KOK SC: Okay, so the Israeli state
14 controls Gaza's sea border.

15 DR HIRSH: I think that's right, yes.

16 MS DE KOK SC: Yes.

17 COURT: Are we still on track here?

18 MS DE KOK SC: I'm trying to get back to
19 the track, M'Lord.

20 COURT: Yes.

21 MS DE KOK SC: Okay but we were talking
22 about the Gaza war because that is our specific context for
23 what happened here, specific in the broader sense.

24 DR HIRSH: Okay.

25 MS DE KOK SC: So we know that there was

1 this war in Gaza and Israel sent in air troops, well, air
2 attack and then ultimately a land attack.

3 DR HIRSH: Yes.

4 MS DE KOK SC: Yes. And we know that
5 there were many casualties.

6 DR HIRSH: I believe, off the top of my
7 head, there were something like 1 400 casualties.

8 MS DE KOK SC: Okay.

9 DR HIRSH: I'm open to - I'm not sure of
10 the figures but I believe it was of that order.

11 MS DE KOK SC: Of Palestinians or
12 Israelis?

13 DR HIRSH: Yes, of Palestinians.

14 MS DE KOK SC: And Israeli casualties?

15 DR HIRSH: I believe about 400 of those
16 Palestinians were combatant and about 1 000 of them were
17 non-combatant.

18 MS DE KOK SC: Civilians, in other words.

19 DR HIRSH: Yes.

20 MS DE KOK SC: Yes and from the Israel
21 side how many people died?

22 DR HIRSH: I don't know. I expect you'll
23 tell me. I -

24 MS DE KOK SC: I'm telling you, all I can
25 say, there is no such thing as an uncontested fact in this

1 but it seems about 30. Does that sound right?

2 DR HIRSH: That sounds right to me, yes.

3 MS DE KOK SC: And of course there was a
4 massive destruction of infrastructure in Gaza as a result
5 of this war, buildings demolished.

6 DR HIRSH: Yes, there was infrastructure
7 - yes.

8 MS DE KOK SC: If you can then turn in
9 the documents bundle, the other file that you have in front
10 of you -

11 DR HIRSH: This file?

12 MS DE KOK SC: Yes, it should be. I'm
13 referring the witness to the trial bundle, M'Lord.

14 COURT: Thank you. Page?

15 MS DE KOK SC: I'd like you to turn to
16 page 283.

17 COURT: Thank you.

18 MS DE KOK SC: Tell me firstly, Dr Hirsh,
19 can you recall what the international reaction was to the
20 Gaza war? I'm sure it wasn't an homogenous reaction but
21 there must have been a range of opinions.

22 DR HIRSH: Yes, there were -

23 MS DE KOK SC: From other states.

24 DR HIRSH: From other states, yes.

25 MS DE KOK SC: Yes. Some of them

1 condemning Israel.

2 DR HIRSH: Yes.

3 MS DE KOK SC: And others not.

4 DR HIRSH: Yes.

5 MS DE KOK SC: If you look then at page

6 283, this is a letter which purports to be written by - the

7 letter runs from 283 through to 292.

8 DR HIRSH: Mm.

9 MS DE KOK SC: So you'll see that it is a

10 letter which appears to have been signed by a whole number

11 of academics in the United Kingdom.

12 DR HIRSH: Yes.

13 MS DE KOK SC: I'm sure you know some of

14 them. I see quite a few colleagues of yours from

15 Goldsmiths.

16 DR HIRSH: Yes, I remember the letter.

17 MS DE KOK SC: You remember?

18 DR HIRSH: Yes.

19 MS DE KOK SC: You saw it at the time.

20 You didn't sign this, did you?

21 DR HIRSH: I didn't sign this letter.

22 MS DE KOK SC: And amongst the

23 signatories of this letter, any people whom you know to be

24 Jewish?

25 DR HIRSH: Oh, I'm sure. I imagine there

1 are many. Haim Bresheeth is an Israeli, 284.

2 MS DE KOK SC: Bresheeth?

3 DR HIRSH: About a third of the way down.

4 MS DE KOK SC: Yes, I see. Media
5 Studies, University of London, he's an Israeli.

6 DR HIRSH: Ja.

7 MS DE KOK SC: And Jewish.

8 DR HIRSH: Ja. You know, I -

9 MS DE KOK SC: Well, you'll obviously not
10 know all of them.

11 DR HIRSH: I'm very sure that a number of
12 - Des Friedman is from my own college, he's Jewish, in 285.
13 Yes, I absolutely accept that a number of those signatories
14 are Jewish.

15 MS DE KOK SC: And these people called it
16 a massacre. They referred to the massacres in Gaza, the
17 latest phase of a war that Israel has been waging against
18 the people of Palestine for more than 60 years.

19 DR HIRSH: Yes, they did.

20 MS DE KOK SC: And then they take a very
21 strong position here to say that Israel must lose this war.

22 DR HIRSH: Yes.

23 MS DE KOK SC: No soft soaping, no talk.

24 DR HIRSH: Correct.

25 MS DE KOK SC: Israel must just lose this

1 war and Israel must accept that it - security depends on
2 justice and peaceful coexistence and that Israel should
3 immediately and unconditionally end its assault on Gaza and
4 withdraw from the occupied territories. And then they say,
5 "And we should do everything that we can to oblige Israel
6 to comply with this, including a programme of boycott,
7 disinvestment and sanctions."

8 DR HIRSH: Yes.

9 MS DE KOK SC: And that is the DBS
10 campaign, it refers to the DBS campaign that we've heard
11 lots about. BDS, BDS.

12 DR HIRSH: The beginning, that wasn't the
13 beginning of the BDS campaign.

14 MS DE KOK SC: No, no, but it's a
15 reference to that.

16 DR HIRSH: Yes.

17 MS DE KOK SC: Yes. And would you
18 describe this letter as anti-Semitic?

19 DR HIRSH: I would describe it as
20 problematic. I think when Israel is in a war with an
21 avowedly genocidal anti-Semitic movement which has
22 genocidal anti-Semitism in its very founding charter, I
23 think to call for the defeat of Israel by that movement
24 would be very worrying to me. I would oppose that strongly
25 personally.

1 DR HIRSH: Just on the historical facts,
2 who launched this invasion? Who started this war?

3 DR HIRSH: As I remember it, there were
4 attacks from Gaza made onto civilian populations in Israel.
5 The people who run Gaza have a principle of attacking
6 civilian Jewish people. I believe there was a number of
7 them over a long period of time and in the end the Israel
8 government moved against the Hamas regime and their forces
9 in Gaza.

10 MS DE KOK SC: Does Gaza have an air
11 force?

12 DR HIRSH: No.

13 MS DE KOK SC: Alright, so but you accept
14 that there is a point of view that says Israel was wrong
15 and the force was wholly disproportionate and there was no
16 way in which Gaza could defend itself.

17 DR HIRSH: Sorry, which question of those
18 would you like me to answer?

19 MS DE KOK SC: That it is a valid point
20 of view that Gaza was - or that there is a point of view,
21 you don't have to agree that it's valid but that there was,
22 at the time, a widely held point of view that Israel was
23 wrong in launching this attack.

24 DR HIRSH: Well, there -

25 MS DE KOK SC: Starting this war.

1 DR HIRSH: Well, I think that is a -
2 sorry, you interrupted me. The bit that you said - before
3 you interrupted me I was going to say that not only is it a
4 legitimate position but it's one I share. I was against
5 the war, I thought that Israel was wrong to launch that
6 attack, so I think it's an entirely legitimate position,
7 yes.

8 MS DE KOK SC: But you would not go so
9 far as to say that it was a massacre.

10 DR HIRSH: I don't think it's a matter of
11 going far, I think it's - I think a war is quite a
12 different event from a massacre. I don't think it's a
13 matter of quantity, it's a matter of what's happening. So
14 I would - no, well, I've said I wouldn't.

15 MS DE KOK SC: Yes, yes. So you say that
16 you also, you were not in favour of Israel starting this
17 operation, let's call it that.

18 DR HIRSH: I think the policy of the
19 Netanyahu government in that time was not one that I agree
20 with personally.

21 MS DE KOK SC: In South Africa, to bring
22 it back to the local context, in South Africa the Jewish
23 Board of Deputies, the Zionist Federation and the Chief
24 Rabbi issued a statement on the, I think it was on the 11th
25 January, in which they said inter alia the following, "The

1 South African Jewish community firmly supports the decision
2 of the government of Israel to launch a military operation
3 against Hamas in the Gaza strip." If you had been a member
4 of the South African Jewish community you would not have
5 been included in that sentiment.

6 DR HIRSH: I've already said it.

7 MS DE KOK SC: Yes. What then happened
8 in terms of context is that a number of South African
9 Jewish persons wrote an open letter to disassociate
10 themselves from this statement and that is the document
11 that you will see at - if I can ask you to turn to page
12 318.

13 DR HIRSH: Do you want me to read it?

14 MS DE KOK SC: No, no, no, you don't have
15 to read it. Have you seen it before?

16 [15:39] DR HIRSH: I don't recognise it but I,
17 ja, I've seen letters like it. It's familiar.

18 MS DE KOK SC: What does that mean,
19 you've seen letters like that?

20 DR HIRSH: It means that I've seen
21 letters which are oppositional to Jewish community
22 leaderships.

23 MS DE KOK SC: Specifically the third
24 last paragraph just before the signatures you'll see that
25 these Jewish people express the view that, "As members of

1 the Jewish community we recognise that Israel's response is
2 an inhumane and disproportionate collective punishment
3 prohibited under international law. We also condemn the
4 long siege Israel has inflicted in the people of Gaza and
5 call for this to be immediately lifted to allow food,
6 medical supplies, fuel, electricity and foreign aid." I
7 assume that the last sentence refers to this Gaza blockade.

8 DR HIRSH: Ja.

9 MS DE KOK SC: Would you consider, well,
10 then you - I'm afraid you're going to have to perhaps just
11 read through this quickly because I would like you to
12 express your opinion as to whether this letter is anti-
13 Semitic.

14 DR HIRSH: No, I don't think this letter
15 is anti-Semitic.

16 COURT: Sorry?

17 DR HIRSH: I don't think is letter is
18 anti-Semitic.

19 COURT: Is what?

20 DR HIRSH: Anti-Semitic.

21 MS DE KOK SC: He doesn't think it's
22 anti-Semitic. So what we can see in South Africa around
23 about the, or just after the commencement of the Gaza war
24 is you had some Jewish people condemning the conduct of the
25 Israeli government and then you had inter alia the SA

1 Zionist Federation supporting that conduct.

2 DR HIRSH: Well, I think that's true but
3 I would like to add that you had a split amongst Zionists.
4 I might guess and I think I'm right is that many of these
5 people in this list of people who identify as Jews and who
6 oppose Israel's war, I think many of them would identify
7 themselves as Zionists and -

8 MS DE KOK SC: Why is that? Do you know
9 any of the people on the list?

10 DR HIRSH: Yeah, I'm guessing. Perhaps
11 you could tell me if I'm wrong or right but what I would
12 resist is making this into a battle between the Zionist
13 Federation on the one hand, the Zionists, and the non-
14 Zionists on the other. I think this is a disagreement
15 amongst Zionists, of course also anti-Zionists but I think
16 this is also - as I said I, my guess is that in this
17 context I would be defined as a Zionist but I also said
18 that I agree with the thrust of this, some of this letter
19 that I disagree with the policy. So I would resist making
20 a distinction between the Zionist Federation who support
21 the war and the anti-Zionists who oppose it. I don't think
22 that would describe the situation.

23 MS DE KOK SC: Well, on this particular
24 issue they had different views.

25 DR HIRSH: Yes, there were different

1 views amongst the Jewish community and amongst Zionists.

2 MS DE KOK SC: Yes. In South Africa
3 COSATU which is a trade union federation took a position
4 that they opposed the Israeli government or condemned the
5 Israeli government's conduct. I suppose that was no
6 unusual amongst other trade union organisations around the
7 world.

8 DR HIRSH: No.

9 MS DE KOK SC: Many others took the same
10 view.

11 DR HIRSH: Sure. I mean, I don't know in
12 what terms they opposed it. This letter for example is in
13 some senses quite balanced. It's critical of the anti-
14 Semitic Hamas movement and what they do as well as critical
15 of the Israeli government. So I don't know if COSATU was
16 balanced in that sense but you'll tell me I suppose.

17 MS DE KOK SC: So what we have is that
18 COSATU condemns it and COSATU is in favour of the BDS
19 campaign.

20 DR HIRSH: Ja.

21 MS DE KOK SC: And after the South
22 African Zionist Federation publicly declares its support
23 for the war COSATU amongst many other civil organisations
24 organises a march they say, COSATU says to the offices of
25 the South African Zionist Federation. Were you, when you

1 were being briefed of this matter were you told about that
2 context and that background?

3 DR HIRSH: I think yes, more or less. I
4 mean, there is one point that I think is quite important is
5 that the Zionist Federation is one organisation, is one
6 part of the Jewish community. It's one body. And I
7 wouldn't like to have an illusion of the Zionist Federation
8 into Zionists in general. I think that would be a mistake.

9 MS DE KOK SC: Well, I don't, we're not
10 doing that.

11 DR HIRSH: Good, okay.

12 MS DE KOK SC: Reports are published on a
13 blog relating to this march. Have you read some of those
14 blog posts?

15 DR HIRSH: I think I did at the time,
16 yes.

17 MS DE KOK SC: Okay.

18 DR HIRSH: I think I have an idea what
19 was said, yes.

20 MS DE KOK SC: Ja. The blog is called
21 It's Almost Supernatural.

22 DR HIRSH: Yes.

23 MS DE KOK SC: Did you follow that blog
24 at the time?

25 DR HIRSH: I didn't follow it. I knew of

1 it.

2 MS DE KOK SC: You knew of it.

3 DR HIRSH: Ja.

4 MS DE KOK SC: So the, on the blog
5 there's a report of the march and then there are comments
6 posted on the blog because the report published on the blog
7 is very critical of COSATU. It describes COSATU's march as
8 an attack on the Jewish community.

9 DR HIRSH: Okay.

10 MS DE KOK SC: Yes, and -

11 DR HIRSH: Are you going to take me to it
12 or -

13 MS DE KOK SC: Yes, yes, it's in your - I
14 thought you'd read this already. Page 3. It starts there.

15 DR HIRSH: Page 3, right at the
16 beginning. At the beginning of the file? Sorry, I'm -

17 MS DE KOK SC: It's in the documents
18 file, so not where your expert summary is, in the other
19 file.

20 DR HIRSH: It's right at the beginning of
21 that whole file there.

22 MS DE KOK SC: Yes, yes.

23 DR HIRSH: Got it, eight, five, four,
24 three. Sorry.

25 MS DE KOK SC: If you can, perhaps you

1 should rather go to page 9.

2 DR HIRSH: Page 9.

3 MS DE KOK SC: Where you'll see there's a
4 call on members of the Jewish community to stand their
5 ground against COSATU.

6 DR HIRSH: Yes.

7 MS DE KOK SC: And we know that
8 subsequent to that people then posted comments on this
9 article, this article critical of COSATU. And the first of
10 those comments you'll see if you can just turn to page 16.
11 You don't need to read the whole thing just look at their,
12 the portion in italics because that quotes the content of
13 the comment.

14 DR HIRSH: Ja.

15 MS DE KOK SC: Have you read that before?

16 DR HIRSH: Let me read it. Right.

17 MS DE KOK SC: And the other comment if
18 you go back to your other file and you turn in the notices
19 - there should be a sub-folder or sub-divider which would
20 say notices. You see that?

21 DR HIRSH: Ja, at the beginning.

22 MS DE KOK SC: Ja.

23 DR HIRSH: Which page?

24 MS DE KOK SC: Have you got to the
25 notices part?

1 DR HIRSH: Yes. It's this pink divider?

2 COURT: The one you had before.

3 DR HIRSH: It says notices here.

4 MS DE KOK SC: Okay, then you're right,
5 at page 6.

6 DR HIRSH: Page 1 - six.

7 MS DE KOK SC: Have you got it? You'll
8 see posted by Philip at 16.08, February 6.

9 DR HIRSH: Yes.

10 MS DE KOK SC: Just read that one.

11 DR HIRSH: Yes.

12 MS DE KOK SC: I'm sure you've seen this
13 before.

14 DR HIRSH: It rings a bell.

15 MS DE KOK SC: And was it given to you -
16 when you say it rings a bell does it ring because you read
17 it at the time or does it ring a bell because you were
18 given this in preparation for your evidence here or when
19 you prepared your evidence summary?

20 DR HIRSH: Honestly I don't remember. I
21 prepared the expert summary about three years ago and so I
22 just don't remember but I'm aware of this comment.

23 MS DE KOK SC: And then to go back to the
24 blog -

25 DR HIRSH: On the other file?

1 MS DE KOK SC: Other file, yes please.

2 Now we can go to page 3.

3 COURT: You're jumping around pages.

4 DR HIRSH: This one with the picture.

5 MS DE KOK SC: Yes, yes.

6 DR HIRSH: Holocaust in Gaza.

7 MS DE KOK SC: No, no, the one - Mr

8 Masuku's comment, Mr Masuku's comment that brings us here.

9 DR HIRSH: Hi guys, this comment, yes.

10 MS DE KOK SC: Hi guys.

11 DR HIRSH: Got it.

12 MS DE KOK SC: So to complete the

13 chronology Mr Masuku gets sent these other two comments.

14 He's not a follower of this blog.

15 DR HIRSH: Okay.

16 MS DE KOK SC: But he gets sent those

17 comments.

18 DR HIRSH: Ja.

19 MS DE KOK SC: He then comments, "Hi

20 guys," in the comments section. The owner of the blog

21 takes it from the comment section and puts it in the body

22 of the blog. You see that?

23 DR HIRSH: Mr Masuku's comment.

24 MS DE KOK SC: Yes.

25 DR HIRSH: Yes.

1 MS DE KOK SC: Yes. Is that how you
2 understand it as well?

3 DR HIRSH: Ja.

4 MS DE KOK SC: Now we have - Mr Masuku
5 says in this, he refers here to a struggle to liberate
6 Palestine.

7 DR HIRSH: Yes, he does.

8 MS DE KOK SC: Dr Hirsh, in your view as
9 at 2009 was Palestine free?

10 DR HIRSH: No. It was occupied.

11 MS DE KOK SC: By?

12 DR HIRSH: By the Israelis, by Israeli
13 forces and a campaign of Israeli civilians although not
14 Gaza at the time.

15 MS DE KOK SC: Yes. And is that still
16 the position today?

17 DR HIRSH: Yes, it is.

18 MS DE KOK SC: So Palestine, the West
19 Bank part of it at least has been occupied under military
20 occupation and a civilian, well, under military occupation
21 since '67. Is that right?

22 DR HIRSH: No, was occupied under
23 military occupation before that, first by the British and
24 then by the Jordanians.

25 MS DE KOK SC: Okay, but specifically by

1 Israel since '67.

2 DR HIRSH: Yes.

3 MS DE KOK SC: So we can have no quibble
4 with Mr Masuku saying that he, that there is a struggle to
5 liberate Palestine.

6 DR HIRSH: Well, I would quibble if you
7 would like me to quibble. I would quibble with the claim
8 that we are struggling to liberate Palestine.

9 MS DE KOK SC: Ja, why?

10 DR HIRSH: Because it seems to me that
11 the politics of this campaign are not a liberational
12 politics.

13 MS DE KOK SC: Sorry, I don't understand
14 what you mean by that.

15 DR HIRSH: Well, this rhetoric that
16 follows about racists and fascists and Zionists and their
17 friends Hitler, this is not a liberational politics. This
18 is not a politics which seeks to liberate in my view.

19 COURT: Well, can you put that
20 differently?

21 DR HIRSH: Well, I think the key - I
22 mean, if we want to talk about the politics of Israel and
23 Palestine, I don't know if that's relevant but if we want
24 to the key distinction is people who are for a politics of
25 peace and liberation, people who are for a politics of

1 peace between the Israelis and the Palestinians on the one
2 hand or people who are combatant on either one side or the
3 other and hope for the defeat of one side or the other.

4 And it seems to me that to denounce people as racist and
5 fascists and Zionists and friends of Hitler is not a
6 politics which is concerned with the liberation or the
7 peace between Israel and Palestine and therefore its
8 liberation.

9 MS DE KOK SC: But Dr Hirsh, the question
10 is not what you find palatable or helpful ways of
11 expressing strong disagreement. Can you - what you are
12 saying is because Mr Masuku speaks in these harsh words,
13 because he refers to racists, fascists and Zionists
14 therefore we must - he and his organisation are not really
15 interested in liberating Palestine.

16 DR HIRSH: I don't know what they're
17 interested in.

18 MS DE KOK SC: Well, let's also not get
19 too academic about this because we must - His Lordship must
20 interpret this ultimately.

21 DR HIRSH: Ja.

22 MS DE KOK SC: As to how a reasonable
23 reader who is not necessarily a lecturer in sociology would
24 interpret it.

25 DR HIRSH: Sure. Sorry, you asked me to

1 quibble and I quibbled.

2 MS DE KOK SC: All right. So I wanted to
3 put to you is that the reasonable man would read it as
4 referring to a -

5 COURT: Yes, Mr Bester?

6 MR BESTER: M'Lord, I object to that. My
7 learned friend is correct. It's an objective test. Your
8 Lordship will answer what it means. But she can't put to
9 the expert witness the reasonable man will interpret it in
10 a certain way. It's a little bit like saying a reasonable
11 man will not drive his motor vehicle in such and such a
12 way. With respect it's an objective test for Your
13 Lordship. It's not for this witness to give any credence
14 to that or to answer that question.

15 COURT: It may be so but I just find it a
16 bit unusual to interrupt cross-examination.

17 MR BESTER: Purely because it's an
18 objection, M'Lord. Perhaps I didn't premise it as that but
19 it's an objection.

20 COURT: Ja. There is an objection. Mrs
21 De Kok?

22 MS DE KOK SC: M'Lord, the difficulty
23 that I'm faced with is Your Lordship will recall that on
24 day one -

25 COURT: Sorry?

1 MS DE KOK SC: On day one of the
2 proceedings I made an objection in which I submitted to
3 Your Lordship that the test is objective. Your Lordship at
4 that time made a ruling to say that Your Lordship
5 considered it to be prudent to let all the evidence in and
6 Your Lordship would then decide at the end what would be
7 helpful and what would not be helpful. Dr Hirsh's expert
8 summary contains numerous expressions of opinions as to
9 what he says this means and why he says these statements
10 are anti-Semitism.

11 [15:59] If my learned friend does not want me to ask
12 these questions then I want him to just make it very clear
13 that he will ask Your Lordship to disregard all of that in
14 the expert summary so that we effectively have left with
15 the witness and abstract evidence as to what the European
16 something or the other Body's definition of anti-Semitism
17 is and nothing else. And nothing which is specific to the
18 facts of this case. If that is what my learned friend
19 wants to do then I won't need to cross-examine.

20 COURT: Well I don't think your opponent
21 can want to be so self-destructive of his case. He is
22 merely objecting that you are now asking an expert witness
23 to - or putting to an expert witness that a reasonable
24 person may not perceive it that way. I thought I have here
25 to deal with an expert witness.

1 MS DE KOK SC: M'Lord, in a nutshell my
2 response to the objection is to say to Your Lordship that
3 this type of evidence has been led in already in the trial
4 when the first witness testified and that it is included in
5 the expert summary. As long as that remains the position
6 then I am entitled to test. If my learned friend wants to
7 disavow any reliance on what is stated in the expert
8 summary then I will reconsider my position.

9 COURT: I think we all had a long day
10 maybe we can't resolve that now. It is almost 4 o'clock.

11 MS DE KOK SC: Yes, yes.

12 COURT: Can I leave my ruling on the
13 objection until tomorrow morning?

14 MS DE KOK SC: As Your Lordship pleases.

15 COURT: Court will adjourn.

16 [COURT ADJOURNED]

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1 [PROCEEDINGS ON 9 FEBRUARY 2017]

2 [10:08] HOF: Waar is jou getuie?

3 MR BESTER: M'Lord, morning. Just by way
4 of -

5 COURT: Morning.

6 MR BESTER: - brief housekeeping, there
7 was a slight amendment made by the stenographers, the
8 external transcribers, of the 7th of February's
9 transcription.

10 COURT: Yes.

11 MR BESTER: I beg leave to hand up the
12 amended version, as well as yesterday's transcription for
13 Your Lordship's convenience.

14 COURT: Can you check if my name is
15 correctly spelt this time?

16 MR BESTER: We will certainly do so,
17 M'Lord. M'Lord, I think let's first correct this and then
18 once it's been corrected we can hand it back to Your
19 Lordship.

20 COURT: Yes, thanks. I don't take
21 offence, but it's -

22 MR BESTER: Nonetheless. Indeed.

23 COURT: Dr Hirsh, you were still under
24 oath when we adjourned yesterday. You confirm that?

25 DAVID SIMON HIRSH: Yes.

1 COURT: Yes. Mr Bester, I have
2 considered your objection overnight and the ruling I make
3 is that I overrule the objection.

4 MR BESTER: As the court pleases, M'Lord.

5 COURT: Thank you.

6 CROSS-EXAMINATION BY MS DE KOK SC (CONTD.):

7 As Your Lordship pleases. Dr Hirsh, the question that we
8 were dealing with was that I had put to you that - or let
9 me perhaps just refer you again to the document. In the
10 document bundle that you have, that one yes, page 3, that
11 is where you find Mr Masuku's comment that was posted on
12 the blog.

13 DR HIRSH: Yes.

14 MS DE KOK SC: And what I was putting to
15 you is that his reference to "As we struggle to liberate
16 Palestine from the racists, fascists and Zionists who
17 belong to the era of their friend Hitler," that in that
18 context the term Zionist would be reasonably interpreted as
19 a supporter of the conduct of the Israeli State at the
20 time.

21 DR HIRSH: I would understand the term
22 Zionist here to be linked together with racists, fascists
23 and friends of Hitler. So I would understand when I read
24 this a conception of Zionist which was linked closely to
25 racists, fascists and friends of Hitler.

1 MS DE KOK SC: Yes, and the - but I just
2 want us to focus on the word Zionist because after your
3 evidence yesterday I'm afraid I'm even more confused than
4 before as to what the term means, but it seems to me that
5 you were saying it can mean various things to various
6 people at various times.

7 DR HIRSH: That's correct.

8 MS DE KOK SC: Yes, and what I'm putting
9 to you is that in this context Zionism refers to support
10 for the Israeli government's actions.

11 DR HIRSH: Well, in my reading in this
12 context the word Zionist here refers to people who are
13 associated, who are like racists, fascists, friends of
14 Hitler, and it links that people, the term links those
15 people to the people who are supporting the policy of the
16 Israeli government at that time.

17 MS DE KOK SC: Yes, so what we have is an
18 expression of an opinion that support for the actions and
19 policy at the time entails a support for racism and
20 fascism. They are linked.

21 DR HIRSH: Yes, the support for the
22 government policy at the time is linked to support for
23 racism and fascism and also that being a Zionist, using the
24 term Zionist to mean somebody who is linked to racism,
25 fascism and is a friend of Hitler.

1 MS DE KOK SC: And you would agree with
2 me that the most immediate context that we have if we were
3 trying to determine what the word Zionist specifically
4 refers to, the most immediate factual context is that the
5 South African Zionist Federation had come out publicly in
6 support of Israel's actions in the war?

7 DR HIRSH: That is a part of the context,
8 yes.

9 MS DE KOK SC: Yes, and the further
10 context is that you concur that Palestine at the time was
11 not free. You've already said that -

12 COURT: Sorry, I can't hear you, Madam.

13 MS DE KOK SC: I'm sorry, M'Lord? Can
14 you not hear me?

15 COURT: I can't hear you, yes.

16 MS DE KOK SC: You've already concurred
17 that at the time Palestine was not free.

18 DR HIRSH: Yes.

19 MS DE KOK SC: And that there was a
20 worldwide movement that had as its stated aim, or that
21 wanted to work towards the liberation of Palestine.

22 DR HIRSH: I would agree with the first
23 question that it had as its stated aim.

24 MS DE KOK SC: Okay.

25 DR HIRSH: I wouldn't necessarily agree

1 that it wanted to work towards that. It was its stated
2 aim, yes.

3 MS DE KOK SC: It was its stated aim, but
4 you say as I understand it that you may personally disagree
5 with their methods?

6 DR HIRSH: Well, I think that this
7 expression of a politics of liberation is not a politics of
8 liberation and I don't think that's simply my opinion. I
9 think that to support one party in a conflict and to
10 denounce the other in these terms is not a politics of
11 liberation and I don't think that that could be downplayed
12 as just a personal opinion.

13 MS DE KOK SC: There were at the time
14 many people across the world who accused the Israeli
15 State's conduct of being fascist and racist.

16 DR HIRSH: Yes, there were.

17 MS DE KOK SC: Dr Hirsh, have you got a
18 pencil or a pen?

19 DR HIRSH: I haven't no, sorry.

20 MS DE KOK SC: I'm just going to hand you
21 my pen for a moment. If you can go to page 3, the blog
22 post -

23 DR HIRSH: Where I am already, yes.

24 MS DE KOK SC: Yes.

25 DR HIRSH: Yes.

1 MS DE KOK SC: And substitute the word
2 Palestine -

3 DR HIRSH: Bongani says, "Hi to all of
4 you as we struggle to liberate Palestine," that yes.

5 MS DE KOK SC: Yes, yes

6 DR HIRSH: Okay.

7 MS DE KOK SC: Substitute Palestine with
8 black South Africans.

9 DR HIRSH: "As we struggle to liberate
10 black South Africans." Okay.

11 MS DE KOK SC: And then substitute
12 Zionists with Afrikaner nationalists.

13 DR HIRSH: Ja.

14 MS DE KOK SC: And again in the second
15 paragraph -

16 DR HIRSH: Afrikaner nationalists.

17 MS DE KOK SC: Yes.

18 DR HIRSH: Okay.

19 MS DE KOK SC: And the second paragraph
20 again where it says every Zionist substitute it with
21 Afrikaner nationalist for me.

22 DR HIRSH: Yes.

23 MS DE KOK SC: And then substitute
24 Palestine with South Africa.

25 DR HIRSH: Yes.

1 MS DE KOK SC: Okay. If it had read like
2 that would you have considered that a racist attack on
3 white South Africans?

4 DR HIRSH: No.

5 MS DE KOK SC: It would be an expression
6 of political opinion?

7 DR HIRSH: It would be an expression of
8 political opinion, yes.

9 MS DE KOK SC: Thank you. Right, if we
10 then go to the context of the speech that Mr Masuku made at
11 Wits -

12 DR HIRSH: Yes.

13 MS DE KOK SC: - it was part of something
14 called "Israel apartheid week."

15 DR HIRSH: Yes.

16 MS DE KOK SC: Can you tell us what that
17 is?

18 DR HIRSH: So Israel apartheid week is a
19 part of a campaign to construct Israel as being identical
20 to apartheid South Africa and to say that Israel and - the
21 conflict between Israel and the Palestinians is very much
22 politically the same as the conflict in old times in South
23 Africa between the South African State and I am not quite
24 sure exactly how it's - but you get the point. So they
25 have a campaign, the heart of which is to launch what they

1 call a boycott of Israel and in particular a boycott of
2 Israeli scholars, and the, this focuses on an attempt to
3 exclude Israelis from our campuses. It's an attempt to say
4 that we can't do joint scientific or scholarly work with
5 Israelis, that they shouldn't be allowed in our campuses or
6 in our journals or in our conferences, and it picks out
7 Israeli scholars for such treatment in a way that doesn't
8 pick out any scholars from any other country on the planet
9 for that at all. It's a particular weapon used against
10 Israeli scholars.

11 MS DE KOK SC: And you disagree
12 politically with that method?

13 DR HIRSH: Yes, I do.

14 MS DE KOK SC: So we know here in South
15 Africa during the apartheid regime there was also a
16 worldwide movement to boycott, sanction and disinvest -

17 DR HIRSH: Yes, there -

18 MS DE KOK SC: - against South Africa,
19 and some people politically supported it and some didn't.

20 DR HIRSH: Yes, that's right. I broadly
21 supported it myself.

22 MS DE KOK SC: Okay. If I understand
23 your evidence correctly you think that you don't agree with
24 the analogies drawn between the State of Israel and its
25 behaviour vis-à-vis the occupied territories, and apartheid

1 South Africa?

2 DR HIRSH: That's correct.

3 MS DE KOK SC: But there are many others
4 around the world, academics and others who have made that
5 connection, not so?

6 DR HIRSH: Yes, some people say that.

7 MS DE KOK SC: I mean here in South
8 Africa in 2009 our Human Sciences Research Council, which
9 is like a government sponsored think-tank, produced a
10 report where they drew these parallels.

11 DR HIRSH: Yes.

12 MS DE KOK SC: So this is an issue that
13 people can agree to disagree on.

14 DR HIRSH: It's certainly an issue that
15 people disagree on, but so of course is anti-Semitism for
16 example. Some people are in favour of it, some people are
17 against it.

18 MS DE KOK SC: You in your CV make
19 reference to an article that you wrote in 2008. Where is
20 that? I want to refer you to this article, it's called
21 "Occupation, not apartheid."

22 DR HIRSH: Yes.

23 MS DE KOK SC: You remember the article?

24 DR HIRSH: I remember it well.

25 MS DE KOK SC: Okay. M'Lord, if I can

1 just hand up this, the article is not - none of Dr Hirsh's
2 publications were attached to his CV, so the article isn't
3 in the bundle, if I can hand up a copy.

4 COURT: Yes.

5 MS DE KOK SC: If Your Lordship can just
6 bear with us for one moment.

7 COURT: I was going to raise this with
8 both parties at the commencement that where expert
9 witnesses would rely on certain articles or authorities
10 they should be readily available to the court so that we
11 can follow the debate.

12 MS DE KOK SC: I'm sorry, M'Lord, my
13 attorney's just mistaken for a moment, but we found it.

14 COURT: Is this now part of the CV for
15 the purposes of the record?

16 MS DE KOK SC: M'Lord, shall we perhaps
17 slot it in at the end of the trial bundle?

18 COURT: Yes, and mark it as what?

19 MS DE KOK SC: And then we will mark that
20 as page 345 and 346.

21 COURT: Ja, so this Mail & Guardian
22 article for purposes of the record is part of annexure A,
23 continue with pages 345 and 46.

24 MS DE KOK SC: So Dr Hirsh, you can
25 confirm that you are the author of this article?

1 DR HIRSH: Yes.

2 MS DE KOK SC: And will you read for us
3 what you wrote in the first sentence of the article?

4 DR HIRSH: "Palestinians are not free."

5 MS DE KOK SC: Carry on with the
6 paragraph, please.

7 DR HIRSH: "They suffer under an Israeli
8 occupation that is sustained by a regime of violence,
9 surveillance and control, as well as a military occupation.
10 Successive Israeli governments have tolerated and supported
11 the efforts of settlers to take Palestinian line for
12 themselves in violation of the Fourth Geneva Convention" -

13 MS DE KOK SC: If I can just stop you
14 there for a moment. Perhaps you can help us. The Fourth
15 Geneva Convention, what does it say?

16 DR HIRSH: The Fourth Geneva Convention
17 amongst other things has a prohibition of moving of, if a
18 state is occupying a piece of land then it has a
19 prohibition of moving civilians into that land, I believe.
20 I'm not an international lawyer, but I believe that's the
21 relevant -

22 MS DE KOK SC: Yes, so if one state
23 occupies another it can't bring its own people and settle
24 them there in the occupied area, its own civilian people.

25 DR HIRSH: That's correct, but this isn't

1 the case of one state occupying another state. This is
2 slightly different -

3 MS DE KOK SC: Yes.

4 DR HIRSH: - in terms of international
5 law I think.

6 MS DE KOK SC: Yes, scrap the word
7 "state" and just use "land" then, hey. All right, so what
8 you are saying is as well as for the military occupation
9 the Israeli governments have supported and tolerated
10 Israeli -

11 DR HIRSH: I've said tolerated, I've
12 written, I think.

13 MS DE KOK SC: You've said "tolerated
14 and" -

15 DR HIRSH: Oh, I'm sorry, you're correct.

16 MS DE KOK SC: - and supported the
17 movement of Israeli settlers into Palestinian land.

18 DR HIRSH: Yes.

19 MS DE KOK SC: And where does this - just
20 explain to me practically how, where does this land, how do
21 the settlers acquire ownership of the land that they settle
22 on?

23 DR HIRSH: So there's a long history to
24 the conflict. In 1948 when the UN set up, or authorised
25 the creation of the Israeli State the UN proposed that

1 there should be a partition between Israel and the Arab
2 lands. The nation, Israeli State at the time accepted the
3 idea of partition. The Arab State surrounding Israel
4 didn't accept the idea of partition. They invaded Israel
5 and they tried to get rid of it altogether and get rid of
6 the Jews from the Middle East. The Israelis won that war.
7 As part of winning that war the Israelis did, there was
8 some moving of civilian population, some Arabs fled, some
9 people were - there were human rights violations on both
10 sides in the war.

11 [10:28] But the Israelis consolidated a smaller state and
12 in 1967 when the surrounding Arab states again tried to
13 wipe the Middle East clean of Israelis, of Jews, the
14 Israelis won and they occupied Gaza which had been
15 previously occupied by the Egyptians and the West Bank
16 which had been previously occupied by Jordan. Some of the
17 land that the Israelis took at that moment many people in
18 Israel thought was authentically Israeli. Like there was
19 the Jewish section of the city of Jerusalem and there was
20 also, for example, the campus of the Hebrew University
21 which the Israelis laid claim to. Other parts of the West
22 Bank lots of Palestinians lived there and some Israelis
23 said that they wanted to have a political project of moving
24 into these lands. Some of these lands are lands which the
25 Jews, the religious Jews laid claim to from their holy text

1 and then there was a political struggle. The settler
2 movement began to build settlements in the West Bank and in
3 Gaza. Many Israelis opposed this policy, many people who
4 considered themselves to be Zionist opposed this policy.
5 And the generally the Israeli governments went along with
6 it and allowed it. So then you have a situation and sorry
7 to come to the answer of the question some of the land was
8 bought from Palestinians, some of the land was land that
9 was unoccupied. I'm sure some of it was taken by various
10 means of force. It was a nasty little conflict over little
11 pieces of land in the West Bank -

12 COURT: And the Palestinians did not like
13 that.

14 DR HIRSH: Many Palestinians did not like
15 that.

16 COURT: Yes.

17 MS DE KOK SC: Thank you, M'Lord. So if
18 you - is it surprising to you that a South African or in
19 South African contexts someone would listen to what you've
20 said and say well I see similarities with forced removals?

21 DR HIRSH: Well if you want my opinion on
22 the Israel, South Africa analogy you should continue
23 reading because it's in this article -

24 MS DE KOK SC: No, no -

25 DR HIRSH: So please read the whole

1 article and not just the -

2 MS DE KOK SC: I have, I have.

3 DR HIRSH: You'll know the answer then.

4 MS DE KOK SC: But summarise it for us.

5 DR HIRSH: So what I've said is that the
6 elected president of the Palestinians doesn't have a
7 politics of saying that the problem in the whole of Israel
8 and Palestine taken as one is a problem of democracy and
9 what we need like in South Africa and a problem with
10 apartheid and what we need is a new democracy where there's
11 one member one vote. What the elected presidency of the
12 Palestinians says is that there are two nations struggling
13 over a piece of land and Mahmoud Abbas, the Palestinian
14 president wants a two state solution. He wants a solution
15 where the Palestinians have self-determination and the
16 Israelis have self-determination and they live alongside
17 each other in peace. So it's very, very different and the
18 reason it's very different is because the apartheid analogy
19 says that Israel is an evil in the same way that the
20 apartheid state was an evil. But Mahmoud Abbas says Israel
21 is not an evil, Israel is our neighbour, we want to live in
22 peace with it. We are a nation, they are a nation, we want
23 to live side by side. So it's quite a profoundly different
24 politics.

25 MS DE KOK SC: These, the building of

1 settlements continues to this day does it not?

2 DR HIRSH: Yes it does.

3 MS DE KOK SC: And if you look at page
4 300 in your bundle just so that we can get a sense of what
5 we're talking about.

6 DR HIRSH: The same -

7 MS DE KOK SC: It's a map.

8 DR HIRSH: Yes a map.

9 MS DE KOK SC: So as I understand it that
10 green line that we see around what is called the West Bank
11 and Gaza reflects the borders of Israel before the '67 war.

12 COURT: Sorry, Ms De Kok, where are you
13 now?

14 MS DE KOK SC: Page 300 of the trial
15 bundle, M'Lord.

16 COURT: 312?

17 MS DE KOK SC: 300.

18 COURT: Thank you.

19 DR HIRSH: I think that's right. I
20 haven't got colour, black and white image.

21 MS DE KOK SC: No you need to see it in
22 colour. M'Lord, I just want to hand Mr Bester a colour
23 copy of this. I will have the black and white.

24 DR HIRSH: So you're more or less right
25 although technically -

1 COURT: Sorry where is my coloured copy?

2 MS DE KOK SC: Does Your Lordship not
3 have a coloured copy?

4 COURT: Mine is pitch black and pure
5 white.

6 MS DE KOK SC: The page 300?

7 COURT: Yes, I can bring it nearer to you
8 unless it's somewhere else in the other bundles.

9 MS DE KOK SC: I'm sorry that shouldn't
10 have happened.

11 COURT: Yes that's better, thank you.

12 MS DE KOK SC: You were saying the green
13 line more or less represents the borders of Israel before
14 the 1967 war.

15 DR HIRSH: So more or less, that's right
16 except that it wasn't a border because it wasn't
17 internationally recognised and it wasn't recognised by the
18 Palestinians or by the Arab states. The Arab states never
19 recognised a border because they never recognised the
20 existence of Israel at all under any border.

21 MS DE KOK SC: So it was a de facto
22 border.

23 DR HIRSH: It was a cease fire line. You
24 can see there's a little kink in it, for example, where
25 there was a wall at Latrine which happened to be in a

1 particular state at the moment when the cease fire
2 happened. And the line around the Gaza Strip is out of
3 date really because the Gaza Strip is no longer occupied by
4 Israel.

5 MS DE KOK SC: Well that in itself is a
6 matter of debate. Some commentators consider it that
7 Israel is still an occupying force by virtue of its
8 blockade.

9 DR HIRSH: Is that a question?

10 MS DE KOK SC: No I'm just putting to you
11 that there's an alternative view.

12 DR HIRSH: There are alternative views
13 about everything I think.

14 MS DE KOK SC: But if you now look at the
15 map of the West Bank -

16 DR HIRSH: Yes.

17 MS DE KOK SC: Now in your colour you'll
18 see that some of it is blue and some of it is yellow.

19 DR HIRSH: Yes.

20 MS DE KOK SC: Just remind me which is
21 the blue one?

22 DR HIRSH: Blue is area C.

23 MS DE KOK SC: Area C and the yellow is
24 area A and B.

25 DR HIRSH: Yes.

1 MS DE KOK SC: Could you tell His
2 Lordship what that refers to, what is area A and B and what
3 is area C?

4 DR HIRSH: I believe area A and B are the
5 areas which were under the control of the Palestinian
6 authority. They are largely towns and cities, Palestinian
7 towns and cities. So a lot of people live in those areas
8 and area C, to be honest I'm not sure of the legal
9 situation, the legal position of area C. I don't know.

10 MS DE KOK SC: Okay but area C is -
11 because you've referred to Palestine being under the
12 control of a civilian authority.

13 DR HIRSH: No as far as I know it's under
14 the control of a military authority but there's also is
15 civilian occupation, there are civilians building town and
16 -

17 MS DE KOK SC: Yes, some civilian
18 administration, can we call it that?

19 DR HIRSH: Yes I think so.

20 COURT: Sorry I'm just trying to follow
21 this. We must go back just a few steps. You said area B
22 is - A is occupied by what is it?

23 DR HIRSH: The yellow area, area A and B
24 -

25 COURT: A and B yes.

1 DR HIRSH: - is run and controlled by the
2 Palestinian authority, the elected president of Palestine,
3 Mahmoud Abbas, except not the part of the yellow which is
4 in Gaza which is run by Hamas which made a coup against the
5 president of Palestine, Mahmoud Abbas. In fact I don't
6 know that Gaza still comes under area A and B, I don't know
7 what that means.

8 COURT: So Hamas is based in the Gaza
9 Strip.

10 DR HIRSH: That's right in Gaza. Hamas
11 took power in Gaza and the presidency of Palestine has
12 authority in the yellow areas in the West Bank.

13 COURT: Right I think then you get to C
14 now.

15 MS DE KOK SC: And area C, that is wholly
16 under control of the Israeli government.

17 DR HIRSH: I believe that's true, but I'm
18 not sure of the details of how that works.

19 MS DE KOK SC: So we have in some parts
20 that the Palestinian people have a measure of
21 administrative authority and in some parts they don't have
22 any presence or authority.

23 DR HIRSH: Well I'm not sure about the
24 Palestinian people, but the president of Palestine does,
25 the Palestinian authority. In the other areas -

1 MS DE KOK SC: In area C, I'm talking
2 about -

3 DR HIRSH: In area C yes I believe that's
4 true. I believe that there's no Palestinian control in
5 area C although as I said, I don't know the details of the
6 legal situation in area C. I'm not sure, but I think
7 that's right.

8 MS DE KOK SC: But areas A, B and C all
9 fall under the military control of Israel.

10 DR HIRSH: Yes that's correct.

11 MS DE KOK SC: If I can go back to your
12 article.

13 DR HIRSH: Yes.

14 MS DE KOK SC: At page 345.

15 DR HIRSH: Oh sorry, the one you gave me?

16 MS DE KOK SC: Yes.

17 DR HIRSH: I haven't got a page number.

18 MS DE KOK SC: Have you still got my pen?

19 Then you can just number it 345 and 346.

20 DR HIRSH: 345 and 346, okay, got it.

21 MS DE KOK SC: In the third paragraph of
22 your article you "Palestinians and settlers live under
23 unequal legal regimes."

24 DR HIRSH: Yes.

25 MS DE KOK SC: "Settlers have

1 incomparably greater freedom of movement, democratic and
2 legal rights as well as access to resources." Can you
3 explain to us why you say that? Firstly, in terms of the
4 uneven legal regimes.

5 DR HIRSH: Yes.

6 MS DE KOK SC: Why do you say that?

7 DR HIRSH: Well Israelis who live in
8 those territories have a vote. In Israeli elections they
9 participate in Israeli politics. They have freedom to come
10 and go, I think, you know, moving across the checkpoints is
11 much, much easier for them than it is for Palestinians. So
12 life is much -

13 MS DE KOK SC: So they can freely move in
14 and out of Palestine, Israel.

15 DR HIRSH: Out of the area C, I think
16 they're not allowed by law into area A or B at all, I
17 think.

18 MS DE KOK SC: But you're not sure.

19 DR HIRSH: I'm pretty sure that's true -

20 MS DE KOK SC: We can check that.

21 DR HIRSH: We can check.

22 MS DE KOK SC: All right so they are able
23 to move in an unrestricted way and you say the Palestinians
24 not. They have to go through check points and what do they
25 check at these checkpoints?

1 DR HIRSH: Well the Israelis have to go
2 through checkpoints too, but obviously well not obviously,
3 in fact it's much easier for them. They check for weapons,
4 for bombs, there have been many, many occasions on which
5 people from the Palestinian towns and cities have smuggled
6 weapons and bombs into the Israeli civilian areas in order
7 to kill Israeli civilians, blow up Israeli buses and that
8 sort of thing. So the Israelis set up a regime of quite
9 harsh -

10 MS DE KOK SC: So you're saying that's
11 the justification for this discrimination is a fear that
12 Palestinians will commit violence against them.

13 DR HIRSH: No I don't think that's the
14 justification for discrimination. I think the
15 discrimination comes from the fact that Israelis who live
16 there are Israeli and Palestinians are Palestinian. And I
17 think formally still what the Israeli government would like
18 and certainly what many Israelis would like is not for the
19 Palestinians to be equal citizens in the whole of a new
20 Israel and Palestine, but for the Palestinians to have
21 self-determination. So the demand isn't that they be
22 allowed to go in and out of Israel, the demand is that they
23 should have their own state. And of course hopefully that
24 would be a liberal democratic state, at peace with Israel
25 and people would have freedom of movement within that

1 framework. But this is a long way in the future.

2 MS DE KOK SC: Can Palestinians - I
3 assume that there are a number of Palestinians who work in
4 Israel.

5 DR HIRSH: There are Palestinians who
6 live in Israel who have more or less full democratic
7 rights, freedom of association, political freedom, they're
8 not discriminated against in any kind of systematic way
9 although there might be some small aberrations in that.
10 Fundamentally the Palestinians who live in Israel are
11 Israeli citizens and have the same rights as anyone else in
12 Israel. The Palestinians who live in the West Bank in
13 Palestine are not considered Israeli citizens. Was that
14 the question, that they're Israeli citizens -

15 MS DE KOK SC: No the question was do
16 they work, I'm talking about Palestinians who are not
17 Israeli citizens -

18 DR HIRSH: So the Palestinians who live
19 in the West Bank, there was a time when there was a lot of
20 free movement of people and there was a time when
21 Palestinians did work in Israel. That's not the case
22 anymore, the case now, as I understand it, is that very few
23 Palestinians who live in the West Bank work in Israel.

24 MS DE KOK SC: Okay and if a Palestinian
25 who lives in the West Bank wanted to visit family, for

1 example, in Israel?

2 DR HIRSH: That would be difficult for
3 them.

4 MS DE KOK SC: It would be difficult.

5 DR HIRSH: I think the Israeli state
6 would make that difficult.

7 MS DE KOK SC: So on this topic of where
8 people find themselves, when the state of Israel was
9 created and there was the war, you said many of the people
10 who lived on the land at the time, let's call them
11 Palestinians, fled.

12 DR HIRSH: That's correct.

13 MS DE KOK SC: All were driven out.

14 DR HIRSH: That's correct.

15 MS DE KOK SC: Many of them now find
16 themselves living in what is now called the West Bank, them
17 and their descendants, so it's getting on in time, hey.

18 DR HIRSH: Also other places where they
19 live.

20 MS DE KOK SC: Yes. I've read and you
21 can tell me if you disagree that it's estimated between 700
22 000 and 800 000 Palestinians fled.

23 DR HIRSH: Yes I think in all left, fled,
24 were driven out -

25 MS DE KOK SC: Yes, Yes.

1 DR HIRSH: - altogether I think that's
2 about right.

3 MS DE KOK SC: There's a population of
4 about 700 to 800 000 who were inhabitants of the and prior
5 to the creation of the state of Israel and afterwards were
6 no longer.

7 DR HIRSH: I think that's about - there
8 might some estimates that are a little lower, but I'm happy
9 to go with that figure.

10 MS DE KOK SC: And these people and their
11 descendants are they allowed to now return to the state of
12 Israel?

13 DR HIRSH: No, these people and their
14 descendants have not been welcomed back into Israel and
15 they've also been treated very badly in a lot of the Arab
16 states where they found asylum.

17 MS DE KOK SC: Because I think you
18 mention in your expert summary where you deal with the
19 argument that the Israeli state was in its - is
20 structurally racist. I think you deal with -

21 DR HIRSH: Is this the other file?

22 MS DE KOK SC: Yes, yes it would be the
23 other file.

24 DR HIRSH: Page?

25 MS DE KOK SC: Page 22. You deal in your

1 expert summary with this, the argument, well you call it
2 the claim that Zionism is racist.

3 DR HIRSH: Yes.

4 MS DE KOK SC: But specifically the
5 argument that the Israeli state, because I don't want to
6 again get into the difficult debate about what is meant by
7 Zionism, but the argument that the Israeli state has a
8 racist underpin and I think you describe that argument very
9 well in paragraph 39.

10 DR HIRSH: Yes.

11 MS DE KOK SC: Yes. I think that you go
12 on to say that disagree -

13 DR HIRSH: Correct.

14 MS DE KOK SC: - but that sets out that
15 argument -

16 DR HIRSH: Yes.

17 MS DE KOK SC: - neatly. So the argument
18 is to say Jewish people can become citizens of Israel from
19 anywhere in the world that they find themselves. That is
20 what we call the right of return, not so?

21 DR HIRSH: I don't there's anything
22 racist about that.

23 MS DE KOK SC: No, no, no. No, no I'm
24 just getting the facts.

25 DR HIRSH: Yes.

1 MS DE KOK SC: I'm not sure if His
2 Lordship is aware of the right of return so it entails that
3 it is part of Israeli basic law.

4 [10:48] That any Jewish person finds himself anywhere in
5 the world who had never been to Israel can go there today
6 and say I lay claim to Israeli citizenship.

7 DR HIRSH: Correct.

8 MS DE KOK SC: The 700 to 800 000
9 Palestinians who lived there and who were either driven off
10 or fled they and their decedents have no similar rights?

11 DR HIRSH: That's correct.

12 MS DE KOK SC: In fact you say that they
13 would find it even very difficult to just visit family that
14 they may still have there?

15 DR HIRSH: That's correct.

16 MS DE KOK SC: So, Dr Hirsh, would it
17 surprise you that from a South African context there are
18 people who would look at this and say this reminds me very
19 much, the position in occupied territories -

20 DR HIRSH: Ja.

21 MS DE KOK SC: This reminds me very much
22 of the Bantustans under apartheid South Africa?

23 DR HIRSH: Well I've written in an
24 article very clearly I think, why I think the analogy is
25 not right. Of course people will think all sorts of

1 things.

2 MS DE KOK SC: No and people will agree
3 and disagree and people will have different opinions.

4 DR HIRSH: Well the situation is not like
5 the situation in South Africa. You know white people came
6 to South African in order to profit, in order to be
7 colonialists, in order to make the people who lived here
8 already work for them. Jewish people who are not all
9 white, who about half of whom you might consider white and
10 about the other half you might not consider as white didn't
11 go to Palestine as colonialists. They didn't go to
12 Palestine as people who wanted to profit from the land or
13 to oppress other people. They went as people running for
14 their lives and running from the most harsh racism that the
15 planet has ever seen. So I think the analogy that you make
16 is quite inappropriate.

17 MS DE KOK SC: Well you consider it to be
18 inappropriate but would you say that it is an irrational
19 analogy that no honest man can hold, can make?

20 DR HIRSH: I don't think that the South
21 Africans, I don't think the ANC for example has anything in
22 common with Hamas. I don't see why A South African would
23 think that it did. Hamas is an anti-Semitic organisation.
24 It wishes to wipe Israel clean of the Jews.

25 MS DE KOK SC: But I -

1 DR HIRSH: But on the other hand -

2 MS DE KOK SC: I'm talking about -

3 DR HIRSH: It's very clear in its freedom
4 charter that it didn't want any such thing. The ANC was a
5 liberation movement for the whole of South Africa and I
6 don't understand at all why anyone who comes from an ANC
7 tradition would think of themselves as being similar to
8 Hamas, it doesn't make any sense to me.

9 MS DE KOK SC: Hamas you said is in
10 charge in Gaza?

11 DR HIRSH: Correct.

12 MS DE KOK SC: Correct. What is Hamas,
13 we're talking about the West Bank looking like a Bantustan,
14 why what has that got to do with Hamas?

15 DR HIRSH: Well the Palestinian authority
16 in the West Bank is also very clear that they're not for a
17 boycott, they're for co-existence, they're collaborate with
18 Israel a lot on security and they won't a Palestinian state
19 they themselves can be free. Again they don't, they're not
20 part of this campaign to say that Israel shouldn't exist or
21 that Israel is like the Nazi's or anything of it.

22 MS DE KOK SC: Dr Hirsh, we've heard
23 evidence that right at the beginning of Mr Masuku's speak
24 at Wits one of the Jewish students who were, who attended
25 the meeting stood up and shouted heil Hitler. Would you

1 consider that to be an accusation or a slur that Mr Masuku
2 himself is like Hitler?

3 DR HIRSH: From what you've told me I
4 have no idea what that meant at all. I need to know
5 something about the context.

6 MS DE KOK SC: Well this is the context.
7 There's a meeting.

8 DR HIRSH: Ja.

9 MS DE KOK SC: The meeting is part of
10 Israel apartheid week.

11 DR HIRSH: Ja.

12 MS DE KOK SC: Mr Masuku comes to give a
13 speech. The theme of the meeting, topic is a boycott
14 Israel.

15 DR HIRSH: Ja.

16 MS DE KOK SC: There are some other
17 students there, some of them are, well there are, there's a
18 number of Jewish students.

19 DR HIRSH: Ja.

20 MS DE KOK SC: Mr Masuku gets introduced.
21 He gets up. Before he gets up or before he, we don't know
22 if he maybe said one sentence, hello or whatever -

23 DR HIRSH: Ja.

24 MS DE KOK SC: Or not but right at the
25 beginning of this speech Mr Schulman who is the chairman of

1 the SAUJS, the Jewish students.

2 DR HIRSH: Ja.

3 MS DE KOK SC: Stands up and screams heil
4 Hitler.

5 DR HIRSH: The chair of the Jewish
6 students?

7 MS DE KOK SC: Yes, Mr Schulman, yes.
8 What does that connote to you?

9 DR HIRSH: If it's as you described it's
10 an appalling thing to do, I think.

11 COURT: It's a what?

12 DR HIRSH: It's an appalling thing to do,
13 if that's, if that happened as you describe, yes.

14 MS DE KOK SC: Well Mr Schulman describes
15 it that way.

16 DR HIRSH: Okay.

17 MS DE KOK SC: But does it connote to you
18 a comparison, that the speaker Mr Schulman was making a
19 comparison between Hitler and Mr Masuku?

20 DR HIRSH: Yes I imagine it does.

21 MS DE KOK SC: Does that in your view
22 exhibit any racism by Mr Schulman against Mr Masuku?

23 DR HIRSH: I don't know if it does to
24 not. I assume that the point was to say that Mr Masuku
25 supports the exclusion of Israelis from our campuses and

1 the boycott movement that, and also I think this had
2 happened after the incident, is this right that this
3 happened after the incident when there was the march
4 against the offices where the Jewish communal headquarters
5 is, is this correct?

6 MS DE KOK SC: It happens after a march.

7 DR HIRSH: So I would imagine that for
8 those reasons some Jews, Jewish students were thinking that
9 Mr Masuku was either anti-Semitic or was helping out anti-
10 Semitic ideas in this country.

11 MS DE KOK SC: But you've testified at
12 great length as to why a comparison between, with Nazis is
13 so odious because you say that nothing, nothing that Jewish
14 people, Israel may be accused of, you say it's not even in
15 the same ballpark?

16 DR HIRSH: That's correct.

17 MS DE KOK SC: Yes. Now assuming that
18 they, will you agree that nothing that Mr Masuku could have
19 said or done would have been in the same ballpark?

20 DR HIRSH: No. If he could, I mean he
21 could have said I support Hitler I think Hitler is really
22 great and I want to kill you all.

23 MS DE KOK SC: Well there's no evidence
24 of anything like that.

25 DR HIRSH: But you gave me a

1 hypothetical. Sorry did I get that wrong?

2 COURT: No this is reference to -

3 DR HIRSH: As far as I know he -

4 COURT: The factual witness before you
5 came into the stand called by the applicant, your clients
6 or for which you are the expert witness.

7 DR HIRSH: Okay.

8 COURT: Yes. You were not here when he
9 testified?

10 MS DE KOK SC: No, no. Dr Hirsh, what I
11 want to establish from you is the, there is no indication,
12 there's been no evidence before this court, not from Mr
13 Schulman who has made the statement.

14 DR HIRSH: Ja.

15 MS DE KOK SC: That Mr Masuku had said
16 anything like I hate Jews or kill Jews or anything -

17 DR HIRSH: No.

18 MS DE KOK SC: Nothing like that.

19 DR HIRSH: No he was for the boycott of
20 Israel -

21 MS DE KOK SC: For the boycott and -

22 DR HIRSH: And these other things that he
23 said in the speeches that we've seen in the evidence.

24 MS DE KOK SC: Yes, yes.

25 DR HIRSH: Those were the things that he

1 said.

2 MS DE KOK SC: Yes.

3 DR HIRSH: Some of which were arguably
4 anti-Semitic, yes.

5 MS DE KOK SC: Does any of that warrant a
6 comparison between him and Hitler?

7 DR HIRSH: No.

8 MS DE KOK SC: Because you've said that
9 the reason why a comparison with Hitler is so odious is
10 because it is so, it's farfetched really. No one in the
11 modern world would come close to that degree of evil.

12 DR HIRSH: No I didn't say that, there
13 have been many genocides in the modern world and absolutely
14 not in Israel or Palestine. There have been genocides.

15 MS DE KOK SC: Yes.

16 DR HIRSH: In the modern world which do,
17 which are comparable to what happened under the Nazis. I
18 can understand that somebody might have thought that being
19 anti-Semitic would make you like Hitler. It certainly, as
20 I said I used the word appalling, didn't I, I think it's an
21 appalling thing to do and your question is, is it racist, I
22 don't think so. I think, I think one of the specific
23 things about mobilising the charge of Nazi against Jews is
24 a specific thing. I think you know it could be racist. I
25 think to mobilise the charge that you're a Nazi against the

1 black South African man, an important man in COSATU, I
2 think it could be racist, I'm not sure to be honest. I
3 think it could be. I certainly think it's an appalling
4 thing to do.

5 MS DE KOK SC: Because as I understand,
6 your evidence dealing with a charge of Nazism which in fact
7 doesn't arise on these papers or a reference to Hitler.
8 Have you read what Professor Friedman wrote in his expert
9 summary -

10 COURT: Sorry Ma'am, you're whispering to
11 the witness and to my exclusion.

12 MS DE KOK SC: I'm sorry. Professor
13 Friedman in his expert summary addresses your arguments
14 relating to the use or drawing analogies with Hitler or
15 Nazism.

16 DR HIRSH: Yes.

17 MS DE KOK SC: He concludes, he concludes
18 that while that comparison is no doubt offensive -

19 DR HIRSH: Yes.

20 MS DE KOK SC: It is not, it is not per
21 se anti-Semitic or racist.

22 DR HIRSH: Yes, he does, that's -

23 MS DE KOK SC: And you disagree with him?

24 DR HIRSH: I do disagree with that, yes.

25 MS DE KOK SC: I just want to understand

1 that, because we find often nowadays, I think it's perhaps
2 a laziness that people easily call other people Nazis -

3 DR HIRSH: Yes.

4 MS DE KOK SC: And Hitler and so on, yes.
5 I read that Mr Ben Carson, the presidential candidate in
6 America called Obamacare Nazi.

7 DR HIRSH: Yes.

8 MS DE KOK SC: Now that is just overblown
9 and silly?

10 DR HIRSH: Right.

11 MS DE KOK SC: You agree, you agree. So
12 when does a reference, such a reference, well let's take Mr
13 Carson's example.

14 DR HIRSH: Ja.

15 MS DE KOK SC: Is that anti-Semitic?

16 DR HIRSH: Just to call President Obama a
17 Nazi?

18 MS DE KOK SC: Yes. Well is it racist?
19 It can't be anti-Semitic.

20 DR HIRSH: Well it could be anti-Semitic.
21 Perhaps I can answer the -

22 COURT: Sorry there is an objection.

23 MS DE KOK SC: Sorry.

24 MR BESTER: Sorry, M'Lord, just to
25 clarify. As I understand it, the question to the witness

1 was not to suggest that Mr Carson had indicated that Mr
2 Obama is a Nazi but rather Obamacare.

3 MS DE KOK SC: Ja.

4 MR BESTER: The health system. I think
5 there's just an important distinction which my learned
6 friend needs to clarify in her question.

7 COURT: But I'm sure she will take that
8 in mind.

9 MR BESTER: Yes.

10 DR HIRSH: Perhaps I can help -

11 MS DE KOK SC: He did say Obamacare.

12 DR HIRSH: Okay. Perhaps I can try to
13 answer the question, in a way that I think might help you.
14 I think one of the key things, so I think there's a
15 campaign around the world to designate Israel and Zionism
16 all Zionists as Nazi. I think that campaign is in many
17 countries. I think it takes a few different forms but it's
18 a, there's an impetus to make this charge of Nazism against
19 the Israelis in particular and against Zionists who is,
20 which includes nearly every Israeli on the planet. One
21 thing that follows from this is that Israel should be
22 treated as though it was Nazi. Another thing that follows
23 from this is that the overwhelming majority of Jews in the
24 world, including here in South Africa should be thought of
25 and treated as though they were Nazis.

1 COURT: Let me say it's not right is it?

2 DR HIRSH: I think it's not right and I
3 think in, I think if you're going to start relating to Jews
4 as though they were Nazis then you're building an anti-
5 Semitic movement. You're building a movement which says
6 that Jews are a unique evil or at least the overwhelming
7 majority of the Jews who have some kind of connection to
8 Israel, they're uniquely evil, they're genocidal and I
9 think it's very dangerous and certainly that would be an
10 anti-Semitic movement to build. So that's, that's the key
11 reason that I say mobilising this analogy with Hitler is
12 anti-Semitic. I also think that there's a specific barb, a
13 sharpness in accusing Jews of being hitlerite, you know you
14 will have trouble finding a Jew, certainly who comes from
15 Europe rather than the Middle East, you will have trouble
16 finding a Jew whose, who didn't have people in their own
17 family murdered by the Nazis and so to mobilise this charge
18 against Jews or against the overwhelming majority of Jews
19 has a particular sharpness. So I would make those two
20 particular arguments, one is that it's a, it's Jew baiting
21 as I said because it's mobilising it against Jews in
22 particular. By bringing up the image of the worst thing
23 that you can possibly ever call a Jew and secondly I think
24 it has an anti-Semitic effect because it encourages and
25 licenses people for example on campus to relate to people

1 like the Union of Jewish Students and Jewish communal
2 organisations and Jews in synagogues as though they were
3 Nazis and that is to create an anti-Semitic way of thinking
4 and even worse if there are sort of people marching on
5 those collectivities and making inflammatory violent
6 aggressive speeches, calling people Nazis then it gets
7 worse and worse. So that's why I think that in this
8 context the Nazi analogy, the Hitler analogy is
9 particularly inflammatory. I think that answered your
10 question maybe.

11 COURT: Well sorry we're, sorry Ms De
12 Kok. The real issue is that did that happen with Mr Masuku
13 in this matter, what you're describing about a campaign and
14 the intention and all that? Did it happen?

15 DR HIRSH: Well I don't think, I don't
16 know what his intention was and I haven't said anything
17 about his intention.

18 COURT: Yes.

19 DR HIRSH: But I think that he was in
20 these transcripts that I've read, I think he was
21 encouraging and he was licensing people in South Africa to
22 think of South African Jews as Nazis, as friends of Hitler
23 and he's clear also in the transcripts not just particular
24 racist Jews but all Zionists. All Zionists, I think I'm
25 right that that's in the transcript and so those speeches

1 did create license people to think that and it licensed
2 people to relate to Jews in South Africa in that way and it
3 went on to say, to talk about specific punishments or
4 things that would be visited upon those people in South
5 Africa by members of COSATU on campus and when he talked
6 about Israeli families whose children may be in Israel, may
7 be serving in the IDF, he was talking about specific
8 actions against South African Jewish families. So not
9 having been a witness to the speeches and not, and not
10 saying anything about his intention I think yes, I think
11 those transcripts do create anti-Semitic ways of thinking.
12 They create ways of thinking about South African Jews which
13 are extremely hostile. Nothing is more hostile then saying
14 that they're like Nazis and which also go beyond hostile
15 ways of thinking to actual claims and actual threats
16 against them.

17 COURT: Well is that a matter of
18 interpretation. Is there any room for other people to
19 think otherwise or to interpret that otherwise?

20 DR HIRSH: M'Lord, I think that -

21 COURT: Objectively speaking -

22 DR HIRSH: Ja.

23 COURT: Is there any other -

24 DR HIRSH: It's difficult for me to
25 answer that question because that is clearly my

1 interpretation.

2 COURT: Yes.

3 DR HIRSH: I have no doubt that those
4 actions should be interpreted in that way.

5 [11:08] But I will sit here all day and all night and try
6 to show you that my interpretation is more than just an
7 opinion.

8 COURT: Sorry, you are -

9 MS DE KOK SC: Thank you, M'Lord. Dr
10 Hirsh, we were dealing - you've said a lot of things now
11 that weren't really related to the question that I had
12 asked and we were dealing specifically with the reference
13 to, any reference to Nazism and to Hitler. You then went
14 off to say why it was always unacceptable.

15 DR HIRSH: I said why it was anti-
16 Semitic.

17 MS DE KOK SC: Yes.

18 DR HIRSH: Yes.

19 MS DE KOK SC: In the speech - you've
20 read the transcript of the speech?

21 DR HIRSH: Yes.

22 MS DE KOK SC: Yes, of course we don't
23 have a full transcript. Not everything was recorded, but
24 everywhere that you read in that transcript did Mr Masuku
25 ever refer to Hitler or the Nazis?

1 DR HIRSH: I don't remember. He, could
2 you turn me to it, or I was thinking of his reference to
3 Hitler in the -

4 MS DE KOK SC: In the blog post.

5 DR HIRSH: - just now.

6 MS DE KOK SC: Yes, yes.

7 DR HIRSH: If you turn me to the
8 transcript I'll be able to answer your question.

9 MS DE KOK SC: Okay, well you can perhaps
10 have a look at it over tea.

11 DR HIRSH: I assume you'll tell me. You
12 -

13 MS DE KOK SC: Well, I haven't seen it.

14 DR HIRSH: Okay.

15 MS DE KOK SC: But as far as I know, and
16 Mr Bester confirms there is no reference. Mr Masuku never
17 said during the meeting anything about Hitler or Nazis.

18 DR HIRSH: Okay.

19 MS DE KOK SC: So perhaps we shouldn't go
20 on a wild goose chase as to in relation to something that
21 wasn't said.

22 DR HIRSH: But it was written online -

23 MS DE KOK SC: Yes, it -

24 DR HIRSH: It was written in public.

25 MS DE KOK SC: It was written in the blog

1 post.

2 DR HIRSH: And many people who advocate
3 for anti-apartheid we do it in those terms. I mean also of
4 course to advocate that Israel is apartheid and therefore a
5 unique evil on the planet and should be boycotted has a
6 similar effect if, especially in South Africa. If you say
7 that Jewish students and Jewish student organisations are
8 apartheid organisations, they're racist organisations
9 similar to apartheid organisations and they defend
10 apartheid, then again you're encouraging people to relate
11 to the overwhelming majority of Jews in South Africa as
12 though they were racists and the overwhelming majority of
13 Jews in South Africa are not racists and UJS is not racist
14 and - sorry, the South African Union of Jewish Students is
15 not racist and to encourage people to relate to them in
16 that way is to encourage them to relate to them in an anti-
17 Semitic way. It's a discriminatory way.

18 MS DE KOK SC: Okay. You place a lot of
19 emphasis in your evidence on the definition of this, or
20 this working definition -

21 DR HIRSH: Yes. Well, a certain amount,
22 yes.

23 MS DE KOK SC: - which is at page 28. I
24 just want some clarity on the status of this document so
25 that his lordship knows whether it can be of any assistance

1 to him or not.

2 DR HIRSH: Yes.

3 MS DE KOK SC: This document has no legal
4 force. Is that correct?

5 DR HIRSH: Well, I think we went through
6 this yesterday and I explained that this document has
7 developed into a - since I wrote this statement actually
8 has developed into a new definition which is functionally
9 the same as this definition.

10 MS DE KOK SC: Yes?

11 DR HIRSH: It's a little bit different
12 and it has quite a lot of force. It's been accepted by
13 this International Organisation for Holocaust Remembrance,
14 which has 31 member states. It was recently explicitly
15 accepted by the British government. It's the working
16 definition of - in, again in a slightly different form of
17 the American State department, it's been recommended by the
18 British Parliamentary Inquiry, by the International
19 Parliamentary Conference on Anti-Semitism, by the OSCE, the
20 Organisation for Security and Cooperation in Europe. So it
21 has quite a lot of force -

22 MS DE KOK SC: Dr Hirsh, to your
23 knowledge does it form part of international law?

24 DR HIRSH: No.

25 MS DE KOK SC: And this European

1 Monitoring Centre on Racism and Xenophobia, which is the
2 original author, was an agency of the United Nations?

3 DR HIRSH: No, it was the European Union.

4 MS DE KOK SC: Oh sorry, the European
5 Union.

6 DR HIRSH: Ja.

7 MS DE KOK SC: Quite correct, yes. And
8 you said that it followed on a political negotiation as
9 well as a fact-finding process.

10 DR HIRSH: Yes, that's correct.

11 MS DE KOK SC: Yes. The European
12 Monitoring Centre on Racism and Xenophobia was then
13 replaced in 2007 by the Agency for Fundamental Rights.

14 DR HIRSH: Correct.

15 MS DE KOK SC: Yes, and that is the
16 current body.

17 DR HIRSH: Correct.

18 MS DE KOK SC: Yes, they have not adopted
19 this definition.

20 DR HIRSH: They have been ambiguous about
21 it, but actually it was never formally adopted by the EUMC
22 either.

23 MS DE KOK SC: Okay. The other - you
24 talk about the UK government and the Department of State -

25 DR HIRSH: Yes.

1 MS DE KOK SC: - in America using this.

2 Again this has not become part of UK or American law.

3 DR HIRSH: I think that remains to be
4 seen. I think if there was a case in the, in British law I
5 think maybe the courts would choose to take it as an
6 important piece of information.

7 MS DE KOK SC: Because he says law is
8 made by parliaments, not by the government of the day.

9 DR HIRSH: Okay, well -

10 MS DE KOK SC: But the British parliament
11 has not adopted this, have they?

12 DR HIRSH: No, the British government has
13 adopted it.

14 MS DE KOK SC: And as you said this is a
15 contentious definition, it's not -

16 DR HIRSH: Absolutely.

17 MS DE KOK SC: It's not universally
18 accepted. Many people are very critical of it.

19 DR HIRSH: Well, it couldn't possibly be
20 universally accepted because the whole issue, it is highly
21 contested. That's why we're here, I think.

22 MS DE KOK SC: And what we have in this
23 definition of anti-Semitism is a detailed and perhaps
24 technical definition. It's not a definition that you would
25 find if you open up the Oxford Dictionary.

1 DR HIRSH: No, you wouldn't find that if
2 you opened up the Oxford Dictionary.

3 MS DE KOK SC: Yes. So this is not
4 common parlance, this is a specific political view of what
5 should be covered by anti-Semitism.

6 DR HIRSH: It's an attempt to give some
7 guidance to people who are making a judgment about what
8 might be anti-Semitic and what might not be anti-Semitic.

9 COURT: Some form of work in progress.

10 DR HIRSH: Correct. It's a working
11 definition. Originally it was very practical, it was for
12 police officers to use. It's been adopted by lots of other
13 people and it's been used in ways that it wasn't
14 necessarily originally intended, but it's a practical
15 document aimed to help you make a judgment. It won't
16 substitute for judgment. It couldn't possibly. It's an
17 aid.

18 MS DE KOK SC: M'Lord, I see that it is
19 tea time. Does Your Lordship want me to continue -

20 COURT: Give me some indication before I
21 go; how much longer?

22 MS DE KOK SC: M'Lord, I would suggest
23 another 30 minutes.

24 COURT: 30?

25 MS DE KOK SC: 30.

1 COURT: Oh, that's half an hour.

2 MS DE KOK SC: Half an hour.

3 COURT: Okay. Court will adjourn for
4 tea.

5 [COURT ADJOURNS COURT RESUMES]

6 [11:41] COURT: Yes, you're still busy, Mrs De
7 Kok, with cross-examination.

8 MS DE KOK SC: Thank you, M'Lord. Dr
9 Hirsh, I just want to now at this stage just tie up a few
10 issues and focus on a few issues in your expert summary
11 that I haven't dealt with already.

12 DR HIRSH: Okay.

13 MS DE KOK SC: Just before we do that
14 you'll recall that yesterday we spoke about the Gaza war
15 and the number of casualties on either side.

16 DR HIRSH: Yes.

17 MS DE KOK SC: Yes. I see from the
18 transcript of those proceedings that the transcript
19 reflects that I put to you that there were about 30, three
20 zero, casualties on the part of the Israelis.

21 DR HIRSH: Yes.

22 MS DE KOK SC: If that is what I said
23 then that was a mistake because I intended always to say
24 13, one three.

25 DR HIRSH: Okay.

1 MS DE KOK SC: But does that change your
2 response in any way?

3 DR HIRSH: If that's the case it wouldn't
4 surprise me.

5 MS DE KOK SC: Now, if we then turn to
6 paragraph 9 of your summary.

7 DR HIRSH: Page?

8 MS DE KOK SC: 13.

9 DR HIRSH: Yes.

10 MS DE KOK SC: Were you - you testified
11 that it is correct to think of anti-Semitism as racism
12 against Jews.

13 DR HIRSH: Yes.

14 MS DE KOK SC: Yes. And I think
15 Professor Friedman agrees with you on that.

16 DR HIRSH: Ja, I don't think it's exactly
17 the same. I think different racisms are different but I
18 think broadly politically we can think of it as similar.

19 MS DE KOK SC: Okay. When you then talk
20 in paragraphs 10 through to 13 of the various types of
21 anti-Semitism that we find, Christian and ring-wing or
22 conservative and Nazi anti-Semitism and Arab nationalist
23 politics and Islamist politics they respectfully seem to me
24 to be irrelevant to our case. It's not suggested that Mr
25 Masuku is a right-wing zealot of a Christian

1 fundamentalist.

2 DR HIRSH: I don't think they're
3 irrelevant to the case because I think that in order to
4 understand the shape and some of the phenomena of
5 contemporary anti-Semitism of this kind I think it helps to
6 understand the shapes and phenomena that anti-Semitism has
7 taken in the past.

8 MS DE KOK SC: But Mr Masuku's remarks
9 which forms the basis of this complaint doesn't seem to me
10 to fall into any of these categories that you deal with
11 here.

12 DR HIRSH: No, it isn't, it doesn't fall
13 into any of these categories although it's connected to the
14 politics of Arab nationalism and the politics of various
15 kinds of Islamist politics because those are the movements
16 in the Middle East which antizionists are broadly
17 supporting so for example yesterday when we saw the letter
18 asking Israel, wanting Israel to lose the war the militia,
19 the army, the people that they wanted to win the war was
20 Hamas. So it's relevant in that sense.

21 MS DE KOK SC: Okay, but Mr Masuku is not
22 an Arab nationalist or an Islamist.

23 DR HIRSH: No, although I think that I
24 don't know the details of Mr Masuku's political tradition
25 but I think Mr Masuku is on the left. I think he's a trade

1 unionist. I think he's some kind of a socialist. And I
2 think that there have been crossovers and similarities
3 between Arab nationalist politics and Islamist politics and
4 also alliances.

5 MS DE KOK SC: Well, Mr Masuku I think
6 will probably describe himself as a trade unionist who
7 feels strongly about equality and human rights.

8 DR HIRSH: Yes, I think that's right.

9 MS DE KOK SC: Going to paragraph 15 to
10 17 of your summary I think we've already dealt with that.
11 I just want to refer you to one document. If you can turn
12 in the documents bundle to page 293.

13 DR HIRSH: The other bundle?

14 MS DE KOK SC: Yes, please.

15 DR HIRSH: 293.

16 MS DE KOK SC: 293, yes.

17 DR HIRSH: Yes.

18 MS DE KOK SC: Just so that we can
19 conclude with this vexed issue of definitions and so forth.
20 At page 293 appears to be an article by Abe, is it
21 Schlimme?

22 DR HIRSH: Yes.

23 MS DE KOK SC: And it seems that
24 Professor Schlimme is a, well, he's a professor at, of
25 international relations, at Oxford University.

1 DR HIRSH: Yes.

2 MS DE KOK SC: Do you know him or of him?

3 DR HIRSH: I know of him. I don't know
4 him.

5 MS DE KOK SC: I see that it is - he is a
6 Jewish person. Is that correct?

7 DR HIRSH: I believe so.

8 MS DE KOK SC: And he says in the, on the
9 first page of his article at 293 a few paragraphs down, "A
10 word on definitions is in order." And then he makes a joke
11 which we can disregard for the moment. And then he says,
12 "A simpler definition of an anti-Semite is someone who
13 hates Jews as Jews."

14 DR HIRSH: Yes.

15 MS DE KOK SC: Yes. Do you take issue
16 with that definition?

17 DR HIRSH: Yes, I do.

18 MS DE KOK SC: Okay, I just wanted to get
19 your response. I'm not going to debate it with you because
20 then we'll be here forever but you accept that there are
21 countervailing, there are various opinions as to what anti-
22 Semitism is. This is Professor Schlimme's opinion.

23 DR HIRSH: Yes, there are various
24 opinions. Some of them - not all opinions are equally
25 valid. Some opinions are racist and some opinions are not

1 racist but to simply say that all opinions are opinions
2 doesn't really go to the issues in this case. Some
3 opinions express hate speech and some don't.

4 MS DE KOK SC: All right. The next -
5 let's see what you think about the next statement. "An
6 antizionist on the other hand is someone who opposes Israel
7 as an exclusively Jewish state or challenges the Zionist
8 colonial project on the West Bank." Do you agree or
9 disagree with that statement that that is what an
10 antizionist is?

11 DR HIRSH: I think actually similarly to
12 defining Zionism defining antizionism is also very complex
13 because many different antizionists have different politics
14 and different ways of thinking and different ideas of what
15 antizionism is and I think to give a one sentence
16 definition of what an antizionist is, is over simple.

17 MS DE KOK SC: But you'll agree with me
18 certainly that according to Professor Schlimme antizionism
19 focusses on, well, it is opposition to a political ideology
20 or conduct.

21 DR HIRSH: Well, I would also say
22 regarding this passage I don't know anyone who believes in
23 Israel as an exclusively Jewish state. Certainly Israel
24 wasn't founded as an exclusively Jewish state. Certainly
25 it isn't an exclusively Jewish state. It has minorities.

1 It has rights for minorities. It has affirmative action.
2 So I don't know who he's talking about when he talks about
3 belief in Israel as an exclusively Jewish state. So he's
4 offering a notion of Zionism which I think doesn't really
5 tally with the real world and he's saying antizionism is
6 opposition to that notion of Zionism.

7 MS DE KOK SC: In the following paragraph
8 he says, "Israeli propagandists deliberately, yes,
9 deliberately conflate antizionism with anti-Semitism in
10 order to discredit, bully and muzzle critics of Israel in
11 order to suppress free speech and in order to divert
12 attention from the real issues. Israel's colonialism,
13 Israel's Apartheid, its systematic violation of the human
14 rights of Palestinians and its denial of their rights,
15 independence and statute. The propagandists persistently
16 present an antiracist movement, antizionism as a racist
17 one, anti-Semitism." So can I take it that you've
18 testified regarding the, what you call the charge of bad
19 faith when anti-Semitism is raised. Can we take it then or
20 it appears that there are many eminent people including
21 Jewish people who believe that anti-Semitism and
22 antizionism is often deliberately conflated?

23 DR HIRSH: I think there are two issues
24 in this paragraph.

25 COURT: Sorry, I missed that.

1 DR HIRSH: Sorry, excuse me. I think
2 there are two issues in this paragraph.

3 COURT: Yes.

4 DR HIRSH: One is dealing with the idea
5 that people mistake, conflate, confuse antizionism with
6 anti-Semitism so the idea that some people who raise the
7 issue of anti-Semitism get it wrong. That's one idea in
8 this paragraph. The other idea in this paragraph is that a
9 group of people who he calls Israeli propagandists are
10 deliberately - and he emphasises deliberately - involved in
11 a bad faith enterprise of getting it wrong on purpose in
12 order to fool people so there are two issues. One is he
13 says some people get it wrong. And the other is he says
14 there's a group of people who are in a conspiracy to get it
15 wrong on purpose.

16 MS DE KOK SC: And you disagree with
17 that.

18 DR HIRSH: I don't think anyone that I
19 know of gets it wrong on purpose. I think that this term
20 "Israeli propagandists" is highly elastic and I think that
21 in an article like this he's referring to people like me
22 and he says that people like me or he's also referring to
23 organisations like the Union of Jewish Students. He's also
24 referring to other, you know, antiracist organisations like
25 the Community Security Trust.

1 He's referring to people who take anti-Semitism
2 seriously and he's saying that they're only pretending to
3 do that and what they're really engaged in is a conspiracy,
4 actually a Jewish conspiracy, to get it wrong on purpose in
5 order to mobilise Jewish power and the Jewish power comes
6 from this idea that the Jews have the power to denounce
7 people as anti-Semitic and therefore get their way in that
8 way. So I think the way this plays out in the discussion
9 is itself one of the key ways that anti-Semitism happens to
10 Jews in for example a trade union or in a, on a campus in a
11 place where these discussions are carried out. So the Jews
12 are not accused of being wrong. They're accused of
13 speaking in bad faith, of lying and I think -

14 MS DE KOK SC: So yes, I understand.

15 DR HIRSH: This is what it, he emphasise
16 it, yes. You read it. Deliberately, yes, deliberately.

17 MS DE KOK SC: That seems to be his view,
18 yes.

19 DR HIRSH: And so part of it depends on
20 how we read the very first two words, Israel propagandists.
21 I'm a teacher. I'm an academic. I'm a thinker. And here
22 I'm not recognised as that. I'm just said to be an Israeli
23 propagandist and I find that -

24 COURT: If you could just limit yourself
25 to the questions.

1 DR HIRSH: Okay.

2 MS DE KOK SC: So would you say that
3 Professor Schlimme is a - that this statement by him is
4 anti-Semitic? Is he an anti-Semite?

5 DR HIRSH: I think this statement by him
6 feeds into ways of thinking which are anti-Semitic and it
7 feeds into and licenses anti-Semitic behaviour.

8 MS DE KOK SC: Turn to paragraph 26 and
9 onwards of your summary. I wanted to ask you in paragraph
10 28 where you said, one way, towards the end of paragraph
11 28, "One way of concealing of Zionism would be to think of
12 it as Israeli nationalism or patriotism." Is it then the
13 same kind of creature as an Afrikaner nationalism for
14 example? I'm not saying that one is better or worse than
15 the other but in terms of the nature of the beast.

16 DR HIRSH: I don't believe that there's a
17 nation which is Afrikaans, is there?

18 MS DE KOK SC: No.

19 DR HIRSH: So in that sense it's
20 profoundly different.

21 MS DE KOK SC: So Palestinian people who
22 find themselves living in Israel.

23 DR HIRSH: Yes.

24 MS DE KOK SC: They're citizens.

25 DR HIRSH: Yes.

1 MS DE KOK SC: Do they generally describe
2 themselves as Zionists?

3 DR HIRSH: No. Some do but generally no.

4 MS DE KOK SC: But why generally would
5 they not be - have Israeli patriotism?

6 DR HIRSH: Well, Palestinians who live in
7 Israel actually - there's a socialist called Sammy Smooha
8 who's done some on work on this, has studied Palestinians
9 who live in Israel and have Israeli citizenship and he
10 finds that they are really drawn in two directions.
11 They're drawn towards Palestine as their nation and their
12 aspiration for Palestinian independence but they're also
13 drawn towards the possibilities of a Western society, of
14 Western education, of being part of Israeli society. They
15 speak Hebrew. Many of them are students, medical students,
16 law students. So he's found that in the kind of identity
17 of Palestinians who have Israeli citizenship it's quite
18 interestingly pulled in two directions.

19 MS DE KOK SC: In paragraph 30 I think
20 you make what, a point that you, that I feel is important
21 for you. You say that, "The danger is that Jews find
22 themselves being forced into a stark choice, either
23 explicitly disavow any connection to Israel in terms which
24 are demanded of them or be defined as a supporter of Israel
25 and therefore as a racist and a fascist and a friend of

1 Hitler." That is almost the essence of what you've been
2 testifying about I think.

3 DR HIRSH: Okay. You can accept that for
4 many decades in this country the majority of white
5 Afrikaners supported Apartheid.

6 DR HIRSH: Yes. When you talk about
7 Afrikaners are you making a distinction between Dutch-
8 speaking white people and English people?

9 MS DE KOK SC: Yes, yes, I'm talking
10 about a specific ethnic group.

11 DR HIRSH: Okay.

12 MS DE KOK SC: And during that time as we
13 know there was an international campaign and a movement to
14 end apartheid.

15 DR HIRSH: At which time was - yes.

16 MS DE KOK SC: And in that time these
17 white Afrikaners also, Dr Hirsh, confronted this stark
18 choice. They had to either say that they disavowed the
19 apartheid government and the system and if they didn't then
20 they were open to the criticism that they were racists and
21 fascists. You accept that?

22 DR HIRSH: Yes, if they were not able to
23 disavow the apartheid state in South Africa then they were
24 open to that criticism, yes.

25 MS DE KOK SC: Yes. And why is it

1 different here? Why can someone not say politically I
2 disagree with the political conduct of the Israeli state
3 and I am entitled to express my opinions, my political
4 opinions, about the people who support that state?

5 DR HIRSH: Well, many people do. Many
6 people who identify themselves as Zionists have many
7 criticisms of what this or that Israeli government does of
8 course but this kind of politics doesn't recognise that.
9 So for example when you want to boycott Israeli academics
10 from having scholarly contact with academics in the global
11 community nobody - well actually there is a history of this
12 which I can go into.

13 [12:01] But fundamentally nobody is asking is this
14 Israeli or that Israeli academic supportive or oppositional
15 to the government. Most Israeli academics are oppositional
16 to the government, but this kind of politics doesn't ask
17 that, it just treats Israelis in the same way, and by a
18 kind of link it tends to treat people who oppose the
19 boycott and people who consider themselves to be in some
20 way connected to Israel, in other words the overwhelming
21 majority of Jews, it tends to treat them in a similar way,
22 or license the treating of them in a similar way.

23 MS DE KOK SC: Well, the Global Movement
24 against Apartheid never asked the white South African
25 cricket or rugby players what their political views were

1 before they boycotted the teams.

2 DR HIRSH: Well, the boycott of South
3 African cricket began with the story around Basil
4 D'Oliveira, so the boycott of South African cricket began
5 when the South African government tried to assume the right
6 to pick the English cricket team on the basis of race.
7 That was the beginning of that boycott. So I think you
8 keep putting to me these two cases as though they were
9 similar. They're really not similar at all. The Israeli
10 football team has a number of Arab players in it. It's not
11 an analogy. The Israel Palestine conflict is a conflict
12 between two states, two nations, and it's not a conflict
13 about a colonial power of the vast majority of people in a
14 racist way.

15 MS DE KOK SC: In terms of paragraphs 31
16 through to 38 where you talk about Jews and their
17 connection to Israel -

18 DR HIRSH: Yes.

19 MS DE KOK SC: - and you talk about some
20 surveys and the like where people were asked whether they
21 have any feelings of attachment -

22 DR HIRSH: Yes.

23 MS DE KOK SC: Do I understand you
24 correctly that when we're talking of attachment it doesn't
25 equate to political support either for the Israeli state or

1 for Zionism in general?

2 DR HIRSH: I think it equates to some
3 kind of support for Israel as a whole. In other words I
4 think it would equate to a feeling of support against
5 people who wish to conquer Israel against the wishes of the
6 majority and to proceed in a way which doesn't allow those
7 Jews to have self-determination. So in that sense I would
8 have thought that attachment to Israel was attached to that
9 set of ideas as a kind of minimum.

10 MS DE KOK SC: You use the example of a
11 Pakistani who immigrates to the UK.

12 DR HIRSH: Yes.

13 MS DE KOK SC: And who will always have
14 some attachment -

15 DR HIRSH: Yes.

16 MS DE KOK SC: - to his homeland.

17 DR HIRSH: Correct. Who might. Who
18 mostly does, not -

19 MS DE KOK SC: No. Ja.

20 DR HIRSH: Usually.

21 MS DE KOK SC: But as you correctly
22 pointed out that doesn't translate to support for the
23 actions of the government of Pakistan from time to time.

24 DR HIRSH: No, I don't think it does.

25 MS DE KOK SC: Okay. I think we've

1 already dealt with 39. Just on this United Nations
2 resolution, I don't think it's of any real relevance in the
3 matter, but I just wanted to correct you on what seems to
4 me to be a factual inaccuracy. You testified that this
5 resolution was supported by the communist nations and the
6 Arab nations and by none of their democratic states. That
7 is what you -

8 DR HIRSH: - which democratic state
9 supported the motion?

10 MS DE KOK SC: Let's see. Brazil.

11 DR HIRSH: Okay.

12 MS DE KOK SC: Portugal. India.

13 DR HIRSH: I'm trying to remember who was
14 running Portugal in 1973. But carry on. India, yes.

15 MS DE KOK SC: India. Sri Lanka.
16 Cameroon.

17 DR HIRSH: Okay.

18 MS DE KOK SC: Burundi.

19 DR HIRSH: Okay.

20 MS DE KOK SC: I'm not going to read all
21 of them to you, so it's a bit of a -

22 DR HIRSH: Okay, fine. If I got that
23 wrong I apologise for that.

24 MS DE KOK SC: It's a bit of an
25 overstatement to say it wasn't supported by any democratic

1 -

2 DR HIRSH: Correct, that's an
3 understatement and I apologise for that.

4 MS DE KOK SC: Okay. In paragraph 41, if
5 you could just explain to me what you mean there. You've
6 spoken about it before where you say that it is anti-
7 Semitic to paint Israel as somehow uniquely evil in the
8 world.

9 DR HIRSH: It - so it -

10 MS DE KOK SC: Or it could be -

11 DR HIRSH: - lead to an anti-Semitic way
12 of thinking and to -

13 MS DE KOK SC: Ja, or could be, yes.

14 DR HIRSH: - to other anti-Semitic
15 consequences.

16 MS DE KOK SC: And then you say "It
17 portrays decades of ongoing life conflict, peace process,
18 successes and failures as little more than a manifestation
19 of a single idea."

20 DR HIRSH: Yes.

21 MS DE KOK SC: What is the single idea
22 that you're talking about there?

23 DR HIRSH: So the way that many anti-
24 Zionists make the case as they say that Herzl in 1890,
25 whatever it was, wrote his book about the Jewish State and

1 it was a racist book and it was a racist idea and it was an
2 idea that Israel should be a state for Jews only and they
3 portray everything bad that ever happens following that as
4 a sort of straight forward result manifestation of that
5 idea, and what I'm saying is that sociology and many forms
6 of social theory and socialism have always thought of the
7 world in a much more complicated way than simply being
8 attached to one idea. The world changed and part of the
9 world, part of the way that the world changed for example
10 was that the Jews were killed and driven out of Europe.
11 Another part of the material changes in the world was in
12 the cities that, cities of the Middle East where there were
13 big thriving Jewish populations or in the Soviet Union. So
14 what I'm saying there is that it's an error to think of
15 every manifestation of something that we don't like in
16 today's Israel as a manifestation of that one single idea.
17 It's a - I mean maybe it, maybe it's not entirely relevant
18 in -

19 MS DE KOK SC: Yes.

20 DR HIRSH: - but I think it's rather
21 important way of understanding the problem with the way
22 that people understand Israel differently from how they
23 understand the rest of the world.

24 MS DE KOK SC: But the point -

25 DR HIRSH: And so -

1 MS DE KOK SC: The point is did Mr Masuku
2 say anything that reflected that Israel is somehow a unique
3 evil in the world or a manifestation of a single wrong
4 idea?

5 DR HIRSH: Oh, I think he does act as
6 though Israel was a unique evil in the world and I think
7 that's reflected in these quotations and I think it's also
8 reflected in the very focus on Israel apartheid week. I
9 think people don't relate to human rights abuses in other
10 states in an analogous way.

11 MS DE KOK SC: If we can perhaps go to
12 what he actually says, if you go to page 260 and you can
13 start at, against line 18 where he says the following,
14 "Support all and take our solidarity to new heights and
15 that solidarity means that if we are involved in supporting
16 the people of Palestine, if we are involved in supporting
17 the people of Burma or all the people who are oppressed all
18 over the world, our duty is to make sure that we give them
19 where it matters the most." Now Dr Hirsh, Mr Masuku is
20 expressly saying we are not just going to ever look at
21 Israel, we support the rights of oppressed people all over
22 the world. So why can you say, where is the basis on which
23 his lordship can find that Mr Masuku was singling out
24 Israel as a unique evil in the world and -

25 DR HIRSH: Well, what speech did he make

1 at Burmese apartheid week?

2 MS DE KOK SC: So before he's allowed to
3 say something about Israel he must first say something
4 about every other wrong in the world?

5 DR HIRSH: No, that's not my point. My
6 point is that there's a particular campaign to portray
7 Israel as a unique evil and there's a particular campaign
8 to exclude Israel and to say Israel is apartheid and Israel
9 is like Hitler and all of the things that we've been
10 looking at, and I don't think that people relate to the
11 human rights abuses in Burma in a way that's analogous to
12 that.

13 MS DE KOK SC: If we look at his words,
14 which is all we have, what we see is that he expresses
15 himself to be concerned about oppressed people all over the
16 world.

17 DR HIRSH: Yes. I mean I haven't seen -
18 if you look at what follows, I haven't seen him making
19 speeches against Burmese families in South Africa or any of
20 that other, any of those other ways of talking about human
21 rights abuses in Burma.

22 MS DE KOK SC: Now Sir, you haven't
23 testified, you haven't been led as to specifically your
24 interpretation of the words so I'm also not going to go
25 there. There's just one outstanding factual issue. The

1 Israeli Army, there's a system of conscription in Israel,
2 isn't there?

3 DR HIRSH: Yes, there is.

4 MS DE KOK SC: That Jewish, is it only
5 males or females as well?

6 DR HIRSH: Not only Jewish, Jewish men
7 and women have to go into the army -

8 MS DE KOK SC: They're obliged to and -

9 DR HIRSH: Yes, they're obliged to and
10 also (inaudible) people and I believe that serving in the
11 army is optional for Israeli citizens of Palestinian
12 descent.

13 MS DE KOK SC: Okay. Palestinian
14 specifically or Muslim? Does it relate to religion?

15 DR HIRSH: It - I think, I'm not sure
16 exactly how it's done. I think there are different ways of
17 describing oneself and people, so people think about
18 themselves as Palestinians or as Muslims or as Arabs or, in
19 all sorts of different ways. So -

20 MS DE KOK SC: Okay, but Israel makes
21 this distinction between the races or ethnic groups -

22 DR HIRSH: Yes, it does -

23 MS DE KOK SC: - for the purposes of the
24 army?

25 DR HIRSH: Yes.

1 MS DE KOK SC: And tell me, are there any
2 conscientious objector groups in Israel that you're aware
3 of?

4 DR HIRSH: Yes, there are.

5 MS DE KOK SC: Okay, so those would be of
6 citizens who - of Jewish citizens, would some of them -

7 DR HIRSH: Yes.

8 MS DE KOK SC: So there is a group of
9 Jewish people who say that it is against their conscience
10 to go and serve in the army?

11 DR HIRSH: Yes, there is.

12 MS DE KOK SC: Have you still got the
13 transcript open there in front -

14 DR HIRSH: 260?

15 MS DE KOK SC: Yes, if you can turn to
16 268.

17 DR HIRSH: Yes.

18 MS DE KOK SC: Again just a factual issue
19 because you followed these events closely; you'll see
20 against line, well 14 to 15, "There are millions of people
21 that are locked in a prison where they can't be able to
22 cross" -

23 DR HIRSH: Sorry, sorry, what page?

24 MS DE KOK SC: 268.

25 DR HIRSH: My apologies, I'm on the wrong

1 page. 14?

2 MS DE KOK SC: Ja. "There are millions
3 of people that are locked in a prison where they can't be
4 able to cross anywhere. They can't access medicine and
5 electricity." So that's obviously now a reference to the
6 people in Gaza, you agree?

7 DR HIRSH: Yes, I think that it's
8 supposed to be a reference to people in Gaza, yes.

9 MS DE KOK SC: Okay. "The best they can
10 receive is that they receive white phosphorous." You see
11 that?

12 DR HIRSH: Yes, I do.

13 MS DE KOK SC: Are you aware that during
14 the Gaza war the Israeli Army released white phosphorous as
15 a cover for their troupes?

16 DR HIRSH: I'm not an expert on armament.

17 MS DE KOK SC: Okay.

18 DR HIRSH: I heard it said and I heard
19 people having discussions about it, yes.

20 MS DE KOK SC: Thank you, Dr Hirsh.

21 M'Lord, I have no further questions.

22 COURT: Thank you. Re-examination?

23 RE-EXAMINATION BY MR BESTER: We have no
24 questions during re-examination for this witness, M'Lord.

25 COURT: Thank you. I just want to ask

1 you one or two issues, Doctor. For South African ordinary
2 people who want to understand the history and the nature of
3 the conflict between Israel and Pakistan, there are
4 numerous authors and literature on the subject. Are you
5 aware of that?

6 DR HIRSH: Yes.

7 COURT: Ja, those would include the book
8 called "The two-nation solution." You aware of that?

9 DR HIRSH: I know of "The two-nation
10 solution." I don't know of that particular book. Who's it
11 written by?

12 COURT: I've got the author somewhere in
13 the library.

14 DR HIRSH: Okay.

15 COURT: But, and also the title, a book
16 titled, entitled "The Israeli Apartheid," I think it's also
17 locally available generally, and some seem to agree with
18 you and you agreed in cross-examination that that conflict
19 is still going on.

20 DR HIRSH: Yes.

21 COURT: And the invasion and settlements
22 are still there. Is that how you understand it as well?

23 DR HIRSH: Occupation and settlements,
24 yes.

25 COURT: It's still there.

1 DR HIRSH: Yes.

2 COURT: And the scary part is that there
3 is no solution in sight for the -

4 DR HIRSH: The solution is very, very
5 difficult to come to, so one of the problems I think is
6 that people seem to act or believe that a solution is in
7 the gift of Israel to give.

8 COURT: Yes.

9 DR HIRSH: That if Israel chose to
10 withdraw from the occupation, if Israel chose to have a
11 solution then there would be a solution, and I think that's
12 wrong and I think the problem with that way of thinking is
13 that it then, if Israel could make a peace as a matter of
14 will then it follows that Israel is at war because of a
15 matter of will and I don't think that's right. I think
16 it's a really, in many ways a terrible situation and it's
17 very difficult to fix and there are terrible consequences
18 in Israel and Palestine and in the region. So I think
19 you're right.

20 COURT: You're saying a possible solution
21 rests largely with Israel itself, or external intervention
22 like the US, the UK, or the two parties themselves?

23 DR HIRSH: I think it's fundamentally
24 about the two parties. I think Israel could do much, much
25 more to try to give those Palestinian people who want to

1 make a peace, who want to live in peace with them
2 confidence. I also think that Palestinians and Palestinian
3 civil society and the Palestinian authority and their
4 movements could do much, much more to demonstrate to
5 Israelis that they want to live in peace alongside them.
6 So I think Israel is more powerful within the territory and
7 therefore has a great responsibility. In the Middle East
8 as a whole Israel is a small minority and other people also
9 have responsibility for the failures of the peace process.
10 And I think also, I agree with you, there is a role for
11 United States and Europe and the United Nations.

12 [12:21] COURT: And in comparing what we know as
13 even South African apartheid with what is happening between
14 Israel and Palestinians in fairness to the apartheid system
15 in particular it is suggested that apartheid was slightly
16 better because what happens was that homelands were
17 created, people were driven out of the cities or the towns
18 but they were allowed to develop themselves for instance in
19 so called homelands and to becomes states, we had
20 presidents in the home lands and there were elections,
21 people were voted in until that system collapsed as well.
22 As compared to the Israeli situation where the Arabs,
23 Palestinian in Palestine were not allowed to have the
24 lands, to develop it, is that right, does it -

25 DR HIRSH: I think -

1 COURT: Is that distinction valid or?

2 DR HIRSH: Well I would say -

3 COURT: Observation.

4 DR HIRSH: I would say two things to
5 that. One is that with hindsight happily, very happily for
6 me and for everyone who supported the anti-apartheid
7 struggle it turned out that apartheid could be overturned
8 peacefully and by a democratic movement and in a democratic
9 way. In fact that happened soon after the end of the cold
10 war when many things changed and apartheid was defeated,
11 peacefully. The conflict between Israel and Palestine
12 seems to be more enduring and more difficult to solve. So
13 that's one way in which there's a difference and the other
14 thing I would say is that there's a distinction between
15 Palestine's or Arabs who live within Israel and have
16 citizenship and those who live in the area, areas under the
17 Palestinian authority and those who live in Gaza. The
18 people who live in Israel have many, many opportunities.
19 They live in a very nearly equal situation and equal legal
20 system. They have political representation. They have
21 opportunities. They have affirmative action. They use,
22 there's no petty apartheid like you know they're on the
23 same beaches, in the same hospitals and the same schools.

24 Within the West Bank, I don't think it's true to
25 say that there's no autonomy, I think there is Palestinian

1 civil society, there are Palestinian universities, there is
2 Palestinian debate and political life. So I wouldn't like,
3 I think, did we read just now a description of the
4 Palestinian's life is like being in prison. I wouldn't
5 accept that. So I don't think Palestinian life in the West
6 Bank is simply awful, well it is awful, I don't think it's
7 awful in the kind of very, very extreme way. I think there
8 is Palestinian life in the West Bank but it's not good
9 enough. In Gaza I think Palestinian life is pretty
10 repressive and that's partly to do with the neighbours,
11 which is Egypt and Israel which are attacked by the
12 political entity that runs Gaza and it's partly to do with
13 the repression of people who live in Gaza by their own
14 political leadership which took power in a coup. So I fear
15 I'm not helping in the sense that I'm not offering an
16 optimistic response to our hope for a better situation. I
17 think -

18 COURT: I don't think I should expect you
19 to resolve, to resolve those issues going back from before
20 1967 and becoming more intense 1948, 49 and but finally I
21 just want to ask this. The fact that there is no solution
22 in sight and that the problems seems to have become endemic
23 does that allow outsiders to comment and criticise either
24 of the two parties?

25 DR HIRSH: Absolutely.

1 COURT: You said absolutely?

2 DR HIRSH: I'm absolutely in favour of
3 outsiders commenting, having opinions, campaigning,
4 criticising and what I've said throughout my evidence is
5 that there's a distinction between criticism which is
6 legitimate and racist hostility which is not legitimate and
7 it is said that I tried to prohibit all criticism by
8 calling it anti-Semitic and that's just not true. I'm
9 personally, I have been critical of the Israeli government
10 for 30 years, outspokenly in various different campaigns
11 and the rest of it.

12 That's a different issue from the calling on
13 people to take action against Jews on campus here or to
14 take action against Jewish families here or to make people
15 think of South African Jews here as though they were
16 Nazis. So criticism is one thing those things are
17 something completely separate and we should insist that the
18 people who are concerned about action against Jews on
19 campus in Johannesburg are not saying that they're
20 concerned about stopping criticism. This is not a, well of
21 course all issues of hate speech are, they all border onto
22 issues of freedom of speech but that's a matter for the
23 lawyers and you is to think through the distinction between
24 free speech and hate speech. But of course criticism is
25 not hate speech.

1 COURT: Yes, thank you. Any questions
2 arising from the court's questions by either of the
3 parties?

4 MS DE KOK SC: Not from my side, M'Lord.

5 MR BESTER: Just one or two questions,
6 M'Lord. You may reference to the government in Gaza, who
7 is that government, which organisation do they represent?

8 DR HIRSH: I hesitate to call it a
9 government because it was a takeover against the
10 constitution of the Palestinian authority by Hamas. Hamas
11 is an Islamist organisation which was oppositional to the
12 PLO and to the Palestinian authority. In fact Hamas rose
13 in opposition to Yasser Arafat's attempt to make peace with
14 Israel and Hamas arose on the basis that they stood against
15 giving up any land or making any kind of a peace with
16 Israel.

17 MR BESTER: And what system of control,
18 if you don't call it government, what system of control do
19 they allow for in Gaza, this movement Hamas?

20 DR HIRSH: I don't know, you could call
21 it a government if you want, I just wanted to make the
22 point that in my view it's not a legitimate government like
23 we would think of governments, it came to power by a coup.

24 MR BESTER: And when was that more or
25 less?

1 DR HIRSH: Goodness me, that was in about
2 2005, end of 2005 I believe.

3 MR BESTER: And are you aware of any
4 elections having been held in that particular area Gaza
5 since 2005?

6 DR HIRSH: No.

7 MR BESTER: And why would that be, to the
8 best of your knowledge?

9 DR HIRSH: That would be because the people
10 in charge are not motivated by democratic politics.

11 MR BESTER: No further question, M'Lord.

12 COURT: You said -

13 MS DE KOK SC: Nothing from my side,
14 M'Lord.

15 COURT: Than you. Dr Hirsh, thank you
16 for your evidence. You are excused.

17 DR HIRSH: Thanks very much.

18 [NO FURTHER QUESTIONS - WITNESS EXCUSED]

19 MR BESTER: M'Lord, we are ready with our
20 next witness. Will be Dr Stanton. He made his flight the
21 second time around.

22 COURT: Yes, let him come.

23 MR BESTER: Thank you, M'Lord. My
24 learned friend Mr Seape will conduct his examination in
25 chief and I will just move over.

1 COURT: No it's about time we heard his
2 voice. You say your witness it's?

3 MR SEAPE: The witness, M'Lord, is Dr
4 Gregory Stanton.

5 COURT OFFICER: What is your full name
6 and surname?

7 DR STANTON: Gregory Howard Stanton.

8 COURT OFFICER: Do you have any objection
9 in taking the prescribed oath?

10 DR STANTON: No.

11 COURT OFFICER: Do you swear that the
12 evidence you are about to give will be the truth, the whole
13 truth and nothing but the truth. If so please raise your
14 right hand and so help me God.

15 GREGORY HOWARD STANTON: So help me God.

16 COURT: Thank you. Your witness. You
17 may proceed, Seape.

18 EXAMINATION BY MR SEAPE: Thank you, Dr
19 Stanton. Just as a matter of housekeeping there should be,
20 as you would have seen there should be two files in front
21 of you. We'll be referring mainly to what on the spine is
22 marked as the pleadings, notices, discovery and expert
23 notices bundle. So if you can just have that in front of
24 you. On the spine of the file and if you have got that
25 file in front of you, could you turn to the expert notices,

1 there's a tab that should say expert notices and summaries.

2 DR STANTON: Yes.

3 MR SEAPE: Yes and in that bundle there,
4 if you turn to page 79 of that bundle. You will see a
5 notice containing your expert summary.

6 DR STANTON: Yes.

7 COURT: The expertise and the CV of this
8 witness is not in contention is it?

9 MR SEAPE: M'Lord -

10 MS DE KOK SC: No, M'Lord, we accept that
11 Dr Stanton has -

12 COURT: Sorry?

13 MS DE KOK SC: We accept that he has the
14 -

15 COURT: Yes.

16 MS DE KOK SC: The qualifications as
17 reflected in his CV.

18 COURT: Okay. We can just go right to
19 his opinions. That is common cause and admitted.

20 MR SEAPE: Dr Stanton, as you would have
21 heard then there's no debate regarding your expertise.

22 Just to make it clear am I correct that it is, you are an
23 expert really in the field of genocide and hate crimes?

24 DR STANTON: Yes.

25 MR SEAPE: Okay. Just to put a timeline

1 on it. How long has this been your particular field of
2 study?

3 DR STANTON: I have really specialised in
4 the study of genocide since 1980. I was a student at Yale
5 Law School when I went to Cambodia to direct a relief
6 programme there and came back having seen the first
7 genocide that I had ever seen and walked through the mass
8 graves, talked to the survivors and it was there that I
9 finally knew if you will the purpose for my life, all of
10 these various degrees and education -

11 COURT: You're obviously American. Could
12 you try and talk English as we speak it here. It's very
13 difficult.

14 MR SEAPE: Yes, Dr Stanton, if you could
15 maybe just take just slightly -

16 COURT: - and sliding over your sayings.

17 DR STANTON: Alright. I'll try to speak
18 as distinctly as I can.

19 COURT: They should have asked you as
20 they do in the States, good morning how are you doing and
21 but I say good morning how are you and you hear me clearly.
22 Like on the African continent. But I know you, please just
23 try and make us understand you, the American slang.

24 DR STANTON: Thank you. Ja, I'm aware of
25 it by the way that Americans do not speak English. Very

1 aware.

2 MR SEAPE: Yes, you were just telling us
3 about your experiences in Cambodia.

4 DR STANTON: Yes. I was there as the
5 field director for Church World Service which is the action
6 arm of the National Council of Churches of Christ in the
7 United States and what I saw there changed my life. I
8 realised that I need to spend the rest of my life working
9 to prevent genocide.

10 MR SEAPE: And when you say that you saw
11 your first genocide there, for those who may not be aware
12 can you just give us very briefly what you're talking about
13 or what circumstance you're referring to?

14 DR STANTON: Yes. The Khmers Rouge
15 regime, a communist regime murdered about 2 million out of
16 8 million Cambodians during a three year period that it was
17 in power and what I saw was the result, the aftermath that,
18 and I realised this was not unique to Cambodia that many
19 other genocides had occurred in human history and so I
20 began to study this terrible problem.

21 MR SEAPE: Alright and if I can just
22 direct you, we're going to a little more detail on this
23 document in some time but if I can just direct you to page
24 88 of that bundle. Yes, and this is a document titled the
25 ten stages of genocide. Am I correct that you developed

1 what we see here?

2 DR STANTON: Yes, I did.

3 MR SEAPE: And can you just explain to
4 the court how you came to develop what, develop the ten
5 stages of genocide and what exactly it is?

6 DR STANTON: Yes. I worked to create an
7 organisation in 1982 called the Cambodian Genocide Project
8 that was devoted to bringing the Khmer Rouge to justice and
9 in doing that I began to study genocides and as part of the
10 effort to bring the Khmer-rouges to justice after the cold
11 war ended I helped to write a law in the United States -

12 MR SEAPE: Yes.

13 DR STANTON: Called the Cambodian
14 Genocide Justice Act which finally passed in 1994 and the
15 reversed American policy had made it American policy to put
16 the Khmer Rouge on trial for their crimes. Up to that
17 point the US government was opposed to trying the Khmer
18 Rouge because of the cold war. The government that had
19 overthrown the Khmer Rouge was allied with Vietnam which
20 was allied with the Soviet Union and the logic, the strange
21 logic of the cold war was that the friend of your enemy was
22 also your enemy.

23 MR SEAPE: Alright.

24 DR STANTON: So what I realised though
25 was having passed the law, which overwhelmingly passed our

1 congress and senate and was signed by President Clinton
2 nevertheless someone needed to get inside our state
3 department to actually bring this about, to make it happen,
4 to have a trial set up for the Khmer Rouge because there
5 was no court and so I joined the foreign service, the state
6 department, took the exam and was accepted and assigned and
7 in fact was appointed to the group that was considering how
8 to put the Khmer Rouge on trial and then the Rwandan
9 genocide broke out in 1994 as you know and the director
10 general of the foreign service asked me to deal with the
11 Rwandan genocide because as she said I at that time was
12 probably the only foreign service officer in the state
13 department who was really an expert on genocide which I
14 found by the way almost appalling. But nevertheless was
15 the situation and so she placed me in charge of writing our
16 United Nations resolutions in the Security Council on
17 Africa. And so I wrote the resolutions that created the
18 Rwandan tribunal resolution 955 and 978 and out of that
19 experience realising that the United Nations and the US and
20 Great Britain and all of the great powers the world had
21 totally failed the country of Rwanda and it's people. I
22 had written a number of dissent memos in the state
23 department about our policy and Madeline Albright who was
24 our UN ambassador called me into her office and she said
25 she wanted me to interview the people who had made our

1 policy on Rwanda so we could understand our mistakes.
2 That's the words she used and you don't say that very often
3 or easily in the state department. So I did, I interviewed
4 a lot of people and I realised that one of the reasons we
5 made those mistakes is people didn't even know what
6 genocide is and more importantly they didn't know what the
7 early warning signs in the process is that develops into
8 genocide.

9 [12:41] And so that is when I wrote the what was then at
10 eight stages of genocide, it's now ten stages of genocide
11 to help our foreign service officers understand what is
12 needed to prevent genocide because there is a logical
13 process that leads up to genocide. It's not a linear
14 process, it's not one in which first stage 1 and then stage
15 2 and stage 3 and so forth, these stages as they're called
16 are often simultaneous. They often happen at the same
17 time. But by breaking it down into a logical process we
18 can understand better how to prevent genocide which is the
19 ultimate crime. And of course we've also learned that this
20 same, these same stages are what cause bullying, what cause
21 hate crimes, in other words that it's a model of human
22 motivation actually and development of criminal activity.

23 MR SEAPE: Thank you very much for that.
24 If I can then turn you to - I will come back to the model
25 in a moment, but if I can turn you to page 81 of the

1 bundle. So if you could just back from where you are.

2 DR STANTON: Yes -

3 MR SEAPE: Yes I'm looking at paragraph
4 11 there and you say there that genocides begin with words.
5 Now as you are no doubt aware this matter concerns a number
6 of statements. Now can you just explain to the court what
7 role, in your experience, words have to play in hate crimes
8 and genocide?

9 DR STANTON: Words are what motivate
10 people to do things. Words have consequences, in other
11 words genocide begins with words as hate crimes begin with
12 words. It is when people conceive of the other as somehow
13 not being worth preserving or a fellow human as not being
14 worthy of living that we have the development of these
15 crimes. And that's why demagogues like Hitler or like
16 Stalin or others are able to motivate people to commit
17 terrible crimes simply using words.

18 MR SEAPE: And you then talk about just,
19 I think it's the third sentence, you say Barbara Coloroso
20 in her book Extraordinary Evil and you give the citation
21 "Like in such repetition of hatred to bullying that is
22 rampant in some schools and that drives teenagers to
23 suicide." Can you just touch on or talk about what role
24 this element of repetition plays in the perpetuation of
25 hate crimes and or genocide?

1 DR STANTON: Yeah, it's very important
2 and the reason it's very important is that repetition makes
3 one statement that is, you know, a hateful statement into a
4 social statement. It turns it into not just one person's
5 opinion, but it turns it into the opinion of a whole lot of
6 people, a group of people. And in, especially schools, we
7 know the bullying that when a person feels set upon by
8 other friends or so called friends and it undermines their
9 self-esteem to the extent that they feel that they are
10 worthless they might even commit suicide. And it's well-
11 known that bullying can bring this about. People who have
12 had it happen to them, you know in their secondary schools
13 or wherever when they were young and I think it's
14 worldwide, know that this is a terrible thing that happens
15 to young people.

16 MR SEAPE: Yes and I mean in your
17 experience, considering the extensive studies you've done
18 on various genocides, this repetitive element what are the
19 consequences if it's left unchecked?

20 DR STANTON: If it's left unchecked then
21 it becomes socially accepted and when it is repeated often
22 as it, for example, was in Rwanda where you had a hate
23 radio station that was literally repeating again and again
24 and again, every few minutes, even every hour, you know
25 that the Tutsis were cockroaches, that they were robbing

1 the society of its wealth. That they should be expelled
2 from the site and then later that they should be literally
3 killed, all of them. When they kept saying this again and
4 again and again it became something that people just
5 accepted as a truth. And it's what is called The Big Lie
6 technique, it's a well-known technique of Hitler. Goebbels
7 actually wrote an article called The Big Lie in which he
8 explained this is how you can make people believe in
9 something that really is false.

10 MR SEAPE: And just for those who might
11 not know who is, you mentioned Goebbels was -

12 DR STANTON: Goebbels was the main
13 propagandist for the Nazis. And I must say, by the way,
14 that this has also been the characteristic of Stalinist
15 communism that the use of The Big Lie technique was also
16 very characteristic of Stalinist communism, we can see the
17 results. People were led to believe that they were going
18 to create a new Utopian society, you know the perfect
19 communist society or the perfect in the case of the Nazis,
20 the perfect racially pure society and they lost all sense
21 of reality because of it.

22 MR SEAPE: Now I'd just like to then go
23 back, we said we would come back to the ten stages, if you
24 can go perhaps to, back to page 88. As the name suggests
25 obviously it identifies ten stages of a genocide. Do you

1 just want to very briefly talk about each of these stages
2 and then we'll get to the two in more detail that you have
3 identified in this case?

4 DR STANTON: Sure. I just repeat that
5 this is not a linear model at all. It's a logical model
6 that we use to think about genocide, but nevertheless there
7 is a logic to this model. So the first stage is always
8 classification, you have to have an us versus them or you
9 couldn't even have a genocide or some other kind of
10 division. Secondly you have to have symbolisation because
11 we have to name what those classifications are. Sometimes
12 we even create physical symbols like yellow stars for
13 instance to symbolise the differences.

14 The third stage is discrimination where people
15 who belong to the other group, that is, you know, the
16 people to be discriminated against have laws passed that
17 prevent them from exercising full citizenship rights. We
18 had it in the United States for well a long, long time with
19 our segregation laws that denied full citizenship to
20 African American population. And I mean in many ways, of
21 course and here's where I mean I am not an expert on South
22 Africa even though I have taught for a year in Swaziland,
23 but I think that the parallel may be here as well that this
24 kind of discrimination was present here. The fourth stage
25 is dehumanisation and this is where you really begin that

1 downward spiral into genocide. It is where the other group
2 is referred to as vermin, rats or as cockroaches or as a
3 disease in the body politic or as a cancer. And the idea
4 here is you have to eliminate these people if you're going
5 to have a better society. And so what's interesting about
6 this is that the people who commit genocide as a result of
7 dehumanisation often think they're actually improving the
8 society because they're getting rid of the of it. The
9 fifth stage is organisation because in order to have
10 genocide you have to have a group to do it. It's not the
11 same as a hate crime. A hate crime is where say one
12 individual may imbibe the poison that is in the atmosphere
13 because of the hate speech in the society. And get a
14 machine gun and go into a school and kill 20 or 30
15 children. This is a hate crime, but genocide is organised,
16 it is usually by a larger group like the SS or by the
17 militia in Rwanda, the so called Interahamwe or in many
18 other genocides. The Khmer Rouge, it was done by the Khmer
19 Rouge themselves, they divided the society into classes and
20 so forth. The next stage is polarisation in which
21 basically the argument is if you're not with us you're
22 against us. And it's the reason why the first people to be
23 killed in any genocide are the moderates in the middle who
24 come from the group that is going to be doing the killing
25 because they're the ones who could most easily stop the

1 process of genocide.

2 That's why in Germany for instance the first
3 people to be arrested and put into the concentration camps
4 were the liberal priests, liberal pastors, the communists,
5 the social democrats and so forth, the people who were
6 opposed to Hitler. In the next stage you get preparation,
7 literally planning for the genocide and we know of many
8 cases. The Wannsee Conference in 1942 planned the
9 holocaust for instance and there's even a movie about it
10 called Conspiracy that was taken from the transcripts of
11 that conference. If you see that movie it will make your
12 blood run cold. These are planned things these genocides
13 and in fact they even knew each other. Hitler was said to
14 have once at a conference in which someone said but
15 wouldn't it be illegal, he said whoever heard of the
16 Armenians. And we have found a copy of Mein Kampf
17 translated into Kinyarwanda in the library of former
18 president Habyarimana of Rwanda for example. I mean in
19 other words this process seems to be something that you
20 know genocide leaders repeat. Finally then you get to
21 persecution in which the group that is targeted will be
22 persecuted, taken to ghettos, taken to concentration camps,
23 even marched out into deserts, put into homelands. You
24 know basically, totally having their rights denied.

25 MR SEAPE: Yes.

1 DR STANTON: And then finally we have
2 actual genocide. That's the stage I call extermination
3 because for the people who are committing the crime they
4 don't really think they're committing a crime at all, they
5 think they're improving the society. And then, of course,
6 I thought this was the end of it. When I first wrote this
7 model in State Department that's where it ended, but then I
8 realised that there was another stage, denial. And denial
9 really starts at the beginning and goes all the way through
10 to the end and even continues 100 years later. We still
11 see it with the Armenian genocide today for instance.

12 MR SEAPE: Thank you very much for that.
13 If we can go back to page 82.

14 DR STANTON: Yes.

15 MR SEAPE: And in the first sentence
16 there you say that the process of dehumanisation has the
17 effect and function of decommissioning normal human moral
18 sentiments. Can you just explain to His Lordship what
19 exactly that means and what that effect on the recipient of
20 the statement has?

21 DR STANTON: Yes and the reason, by the
22 way, that it's so important that it is the recipient that
23 we're thinking about here, is that that is the key factor
24 in looking at hate speech. What does the audience hear,
25 how do they understand the hate speech. The reason that

1 dehumanisation is so problem - is such a problem is it
2 makes people believe that it's a kill or if they commit
3 murder against these people they won't actually even be
4 committing murder because they're not even going to be
5 killing a full human being. They will be killing someone
6 who, you know, is less than human. And this is where it's
7 ghastly, but you - in genocides frequently the people
8 committing the crimes even think they're going to be
9 improving the society.

10 So it takes away this natural human abhorrence of
11 murder. In every society I have ever lived in and that's
12 quite a few societies by this time, I'm 70 years old now,
13 there's no tolerance for murder. You know murder is
14 absolutely illegal in every society I know of, but you take
15 away that moral revulsion.

16 MR SEAPE: Yes. M'Lord, I see that it is
17 about four minutes to one and that would be a good place to
18 pause for the moment, to take -

19 COURT: Thank you, Mr Seape, I need just
20 to talk with both counsel outside here quickly please. The
21 court will adjourn for lunch now.

22 [COURT ADJOURNS COURT RESUMES]

23 [14:15] COURT: Thank you, you may proceed, Mr
24 Seape.

25 MR SEAPE: As the court pleases, M'Lord.

1 Dr Stanton, we had just concluded your testimony regarding
2 the dehumanisation stage of the 10 stages to genocide that
3 you developed. I'd like to then move on to the other stage
4 that you identified as being relevant, which is the
5 polarisation stage. Now I've got two questions for you on
6 that aspect and if you can answer them in turn I'd
7 appreciate that. The first question is what is the
8 polarisation stage? The second would be why is it
9 problematic and what are its effects?

10 DR STANTON: Sure. Polarisation is the
11 stage at which you really separate the "us" versus the
12 "them" in a very active way. You've already classified,
13 you know, the two different groups, but polarisation is
14 where you literally try to drive them apart and you also
15 try to drive anybody who's in the middle, any moderate,
16 into one or the other camp and it's especially aimed at
17 moderates, it's aimed at shaming people who are in the
18 middle saying they're really not loyal to the true cause
19 and so forth. The reason why it's particularly relevant in
20 the case of hateful speech is hateful speech is
21 specifically aimed at people who let's say are in the
22 middle, who are timid about their loyalties one way or
23 another, and so it shames them into either going - well,
24 hopefully according to the speaker to joining the camp of
25 the speaker, and also it's intended to intimidate the

1 people in the other group, in the targeted group -

2 MR SEAPE: Yes.

3 DR STANTON: - into silence or even to,
4 you know, to flight.

5 MR SEAPE: Okay. And you know the second
6 question I had for you is that why is it particularly
7 problematic? What effects does it have? What does it have
8 on the recipient of the particular communication?

9 DR STANTON: Well, the audience that is
10 receiving the communication, if it is in agreement with the
11 speaker, can be then motivated to act, to take action, and
12 against other group, and in other words it can actually
13 bring about marches and you know, other kinds of activity
14 that the followers of the speaker might undertake. For
15 those who are in the other group it is intended and often
16 does create a sort of terror in that other group in which
17 the other group then retreats into inside of its walls or
18 trace to hide and even tries to flee, and if the aim of the
19 speech is in fact to encourage the people in the other
20 group to actually flee the country that of course might be
21 one result.

22 MR SEAPE: Thank you, that's very useful.
23 Now I'd like to go to and deal with another topic with you
24 and you start off at paragraph 14, if you could go to page
25 82. You might still be there, I think.

1 DR STANTON: Yes.

2 MR SEAPE: Paragraph 14, and you say
3 there, "Political leaders publicly incite followers using
4 racial code words." And then you make reference to certain
5 of Mr Masuku's statements and then at paragraph 15 you
6 continue that theme of racial code words by saying, "He
7 cleverly masked his threats to avoid legal prohibitions on
8 direct incitement of violence, but his audience knew his
9 meaning." You then continue and you say, "Anthropologists
10 call this contextual communication, reference to subtext."

11 DR STANTON: Right.

12 MR SEAPE: You see that?

13 DR STANTON: Mm.

14 MR SEAPE: So you've linked those two
15 themes - well, that singular theme in those two paragraphs.

16 DR STANTON: Mm.

17 MR SEAPE: Now you make reference to the
18 subtext and I'd like you to just explain to his lordship
19 what exactly is a subtext, and I'll have some follow-on
20 questions for you.

21 DR STANTON: Sure. Well, I'm a cultural
22 anthropologist and one thing that cultural anthropologists
23 looked for -

24 MR SEAPE: Okay, can I just stop you
25 there. Can you explain what a cultural anthropologist

1 does?

2 DR STANTON: Yes.

3 MR SEAPE: Yes.

4 DR STANTON: Of course. Cultural
5 anthropologist tries to look at the underlying processes
6 and structures of a society to try to understand why people
7 interact the way they do and why they do what they do.

8 MR SEAPE: Great.

9 DR STANTON: Their rituals, their various
10 ways of speaking and so forth. It is - once you become an
11 anthropologist you are always an anthropologist. You're
12 even analysing your own society all the time.

13 MR SEAPE: Right.

14 DR STANTON: And one of the things that
15 happens if you start looking at a society and that is part
16 of an anthropologist's training is to look for if you will
17 the texts that are underneath the surface.

18 MR SEAPE: Right.

19 DR STANTON: You know, people live
20 according to certain narratives, that is they believe
21 certain stories that really help them organise their
22 societies. For example, I mean a lot of societies in the
23 west and in Africa are Christian and so they organise their
24 societies according to the narrative of the Christian
25 gospel and a lot of the stories that Jesus told for

1 instance. So but underneath then when you have that kind
2 of a narrative structure in your society there will be
3 subtexts that will appear when people start telling other
4 related stories about birth for instance, or about
5 forgiveness, or about a lot of the things that Jesus
6 taught. Now I'm just using a Christian example because
7 it's the one I use, I know the best because I'm a
8 Christian.

9 MR SEAPE: Right.

10 DR STANTON: But the subtext can also be
11 one that is a very, very damaging one. The subtext for
12 Jews in the west has traditionally been that Jews were
13 killers of Christ and that has been with us I'm afraid
14 since the time of the gospel of John and, you know, some of
15 the gospels in the Bible. It was very seriously, you know,
16 believed in by Luther, by other leaders in the church, and
17 so this subtext of really anti-Jewish sentiment has been
18 present in western civilisation really for at least 2 000
19 years, probably before then even, because as I think I've
20 mentioned to you the earliest record we have of an actual
21 genocide was found on an Egyptian stela in which a pharaoh
22 in 5700BC claimed to have wiped out the people of Israel.
23 Now that's of course a rather premature judgment on his
24 part, but it shows you how long this antipathy towards
25 Jewish people has lasted and so having that subtext in

1 place means that it takes very little to call up that
2 subtext to the minds of the listeners, and so when for
3 example you have a reference to the Israeli Defence Forces,
4 well, everybody knows who that is referring to. You don't
5 really need to say the word Jews because the truth is most
6 of the people who are going to sign up to go fight for the
7 Israeli Defence Forces are going to be Jews, and a lot of
8 our communications in other words is carried out at
9 different levels of meaning in our - we have a surface
10 meaning and then below that another meaning and a subtext
11 below that and a good poet of course, or a good songwriter
12 knows how to use all of those subtexts and I mean really
13 great poetry of course will elicit emotions in people. Now
14 unfortunately really great demagoguery for example against
15 Jews can also elicit extraordinary hatred and we saw that
16 in the holocaust.

17 MR SEAPE: Thank you very much for that.
18 Now just continuing on this theme of the subtext, can you
19 perhaps explain to his lordship how does one appreciate or
20 identify the subtext of a particular communication? What
21 would one need to know?

22 DR STANTON: Well, you'd need to know
23 basically four things when you're interpreting a speech or
24 a text. First of all you need to know the identity of the
25 speaker; does the speaker have a certain kind of authority.

1 Does the speaker have a certain office in which that
2 speaker, from which that speaker speaks? You know, is the
3 speaker for example a priest or is that, is a labour union
4 leader or is a political leader of some kind. Is it
5 someone that someone was going to follow?

6 MR SEAPE: Right.

7 DR STANTON: The second thing you need to
8 know is what are the underlying culture beliefs of the
9 audience because it is what the audience hears that is the
10 key to whether something is hate speech or not. If the
11 audience hears cleverly designed words that may skirt the
12 edges, you know, of acceptability in speech and yet will
13 call up deep hatreds and antipathy on the part of the
14 audience you may very well have a case of say hate speech.

15 MR SEAPE: Yes.

16 DR STANTON: Unfortunately in this last
17 campaign in the United States we had that going on
18 frequently in the political campaign. I mean I almost
19 thought we were back in the 1950s. There were things, you
20 know, being said and they were coded, coded words, but
21 everyone knew what they were referring to. This was racism
22 come back and so that's the second thing. The third thing
23 you will look for in a speech is if you will the cultural
24 context of the speech, in what kind of a setting is that
25 speech given.

1 MR SEAPE: Yes.

2 DR STANTON: And then finally you'll look
3 for what is the probable outcome or the intended result or
4 outcome of that speech. Well, if it is part of an overall
5 campaign to diminish the influence of a certain group of
6 people or to even worse, you know, drive them in the, some
7 kind of exile or in other ways to discriminate against
8 them, that of course would be evidence that you've got
9 speech that could elicit hatred.

10 MR SEAPE: Thank you very much for that.
11 And I mean can you perhaps, if you can perhaps with
12 reference to examples just explain to his lordship why this
13 is such an effective technique, the use or employment of
14 the subtext?

15 DR STANTON: Yes, a good example might be
16 Yugoslavia when in the late 1980s and early 1990s when
17 Slobodan Milosevic took over Yugoslavia and he believed
18 that all Serbs, including the Serbs in Bosnia and in part
19 of Croatia and so forth should be unified into greater
20 Serbia, as he called it, and he used a particular barrel
21 that actually occurred in Kosovo in which - and
22 interestingly enough in which the Serbs were actually
23 defeated by the Turks, but it was like waiving a bloody
24 shirt and he pointed out that they had been defeated but
25 they were going to come back now. This was their time to

1 come back, and so out of that he used the subtext of Serb
2 nationalism to literally create an armed force within
3 Serbia that then invaded parts of Bosnia and Croatia and -
4 I mean that was the cause of the Balkan Wars and that's a
5 good example of a subtext. Another one of course is as I
6 say the subtext of anti-Jewish thought in Germany that
7 Hitler used so effectively. The subtext that was used by
8 the Khmer Rouge or even in Soviet Union that the
9 underprivileged were the result of exploitation by the
10 capitalist class for example and so there is - and of
11 course there are always going to be some people who are
12 exploited or are poorer than others in a society and if
13 they can pin their frustrations or their feelings of
14 injustice on a particular group of people, particularly a
15 small group of people who they see as the owners in the
16 society it takes, it utilises this I think very universal
17 sense of righteous pursuit of justice by a lot of people
18 around the world.

19 MR SEAPE: Yes, and you just - you
20 touched on an interesting issue when you spoke about the
21 ability of the subtext to elicit feelings in the recipient,
22 or a person that might be a recipient of a particular
23 communication. Now would that person have to know that
24 they're being affected in this way by the subtext?

25 DR STANTON: Not always, and that is very

1 interesting. Some of these subtexts are almost
2 unconscious, are - you know, they exist in the culture and
3 yet if you ask the average person do you, are you really
4 anti-Jewish, they say oh no, you know, gosh, I've got some
5 Jewish friends, you know, and yet if you really start
6 probing a little more you can find a lot of deeper feelings
7 that are there that are actually cultural feelings, not
8 just individual ones. Excuse me, I'm going to take a drink
9 here.

10 MR SEAPE: Please go ahead.

11 DR STANTON: And so no, there aren't
12 always things that the person himself or herself is even
13 aware of.

14 MR SEAPE: I see. And for the
15 communicator, so in other words the person who's
16 responsible for the speech or communication, are there any
17 benefits to that person? Is this a technique that seeks to
18 aid them in any way?

19 DR STANTON: Yes, I mean the best
20 examples are these people who are so good at it, like
21 Milosevic or Hitler, that they could exploit these feelings
22 that are very often very deep in order to take power and
23 increase their own power to the point that they're
24 literally able to mobilise their whole societies and go to
25 war. I mean that's the most extreme example of course. It

1 doesn't always lead to something that horrible. I mean
2 sometimes it's just somebody like our current president in
3 the United States who's able to really pull on some of
4 these deep feelings in people and mobilise them and
5 probably any really good political leader knows how to do
6 that and it doesn't always lead to, you know - well, it
7 mostly doesn't lead to genocide, but nevertheless it can
8 lead to discriminatory behaviour in the society. It can
9 lead to hateful acts. It can actually lead to hate crimes.
10 Every society is going to have some people who are less
11 able to really make good judgements than others.

12 MR SEAPE: Right.

13 DR STANTON: And maybe have an AK47 in a
14 closet, at least in the United States.

15 MR SEAPE: Yes. You referred to some of
16 the work you had done in Rwanda and perhaps you could maybe
17 refer us to some of the type of speech that was used in
18 that well-known example of genocide and maybe just explore
19 with us some of the subtext underlying the speech.

20 DR STANTON: Yes.

21 MR SEAPE: Specific words used in that -

22 DR STANTON: Rwanda is a particularly
23 interesting case because there you had a society that had
24 been polarised both by tradition, there was a division
25 between the Tutsi and the Hutu and the Twa the Twa being

1 the pygmy group, and the - that traditional division in
2 which the Tutsi were the monarchy, was used by the Belgians
3 in indirect rule because it was so much more economical to
4 try to rule one of their colonies indirectly than by
5 sending in their own people that they decided to rule the
6 country by simply empowering the Tutsi monarchy.

7 [14:35] And also they tried to train Tutsi priests who
8 would essentially control the Catholic church in Rwanda and
9 in order to make that work they had to decide who was Tutsi
10 and who was Hutu, it's not always easy. I mean I've lived
11 in Rwanda, both in 88/89 and then you know I've been back
12 and forth a lot since then.

13 MR SEAPE: Yes.

14 DR STANTON: There's been a lot of
15 intermarriage. So the Belgium's actually went out into the
16 population and tried to count the number of cattle that
17 people had which cattle raising was considered the
18 traditional Tutsi occupation.

19 MR SEAPE: Alright.

20 DR STANTON: And Farming was considered
21 the traditional Hutu occupation. So they would then try to
22 find out how many cattle people would have, they would even
23 go so far as to measure noses because they had this very
24 strange 19th century racist European concept that somehow
25 the Tutsi were a lost tribe of Israel and that they were

1 closer to the "white race". I mean it's very strange.

2 MR SEAPE: Ja.

3 DR STANTON: But nevertheless they went
4 out and they gave the people in 1933 ID cards in which they
5 named them as Tutsi or Hutu or Twa. In 1988 when I first
6 saw this I was having dinner with the President of the
7 Supreme Court of Rwanda and I said to him they're going to
8 use this for genocide and he said they already have.
9 There's been genocidal massacres that used these ID cards
10 and I said well why don't you, you know rule these to be
11 unconstitutional. He says because we don't have judiciary
12 review here in Rwanda, you're going to have to go to the
13 President. So I got an appointment with President
14 Habyarimana himself and I brought this subject up. He
15 didn't want to hear it and what I found out later of course
16 is that he had led some of these genocidal massacres
17 himself and as we now know during the 1994 genocide in
18 Rwanda they used the ID cards to identify who was Tutsi and
19 who was Hutu. It was a very symbolic way of expressing the
20 polarisation in a society. This was also expressed of
21 course in the way the hate radio kept broadcasting messages
22 that the Tutsis were "cockroaches".

23 MR SEAPE: Alright.

24 DR STANTON: And I mean that's
25 dehumanisation at its extreme of course. So when the

1 genocide got underway a lot of the defences against murder
2 that most people would have were gone and they were ready
3 to kill and so that is why it, I'm not, that is why it was
4 so particularly dangerous there in Rwanda and I would argue
5 is still dangerous in Burundi. South Africa I think is a
6 much stronger society, it's probably unlikely to have
7 genocide. I think we're probably unlikely to have it again
8 in the United States even though we have had it as you well
9 know. We committed genocide against our own native
10 American population. I believe that the middle passage in
11 our slavery trade was genocide. So we have done it. We've
12 committed genocide in our society and yet I don't think now
13 we're as, we're very likely to have it because of the
14 checks and balances in our governmental system. But when
15 you have a bipolar system, a bipolar society as in Rwanda
16 or Burundi it's a very dangerous situation.

17 MR SEAPE: Now what is the, what is the
18 role of a particular, in any society a hate speech
19 provision as a check or a balance?

20 DR STANTON: It's a very strong balance,
21 a check. I in fact applaud the fact that you have I think
22 a well worded hate speech statute here in South Africa.
23 One that doesn't go too far in, I mean if you go too far of
24 course you're going to destroy free speech all together and
25 that's not good. But there is a provision in South African

1 law that allows for civil suits, you know about hate speech
2 if the hate speech is blatant enough it can actually be
3 kicked up to a criminal level but it's mostly civil suits
4 that are permitted in the South African law which I think
5 is a very good approach.

6 What it does is it essentially says to people who
7 try to use hate speech enough we're not going to put up
8 with this in our society. You may, you know have said this
9 time but we're going to demand an apology from you or we're
10 going to demand some other kind of recompense for it. In
11 my view at least that kind of balance in a society is a
12 good one because it means that people can't just willy-
13 nilly use hateful language to denigrate other people.
14 Unfortunately in our society because of our first amendment
15 and because of recent ruling by Justice Scalia that
16 actually legalised the planting of a burning cross on the
17 front yard of a black family that's moved into a
18 neighbourhood in Minnesota and he struck down a hate speech
19 law in Minnesota as a result our society is weaker for
20 that, I think.

21 MR SEAPE: Okay.

22 DR STANTON: Then South Africa.

23 MR SEAPE: But I mean just in your
24 experience what I'm really getting at is not a particular
25 circumstance but generally what have you found to be the

1 role of these types of provisions.

2 DR STANTON: I understand better I think.

3 Well perhaps -

4 COURT: Mr Seape, what we have in place
5 in South Africa about this, it's common knowledge.

6 MR SEAPE: It is common -

7 COURT: It's not in dispute.

8 MR SEAPE: I accept that.

9 COURT: What we have and that's exactly
10 why we're here, it's those provisions that we have and
11 we're described as being lucky or fortunate.

12 MR SEAPE: I accept that, your Worship.

13 DR STANTON: I'd say wise actually.

14 COURT: I beg your pardon, Doctor?

15 DR STANTON: I would use the word wise.

16 COURT: Wise.

17 DR STANTON: I think it's wise.

18 COURT: Even better.

19 MR SEAPE: I accept that your worship. I
20 won't pursue that line.

21 COURT: Yes.

22 MR SEAPE: Sorry. Now for a
23 communicator, I just want to ask one last question on this
24 theme of the subtext. For the person who is making the
25 speech or the communication are there any other methods

1 that can be used other than code words, because that's the
2 one you specifically referred to, to drive the subtext or
3 the particular narrative?

4 DR STANTON: Yes. Hateful songs are one
5 way. Very powerful songs, I mean songs that elicit certain
6 kinds of emotions in people because music has a powerful
7 effect on people and if they're coupled with words that
8 carry hatred in them, even if they come from another era
9 they can be a problem for our country. We have that very
10 problem in America when people try to sing Dixie for
11 instance. Sort of the anthem of the Southern Confederacy
12 believe me it brings up a lot of emotions in people,
13 especially African Americans and of course art has that
14 kind of effect. Sometimes you actually have direct
15 incitement. Now direct incitement to commit genocide is
16 not protected speech. It is because incitement to commit a
17 crime is not protected speech.

18 MR SEAPE: Yes.

19 DR STANTON: And I think probably we need
20 to enforce that kind of law more than we do in the world
21 because sometimes the speech gets so out of hand that
22 people using it are literally calling for the deaths of
23 other people. Leon Mugesera for instance made a speech in
24 1992 in Rwanda in which he called for sending all Tutsi
25 down the Kagera River to where they came from. Arguing

1 they had all come from Ethiopia. Well that meant dead. He
2 should have been prosecuted. So when you have that kind of
3 speech and we have had plenty of it, you know my view is
4 that is criminal speech and you need to do something more
5 than just have a civil suit about it because that's
6 incitement. It has a, it's a clear and present danger.
7 That's what the test is in the United States. But
8 incitement should be distinguished from just regular hate
9 speech I would say. Incitement has this direct
10 implication, imminent harm.

11 MR SEAPE: Yes.

12 DR STANTON: Let me talk more about that
13 a little bit, if you don't mind. One of the biggest issues
14 here is how a genocidal culture is created.

15 MR SEAPE: Yes.

16 DR STANTON: Hate speech may lead only to
17 a hate crime or two or three or four. If you keep
18 repeating hate speech you can actually create a culture of
19 genocide. A culture that is open or tolerant of genocidal
20 massacres. That's of course the objective of people like
21 Hitler and others who are really intent on committing
22 genocide. I personally don't think there are such people
23 here in South Africa but I don't know South Africa as well
24 as any of you I'm sure. I'm sure we do have some people
25 like that in the United States but for the most part

1 they're really a fringe. Any that's, I just wanted to make
2 that comment because as an anthropologist one thing we know
3 is culture is built up by a lot acts.

4 MR SEAPE: Yes, no thank you for that.
5 I'd like to then move onto another issue which you have
6 dealt with and if you can turn to page 83 of that bundle
7 and you, you start there by saying, you have a quote there,
8 blame the victims and you refer to a particular article
9 Stanton GH and I think if you then turn to page 92. We see
10 there an article, sorry are there? Now we see there an
11 article called the twelve ways to deny a genocide and you
12 are obviously the author of this, is that correct?

13 DR STANTON: Yes.

14 MR SEAPE: In brief can you just explain
15 to us and I'll go to what I specifically want to take you
16 to but can you just explain to us -

17 DR STANTON: Sure.

18 MR SEAPE: On what this article is,
19 what's its purpose is and how it came about?

20 DR STANTON: What we were looking at in
21 this article and it was an article based on work by a
22 number of genocide scholars. We were trying to look at how
23 the Sudanese government was denying the genocide that it
24 was committing in Darfur at the time.

25 MR SEAPE: Yes.

1 DR STANTON: Since that time by the way
2 the Sudanese government has started three more genocides.
3 So it is committing right now four simultaneous genocides
4 and what we discovered was that there was a real, again a
5 real structure, a real pattern to this, to the tactics if
6 you will of denial and so I just sat down and listed them
7 along with a friend of mine, Israel Charny who was really
8 one of the pioneers in genocide studies. He wrote the
9 encyclopaedia of genocide and what we concluded were was
10 there's very predictable strategies or tactics that are
11 used by people.

12 MR SEAPE: Yes.

13 DR STANTON: Who wanted to deny because
14 denial seems to be part of every single genocide we've ever
15 looked at.

16 MR SEAPE: So you specifically
17 identified, let's call it an excuse or a justification
18 which appears at page 94 and you've entitled it blame the
19 victims. Can you just talk about that?

20 DR STANTON: Sure. Well blame the victim
21 is one of the most common and most powerful of these
22 strategies of denial. What the strategy, what the tactic
23 does is it tries to say the victims were really an enemy
24 among us.

25 MR SEAPE: Yes.

1 DR STANTON: Or the victims brought it on
2 themselves by starting an insurgency against us and so we
3 were just really acting in self-defence. It's a very
4 potent way of justifying a genocide and this by the way was
5 the way that the Turks used for instance against the
6 Armenians, they said we are in the middle of World War 1,
7 the Armenians are a Christian minority among us, they're
8 sort of like a fifth column as it were that is, you know
9 not really loyal to the Turkish, the Ottoman empires as it
10 was then called and so we have to eliminate them and they
11 actually literally marched a million and a half Armenians
12 and Pontic Greeks and other Christians out into the Syrian
13 desert and they died and Turkey's still denying the they
14 did it.

15 But their main, they have a couple of main ways
16 of denying one is this blaming the victims. That the
17 Armenians were really, they were really allied with the
18 allied forces, with Russia, with England, France and the
19 others that were fighting the Ottoman empire in World War
20 1. In the case of Darfur very similarly the Sudanese
21 government claims that it, the rebels in Darfur brought it
22 on themselves and brought it on the Darfurian people by
23 attacking the air force of Sudan in a particular air force
24 base that's in Al-Fashir in Darfur. I mean to claim that
25 that justifies killing little children and you know

1 helpless people is of course outrageous. But it is a very
2 common tactic of denial.

3 MR SEAPE: I see.

4 DR STANTON: Now in the case of Jews, let
5 me mention that one. It's a very common one that is used
6 also. Hitler tried to claim that Jews had a plot to run
7 every single institution in the world. It was a secret
8 plot that was sort of codified in the protocols of the
9 elders of Zion which is a fictitious, well it's a false
10 document that was made up by Russian propagandists against
11 Jews. But the whole idea is we have to stop these people
12 before they completely take over our society, in other
13 words our aim here is really self-defence. If we don't get
14 them first they're going to get us was the idea and so
15 you'll often find that in, we call it mirroring those of us
16 who had studied genocide in which the party that is
17 attempting to commit genocide will accuse the party they're
18 about to kill of having the same intent that they have.
19 Namely they say if we don't kill the Tutsi they're going to
20 kill us first and that is often used as a way to justify
21 mass killing.

22 MR SEAPE: M'Lord, if you'll just give me
23 one moment to make sure I've covered everything, M'Lord, no
24 further questions for this witness.

25 COURT: Thank you. Is there any cross-

1 examination?

2 CROSS-EXAMINATION BY MS DE KOK SC: Thank
3 you, M'Lord.

4 DR STANTON: This is the part I've been
5 looking forward to.

6 MS DE KOK SC: Please relax. Dr Stanton,
7 that was very interesting. It was really fascinating. But
8 I'm afraid and I don't mean any disrespect but I think for
9 our particular purposes there's very limited aspects of
10 your evidence that will be able to assist his lordship at
11 the end. So I'm going to focus on them. I understand what
12 you said about dehumanisation. If you, you should have,
13 yes the file that you have in front of you there should be
14 a subfolder marked notices. Won't you see if you can see
15 it?

16 DR STANTON: Sure.

17 MS DE KOK SC: It's the section just
18 before, where the expert summary starts.

19 DR STANTON: I see it.

20 MS DE KOK SC: And if you turn to page 6.

21 DR STANTON: Sure, got it.

22 MS DE KOK SC: You will see there a
23 document that was posted on the internet or the worldwide
24 web.

25 DR STANTON: Oh my God, ja.

1 MS DE KOK SC: Have you -

2 DR STANTON: That's dehumanisation.

3 MS DE KOK SC: Yes, so would that be a
4 classic example -

5 DR STANTON: Classic.

6 MS DE KOK SC: Of where you say someone
7 is a monkey, not human, not deserving of respect.

8 [14:55] DR STANTON: That's classic, that's
9 classic dehumanisation. Of course here it is coming from,
10 probably a white racist. Dehumanisation is, you know,
11 possible from all sides.

12 MS DE KOK SC: Of course, of course.

13 DR STANTON: Yeah and I have to say it's
14 - well I guess I shouldn't go beyond it because this is
15 cross-exam and I know you're not supposed to be, but it has
16 more often in South Africa come from Europeans than it has
17 from blacks. And I would the same in the United States.

18 MS DE KOK SC: But specifically what I
19 wanted to ask you is I can see this dehumanisation, I can
20 easily see what you're talking about, but bringing it to
21 the facts of our case, why we are here, at what stage do
22 you contend that Mr Masuku dehumanised Jewish people?

23 DR STANTON: Okay. It's a subtle and
24 important point that you're driving at here. He did it in
25 a very subtle way.

1 COURT: I must hear you now, you're
2 facing away from me. I know it's difficult to listen there
3 and -

4 DR STANTON: No, no I'm sorry.

5 MS DE KOK SC: Dr Stanton, you can ignore
6 me and speak towards his Lordship.

7 DR STANTON: I know and I'm sorry, Your
8 Honour.

9 COURT: At least we're left with your
10 recorded voice -

11 DR STANTON: I appreciate that.

12 COURT: Late. You say you did in a what?

13 DR STANTON: What I - she wanted to know
14 because this obviously white racist has -

15 COURT: No, no -

16 DR STANTON: Oh you heard that part okay.

17 COURT: You were busy replying and saying
18 Mr Masuku did it in a very what?

19 DR STANTON: In a very subtle way.

20 COURT: Subtle.

21 DR STANTON: In other words a way that
22 was indirect. It was clever if you will. Instead of using
23 the word Jews he talked about people whose sons, in fact I
24 can read it I think, who - "any South African family
25 descended son or daughter to be part of the Israeli defence

1 force must not blame us when something happens to them with
2 immediate effect. Anyone who goes to Israel and from
3 Israel will face the consequences." Well those of us who
4 know something about the world know that the only people
5 who are going to go and join the Israeli defence forces are
6 Jewish because only Jews automatically have dual
7 citizenship in Israel if they apply for it.

8 MS DE KOK SC: Yes.

9 DR STANTON: And so what you had here was
10 a rather clever way of referring to Jews. It came out
11 later in one of the blogs that Mr Masuku used in which he
12 literally did use the word Jews. So in this case we knew
13 that that's what he was talking about.

14 MS DE KOK SC: But, Dr Stanton, let me
15 just interrupt you there. What Mr Masuku is saying is that
16 he's talking about families, let's assume that they are
17 Jewish families, he is talking about families who choose to
18 send their sons or daughters for voluntary military service
19 in the army of the Israeli state. Has that got anything to
20 do with their Jewishness, is it an attack on their race or
21 is it an attack on their conduct?

22 DR STANTON: Well I think it's both
23 because what he then goes onto say is that such people
24 should leave South Africa. In other words what he's doing
25 is he's saying these people and I'm quoting here "All the

1 people" he says "What kind of person who chooses to
2 acknowledge that, that Israeli is a murderous state is
3 something is wrong with that person" and then he goes on to
4 say that these people should leave South Africa. Now what
5 that is, is the same kind of statement that somebody who
6 says that you aren't loyal to our country, he's saying
7 you're aren't really loyal to our country, go to the
8 country you're really loyal to which is Israel. And that
9 sort of statement which is the kind of statement for
10 instance that fanatical religious believers would say
11 you're an infidel so get out of our society. That kind of
12 statement which is the uttering of a group is dehumanising
13 by its nature.

14 MS DE KOK SC: But I would like you
15 always, because what we are dealing with here in terms of
16 our hate speech legislation, is a prohibition on speech
17 based on, in this case, race and ethnicity.

18 DR STANTON: And religion.

19 MS DE KOK SC: And religion and you're
20 right. Race, religion and ethnicity. And you would surely
21 agree with me that it is quite legitimate to criticise
22 people for the way in which they act and in what causes or
23 ideologies they choose to support.

24 DR STANTON: I would agree with that.
25 The one difference though is to then conclude that they

1 should actually leave this country, that they should be
2 exiled from this country, that they have no right to live
3 in this country is a dehumanising statement. It is the
4 uttering of those people, it is essentially hate speech and
5 what is worse is that unfortunately Mr Masuku went beyond
6 and fulfilled the other prong of the test in hate speech
7 statute namely, wishing physical harm upon those people.

8 MS DE KOK SC: That is your
9 interpretation of the words.

10 DR STANTON: I would agree with it, it's
11 my interpretation, but I mean when he literally said at the
12 meeting in the University of the Witwatersrand, we've got
13 COSATU people right here in this meeting and if you don't
14 think we use violence well you're wrong.

15 MS DE KOK SC: His Lordship will look at
16 the words and -

17 DR STANTON: I understand.

18 MS DE KOK SC: - and interpret them.

19 DR STANTON: Sure.

20 MS DE KOK SC: But I want to just
21 postulate this. We have in this country sometimes
22 difficulties with racism.

23 COURT: Sorry I can't hear.

24 MS DE KOK SC: I'm sorry, M'Lord.

25 COURT: You say for instance we have

1 what?

2 MS DE KOK SC: In our country we have
3 difficulties with racism.

4 DR STANTON: So do we.

5 MS DE KOK SC: I'm sure you do.

6 DR STANTON: Big time.

7 MS DE KOK SC: And we sometimes have
8 incidents where people make nasty and odious racist
9 remarks. If someone were to say of black people, for
10 example, that they are monkeys you would get a response
11 from people who say you know what if you cannot accept that
12 we are now living in a non-racist society you would be
13 better off in Australia. That's our particular - but there
14 could be others. So you would have lots of people saying
15 if you don't fit in with our values you should rather
16 leave. Is there uttering, is that genocide or speech
17 leading to genocide?

18 DR STANTON: It's certainly not genocide,
19 no, no [inaudible] but to say that somebody wouldn't have
20 the right to make that kind of statement in your society is
21 one thing. In other words you should be free to vigorously
22 criticise that person, but then to actually try to
23 intimidate them into leaving your country is a big step
24 beyond that. We have some very hateful people in the
25 United States and yet I would not argue that they should go

1 to Australia or some other place where they might be
2 happier because it's whiter. The big mistake here I think
3 is that there was actually threat of physical harm. It
4 went beyond just saying something that was not nice. If
5 that was, you know, saying - and the fact that - I
6 specifically singled out this group of people, namely, Jews
7 who would send their children off to fight in Israeli
8 defence forces, played into this sub text of anti-Jewish
9 prejudice that has been characteristic of western
10 civilisation for thousands of years.

11 MS DE KOK SC: Well just talking about
12 the subtext. If you look at the document bundle which
13 would be the other bundle.

14 DR STANTON: Sure. By the way, I have a
15 particular sympathy for Mr Masuku because I understand he
16 has Swazi connections. But anyway I'm sorry if I - I
17 digress.

18 MS DE KOK SC: You didn't meet while you
19 were there did you? If you go to - you'll see that there
20 are a whole lot of photographs in the bundle.

21 DR STANTON: Okay.

22 MS DE KOK SC: Perhaps you can turn to 38

23 DR STANTON: Section, sorry I have volume
24 1 and 2 and 3 -

25 MS DE KOK SC: No, no you need to look at

1 the other file I think, is it that file, yes. Then it'll
2 be in the first volume.

3 DR STANTON: First volume, okay good. Oh
4 I see the photographs.

5 MS DE KOK SC: You can look at page 38.

6 DR STANTON: 38 okay.

7 MS DE KOK SC: You can look at page 30 -

8 DR STANTON: There are not really numbers
9 here, oh yeah it's here, I see, okay. Here's 38, yeah,
10 yeah got it. Mm-mm.

11 MS DE KOK SC: Do you see 38? There you
12 get a nice view from behind of the young people who
13 attended this meeting.

14 DR STANTON: Right.

15 MS DE KOK SC: Do you see them? A
16 diverse bunch it seems.

17 DR STANTON: Yeah. Much like my
18 students.

19 MS DE KOK SC: If you look at 30 you will
20 see Mr Masuku and the two -

21 DR STANTON: Now this is number what?

22 MS DE KOK SC: 30.

23 DR STANTON: 30 okay.

24 MS DE KOK SC: Three, zero. You will see
25 some of the presenters. Now, Dr Stanton, how can you say

1 that in South Africa in 2009 there was amongst this group
2 of students an inherent cultural subtext of hostility
3 towards Jewish people because they are Jewish?

4 DR STANTON: Well I think it was -

5 MR SEAPE: Sorry, M'Lord, we object to
6 that question. The witness did not say that there was an
7 inherent sub text or hostility by these particular students
8 to Jews. He was talking about historical hostility that
9 the Jews have experienced around the world. So I'd just
10 like my learned friend just to clarify that.

11 DR STANTON: That's right, yeah I was.

12 COURT: Yes there's objection to your
13 line of questioning now on your right.

14 MS DE KOK SC: M'Lord, the witness has
15 said that the statements must be interpreted in the light
16 of the sub text which includes the inherent prejudices of
17 the audience. So we must look at that audience.

18 COURT: Okay.

19 MS DE KOK SC: It doesn't help us to talk
20 about historical prejudices against Jewish people in Russia
21 200 years ago. We're talking about this audience.

22 COURT: That's different in what you said
23 initially. You're now more consistent with his evidence
24 than the previous terms you used I think. That's my
25 understanding.

1 MS DE KOK SC: M'Lord, the question that

2 I want -

3 COURT: You used the words hostilities
4 and what you said before. I understand your question now
5 to be relevant. I don't know if Mr Seape and his -

6 MR SEAPE: Yes, M'Lord, our position is
7 simply that the witness never made any allegations against
8 the particular students. Of course he doesn't know those
9 students and that was not the purpose of his evidence. He
10 simply said the statements made by Mr Masuku were playing
11 into a particular subtext that is informed by historical
12 fact. He never made any mention about what these
13 particular students may or may not have known.

14 COURT: Well generally you're being more
15 specific, she's being more general I think. That's how I
16 see the objection. I'm not ruling either way.

17 MS DE KOK SC: So Dr Stanton, you would
18 have followed from the debate that what I'm trying to
19 ascertain from you is whether there's any basis on which
20 you can testify that this particular audience, the people
21 who in fact heard Mr Masuku's remarks had a subtext -

22 DR STANTON: Yes.

23 MS DE KOK SC: - of anti-Semitism.

24 DR STANTON: I would only have to say
25 that whatever it is right here there's speculation because

1 as he said I do not know this group of students. And I've
2 learned experience not to try to judge the views of
3 students unless you actually know them personally. But in
4 this case you had a rally, as I understand it, that was
5 aimed at supporting a boycott and divestment campaign
6 against the state of Israel. One could argue and I'm not,
7 again I'm only speculating, not making a definite
8 conclusion, one could argue that people who would attend
9 such a rally for the most part would be people who would
10 support such a boycott or a divestment.

11 MS DE KOK SC: I think you could assume
12 that.

13 DR STANTON: So the question then would
14 be okay what kind of correlation might there be in their
15 view of Jews with such a campaign for boycott. Again that
16 is purely for me to speculate about and it would take a
17 finding of fact I would say to make a definite conclusion
18 that this statement played into a hateful subtext if you
19 will. I mean I would just argue that because of our -
20 because of the way you have to interpret texts you need to
21 go beneath the surface of the texts. That was the basic
22 point I was trying to make and I think it's within the
23 realm of the of finder of fact, namely, His Honour, the
24 Judge, I'm sorry you call Your Lord, I'm sorry, the Judge
25 to make that finding of fact in this case. And what that

1 meant in this case, what the statements meant.

2 MS DE KOK SC: So, Dr Stanton, you accept
3 that a boycott and disinvestment and sanctions campaign is
4 not per se anti-Jewish.

5 DR STANTON: Not necessarily anti-Jewish,
6 I would agree with you.

7 MS DE KOK SC: You accept that criticism
8 of the conduct of the Israeli government is not necessarily
9 anti-Jewish.

10 DR STANTON: That's right, I would agree
11 with that. In fact I have to say that our own
12 organisation, Genocide Watch, has been critical of the
13 Israeli government.

14 MS DE KOK SC: And you will have seen
15 from the transcript that the topic of the conversation of
16 the meeting was this campaign against Israel.

17 DR STANTON: I understand that, but I
18 would want to caution you that I really am not an expert
19 about the politics of the state of Israel or in our
20 relations with Palestinians or any of those things. The
21 most I can tell you about the state of Israel, you know, is
22 some of the good restaurants to go to when you're on a
23 honeymoon there. But seriously I mean to say let's not get
24 into that tangent, if you will, because I don't think it's
25 central here to this case. What this case is about are

1 particular statements made by a particular person and I'm
2 just here really as a witness to how one might try to
3 interpret statements.

4 MS DE KOK SC: But ultimately the
5 decision that His Lordship must take is -

6 DR STANTON: That's His Lordship's
7 decision.

8 MS DE KOK SC: - is whether the speech is
9 aimed and directed and based on race and ethnicity or
10 whether it is political speech criticising support for a
11 political movement.

12 DR STANTON: And my argument here is that
13 it is very clearly aimed at a particular religious group.

14 MS DE KOK SC: Religious group.

15 DR STANTON: Namely, the Jews.

16 MS DE KOK SC: Okay.

17 DR STANTON: And that the specific
18 prescription that Mr Masuku gave was these people should
19 leave South Africa. And when you have that kind of
20 statement in which you are saying essentially let's remove
21 the citizenship of these people, let's send them somewhere
22 else you're making a hateful statement I believe.

23 MS DE KOK SC: But you are jumping, you
24 are jumping from saying in your view it was aimed at a
25 religious group, being Jews and then you make a further

1 jump to say that Mr Masuku said these people must leave the
2 country, these people now being Jews.

3 DR STANTON: Yes.

4 MS DE KOK SC: Yes.

5 DR STANTON: Well it's not a jump at all.

6 MS DE KOK SC: Well -

7 DR STANTON: He uses the word Jews in
8 fact in one point.

9 MS DE KOK SC: Well then you better show
10 me where -

11 DR STANTON: Well okay. I believe it's -
12 let's see, in one of these -

13 MS DE KOK SC: No you need to show me
14 where he says so in the transcript of the speech which is
15 what we're talking about.

16 DR STANTON: Okay in that particular, I
17 don't believe that he used that word in the speech.

18 [15:15] In that particular rally, but later I believe he
19 did specifically in, on the 13th of February 2009 I believe
20 he said "This is what I said; anyone who still entertains
21 the illusion that apartheid will ever come to light here,
22 whether Jew or whosoever, you're free to leave. I continue
23 to quote Mandela when he said that all who does not accept
24 it are woken up to the reality that we now live in a
25 democratic South Africa or that racism or promotion of it

1 is a crime are free to leave the country. I repeat,
2 whether Jew or whosoever does so must not just be
3 encouraged but forced to leave for such a crime is so
4 heinous it can't be tolerated." I think that's pretty
5 direct.

6 MS DE KOK SC: What are you referring to
7 there, Sir? What are you referring to there?

8 DR STANTON: That was -

9 MS DE KOK SC: An e-mail?

10 DR STANTON: I believe it was on a blog -

11 MS DE KOK SC: And the date of the e-
12 mail?

13 DR STANTON: It was obviously, it was
14 obviously some kind of blog that was public because I've
15 got it right here in front of me.

16 MS DE KOK SC: But I would like you to
17 focus; this case is only about four statements, four
18 statements made - three in the speech and one in the blog
19 post. We're not looking at everything that, anything that
20 Mr Masuku ever said in his life. This case is about these
21 statements. So let us just turn to that.

22 DR STANTON: Well, I would argue also
23 really, you can look at - in interpreting those statements
24 you can also look at other statements he has made. I would
25 hope you could, just as you can in any trial.

1 MS DE KOK SC: You can as a matter of
2 law, you would be able to interpret that if you can prove
3 that the people, the audience had read the other thing, the
4 other document.

5 DR STANTON: Right.

6 MS DE KOK SC: And that's not the
7 claimant's case.

8 DR STANTON: Mm.

9 MS DE KOK SC: So we can disregard that.
10 So if we then look at the transcript of the meeting, which
11 is what the claimants complain about -

12 DR STANTON: Right, okay.

13 MS DE KOK SC: Do they -

14 DR STANTON: It's a very incomplete
15 transcript, as you -

16 MS DE KOK SC: Yes, it is, yes.

17 DR STANTON: Very.

18 MS DE KOK SC: Does Mr Masuku ever
19 mention the word Jew?

20 DR STANTON: No actually -

21 MS DE KOK SC: We know he doesn't.

22 DR STANTON: He doesn't, no. He's very
23 clever.

24 MS DE KOK SC: Or maybe he's not anti-
25 Semitic, Sir.

1 DR STANTON: I think it's up to the judge
2 to decide whether those statements refer to Jews or not
3 actually. I don't think anybody else would send their kids
4 to go fight in the South - in the Israel Defence Forces.

5 MS DE KOK SC: In fact I've misled you.
6 He does refer to Jews twice -

7 DR STANTON: Okay.

8 MS DE KOK SC: - in his speech. The
9 first, or the one reference you'll find at page 272.

10 DR STANTON: 272, okay, let's see where
11 it is. Let me find it here. Okay, that goes beyond that
12 one. Can you tell me where that is in this volume?

13 MS DE KOK SC: I think it will be volume
14 3.

15 DR STANTON: Okay, volume 2, okay.

16 MS DE KOK SC: Ja, go to the last
17 divider.

18 DR STANTON: Sure, okay. And it's page
19 272, you say?

20 MS DE KOK SC: Yes.

21 DR STANTON: I'm having a hard time
22 finding it, I'm sorry, I've looked, looking. Ah, here it
23 is, got it.

24 MS DE KOK SC: If you go to the bottom of
25 the page where he starts speaking, he says "Who wants a

1 democratic front?" and then he carries on. "That's why I
2 appreciate the Jews like Kasrils and many others who have
3 set the murder of his own brothers, people it is not in our
4 name, we are Jews of decency," and he continues.

5 DR STANTON: I see. In other words Jews
6 he agrees with are okay, but Jews who send their sons off
7 to fight in the Israeli Defence Forces are not, they should
8 leave South Africa.

9 MS DE KOK SC: Yes, well he says that he
10 disagrees with Jews who - and anyone else who supports the
11 policies of the State of Israel.

12 DR STANTON: I don't see how you can see
13 that's not hate speech. That's hate speech.

14 MS DE KOK SC: 267, Sir, that's the other
15 reference. "Occupy your land and then oppress you? No one
16 accepts it." Have you got the page?

17 DR STANTON: Mm. Yes, I mean I'll be
18 very frank; it's very much like my saying you Jews who, you
19 know, don't support our war in Iraq or our war in Vietnam
20 should go to Israel, you're not really Americans, you're
21 not really loyal. I think that's intolerable. You can
22 have a free society with that kind of -

23 MS DE KOK SC: But if you were to say,
24 Sir, because again you are making it about the Jews and not
25 Mr Masuku. If you were to say, if you do not recognise the

1 rights of equality for everyone, if you support a
2 government that oppresses other people, then this is not a
3 country for you - that's what he says, he says this is not
4 a country for racists and you should leave.

5 DR STANTON: Well, unfortunately if that
6 were the case you would have to exile, you know, a good
7 portion of many countries.

8 MS DE KOK SC: Yes. Well Sir, it's
9 clearly, clearly it is political rhetoric.

10 DR STANTON: Well, not if it's based on
11 ethnicity, religion or race.

12 MS DE KOK SC: Yes, and there we get down
13 to it. If it's political rhetoric it is not hate speech,
14 but if it is in fact based on someone's race or ethnicity
15 or religion then it could become hate speech. Do you agree
16 with that?

17 DR STANTON: Well, I don't know for sure,
18 depending on the particular speech you are referring to. I
19 would say you'd have to again consider it in the context of
20 those factors that I was talking about when I was on direct
21 examination. If you look at it in terms of those factors,
22 those four factors, to interpret the speech I would think
23 this would qualify as hate speech.

24 COURT: Sorry, I can't hear you.

25 DR STANTON: I'm sorry. If you'd look at

1 it in terms of those four factors, the presuppositions of
2 the audience, how they would hear it, the intent of the
3 speaker and his, in particular his particular authority,
4 namely as a major leader of a major labour union coalition
5 or union, in terms of the history of this country, you know
6 which is one - let's face it - that has had a long history
7 of divisions and so forth, just as ours has in the United
8 States, and in terms of the context here of the speech,
9 well I - my conclusion at least is that this is going over
10 the line. The part of it that is purely political, you
11 know, where it's in fact criticising Israel and saying, you
12 know, what Israel is doing in the settlements and that is
13 illegal, I would argue is protected speech, but it - the
14 point, the part at which he says you South African families
15 that are sending your sons and daughters to fight in
16 Israeli Defence Forces, you - there's going to be
17 consequences and they're going to be immediate, and I mean
18 physical consequences.

19 MS DE KOK SC: Is that what he says?

20 DR STANTON: Yeah. I mean I'm quoting
21 there.

22 MS DE KOK SC: No. No, you're not.

23 DR STANTON: You know he says if you
24 think this doesn't mean violence you have another thing
25 coming, essentially.

1 MS DE KOK SC: That's at a completely
2 different stage of the meeting, Sir.

3 DR STANTON: Well sorry, I'm
4 paraphrasing. I should not do that much, be a better
5 lawyer than that, sorry.

6 MS DE KOK SC: Well, Dr Stanton, I think
7 you've made your point and I want to finish up with you.

8 DR STANTON: Fine.

9 MS DE KOK SC: Just on the issue of the
10 armed, sending the children to the army, sending your child
11 to go and serve in the defence force, there is a piece of
12 legislation in this country which - and there is a debate
13 about the meaning of the legislation, but there is
14 certainly a point of view that the legislation prohibits a
15 South African citizen from serving in the army of another
16 country.

17 DR STANTON: Even if the person is a dual
18 citizen?

19 MS DE KOK SC: Yes.

20 DR STANTON: Well, I don't know enough
21 about South African law about that. I know it's not true
22 in the United States where if you're a dual citizen you can
23 -

24 MS DE KOK SC: But here it has nothing to
25 do with whether you're a dual citizen. It is whether you

1 are -

2 DR STANTON: Because I had friends in
3 fact who went and fought for the Israeli Defence Forces in,
4 you know, the, in the 6 day War in 1967 when I was in
5 college -

6 MS DE KOK SC: So when Mr Masuku refers
7 to a family sending their son or daughter he's referring to
8 a South African family who voluntarily chooses in breach of
9 our law to send their son or daughter to go and fight in an
10 army which Mr Masuku, rightly or wrongly, considers -

11 MR SEAPE: M'Lord, sorry, I do have to
12 object there. As my learned friend had pointed out,
13 whether it's in breach of the law is a contested issue.
14 There's been no evidence led that that is a matter of fact.
15 So she cannot put it to the witness that, you know, she
16 cannot put a set of circumstances that relies on a
17 contentious legal issue.

18 DR STANTON: It especially is -

19 COURT: Sorry, it's -

20 DR STANTON: - beyond my expertise.

21 COURT: - your turn, Dr Stanton -

22 MS DE KOK SC: M'Lord, I thought that I
23 prefaced it with arguably and -

24 COURT: Sorry?

25 MS DE KOK SC: Arguably in breach of our

1 law.

2 COURT: I can't hear you now. You've
3 been affected by speaking slowly or lowly.

4 MS DE KOK SC: Yes, well I -

5 COURT: I wanted to hear your response to
6 the objection.

7 MS DE KOK SC: Yes, my response to the
8 objection, M'Lord, is that the question made it clear that
9 I'm not putting to the witness as a fact that it is a
10 breach of law, I'm putting to him that it is arguably a
11 breach of the law.

12 COURT: Yes. What is your response?
13 Objection is overruled.

14 DR STANTON: Okay, my only response is
15 I'm not an expert on South African law.

16 COURT: Can you take it any further?

17 MS DE KOK SC: No.

18 COURT: No.

19 DR STANTON: I mean I did respond in the
20 sense, Your Honour, that in the United States at least if
21 you're, if you have dual citizenship it is not illegal for
22 you to fight in another army, but that's US law about which
23 I do know.

24 COURT: Yes.

25 DR STANTON: And it's not South African

1 law.

2 MS DE KOK SC: Dr Stanton, just to put
3 matters in context here when you talk about genocide and
4 the terrible consequences of, eventually of hate speech and
5 dehumanisation and so forth, this speech was made in 2009.

6 DR STANTON: Mm.

7 MS DE KOK SC: We're now in 2017.

8 DR STANTON: Mm.

9 MS DE KOK SC: Eight years later. Are
10 you aware of any one incident of physical violence against
11 a South African based on his Jewish religion or ethnicity?

12 DR STANTON: No, and let me just explain
13 something here. The way that I see hate speech affecting a
14 society is in a long-term sense and that is why you need a
15 law like you have that will halt it when it occurs, even if
16 you have to do so years later, because these things add up.
17 In other words hate speech isn't just one instance. It
18 will be done again and again and again until you have a
19 certain tolerance for hateful culture in a society and we
20 have of course in our society in the United States, which I
21 do know well, we put up with an institutionally racist
22 system for the better part of our history and so in that
23 sense I understand how vicious such a situation can be if
24 you allow hate speech to go on unchecked for literally
25 hundreds of years and so it's very important for South

1 Africa to stop this process before it continues, and that's
2 why even if it is late, you know, even if it's eight years
3 afterwards it's good because it makes a point to other
4 people that they shouldn't engage in this kind of speech
5 here in this society that is in fact trying to achieve
6 racial harmony and -

7 MS DE KOK SC: My question wasn't aimed
8 at whether you think this complaint is a good thing or not.
9 It was aimed at you saying that one of the ways in which
10 you interpret is to look at intended and actual outcomes.

11 DR STANTON: Well actually I didn't say
12 that. I didn't say that -

13 MS DE KOK SC: Well, I'm paraphrasing
14 there, but why were those four tools of interpretation that
15 you were talking about?

16 DR STANTON: Well, the outcomes don't
17 have to be immediate. That was my point.

18 MS DE KOK SC: Yes, and my point to you
19 was notwithstanding you somehow interpreting Mr Masuku's
20 words as a call to violence, in eight years it hasn't
21 materialised.

22 DR STANTON: Well, I don't know whether
23 it has or not. You know more about what's happened in
24 South Africa since than I do, I'm sure. We do follow it, I
25 would say in Genocide Watch we follow it pretty closely and

1 maybe we're one of the few organisations in the world that
2 does. Quite frankly Amnesty International, Human Rights
3 Watch and some of the others are unwilling to follow
4 violence in a society that they see as, you know, a sort of
5 new hope for mankind. There's a kind of Utopian vision in
6 those societies. I happen to come from a, let us say
7 realist background in which no kind of discrimination, no
8 kind of hatred is tolerated. So even though I worked
9 strongly in the anti-apartheid movement and with the United
10 Democratic Front here in Johannesburg, you know in 1989 and
11 90, I'm also just as concerned about hatred no matter where
12 it comes from in this society and in many others as well,
13 as you probably know.

14 MS DE KOK SC: Ja, well Dr Stanton, I
15 think perhaps the thing about South Africans is that we
16 scream and shout at each other a lot, but in the end we
17 somehow manage to get along.

18 DR STANTON: And so do we. So with that
19 positive note perhaps we have further questions.

20 MS DE KOK SC: No, I have no further
21 questions.

22 COURT: Re-examination, Mr Seape?

23 RE-EXAMINATION BY MR SEAPE: No further
24 questions for this witness, M'Lord.

25 DR STANTON: I just want to say, Your

1 Honour, it's been a great honour to be in your court.

2 COURT: It appears that you enjoyed
3 yourself here.

4 DR STANTON: Well, I really do -

5 COURT: You were looking forward to
6 cross-examination. Anyway, it remains for me to say thank
7 you for your evidence.

8 DR STANTON: Thank you.

9 COURT: And for coming to court, and
10 enjoy the rest of your stay in South Africa.

11 DR STANTON: I most certainly will, Sir.

12 COURT: Thank you, you're excused.

13 [NO FURTHER QUESTIONS - WITNESS EXCUSED]

14 COURT: Right, the doctor has been
15 excused, Dr Stanton. We're in the hands of the applicant
16 in this matter now.

17 MR SEAPE: M'Lord, we have consulted and
18 that appears to be the case for the South Africa Jewish
19 Board of Deputies on behalf of - of the South African Human
20 Rights Commission on behalf of SAUJS Board.

21 COURT: Ms De Kok, the case for the
22 applicant has been closed.

23 MS DE KOK SC: M'Lord, would it be in
24 order if I - I'm intending to call Mr Masuku next. His
25 evidence will hopefully not be lengthy, but it will

1 certainly go well past 4 o'clock. Would it be in order if
2 I start with him first thing tomorrow morning?

3 COURT: We still have some time, but I
4 have the other problem -

5 MR SEAPE: M'Lord, just for - no, there
6 would be no objection from our side.

7 COURT: And you say it's a factual -

8 MS DE KOK SC: Factual, yes.

9 COURT: Factual witness.

10 MS DE KOK SC: Yes.

11 COURT: You may finish with him before 4,
12 but cross-examination -

13 MS DE KOK SC: No, I won't -

14 COURT: - is unpredictable.

15 MS DE KOK SC: I won't finish with him in
16 chief before 4 in any event, M'Lord, and that's why I
17 thought it's best to not interrupt his evidence at an
18 arbitrary point.

19 COURT: So there's no prejudice on both
20 sides if I were to adjourn now. Thank you very much, the
21 matter is then adjourned until tomorrow, being the 10th of
22 February 2017, for further evidence. Court will adjourn.

23 [COURT ADJOURNED]

24 .

25 .

1 [PROCEEDINGS ON 10 FEBRUARY 2017]

2 [10:05] MS DE KOK SC: May it please you, M'Lord.

3 COURT: Yes.

4 MS DE KOK SC: M'Lord, I then call the
5 first witness for the respondent, Mr Bongani Masuku.

6 COURT: Thank you.

7 COURT ORDERLY: Please state your full
8 name and surname.

9 MR MASUKU: Bongani Masuku.

10 COURT ORDERLY: Do you have any objection
11 in taking the oath?

12 MR MASUKU: I have no objection.

13 COURT ORDERLY: Do you swear that the
14 evidence you are about to give will be the truth, the whole
15 truth and nothing but the truth? If so please raise your
16 right hand and say, "So help me God."

17 BONGANI MASUKU: So help me God.

18 COURT: Your witness. You may proceed.

19 EXAMINATION BY MS DE KOK SC: Thank you,
20 M'Lord. Mr Masuku, you may take a seat. Mr Masuku, you
21 will see that there are two files in close proximity. The
22 one is a file of pleadings and notices. That is the one
23 there that you are, that's lying open in front of you, and
24 then behind you is what we'll call the trial bundle.

25 MR MASUKU: Okay.

1 MS DE KOK SC: Now Mr Masuku, can you
2 perhaps give us some sense of your background? When and
3 where were you born?

4 MR MASUKU: I was born in 1972 in
5 Swaziland.

6 MS DE KOK SC: I'm going to have to ask
7 you to speak up a bit.

8 MR MASUKU: I was born 1972 in Swaziland.

9 MS DE KOK SC: Swaziland. Were you
10 educated in Swaziland? Is that where you went to school?

11 MR MASUKU: Yes.

12 MS DE KOK SC: And did you matriculate in
13 Swaziland?

14 MR MASUKU: Even university I did in
15 Swaziland.

16 MS DE KOK SC: So when you talk about
17 university, what university and what degree?

18 MR MASUKU: University of Swaziland,
19 UNISWA, a BA Social Sciences degree.

20 MS DE KOK SC: And how did you get
21 involved in the trade union movement?

22 MR MASUKU: First of all I started with
23 the student movement in Swaziland and the political
24 movement in Swaziland. You may know that political parties
25 are banned and the king has absolute power. So we were

1 part of the underground political movement. So, but at the
2 time it was also linked with the South African liberation
3 struggle, so there was quite frequent activities on both
4 countries, so we were involved on both sides of the, in the
5 struggle against apartheid and in the struggle against -
6 because as you know the king used to also work together
7 with the apartheid regime. So that's how I got close
8 contact. Before then I was, I then left Swaziland in exile
9 in South Africa.

10 MS DE KOK SC: When did you leave
11 Swaziland?

12 MR MASUKU: I left 1998.

13 MS DE KOK SC: Yes?

14 MR MASUKU: And came to be based in South
15 Africa with the assistance of the alliance and then COSATU
16 employed me as its educator, national educator, in 2004.
17 2006 I was promoted to head the international department of
18 COSATU, so till today.

19 MS DE KOK SC: And you're saying you
20 still hold that same position until today?

21 MR MASUKU: Absolutely.

22 MS DE KOK SC: And what are your
23 functions - broadly speaking what are your functions in
24 that capacity as the head of the international department?

25 MR MASUKU: My main functions generally

1 are international policy for the federation, giving support
2 to the political leadership and advising on global trends,
3 it's managing the international department in its budget
4 and operations. It's also coordinating international
5 activities, whether it's trips, whether it's visits,
6 whether it's exchanges, so in general that is the basis of
7 my work, but also to work with the campaigns department to
8 advance campaigns on international solidarity, justice,
9 workers' right, on various countries' international
10 organisations in the world.

11 MS DE KOK SC: Now I want to take you to
12 the latter part of 2008. We've heard evidence about there
13 being a war in Gaza at that time. Could you tell the court
14 what COSATU's stance regarding this war and the Israeli and
15 Palestine conflict at the time was?

16 MR MASUKU: First and foremost I think it
17 will be useful to give a small background in the sense
18 COSATU is a product of a struggle in solidarity itself.
19 When COSATU South African workers were fighting against
20 apartheid they received a lot of solidarity from other
21 international trade unions and therefore one of the
22 cardinal pillars of COSATU's policies is the centrality of
23 international solidarity. So the Palestinian struggle, the
24 -

25 COURT: Sorry, Mr Masuku, can you just -

1 MR MASUKU: Sorry.

2 COURT: - allow me to try and write some
3 of the things you say.

4 MS DE KOK SC: If you could just slow
5 down a little bit.

6 MR MASUKU: Okay. So -

7 COURT: Yes?

8 MR MASUKU: Palestinian struggle, Western
9 Sahara struggle against Moroccan occupation, Swaziland
10 struggle for democracy, Zimbabwean struggle and others have
11 always been at the heart of COSATU's international
12 solidarity work before I came, so my duty was to take over
13 the policy decisions of COSATU. In this particular
14 instance in December 2008 Israel waged war on Gaza, many
15 justifications but the fact of the matter is that it waged
16 war on Gaza which was called "Operation Cast Lead." So as
17 expected COSATU is a fighter against colonialism,
18 occupation, apartheid and the taking away of other people's
19 land because all Africans have gone through this struggle
20 against colonialism. So in that context it was a principle
21 decision that we must render solidarity as expected. The
22 leading structures of COSATU took a decision, we have a
23 decision on this matter and we need international
24 department and the organising department to lead in
25 organising what is required - solidarity, and so on and so

1 forth. So we did as per that instruction; coordinated with
2 various, some of the Palestine solidarity committee -

3 COURT: Did you hear me? Please.

4 MS DE KOK SC: So you were saying a
5 decision had been taken by the top structure of COSATU and
6 you were tasked with implementing a campaign.

7 MR MASUKU: Together with the organising
8 department. So we did as instructed, to coordinate a
9 campaign of solidarity, not only in South Africa but to
10 link up with our sister unions all over the world.

11 MS DE KOK SC: And Sir, practically what
12 forms did this campaign take?

13 MR MASUKU: First and foremost was to
14 coordinate a meeting where the different interested
15 parties, whether it's the ANC, SACP and all solidarity
16 organisations, political parties, we were in one house
17 where we discussed what response will be necessary.

18 MS DE KOK SC: You can just stop there
19 for a moment. Yes, and?

20 MR MASUKU: Sorry?

21 MS DE KOK SC: You can carry on.

22 MR MASUKU: Okay. So it was then agreed
23 we will have pickets, marches, press releases and various
24 forms of activities, and including demanding that
25 government takes decisive action, because it was other

1 people who also did the same in support of South Africa
2 during those times, so we have to also do something
3 necessary, like for instance demanding that the Israeli
4 Embassy account for the action.

5 MS DE KOK SC: I want to take you then to
6 a march which happened on the, which we know - it's common
7 cause - happened on the 6th of February 2009. Were you part
8 of that march?

9 MR MASUKU: Yes.

10 MS DE KOK SC: And who else was part of
11 the march?

12 MR MASUKU: Sorry, the?

13 MS DE KOK SC: Who else was part of the
14 march? What other - were there other organisations apart
15 from COSATU -

16 MR MASUKU: Oh yes, absolutely. It was a
17 coalition of different organisations. I've already
18 indicated Palestine Solidarity Committee, Young Communist
19 League, SASCO, ANC Youth League, ANC itself, various
20 individual faith groups, the South African Council of
21 Churches, so quite a number of organisations.

22 MS DE KOK SC: And where did you march
23 to?

24 MR MASUKU: Sorry, where or when?

25 MS DE KOK SC: Where.

1 MR MASUKU: Oh. We targeted two
2 organisations and the embassy. The two organisations was
3 the South African Board of Jewish Deputies and the South
4 African Zionist Federation, and the embassy has been a
5 frequent - we've had frequent marches, but this time we
6 decided to march to the two because they were the upper-
7 hand and the only ones who openly defended what in our view
8 wasn't defensible, the war in Gaza.

9 MS DE KOK SC: I'm sorry, I didn't hear
10 you there. You said they were the only ones who openly?

11 MR MASUKU: Openly defended what in our
12 view was indefensible, 1 400 children killed, children and
13 women killed. Of course they use all sorts of pretexts,
14 but that was the primary reason why we targeted the two.

15 MS DE KOK SC: I want to then ask you to
16 open up the trial bundle, that one there, yes. If you can
17 go to where it says volume 1 and then go to page 3.

18 MR MASUKU: Sorry, page?

19 MS DE KOK SC: 3.

20 MR MASUKU: 3.

21 MS DE KOK SC: 3.

22 MR MASUKU: Okay.

23 MS DE KOK SC: This is a - we know that
24 this is a blog called "It's almost Supernatural," and then
25 we see there in the block a message from you. Could you

1 tell his lordship - well, let me first ask you; before the
2 6th of February had you ever read this blog? Before the
3 6th.

4 MR MASUKU: No.

5 MS DE KOK SC: Just say it a bit louder.

6 MR MASUKU: No, I had never.

7 MS DE KOK SC: You had not. So how did
8 the blog come to your attention?

9 MR MASUKU: I was brought to the
10 attention of it by a comrade who's now in BDS, who was a
11 student at Wits. I had never known about it. So he sent
12 me an e-mail and there were two striking e-mails of
13 particular interest in it.

14 MS DE KOK SC: Yes, and what were these
15 e-mails of interest?

16 MR MASUKU: The first e-mail in summary
17 was saying "COSATU are monkeys that will die of AIDS that
18 would be cured by raping babies. Let's leave South Africa.
19 Let's do it for Aliyah," because he - that's the first one,
20 that's the essence of it.

21 MS DE KOK SC: If you can just stop there
22 for a moment and take your pleadings file and go to the
23 section that says notices. Have you got the section called
24 notices?

25 MR MASUKU: Yes.

1 MS DE KOK SC: In that section you can
2 turn to page 6.

3 MR MASUKU: Yes, page 6?

4 MS DE KOK SC: Yes.

5 MR MASUKU: Yes.

6 MS DE KOK SC: Have you got it? Is that
7 the document that you're referring to? No, I'm talking
8 about, not the e-mail that was sent to you, but the, what
9 your attention was drawn to, was this -

10 MR MASUKU: Yes, yes, that's the
11 statement -

12 MS DE KOK SC: Yes.

13 MR MASUKU: - where, on page 6, yes,
14 that's the statement. That was the first statement that
15 was sent.

16 MS DE KOK SC: Okay.

17 MR MASUKU: That was communicated to
18 COSATU.

19 MS DE KOK SC: And the second one?

20 MR MASUKU: The second -

21 MS DE KOK SC: What did it say in general
22 terms?

23 MR MASUKU: Ja, in general the second one
24 said we as Israeli, all Israeli loyal companies must not
25 employ anyone from COSATU, and after receiving them I

1 circulated to the whole COSATU staff and leadership and
2 then COSATU released a statement, but anyway, that is the
3 summary of it.

4 MS DE KOK SC: Yes. So that, you're
5 saying that's how you then came to visit this blog and then
6 you posted a comment?

7 MR MASUKU: Absolutely. After receiving
8 it, after circulating to staff I then posted a comment on
9 it.

10 MS DE KOK SC: And the comment that you
11 posted, or the text of it is reflected on page 3, of your
12 other file, sorry.

13 MR MASUKU: Sorry, on page?

14 MS DE KOK SC: 3 of the trial bundle.
15 That would be the other file.

16 MR MASUKU: Oh yes. Yes.

17 MS DE KOK SC: Now Sir, I'm not going to
18 ask you to comment on the meaning of the words because I
19 suspect that there will be an objection if I do. I just
20 want to ask you one thing. At the time what was your
21 understanding of the word Zionist?

22 COURT: The word what?

23 MS DE KOK SC: The word Zionist.

24 COURT: Zionist, thank you.

25 MR MASUKU: I understood, as I still

1 understand, that Zionists are a movement that claims
2 exclusivity, superiority or supremacy over other groups and
3 that claims to be pure and therefore doesn't want to
4 associate with other groups. That's why we see the
5 cleansing where they are involved. That's why we also
6 called it in the South African context it's an apartheid
7 movement.

8 MS DE KOK SC: I then want to ask you to
9 turn to the events of a meeting at the University of the
10 Witwatersrand.

11 MR MASUKU: Sorry, the meeting with the?

12 [10:25] MS DE KOK SC: At Wits.

13 MR MUSUKU: Oh, at Wits.

14 MS DE KOK SC: We know that it's common
15 cause that on 5 March 2009 a meeting was held at Wits at
16 which you attended. Can you explain to His Lordship how it
17 came about that you attended this meeting?

18 MR MASUKU: The students at Wits, if I'm
19 not mistaken, particularly SASCO and a young communist
20 league, The Progressive Youth Alliance annually host what
21 is called Israeli Apartheid Week. So they invited the
22 General Secretary of COSATU to be a guest speaker for that
23 particular year.

24 MS DE KOK SC: And who was at the time?

25 MR MASUKU: It was Zwelinzima Vavi. I

1 was in Cape Town and when he couldn't make it, because I
2 was coming back that Friday, I was requested to change my
3 flight schedule to be earlier so that I can immediately
4 from the airport go to Wits. So I replaced him otherwise
5 it was him who was invited and he requested that I replace
6 him and then that's what I did. So we changed our flights
7 and I came earlier from Cape Town and I went to the venue.

8 MS DE KOK SC: And can you recall
9 generally the topic of your speech that you made, what was
10 it about?

11 MR MASUKU: The topic of the speech was
12 how - was related to the experiences of the dock worker.
13 The dock workers belonging to SATAWU, SATAWU is the South
14 African Transport and Allied Workers Union. The transport
15 affiliate of COSATU.

16 MS DE KOK SC: You say it is an affiliate
17 of COSATU.

18 MR MASUKU: Yes.

19 MS DE KOK SC: Yes.

20 MR MASUKU: It serves together with ITF,
21 International Transport Federation and COSATU, COSATU CEC,
22 it initiated a campaign not to handle goods to Zimbabwe
23 first, that's why the Chinese ship that came could not dock
24 in South Africa, that was carrying arms. So following that
25 then there was the Israeli one. So the workers refused to

1 handle the goods and it was in barrels and went back. So
2 the students called us to share how practical solidarity
3 can be learning from the struggle in support of South
4 Africa against apartheid, but also using this as a model of
5 practical solidarity. So in essence that was what I was to
6 do, to share how it was coordinated and what happened.

7 MS DE KOK SC: Do you recall where the
8 meeting took place?

9 MR MASUKU: I recall the place, but I
10 can't remember the name of the venue, but somewhere next to
11 the main hall if I'm not mistaken, at Wits University, not
12 far from Senate House, something like that.

13 MS DE KOK SC: And was it a large or a
14 small venue?

15 MR MASUKU: I think it was a relatively
16 medium size, if I were to generalise.

17 MS DE KOK SC: And to the best of your
18 recollection how many people attended?

19 MR MASUKU: I can't remember, but if I
20 were to try and recall a bit I should expect around 40 or
21 so, ja somewhere around there. Sizeable, but not too big.

22 MS DE KOK SC: In the trial bundle you'll
23 see at page 29 through to page 54 you'll see some
24 photographs.

25 MR MASUKU: Oh ja.

1 MS DE KOK SC: Do you see them?

2 MR MASUKU: Yes. Yes I see -

3 MS DE KOK SC: Do they ring a bell, do
4 they reflect how the venue looked and the people there?

5 MR MASUKU: In a sense ja.

6 MS DE KOK SC: Now, Sir, when you got up
7 to speak, well let me first ask you did anyone introduce
8 you to the audience?

9 MR MASUKU: Yes absolutely. The PIA who
10 had invited us to first make - I'm sorry, make background,
11 background to why they invited COSATU and the struggle of
12 the Palestinian people and it links with the South African
13 struggle and then introduce myself to the podium.

14 MS DE KOK SC: And what happened when you
15 started speaking?

16 MR MASUKU: When I started speaking I
17 heard some noise, at first I couldn't make - for instance
18 it continues where words were uttered from the floor "oh a
19 friend of Hitler, oh you want us to leave." There were
20 different words, some were not clear, from the audience.
21 At that I couldn't make them because I even said I wasn't
22 alerted to what is going to happen. Anyway I proceeded to
23 try and contain myself and focus on the message until it
24 was almost impossible to speak.

25 MS DE KOK SC: Now we have a transcript

1 or we have three transcripts setting out what was said at
2 various times. If you can just turn to, firstly to page
3 259.

4 MR MASUKU: Sorry to page?

5 MS DE KOK SC: 259. What I firstly want
6 to ask you is you'll see that there's a transcript which
7 runs from 259 through to 269.

8 MR MASUKU: To 260?

9 MS DE KOK SC: 269.

10 MR MASUKU: Oh to 269. Yes I see the
11 transcript.

12 MS DE KOK SC: And then you'll see that
13 there's another one, a portion let's call it, that starts
14 at 272 and it goes through to 275. And then finally you'll
15 see that there's a last portion which is at page 278.

16 MR MASUKU: Okay.

17 MS DE KOK SC: Now, Mr Masuku, can you
18 remember, have you read these transcripts recently, did you
19 -

20 MR MASUKU: Yes I read it.

21 MS DE KOK SC: Yes and can you assist us
22 or can you remember in what order we must read these
23 transcripts? In other words which comes first and second
24 and third, do you know?

25 MR MASUKU: I wouldn't be that sure

1 because the other thing that - is that some of the wordings
2 seem to start from the middle.

3 MS DE KOK SC: Yes.

4 MR MASUKU: Because of the disruptions
5 and the noise. So sometimes to construct a full sentence
6 becomes a problem. So there is a problem with the way they
7 were transcribed, some of them. But sometime they give
8 some indicator about the idea.

9 MS DE KOK SC: Yes all I wanted to find
10 out from you is whether you are able to say in which order
11 we must read these transcripts chronologically. Do you
12 know which one comes first in time?

13 MR MASUKU: I think in my view the 259,
14 if I'm not mistaken, the 259 in the first one, ja in fact
15 the order that they are in seems to me to be the order that
16 they should -

17 MS DE KOK SC: Okay. Now, Mr Masuku, the
18 case against you is based on four statements. The first is
19 the post on the blog that you've already referred to. The
20 second statement you will find if you go to the pleadings
21 section. If you go to page 10 of that section.

22 MR MASUKU: Okay.

23 MS DE KOK SC: And you go to paragraph
24 6.2.2 right at the bottom of the page. You'll see there's
25 a statement that says "COSATU has got members here, even on

1 this campus we can make sure that for that side it will be
2 hell.

3 MR MASUKU: Yes.

4 MS DE KOK SC: Now, so the transcript
5 that we have doesn't contain any wording which reads
6 exactly like that, but if you look at page 17 in the same -

7 MR MASUKU: Okay.

8 MS DE KOK SC: No sorry 16 in the same
9 file.

10 MR MASUKU: Page 16.

11 MS DE KOK SC: Yes. You will see that
12 this is a response that you wrote on the 4th of June 2009 to
13 the South African Human Rights Commission.

14 MR MASUKU: Yes.

15 MS DE KOK SC: And you'll see in
16 paragraph 6 you said "It is true that I stated during that
17 lecture" and then you repeat what is set out in the
18 document that I've just referred to and then you add "or
19 words to that effect."

20 MR MASUKU: Sorry -

21 MS DE KOK SC: Or words to that effect.

22 MR MASUKU: Yes.

23 MS DE KOK SC: Do you see that?

24 MR MASUKU: Yes.

25 MS DE KOK SC: So I just want to get

1 clarity from you. At the time when you wrote this letter
2 on 4 June 2009 did you have an independent recollection of
3 the exact words that you used during the speech?

4 MR BESTER: M'Lord, an objection from my side. The
5 question is a leading question, it pre-supposes a yes or no
6 answer. I'm sure my learned friend can rather phrase it in
7 a more open ended manner given that she is examining the
8 witness in chief.

9 COURT: Yes, Mrs De Kok.

10 MS DE KOK SC: I will try and -

11 COURT: You will rephrase.

12 MS DE KOK SC: Yes I will rephrase.

13 COURT: Thank you.

14 MS DE KOK SC: When you wrote this letter
15 on 4 June 2009 did you have notes of your speech?

16 MR MASUKU: Yes, I had rough notes of my
17 speech, but not necessarily a speech.

18 MS DE KOK SC: Were those notes that you
19 prepared before the speech?

20 MR MASUKU: No just a recollection of
21 what at time as I was speaking on the phone preparing.

22 MS DE KOK SC: Yes.

23 MR MASUKU: Yes in advance -

24 MS DE KOK SC: So you had made some notes
25 in preparation.

1 MR MASUKU: I had made some notes in
2 preparation in one or two paragraphs.

3 MS DE KOK SC: The statements that we
4 find at page 259 onwards up to - the transcript, the first
5 transcript, so it's 259 through to 269.

6 MR MASUKU: The 259 one?

7 MS DE KOK SC: Yes, yes.

8 MR MASUKU: Okay.

9 MS DE KOK SC: Those remarks that they -
10 that reflect there, the statements by you did they form
11 part of a prepared speech that you had written out
12 beforehand?

13 MR MASUKU: There are two things that
14 happened, the first one like I said, I was called upon to
15 replace the General Secretary so I had to make up quickly
16 in mind. Like I said, it was only when I spoke to them
17 about what is the seminar about that I put something
18 together which (inaudible) but the main thing was about
19 practical sharing experience.

20 MS DE KOK SC: Just speak a little bit,
21 Mr Masuku.

22 MR MASUKU: Oh okay sorry. There are two
23 things that happened. The first one, as I said, I was
24 called at a late hour to replace the General Secretary. I
25 then got in contact with the organisers about what is it

1 about. They said you don't need a fully prepared speech,
2 you just need the notes because you have the practical
3 experience. Then that on the form from my understanding
4 with them, a form of putting down - the second one was that
5 as I spoke there the disruption, the heckling changed and
6 made it impossible for the presentation to happen. So what
7 happens is that the heckling got so serious that it was not
8 possible for any speech to be made in its full prepared
9 sense or the way I had predetermined it.

10 MS DE KOK SC: Sorry the way you had
11 predetermined it.

12 MR MASUKU: I had planned -

13 MS DE KOK SC: Planned it okay. To
14 return then to page 16 which is what we were busy with in
15 the pleadings bundle, your letter to COSATU.

16 MR MASUKU: Sorry, in the first bundle?

17 MS DE KOK SC: Yes the pleadings bundle.

18 MR MASUKU: Page 60?

19 MS DE KOK SC: 16, one six.

20 MR MASUKU: Oh 16, okay.

21 MS DE KOK SC: In paragraph 6 -

22 COURT: Sorry I need find my pleadings
23 bundle.

24 MS DE KOK SC: It should be LM2 to the
25 particulars of claim, M'Lord. The complaint affidavit,

1 it's at page 16 of the pleadings section. Anyway it
2 doesn't matter, we know what it's about. Thank you.

3 MS DE KOK SC: Mr Masuku, I just want to
4 ask you why did you add the words or words to that effect?
5 Look at paragraph 6, you say it's true that I stated and
6 then you repeat the statement referred or words to that
7 effect.

8 MR MASUKU: It's words to that effect.

9 MS DE KOK SC: Why did you add that in
10 your letter, why did you say or words to that effect?

11 MR MASUKU: It was because I was cautious
12 that I can't claim to have an, like I had said, I was
13 speaking verbally, so I can't claim to fully recollect what
14 had happened. So 4 June when I've made a speech somewhere
15 in February which was not a written speech and it was
16 because I was substituting someone, so that's why I was
17 very careful about the fact that I must - that it was to
18 that effect, to this effect.

19 MS DE KOK SC: Now I'm not going to ask
20 you what you meant or intended by the word hell, but I am
21 going to ask you the campaign by COSATU in support and
22 solidarity of Palestine did it before or after this speech
23 involve any acts of violence?

24 MR BESTER: M'Lord, another objection,
25 with respect it's a leading question, it's going illicit a

1 yes or a no. Perhaps my learned friend could just in
2 general terms seek to be more open ended in the manner in
3 which she phrases her questions. These are issues which
4 are key components of this case and it is simply not the
5 proper manner of examination in chief.

6 [10:45] To ask leading questions to a witness during
7 evidence in chief. I don't want to be overly technical
8 about this but -

9 COURT: You remind me of points of order
10 last night. You seem to be doing quite often but I
11 understand the gist of your objection which is not wholly
12 justified and, Mrs De Kok, I'm sure you understand what you
13 should do and not do.

14 MS DE KOK SC: Yes, M'Lord.

15 COURT: Yes.

16 MS DE KOK SC: I think that is probably
17 borderline so to avoid the debate I should perhaps just ask
18 the witness what was the nature of -

19 COURT: Well, just give your witness more
20 -

21 MS DE KOK SC: More freedom.

22 COURT: Laxity to tell us the story. And
23 let him also talk to me. He's talking to you the whole
24 morning. He's not giving evidence to you. He's giving
25 evidence to me. I know it's difficult but I want to hear

1 him and see him.

2 MS DE KOK SC: Mr Masuku, when you answer
3 my questions look towards His Lordship please. Then he can
4 hear you better.

5 COURT: Yes, thank you.

6 MS DE KOK SC: Mr Masuku, the nature of
7 COSATU's campaign in solidarity with Palestine, can you
8 describe to His Lordship the nature of that campaign?

9 MR MASUKU: Ja, thanks, M'Lord. As I
10 gave the background that COSATU has one of its principles
11 international solidarity Palestine is one of the key areas
12 as is Swaziland, Zimbabwe. So the nature of the campaign
13 is such that our struggle is for equality of all nations
14 for justice, for dignity. It is a struggle against
15 occupation against colonialism, against apartheid wherever
16 it happens, not only in Palestine, not only in Western
17 Sahara. So this was a principled stand taken before
18 Operation Cast Lead of 2008.

19 So when Operation Cast Lead happened and 1 400
20 children are said to have died what we did as always was to
21 coordinate a solidarity campaign that I indicated before
22 which means that we must support the right of the
23 Palestinian people to sovereign self-determination and the
24 right to rule themselves in their own land and freedom from
25 taking away of their land. So that to us means the need

1 for equality, justice and dignity. That's the essence of
2 the campaign. So the rest of the - was in that context.

3 MS DE KOK SC: But the - what were the
4 nature of the measures that you took in support of this
5 campaign? What were the, what was the nature of the
6 measures that you took, COSATU took in support of this
7 campaign?

8 MR MASUKU: As indicated earlier on so it
9 is the - we said we'll take up, we'll coordinate with all
10 those who are also appalled by the situation who support
11 rights, who supports freedom, who supports equality not
12 only in South Africa but globally but also we said we will
13 link up with all organisations that share that sentiment
14 and then we said we'll organise jointly marches, pickets,
15 public debates, public forums and all forms of pressure to
16 put pressure on Israel to withdraw from the occupied
17 territories, to grant the Palestinian freedom, the people
18 their freedom but also to ensure peace in the Middle East,
19 not silence, peace based on justice.

20 MS DE KOK SC: The third statement of
21 which the applicant complains you'll find at page 11,
22 paragraph 6.2.3 of the pleadings bundle. Just turn back to
23 page 11.

24 MR MASUKU: Of the same file.

25 MS DE KOK SC: Paragraph 6.2.3. The

1 statement commences the following things are going to
2 apply, any South Africa family - we've read it. It refers
3 to the Israeli defence force. Now, so what was at the time
4 your or COSATU's stance regarding South African citizens
5 who choose to go and serve in the Israeli Defence Force?

6 MR MASUKU: In the same way that there
7 was a campaign against the South African Defence Force
8 during the struggle against apartheid which was an example
9 the Israeli Defence Force is regarded by the global
10 progressive movement as an illegitimate enforcer of the
11 occupation. So going to serve in the Israeli Defence Force
12 is both immoral but also illegal in South African law
13 because of the Foreign Mercenary Act, Mercenaries Act. It
14 disallows South Africans to participate in war machines
15 that are enforcing occupation, apartheid and colonialism
16 elsewhere. So in that context we had, we were warning, in
17 fact we issued a statement where we said the South African
18 government must take measures to ensure no South African
19 joins the IDF so it was an elaboration of that statement
20 that we can't be part as South Africans who have fought
21 apartheid to go and assist in the enforcement of
22 colonialism, occupation and apartheid elsewhere, not only
23 in Palestine, anywhere in the world.

24 COURT: So you had no problem to the
25 Israeli Defence Force there but you objected to people from

1 here becoming part of it there.

2 MR MASUKU: We have a problem in its
3 enforcement of occupation.

4 COURT: There?

5 MR MASUKU: There, yes. So our problem
6 was assisting or South Africans joining it would also give
7 us the problem because if it's a normal conventional -
8 there are South Africans who are serving in the British
9 military for instance but we've never had a campaign
10 against that because it's regarded as a normal state. But
11 in the case of enforcing occupation in Palestine that was
12 where the question or objection was because it was brought
13 to our attention by various groups that are operating in
14 Palestine that there's an increasing number of South
15 Africans and they didn't refer to any particular group,
16 they said just said South Africans, who are now serving in
17 the Israeli Defence Force.

18 COURT: Yes, thank you.

19 MS DE KOK SC: Thank you. Then still on
20 page 11 you'll see the fourth statement that the claimant
21 complains of.

22 COURT: Sorry, where?

23 MS DE KOK SC: 6.2.4. COSATU is with
24 you.

25 COURT: Okay.

1 MR MASUKU: In the context the statement
2 was with - in fact you can see. What happened is that when
3 the hecklings become and the disruption becomes so loud and
4 disruptive I couldn't proceed to speak. Then I decided to
5 say particularly to the students South Africa doesn't have
6 enclaves. I'm just giving the logic, doesn't have - and
7 the Constitution covers every part and space of South
8 Africa.

9 MS DE KOK SC: You said it doesn't have?

10 MR MASUKU: Enclaves.

11 MS DE KOK SC: Enclaves, yes.

12 MR MASUKU: Enclaves. So every space in
13 South Africa is a free space for people to express their
14 view including Wits. So there is no group or groups or
15 people who will disrupt or who not allow others to express
16 their views because they differ with them. We can't build
17 a society when we have a Constitution that says we can
18 differ but still live together so the idea about the Wits
19 or Orange Grove is because the experiences we had at Orange
20 Grove were manhandled, physically beaten. When we entered
21 the Orange Grove for that march we were physically
22 manhandled. In fact some of the guns that I saw there are
23 guns that I've not seen anywhere else in South Africa by
24 certain private securities that we were, that were
25 enforcing other than the SAPS.

1 So from there to Wits the comparison to me was
2 there are people who think there are parts of South Africa
3 that the constitution doesn't operate. Whether it's Wits,
4 whether it's wherever the right to speak and differ freely
5 without disruption, without the threat of abuse is
6 protected by the constitution. So in this context I was
7 referring to the fact that COSATU also have members who are
8 members of NEHAWU organised here and their duty is to
9 defend and protect the values for which the freedom was
10 won. That is the right to express yourself freely and
11 differ without abusing each other, without threatening each
12 other.

13 MS DE KOK SC: Mr Masuku, you are accused
14 that when you referred to Zionists, that would now be in
15 your blog comment, when you referred to Zionists you really
16 mean Jews as an ethnic or a religious grouping. What is
17 your response to that?

18 MR MASUKU: I think somewhere in the
19 statement also I said I have paid respects for some Jews
20 because some of the campaigns we had Jews. There are
21 different Jewish groupings. We are British Jews for free
22 Palestine. There are South African Jews for a free
23 Palestine. There are, there's a group called Not in my
24 Name. It's Jews. One of the best international officers
25 of one COSATU union at the time was a Jew by the name of

1 Steve Faulkner. He was at Orange Grove. Even in one of
2 the pictures here he appears.

3 And one of the best friends we have worked with
4 in this campaign is Ronnie Kasrils, a Jew. And Jews were
5 part of the struggle against Apartheid in South Africa, Joe
6 Slovo and many of them. So we are very clear. Zionists
7 and Jews are not the same thing. It's like saying all
8 whites in South Africa are responsible for apartheid. It's
9 not so. There were many whites who stood up and sacrificed
10 and died for the freedom of South Africa. But there are
11 those in the name of whites who claim to abuse and be
12 racist on blacks in the name of whites. That is what is
13 happening. Zionists is the group of racists who support
14 and enforce apartheid and that do not believe in equality
15 with others. But Jews all over the world including the
16 United States have always consistently said not in my name
17 and they've stood to defend the values of justice and
18 freedom. So there's a separation between Zionists and
19 Jews.

20 MS DE KOK SC: Thank you, M'Lord. Those
21 are my questions for this witness. Mr Masuku, just stay
22 there. Mr Bester has got some questions.

23 COURT: Thank you. Cross-examination.

24 CROSS-EXAMINATION BY MR BESTER: Thank
25 you, M'Lord.

1 COURT: Sorry, are you seated or
2 standing, Mr Masuku? Are you seated or standing? Oh,
3 you're sitting. I wasn't sure whether you're short or
4 seated. Mr Bester.

5 MR BESTER: Thank you, M'Lord. Mr
6 Masuku, I notice that you have a BA degree in social
7 sciences. Is that correct?

8 MR MASUKU: Sorry?

9 MR BESTER: You have a BA degree in
10 social sciences.

11 MR MASUKU: Yes.

12 MR BESTER: So you will then accept that
13 the social sciences unlike the natural sciences is a far
14 more open field that allows for different perspectives on
15 things. In other words reasonable people could differ on
16 various things.

17 MR MASUKU: Absolutely.

18 MR BESTER: And based on your academic
19 background you would accept that.

20 MR MASUKU: But also based on my moral
21 convictions too.

22 MR BESTER: Yes, yes. There I notice
23 that earlier on in your testimony you spoke about the time
24 period around December 2008 when Israel as you say waged
25 war on Gaza and COSATU then took a principled decision to

1 render solidarity and assistance to people who were opposed
2 to this war. Let me just understand. You then mentioned
3 the fact that as part of the campaign you were meeting with
4 different interested parties and you listed some of them.
5 Is that more or less - do I understand you correctly?

6 MR MASUKU: Sorry, I listed some? I
7 missed that.

8 MR BESTER: You listed some of the
9 interested parties with whom you had meetings.

10 MR MASUKU: Yes.

11 MR BESTER: But they were all - well, let
12 me rephrase. I don't recall you having said that you at
13 that stage had meetings with the South Africa Jewish
14 community. Is that correct?

15 MR MASUKU: Like I indicated we made an
16 open invitation for anyone interested so it was sent out to
17 the media. It was sent out to various forums so various
18 groups came. Let me make an example. The PAC is not part
19 of the ANC alliance but it was in that meeting.

20 MR BESTER: But my question is a
21 different one. Did you specifically invite Jewish
22 representative organisations at that stage?

23 MR MASUKU: We invited - let me make an
24 example. We didn't invite Zulus. We invited every South
25 African, not any particular group. Anyone who agrees,

1 that's why there were Jews like Steve who were in that
2 meeting who believe and sympathised with or agreed with
3 what the cause was about.

4 MR BESTER: So then to answer my question
5 the answer would really be no insofar as an invitation to
6 specific Jewish groups. That wasn't done. It was a more
7 general invitation.

8 MR MASUKU: It was general open
9 invitation.

10 MR BESTER: And the people who showed up
11 just who were they again, the people who attended this -
12 you mentioned the PAC. Did they attend that particular
13 meeting?

14 MR MASUKU: I made an example of those
15 that I recall. I can say that again.

16 MR BESTER: Yes.

17 MR MASUKU: Palestine Solidarity
18 Committee, the Young Communist League, SASCO, ANC, PAC,
19 AZAPO, South African Council of Churches, the Palestine
20 Solidarity Alliance, PSA, and then various affiliates of
21 COSATU.

22 MR BESTER: And would it be correct to
23 say, and I'm taking a calculated guess and correct me if
24 I'm wrong, that the people you've listed here their
25 sympathies would be aligned with your sympathies insofar as

1 what is going on in the Middle East. They share your same
2 views. Is that correct?

3 MR MASUKU: They share our same - not
4 necessarily. Council of Churches is a church organisation.
5 So we only agreed on the fact of one thing. This is
6 appalling. This is alarming and all of us must act. We
7 were united only by that campaign. It was not necessarily
8 that we shared - PAC for instance as you know has a
9 different view to the ANC and the alliance.

10 MR BESTER: Yes, yes, perhaps let me
11 clarify. I'm not referring to political views in general.
12 I'm referring specifically to the question in the Middle
13 East. If one could simplify matters and draw a clear
14 dividing line as either being pro-Palestinian or pro-
15 Israeli the people you've mentioned would've fallen on the
16 side of the Palestinian people. Is that correct?

17 MR MASUKU: No sorry, it was a campaign.
18 It was not a public debate. It was a campaign for a free
19 Palestine.

20 MR BESTER: Then let me ask you, you also
21 mentioned that you then around 2008 if I understand it
22 correctly or rather 1998 you left Swaziland and then you
23 were brought to this country by the alliance and in 2006
24 already you were promoted to the head of the international
25 department at COSATU. Now, in your capacity as head of

1 international relations at COSATU does that mean that you
2 engage with the various foreign trade unions, perhaps the
3 international labour organisations and perhaps even foreign
4 governments from time to time. Will I be correct in that?

5 MR MUSUKU: Absolutely.

6 [11:05] Including those who may not share the same views,
7 but we engage all of them.

8 MR BESTER: I'm glad you say that because
9 that was going to be my next question. So insofar as when
10 we engage with those who do not share our own views, and
11 again I'm not an ambassador or a diplomat, but little did I
12 know that when one is dealing at a level of international
13 relations it seems to me the key word would be diplomacy,
14 is that not so?

15 MR MASUKU: That is government. In trade
16 union it's activism.

17 MR BESTER: Activism. But when you
18 engage with people who do not share your own view at an
19 international level you would do so in a manner which is no
20 doubt informed by sensibilities and respect for the fact
21 that they might differ from you, but you would seek to
22 engage with one another constructively, not so?

23 MR MASUKU: Absolutely. Let me - we can,
24 we have met even the Israeli trade unions, who we disagreed
25 with. We'd met with them in Canada. We've differed with

1 them, but we've said there's nothing, there's no bad blood.
2 We've met with various governments of Europe, expressed our
3 concerns about their support for an apartheid state, but
4 we, there's no bad blood. So even some of the trade unions
5 don't necessarily agree with our views, but we engage with
6 them and there's no bad blood. So we engage everyone, but
7 it's different when it's now a campaign for solidarity.

8 MR BESTER: Yes, and we'll get to that
9 difference because it does become key. So let me ask you
10 then; you accept as someone who holds an official position
11 at COSATU, as head of international relations that is a
12 position of some importance and some responsibility. Would
13 that be fair?

14 MR MASUKU: I want to be sure I got your
15 question properly, M'Lord. Did you say what is the
16 responsibilities that go with my office?

17 MR BESTER: No, no, no, no, I'm asking
18 you a different question. I'm asking you to comment
19 whether it is correct that in your position as head of
20 international relations at a labour federation like COSATU,
21 a big, call it conglomerate of various trade unions, as
22 head of international relations you occupy quite an
23 important position. Would that be fair?

24 MR MASUKU: I think so, because I take my
25 responsibility seriously.

1 MR BESTER: Yes, and COSATU we know is
2 obviously part of the tripartite alliance and it is made up
3 of various affiliate trade unions, not so?

4 MR MASUKU: Correct.

5 MR BESTER: And give or take it has well
6 over 1.5, 1.6 million workers who fall under the COSATU
7 umbrella. Is that correct?

8 MR MASUKU: That's correct.

9 MR BESTER: What is the precise figure?
10 I know it changes from time to time, but on your last
11 estimate what was the correct figure?

12 MR MASUKU: No, the latest - my leaders
13 will correct me - the latest if I recall it's 1.8 million.

14 MR BESTER: 1.8 million people, right.
15 So insofar as 1.8 million workers in this country you
16 represent them specifically with reference to international
17 relations.

18 MR MASUKU: Correct.

19 MR BESTER: That's correct?

20 MR MASUKU: Although I'm not limited to
21 that. COSATU can just deploy me at Nedlac and I do go
22 there, so in various forum, but my primary responsibility
23 is international.

24 MR BESTER: Yes. No, I accept that you
25 might fulfil different duties and go to Nedlac, which is as

1 I understand it a domestic matter and it's got nothing to
2 do with foreign relations. I understand that, yes. Yes.
3 Then if I can ask you, on the date in question, 5th of March
4 when you attended the meeting at Wits - now we know you
5 replaced Mr Vavi, but you were there that day in your
6 capacity as a representative from COSATU. Is that correct?

7 MR MASUKU: Absolutely.

8 MR BESTER: And stemming from the fact
9 that you occupy a position of some importance in COSATU
10 with reference to these 1.8 million people who fall under
11 the COSATU umbrella, you would also accept that words
12 spoken or written in certain instances have serious
13 consequences. Is that correct?

14 MR MASUKU: It's the general
15 responsibility of a leader.

16 MR BESTER: I beg your pardon?

17 MR MASUKU: I'm saying every leader has
18 that responsibility in context to express that with
19 responsibility.

20 MR BESTER: To express - I'm sorry, I
21 can't hear you clearly. To express?

22 MR MASUKU: Okay, I'm saying when you
23 have the position of responsibility generally you have, you
24 do exactly that what you say.

25 MR BESTER: There's, words have

1 consequences and therefore one must act with a degree of
2 responsibility.

3 MR MASUKU: Yes.

4 MR BESTER: You accept that, and when we
5 look at words we don't always look at the express meaning,
6 but we also sometimes look at the implicit meaning because
7 words could mean various things. You accept that?

8 MR MASUKU: I accept, but in context.

9 MR BESTER: Yes.

10 MR MASUKU: The context is critical.

11 MR BESTER: Context is everything. No,
12 you and I certainly agree on that. M'Lord, I see it's 11
13 past, 12 past 11. I'm going to start a new theme. Perhaps
14 now would be the opportune moment to take the tea
15 adjournment.

16 COURT: I think it may be opportune to
17 adjourn. Court will adjourn.

18 [COURT ADJOURNS COURT RESUMES]

19 [11:38] COURT: You were still busy, Mr Bester.

20 MR BESTER: Mr Masuku, will you tell his
21 lordship - before I get there let me perhaps rephrase that
22 and say as I understand your case you appear to make a
23 distinction between Jews and Zionists. Do I understand you
24 correctly? Is that the tenor of your defence to this
25 complaint?

1 MR MASUKU: Yes.

2 MR BESTER: Yes, now if you cast your
3 mind back over your career as head of COSATU's
4 international relations have you ever at any stage
5 expressed negative views about Jews in general?

6 MR MASUKU: Have I - the last part?

7 MR BESTER: Have you ever during your
8 career with COSATU expressed negative views about Jews in
9 general.

10 MR MASUKU: Jews in general?

11 MR BESTER: Yes, in other words -

12 MR MASUKU: Not that I recall of.

13 MR BESTER: - not just Zionists, but
14 Jews.

15 MR MASUKU: Not that I recall of.

16 MR BESTER: Can I then ask you to turn to
17 the trial bundle, page 15.

18 MR MASUKU: Sorry, page 15?

19 MR BESTER: Yes. This is an e-mail you
20 wrote to Steven Maggid of the Supernatural Blog on
21 Wednesday, the 11th of February 2009. Is that correct?

22 MR MASUKU: Sorry, on page 15?

23 MR BESTER: Yes, of the trial bundle.

24 MR MASUKU: Okay.

25 MR BESTER: Is that correct?

1 MR MASUKU: Yes.

2 MR BESTER: That's an e-mail you sent to
3 Steven Maggid of the Supernatural Blog on Wednesday, the
4 11th of February 2009. Is that correct?

5 MR MASUKU: Yes, that's correct.

6 MR BESTER: If I can just ask you to look
7 at the second paragraph and you're now dealing with the
8 march on the previous Friday, you say, "Further, if anyone
9 of you was at the march on Friday you would have known the
10 insults we received, the threats we went" -

11 MR MASUKU: Sorry, sorry, which paragraph
12 is that?

13 MR BESTER: The second paragraph.

14 MR MASUKU: Oh, okay.

15 MR BESTER: "Further, if anyone of you
16 was at the march on Friday you would have known the insults
17 we received, the threats we went through and the stone-
18 throwing at our buses by the people who were there,
19 coincidentally, Jews, without being anti-Semitic. They
20 even told us that we can march all over South Africa but
21 not in Main Street in Orange Grove. They were really eager
22 to manhandle us. I will not explain further" -

23 MR MASUKU: I think we're on different
24 pages.

25 MR BESTER: Sorry, are you on a different

1 page? I believe you're in the pleadings bundle.

2 MR MASUKU: Page 15 or 16?

3 MR BESTER: 15. I believe you're in the
4 pleadings bundle. You need to go to -

5 COURT: Please look at the other file,
6 the other -

7 MR BESTER: The other file. To the trial
8 bundle, the file behind you. Page 15.

9 MR MASUKU: Page 15, oh ja. Okay.

10 MR BESTER: Yes, you have a recollection
11 of this e-mail?

12 MR MASUKU: Okay. Okay.

13 MR BESTER: Let me just read more or less
14 where I stopped. "They even told us we can march all over
15 South Africa but not in Main Street, Orange Grove." You
16 see that?

17 MR MASUKU: Sorry, the?

18 MR BESTER: You see that, the passage
19 I've just read to you? Do you see that?

20 MR MASUKU: Yes. Yes.

21 MR BESTER: Right, "They were really
22 eager to manhandle us. I will not explain further, but I
23 came to one conclusion; that Jews are arrogant, not from
24 being told by any Palestinian but from what I saw myself."
25 Those are your words, Sir. Is that correct?

1 MR MASUKU: Yes.

2 MR BESTER: I beg your pardon?

3 MR MASUKU: Yes.

4 MR BESTER: And it's also correct that
5 you did not draw a distinction between Zionists and Jews,
6 you said "Jews are arrogant." Is that correct?

7 MR MASUKU: Okay.

8 MR BESTER: You agree with that?

9 MR MASUKU: No, I wrote the statement.

10 MR BESTER: Yes. But you agree you did
11 not say Zionists are arrogant, you said Jews are arrogant.

12 MR MASUKU: Yes.

13 MR BESTER: Yes.

14 MR MASUKU: Yes.

15 MR BESTER: Thank you. Now let's deal
16 with the same bundle, shall we, the actual blog post on
17 page 3.

18 MR MASUKU: Okay, the blog post on page?

19 MR BESTER: 3 of that bundle.

20 MR MASUKU: Okay.

21 MR BESTER: And also if I can ask you if
22 you can go to the notices bundle, you'll recall the e-mail
23 you received from one Phillip where there's mention made of
24 monkeys. Do you remember that?

25 MR MASUKU: Yes.

1 MR BESTER: In the notices bundle, it's
2 the other file, page 6. I want you to have both open, if
3 you will, Sir. Are you there?

4 MR MASUKU: No, not exactly. By the way,
5 which page is that? Because there are quite a number of
6 them.

7 MR BESTER: Yes -

8 COURT: The first one is page 3 of the
9 same blue file you had just now.

10 MR MASUKU: Yes, 3 on this one?

11 COURT: Yes.

12 MR MASUKU: And then I was asking -

13 MR BESTER: The other file is the notices
14 divider, there's a small sub-file that says notices.

15 MR MASUKU: Oh, okay.

16 MR BESTER: And that section, if I can
17 just ask you to turn to page 6, please.

18 MR MASUKU: Okay. Yes, I'm there now.

19 MR BESTER: Now from what I understand
20 your contribution to this blog that we see on page 3 from
21 what I understand was really the result of this e-mail from
22 one Phillip where he said, "Even when all the monkeys in
23 COSATU have died of AIDS," is that correct, that made you
24 decide to contribute to the blog? Is that correct?

25 MR MASUKU: I think I would say that's

1 the context.

2 MR BESTER: That's the context, yes. Now
3 this person here Phillip, he would not have been known to
4 you. Is that correct? You don't know who that is.

5 MR MASUKU: Not know who?

6 MR BESTER: Phillip, the person who made
7 those remarks on page 6 when he said "Even when all the
8 monkeys in COSATU have died of AIDS," he would not have
9 been known to you. Is that correct?

10 MR MASUKU: Absolutely.

11 MR BESTER: All we really know of Phillip
12 is what we see from his e-mail on page 6 and presumably we
13 can conclude that he no longer lives in South Africa. Is
14 that correct? Where he says, "I still won't return to SA."
15 So we can conclude that he most probably lives overseas.
16 Will you agree with that?

17 MR MASUKU: I'm not sure.

18 MR BESTER: Are you looking at the e-mail
19 I'm referring to?

20 MR MASUKU: This may not necessarily say
21 so, but I think the conversation was someone who was giving
22 a pretext, so I can't be sure whether he really has left
23 South Africa, but whichever way, I was discussing with him.

24 MR BESTER: But on the face of the e-mail
25 that would appear to be the case.

1 MR MASUKU: Implicitly, yes.

2 MR BESTER: Yes. But if you say your
3 contribution to the blog was in response to this particular
4 e-mail, let me put it to you that in your blog contribution
5 you don't refer to Phillip's e-mail at all, do you?

6 MR MASUKU: It was not relevant to refer
7 to, the substance was relevant.

8 MR BESTER: The substance, but do you
9 refer to the substance of his remarks in your blog post?
10 You don't. Is that correct?

11 MR MASUKU: First and foremost it was not
12 only Phillip.

13 MR BESTER: Yes?

14 MR MASUKU: That's why in the statement
15 that we released on the 4th of June - I'm sorry, on the 3rd
16 of January, we listed that e-mails, phones and everything.
17 So I think this is just but one, so the response is not
18 directed to Phillip, it's a response to the blog because in
19 the blog there were several people, Anton Posner several
20 were writing, so I don't think it was a conversation with
21 Phillip per se.

22 MR BESTER: Okay. So are you then saying
23 that your blog post was not a response to this e-mail by
24 Phillip where he mentions, where he really called the
25 members of COSATU monkeys? It wasn't a reference, your

1 blog post wasn't a response to that?

2 MR MASUKU: Like I said, it's a blog.

3 MR BESTER: Yes?

4 MR MASUKU: When it's a blog someone
5 posts there are various comments. So the comments, I
6 responded to the sum total of the comments. When I got the
7 e-mails, the two, I forwarded to COSATU staff. Then there
8 was a, there was continued action, it didn't stop. Then I
9 responded generally, to summarise. So Phillip was part of
10 a group in a blog.

11 MR BESTER: I see. So you would agree
12 with me that your blog response is not directed at Phillip
13 specifically. Is that correct?

14 MR MASUKU: It's directed to what they
15 call themselves the supporters of Israel, because that's
16 how they use to say, "We supporters of Israel," whenever
17 they were speaking. So as supporters of Israel Phillip was
18 one of them, so it was a response not necessarily to him
19 per se, but to including him too.

20 MR BESTER: And did you at that stage
21 regard every supporter of Israel as a Zionist?

22 MR MASUKU: Sorry?

23 MR BESTER: Did you regard every
24 supporter of Israel as a Zionist?

25 MR MASUKU: A supporter of Israel?

1 COURT: Supporters of Israel.

2 MR MASUKU: Israel is a Zionist state,
3 isn't it?

4 MR BESTER: Or let me just -

5 MR MASUKU: It's led by a Zionist regime,
6 so supporters of South Africa apartheid, what were they
7 called?

8 COURT: No, don't ask questions, just
9 answer questions.

10 MR MASUKU: Sorry?

11 COURT: You don't have to ask counsel
12 questions. You're asking a question. You just have to
13 answer his questions.

14 MR MASUKU: Apologies. Apologies.

15 COURT: Yes.

16 MR MASUKU: Okay, Israel is an apartheid
17 Zionist state, so supporters of Israel are supports of a
18 particular state, not just a state. Therefore -

19 MR BESTER: That's your interpretation?

20 MR MASUKU: Yes.

21 MR BESTER: Well, let me put a slightly
22 different analogy to you and then we can engage with one
23 another a little bit more on this point. You know
24 obviously who the New Republican Administration is in the
25 United States.

1 MR MASUKU: Yes.

2 MR BESTER: It's run by President Trump.

3 MR MASUKU: Yes.

4 MR BESTER: And you would also agree that
5 his ascendancy to the position of President of the United
6 States has polarised American society, and indeed the
7 world. Is that correct?

8 MR MASUKU: I suppose so.

9 MR BESTER: Yes, but you agree that it is
10 still possible for an American to feel a strong attachment
11 to America without necessarily supporting President Trump's
12 government. Is that correct?

13 MR MASUKU: Let me make that - let me get
14 you properly so that I can answer in context. The
15 differences that Zionist is not necessary Jews, so Jew,
16 they are Jews who have affinity to Israel, but they are
17 Zionists who have affinity to Israel, but in the Trump case
18 it's an individual, it's not an ideology. In the case of
19 Israel, here is the problem; the problem is an ideology
20 called Zionism, so in the case of Trump it's an individual
21 who after 2020 he would have left the office, unless he
22 goes back. So the difference there is that here is a
23 system - it's not about individual. Even if it was not
24 Benjamin Netanyahu just to illustrate your case, anyone who
25 supports the system of Zionism is where the problem is. So

1 I wanted to make that small distinction between the case of
2 the United States and Israel.

3 MR BESTER: Well, that's your opinion and
4 no doubt we will deal with that more in due course. But
5 just touching on the subject of Zionism, do you accept as a
6 basic premise that by far the majority of Jews are in fact
7 Zionists? Do you accept that?

8 MR MASUKU: That by far the majority of
9 Jews are?

10 MR BESTER: By far the majority of Jews
11 in the world are Zionists. Do you accept that?

12 MR MASUKU: I don't have statistics
13 regarding that, so I can't confirm it, but from what I have
14 seen and interacted with there is quite a sizeable number
15 of Jews, which I can't quantify in exact terms, who oppose
16 what Israel is doing.

17 MR BESTER: Well, let's look at the
18 transcript and let's see what you said at Wits in March
19 2008, shall we?

20 MR MASUKU: Which file?

21 MR BESTER: If you can go to page 248 of
22 the transcript in the trial bundle.

23 MS DE KOK SC: Sorry, 2?

24 MR BESTER: 248.

25 MS DE KOK SC: M'Lord, the reference to

1 page 248 is a reference to one of the earlier drafts of the
2 transcript. I think it would perhaps be better for the
3 purposes of the record if my learned friend refers to what
4 is now the common cause transcript, and 248 is, in the
5 official or agreed transcript is at 259.

6 COURT: 259?

7 MS DE KOK SC: Well, it starts at 259.

8 COURT: 259, yes.

9 MR BESTER: I'm indebted to my learned
10 friend.

11 COURT: Yes.

12 MR BESTER: Mr Masuku, the passage I want
13 to take you to is then on page 267.

14 MR MASUKU: Sorry, page 2?

15 MR BESTER: 267.

16 COURT: Thank you, Mrs De Kok. You're on
17 page 267, Mr Bester?

18 MR BESTER: Yes, M'Lord.

19 COURT: Yes.

20 MR BESTER: Perhaps I'll just come back
21 to this. Mr Masuku, if I can then ask you, go to the
22 pleadings bundle, if you will, page 16. During your
23 evidence in chief you dealt briefly with the fact that you
24 did make the remarks quoted at paragraph 6 of this letter,
25 where you then said, "It is true that I stated during that

1 lecture that," and then you quote the words, "or words to
2 that effect." Do you see that, page 16?

3 MR MASUKU: Yes.

4 MR BESTER: Yes. So you were not
5 entirely sure of the precise words that you used during the
6 course of your address to the students, but the substance
7 of what is quoted there, you were happy with that and that
8 was indeed a correct recordal of the words that you used.
9 Is that correct?

10 MR MASUKU: Like I indicated before that
11 it is to the best of my recollection.

12 MR BESTER: That those were the words
13 that you used?

14 MR MASUKU: Yes.

15 MR BESTER: Let me ask you, in response -
16 we don't have to go back there, but in response to that
17 comment from Phillip where he spoke of COSATU members as
18 being monkeys, at the time you did not exercise the right
19 to lay a complaint with the South African Human Rights
20 Commission, did you?

21 MR MASUKU: No, I didn't.

22 MR BESTER: But you were alive to the
23 fact and you were fully aware of the fact that if a
24 complaint was received the South African Human Rights
25 Commission would investigate such a complaint. Is that

1 correct?

2 MR MASUKU: No, it didn't - it wasn't
3 much of a matter to, for reporting because the question was
4 - it didn't come to our mind to report it, but also it
5 wasn't an - the trade union movement deals differently at
6 times with issue.

7 [11:58] For instance you can march there rather than
8 complaining to the Human Rights Commission because it is a
9 long laborious process. So I'm just saying amongst the
10 things that we could do that was not one of the
11 considerations.

12 MR BESTER: Yes, but I'm referring to the
13 content by Philip.

14 MR MASUKU: Yes.

15 MR BESTER: Specifically that e-mail.
16 You would not know where Philip necessarily is and
17 therefore you could not necessarily march against him. But
18 to the extent that you wished to lay a complaint with the
19 Human Rights Commission that is something that you could
20 have done but you chose not to do so. Correct?

21 MR MASUKU: Absolutely.

22 MR BESTER: In fact as far as I
23 understand COSATU has in the past lodged many complaints in
24 cases of racism with the South African Human Rights
25 Commission. Would you agree with that?

1 MR MASUKU: No, we did but in effect we
2 prioritise - there are too many cases of racism. So those
3 that affect workers are more important than those that
4 affect us service providers to workers because we are
5 employees. So we have many cases of racism that have been
6 reported that it will simply not be advisable to add that
7 time. In fact it didn't come to mind about the Human
8 Rights Commission.

9 MR BESTER: Now if I can ask you as far
10 as you were aware and on your understanding do you accept
11 that Hitler embarked on an extermination campaign that was
12 aimed at Jews? Do you accept that?

13 MR MASUKU: I'm sorry, the word you used-

14 MR BESTER: You -

15 MR MASUKU: Exterminate.

16 MR BESTER: Do you accept that Hitler had
17 a programme by which he wanted to kill Jews? Do you accept
18 that?

19 MR MASUKU: Yes.

20 MR BESTER: In fact do you also confirm
21 that -

22 MR MASUKU: And blacks too.

23 MR BESTER: Yes, of course. Blacks, what
24 is regarded as Roma or gypsy people, various other
25 groupings. But do you accept that there was no special

1 dispensation whereby Jews who were not Zionists were not
2 killed or sent to the concentration camps? In other words
3 Jews who were not Zionists were therefore saved from the
4 concentration camps. That wasn't the case. Am I right?

5 MR MASUKU: Hitler killed Jews in the
6 holocaust.

7 MR BESTER: Yes.

8 MR MASUKU: Yes, and that is clearly
9 inhumane. He killed Jews, yes, in general.

10 MR BESTER: But in that process he did
11 not save anti-Zionists or Zionists. He killed Jews in
12 general.

13 MR MASUKU: As a matter of fact he killed
14 Jews. That's why I'm emphasising the word, not necessarily
15 Zionists, Jews.

16 MR BESTER: And you obviously would've
17 been in court during the course of these proceedings over
18 the past few days. Am I right? You attended the events
19 every day. And you would've heard then evidence being led
20 that the vast majority of Jews are in fact Zionists. You
21 would've heard that evidence.

22 MR MASUKU: Hearing doesn't mean it's a
23 fact so my issue was I have no evidence. I've heard an
24 opinion.

25 MR BESTER: But from where you stand you

1 don't have any evidence to the contrary to suggest that
2 they in fact make up a minority of Jews.

3 MR MASUKU: My experience with Jews is
4 that both in the South African liberation struggle and in
5 the struggle against Palestine, for freedom in Palestine
6 I've interacted with a number of Jews from all over the
7 world who say I'm a proud Jew but what's happening in
8 Israel it's not in my name. So that's why I say I can't
9 confirm that majority of Jews are Zionists. All I know is
10 that there are Zionist lobbies and there is no evidence to
11 me to the contrary. I've met Jews from all over the world
12 who have stood proud to say I'm a Jew. I was a victim of
13 holocaust but I will not allow another holocaust anywhere.

14 MR BESTER: But that would be the result
15 of the Jews who you've had interaction with. I'm assuming
16 it would be Jews -

17 MR MASUKU: That's why I say from my
18 experience.

19 MR BESTER: Yes, in your experience that
20 would be Jews who have a close association with the trade
21 union movement, Jews perhaps who were part of the
22 liberation struggle. Those are the sorts of people that
23 you would've had interaction with. Am I correct?

24 MR MASUKU: Not necessarily. Academics
25 and United Nations agencies, some sat even in governments,

1 in various governments. When we meet at ILO they are in
2 various councils of the various international bodies so NGO
3 activists. So they are not necessarily in the trade union
4 but quite a number of them.

5 MR BESTER: But from where you stand you
6 don't have any definitive evidence to the contrary. That's
7 a view that you have that they may not be in the majority
8 but you don't know specifically.

9 MR MASUKU: Absolutely. I don't know
10 specifically.

11 MR BESTER: Now, if we can look at your
12 blog entry on page 3.

13 MR MASUKU: On page 3 of?

14 MR BESTER: Page 3 of the trial bundle.

15 MR MASUKU: Okay.

16 MR BESTER: Right, you're there. I'm not
17 going to ask you what the words mean because that is an
18 objective test. But at the time when you wrote this
19 commentary in the blog that was during or about the time of
20 the Gaza war. Am I right?

21 MR MASUKU: Yes, it was around that time.

22 MR BESTER: Based on what you've said
23 there were approximately 1 400 casualties on the
24 Palestinian side. We'll get later to the breakdown of what
25 those casualties were but that was the figure that was also

1 mentioned in court yesterday. Am I right?

2 MR MASUKU: Absolutely.

3 MR BESTER: Yes. So and just to be clear
4 these are casualties in the sense of people who died. Is
5 that how you understand it?

6 MR MASUKU: Yes, absolutely.

7 MR BESTER: So where you stand, Mr
8 Masuku, you were of the view that at the time the
9 Palestinian people were subjected to violence and generally
10 a very unpleasant experience. Is that correct?

11 MR MASUKU: Absolutely.

12 MR BESTER: At the same time in your blog
13 entry you had no difficulty in wishing the same experience
14 to Zionists. Is that correct?

15 MR MASUKU: In wishing the?

16 MR BESTER: The same experience as
17 experienced by the Palestinian people to be visited upon
18 Zionists. Do you agree with that?

19 MR MASUKU: No, I said anyone who's wrong
20 must taste what he feeds others. If I make a medicine as a
21 doctor I can't give someone without tasting if it works on
22 me.

23 MR BESTER: Yes, we're not going to deal
24 with what the words mean. I'm simply putting it to you
25 that what you wrote was, is that Zionists must be made to

1 drink the bitter medicine they are feeding our brothers and
2 sisters in Palestine. You see that. Right?

3 MR MASUKU: Absolutely.

4 MR BESTER: Yes, and that was the view
5 that you held at the time and a view you still hold to this
6 very day. Is that correct?

7 MR MASUKU: Referring to?

8 MR BESTER: That was the view you held at
9 the time and it is a view you still hold today. Is that
10 correct?

11 MR MASUKU: Here is a context of everyone
12 trying to say stop the war. How else would you appeal if
13 someone doesn't stop the war? United Nations,
14 international organisations, stop the occupation.
15 Everyone's complaining. Now there's only one question.
16 Maybe for them to change they need to have a taste of what
17 the Palestinians who have stayed in Britain in exile for
18 all their lives, they have never known Palestine that I've
19 met somewhere here in South Africa. Some of them have been
20 forced out of their land. So the context of that is
21 important. That's why I said the context, the context was
22 can you accept to be kicked out of your land permanently
23 into another land. So maybe if you taste that then sanity
24 will prevail.

25 MR BESTER: Perhaps let's just clarify

1 because we're talking at cross purposes and let me just
2 understand what you're saying because you were talking
3 about Palestinians in Britain. I'm not interested in that.
4 In your blog post you specifically refer to bitter medicine
5 they are feeding our brothers and sisters in Palestine. So
6 you were referring to people living in Palestine. Is that
7 correct?

8 MR MASUKU: Let me explain again. I'm
9 referring to what they are giving to the brothers and
10 sisters in Palestine who have members who are not there,
11 whether they are in Britain whatever. For me it's relevant
12 here because the families are suffering. The delegation of
13 the delegation that has gone to Palestine has given the
14 horror of the experiences so that's the medicine we are
15 referring to is Palestine as in Palestinians all over the
16 world and in Palestine the land.

17 MR BESTER: But you agree with me, and
18 I'm not nit-picking, you agree with me that your reference
19 in the second paragraph of the blog post you specifically
20 only refer to brothers and sisters in Palestine. You don't
21 refer to Britain or the Palestinian diaspora, people who
22 would be living elsewhere. You are specific to people in
23 Palestine. Is that correct on the face of this document?

24 MR MASUKU: They don't have members who
25 are outside the country. So the Palestinians who are in

1 Palestine are suffering. Some children have no fathers
2 there. That's the point I was making. They are in
3 Palestine, yes. We agree on that. And anyway they are
4 subjected to the horror in Palestine but I was saying there
5 is a connection between their suffering in Palestine and
6 their family members who can't go back home. Anyway for
7 me, even if you can go back to the Palestine I would still
8 say it doesn't change anything because daily their land is
9 being taken away for settlements despite United Nations'
10 repeated condemnation.

11 MR BESTER: Then if we can move on. And
12 again let me make it clear. I'm not going to argue with
13 you about the political situation in Palestine. It's not
14 for me or you to have that debate. I'm going to be limited
15 to the issues that arise in this dispute. Then if you can
16 go again to page 16 of the -

17 MR MASUKU: Sorry, page?

18 MR BESTER: Of the trial bundle, page 16.
19 I beg your pardon, it's in fact page 16 of the pleadings
20 bundle. I'm contradicting myself. Now, page 16 again this
21 is your letter of the 4th of June 2009. Do you see that?
22 Now, in paragraph 6 you state and we've looked at this
23 previously, "It is true that I stated during the lecture
24 COSATU has got members here even on this campus. We can
25 make sure that for that side it will be hell." Those were

1 the words you used or words to that effect. That much we
2 know. But let's just go back and understand the context
3 within which these remarks were made, Mr Masuku. Firstly
4 am I correct in saying that COSATU had members on the Wits
5 campus? Is that correct?

6 MR MASUKU: Yes, NEHAWU.

7 MR BESTER: NEHAWU members and they were
8 working for the university as staff members and they were
9 on the campus.

10 MR MASUKU: Yes.

11 MR BESTER: But over and above that
12 COSATU also would've had an association with various
13 student bodies such as the PSC. Am I right?

14 MR MASUKU: No, no, such as SASCO, YCL.

15 MR BESTER: SASCO, YCL.

16 MR MASUKU: PSC are an independent
17 organisation. Yes, we've got mass democratic movement that
18 we relate to.

19 MR BESTER: So let's just understand.
20 These remarks were made. Do you recall what time of day it
21 was because Mr Shulman testified to the effect that the
22 meeting would've been held around lunch time. Does that
23 ring a bell? Does that make more or less sense to you?

24 MR MASUKU: No, I can't remember exactly
25 what time was it but I do remember that it was a - because

1 I think the students used their lunch hour so it should've
2 been after lunch. That's all I can remember, around about
3 there.

4 MR BESTER: Well, let me put to you the
5 5th of March 2009 was in fact a Thursday. And this event
6 took place at a meeting of the PSC, otherwise known as the
7 Palestinian Solidarity Committee. Is that right?

8 MR MASUKU: What about the Palestinian
9 Solidarity Committee? Sorry, I missed that?

10 MR BESTER: The meeting was one organised
11 by the PSC.

12 MR MASUKU: The one at Wits.

13 MR BESTER: Yes, on the 5th of March 2009,
14 yes.

15 MR MASUKU: By PSC, yes, together with
16 the PYA as I indicated earlier, SASCO, YCL and so on.

17 MR BESTER: In fact if we just go to the
18 trial bundle quickly look at the photographs. Page 29.
19 Let's start there.

20 MR MASUKU: Sorry, we start with which
21 one?

22 MR BESTER: Page 29.

23 MR MASUKU: 29.

24 MR BESTER: Yes, that will be the first
25 photograph. Are you there? You are there.

1 MR MASUKU: Yes.

2 MR BESTER: You see that, I'm assuming
3 that's you, Mr Masuku, and there's a big banner behind you
4 that says Wits Palestinian Solidarity Committee. Do you
5 see that?

6 MR MASUKU: I see that banner.

7 MR BESTER: And if you flip to the next
8 page again that same banner and then on page 31 would that
9 be students raising the Palestinian flag, page 31? And
10 then 32 is a good example. So it seems to me that this was
11 officially a meeting of the Wits Palestinian Solidarity
12 Committee in its official context. Is that correct?

13 MR MASUKU: No, this is how we organise
14 meetings. You can be a collusion of organisations. A
15 banner is not necessarily a determinant of who has
16 organised the meeting. We do go into meetings where we
17 have organised the meeting but someone who's co-hosting
18 with us puts a banner. So I want us to separate the banner
19 from who invited the actual - so that's where I wanted -
20 the banner I'm not denying it. Palestinian Solidarity.
21 But the invitation was very clear about the fact that
22 there's YCL and so that's why if you look at one of the
23 pictures.

24 MR BESTER: Yes.

25 MR MASUKU: The person's who's chairing,

1 I think it's the picture after the 29th.

2 MR BESTER: Well, let's go to page 40.

3 That might be useful.

4 MR MASUKU: Sorry, page?

5 MR BESTER: 40.

6 MR MASUKU: Yes, page 40 there is YCL

7 there and -

8 MR BESTER: YCL being Young Communist

9 League.

10 MR MASUKU: Young Communist League, yes.

11 MR BESTER: But these are all

12 organisations as I understand it who have the same

13 viewpoint on the greater conflict between Israel and the

14 Palestinian people in the Middle East. Am I correct?

15 MR MASUKU: Broadly.

16 MR BESTER: Broadly speaking. So then in

17 broad terms members of the PSC Palestinian Solidarity

18 Committee on campus, members of the Young Communist League

19 and so on, students on campus who attended the meeting

20 would most definitely have rather been pro-Palestinian as

21 opposed to being pro-Israeli. Am I correct?

22 MR MASUKU: Yes, in the context of

23 solidarity, yes.

24 MR BESTER: Yes, definitely. I mean, it

25 would be very strange to find someone on the PSC who has

1 strong feelings in favour of Israel. That wouldn't seem
2 right. Am I correct?

3 MR MASUKU: It's just like finding in a
4 football team a tennis player.

5 MR BESTER: Yes.

6 MR MASUKU: So the purpose why the
7 Palestinian Solidarity Committee, the Young Communist are
8 part of a progressive movement in the world and a
9 progressive movement is determined by standing for justice,
10 fighting colonialism, fighting Apartheid. So it would be
11 difficult or a misnomer to find someone who supports
12 injustice within forces for justice.

13 MR BESTER: Now, we know it was more or
14 less a lunch time meeting. And those in attendance at the
15 meeting were more likely to be students at Wits. Am I
16 correct?

17 MR MASUKU: I'm not sure. I'm not an
18 organiser.

19 MR BESTER: But as far as you were aware
20 were there, to the best of your knowledge were there people
21 from outside who attended this meeting?

22 MR MASUKU: I found people from outside
23 too because at Wits there are always different people.
24 There are different seminars and open lectures and
25 different people attend. So I'm not sure but I can only

1 imagine that the students who organised that should be the
2 main attendants that -

3 MR BESTER: So would it be fair to say
4 that the majority of people who were present were most
5 likely Wits students who have an interest in this very
6 polarised subject?

7 [12:18] MR MASUKU: Relatively.

8 MR BESTER: Relatively.

9 MR MASUKU: Yes because I have no - I
10 have no substantive facts about that, I'm just saying
11 relatively.

12 MR BESTER: I accept, you would not have
13 done a head count beforehand to find out who is from
14 outside Wits or who is at Wits, but from what we know
15 mostly likely people who attend these sorts of lunch time
16 events for students are most likely students.

17 MR MASUKU: Okay here is the context. I
18 came late from Cape Town, I land at the airport, I hurry to
19 the meeting, I found the meeting already warming up, so I
20 must admit there was not time to be able determine who is
21 here. But all I know is that the organisers were the
22 students in their various formation.

23 MR BESTER: And the majority of those in
24 attendance would no doubt have supported the Palestinian
25 cause, am I correct?

1 MR MASUKU: Sorry the attendance?

2 MR BESTER: The majority of people who
3 were in attendance at the event would have been supporters
4 of the Palestinian cause, am I correct?

5 MR MASUKU: Not always. I've attended
6 seminars where the majority of people - but it's an open
7 forum, unless the members - but it's most likely, but it's
8 not always the case.

9 MR BESTER: Yes but I'm not asking in
10 general terms about other events, I'm asking about this
11 event in particular.

12 MR MASUKU: That's why I'm saying I've no
13 way to determine certainly that there is, but I can
14 speculate most likely.

15 MR BESTER: Most likely. In fact very
16 few people at that meeting would have been supporters of
17 Israel, is that correct?

18 MR MASUKU: I suppose so because also I
19 suppose more people stand for justice than people who stand
20 for injustice.

21 MR BESTER: Well we can debate what that
22 means, but - the people who heckled you, who heckled you at
23 that meeting they were Jewish students, is that correct?

24 MR MASUKU: Were they?

25 MR BESTER: They were Jewish students, is

1 that correct?

2 MR MASUKU: No I don't know who recorded
3 me.

4 MR BESTER: No not contacted, heckled,
5 the people who heckled you at that meeting.

6 MR MASUKU: Oh heckled, I didn't know
7 whether they were Jewish or not, I just saw a sea of
8 students and I heard hecklings and I even said to the
9 organisers later why didn't you warn me I'd be heckled, who
10 is the heckler. They speculated, so I don't know who's
11 heckling.

12 MR BESTER: So are you saying to me you
13 had no idea that the students there were Jewish?

14 MR MASUKU: All I know is that they were
15 supporters of Israel. I'm not sure if they were Jewish.
16 By the way even, there are - even IFP members support
17 Israel.

18 MR BESTER: Because you see there were
19 people present at that meeting, Jewish students with T-
20 shirts of the South African Union of Jewish Students,
21 otherwise known as SAUJS. Do you remember that?

22 MR MASUKU: I remember seeing one.

23 MR BESTER: Yes.

24 MR MASUKU: Yes.

25 MR BESTER: And also - there were also

1 students who wore the traditional Yarmulke, the Jewish
2 skull cap.

3 MR MASUKU: Sorry the?

4 MR BESTER: There were also students
5 there who wore the traditional Jewish skull cap, otherwise
6 known as a Yarmulke.

7 MR MASUKU: I can't recall properly, but
8 probably.

9 MR BESTER: Probably.

10 MR MASUKU: Like I say because I came
11 late there was no time for context, but probably. But I
12 saw the T-shirt of SAUJS.

13 MR BESTER: Yes. But if someone wears a
14 T-shirt of SAUJS he would most likely be a Jew not so?

15 MR MASUKU: I'm not sure, I've met many
16 people who support Israel who are not Jews.

17 MR BESTER: Yes but that's not the
18 question. Please focus on the question and the question is
19 if someone wears a student organisation T-shirt, in this
20 case a T-shirt from the South African Union of Jewish
21 Students more likely than not he will be a Jew, not so?

22 MR MASUKU: I'm not sure. For me it's
23 not a religion, it's the political principle. There are
24 people who support let's say Donald Trump they don't need
25 to be American, so I have not done this, I can say from a

1 religious point because we must separate religion from the
2 politics. The politics are different from the religion.

3 MR BESTER: Are you saying that you had
4 no idea that there were Jewish students present at that
5 meeting?

6 MR MASUKU: No I said they are most
7 likely because I saw SAUJS T-shirts.

8 MR BESTER: And the people who heckled
9 you were certainly some of those who wore the SAUJS T-
10 shirt. Is that correct?

11 MR MASUKU: I can't remember. The
12 heckling was so confusing and the disruption was so intense
13 you couldn't identify who is what. It literally almost
14 halted to a standstill.

15 MR BESTER: Let's just go to page 16.

16 MR MASUKU: Page 60?

17 MR BESTER: 16 of the pleadings bundle.

18 MR MASUKU: Okay.

19 MR BESTER: Do you accept that you were
20 heckled by a particular section of the audience, is that
21 correct?

22 MR MASUKU: I can't determine but there
23 were people who heckled me, that's what I'm sure of.

24 MR BESTER: Well I'll just read into your
25 words, you said, page 16 paragraph 3. "During the lecture

1 I was repeatedly heckled by a particular section of the
2 audience." Those were your own words, do you agree with
3 that?

4 MR MASUKU: Yes that's what I wrote.

5 MR BESTER: Yes and you say "Most of them
6 seemed to be members of the South African Union of Jewish
7 Students." Do you see that?

8 MR MASUKU: Yes that's what - the advice
9 that I was given when I - that's why I said who are these
10 heckling me and that's what I was told so that's why I then
11 put it there.

12 MR BESTER: Now the people who were in
13 disagreement with the views that you expressed at that
14 meeting were predominantly students from SAUJS, is that
15 correct?

16 MR MASUKU: Sorry students from?

17 MR BESTER: SAUJS, South African Students
18 of Jewish Students. The people who disagreed with you at
19 the meeting, who heckled you were predominantly from the
20 student body for Jewish students. Is that correct?

21 MR MASUKU: No I've said it again, I
22 don't think I could ascertain that. I saw one T-shirt of
23 SAUJS and I'm not sure if I would then conclude from that,
24 but all I can say is that they would call Israel in their
25 hecklings. The words they used like a friend of Hitler,

1 you want us to leave. You hate Israel, you hate - calling
2 those words. One think I can conclude they were supporters
3 of Israel.

4 MR BESTER: And therefore on that premise
5 you naturally concluded that they would have been Zionists,
6 is that correct?

7 MR MASUKU: I said most likely.

8 MR BESTER: Most likely. To the best of
9 your knowledge you were not heckled by a large section of
10 any other demographic group at this meeting. Am I correct?

11 MR MASUKU: Sorry I missed, I'm sorry.

12 MR BESTER: To the best of your
13 recollection you were not heckled by any people from
14 another demographic group because you were not heckled by
15 for instance Indian people or black people or English
16 people or Afrikaans people. The heckling was predominantly
17 from the South African Union of Jewish Students. Correct?

18 MR MASUKU: I met an Afrikaner who even
19 said if I remember some of the words that "We Afrikaners
20 also supported it" so that's why I keep saying I am not
21 sure whether it would be a correct measurement to say they
22 were Jewish. But what I know is the organisation was
23 SAUJS, that's the T-shirt I saw and I was told some are
24 members of it. Then that is the only link I have with it,
25 but I do remember having a conversation with an Afrikaner

1 who said to me that he supports Israel unapologetically.

2 MR BESTER: And was that discussion with
3 that Afrikaans person at that very meeting?

4 MR MASUKU: Sorry.

5 MR BESTER: Was that discussion with that
6 Afrikaans person at -

7 MR MASUKU: No afterwards when we were
8 leaving, we did have - others did approach us as were going
9 and we had conversation, we differ with you but we didn't
10 agree the approaches, there were all sorts of things at the
11 meetings.

12 MR BESTER: So the Afrikaans person, just
13 to clarify because I don't want things to be confused. The
14 Afrikaans person was not present at the meeting, am I
15 correct?

16 MR MASUKU: No, no, no I'm talking about
17 someone who was coming from the meeting. When we went out
18 he is the one who as he was speaking, but inside the
19 meeting he had said as part of the heckling that he
20 supports Israel, but he's an Afrikaans.

21 MR BESTER: From your understanding would
22 you agree with me that the majority of students at that
23 meeting who supported Israel, I want to put to you, would
24 have been Jewish?

25 MR MASUKU: I'm not sure, but most

1 likely.

2 MR BESTER: Most likely.

3 MR MASUKU: Yes.

4 MR BESTER: Then if we can move on, let's
5 go to the trial bundle shall we? Page 260. Are you there?

6 MR MASUKU: Yes.

7 MR BESTER: Part of the transcript. I
8 want to focus on your comments with reference to the
9 Israeli defence force. Now I had the benefit of listening
10 to your evidence in chief this morning naturally.

11 MR MASUKU: Sorry you had the benefit of?

12 MR BESTER: I had the advantage of
13 listening to your evidence in chief this morning and I
14 noticed that you did not say anything about the people who
15 joined the IDF to what racial or ethnic group they come
16 from.

17 MR MASUKU: Because I don't know them.

18 MR BESTER: You don't know them. Yes and
19 it's because you don't know them that I want to put to you
20 that you have no knowledge as to whether people who are not
21 Jewish would join the IDF.

22 MR MASUKU: The IDF in its own propaganda
23 says or should I say propaganda communication says the army
24 is diverse, it's not only made of Jews, that's their
25 communication.

1 MR BESTER: But let's focus on South
2 Africa and what we do know with regard to the events that
3 took place here. You don't have any personal knowledge of
4 other ethnic groups in South Africa having joined the IDF
5 do you?

6 MR MASUKU: I don't know even the Jews
7 who have gone there. I know there are people who are said
8 to be going there to Israel, to the IDF, but I don't what
9 the ethnic background is. So I don't whether they are
10 Afrikaans or they are Jews, whether they are Zulus.

11 MR BESTER: Well let me put it to you
12 it's highly unlikely that anybody other than a Jew will
13 join the IDF firstly. Listen to that proposition and
14 secondly do you have any factual evidence to show that
15 members from other communities have in fact joined the IDF
16 from South Africa?

17 MR MASUKU: Like I said, I've no factual
18 evidence of who is joining IDF. I only know that it has
19 been said over and over that there are people who live in
20 South Africa to join the IDF. There has been no breakdown
21 of who they are. But what I do know is that there are
22 Ethiopians, there are other Africans who have been victims
23 of racism in Israel. Some of them are said to have served
24 in the IDF.

25 MR BESTER: Of course, let me help there

1 perhaps from what I know and that is that Ethiopians who do
2 serve in the IDF are in fact -

3 MR MASUKU: Sorry.

4 MR BESTER: Let me perhaps help you
5 there, just to clarify that for the record. Ethiopians who
6 do serve in the IDF serve in the IDF precisely because they
7 are Jewish.

8 MR MASUKU: No that's fine, that's why
9 I'm saying in my understanding, I didn't know who because I
10 found different people who were supporting Israel. So as
11 to who joined the army and I heard from their
12 communication, they say it, they don't discriminate against
13 anyone, anyone is allowed in the IDF. So it gave me no
14 impression that they are particular groups.

15 MR BESTER: Yes but we're talking at
16 cross purposes again, you're not responding to my question.
17 What I'm putting to you in the context of your remarks on
18 South Africa because your remarks were specific to South
19 Africa, South African families.

20 MR MASUKU: Yes.

21 MR BESTER: I'm saying to you the most
22 likely people from South Africa to go and fight in the IDF
23 would be people of Jewish extraction, that's what I'm
24 saying. You either will admit that or you will say no.

25 MR MASUKU: I don't know, that's what I

1 said.

2 MR BESTER: You don't -

3 MR MASUKU: I said South African families
4 specifically.

5 MR BESTER: Yes.

6 MR MASUKU: Because we were talking about
7 a country that has come from a tragedy that we had in
8 (inaudible). So we South African families, so not mistake.
9 With a Zulu word, a Xhosa word, a British word or South
10 African families, so that's the one I know.

11 MR BESTER: Do you know of any Zulus who
12 have joined the IDF, do you know any people personally,
13 Zulus?

14 MR MASUKU: No I don't know anyone.

15 MR BESTER: Any Xhosas?

16 MR MASUKU: Any?

17 MR BESTER: Any Xhosas who have joined
18 the IDF?

19 MR MASUKU: I don't know anyone.

20 MR BESTER: Sotho?

21 MR MASUKU: I don't know anyone.

22 MR BESTER: Ndebele?

23 MR MASUKU: I don't know anyone.

24 MR BESTER: Do you know any Afrikaans
25 people who've joined the IDF?

1 MR MASUKU: I don't know anyone, except I
2 heard a story that there was an Afrikaans who did, but I
3 can't confirm, I don't know anyone.

4 MR BESTER: No you don't have personal
5 knowledge of that.

6 MR MASUKU: Sorry.

7 MR BESTER: You don't have personal
8 knowledge of that. And if we go with the other language
9 groupings in South Africa Tsonga, Venda, you don't know if
10 any of those have also joined the IDF.

11 MR MASUKU: Not even the Jews or
12 Afrikaners or anyone, there's nobody who has gone to Israel
13 or IDF that I know.

14 MR BESTER: That you know of.

15 MR MASUKU: Yes.

16 MR BESTER: But it is something that you
17 nevertheless feel strongly on for someone who doesn't know
18 a great deal, you feel very strongly about that issue.

19 MR MASUKU: There are people in the
20 Caribbean who felt strongly about the liberation of South
21 Africa, but they'd never even seen the first port of entry
22 of South Africa. So feeling strong about justice doesn't
23 need geography.

24 MR BESTER: Well I'm not going to debate
25 politics with you. I understand that you are indeed

1 familiar with the regulation of Foreign Military Assistance
2 Act. Do you know the Act well?

3 MR MASUKU: I can't say well, but I know
4 it.

5 MR BESTER: Because in fact in response
6 to the complaint from the South African Human Rights
7 Commission in relation to these words you specifically made
8 reference to the Foreign Military Assistance Act. Do you
9 remember that?

10 MR MASUKU: I'm sorry let me get to the
11 letter by that page.

12 MR BESTER: It will be page 17.

13 MR MASUKU: Okay so paragraph?

14 MR BESTER: Paragraph 11.

15 MR MASUKU: Yes I remember that.

16 MR BESTER: What you say in the final
17 sentence you say "What concerns us is that such persons by
18 their actions are in violation of the regulation of Foreign
19 Military Assistance Act. And as such are committing crimes
20 that are prosecutable in South Africa." Do you see that?

21 MR MASUKU: Yes.

22 MR BESTER: Yes so at the time you claim
23 that that was your main interest.

24 MR MASUKU: What are my - sorry.

25 MR BESTER: At the time you claimed that

1 a possible violation of that legislation was your main
2 interest, that was your concern.

3 MR MASUKU: The primary one was a moral
4 question. I've referred to it that COSATU has principles
5 of solidarity to oppress people morally. The Foreign
6 Military Assistance was just to indicate that legally there
7 is also a problem, but the moral political conscience is
8 more primary.

9 [12:38] MR BESTER: Well, given that you are
10 familiar with the Act then you will know that in terms of
11 the legislation it's only the person who actually offers
12 foreign military assistance who will be held criminally
13 liable.

14 MR MASUKU: Sorry, it will be a person
15 who?

16 MR BESTER: It will only be the person
17 who offers foreign military assistance, in other words who
18 fights in a foreign army.

19 MR MASUKU: Yes.

20 MR BESTER: Who opens himself open to
21 criminal prosecution.

22 MR MASUKU: Absolutely.

23 MR BESTER: You agree with that?

24 MR MASUKU: Yes, that's why there's a
25 docket.

1 MR BESTER: I beg your pardon?

2 MR MASUKU: That's why there's a docket.

3 MR BESTER: Yes.

4 MR MASUKU: Against those who

5 participate, the South Africans who participate. I don't

6 know them but I know there's a docket that is doing the

7 rounds now.

8 MR BESTER: But you did not open the

9 docket yourself, did you?

10 MR MASUKU: No.

11 MR BESTER: Yes. In fact you have not

12 taken any steps to report matters of this nature to the

13 police, have you?

14 MR MASUKU: Because the people who advise

15 us are the ones who have said they are collecting

16 information and they have submitted the dockets so we

17 didn't need to do something else.

18 MR BESTER: Right, so you don't know

19 personally. You're relying on what others tell you.

20 MR MASUKU: Exactly.

21 MR BESTER: Yes, right. So and given

22 that you and I are in agreement that it is then only the

23 person who renders the foreign military assistance who

24 stands to be criminally liable your remarks, Mr Masuku, in

25 fact went further than that. What you in fact said was

1 something not directed at the person concerned but at their
2 families. You remember that.

3 MR MASUKU: Yes, that's what it says
4 here.

5 MR BESTER: Yes, you said, I want to
6 repeat on page 260 at the bottom of page 260. "The
7 following things are going to apply. 1) Any South African
8 family I want to repeat so that it's clear for anyone, any
9 South African family that sends its son or daughter to be
10 part of the Israeli Defence Force must not blame us when
11 something happens to them with immediate effect." You did
12 not speak of the actual soldier who fights in the IDF. You
13 were specific to the families. Is that correct?

14 MR MASUKU: Both.

15 MR BESTER: Show me where you refer to
16 the soldier.

17 MR MASUKU: Sorry?

18 MR BESTER: Show me in the transcript
19 where you made mention of the soldier.

20 MR MASUKU: The Foreign Military
21 Assistance covers that.

22 MR BESTER: No, no, I'm referring to the
23 transcript. Let's focus on the transcript on page 260.

24 MR MASUKU: Yes, that's why I'm saying
25 there is a context. This paragraph I was speaking to the

1 families but on this paragraph we were referring to the
2 persons who are covered already enough by the Foreign
3 Military Assistance Act.

4 MR BESTER: Well, let's just clarify two
5 things because I'm concerned again that we're talking at
6 cross purposes. You're not answering my questions. One,
7 you make no reference to the Foreign Military Assistance
8 Act during your speech. Am I correct?

9 MR MASUKU: Okay. In my - that's why I
10 wrote myself.

11 MR BESTER: No, no, I'm not talking about
12 the letter. I'm talking about the transcript of your
13 speech.

14 MR MASUKU: Okay, I was speaking in
15 context to the speech where in the speech I had referred to
16 the IDF. So this was the context because the South African
17 Board of Jewish Deputies laid a complaint with the South
18 African Human Rights Commission.

19 MR BESTER: Yes, that we know.

20 MR MASUKU: And I was called to explain
21 so I was - the Foreign Military Assistance Act was to
22 explain my remark at Wits on the IDF.

23 MR BESTER: Yes.

24 MR MASUKU: That it's because of that
25 Foreign Military Assistance Act.

1 MR BESTER: Just to go back your remarks
2 at Wits did not contain any remark where you made reference
3 to the Foreign Military Assistance Act.

4 MR MASUKU: Absolutely. But they refer
5 to IDF.

6 MR BESTER: Yes, and in this passage that
7 I've read to you now where you say, "The following things
8 are going to apply. 1) Any South African family I want to
9 repeat so that it's clear for anyone," what I've just read
10 to you on page 260 your core focus there is the South
11 African family, not so?

12 MR MASUKU: I think you keep missing the
13 point. I have said it. The families appear once and
14 there's nowhere else where it appears. The IDF appears
15 more than - I spoke about it at Wits and I spoke about it
16 here. The issue is that families have complained in South
17 Africa, during the Conscription Act when things were
18 happening families were receiving bodies from Angola.
19 Someone was joking about it that they were saying they were
20 bitten by mosquitoes. So families are the first to feel
21 the effects. So now the family I mentioned only once. The
22 issue was the IDF.

23 MR BESTER: So families are the first
24 ones to feel the effects of war.

25 MR MASUKU: Yes.

1 MR BESTER: Right, but then you say in
2 respect of those families you don't sympathise with them.
3 You in fact say, "Any South African family that sends its
4 sons or daughter to be part of the Israeli Defence Force
5 must not blame us when something happens to them with
6 immediate effect." Do you see that?

7 MR MASUKU: The biggest problem in that
8 context was that we were given the background that there
9 are families that have said they are willing to send their
10 children. That was media news. I can confirm it. So in
11 my speech I wasn't specific that if we are also party to
12 the crime of the IDF as South Africans then something is
13 wrong with us having been through the experience. That was
14 the point.

15 MR BESTER: So again you're relying on a
16 media report. It's not something that you know personally
17 of.

18 MR MASUKU: No, in a public address we do
19 use media reports.

20 MR BESTER: Yes, but that's different.
21 Let me put it to you clearly so there's no
22 misunderstanding. That's different from having personal
23 knowledge of something. Do you accept that?

24 MR MASUKU: Personal knowledge of?

25 MR BESTER: You have no personal

1 knowledge of whether families in fact wanted to send their
2 children to go fight in the IDF. You are relying for that
3 allegation on what you read or saw in the media.

4 MR MASUKU: I've relied on those and also
5 people who are more involved in that work, in that area of
6 work, ja. I'm not doing that kind of work so I relied, ja.

7 MR BESTER: You simply don't know.

8 MR MASUKU: I do know something. That's
9 why I could speak about IDF.

10 MR BESTER: Yes.

11 MR MASUKU: That it's some people who are
12 coming from South Africa.

13 MR BESTER: I accept that you know
14 something about the IDF. Let me put it to you, Mr Masuku,
15 you don't know, you can't say to this court -

16 MR MASUKU: That's why -

17 MR BESTER: No, no, no, let me finish.
18 Let me finish. You can't say to this court because you
19 simply don't know whether other racial groups go fight in
20 the IDF. That's something that you don't know.

21 MR MASUKU: I don't know which racial
22 group in the first place. I agree with you on that but I
23 don't know which racial group in the first place, not that
24 I don't know whether other - I don't know any racial group
25 that goes there so I was referring to South Africans.

1 South Africans are not Jews. South Africans are not Zulus.
2 South Africans are the diversity of South Africa. So any
3 South African.

4 MR BESTER: But within that diversity let
5 me put it to you people still practice their particular
6 religions and cultures. You accept that.

7 MR MASUKU: Absolutely.

8 MR BESTER: And let me put it to you
9 further, the only possible South Africans who would fight
10 in the IDF are Jewish. What do you say to that?

11 MR MASUKU: I can't confirm. I'm not
12 sure.

13 COURT: Mr Bester, you have dealt with
14 that. It's not the first time you put it to the witness.
15 You recall that.

16 MR BESTER: Just to clarify that, M'Lord.

17 COURT: Yes.

18 MR BESTER: I'm about to move on. Then
19 let me just move on from there. You did mention reference
20 to dockets just now but we've covered that. But when
21 someone commits a crime the appropriate course of action is
22 that one reports the matter to the police and the police
23 then do an investigation. Is that correct?

24 MR MASUKU: Ideally.

25 MR BESTER: Ideally that's how it should

1 happen.

2 MR MASUKU: Yes.

3 MR BESTER: And then if the police are of
4 the view that a crime has been committed or that there's a
5 case to be answered for they refer that to the prosecuting
6 authority, the NPA, and they will then prosecute. Am I
7 correct?

8 MR MASUKU: I have indicated there are
9 certain lawyers who have not made it a secret, even in
10 public they have released they are working on a docket of
11 those South Africans who are doing that. So it didn't need
12 us anymore to do that because there is that information.

13 MR BESTER: I'm just asking you in
14 general terms.

15 MR MASUKU: Okay.

16 MR BESTER: Please answer the question.

17 MR MASUKU: No, I agree with you.

18 MR BESTER: It's not a loaded question.
19 It really is a simple question.

20 MR MASUKU: Okay, okay.

21 MR BESTER: In your speech from what we
22 see in the transcript you made no reference to that process
23 insofar as the docket or a prosecution. That wasn't said
24 by you.

25 MR MASUKU: No, at that time the docket

1 was not in.

2 MR BESTER: Yes, but in general terms.

3 MR MASUKU: Remember we are in the eight
4 year now since this happened. At that time we were still
5 talking about concerns that we are hearing. Later an
6 update from lawyers indicated there is a process. So it
7 said to us that there was a - so we are not much involved
8 in that because there are people who know it better.
9 That's all I was emphasising.

10 MR BESTER: But none of that appears from
11 your statement because it was much later only. Am I
12 correct?

13 MR MASUKU: Sorry?

14 MR BESTER: None of that would appear
15 from your statement because at the time of your statement,
16 of your remarks before Wits that process had not yet
17 unfolded. Am I correct?

18 MR MASUKU: I'm not sure. I only heard
19 it a bit later but we were expressing concern only at that
20 time.

21 MR BESTER: Also to the extent that this
22 was a concern of you, Mr Masuku, I don't understand you at
23 Wits to have said words along these lines. "Comrades, if
24 you know of anybody joining the IDF then please approach
25 your nearest police station to lay criminal charge." That

1 wasn't said by you. Am I right?

2 MR MASUKU: It's immaterial.

3 MR BESTER: I'm not asking you to judge
4 the statement. I'm simply asking you to look at the
5 transcript and tell me whether you made any remarks of that
6 nature, yes or no.

7 MR MASUKU: It's covered by the remark on
8 not going for the IDF. Of course the PSC because they are
9 involved they would know far better than I do and they
10 always have these issues. They deal with them better. So
11 I wouldn't much - we were there, I was there to speak about
12 workers and the angle of workers and how they relate to the
13 solidarity struggle. They deal with those matters more
14 intensely than we do. We only deal with worker solidarity
15 so I was called to speak about worker solidarity. These
16 remarks were not the substance of the focus so it's in that
17 context that I was explaining that I might have not needed
18 to get into that because I was there with a topic to speak
19 on the achievements of the dock workers in Durban.

20 MR BESTER: Yes, no, that's quite
21 correct. That wasn't the substance of your remarks to deal
22 with the campaign of bringing people who violate that
23 particular legislation to book. That wasn't the focus of
24 your campaign. What you in fact said was that any South
25 African family that sends their children to the IDF they

1 must not be surprised if something happens to them. That's
2 what you said. Am I correct?

3 MR MASUKU: Yes, that's what I said.

4 MR BESTER: Yes. Let's move on. Now,
5 insofar as soldiers who have joined the IDF once they're in
6 Israel you accept that they are beyond your reach and
7 control. There's not much you can do about them other than
8 campaign and protest and so forth. It would be very
9 difficult for you to bring them to book once they are
10 actually in Israel. Is that correct?

11 MR MASUKU: Directly.

12 MR BESTER: Directly.

13 MR MASUKU: It's correct but indirectly
14 there are processes where the United Nations Human Rights
15 Council that we know that are - for instance the Goldstone
16 Commission was commissioned by the United Nations. So
17 there are various processes that have called Israel to
18 order and that are far advanced. All we can do is to add
19 our voice on that and add to the campaign.

20 MR BESTER: But I'm simply asking you
21 about you personally, what you can or cannot physically
22 achieve. There was nothing, there's nothing that you can
23 do in that instance. Am I right?

24 MR MASUKU: We can campaign and name and
25 shame. That's what we do. We expose.

1 MR BESTER: And you would do so in
2 relation to people in South Africa. Am I correct?

3 MR MASUKU: Globally. I'm the
4 international secretary so I do so globally.

5 MR BESTER: Yes.

6 MR MASUKU: Yes.

7 MR BESTER: You would then go overseas
8 and you would protest on behalf of COSATU and you would
9 join a campaign or a protest overseas. But insofar as the
10 constituents of COSATU, the people on the ground,
11 organisations with whom it shares a close association on
12 this issue such as the PSC at Wits they would campaign
13 against people in South Africa. Am I correct?

14 MR MASUKU: You are correct but also -

15 MR BESTER: - that campaign. I beg your
16 pardon?

17 MR MASUKU: No, I'm sorry, I was saying
18 also they link, do link up internationally. There is a PSC
19 Britain, PSC wherever. So ja, they do.

20 MR BESTER: No, no, there's no dispute
21 that the PSC has got an international presence.

22 MR MASUKU: Okay.

23 MR BESTER: That's not what I'm asking.
24 I'm simply asking insofar as South Africa and what you can
25 do here on the ground. You would then campaign locally on

1 the ground here.

2 MR MASUKU: Okay, let me explain this.

3 COSATU has an organising and campaigns department, has an
4 international department. The international department's
5 duty is to interface with the - in fact in this campaign
6 the lead department on the campaign, the conceptualisation
7 by the international department but the organising and
8 campaigns department actually carries the campaign so
9 that's why I was indicating the disparity there. But if
10 you would go to the border of Zimbabwe for instance both
11 international and organising will be leading that to
12 blockade Zimbabwe. So the point of the matter is that
13 there is an interface but the lead department on organising
14 and campaigning is the organising and campaigns department.

15 MR BESTER: Mr Masuku, during your
16 remarks at Wits did you ever to the best of your
17 recollection make any reference to violence?

18 MR MASUKU: Reference to?

19 MR BESTER: To violence.

20 MR MASUKU: I can't recall unless in
21 context.

22 MR BESTER: The question I put to you
23 whether during your remarks at Wits you at any point made a
24 reference to violence.

25 MR MASUKU: In what context?

1 MR BESTER: No, no.

2 MR MASUKU: No, I'm not asking a
3 question. I'm just saying in what context, it depends. It
4 depends. When I say we condemn violence, yes, I refer to
5 violence. When I say people who use violence, yes, I do
6 remember that.

7 MR BESTER: Did you at any stage
8 according to you make an explicit or implicit threat of
9 violence?

10 MR MASUKU: No.

11 MR BESTER: Are you sure about that?

12 MR MASUKU: Of me calling for violence?

13 MR BESTER: Explicit or implicit.

14 MR MASUKU: I don't recall that.

15 MR BESTER: Did you at any stage discount
16 the prospect that violence might follow?

17 MR MASUKU: I only warned about the fact
18 that if people can come to a meeting and disrupt like this
19 do they expect gifts or prayers. That's the only thing I -

20 MR BESTER: So when people come to a
21 meeting and they disrupt you're happy to use violence
22 against them. Is that what you're saying?

23 MR MASUKU: I said what do they expect.
24 That's what I said at Wits in fact to one of them. If you
25 come and disrupt people in a meeting, peaceful that are

1 protected by the Constitution do you expect gifts and
2 prayers from them? That's what I asked the students.

3 MR BESTER: I'm glad you mentioned the
4 Constitution because let's look at the Constitution or
5 let's think about the Constitution or have the Constitution
6 in mind while we read your remarks. If you go to page 261.

7 MR MASUKU: Sorry, page?

8 MR BESTER: 261 of the transcript. Let
9 me read to you what you said on page 261 at the bottom of
10 the page. You said the following. "When it comes to
11 talking we can fight."

12 MR MASUKU: Sorry, sorry, 231.

13 MR BESTER: 261, 261.

14 MR MASUKU: 261.

15 MR BESTER: Ja, 261.

16 MR MASUKU: 261, okay, the bottom of the
17 page.

18 MR BESTER: Yes. "When it comes to
19 talking we can fight. When it comes to fighting no one
20 must entertain the assumption he possesses monopoly over
21 violence." Do you see that?

22 MR MASUKU: Yes, I see that.

23 MR BESTER: And then you continue. "So
24 we don't want to warn everyone. We are just talking now
25 because we can talk but when it comes to physical fighting

1 no one must entertain an illusion. We have been there in
2 the trenches against Apartheid and we can still do it. So
3 let us not entertain the assumption that if someone has a
4 different view let's talk. But if someone wants to fight
5 we will do that. COSATU has got members here even in this
6 plenary. We can make sure that anyone that," and then it
7 goes indistinct. Let me put it to you, Mr Masuku, in the
8 context of what you referred to as the Constitution just
9 now certainly as how I understand the Constitution which is
10 premised on allowing for the free exchange of ideas, robust
11 discussion but tolerance for views and perspectives of
12 other people. Would you agree that your reference to
13 violence and not discounting violence is rather
14 unfortunate? Would you agree with me on that?

15 MR MASUKU: Okay. The context says
16 itself for itself. We are already in a chaos. The meeting
17 has been disrupted. Then we say by the way don't think
18 because we love peace we are not able to - I'm talking
19 about what I said here - we are not able to fight. So
20 don't mistake that. So this meeting was peacefully
21 organised. So we have a duty to make sure that we can all
22 talk and differ. That's what the Constitution says. But
23 it's not perpetuating violence to say if you fight don't
24 think that I will wait and only wish.

25 MR BESTER: Let me put it to you, Mr

1 Masuku, that no student during that meeting threatened you
2 with violence. Are you able to dispute that?

3 MR MASUKU: Sorry, the students?

4 MR BESTER: No student at that meeting at
5 any stage threatened you with violence.

6 MR MASUKU: They were, who said if you do
7 things about Israel, Israel will defend itself and we will
8 defend Israel at all costs. There was a physical exchange
9 of many words and threats. It's words at Orange Grove. At
10 Orange Grove there were comrades who were pouring blood.

11 MR BESTER: Can you show me in the
12 transcript where that was said, where those remarks, those
13 threats of physical violence were made on the transcript.
14 Are you able to identify that?

15 [12:58] MR MUSUKU: No, no of course it is not
16 here but I am telling you because I was there practically.
17 We were stopped physically not by the SAPS by a private
18 security company that we told. We asked how does a private
19 security company run the country so I am just making, that
20 there were threats and physical instances.

21 MR BESTER: Yes, but I believe you are
22 talking about the march to the Jewish Community Centre?

23 MR MUSUKU: Yes, I was comparing the two.

24 MR BESTER: Yes, I am not referring about
25 that, that wasn't my question. My question was at this

1 Wits meeting, I put it to you clearly and I don't
2 understand why you didn't answer the question. The
3 question was no student threatened you with violence at
4 that meeting.

5 MR MUSUKU: They were in the loud noise.

6 MR BESTER: In the loud noise?

7 MR MUSUKU: Yes.

8 MR BESTER: We are going to adjourn for
9 lunch now. Can I ask you during the lunch adjournment,
10 look at the transcript and find for me where you can pick
11 that up.

12 MR MUSUKU: We couldn't find it. But I
13 can tell you from experience I can't have a reason to lie,
14 there were students who said Israel has a right to defend
15 itself physically in the hecklings, I was listening. It is
16 just that of course I am not sure who was recording and
17 what part was recorded or not but who said Israel has a
18 right to defend itself and we have a right to defend it
19 too. They were saying that to me while I was speaking.

20 MR BESTER: Perhaps just consider the
21 transcript over lunch and we will take that further after
22 lunch. M'Lord, I see it is on the dot 1 o'clock.

23 COURT: On a Friday afternoon. Yes, I
24 shall adjourn,

25 [COURT ADJOURNS COURT RESUMES]

1 [13:59] COURT: Mr Masuku, you confirm that
2 you're still under oath? Say something.

3 MR MASUKU: Oh.

4 Just confirming too for the record to take up
5 your voice.

6 MR MASUKU: Okay.

7 COURT: Do you confirm? Do you confirm
8 that you're under oath still? Do you confirm that? That
9 you're still under oath.

10 MR MASUKU: I'm still under oath.

11 COURT: Yes, proceed, please.

12 CROSS-EXAMINATION BY MR BESTER (CONTD.):

13 May it please the court, M'Lord. Mr Masuku, shortly before
14 the lunch adjournment I asked you to please consider the
15 three transcripts to establish for me whether you could
16 find on the transcripts any evidence of violence having
17 been threatened by any of the students towards you. Did
18 you have a chance to do that during the lunch adjournment?

19 MR MASUKU: As I indicated even these
20 transcripts, Your Honour, I don't know how they came here
21 and I can say with confidence there were many events that
22 are not in this transcript and pictures. So I have no
23 doubt that there are so many things that have happened, so
24 that is why I was saying I do not know even these ones how
25 they came here, so I wouldn't have them, but I'm testifying

1 as someone who was there on the day.

2 COURT: Well, the question really is from
3 what you have before you, whether complete or incomplete,
4 is there any signs of violence which was directed at you?

5 MR MASUKU: Sorry, I missed the question,
6 Judge.

7 COURT: I say the question really is on
8 what you have, the transcripts -

9 MR MASUKU: Yes.

10 COURT: Whether they are complete or not,
11 is there any - when you read it during lunch was there any
12 indication of violence directed at you?

13 MR MASUKU: Except for swear words -

14 COURT: Yes?

15 MR MASUKU: - and abusive words like "Oh
16 Hitler."

17 COURT: Like?

18 MR MASUKU: "Oh Hitler."

19 COURT: I see.

20 MR MASUKU: That's what was said to me.
21 So there were many others that were used, so - but I'm not
22 sure if by violence you mean - ja, it depends on what you
23 mean, but that's all I can say for now, that there were
24 serious swear words like that.

25 MR BESTER: Let me perhaps just clarify

1 what I mean by violence. What I mean thereby is a threat
2 of physical harm. That's what I mean by violence, that you
3 can confirm that on the transcript none of the students
4 threatened you with physical harm. Is that correct? On
5 the transcript.

6 MR MASUKU: Not, there's no transcript,
7 but I was threatened with physical harm.

8 MR BESTER: Let's move on. If I can ask
9 you to turn to the trial bundle, page 259 -

10 MR MASUKU: Sorry, in which one?

11 MR BESTER: The trial bundle. I don't
12 believe it's that bundle. On the spine it should say
13 pleading - trial bundle, page 259. That's the correct one,
14 yes. Now at the base of page 259 you said - are you there
15 at page 259?

16 MR MASUKU: Yes, no I've got it.

17 MR BESTER: Page 259, at the base of the
18 page you say, "COSATU is with you. We will do everything
19 to make sure that, whether it's at Wits University or
20 whether it's at Orange Grove, anyone who does not support
21 equality and dignity, who does not support the rights of
22 other people in the world, must face the consequences, even
23 if it means that we will do something that may necessarily
24 cause what is regarded as harm." You see that?

25 MR MASUKU: Yes.

1 MR BESTER: Yes, now as I understand it
2 you appear to have made reference here to anyone who does
3 not support equality and dignity, as a general statement.
4 Am I correct?

5 MR MASUKU: Yes.

6 MR BESTER: Yes, but you would agree with
7 me, Mr Masuku, that people who do not support equality and
8 who do not support dignity - unfortunately as it is there
9 are many of them in this world, not so? In fact we find
10 them not just in South Africa, we find them in the United
11 States, but let's talk about our own country. We may well
12 find them, for lack of a better example, in a place like
13 Ventersdorp or Orania. They will be there.

14 MR MASUKU: Yes.

15 MR BESTER: Am I right?

16 MR MASUKU: Yes.

17 MR BESTER: Yes, but in your example you
18 singled out only two specific locations, one being Wits,
19 the other one being Orange Grove, from what I've read to
20 you. Am I correct?

21 MR MASUKU: Yes.

22 MR BESTER: Yes.

23 MR MASUKU: As examples.

24 MR BESTER: Well, you said whether it's
25 at Orange Grove -

1 MR MASUKU: Yes.

2 MR BESTER: - whether it's at Wits or
3 whether it's at Orange Grove. Those were the two instances
4 that you referred to.

5 MR MASUKU: That I experienced.

6 MR BESTER: But you're also aware of the
7 fact, just to go back, that people who do not support
8 equality and freedom are at many other places also.

9 MR MASUKU: Yes, no they're in many other
10 places, you're right.

11 MR BESTER: No doubt in your native
12 Swaziland you also would have experienced instances of
13 that.

14 MR MASUKU: Absolutely.

15 MR BESTER: Right. Now you know as a
16 matter of fact that there are Jewish students at Wits. You
17 know that.

18 MR MASUKU: Yes, I know.

19 MR BESTER: And you also know that
20 traditionally there is a significant Jewish population in
21 Orange Grove and the area around that, correct?

22 MR MASUKU: I can't confirm, I'm not
23 sure. I only know their headquarters of the South African
24 Zionist Federation and South African Deputies which we were
25 targeting, and at Wits I know that we had an experience

1 with people who support Israel. That was the basis of my
2 talk.

3 MR BESTER: You've already clarified to
4 me that you know, or you knew that there were Jewish
5 students at Wits, but insofar as Orange Grove is concerned
6 what you're saying is that in the area close to Orange
7 Grove the headquarters of the South African Zionist
8 Federation would have been.

9 MR MASUKU: Sorry, you said what about
10 the area?

11 MR BESTER: What did you say about the
12 example of Orange Grove? Who was situated there?

13 MR MASUKU: No, I said the two, other
14 than the lecture at Wits -

15 MR BESTER: Yes, yes, yes.

16 MR MASUKU: - Orange Grove comes in
17 because when the two organisations, South African Board of
18 Jews Deputies and Zionist Federation were the supporters of
19 the war against Palestinians. We then identified and we
20 advised that their headquarters is based there, so our
21 primary going to Orange Grove, the only thing that linked
22 us was to march on the headquarters of those two
23 organisations.

24 MR BESTER: Yes, and you will agree with
25 me that at those headquarters there are in fact - and you

1 may or may not know this, but let me put it to you - those
2 headquarters where you marched to in fact house a whole
3 host of different Jewish organisations. Would you dispute
4 that?

5 MR MASUKU: I wouldn't know. I wouldn't
6 dispute it because I have no knowledge of that.

7 MR BESTER: Yes. And let me put it to
8 you further that all of those Jewish organisations at that
9 community headquarter in fact serve the interests of the
10 South African Jewish community. Would you dispute that?

11 MR MASUKU: I'm hearing it for the first
12 time, so I wouldn't dispute, I wouldn't know. I didn't
13 know.

14 MR BESTER: Well, it's a bit strange that
15 you say you don't know because what you have said to me is
16 that you do know that the South African Jewish Board of
17 Deputies is based there and you would surely know that they
18 serve the interests of South African Jews. Is that
19 correct?

20 MR MASUKU: That's why when we started,
21 Your Honour, I indicated that there are many Jews who have
22 distanced themselves from this organisation, so I can't be,
23 I can't know how many Jews those two organisations
24 represent, but I have a series of organisations that I've
25 dealt with that distance themselves from those two

1 organisations.

2 MR BESTER: Please, Mr Masuku, we're
3 wasting lots of time because of your failure to answer the
4 question. I did not ask you at any point to put a number
5 to how many Jews support this or that organisation. I
6 simply asked you whether you dispute the fact that the
7 South African Jewish Board of Deputies furthers the
8 interests of the South African Jewish community, and you
9 can either dispute that or you can say you don't know.

10 MR MASUKU: I do not know. That's what I
11 only saw on e-mail.

12 MR BESTER: I beg your pardon?

13 MR MASUKU: That's what I only saw in one
14 of the e-mails.

15 MR BESTER: You saw that in one of the e-
16 mails at the time?

17 MR MASUKU: Sorry?

18 MR BESTER: You saw that in one of the e-
19 mails at the time on the blog post?

20 MR MASUKU: No, afterwards when the case
21 was laid. In fact when they reported to the South African
22 Human Rights Commission, to be precise.

23 MR BESTER: Would you dispute the fact
24 that in the area around Orange Grove that there are a
25 significant number of Jewish shuls or synagogues, as they

1 are referred to? Do you dispute that?

2 MR MASUKU: I didn't know. So I can't
3 dispute it, but I can't agree with it because I don't know.

4 MR BESTER: Mr Masuku, you well know that
5 the State of Israel, the Israeli government in South Africa
6 is represented by its embassy, not so?

7 MR MASUKU: Sorry, repeat that.

8 MR BESTER: You are aware of the fact
9 that the State of Israel, its government is represented by
10 the Israeli Embassy in this country. You know that, right?

11 MR MASUKU: Yes.

12 MR BESTER: And that embassy in fact is
13 situated not in Orange Grove, but it is situated in
14 Pretoria. You know that?

15 MR MASUKU: I know. I've marched there
16 several times.

17 MR BESTER: Mr Masuku, you mentioned -

18 COURT: Mr Bester -

19 MR BESTER: Yes, M'Lord.

20 COURT: It is customary and good manners

21 -

22 MR BESTER: Indeed, I do apologise.

23 COURT: - in a court of law if you

24 consult with your colleague, attorney or junior or

25 whatever, you ask the indulgence of the court. You don't

1 leave the court in silence and speculating.

2 MR BESTER: I do apologise for that,
3 M'Lord.

4 COURT: Yes.

5 MR BESTER: I just got carried away in my
6 own thoughts, my apologies. Mr Masuku, let's just
7 continue. With reference to Orange Grove you mentioned two
8 organisations. You mentioned the Jewish Board of Deputies
9 and you mentioned the South African Zionist Federation, but
10 as far as you are concerned you would treat both
11 organisations as being Zionist organisations. You don't
12 draw a distinction between the two. Is that correct?

13 MR MASUKU: We - these are the bases of
14 our march to them. They released a statement, there were
15 statements where they were supporting the war. So other
16 than the march to the embassy we decided to also march to
17 those who support a war against children and women in
18 Palestine. That was the basis. Other than that I've not
19 had any interaction with them or know none, know much about
20 it except for that particular event for the release of the
21 statement in support and then that's when we decided if you
22 want to also fight those, the representative of the
23 embassy, you also fight those who support.

24 MR BESTER: On what do you base the
25 factual allegation, Mr Masuku, that these people in Orange

1 Grove support a war on women and children? How do you
2 arrive at that conclusion?

3 MR MASUKU: They released a statement
4 openly where they were supporting the war in Israel. It's
5 even on the website even up to this day. Both of them - in
6 fact I think - ja, both of them, and they were supporting
7 and giving morale to the soldiers of the ITF in other
8 statement, so I'm just saying that they have never made it
9 secret, it's been open.

10 MR BESTER: But let me just clarify
11 something with you. The statement that you are referring
12 to - and you can take me there if you so wish, but they
13 don't say "We support a war on women and children." Am I
14 correct?

15 MR MASUKU: They said they support
16 Israel, and what is Israel doing? They support Israel's
17 war and it's because of the terrorists, they are fighting
18 terrorists. They explain, they keep contact, but they
19 don't hide the fact that they support the war against Gaza.
20 They didn't hide that. Yes, that is my edition to say who
21 are the war directed against. The majority of the people
22 who died are women and children.

23 MR BESTER: We'll get to that, but it's
24 really your interpretation then, it's your edition, as you
25 say.

1 MR MASUKU: No, that's fine.

2 MR BESTER: Am I correct?

3 MR MASUKU: Yes.

4 MR BESTER: Yes. Then if I can ask you -

5 MR MASUKU: No, no, it's not - it's the
6 interpretation of statistics.

7 MR BESTER: We'll get to the figures.

8 I'll get to the figures. If I can ask you page 265 -

9 MR MASUKU: Sorry, page?

10 MR BESTER: 265. Again if I understand
11 your evidence in chief and your testimony during cross-
12 examination the point which you wish to bring across is one
13 in terms of which you say your target has all along been
14 Zionists and not Jews. That's really how I understand your
15 case. Is that correct?

16 MR MASUKU: Ja, no in general, broadly
17 that's what -

18 MR BESTER: Do you feel you have always
19 maintained that clear distinction?

20 MR MASUKU: Sorry?

21 MR BESTER: Do you believe you have
22 always maintained that distinction clearly?

23 MR MASUKU: Where it happens that it's
24 not Zionists who support Israel and their wrongs I
25 criticise, even if it's Zulus. We had a march to Pretoria

1 and the IFP marched in support of Israel, so I'm just
2 making them - it's Zionists who are the problem, but it
3 does mean anyone who justify the wrong that Israel does
4 also gets criticised. It's natural.

5 MR BESTER: I'm not concerned with other
6 groups. I'm concerned with the distinction which you claim
7 to have drawn between Zionists and Jews. Can we please
8 focus on that distinction for the moment? I'm not
9 interested in Zulus or anybody else for now, let's focus on
10 that distinction. What I put to you is have you always in
11 your view maintained the clear distinction between Zionism,
12 your attack on Zionism and Jews, and Jewish people. Have
13 you kept that distinction clear at all times?

14 MR MASUKU: Partly, but I explained to
15 you that also there are other supporters of Israel who
16 might not be. I was summarising that. So the point I was
17 making, when I criticise you it doesn't mean you are always
18 a Zionist. You can be a Zionist because the Zionist
19 doesn't hide the fact that they support the State of
20 Israel, but I was saying in other instances others who may
21 not necessarily be in that group you are talking about but
22 who support the State of, the apartheid State of Israel,
23 are also a target. So I was just adding that, but I agree
24 with you that the Zionists are the primary supporters of
25 the State of Israel and therefore inevitable.

1 MR BESTER: So if a Zulu supports Israel?

2 MR MASUKU: Sorry?

3 MR BESTER: If a Zulu person supports
4 Israel in your view he is then a Zionist?

5 MR MASUKU: He might be a Zionist, he
6 might not. I don't know, but all I know is that we had a
7 march together, they were supporting Israel, we were
8 supporting Palestine, in Pretoria.

9 MR BESTER: Let's just clarify something.
10 I need to understand your definition of, or at least how
11 you understand Zionism. If a Jew supports Israel he would
12 be a Zionist, not so?

13 MR MASUKU: No, no, no, Zionism is a
14 movement. Not all Jews are members of the Zionist
15 movement.

16 MR BESTER: No, we never said that. We
17 never said that. I'm merely asking you a hypothetical. If
18 a Jewish person supports Israel in your view does that then
19 make him a Zionist?

20 MR MASUKU: Not necessarily. It's a
21 movement. Zionism is a movement. That's why I qualified
22 later to say even those who support Israel, because I
23 wanted to accommodate that, because Zionism is a movement.
24 It's like in South Africa the Afrikaner Broederbond was the
25 leader of a racist movement. Not all whites were members

1 of the Afrikaner Broederbond. So the Zionism is a movement
2 of people who are racist supremacists in Israel. So not
3 all Jews are Zionists.

4 MR BESTER: Yes, no we never said that.
5 We never said that. Again we're talking at cross purposes.
6 But be that as it may, let me simply say that at the end of
7 this matter I'm going to argue that you've been very
8 evasive during your cross-examination and your answers. If
9 I can ask you then to read the bottom of page 265, line 23
10 - 22, I beg your pardon, you say -

11 COURT: Sorry, you put it to Mr Masuku
12 that he is evading questions.

13 MR BESTER: He's entitled to respond to
14 that.

15 COURT: Sorry?

16 MR BESTER: He should be given the
17 opportunity to respond.

18 COURT: Yes otherwise you are going to
19 say I put it to you in cross-examination you never said
20 anything. Mr Masuku, do you understand what Council is
21 saying to you now, the previous question?

22 [14:19] MR MASUKU: The remark about evasiveness,
23 your honour?

24 COURT: Yes. He said that at the end of
25 this matter in argument, he's going to argue to me that you

1 during cross-examination, you evaded questions, what is
2 your response to that?

3 MR MASUKU: I assumed I, your honour that
4 I answered to the best of my ability and knowledge.

5 COURT: Yes, thank you.

6 MR BESTER: I'm indebted to your
7 lordship. Let's then move down page 265, line 22.

8 MR MASUKU: Sorry 265 and 2?

9 MR BESTER: It's page 265 and line 22.

10 MR MASUKU: Okay.

11 MR BESTER: You say at the bottom of the
12 page. "There is this tendency", are you there? Page 265.
13 It's the trial bundle.

14 MR MASUKU: Yes.

15 MR BESTER: Page 265.

16 MR MASUKU: 265?

17 MR BESTER: Yes.

18 MR MASUKU: I heard you saying page,
19 paragraph.

20 MR BESTER: Yes, I'm giving you the line
21 reference, the line reference will be line 23, 22 but just
22 find page 265 for now.

23 MR MASUKU: Oh ja, page, the paragraph
24 25.

25 MR BESTER: Yes, where you say "there is

1 a tendency that I have referred to before", do you see
2 that? Page 265. It is the transcript of the recording.

3 MR MASUKU: Okay ja, no I see it, yes.
4 I'm sorry.

5 MR BESTER: You say at the bottom of the
6 page, "there is this tendency that I have referred to
7 before, the assumption that when we call for justice in the
8 Middle East you are anti-Semitic" and then there's a
9 student that heckles you and says you are anti-Semitic and
10 then you say, on page 7, "I wrote to one Zionist, 266, you
11 say "I wrote to one Zionist who wrote to me. I said I'm
12 less concerned about Semitism or whatever name you call it,
13 all I want is justice, if you can ask me". So, Mr Masuku,
14 let's just pause there. Your pursuit of justice as you
15 understand that conception of justice is so important to
16 you that it's more important in fact that whether in the
17 process you call someone anti-Semitic or not, that doesn't
18 bother you. It's more important for you to pursue justice.
19 Is that correct?

20 MR MASUKU: The other, it's not
21 necessarily an either or. Anti-Semitism and justice are on
22 the same side. So the point that I was made here was that
23 stop blackmailing me to hide the horror you are doing in
24 Palestine by labelling me, focus on the issue of justice.
25 Don't hide your kinds by trying to blackmail me.

1 MR BESTER: And then you continue.

2 MR MASUKU: Sorry?

3 MR BESTER: You continue then, let's read
4 on. You say and then it's indistinct but then the next
5 line is, that's racist and then you say explanation for
6 whatever I do I only owe the people who want justice as to
7 what I have, as to what have I done to assist them and I've
8 only said that we will do our part to assist. Whether it's
9 anti-Semitic or not it's none of my business and I don't
10 care". Do you see that?

11 MR MASUKU: It says whether anti-
12 Semitism, it's not whether it's -

13 MR BESTER: Well it says -

14 MR MASUKU: - there.

15 MR BESTER: It says whether anti-Semitic
16 or not.

17 MR MASUKU: Yes.

18 MR BESTER: It's none of my business and
19 I don't care. So what you said here, Mr Masuku is that you
20 did not care whether your trench criticism of the state
21 of Israel is anti-Semitic or not. You don't care. What
22 was more important for you was your idea of what the
23 pursuit of justice means.

24 MR MASUKU: When an apartheid racist
25 calls you a name, what do you expect? It's not legitimate

1 it's a moral - so the point was, here is someone who
2 justify horror and he uses to me, and he says to me without
3 knowing me that I am anti-Semitic. I said your label is as
4 quick as it can, as I can wash it than the essence. Let's
5 not hide away from the essence because the word anti-
6 Semitic has become used to silence critics of Israel. So
7 it matters who, okay if he says I'm anti-Semitic he just
8 meets me the first day.

9 MR BESTER: I beg your pardon.

10 MR MASUKU: He meets me the first day and
11 he says, I met him at Wits that very day. He says to me
12 I'm anti-Semitic. I'm not sure he's a prophet or whatever
13 so the first question I ask is I am here to speak about
14 justice, don't try to side-line or divert me into your
15 other concerns. I am here for justice and I apologise, I
16 don't apologise. So that's what I say to them.

17 MR BESTER: You are there for justice,
18 you don't apologise and in fact your pursuit of justice is
19 so important to you that it does not matter to you whether
20 in the process it's anti-Semitic or not, as you said here
21 you don't care. Those are your words, you agree?

22 MR MASUKU: Okay like I said anti-
23 Semitism and justice are not on the different side. At
24 first when you start to talk about the Holocaust I said
25 every genuine activists of justice would never support the

1 Holocaust against the Jews. We never support the Holocaust
2 against Africans or colonialism. So the point I'm making
3 is, your Honour, I'm consistent that anti-Semitism and
4 justice are on the same side. But it is a problem when
5 someone is accused of injustice then he wants to try and
6 polish his image by throwing a label at me and think it
7 would stick.

8 MR BESTER: But people in South Africa,
9 South African citizens who are Jews, who happen to support
10 the State of Israel according to you, you would rather have
11 them leave, is that not so?

12 MR MASUKU: I would rather?

13 MR BESTER: You would rather have them
14 leave this country, is that not so?

15 MR MASUKU: I said South Africa is
16 guarded by a constitution. You either submit to the
17 constitution or you go to the jungle where you think there
18 is no law that's what I said. I said the days where South
19 Africa was without a rule of law and a democratic
20 constitution are over. That's why there are people who
21 have left voluntarily to Australia or to other parts of the
22 world because they were incompatible with the democratic
23 dispensation. So they are free, the constitution
24 guarantees them that right. That's the context I was
25 saying it. In fact the constitution protect their rights

1 to leave if they want.

2 MR BESTER: Do you believe that in your
3 view the constitution supports the right of a Jewish person
4 in South Africa -

5 MR MASUKU: Absolutely.

6 MR BESTER: To support the State of
7 Israel?

8 MR MASUKU: First of all the constitution
9 of South Africa, protects South Africans. Then Jews who
10 are South African are protected even by the constitution of
11 South Africa because they are South Africans and they are
12 entitled to all their rights. But now this is the problem.
13 Whether Jew or Zulu or Swazi there are things that are
14 unacceptable in the standards of the constitution and they
15 don't ask whether you are a Jew or Zulu, you abide by the
16 constitution. You can't support in other parts of the
17 world what the constitution of South Africa that is
18 protecting us doesn't support.

19 MR BESTER: But in a constitutional state
20 what do we do when someone according to your definition as
21 a racist, we take them to task, we don't force them to
22 leave the country, not so?

23 MR MASUKU: No you don't. You don't.

24 MR BESTER: Now, Mr Masuku, if we can
25 move back to page 260. Page 260 of the transcript line 18

1 -

2 MR MASUKU: Sorry line?

3 MR BESTER: 18.

4 MR MASUKU: Page 260?

5 MR BESTER: 260, yes.

6 MR MASUKU: Why don't mine have -

7 MR BESTER: Sorry you won't see line 18,

8 you would have to count it. You'll see there's a line 20.

9 So just two lines above that on page 260.

10 MR MASUKU: I'm sorry maybe I'm not

11 getting you. Page 2?

12 MR BESTER: 260.

13 MR MASUKU: 260 yes. I'm at page 260 and

14 I -

15 MR BESTER: If you go down two third of

16 the page. There is, it says Mr Masuku and then it says -

17 MR MASUKU: 15 downwards?

18 MR BESTER: Yes, 15 is a female voice.

19 There's a male voice.

20 MR MASUKU: Yes.

21 MR BESTER: And then it says Mr Masuku.

22 MR MASUKU: Okay.

23 MR BESTER: Alright and then you say "Mr

24 Masuku, you say support all and then it's indistinct and

25 take our solidarity to new heights and that solidarity

1 means that if we are involved in supporting the people of
2 Palestine, if we are involved in supporting the people of
3 Burma or all the people who are oppressed all over the
4 world our duty is to make sure that we give them where it
5 matters the most". Alright so let's just stop there. You,
6 on the face of it, from what we've just read appear to feel
7 concerned with the wellbeing of oppressed people all over
8 the world and you mention Burma as a specific example, am I
9 correct?

10 MR MASUKU: You are correct.

11 MR BESTER: And you also mention in your
12 examination in chief, you made reference to, I think it was
13 Western Sahara, not so?

14 MR MASUKU: Yes.

15 MR BESTER: Yes. Now from the history
16 that I know Western Sahara, yes in fact on page 267, before
17 we go to Western Sahara, page 267.

18 MR MASUKU: 267.

19 MR BESTER: In the middle of the page,
20 you mention some other examples.

21 MR MASUKU: Yes.

22 MR BESTER: Of, of people who fought for
23 their liberation. You refer to examples from Latin America
24 and then also the Chinese and the Vietnamese. You give a
25 number of examples and let's just go back to page 260 shall

1 we, and there you made reference to Burma and you also
2 during your examination in chief referred to Western
3 Sahara.

4 MR MASUKU: Sorry I made a?

5 MR BESTER: You made reference in your
6 examination in chief this morning to Western Sahara.

7 MR MASUKU: Absolutely.

8 MR BESTER: Now as I understand it, on my
9 understanding of what the position in the Western Sahara
10 is, and correct me if I'm wrong, what's happening there is
11 there's a movement called the Polisario Front is like the
12 ANC, it's a liberation movement who seeks to ensure that
13 Western Sahara is freed from occupation by the Moroccan
14 government, is that correct?

15 MR MASUKU: Correct.

16 MR BESTER: Yes. So you draw parallels
17 between the oppressed people of Western Sahara liberation
18 movements and the oppression that black people experienced
19 in South Africa and various other parts in the world, am I
20 correct?

21 MR MASUKU: Yes.

22 MR BESTER: Yes. Now let's use Western
23 Sahara as an example. Are you aware ever of a Western
24 Sahara apartheid week having been held?

25 MR MASUKU: There is none.

1 MR BESTER: There is none.

2 MR MASUKU: Because the apartheid weeks
3 is not started by the people who support, it's started by
4 the, when you have an apartheid week it's not, the forms of
5 struggle in the world don't take the same way. Just like
6 in Swaziland, you have a global week of action and so, so
7 there are different forms of pressure weeks all over the
8 world. So Western Sahara it's because the Saharawi's which
9 I also happen to be in the refugee camp with them, have not
10 decided on that. So you don't set a pace for them. So in
11 this particular case the Palestinian National Committee PNC
12 is the one that commissioned the BDS movement and other
13 things. So we respond as supporters, not as leaders of
14 their struggles.

15 MR BESTER: In fact you're quite correct
16 that the people of Western Sahara live in refugee camps.
17 They do not enjoy the right to self-determination.

18 MR MASUKU: Yes.

19 MR BESTER: And at least on that score as
20 far as you are concerned on your interpretation they are in
21 fact no different from the people in Palestine is that
22 correct, as you understand it?

23 MR MASUKU: But there is a different
24 context. But the essence is justice.

25 MR BESTER: Yes.

1 MR MASUKU: The different context is that
2 in the refugee camps where they live, whether it's
3 Mauritania or in Algeria they're not, they're in camps but
4 in Morocco the occupation, the occupation is not
5 necessarily like the Israeli one. We, I know you said you
6 don't want politics but let me just say to cut it short,
7 before we go to politics the summary and the essence is
8 that the forms of occupation also differ. Just like
9 colonialism in South Africa are not the same as that in
10 Zimbabwe. But all of them they all are about colonialism.

11 MR BESTER: Yes and the case of Burma,
12 are you aware of Burma apartheid weeks having been held?

13 MR MASUKU: Not at Burma apartheid week
14 but at the ILO every year in June in Geneva we always had
15 honoured, until the release of, what's her name, the one
16 who is out now who is the leader, the one who was in jail.
17 So until then there was a global incorporation, in fact
18 there was a special sitting. So there are different forms
19 in which we commemorate this experiences.

20 MR BESTER: Yes, in fact I think her name
21 is Aung San Suu Kyi, if I'm not mistaken, the Burmese
22 leader who, but be it as it may let me just continue then.
23 So there are, we understand that there are different forms
24 of occupation. No particular situation may be exactly the
25 same as a situation in another country and that's precisely

1 the point isn't it, that in every single setting whether
2 it's the Middle East, whether it's Burma, whether it's
3 Western Sahara, whether it's South Africa the position on
4 the ground is in fact different to what it is in another
5 country.

6 MR MASUKU: Absolutely.

7 MR BESTER: Yes. In fact the degrees of
8 racial -

9 MR MASUKU: Oppression is one.

10 MR BESTER: Oppression is one, but we're
11 not talking about oppression specifically, we're going into
12 a little bit more details. But the reality of the
13 situation then is, it makes it very difficult then to
14 simply compare one state to being like the apartheid state,
15 isn't, one must be very sure, before one does that to make
16 sure that the comparison is accurate, not so?

17 MR MASUKU: Absolutely. How did the
18 people of the world join the struggle against apartheid
19 South Africa -

20 MR BESTER: Of course.

21 MR MASUKU: I'm just talking about the
22 people in the Dominican Republic, the point I'm making is
23 we have read the situation in Palestine. We have had
24 several delegations that went to Palestine to the occupied
25 territory. To the, to Israel and through different places.

1 So the conclusion is not just an individual. It's out of
2 the experiences, I want to, if the president of, who was
3 forced to strip naked in the, what is this, in Israel, the,
4 this thing that Israel, other than the wall, Israel is
5 always blocking people not to pass. There is a deputy
6 president who was literally forced to be strip naked
7 searched, it was the deputy president of SAMU, so we've had
8 many delegations. So I want to assure you that our summary
9 is based on the experiences in Palestine.

10 MR BESTER: Now -

11 MR MASUKU: Just like in Western Sahara
12 to.

13 MR BESTER: Let me ask you then, insofar
14 as the examples that we've referred to, you mentioned
15 China, you mentioned Vietnam, Burma, the position insofar
16 as Western Sahara and Morocco. Do you target Moroccan
17 interest in South Africa to protest against the occupation
18 of Western Sahara, do you do that?

19 MR MASUKU: We used when the, by the
20 embassy just returned.

21 MR BESTER: Yes.

22 MR MASUKU: You remember that Morocco
23 withdrew the embassy in South Africa. So we used to march
24 but now that it has returned we'll be calling the march
25 again on Morocco.

1 MR BESTER: And then you march against
2 the embassy, is that correct?

3 MR MASUKU: Yes, against the embassy.

4 MR BESTER: You don't march against
5 Moroccan people living in South Africa?

6 MR MASUKU: Because they never, they
7 released a statement that they justified the occupation.
8 Once they do that we march on them.

9 MR BESTER: Now, Mr Masuku, now I'm just
10 conversing, conferring with Mr Seape on a matter quickly if
11 I may.

12 COURT: Yes.

13 MR BESTER: Now, Mr Masuku, if I can ask
14 you to turn to the pleadings bundle.

15 MR MASUKU: Page?

16 MR BESTER: Before we get there, let me
17 ask you this. A Jewish person living in South Africa who
18 does not disassociate himself or herself from Israel,
19 according to you such a person should be treated as
20 unwelcome until such time as they repudiate their
21 association with Israel, not so? Such a person should be
22 rejected not so?

23 MR MASUKU: There is nowhere where I said
24 he should be rejected. I said the constitution of South
25 Africa requires of all South Africans to uphold the values

1 of justice. So anyone who can't comply with that
2 inevitably makes himself out of the constitutional process,
3 constitutional in the rule of law. But I didn't say
4 rejected because I said the person is upholding and
5 promoting values that are opposite to our constitution and
6 the rule of law.

7 [14:39] MR BESTER: But on your interpretation of
8 the position it would seem to me and I want to give you an
9 opportunity to comment on what I am about to say, is that
10 insofar as Jewish South Africans are concerned that they
11 are only entitled to feel welcome in this country insofar
12 as them drawing a clear line where they swear allegiance
13 not to Israel. What you want to see that they disavow any
14 allegiance to Israel, not so?

15 MR MASUKU: Not religion. This is what
16 must be clear -

17 MR BESTER: I beg your pardon.

18 MR MASUKU: There is no religious -

19 MR BESTER: No I'm not talking about
20 religion, I'm talking about allegiance. What I'm saying is
21 you want them, you want them to, as it were, cut the
22 umbilical cord that connects them in Israel, not so?

23 MR MASUKU: I don't think there was
24 anywhere where it specifically talks to you, it was
25 supporters of a horror called Israel and I was specific.

1 Even if I'm black and I justify just like I've had friends
2 who justify Israel and they don't need to be Jews, I'll say
3 where is your conscience that someone can occupy someone's
4 land and you still support him.

5 COURT: Mr Bester, do you still have
6 questions to witness?

7 MR BESTER: Yes page 272, if I can just
8 ask you before go to the pleadings bundle, page 272.

9 MR MASUKU: Sorry 2?

10 MR BESTER: 272.

11 MR MASUKU: Okay.

12 MR BESTER: 272 in the middle of the
13 page.

14 MR MASUKU: Sorry 2?

15 MR BESTER: 272.

16 MR MASUKU: Oh 272.

17 MR BESTER: Yes.

18 MR MASUKU: Okay thanks.

19 MR BESTER: In the middle of page you say
20 "Is free to leave the country." Or what you first say is
21 "Anyone who supports the racist apartheid murder state is
22 removed" and then there's some interjection presumably by
23 some students and then you say again "Is free to leave the
24 country. (Inaudible) and I say so, you can leave this
25 country, this is not a country for racist." But, Mr Masuku

1 that's racism on your interpretation not so? That's how
2 you understand what racism is.

3 MR MASUKU: Yes.

4 MR BESTER: Yes.

5 MR MASUKU: No black person doesn't
6 understand what racism means.

7 MR BESTER: I'm not disputing that for
8 one moment, but the next thing is if people don't fit your
9 particular mould as to how they should approach these
10 matters then you are of the view that they should rather
11 leave South Africa, not so?

12 MR MASUKU: Someone said, a South
13 African, they are leaving for Australia. I said you are
14 free, the constitution guarantees them that right. So I
15 say to you there is no law in South Africa that force
16 people to stay when they don't like the constitution that
17 upholds anti-racism. It's only in other countries like
18 Israel that where racism is allowed and institutionalised.
19 I said South Africa does allow it, so you are free to leave
20 it, that's what I was saying.

21 MR BESTER: You say racism is allowed in
22 the state of Israel, Mr Masuku, but let me put it to you,
23 perhaps let's just unpack this analogy which you seek to
24 draw the whole time between apartheid and the state of
25 Israel. Now we know in apartheid for instance -

1 MR MASUKU: Sorry.

2 MR BESTER: We know in apartheid there
3 was something called the Group Areas Act.

4 MR MASUKU: Yes.

5 MR BESTER: Right. My understanding of
6 it and I was perhaps too young at the time, but by all
7 accounts from what I've read about the matter under the
8 Group Areas Act there were certain limitations on black
9 people in terms of entering white areas. So you could for
10 instance have a beach which was segregated and it may only
11 have been a whites only beach and so on. That was really
12 the essence of that. You agree with that.

13 COURT: Is that correct?

14 MR BESTER: It might be a whites only
15 beach.

16 COURT: For beaches we had a separate
17 amenities act.

18 MR BESTER: It might not be the Group
19 Areas Act.

20 COURT: The Group Areas Act it was areas
21 for specific, for the whites only.

22 MR BESTER: For the whites only.

23 COURT: The cities and the towns. So
24 let's make sure that what we put is not only factually
25 correct, but legally -

1 MR BESTER: Legally correct, yes, M'Lord.

2 COURT: Otherwise you're going to get a
3 cockeyed answer.

4 MR BESTER: I'm indebted for Your
5 Lordship's assistance. But let's work from that example
6 because let me put it to you, Mr Masuku, there is no
7 prohibition for a Palestinian person living in Israel from
8 enjoying the same amenities as a Jewish person when it goes
9 to visiting a beach in a place like Tel Aviv. Do you agree
10 with that, yes or no?

11 MR MASUKU: Before that did you - okay
12 let me just say before answering that, I'll answer, I want
13 to make the context, Group Areas Act is not the only reason
14 that made apartheid. I think M'Lord was correct. It's a
15 form, in Israel there are more than 40 laws whether it's on
16 education or amenities that separate Arabs and Jews and
17 that's why in the settlements the land is taken from the
18 Palestinians, they bulldoze their houses, destroy them.
19 New settlement appears to accommodate Jews, not Arabs. In
20 parliament of Israel there is a minority party that
21 represents Arabs and that party its representative was here
22 in South Africa. She even wrote a piece on Pretoria News
23 where she explained how as an MP she's affected - so the
24 point I'm making is that apartheid is not necessarily - but
25 apartheid means there is exclusivity and superiority of one

1 group over the other. The privileges are not the same for
2 the groups.

3 MR BESTER: Yes, now if I can ask you to
4 turn to the pleadings bundle. In the pleadings bundle if
5 you go to page 12 paragraph 7 you will see -

6 MR MASUKU: Sorry page?

7 MR BESTER: Page 12 of the pleadings
8 bundle.

9 MR MASUKU: Page 12.

10 MR BESTER: Paragraph 7 you'll see the
11 case for the South African Human Rights Commission.

12 MR MASUKU: Okay. Page 12 yes I'm sorry.

13 MR BESTER: You see that paragraph 7,
14 that's the case for the Human Rights Commission on page 12,
15 paragraph 7. Then if you go to page 16, page 16 is your
16 response to the complaint 4 June 2009. Do you see that?

17 MR MASUKU: Page 16?

18 MR BESTER: Yes page 16.

19 MR MASUKU: Okay.

20 MR BESTER: Page 16, paragraph 1 and then
21 paragraph 3 and then you deal with 4 and 5 and it goes down
22 and you explain yourself, I'm not going to deal with these
23 matters. Page 17, paragraph 7 all the way to paragraph 13,
24 but you essentially set out your explanation for the
25 context insofar as you are concerned within which the

1 remarks were made both on the blog and at the lecture at
2 Wits. Do you see that? You just move very quickly pages
3 17 and 18. I'm not going to read it to you, I just want to
4 refer that to you. Then, Mr Masuku, if you go to page 46,
5 page 46 you'll see is the affidavit in response to the
6 complaint, do you see that?

7 MR MASUKU: Yes.

8 MR BESTER: And then you set out various
9 defences to the allegations levelled against you. In
10 particular look at page 50, paragraph 11.5.

11 MR MASUKU: 11.5.

12 MR BESTER: Yes. Page 51 in particular,
13 paragraph 11.5. You say "The statements made by me during
14 the lecture constitute comments on facts which are true and
15 in the public interest." Do you see that?

16 MR MASUKU: Yes.

17 MR BESTER: Yes. Now let me put to you
18 specifically what specific facts are you relying on as
19 having been true, Mr Masuku?

20 MR MASUKU: Sorry what facts am I?

21 MR BESTER: What specific facts are you
22 relying on in the lecture at Wits as having been true?

23 MR MASUKU: I rely on the recollection of
24 my memory and the interaction with those who are there. Is
25 that at Wits?

1 MR BESTER: At Wits. I'm talking about
2 the content of what it is that you said.

3 MR MASUKU: But also there are other
4 supplementary material that remind me, but primarily I rely
5 on the recollection of my memory and the interaction with
6 those who were there.

7 MR BESTER: Well this morning, during
8 your examination in chief you made mention of the number of
9 Palestinian casualties during the war on Gaza and you said
10 they were predominantly women and children. Do you recall
11 that?

12 MR MASUKU: No, no not necessarily in the
13 case of South Africa.

14 MR BESTER: No, no I'm talking about the
15 Gaza war.

16 MR MASUKU: Oh ja.

17 MR BESTER: And the Palestinian
18 casualties there that they were predominantly women and
19 children.

20 MR MASUKU: Absolutely.

21 MR BESTER: But where do you get that
22 from and on what do you base that?

23 MR MASUKU: It was in the media
24 everywhere.

25 MR BESTER: So you've relied purely on

1 the media as to what the media says. What particular
2 publications did you rely on?

3 MR MASUKU: I relied on - we rely on
4 newspapers, we rely on people who have been there, we rely
5 on United Nations Human Rights Councils when we
6 participate, where we participate. We rely on Amnesty
7 International, Human Rights. I'm just saying it's quite a
8 (inaudible) of information.

9 MR BESTER: So I'm asking you
10 specifically with reference to what you personally know,
11 which media did you rely on specifically? Can you name the
12 newspapers that you relied on?

13 MR MASUKU: No I can't recall the
14 newspapers, but I just know it was an open debate at that
15 time.

16 MR BESTER: And the people, which people
17 did you speak to who told you that these were the number of
18 casualties insofar as women and children are concerned.

19 MR MASUKU: Which people did I speak to?

20 MR BESTER: Yes.

21 MR MASUKU: No there were many debates.
22 I can't recall one debate, there were several whether in
23 the media, whether in the United Nations Human Rights
24 Council, whether in - in different forums where I was,
25 there were different discussions. But even also to release

1 statements out of the information by Amnesty International,
2 Human Rights Watch, organisations that usually deal with
3 human rights.

4 MR BESTER: If I can just take an
5 instruction, M'Lord. Mr Masuku, you accept that in a
6 country of plus, minus 50 odd million people with only
7 approximately 70 000 Jews that they would be a minority
8 grouping, not so?

9 MR MASUKU: Absolutely, I also belong to
10 a minority group. Swazis are a minority in South Africa.

11 MR BESTER: No further questions for the
12 witness, M'Lord.

13 COURT: Thank you. Re-examination.

14 MS DE KOK SC: M'Lord, I've got nothing
15 in re-examination.

16 COURT: Mr Masuku, thank you for your
17 evidence, you are excused.

18 [NO FURTHER QUESTIONS - WITNESS EXCUSED]

19 Mrs De Kok.

20 MS DE KOK SC: Yes, Your Lordship will
21 recall that we indicated to Your Lordship that Professor
22 Friedman is only available, he's not available on the
23 Friday. That was the one day that he was not available.
24 So the plan is to call him on Monday, M'Lord. So at this
25 stage we would ask Your Lordship to adjourn until Monday at

1 10:00.

2 COURT: Well let's look ahead. You call
3 him on Monday, he's probably going to spend the whole day
4 in the witness box depending on cross-examination and the
5 following day would be the last day for a trial. It means
6 in that time we need to prepare heads of argument so that
7 we can argue. Are you sure we'll finish on Tuesday?

8 MS DE KOK SC: We will certainly finish
9 with the evidence, M'Lord, but we are concerned that we
10 won't be able to finish with the argument by Tuesday
11 depending on how long the cross-examination is.

12 COURT: Well it's always been my concern
13 to finish during the allocated time. Otherwise we have
14 problems thereafter. Where is your expert now, in the
15 country or outside?

16 MS DE KOK SC: He is in the country, but
17 he is at - on a Friday afternoon he has religious
18 commitments, he's a preacher.

19 COURT: Yes.

20 MR BESTER: M'Lord, it's a subject which
21 my learned friend and I have discussed briefly and that is
22 the exchange of heads of argument. It seems from where we
23 stand, to do justice to the case and to assist Your
24 Lordship we would rather do more comprehensive heads of
25 argument than place ourselves under the pressure of

1 producing heads of argument between now and Monday and to
2 have them ready for Your Lordship on Tuesday morning to
3 argue. That would not necessarily allow us to develop the
4 arguments in a fulsome manner for the full benefit of the
5 court. From where we stand practically to come back and
6 argue the matter ought to take no more than two hours, two
7 and half, three hours at most. All the arguments will
8 already be made in the heads of argument and that
9 opportunity will just really be there to clarify any
10 matters which Your Lordship may wish to raise and to
11 perhaps to address a few points in the other side's heads
12 of argument. It really won't be for purposes of arguing
13 the full case from that point of view.

14 COURT: Do you think we'll finish by
15 Tuesday?

16 MR BESTER: With the evidence, most
17 definitely.

18 COURT: No I mean the whole case.

19 MR BESTER: I don't -

20 COURT: I've learned not to rely on
21 counsel's estimates anymore. I'm worried that I may not be
22 available on Wednesday and doing something else and having
23 to come back somewhere after six months or five months to
24 finish the case is not acceptable. I mean trials must be
25 finished speedily and you know - I warned you about

1 becoming part heard, whether it's on the evidence or heads
2 of argument the case will be part heard on Tuesday I think.
3 You mean Professor Friedman was never here before in court.

4 MS DE KOK SC: No we don't, no. Your
5 Lordship will recall that right at the outset I said that
6 there was just one day where Professor Friedman wasn't
7 available and it was Friday.

8 COURT: Ja well. Have I got the
9 transcripts up to date?

10 [14:59] MR BESTER: Your Lordship should have
11 them indeed.

12 COURT: The one you took back yesterday?
13 I haven't checked.

14 MR BESTER: I'm told that they are all
15 there, M'Lord.

16 COURT: Okay.

17 MR BESTER: It's only today's transcript
18 which will still have to come.

19 COURT: Yes. Well, it looks like I've
20 got no alternative but to adjourn the matter further until
21 Monday, the 13th of February 2017.

22 MS DE KOK SC: As Your Lordship pleases.

23 COURT: At 10 o'clock in the morning.
24 Court will adjourn.

25 [COURT ADJOURNED]

1 [PROCEEDINGS ON 13 FEBRUARY 2017]

2 [10:01] MS DE KOK SC: May it please you, M'Lord.

3 COURT: Yes.

4 MS DE KOK SC: M'Lord, I call Prof Steven
5 Friedman.

6 COURT: Thank you.

7 COURT ORDERLY: State your full names and
8 surname.

9 PROF FRIEDMAN: Steven Eli Friedman.

10 COURT ORDERLY: Do you have any objection
11 to taking the oath?

12 PROF FRIEDMAN: No, I don't.

13 COURT ORDERLY: Do you swear that the
14 evidence you are about to give will be the truth, the whole
15 truth, and nothing but the truth? If so please raise your
16 right hand and say, "So help me God."

17 STEVEN ELI FRIEDMAN: So help me God.

18 COURT: Thank you. Your witness, you may
19 proceed.

20 EXAMINATION BY MS DE KOK SC: Thank you,
21 M'Lord. Prof Friedman, you should have in front of you two
22 files. The one reads on the spine pleadings and notices
23 and the other one reads trial bundle.

24 PROF FRIEDMAN: Yes.

25 MS DE KOK SC: If I can ask you just for

1 the moment to keep the pleadings file handy.

2 PROF FRIEDMAN: That's this one, okay.

3 MS DE KOK SC: Prof Friedman, where and
4 in what capacity are you currently employed?

5 PROF FRIEDMAN: I am a research professor
6 in the Faculty of Humanities at the University of
7 Johannesburg.

8 MS DE KOK SC: If you turn to page 37 of
9 the notices section, you'll see that there are various -
10 no, I'm sorry, there's a section that reads expert notices
11 and summaries.

12 PROF FRIEDMAN: Sorry, where is that? On
13 page 37?

14 MS DE KOK SC: If you go to the third
15 divider -

16 PROF FRIEDMAN: Yes. Oh, expert notice
17 and summaries, yes.

18 MS DE KOK SC: Yes, and if you go to page
19 37 -

20 PROF FRIEDMAN: Yes, I am there. Yes.

21 MS DE KOK SC: Have you got it? That
22 appears to be your CV.

23 PROF FRIEDMAN: That's correct.

24 MS DE KOK SC: And can you confirm that
25 this document correctly sets out your qualifications and

1 expertise?

2 PROF FRIEDMAN: It does, yes.

3 MS DE KOK SC: Prof Friedman, are you
4 Jewish?

5 PROF FRIEDMAN: I am.

6 MS DE KOK SC: And do you observe the
7 Jewish religion?

8 PROF FRIEDMAN: I do, yes.

9 MS DE KOK SC: If you in that same
10 section that you've been looking at, if you turn to page
11 11, so just turn back -

12 PROF FRIEDMAN: Yes?

13 MS DE KOK SC: You'll see there an expert
14 summary of a Dr David Hirsh.

15 PROF FRIEDMAN: I do, I see it, yes.

16 MS DE KOK SC: And you were asked to
17 prepare a response to Dr Hirsh's summary.

18 PROF FRIEDMAN: That is correct.

19 MS DE KOK SC: And if we then turn to the
20 document at page 45 through to 74 -

21 PROF FRIEDMAN: Yes?

22 MS DE KOK SC: Is that the response that
23 you prepared?

24 PROF FRIEDMAN: It is.

25 MS DE KOK SC: And does this document

1 correctly reflect your opinions and the reasons therefore?

2 PROF FRIEDMAN: It does, yes.

3 MS DE KOK SC: Now Prof Friedman, I'm not
4 going to ask you to repeat or go through everything in the
5 document because we've all read it and it now forms part of
6 the, or it has now been introduced into the evidence. I'm
7 just going to ask you to focus on a few issues. At page 45
8 under the - we see a subheading "Overview: Zionism, anti-
9 Semitism and the silencing of dissent." You see that?
10 Could you explain briefly to his lordship what in your view
11 Zionism means?

12 PROF FRIEDMAN: Zionism, M'Lord, is the
13 belief in a state for the Jewish people, the state -

14 COURT: Belief in what?

15 PROF FRIEDMAN: The state for the Jewish
16 people, that the Jewish people should have a state which is
17 exclusively their own.

18 MS DE KOK SC: Can you then summarise for
19 us what in your view the differences, if any, between anti-
20 Zionism versus anti-Semitism is and why it is important to
21 draw this distinction.

22 PROF FRIEDMAN: Ja, M'Lord, anti-Semitism
23 is hatred of the Jewish people. The belief that there
24 ought to be a Jewish state in a country in which there are
25 other citizens whose state it would not be is a particular

1 political point of view which is held by some Jewish people
2 and rejected by other Jewish people. So in other words to
3 say that to be anti-Zionist is anti-Jewish is rather like
4 saying that to be against Afrikaner nationalism is to be
5 against Afrikaners and white people. It is not, doesn't
6 logically flow from that. The title of the section is
7 there because in many, in some parts of the world today, in
8 France, the United States and the United Kingdom in
9 particular the claim that anti-Semitism, that anti-Zionism
10 is anti-Semitism is being used in order to silence critics
11 of the Israeli State and is used to outlaw action which is
12 designed to influence the decisions of the Israeli State.
13 So it has been written about extensively. It's the purpose
14 of saying that anti-Semitism, that anti-Zionism is racism,
15 is hate speech, is designed to silence criticism and
16 therefore to infringe free speech.

17 MS DE KOK SC: You said that Zionism is
18 an ideology that is supported by certain Jewish people and
19 rejected by others.

20 PROF FRIEDMAN: That is correct, M'Lord.

21 MS DE KOK SC: Could you perhaps just
22 elaborate on that?

23 PROF FRIEDMAN: Well, first of all some
24 religious Jewish people reject Zionism. There are some
25 large sects in the United States and indeed some in

1 Jerusalem who reject Zionism on religious grounds. Their
2 view is that there can only be a Jewish State when the
3 Messiah comes and they believe the Messiah has not yet
4 come. There are various prescriptions in Jewish law which
5 in their view say that it is a crime against God to set up
6 a state in, which claims to be a Jewish State. There are
7 also of course Jews who are not religious who reject
8 Zionism because they believe that it is discriminatory,
9 they believe that it discriminates against and oppresses
10 the Palestinian people. So there is no - it is not correct
11 to say that all Jews support Zionism.

12 MS DE KOK SC: Now Sir, if you turn to
13 page 49 of the document -

14 PROF FRIEDMAN: Yes.

15 MS DE KOK SC: You commence there with a
16 more detailed response to certain paragraphs of Dr Hirsh's
17 opinion.

18 PROF FRIEDMAN: Correct.

19 MS DE KOK SC: And firstly you deal with
20 what he says at paragraphs 6 to 14 of his summary where he
21 talks about how anti-Semitism is to be defined, or rather
22 to be identified.

23 PROF FRIEDMAN: Yes.

24 MS DE KOK SC: Is there anything that you
25 want to - your response here is quite comprehensive. Is

1 there anything that you want to add?

2 PROF FRIEDMAN: No, I don't need to add.

3 I mean my point here is simply that if you don't clearly
4 define anti-Semitism, as I do, as hatred against Jewish
5 people, if you simply say as Dr Hirsh says that it's a
6 matter of judgment, then you are really opening a situation
7 in which people can claim that things are anti-Semitic when
8 they're not, because if you say to that person well it
9 doesn't meet your definition, they'd simply say well, this
10 is my judgment. So I don't think that it helps us to
11 simply say that you can identify a particular form of
12 hatred simply by consulting the judgment of people who
13 claim to be experts on it. There is a very clear
14 definition of anti-Semitism and it is always clearly
15 possible to determine whether a particular statement or a
16 particular action is anti-Semitic or not. It's not a
17 matter of judgment.

18 MS DE KOK SC: If I can then ask you to
19 turn to page 53. You deal there with paragraphs 15 to 20
20 of Dr Hirsh's summary where he deals with the issue of
21 whether criticism of Israel is anti-Semitic.

22 PROF FRIEDMAN: Yes, I have it.

23 MS DE KOK SC: And essentially Dr Hirsh
24 says it's not necessarily so but it can be.

25 PROF FRIEDMAN: That's correct.

1 MS DE KOK SC: And if you can summarise
2 your response to that?

3 PROF FRIEDMAN: Well, the problem with
4 this definition is that it claims to allow certain forms of
5 criticism, but it actually outlaws most criticism, so in
6 other words so what Dr Hirsh is arguing is that you can
7 criticise the state as long as you do it in terms of which
8 he approves. So in other words the situation is created in
9 which many of the critics of the state of Israel believe
10 that it discriminates racially. Dr Hirsh says you're
11 allowed to criticise the state of Israel as long as you
12 don't say that it discriminates racially. He's saying that
13 he and others who share his point of view have the right to
14 decide what criticism is legitimate and what is not, and
15 once one takes that view one is in a sense saying that it's
16 not permissible - there are certain processes and that's
17 not permissible. If I can give another analogy; imagine a
18 situation in which I feel that somebody else is a bully and
19 the bully says to me, you can criticise me as long as you
20 don't call me a bully, that creates a situation in which
21 you are in effect being silenced.

22 MS DE KOK SC: At page 54 you deal with
23 the working definition of the European Union Monitoring
24 Commission.

25 PROF FRIEDMAN: Yes.

1 MS DE KOK SC: EUMC. If you can perhaps
2 just summarise for us what your difficulties are with this
3 definition, or working definition.

4 PROF FRIEDMAN: Well, my difficulty is
5 this is not, if it purports to be an academic definition
6 it's not an academic definition, it's a political statement
7 by a particular group of states which expressed their
8 particular point of view, and it has the same effect as the
9 position I mentioned earlier. It outlaws various
10 statements. It says that if you deny that the state of
11 Israel should exist in its current form you are an anti-
12 Semite. I point out there that there are many Jews who
13 don't like the present form of the state of Israel and
14 would like it to change its form. There are other
15 restrictions there, many of which are ignored by Jewish
16 people themselves, and I mention some of the Jewish people,
17 well-known Jewish people throughout history who have
18 refused to accept this definition. So it is once again a
19 definition and this is a very strong trend, as I indicated
20 earlier, in sections of the world at the moment to try to
21 outlaw various forms of legitimate expression by describing
22 them as anti-Semitic and therefore as hate speech.

23 MS DE KOK SC: At page 58 you refer, you
24 deal essentially with Dr Hirsh's opinions as set out in
25 paragraphs 18 or 19 of his summary where he says that it is

1 anti-Semitic to portray Israel as essentially or uniquely
2 evil, and what is your comment on that?

3 PROF FRIEDMAN: Well, if standards were
4 used to apply to the state of Israel that apply to nobody
5 else that point might be valid, but I'm not aware of any
6 opponent to the state of Israel who does apply different
7 standards to the state of Israel and to anybody else. In
8 fact one of the frequently heard criticism is that the
9 western powers have one standard for other human rights
10 abusers and another standard for the state of Israel.
11 Critics of the state of Israel criticise it in exactly the
12 same terms as they criticise apartheid South Africa and
13 criticise it on exactly the same grounds as they would any
14 other state which reserves itself for one ethnic group.
15 That criticism has been at various times in the last
16 hundred years directed at many states, so the criticism of
17 the state of Israel does not single it out by applying
18 different standards to it. It in fact is the reverse, it
19 insists that it be subject to the same standards as any
20 other state.

21 MS DE KOK SC: Dr Hirsh then says that
22 sometimes what is called criticism of, or disguised as
23 criticism of Israel is in fact not that and he uses as an
24 example campaigns of boycott and exclusion. What is your
25 comment on that?

1 PROF FRIEDMAN: Well, M'Lord, boycotts
2 and exclusion are a very common non-violent political
3 tactic which are being used at many times during human
4 history. It is a perfectly legitimate tactic as long as
5 you don't use force to infringe on anybody else's right.
6 In fact many of us would argue that if you take away from
7 people who've been discriminated against the right to
8 engage in peaceful boycotts then you run the risk that they
9 might resort to violence, and it is simply incorrect to say
10 that if somebody launches a boycott campaign they are being
11 anti-Semitic. Of course if that boycott campaign was
12 directed against Jews as Jews, if people said I'm not
13 prepared to buy from Jews that would be anti-Semitic, but
14 that is not what the boycott campaign does. It is aimed at
15 a particular state and a particular state's policies. It's
16 not aimed at a group of people.

17 MS DE KOK SC: At the bottom of page 59
18 through to page 61 you deal with what Dr Hirsh calls the
19 charge of bad faith. Is there anything that you want to
20 add to that?

21 PROF FRIEDMAN: Well I do now, you know
22 there seems to be a problem here in the sense that the
23 argument is being made that if you say that an - if you say
24 for example that an argument is designed to silence
25 criticism then you are claiming that the person who makes

1 the argument is acting in bad faith. That is not at all
2 the case. What you do is that you're looking at a
3 particular argument, you're saying well if we follow that
4 argument what are the consequences of the argument. The
5 consequences of following Dr Hirsh's argument is that most
6 protests against the Israeli State would not be permitted
7 and people who are opposed to the actions of that state
8 would be silenced. I don't think that it indicates bad
9 faith to point that out. You are simply pointing out that
10 a person's argument leads to a particular consequence and
11 you're not making any judgment about the honesty or
12 dishonesty or the good faith of the person concerned.

13 MS DE KOK SC: At page 61 and onwards you
14 deal in particular now with Dr Hirsh's definition, if we
15 can call it that, of Zionism. If you can just turn to page
16 63, the first paragraph there, you describe, you say Israel
17 - sort of in the middle of the paragraph - "Israel is
18 therefore most accurately described as ethno nationalist
19 rather than a nation state." Do you see that?

20 PROF FRIEDMAN: Yes.

21 MS DE KOK SC: Can you explain to us what
22 you mean by that?

23 PROF FRIEDMAN: Yes, that refers to the
24 fact that there's a state for the Jewish people in a
25 territory in which the Jewish people are not the only

1 people in that state. There are other people in that state
2 who enjoy formal citizenship rights but are discriminated
3 against in many ways.

4 [10:21] And who if one looks at the history are only
5 tolerated in that state because the people who are in the
6 state have no other option. I think it's important to bear
7 in mind, which I mention, that those who say that the state
8 of Israel is simply a normal state which doesn't
9 discriminate seem to be unaware that there have been
10 several court cases in the state of Israel in which Israeli
11 citizens, Jewish Israeli citizens have attempted to have
12 their nationality in their passport described as Israel.
13 That is opposed, that is against Israeli law. In Israeli
14 law your nationality is described as Jewish or Arab or some
15 other ethnic description and these attempts by citizens of
16 the state to insist that they are treated as nationals of
17 the state, as you would in any other nation state have been
18 repeatedly rejected by the Israeli government and by the
19 Israeli courts.

20 MS DE KOK SC: You also, at page 63 deal
21 with Dr Hirsh's opinion that Zionism most aptly described a
22 movement which culminated in the creation of the state of
23 Israel and that it is not really - that its nature changed
24 after the establishment of the state of Israel.

25 PROF FRIEDMAN: I find this argument

1 peculiar, M'Lord, if you follow current debates in the
2 state of Israel first of the all the main Israeli
3 opposition party calls itself the Zionist Union. Clearly
4 that party still believes that Zionism is the ideology of
5 the Jewish state. He repeated there are all over the
6 world, including this country, organisations called Zionist
7 Federations which proudly proclaim their support for
8 Zionism and in their view, accurately in my view, the idea
9 that Zionism ceased to mean the same thing when the Jewish
10 state was established is incorrect. Once the Jewish state
11 was established what Zionism tried to do is to make sure
12 that that state survived and that that state was as strong
13 as possible. And that is still the case today. So the
14 idea that Zionism is not really the same as it was before
15 1948 is not a view which would find particular support
16 among Zionists today let alone among anybody else.

17 MS DE KOK SC: If you turn to page 68 you
18 deal there with Dr Hirsh's view of conclusions that most
19 Jewish people have some or other attachment to Israel.
20 What is your comment on that?

21 PROF FRIEDMAN: Well the evidence
22 suggests that he may be right although I would have to
23 point out that there's some recent surveys in the United
24 States of America which indicate that Jewish support for
25 the state of Israel in the United States is declining.

1 There are some supporters of the state of Israel who have
2 written articles. I could refer you to an article by Peter
3 Beinart in the journal of Foreign of Affairs for example in
4 which he complains that you Jewish Americans are losing
5 faith in the state of Israel. But it is probably still the
6 case today that the majority of Jews support Zionism, but
7 to say that that makes Zionism anti-Semitic is rather like
8 saying that because the majority of white, the vast
9 majority of white people supported apartheid, it was anti-
10 white to oppose apartheid. It's really indirectly, it's
11 the same, it's the same principle.

12 MS DE KOK SC: Still on page 68 and under
13 the heading Zionism and Racism you then deal with Dr
14 Hirsh's opinions as to whether it is anti-Semitic to call
15 Zionism racist or to call the state of Israel racist. What
16 is your response to that?

17 PROF FRIEDMAN: Well it clearly is not
18 anti-Semitic and there are legitimate reasons for calling
19 the state racist, 93% of the land, state's land surface is
20 administered by the Jewish Agency which allows only Jews to
21 purchase and live on that land. There are various other
22 forms of discrimination against Palestinians and most
23 important of all in violation of several United Nations
24 resolutions the state of Israel continues to occupy
25 territory inhabited by Palestinian people without giving

1 full rights to those people and without making them full
2 citizens. This occupation is now - it will be the 50th
3 anniversary this year of this occupation. And certainly
4 the kind of conditions which people are subjected to there
5 and I give eye witness testimony on this, people are, for
6 example, if they simply want to go to pray at a mosque
7 across the way or to visit relatives across the border
8 they're expected to stand in line in a queue for up to five
9 hours. They are very often humiliated by soldiers at the
10 head of that queue and generally they are treated much the
11 same as black people were treated in this country when we
12 had pass laws. So it is certainly not an outrageous claim
13 to claim that the state is racist. Its supporters point
14 out that Palestinians are entitled to vote, that is
15 perfectly true, most people believe that the reason
16 Palestinians are entitled to vote is that within the
17 state's borders they are a minority and therefore they are
18 of no threat to the majority. But there is no doubt in
19 Israeli legislation that this is a state for Jews in which
20 non-Jews are tolerated, but not given full rights.

21 COURT: Sorry, Professor. Which UN
22 resolution specifically are you referring to that had been
23 violated, not the ones that have been revoked or the one
24 revoked?

25 PROF FRIEDMAN: There were several, I

1 don't have the numbers in front of me, M'Lord but number
2 265, I could look that up, sticks to my imagination. These
3 are repeated resolutions of the United Nations General
4 Assembly which declares the occupation of Palestine lands
5 and the building of Israeli settlements in Palestine lands
6 a violation of international law.

7 COURT: Yes proceed.

8 MS DE KOK SC: Thank you. M'Lord.

9 Professor Friedman, if I can just ask you for a moment to
10 turn to the other file that you have. And if you can turn
11 to, I think it's page 300.

12 PROF FRIEDMAN: Yes, I'm at page 300.

13 MS DE KOK SC: I'm just going to ask the
14 attorney to help you quickly open that file properly, then
15 it's going to be much easier to read.

16 COURT: Sorry are you on page 3?

17 MS DE KOK SC: 300, M'Lord.

18 COURT: 300.

19 MS DE KOK SC: Three, zero, zero.

20 PROF FRIEDMAN: Ah here we are.

21 MS DE KOK SC: Have you got it?

22 PROF FRIEDMAN: Ja.

23 MS DE KOK SC: Do you have in front of
24 you a coloured map?

25 PROF FRIEDMAN: Yes, I do.

1 MS DE KOK SC: Now Dr Hirsh was also
2 referred to this map and there were some things that he
3 wasn't quite sure about, so perhaps you can help us. If
4 you can just explain to us the green line that we see
5 there, what would that depict?

6 PROF FRIEDMAN: The green line, M'Lord,
7 is the Armistice line of 1949 which reflected the positions
8 of the various combatants, armies at that stage. And that
9 Armistice line in 1948 became the de facto border of the
10 state of Israel at that time.

11 MS DE KOK SC: So at that time it would
12 have excluded the West Bank and the Gaza strip.

13 PROF FRIEDMAN: That is correct. The
14 West Bank was part of Jordan and the Gaza was administered
15 by Egypt.

16 MS DE KOK SC: Now if we look now at the
17 present then of the West Bank there's an area A and B in
18 yellow and an area C in blue.

19 PROF FRIEDMAN: Correct.

20 MS DE KOK SC: Could you explain to us
21 what that connotes to you?

22 PROF FRIEDMAN: Well the West Bank, the
23 entire West Bank, of course, is that territory which was
24 occupied by the Israeli military earlier in 1967. Blocks
25 A, B and C are blocks which have different statuses, in

1 effect block A and B is meant to be under the sole control
2 of the Palestinian authority although many of us question
3 whether that's in fact the case. Block C is under the
4 direct control of the Israeli state.

5 MS DE KOK SC: And what are Palestinians,
6 what are their rights in the blue, in area C, in the blue
7 areas?

8 PROF FRIEDMAN: Well they really - they
9 have no rights in area C, they are subjected to - it's a
10 military occupation. In principle Palestinians in the West
11 Bank are entitled to elect their own legislative assembly,
12 but in effect this has been - this doesn't happen in
13 practise. When Palestinians in the year 2005 elected a
14 government of which the Israeli state disapproved that
15 government was, in effect, pushed out of office by force.
16 The current president of the Palestinian authority was
17 supposed to be - subjected himself to re-election eight
18 years ago. In effect, the democracy, the limited democracy
19 which Palestinians were supposed to enjoy ended in 2005 and
20 so for the last 10 years Palestinians have been represented
21 by an unelected authority. There are also strict
22 limitations on people's freedom of movement which is a very
23 serious burden to the local population.

24 MS DE KOK SC: In what way?

25 PROF FRIEDMAN: Well you can't go into

1 various places unless the military let you, the system of
2 checkpoints I mentioned in which you can very often be
3 either blocked entirely, there are some people who are
4 simply not allowed to go to certain places, or you are
5 subject to lengthy, stringent controls before you can
6 actually go there. There is also and this has been well
7 publicised, some years ago the Israeli state built a wall
8 through parts of Palestine and that wall also substantially
9 restricts freedom. And people's freedom of movement as
10 well as, in some cases, depriving them of their land
11 because if the wall cuts through your land or excludes your
12 land you are forced to forfeit that land to the Israeli
13 state.

14 MS DE KOK SC: And the settlements by
15 Jewish settlers would that now occur in area C?

16 PROF FRIEDMAN: It does, yes. Ja that
17 happened after 1967, groups of Israelis decided to settle
18 in what was meant to be occupied Palestinian territory and
19 the settlement movement has grown rapidly since then.

20 MS DE KOK SC: And the land on which the
21 settlements are built, how is that obtained?

22 PROF FRIEDMAN: Well originally it was
23 obtained by force of arms, as I pointed out. In 1967 the
24 entire West Bank was the fruits of military conquest and of
25 course, it is still in terms of international law an

1 occupied territory administered by an occupying army.

2 MS DE KOK SC: If you can then just turn
3 your attention to the position of the Gaza strip which we
4 also see on the map and tell us what do you understand by
5 the Gaza blockade.

6 PROF FRIEDMAN: Well, M'Lord, what
7 happened there, as I indicated, from 1967 Gaza, like the
8 West Bank, was occupied territory. Some years ago the
9 Israeli state announced that they're withdrawing from Gaza
10 and what they did then was to removed their troops directly
11 from Gaza. But what they then did is blockade Gaza so that
12 no goods could, or people could enter or exit Gaza. So the
13 effect is that although there are no Israeli troops
14 physically in Gaza Israel continues to control whether
15 people in Gaza can move out of it. And more importantly it
16 controls whether people in Gaza can receive basic
17 foodstuffs or medical supplies and there have been such
18 cases in which people have been unable to get hold of
19 necessary supplies because of the blockade. Of course at
20 various occasions in the last few years the Israeli state
21 has also launched military operations in Gaza. They have
22 attacked Gaza at various stages which obviously illustrates
23 the extent in which control over Gaza is still maintained.

24 MS DE KOK SC: Now, Sir, you can put that
25 file away and just return to your other file and we're

1 still dealing with the section that starts at page 68. Dr
2 Hirsh spoke of a potential comparison between Zionism or
3 the state of Israel and apartheid and Dr Hirsh is of the
4 view that this is not a valid comparison. What is your
5 view in that regard?

6 PROF FRIEDMAN: M'Lord, I think it's an
7 entirely valid comparison, I mean obviously Dr Hirsh is
8 correct that there are some features of apartheid which are
9 not found in the state of Israel and there were some
10 elements of the state of Israel which are not found in
11 apartheid. The common thread between apartheid and Zionist
12 control of the state of Israel is, as I mentioned earlier,
13 the idea of an ethno nationalist state. So in other words
14 under apartheid South Africa was proclaimed to be a state
15 for white people and not for black people. Similarly the
16 state of Israel is a state for Jewish people in which, as I
17 indicated earlier, others might be tolerated to some
18 extent, but are certainly not regarded as welcome or
19 regarded as full citizens.

20 Now as I mentioned earlier, those who reject this
21 analogy point out that Palestinians are entitled to vote,
22 they point out that there is one Palestinian judge in the
23 Israeli Supreme Court and they'll argue that this indicates
24 that there's no discrimination. But as I indicated
25 earlier, if you block people's access to land, if you block

1 people's access to equal education, if you block people's
2 access to jobs which is a major issue because there has
3 been a very deliberate Israeli policy of A, not employing
4 Palestinians and B, not allowing them to move to other
5 places where they can get work. The effect, very often, on
6 people's lives is exactly the same as that under apartheid,
7 but the similarity, the key similarity is that if you set
8 up a state for one ethnic group in an area where there are
9 several ethnic groups it is inevitable that you will
10 discriminate against people who are not members of the
11 groups for which the state is intended.

12 MS DE KOK SC: Dr Hirsh also dealt with
13 whether it is - he contends that a comparison with Hitler
14 or to call someone a friend of Hitler is anti-Semitic.
15 What is your response?

16 PROF FRIEDMAN: Well I think given what
17 Hitler was and what Hitler did to call anybody a friend of
18 Hitler is offensive to them or should be offensive to them.
19 [10:41] But it's not anti-Semitic. There is no
20 connection between the two. I mentioned in my paper
21 because I think these analogies are useful that during the
22 time we had apartheid in South Africa, I mentioned two
23 authors who wrote books and papers comparing the South
24 African system to Nazism. Now you may argue as many people
25 did that that was an exaggeration, that it was offensive

1 but it's certainly not intended to discriminate against
2 white South Africans. Whether or not one regards the
3 analogy is Nazism is appropriate or extreme, the point is
4 that it is not directed as Jews as Jews it is directed at a
5 particular state and therefore whether it is valid or not
6 it is not anti-Semitic.

7 MS DE KOK SC: At page 71 and onwards
8 you deal with certain statements that Dr Hirsh made in
9 relation to Mr Masuku's reference to families who send
10 their children to the Israeli Defence Force.

11 PROF FRIEDMAN: Correct.

12 MS DE KOK SC: And you say at page, at
13 the bottom of page 71 "South Africans serving in Israeli
14 military is the subject of considerable controversy here".
15 Could you perhaps just explain to us what you mean by that?

16 PROF FRIEDMAN: Well in the view it
17 hasn't been tested in court yet, in the view of those who
18 oppose the recruitment of Israeli soldiers in South Africa,
19 it is a contravention of the Regulation of Foreign Ministry
20 Assistance Act which is an Act which prevents people
21 sending foreign armies under some circumstances. Obviously
22 there is a view that that is not, that it is not a
23 violation of the Act but it's never been tested in court
24 and therefore people who are opposed to South Africans
25 serving in the Israeli army contend that this is an illegal

1 act. Obviously even if it is not an illegal act the
2 question of whether South Africans should volunteer to
3 serve in an army which in the view of its critics is
4 upholding an illegal occupation is something which attracts
5 a great deal of moral criticism.

6 I think it's very important to stress, given what
7 appears in the submission I read that this is not at all an
8 attack on Jewish people. In fact if you look at the
9 current trend at the moment, the percentage of Jewish
10 people in South Africa who send or encourage their children
11 to serve in the Israeli army is rather small. It's a small
12 section of the Jewish population and of course there are
13 many Jews around the world who choose not to encourage
14 their children to do that.

15 I also mentioned that within the borders of the
16 Israeli state there are Israelis who refuse any longer to
17 serve in the Israeli military because they say that it
18 violates their conscience and they have formed
19 conscientious, object organisations to express so that. So
20 the claim that if you oppose people serving in the Israeli
21 army you are opposing Jews is incorrect.

22 MS DE KOK SC: Sir, then at page 73 to
23 74 we find your conclusion. You don't need to go through
24 that, but do you confirm this conclusion?

25 PROF FRIEDMAN: I do.

1 MS DE KOK SC: Professor Friedman, just
2 one last other aspect. You will have been provided quite
3 recently with a summary of a Dr Gregory Stanton.

4 PROF FRIEDMAN: Correct.

5 MS DE KOK SC: And have you read that?

6 PROF FRIEDMAN: I have, yes.

7 MS DE KOK SC: Is there - are there any
8 comments that you want to make in respect of his report?

9 PROF FRIEDMAN: Well there are two
10 comments I'd like to make, M'Lord. The one is that the
11 problem with his analysis is, and in many of the points he
12 makes about genocide are generally accepted. I mean
13 they're not particularly unusual. I mean the idea that if
14 you're going to commit genocide you cause hatred, you
15 stigmatise the other party. But what Dr Stanton does in
16 the document

17 MR BESTER: Sorry.

18 PROF FRIEDMAN: - is then to make -

19 COURT: Yes, sorry, Professor. There's
20 an objection. I wonder if Mr Bekker could not wait until
21 you finish before -

22 MR BESTER: I'm sorry, M'Lord, I -

23 COURT: - he objects.

24 MR BESTER: My apologies, M'Lord. I've
25 just realised I've gone through Professor Friedman's

1 summary -

2 COURT: Sorry?

3 MR BESTER: I've gone through Professor
4 Friedman's witness summary.

5 COURT: Yes.

6 MR BESTER: He now appears to be dealing
7 with Dr Stanton's witness summary, however, Professor
8 Friedman's own witness summary does not deal with Professor
9 Stanton's witness summary at all. His witness summary has
10 limited himself to the summary of Dr Hirsh. In other words
11 what the witness is therefore doing he's testifying in
12 relation to matters which have not been tabled by way of a
13 summary of the evidence that he would give before this
14 Court and on that basis I submit it would inadmissible,
15 M'Lord.

16 COURT: Are you saying to me that
17 Professor Friedman as an expert witness of the respondent
18 in this matter is not entitled to express his expert
19 opinion on what is before the court?

20 MR BESTER: Not insofar as he has not
21 made reference thereto or dealt with the subject -

22 COURT: Previously you mean?

23 MR BESTER: - previously in a summary.

24 COURT: You mean it should've been
25 noticed before.

1 MR BESTER: It should've been noticed.
2 His witness summary should therefore have been a summary in
3 respect of both Dr Hirsh and Dr Stanton. It's limited to
4 Dr Hirsh and one could imagine, M'Lord, the consequences
5 that might follow because it might well be that there are
6 certain things which Professor Friedman now say which quite
7 frankly and to be fair to Dr Stanton ought to have been put
8 to Dr Stanton so he could've dealt therewith. That's where
9 the objection comes from. It's not prefaced by anything
10 found in Dr Friedman, in Professor Friedman's witness
11 summary. On that evidence, on that basis the evidence
12 would be inadmissible.

13 COURT: Before there's a reply to your
14 objection I just want to remind that this is an inquiry
15 where the Court can play an active role to regulate its own
16 affairs to get to the bottom of the matter, not strictly
17 the normal civil trial where a witness is confined to what
18 they indicated they would testify on. You yourself
19 admitted this early on in these proceedings that I'm here
20 to enquire, to establish the truth but I hear you are now
21 suggesting that I should ignore Professor Friedman's
22 opinion in response to Dr Stanton's. It's a problematic
23 for me but let me hear what Counsel De Kok says to the
24 objection.

25 MS DE KOK SC: Thank you, M'Lord.

1 M'Lord, just to put the matter into perspective, Professor
2 Friedman's report which was framed as a response or a
3 rebuttal of Dr Hirsh's report was served last year, in
4 December of last year. Professor - Dr Stanton's report
5 only came to us very late in the day. It came to us, it
6 was served not on the, I think on the 20th of January,
7 M'Lord. So my learned friend is correct that on a strict
8 application of the rules we would've been entitled to then
9 file a further summary or a report by Dr Friedman, setting
10 out his rebuttal, but my submission to Your Lordship is
11 that the rules of Court on expert notices and summaries
12 which do not necessarily apply in these proceedings as
13 strictly, in any event gives Your Lordship a discretion to
14 allow evidence of which notice has not been given
15 beforehand. Professor Friedman prefaced his answer to say
16 that he's got only two points to make in relation to Dr
17 Stanton's report. If - I would suggest, M'Lord, that Your
18 Lordship listens to that evidence on those two points and
19 then if my learned friend contends that this is so
20 unexpected or so prejudicial then we can deal with it on
21 that basis.

22 COURT: Yes, Mr Bester?

23 MR BESTER: M'Lord, the, let me just
24 briefly say the dates which my learned friend referred to
25 are quite correct but where the difficulty lies, it's a

1 basic question of fairness and even though Your Lordship is
2 absolutely correct, this process is a bit different, it is
3 an inquiry, but the inquiry is still informed by the basic
4 notion of fairness. At the very least what one should've
5 expected, if it was not to be dealt with by way of a
6 supplementary summary filed in rebuttable to Dr Stanton and
7 at the very least these two points were put to Dr Stanton
8 so he could've provided a response thereto. That now will
9 simply not be possible and that is because it is unfair to
10 introduce it now at this very late stage. I'm not going to
11 take any further than that. I've made my submission.

12 COURT: If the opinions now expressed by
13 Professor Friedman in regard to Dr Stanton's opinion are so
14 destructive of the applicant's case, is that not something
15 to be argued later for the court to ignore that opinion on
16 the same grounds that you want it to be ignored now?
17 Alternatively there's still an opportunity for Dr Stanton
18 to come back and rebut, is it not so?

19 MR BESTER: It could be done. I'm -

20 COURT: Yes.

21 MR BESTER: - not sure whether he's
22 still available but -

23 COURT: Yes, but I mean the window is not
24 or the door is not closed yet.

25 MR BESTER: Subject to practical

1 consideration.

2 COURT: Yes, but I mean these are issues
3 that could be argued at the end of the day. It does not
4 follow at this stage that this court will automatically
5 take into account the opinions opposed to those of Dr
6 Stanton, is it?

7 MR BESTER: Indeed, M'Lord.

8 COURT: The matter is going to be argued
9 and I'm going to be pointed this way and that way and my
10 discretion comes into play and things like that.

11 MR BESTER: Indeed, M'Lord.

12 COURT: I hear that you may be right in a
13 normal civil trial but -

14 MR BESTER: Yes.

15 COURT: - I'm here to deal with equality
16 court procedures. Anyway, I'll keep an open mind. I will
17 overrule the objection for -

18 MR BESTER: As the Court pleases,
19 M'Lord.

20 COURT: Yes, thank you.

21 PROF FRIEDMAN: M'Lord, as I say I have
22 two problems with it. The first one is that as I say Dr
23 Stanton's description of how genocide happens would be
24 widely accepted except that it only holds if you have
25 evidence that hatred is being directed at a particular

1 racial or religious group. Now the example he cites is,
2 are comments on whether people should serve in the Israeli
3 military or not and he says that everybody knows that that
4 refers to Jews and therefore it could lead to Genocide. As
5 I've tried to point out it is simply not true that this
6 refers to Jews as a group because many, many Jews are not
7 covered by it. So while I'm prepared to accept that this
8 is a fairly standard description of what happens prior to
9 genocide, it is clearly not valid to say it applies when
10 people criticise a particular state or a particular
11 political philosophy. If that was correct then every time
12 somebody was drastically opposed to an alternative
13 political view then you could talk about the dangers of
14 genocide.

15 I think it's also necessary to point out that I
16 was struck by the fact that if we take one particular
17 section of Dr Stanton's evidence then the case could be
18 made that the current policies of the Israeli state are
19 contributing to genocide and what I have in mind there is
20 that Dr Stanton says that if you start dividing people up
21 into different racial and ethnic groups, if you start
22 making a distinction between this group and that group,
23 then you may be creating conditions for genocide because
24 you're targeting a particular group. As I pointed out
25 earlier, the Israeli state distinguishes between the

1 nationality of various groups and if you take the argument
2 to its logical conclusion that could be a preparation for
3 genocide. I'm not making the case that it is, I'm simply
4 pointing to a problem with that particular way of
5 reasoning.

6 COURT: Yes.

7 MS DE KOK SC: Thank you, M'Lord, I have
8 got no further questions for the witness.

9 COURT: Well before you cross-examine, Mr
10 Bester, I hear that the evidence given now by Professor
11 Friedman is partly in favour of your case about genocide.
12 I've had no objection from you about that.

13 MR BESTER: Well we'll argue the matter
14 in due course, M'Lord.

15 COURT: Yes. I think so. Cross-
16 examination then.

17 CROSS-EXAMINATION BY MR BESTER: As the
18 Court pleases. Professor Friedman, good morning. If I can
19 ask you to please turn if you will to your curriculum vitae
20 on page 37 of the notices bundle.

21 PROF FRIEDMAN: I have it.

22 MR BESTER: You started your career as a
23 labour reporter with the Financial Mail and then you, from
24 79 to 85 you were a labour report and labour correspondent
25 for the Rand Daily Mail and the Guardian Financial Times.

1 Around 1985, that would've been the time of the formation
2 of COSATU if not mistaken, is that correct?

3 PROF FRIEDMAN: That's correct.

4 MR BESTER: And would you have reported
5 extensively on that at the time?

6 PROF FRIEDMAN: I did. Well actually I
7 didn't report directly on it because at that stage I had
8 taken leave of absence to write a book. COSATU came a bit
9 later and in fact what I had to do was write a special
10 section of the book reflecting the formation of COSATU
11 because at the time that I took leave to write the book it
12 had not yet been formed, but I did, there is a section in
13 my book which deals with COSATU, yes.

14 MR BESTER: And the book you would be
15 referring to would be the one "Building Tomorrow Today".
16 Is that correct?

17 PROF FRIEDMAN: Yes.

18 MR BESTER: And if I understand it deals
19 with the African Trade Unions in South Africa -

20 PROF FRIEDMAN: Correct.

21 MR BESTER: - and their formation from
22 1978 to 84.

23 PROF FRIEDMAN: That is correct.

24 MR BESTER: And would you have had to
25 interact with various role players at COSATU for that

1 chapter on COSATU that you introduced at a later stage?

2 PROF FRIEDMAN: Yes, I would.

3 MR BESTER: If I can you, then you then
4 worked for the South African Institute of Race Relations
5 and at some point you were also a member of a reference
6 group evaluating US and German democracy and governance
7 funding. That's on page 38 of -

8 PROF FRIEDMAN: Yes, that's correct.

9 MR BESTER: Now during these early years
10 did you at any stage at this point of your career embark
11 upon any specific study on the greater geopolitical
12 conflict between Israel and the Palestinian people?

13 PROF FRIEDMAN: At the period up until
14 1985?

15 MR BESTER: From 1985 to 1995, the
16 period when you were involved in this reference group
17 evaluating US and German democracy and governance.

18 PROF FRIEDMAN: Well the reference group
19 didn't last for 10 years. It happened during the 10 years,
20 but if the question is did I or do academic works
21 specifically on the conflict during that period, no I did
22 not.

23 MR BESTER: Then if I can ask you the
24 four books that you've written, "Building Tomorrow Today"
25 and then you were the editor of another book listed on page

1 38 "The Long Journey. South Africa's quest for a
2 negotiated settlement" and then you were the editor
3 together with Doreen Atkinson of another book "The Small
4 Miracles. South Africa's negotiated settlement". And then
5 also interestingly a book on Harold Wolpe and the racial
6 critique of apartheid which we'll get to. Those would be
7 the four books that you've written or that you've spent
8 time towards, is that correct?

9 PROF FRIEDMAN: That's correct, yes.

10 MR BESTER: And all of them really deal
11 with the domestic affairs of South Africa.

12 PROF FRIEDMAN: That is correct.

13 MR BESTER: You've not undertaken any
14 writing of books per se on the Israeli Palestinian conflict
15 is that correct?

16 PROF FRIEDMAN: I have contributed
17 chapters to edited collection of, I've - three edited
18 collections I have contributed chapters to on the Israeli
19 Palestinian issue.

20 MR BESTER: Is that listed in your CV?

21 PROF FRIEDMAN: Some of them should be,
22 it's not - well let me have a look. Sorry, it's a long -

23 MR BESTER: I tell you what, we'll get
24 there is due course. Not to worry, we'll just move on.

25 Let me just ask, insofar as your book on Harold Wolpe -

1 PROF FRIEDMAN: Sorry, M'Lord, if I can -

2 MR BESTER: Yes.

3 PROF FRIEDMAN: - draw attention the
4 article "One text many meanings, reading a non-Zionist from
5 the Hebrew bible" that is one of the -

6 MR BESTER: Page.

7 PROF FRIEDMAN: - articles. That is on
8 page 43.

9 MR BESTER: At the top?

10 PROF FRIEDMAN: No, in the middle. The
11 next -

12 COURT: Sorry, which one was that you
13 mentioned?

14 PROF FRIEDMAN: Sorry, that's 43, M'Lord.

15 COURT: Yes, I'm there.

16 PROF FRIEDMAN: "One text, many
17 meanings". It's about in the middle of the page and the
18 next articles is also on the same topic.

19 [11:01] And it should somewhere there be a third way -
20 yes, there is. At the top of the page there is an article
21 in the South African Review of Sociology on the boycott of
22 Israeli Universities. The - I'm afraid the third one is
23 not entered in the CV, yet it's a contribution to a book
24 which was published last year and I need to update the CV
25 accordingly.

1 MR BESTER: Right, but we will get to
2 these specific instances that you've referred to now, but
3 these are at best articles that you've written that touch
4 on the subject. My question was specifically in relation
5 to books, actual books -

6 PROF FRIEDMAN: Have I written a book on
7 the -

8 MR BESTER: Yes.

9 PROF FRIEDMAN: No, I have not.

10 MR BESTER: All right. Then if I can ask
11 you, the book on Harold Wolpe, as I understand it he was a
12 lawyer, a sociologist, a political economist, but he was
13 also a left-leaning member of the South African Jewish
14 community. Is that correct?

15 PROF FRIEDMAN: That's correct.

16 MR BESTER: Yes, and he made an
17 interesting transition from a Zionist to a communist, not
18 so?

19 PROF FRIEDMAN: That's correct, M'Lord.

20 MR BESTER: And in that transition do you
21 think he would then in later years have occupied a strictly
22 anti-Zionist perspective?

23 PROF FRIEDMAN: That is correct, if you
24 consult the book I do quote associates of his who say that
25 was his view after he abandoned Zionism, that's correct.

1 MR BESTER: And it's fair to say that as
2 a subject people in the South African Jewish community who
3 are of the left-leaning inclination, if I can call it that,
4 traditionally if we go back over the 20th century, Jewish,
5 members of the Jewish community, those people would have
6 taken up membership of trade unionists, they would have
7 become members of the South African Communist Party, and
8 some of them in fact we do know contributed to the
9 liberation of this country, not so?

10 PROF FRIEDMAN: That's correct, M'Lord.
11 Although I'm, just in the interest of accuracy, I don't
12 think it's true to say that the majority of Jews were in
13 that position. Jews were politically diverse and still are
14 politically diverse, but it's certainly true that the
15 Jewish - the level of Jewish participation in the anti-
16 apartheid movement was unusually high. That is correct.

17 MR BESTER: Yes. But if we can use the
18 phrase - and correct me if I'm wrong, perhaps I'm
19 describing it a little inaccurately, but let's call it
20 left-leaning Jews of the time, they would in terms of when
21 measured rather against the overall South African Jewish
22 population their views do not represent the majority
23 viewpoint. Is that correct?

24 PROF FRIEDMAN: That's correct.

25 MR BESTER: If I can then ask you if we

1 can then turn to page 38, the publications we've dealt
2 with. Page 39, the monographs, articles and book chapters
3 that you've written, these started in 1986. Would that
4 have been the first?

5 PROF FRIEDMAN: Yes, that would be the
6 first one.

7 MR BESTER: Right, so we're really
8 covering a period now in excess of, just in excess of 31
9 years -

10 PROF FRIEDMAN: Yes.

11 MR BESTER: - that you've dedicated
12 yourself to publications of a high academic level. A
13 number of these would have been published in, some of them
14 in academic journals such as for instance the South African
15 Journal of Sociology for instance. Is that correct?

16 PROF FRIEDMAN: That's correct, M'Lord.

17 MR BESTER: Yes, now on my count you have
18 had a significant scholarly output, Prof Friedman. On my
19 count the articles that you've listed here number 73.
20 Would you quibble with that? Is that more or less correct?

21 PROF FRIEDMAN: I haven't counted them,
22 but I'm prepared to accept your -

23 MR BESTER: You're prepared to accept it.

24 PROF FRIEDMAN: Yes.

25 MR BESTER: And that then would have been

1 over a period of 31 years from 1986 until the present.

2 PROF FRIEDMAN: That is correct.

3 MR BESTER: Now let's just look at it.

4 The articles that you identified that touch on the greater
5 Palestinian/Israeli conflict are indeed the three ones
6 listed on page 43 which you've referred me to. The first
7 one would have been at the top of page 43, "A university is
8 judged by the company it keeps," in the South African
9 Review of Sociology. Then there's one a little bit down,
10 "One text, many meanings, reading a non-Zionist Judaism
11 from the Hebrew Bible," which you published around 2012.
12 What was the nature of that publication?

13 PROF FRIEDMAN: It was the proceedings of
14 a conference, M'Lord, held in Bethlehem by the Dias Centre,
15 which is a Christian theology centre in Bethlehem.

16 MR BESTER: And then you wrote an
17 article, the very next one, "Jewish identity and minority
18 status in a democratic Palestine."

19 PROF FRIEDMAN: Yes.

20 MR BESTER: On my understanding of these
21 articles, and I've tried to call it aggregate, the topics
22 or the subjects which they deal with, one or two deal with
23 the USSR, I think you wrote one or two articles on Russia,
24 "New mood in Moscow," and that would have been towards the
25 end of the Cold War no doubt when things were heating up

1 quite interestingly in the Soviet Union. The majority of
2 your articles appear to focus on South Africa's transition
3 to democracy and contemporary South African politics. You
4 also write on civil society and then you've made some
5 scholarly contribution based on these articles to South
6 African civil society, and more specifically the work of
7 the TAC and their campaign to introduce antiretrovirals for
8 the HIV/AIDS pandemic. But the summary I've given you is
9 to the fields that you've covered. Would that more or less
10 be correct?

11 PROF FRIEDMAN: Well yes, except that I
12 have written on Israel and Palestine.

13 MR BESTER: No, of course.

14 PROF FRIEDMAN: It may not have been a
15 major part of my work, but it was a part of my work.

16 MR BESTER: Well, that was going to be my
17 next question because it seems to me over a 31-year period
18 of the 73 articles that you've listed only three of them in
19 fact focus on this very vexed, complicated question, or
20 periphery touch on this issue of the fight between the - I
21 don't want to, let me rephrase that - the conflict between
22 the Palestinians and the Israelis. Is that correct? Based
23 on what you -

24 PROF FRIEDMAN: Well, there are some
25 others which are not listed there, but if your point is

1 that it is a small part of my overall work, yes I would
2 agree with it.

3 MR BESTER: Yes, and accordingly it would
4 not have been a field of intense study on your part over
5 the past 31 years. Is that correct?

6 PROF FRIEDMAN: No, that doesn't follow
7 at all, M'Lord. It's been a major preoccupation. The fact
8 that one only publishes some work on an issue doesn't mean
9 that one doesn't read widely on that issue. Besides being
10 an academic I am also, I teach Jewish religion and I teach
11 Jewish history at religious congregation, at a particular
12 religious congregation, and as part of that responsibility
13 it is important to me to read widely and keep myself fully
14 informed on the nature of what occurs in Israel Palestine.
15 It is not - if you consult standard academic practice a
16 work, the quality of work on a subject is based on its
17 merits, not by how many articles a particular author writes
18 on that particular topic.

19 MR BESTER: That we accept, but the fact
20 is you yourself have not made a major scholarly
21 contribution to issues like what is anti-Semitism and the
22 greater conflict between Palestinians and Israelis. Is
23 that correct?

24 PROF FRIEDMAN: Well, I think you'd have
25 to ask my colleagues whether I've made a - I don't think I

1 should judge whether I think my - you know, I obviously do
2 my best to make a contribution. It's up to my colleagues
3 to decide whether they think that that contribution is
4 useful.

5 MR BESTER: But in terms of your
6 scholarly output the sum total of the articles you've
7 listed would be three out of 73. Is that correct?

8 PROF FRIEDMAN: Well, five, but let's not
9 quibble.

10 MR BESTER: Let's work on what we have
11 before the court.

12 PROF FRIEDMAN: Ja, well as I say there
13 are others.

14 MR BESTER: Yes.

15 PROF FRIEDMAN: But they're not reflected
16 there. The French author Marcel Proust only wrote one
17 book. He's still famous as an author.

18 MR BESTER: I beg your pardon?

19 PROF FRIEDMAN: The French author Marcel
20 Proust only wrote one book. He's still regarded as a giant
21 of French literature.

22 MR BESTER: Yes. No, there's no doubt
23 about it, but fortunately his expertise is not the subject
24 of discussion, because let me put it to you, Prof Friedman,
25 that we will ultimately argue at the end of the case that

1 your expertise is not really within this field. You are
2 not a specialist and you do not have sufficient knowledge,
3 as demonstrated by your lack of academic output, to qualify
4 as an expert in this very vexed and complicated field. How
5 do you respond to that?

6 PROF FRIEDMAN: Well, I obviously deny
7 it, M'Lord. I've made the point that the size of one's
8 contribution - the size of one's written work is not
9 necessarily a reflection of the quality of the work. I'm
10 fortunate enough to be repeatedly invited to give papers on
11 the topic. The reason I was in Bethlehem was that I was
12 invited by my hosts to talk on the topic and I am often
13 consulted on the topic. It is simply not valid to say that
14 because somebody has written very little work on the topic
15 that they are not qualified. I might add, and I hope it's
16 taken in the spirit in which it's offered, that unlike the
17 expert witness on the other side I can define Zionism and I
18 can define anti-Semitism.

19 MR BESTER: Dr Hirsh -

20 COURT: Mr Bester, may I interrupt you
21 and I may have mispronounced your name earlier this
22 morning, but you remain Mr Bester.

23 MR BESTER: I certainly do.

24 COURT: And nothing else which I may have
25 said. May I take the tea break now, please?

1 MR BESTER: Certainly, M'Lord.

2 [COURT ADJOURNS COURT RESUMES]

3 [11:40] COURT: Sorry, did I hear your response?

4 Thank you. Mr Bester you're still busy with cross-
5 examination?

6 MR BESTER: Indeed so, M'Lord. Professor
7 Friedman if I can ask you, during the tea adjournment I
8 just briefly considered your résumé again, with reference
9 to the testimony you gave on the subject of genocide am I
10 correct in saying that you haven't specifically written
11 anything on genocide that's referred to in your CV, is that
12 correct?

13 PROF FRIEDMAN: That's correct, yes.

14 MR BESTER: The reason for that is that
15 you've not made it your business to endeavour in a study of
16 genocide as a discipline, is that correct?

17 PROF FRIEDMAN: Well, not as a discipline
18 no. I mean I'm obviously interested in the topic and I've
19 read on the topic but it's not one of my academic
20 specialities, no.

21 MR BESTER: If I can ask you then, have
22 you previously acted as a consultant to COSATU or any of
23 its affiliates?

24 PROF FRIEDMAN: No, I haven't, M'Lord.

25 MR BESTER: Do you understand that when

1 you give evidence it must be seen as the product of
2 independent thought, uninfluenced by the demands or
3 circumstances of the particular litigation? You appreciate
4 that?

5 PROF FRIEDMAN: I do, M'Lord.

6 MR BESTER: And the evidence that you
7 give then must of course always be neutral and independent
8 in all respects, am I correct?

9 PROF FRIEDMAN: Well, neutral is not
10 independent, M'Lord. I have never met a neutral human
11 being. Independent means that you give your honest opinion
12 and you do not taint that opinion by serving the interest
13 of particular organisations.

14 COURT: Sorry, can you repeat, Professor,
15 the first part of your reply?

16 PROF FRIEDMAN: I'm saying that we all
17 have opinions, M'Lord. I don't deny having opinions. My
18 work is independent in the sense that I don't reflect the
19 view of any organisation. I reflect my own view based on
20 the evidence as I see it.

21 COURT: Thank you.

22 MR BESTER: Prof Friedman, are you aware
23 of any facts which are material to your independence which
24 you have not brought to this court's attention?

25 PROF FRIEDMAN: Well, if you mean do

1 support the BDS Movement, yes I do support the BDS
2 Movement. I don't think that that's - as I said before I'm
3 entitled to opinions. I don't belong to any organisation
4 and I don't serve any organisation.

5 MR BESTER: Let's cast our minds back.
6 Around 2011 you were one of the academics that made
7 submissions to the University of Johannesburg to it to
8 terminate its association with the Ben-Gurion University in
9 Israel, is that correct?

10 PROF FRIEDMAN: Ja, that's correct,
11 M'Lord.

12 MR BESTER: And you campaigned actively
13 towards that goal?

14 PROF FRIEDMAN: I did, M'Lord, yes.

15 MR BESTER: And the basis that you did
16 that was because according to you Ben-Gurion University did
17 not do enough to reach out to Palestinian people inter
18 alia? Would that have been one of the -

19 PROF FRIEDMAN: No, that's not entirely
20 correct, M'Lord. The record at Ben-Gurion University was
21 it that it had actively assisted the occupation of
22 Palestinian territory as an institution.

23 MR BESTER: If I can ask you your
24 particular position that you've adopted in relation to the
25 greater conflict in the Middle East between Palestinian

1 people and Israel is one which you have held for a long
2 time. It's nothing new, is that correct?

3 PROF FRIEDMAN: That's correct, M'Lord,
4 yes.

5 MR BESTER: Because as early as 2009
6 already Mr Masuku on his own version appear to have a great
7 admiration for your position. Would you agree with that?

8 PROF FRIEDMAN: I think you'd have to as
9 Mr Masuku.

10 MR BESTER: Well, let's look at page 17
11 of the trial bundle, shall we?

12 PROF FRIEDMAN: Which one is that?

13 MR BESTER: This will be the other
14 bundle.

15 COURT: Page?

16 MR BESTER: Page 17, M'Lord.

17 COURT: Thank you.

18 PROF FRIEDMAN: Oh here, yes I see that.

19 MR BESTER: He says in this e-mail to
20 various people, and I'm not going to read the whole e-mail,
21 he simply says "let me clarify one thing, I hate no Jew.
22 For that matter a great admirer of Ronnie Kasrils, Steven
23 Friedman" and then he goes on. That's reference to you, am
24 I correct?

25 PROF FRIEDMAN: I'm sure it is, M'Lord.

1 MR BESTER: Yes. Well, clearly then let
2 me put it to you that Mr Masuku admires you because you are
3 - you happen to be a Jew who thinks exactly like him on
4 these matters of the conflict between Israel and Palestine,
5 would you agree with that?

6 PROF FRIEDMAN: Well, I don't know. Mr
7 Masuku and I will have to have a conversation about what we
8 agree on. Are we both opposed to an ethnic national state
9 in the Middle East yes, we share that view. Do we both
10 support peaceful boycott, divestment and sanctions in order
11 to change the policy of that state? Yes, we both do.

12 MR BESTER: Yes. So you see, Dr
13 Friedman, what we are going to argue for at the end of this
14 matter is that you have long since taken a particular
15 stance in this conflict. You've therefore adopted a clear,
16 unequivocal position on one side of the divide and as a
17 result thereof you are not to be viewed as a dispassionate
18 expert who will approach the very vexed questions arising
19 in these proceedings in a fair minded, dispassionate
20 manner. How do you respond to that?

21 PROF FRIEDMAN: I'm as partial as Dr
22 Hirsh, Dr Stanton and anybody else. I'm not aware of any
23 academic writing on this issue who is impartial and
24 neutral. Everybody has a position on this issue. I don't
25 think that anybody and I include, I don't think that

1 anybody's work should be judged on the position they take.
2 Their work should be judged on the quality of the work and
3 I'm quite happy to stand or fall on the quality of my work.
4 But as I say I would be interested to know of anybody who
5 writes on this conflict who would be considered by their
6 colleagues to be neutral.

7 MR BESTER: So as I understand it with
8 reference to Dr Hirsh you've said you would be as partial
9 as he is by way of example?

10 PROF FRIEDMAN: Absolutely, yes.

11 MR BESTER: Well, in fact in your report
12 you describe him as being highly partisan.

13 PROF FRIEDMAN: Yes.

14 MR BESTER: So would you say that the
15 same would apply to you, just on the other side of the
16 divide?

17 PROF FRIEDMAN: Yes, but I make no secret
18 of my partisanship, M'Lord.

19 MR BESTER: Then if I can ask you, do you
20 accept, Prof Friedman, that if we go back in history if we
21 use the examples of Weimar Germany, the rise of Nazi
22 Germany in the 1930's other examples such as Rwanda, that
23 words have important consequences when uttered
24 irresponsibly. Would you agree with that?

25 PROF FRIEDMAN: I would agree with that,

1 M'Lord.

2 MR BESTER: And would you also agree that
3 since the disintegration of the Oslo Peace Accord around
4 2001 there has been increase in the number of anti-Semitic
5 attacks on Jewish communities and individuals across the
6 world? Would you share that view?

7 PROF FRIEDMAN: No, I would not share
8 that view, M'Lord.

9 MR BESTER: In what basis do you differ
10 from that?

11 PROF FRIEDMAN: Well, I would need to see
12 the evidence that that is the case. The evidence that has
13 been presented so far, I'm aware of evidence that's been
14 presented which is highly suspect.

15 MR BESTER: I beg your pardon?

16 PROF FRIEDMAN: I'm aware of evidence
17 which is being presented in defence of that view which is
18 highly suspect.

19 MR BESTER: And then -

20 PROF FRIEDMAN: You know, to be specific
21 I'm aware of cases and incidents which happened 20 years
22 ago are cited as evidence of a trend today. That's clearly
23 not valid, that's not a valid claim.

24 MR BESTER: But that would be with
25 reference to international examples. We're not talking

1 about South Africa there, are we?

2 PROF FRIEDMAN: Well, that was the
3 French.

4 MR BESTER: But you're also aware of
5 attacks in France against members of the Jewish community
6 that are fairly recent and of a current nature?

7 PROF FRIEDMAN: I'm aware of current
8 attacks on the Jewish community by Islamists. I'm also
9 aware of current attacks by the Jewish community in France
10 by right wing anti-Semites yes. I am aware of that.

11 MR BESTER: And often whether it is
12 Islamists, let's perhaps use the example of ISIS, or right
13 wing extremists, the common denominator in many instances
14 surely would be is that in a modern era of social media the
15 use of social media and Internet technology provides a
16 great platform for hate to be disseminated for people to
17 receive that hate and act on certain prejudices. That
18 would be correct?

19 PROF FRIEDMAN: Well, it's certainly
20 disseminates the hate. We have clear evidence of that.
21 What is debated in the field is what effect that hate has
22 on actions. There are differing views on that but if the
23 question is can social media be used to reinforce hatred?
24 Yes, that is certainly true.

25 MR BESTER: You're on record as I

1 understand for using phraseology like Jewish money power
2 represents language that cost millions of lives in Europe.

3 Do you agree with that?

4 PROF FRIEDMAN: I most certainly do, yes.

5 MR BESTER: And you accept that even
6 amongst those who support the Palestinian cause that
7 regrettably that there those amongst that particular
8 constituency who failed to draw the clear distinction
9 between an attack on Zionism and anti-Semitism, is that
10 correct?

11 PROF FRIEDMAN: That's correct.

12 MR BESTER: In fact, to put it
13 colloquially, it seems to me that when that clear dividing
14 line is not maintained with the utmost discipline the
15 members of the - call it BDS Movement - would then often
16 score an own goal, id that not so?

17 PROF FRIEDMAN: That is correct, M'Lord,
18 which is why many sections of the BDS movement are very
19 anxious to prevent that sort of behaviour.

20 MR BESTER: And in the process what
21 happens is that they undermine their own cause, not so?

22 PROF FRIEDMAN: Well, we would question
23 whether people who have that attitude to Jews really do
24 support our commitment to democracy but certainly they
25 undermine the cause of justice in Israel and Palestine. I

1 would agree with that entirely.

2 MR BESTER: Then if I can ask you to turn
3 to page 266 of the trial bundle.

4 PROF FRIEDMAN: Sorry, that's this one?

5 MR BESTER: It will be that one, yes.

6 PROF FRIEDMAN: Thank you, I have it.

7 MR BESTER: The top of the page Mr Masuku
8 says during the course of the lecture at Wits, he says "I
9 wrote to one Zionist who wrote to me I said I'm less
10 concerned about Semitism or whatever name you call it. All
11 I want is justice, if you can ask me." Then it goes on,
12 someone says that racist and the Mr Masuku says
13 "explanation for what I do, I only owe it to the people who
14 want justice as to what I have done to assist them and only
15 said that we will do our part to assist. Whether anti-
16 Semitic or not it's none of my business and I don't care."
17 Do you see that?

18 PROF FRIEDMAN: I do.

19 MR BESTER: Yes, clearly on the face of
20 this passage Mr Masuku himself appears to have not
21 maintained that distinction, do you agree with that?

22 PROF FRIEDMAN: I would disagree, M'Lord.
23 I don't think that that violates the distinction at all,
24 particularly if you read on. What I understand Mr Masuku
25 to be saying in this particular instance is that he doesn't

1 care if people try to violate his freedom of speech by
2 accusing him of anti-Semitism. It's common as I said
3 earlier who dislike criticism on the state of Israel to
4 accuse the critics as either being anti-Semites or if
5 you're Jewish as in my case, the term used as self-hating
6 Jew and that term is used in order to silence people. I
7 have actually read the transcript of the meeting and if you
8 go on you will see that Mr Masuku is it Semitic? I presume
9 he means anti-Semitic, to accept that Palestinian children
10 must live under the conditions they live under. We'll have
11 peace including here on the Sothern tip of Africa and if
12 everybody has peace. He's clearly making the view, taking
13 the view that he doesn't feel deterred by accusations of
14 anti-Semitism. That doesn't mean he's anti-Semitic.

15 MR BESTER: Prof Friedman, you will also
16 appreciate the fact that the charge of bad faith that has
17 levelled against people who complain about anti-Semitism or
18 surely is not always valid and of application in the
19 particular instance? There are instances where people
20 clearly try and send what is permissible free speech and
21 engage in anti-Semitism?

22 PROF FRIEDMAN: That is correct, M'Lord.

23 MR BESTER: In fact, if one had to say
24 instead of Dubula Ibunu, Dubula Ijuda, that would in your
25 view certainly constitute hate speech, is that correct?

1 PROF FRIEDMAN: Most certainly, yes.

2 MR BESTER: Can I ask you to turn to your
3 expert summary in the other file?

4 MS DE KOCK SC: Page?

5 MR BESTER: We'll just start at the
6 beginning of your expert summary. That will be page 45.
7 Now am I correct in saying that Dr Hirsh is not known to
8 you personally, is that correct?

9 PROF FRIEDMAN: That is correct.

10 MR BESTER: And you would not be familiar
11 with his body or his contribution to this particular
12 debate, is that correct?

13 PROF FRIEDMAN: That is correct.

14 MR BESTER: In fact, you've made very
15 little attempt to study his work before you penned your
16 expert summary, is that correct?

17 PROF FRIEDMAN: That's correct, M'Lord.
18 I wasn't asked to comment on his work. I was asked to
19 comment on his expert summary.

20 MR BESTER: And you also would not have
21 been present when Dr Hirsh testified during the course of
22 these proceedings?

23 PROF FRIEDMAN: That is correct, M'Lord.

24 MR BESTER: Yes, because in fact what Dr
25 Hirsh did say was that Israel was wrong to go into Gaza and

1 he also did say that in the past he himself has been
2 critical of Israel's practices and policies. Would you
3 dispute that?

4 PROF FRIEDMAN: No, I do not dispute
5 that, M'Lord.

6 MR BESTER: Now if you had the benefit of
7 that particular set of facts would it have resulted in you
8 altering the first paragraph of your summary on page 45?

9 PROF FRIEDMAN: Not at all, M'Lord. As I
10 explained earlier my difference with Dr Hirsh's point of
11 view is not that he denies any right to criticise. I
12 mention in my submission that he allows certain sort of
13 criticism. But that he draws a line between criticism
14 which he accepts and criticism which he doesn't and
15 criticism which he doesn't accept is clearly not anti-
16 Semitic or hate speech. So for example you're allowed to
17 criticise the occupation of Gaza, you're not allowed to
18 criticise the Israeli state for being racist. That is a
19 restriction of freedom of speech.

20 MR BESTER: Where specifically, if you
21 can take me to Dr Hirsh's expert summary does he make just
22 that statement?

23 PROF FRIEDMAN: Well, I would have to dig
24 it up. I will try to find it. Well, I deal with the EUMC
25 which he supports. I mean I'm simply warning that this in

1 various places and I need to find. Yes, here we are on
2 page 58.

3 MR BESTER: Yes, I understand that. What
4 I wanted you to do was to identify the passage or portion
5 of Dr Hirsh's summary.

6 PROF FRIEDMAN: Well, I'm happy to do
7 that, M'Lord, but then I'd have to go through Dr Hirsh's
8 summary again and I'm quite happy to do that but that might
9 take some time.

10 MR BESTER: Well, it is a rather
11 important point so perhaps that is something that I should
12 do.

13 PROF FRIEDMAN: Okay, so could we just
14 establish where Dr Hirsh's summary is?

15 MR BESTER: His summary starts, let me
16 perhaps assist you, his summary starts on page 11 of that
17 very same bundle.

18 PROF FRIEDMAN: Okay, let me look. Oh,
19 yes. I think I've got the document here. Sorry, this is -
20 yes, okay then we talk about the same document.

21 MR BESTER: Page 11 is where his expert
22 summary starts.

23 PROF FRIEDMAN: Okay, so ja, if I can
24 refer you as a start, there are very other examples, Hirsh
25 testified that the EUMC provides is -

1 MR BESTER: Sorry, which page are you
2 now?

3 PROF FRIEDMAN: Page 15, sorry, page 17.

4 MR BESTER: Yes?

5 PROF FRIEDMAN: Hirsh testified that the
6 EUMC provides the useful framework which may be assisted in
7 making a judgement concerning what kinds of hostility to
8 Israel are anti-Semitic. If you consult the EUMC you will
9 see - here we are, page 19. Campaigns of boycott. A
10 campaign boycott is not anti-Semitic -

11 MR BESTER: Sorry, where are you, page
12 19?

13 PROF FRIEDMAN: Page 19, second line.
14 Campaigns of boycott are not anti-Semitic. Campaigns of
15 exclusion are not anti-Semitic. (Inaudible) violence are
16 unacceptable but they're not anti-Semitic. For example,
17 requiring Jews to take some sort of loyalty test I'm not
18 clear what he means there. Later on, he refers to
19 allegations of racism and he says -

20 MR BESTER: Of course if I can just
21 interject there?

22 PROF FRIEDMAN: This if I can clarify,
23 M'Lord?

24 MR BESTER: Yes?

25 PROF FRIEDMAN: Page number 23 -

1 MR BESTER: Paragraph 23?

2 PROF FRIEDMAN: Paragraph 25, sorry, on
3 page 18.

4 [12:00] Where he refers to Mr Masuku's evidence, Masuku
5 uses the word Zionist to mean something very similar to
6 racist and fascist and Hitlerite and he advocates action
7 against them.

8 MR BESTER: Yes, but I'm not asking you
9 to interpret the words used by Mr Masuku. That's not my
10 question.

11 PROF FRIEDMAN: No, I'm dealing with Dr
12 Hirsh's words, not Mr Masuku's words.

13 MR BESTER: Yes, what I'm specifically
14 enquiring from you is to show me in Dr Hirsh's statement
15 where he says criticism of Israel makes one a racist.
16 That's -

17 PROF FRIEDMAN: No, the -

18 MR BESTER: - the nature of my question.

19 PROF FRIEDMAN: Yes, he says that if you
20 use the word Zionist to mean something very similar to
21 racist then you are an anti-Semite. That is supposed to
22 ensure that people do not accuse the Israeli State of
23 racism. That is a restriction of freedom of speech. He
24 says that a boycott campaign is anti-Semitic. That is a
25 restriction of people's right to engage in non-violent

1 political activity.

2 MR BESTER: Well, let's just go back to
3 page 16, paragraph 19. He does say sometimes. He does not
4 state it as an absolute truth. He does use the word
5 sometimes, so in some instances. He's careful in the way
6 that he's couched the use of a language. Do you see that?

7 PROF FRIEDMAN: M'Lord, I do see that but
8 the point is that if - restrictions are restrictions,
9 whether they happen sometimes or always. If I tell you,
10 you can only exercise freedom of speech on a Thursday I'm
11 restricting your freedom of speech on the other days of the
12 week.

13 MR BESTER: But other than -

14 PROF FRIEDMAN: If I tell you I can only
15 use it in some instances and not others then I am
16 restricting your freedom of speech.

17 MR BESTER: Other than the example you've
18 given now, which you and I differ on, but also paragraph 24
19 where you've dealt with his supposed interpretation of what
20 Mr Masuku said, were there any other instances in his
21 summary where he expressly says that, that criticism of
22 Israel is racist? Does he say that?

23 PROF FRIEDMAN: Well yes -

24 MR BESTER: In express terms?

25 PROF FRIEDMAN: Well, in express terms

1 for example, you know, there's an argument which is
2 developed here. In effect if I can summarise Dr Hirsh's
3 argument here, his argument is that the victims of racism
4 should have a very important say in whether something is
5 racist or not, which I would agree with. What he then goes
6 on to say is that if a group of people believe that they
7 are victims of racism that should be taken at face value.
8 I disagree very strongly with that. In fact if Dr Hirsh's
9 definition is correct then one has to call the Israeli
10 State a racist state because many Palestinians believe that
11 they're the victims of racism and if Dr Hirsh is correct to
12 say that anybody who feels that they're a victim of racism
13 must be taken seriously then the Palestinians clearly must
14 be taken seriously. It's not a tenable object, it's not a
15 tenable position to say that anybody who feels or claims
16 that they're a victim of racism is in fact a victim of
17 racism, and the effect is to try to silence those people
18 who express the views which cause them to believe that
19 they're victims of racism.

20 MR BESTER: Can I ask you to turn to page
21 13 of Dr Hirsh's summary?

22 PROF FRIEDMAN: I am there, yes.

23 MR BESTER: Let me put it to you, Prof
24 Friedman, that we will argue that you simply misunderstood
25 the nature of Dr Hirsh's expert summary. He's not

1 suggesting that the notion of subjective feelings should be
2 the be all and end all, or that that is in any way
3 dispositive. In fact what he says at the top of paragraph
4 6 is that racism is an objective social phenomenon, not
5 simply or necessarily a subjective feeling, and that I
6 would put it to you takes it outside the ambit of simply
7 relying on someone's subjective feeling, is that we have to
8 assess instances of racism as a phenomenon based on a set
9 of objective criteria. Yes, ultimately the decision maker
10 as in this particular court will always be a human being.

11 PROF FRIEDMAN: Yes.

12 MR BESTER: But it's objective according
13 to Dr Hirsh. He did not in any manner or form regard
14 subjective feelings as being dispositive.

15 PROF FRIEDMAN: He regards subjective
16 feelings as being important. I would agree, M'Lord, that
17 we need to define the term exactly and I think that it is
18 one of the weaknesses of Dr Hirsh's argument that he does
19 not define the term exactly because what that leads to is
20 the consequences I have described. If you say very
21 clearly, as I tried to do in my submission, that this is
22 what anti-Semitism is and this is what it isn't, it gives
23 one a clear guideline for determining whether a political
24 action is anti-Semitic. If you look through Dr Hirsh's
25 evidence I see no clear definition of what anti-Semitism

1 is. In fact he's very concerned to say that he doesn't
2 want to give a clear definition because it's a matter of
3 judgment in his view, and that to me opens up tremendous
4 latitude for people to decide what anti-Semitism is and not
5 subject themselves to critical scrutiny.

6 MR BESTER: If I can ask you then with
7 reference to the EUMC definition of anti-Semitism, which
8 you'll find at page 28, there's an appendix there.

9 PROF FRIEDMAN: I'm not - I'm trying to
10 get there, thank you. Yes, I'm there.

11 MR BESTER: As I understand your
12 testimony you regard the definition as being flawed because
13 it does not allow for permissible criticism of the state of
14 Israel. It seeks to somehow immunise the state of Israel
15 from legitimate criticism. Would that be correct?

16 PROF FRIEDMAN: That is correct, M'Lord.

17 MR BESTER: Well, let me ask you then, if
18 you turn to page 29, you'll read on page 28 it gives
19 various examples. Then on page 29 there's a very important
20 caveat right at the end. It says, "However, criticism of
21 Israel similar to that levelled against any other country
22 cannot be regarded as anti-Semitic." So surely that carves
23 out an acceptable amount of space for legitimate criticism
24 of Israel if one criticises the state in exactly the same
25 way one would for instance criticise the United States for

1 atrocities said to have been committed in places like
2 Afghanistan, in Iraq, Latin America, America's role in
3 Latin America, Vietnam, Cambodia. The list can go on. So
4 surely if one draws that distinction and allows for
5 criticism based on the fact that if it's the same criticism
6 one would level against any other state, then in fact it is
7 perfectly permissible. Do you see that?

8 PROF FRIEDMAN: I do see that, M'Lord,
9 but I have two problems about it. The one is who decides
10 whether the criticism is the same as any other country? I
11 don't think that the EUMC document is a particularly
12 reliable arbiter because first of all if you go to the
13 bottom of page 28 it says that, "Claiming that the
14 existence of the state of Israel is a racist endeavour is
15 anti-Semitism." So in other words as I said earlier in the
16 view of the EUMC anybody who says that the state of Israel
17 is racist is an anti-Semite. That is not a criterion I
18 would accept as valid even, and certainly I'm not in favour
19 of double standards, it says there "applying double
20 standards by requiring it of a behaviour not expected or
21 demanded of any other democratic nation." That is a highly
22 subjective claim. One person's double standard is another
23 person's consistency, and if we're going to stop people
24 speaking every time we feel that they are guilty of a
25 double standard we are going to close down a great deal of

1 human debate.

2 MR BESTER: In fact I can put you at ease
3 and tell you that it's not the purpose of this litigation,
4 certainly not to stifle legitimate expression and we will
5 argue that in due course.

6 COURT: Mr Bester, sorry, tell me if I am
7 incorrect; did I misunderstand your expert Dr Hirsh when he
8 more than once told me that the definitions and incidents
9 that he's referring here to are not conclusive? Somewhere
10 he says it's a guide, right at the top of page 28. He did
11 qualify some of the examples that he gave here.

12 MR BESTER: Quite correct, M'Lord.

13 COURT: And made the point that they are
14 not conclusive and -

15 MR BESTER: Yes, in fact what he did say
16 was, is because this is such a contested terrain -

17 COURT: Yes.

18 MR BESTER: - one will not find universal
19 acceptance amongst all human beings as to what is anti-
20 Semitism.

21 COURT: Yes.

22 MR BESTER: There are probably people on
23 the right who adopt a far more narrower definition of anti-
24 Semitism, which would allow for criticism against Jews to
25 be far more generous and spacious both in content, colour

1 and tone, and there might be other definitions which are
2 more extensive in effect, but he did say from a
3 sociological point of view that this is a highly contested
4 terrain.

5 COURT: Yes.

6 MR BESTER: And as a result one will -
7 it's not like - in other words by way of lack of a better
8 example, it's not like the natural sciences where we know
9 exactly what the chemical properties of water are. It's a
10 universal truth, that we know, H₂O. This is something
11 quite different when one is in the social sciences and it
12 is a matter for some contestation.

13 COURT: Anyway, that would be a matter
14 for argument later on.

15 MR BESTER: Indeed.

16 COURT: And interpretation by the court
17 and in the context of what happened here.

18 MR BESTER: Indeed, M'Lord. Prof
19 Friedman, if I could just go back and correct one error
20 that you made on page 28.

21 PROF FRIEDMAN: Yes?

22 MR BESTER: And tell me it was just an
23 oversight, not deliberate on your part. You said at the
24 bottom of page 28, you say "denying the state of Israel
25 their right to self-determination." In fact the wording

1 used there is "denying the Jewish people" -

2 PROF FRIEDMAN: Ja -

3 MR BESTER: - their right to self-
4 determination." There's quite a distinction there, isn't
5 there?

6 PROF FRIEDMAN: Well, could I elaborate
7 on that, M'Lord? The exact sentence says, "Denying the
8 Jewish people their right to self-determination, for
9 example by claiming that the existence of the state of
10 Israel is a racist endeavour." With respect, M'Lord, the
11 two statements have absolutely nothing to do with each
12 other. The Jewish people's right to self-determination is
13 a matter which is energetically - as I pointed out in my
14 summary - debated among Jews. Jews differ on what Jewish
15 self-determination is. According to this definition the
16 only Jews whose idea of self-determination matter are those
17 Jews who support the Israeli State. Those Jews who have
18 other ideas of self-determination, which I discussed in my
19 evidence, are simply disregarded. Their opinions are of no
20 weight and that in effect silences them.

21 MR BESTER: But it's quite possible, you
22 would concede, for one to support as a Jew the right of
23 one's people to self-determination without at the same time
24 being a supporter of the particular Israeli regime, not so?

25 PROF FRIEDMAN: That is indeed correct

1 and it's also possible to support Jewish self-determination
2 without supporting the idea of the Israeli State in any
3 shape or form.

4 MR BESTER: And on that level the debate,
5 I'm sure you will agree with me, does become fairly
6 nuanced, doesn't it?

7 PROF FRIEDMAN: Well, not entirely. I
8 mean if you take the view - and for example if you go to
9 New York State in the United States there is a group of
10 Jewish people there who have their own municipality. They
11 live in effect under Jewish law and they entirely reject
12 the state of Israel. That, in their view that is a form of
13 Jewish self-determination. Whether you agree with their
14 view or not, it's a valid Jewish view.

15 MR BESTER: If I can just speak to Mr
16 Seape about an issue, M'Lord?

17 COURT: Yes.

18 MR BESTER: We know that Dr Hirsh relies
19 on the EUMC definition of anti-Semitism, but your
20 understanding of the term, or your definition of the term,
21 has that been accepted by any international bodies or
22 organisations?

23 PROF FRIEDMAN: Well, I think it's a
24 general - incidentally it's also accepted by the EUMC until
25 they go on to elaborate on it because if you look at the

1 page 28 in bold the EUMC says, "Anti-Semitism is a certain
2 perception of Jews which may be expressed as hatred towards
3 Jews. Rhetorical and physical manifestations of anti-
4 Semitism are directed towards Jewish or non-Jewish
5 individuals and their property, towards Jewish community
6 institutions and religious facilities." I would endorse
7 that description. The problem with the EUMC document is
8 that it totally invalidly tries to confuse that anti-
9 Semitism with criticism of a particular state.

10 MR BESTER: Yes, so as I understand it
11 that part of the definition you don't quibble with. You
12 seem to take issue with what follows and the elaboration
13 and the examples given.

14 PROF FRIEDMAN: Yes.

15 MR BESTER: Albeit non-exhaustive, but on
16 your more narrow construction of anti-Semitism - and that's
17 why I go back to the question, which you haven't answered -

18 PROF FRIEDMAN: Yes.

19 MR BESTER: - does your narrow definition
20 of anti-Semitism receive favour or acceptance at an
21 international level?

22 PROF FRIEDMAN: Absolutely. It's very
23 common in academic writing. I'm not aware of international
24 treaties which encapsulate it, but many academic writers on
25 the subject would agree with me.

1 MR BESTER: Yes, but has it received
2 acceptance on the part of international bodies per se?
3 You're not aware of that?

4 PROF FRIEDMAN: Well, I'm not aware - you
5 know, I don't know that it's the job of international
6 bodies to settle economic debates - academic debates,
7 sorry. Am I aware of an equivalent to the EUMC which says
8 nothing else? No. I am incidentally, although I notice
9 that Dr Hirsh doesn't much like it, I am aware of a United
10 Nations resolution which defines Zionism as racism and
11 would be more or less consistent with this, but as I say
12 that resolution was later rescinded and Dr Hirsh rejects
13 it.

14 MR BESTER: Now Prof Friedman, if I can
15 ask you on your expert summary, page 46 -

16 PROF FRIEDMAN: Mine, ja.

17 MR BESTER: Yes. You do accept at the
18 bottom of page 46, the last paragraph, that it was really
19 after Nazi Germany that the majority of Jews began to be
20 attracted to Zionism, with the result today that we can
21 accept that the majority of Jews are in fact Zionists. Is
22 that correct?

23 PROF FRIEDMAN: Probably correct. It may
24 be changing, but I would concede that the majority almost
25 certainly are, yes.

1 MR BESTER: Yes, in fact interestingly
2 enough you did refer during your testimony to a study
3 undertaken in the United States -

4 PROF FRIEDMAN: Yes.

5 MR BESTER: - that tended to suggest that
6 - was it amongst young people in particular, young Jews in
7 the United States, that their connection with the state of
8 Israel appears to be on the decline.

9 PROF FRIEDMAN: That is correct.

10 MR BESTER: If I can put it in imprecise
11 terms, but you're not aware of any study having been
12 undertaken in South Africa recently that has come to the
13 same conclusion. Is that correct?

14 PROF FRIEDMAN: No, I'm not aware of such
15 a study.

16 MR BESTER: In fact it's fair to assume
17 that in South Africa the majority of Jews would be
18 Zionists, not so?

19 PROF FRIEDMAN: The majority would, but
20 there is also a significant majority who are not, who -
21 actually there are at least two non-Zionist Jewish
22 organisations in South Africa.

23 MR BESTER: But as one would of course
24 come to accept in any society, even if we could look at the
25 Afrikaners during the height of apartheid, there were

1 Afrikaners, the majority perhaps who were supportive of the
2 National Party and then there were Afrikaners who were not.

3 PROF FRIEDMAN: Precisely.

4 MR BESTER: For instance -

5 PROF FRIEDMAN: Which is precisely why
6 criticism of apartheid was not criticism of Afrikaners as a
7 group of people. It was criticism of a particular
8 ideology.

9 MR BESTER: But you do accept that
10 sometimes the criticism that is levelled against a group of
11 people because - call it what one wishes to call it -
12 because of them exploiting a position of privilege or
13 imposing their ways and their wills on other groupings,
14 perhaps a majority grouping in a particular geographical
15 region. Sometimes that criticism transcends the
16 ideological, does it not? And it becomes criticism that is
17 based on race and ethnicity. As a proposition you accept
18 that?

19 PROF FRIEDMAN: I accept that.

20 MR BESTER: Yes, for instance
21 notwithstanding the fact that Afrikaners committed
22 atrocities in the name of apartheid in propping up an
23 illegitimate regime, our courts have accepted in the new
24 South Africa that singing slogan songs like "Kill the
25 Boer," "Dubula Ibunu" is unacceptable. You accept that?

1 PROF FRIEDMAN: I do.

2 MR BESTER: Yes, and as a result, Prof
3 Friedman, you would accept that based on the same premise
4 that notwithstanding the conflict that plays itself out in
5 the Middle East at the moment, whether one accepts Israel
6 to be the aggressor or not does not detract from the fact
7 that in South Africa the Jewish community is entitled to be
8 protected against anti-Semitism, not so?

9 PROF FRIEDMAN: Of course. Everybody's
10 entitled to be protected against anti-Semitism and any
11 other form of racism.

12 MR BESTER: And in fact we accept that
13 they are a small minority in this country, not so?

14 PROF FRIEDMAN: Yes.

15 MR BESTER: Only approximately 70 000 of
16 them.

17 PROF FRIEDMAN: I don't think that's
18 relevant. I just think every human being is entitled not
19 to be a victim of racism, however many of them there are.

20 MR BESTER: Then on page 47 you describe
21 Zionism as purely a political ideology, in other words a
22 somewhat more narrower definition to Dr Hirsh, because Dr
23 Hirsh prefers a more expansive definition whereby Zionism
24 is more all-encompassing and connotes not just simply a
25 political dimension, but also a certain cultural and call

1 it, if one will, religious components thereto in terms of
2 which Jewish people all over the world experience a sense
3 of belonging and connection to the state of Israel. What
4 do you say to Dr Hirsh's more expansive definition?

5 PROF FRIEDMAN: Well, first of all I'm
6 not aware of this as a definition. I looked very closely
7 at his submission to see exactly what his definition was
8 and my understanding of his submission was that he chose
9 not to give a definition because he felt, he claimed it was
10 more complicated than that. I'm not sure what that means.
11 But if you're asking me to comment on the statement that
12 Jews, all Jews feel an emotional attachment to the state of
13 Israel, it's clearly a false statement. The Jewish groups
14 I mentioned do not feel an emotional attachment to the
15 state of Israel and those include - you know, Dr Hirsh
16 seems to be unaware of a very long tradition of religious
17 Jewish anti-Zionism.

18 [12:20] These are deeply religious Jews who observe the
19 Jewish religion faithfully who reject Zionism. They don't
20 feel any emotional attachment to the state of Israel but
21 they're very proud Jews.

22 MR BESTER: Page 48 of your summary you
23 seek to draw an analogy with Afrikaner nationalism and we
24 did touch on it just now, you say, I'm just going to read
25 to you the second paragraph halfway down the paragraph you

1 start a sentence "However, regardless of the tactics
2 employed opponents of apartheid were not expressing racial
3 hostility to Afrikaners but to a system which gave rights
4 to some but not others because they were of a different
5 race. Since apartheid ended Afrikaners have of course
6 enjoyed the same rights as other South Africans while
7 supporters of Afrikaner nationalism often claimed that
8 pressure on apartheid was an expression of hatred on
9 Afrikaners. This was a form of propaganda designed to
10 discredit criticism of apartheid, not an accurate
11 description". Do you see that?

12 PROF FRIEDMAN: I do, M'Lord.

13 MR BESTER: But at the same time you
14 accept that it's quite possible for anyone to be a follower
15 of for instance Afrikaans or Jewish culture without them
16 necessarily subscribing to the ideological view whereby
17 they support either apartheid or extreme support for a
18 particular regime in the state of Israel. Do you agree
19 with that?

20 PROF FRIEDMAN: Absolutely.

21 MR BESTER: And in fact if one in
22 speech, either spoken or written words, does not exercise
23 caution to draw a clear distinction at all times it may
24 well be so that many instances where that distinction is
25 not maintained, one can be guilty of some form of

1 generalisation. In other words people who would otherwise
2 not be caught up in that web would then also be the subject
3 of a particular hateful expression. Do you agree with
4 that?

5 PROF FRIEDMAN: It's certainly possible,
6 M'Lord.

7 MR BESTER: Then if I can ask you, page
8 51, you make the point in the second paragraph where, as I
9 understand it, Professor Friedman, you effectively accused
10 Dr Hirsh of double standards in that you accuse him of
11 saying that when Jews or Israelis complain of oppression or
12 racism that should be taken seriously but then conversely
13 when the complaint emanates from the Palestinian people it
14 is something which we should not be sensitive to. Is that
15 the double standard dichotomy that you are referring to?

16 PROF FRIEDMAN: That's correct.

17 MR BESTER: But of course had you been
18 in court you would've heard that Dr Hirsh himself holds no
19 brief for the state of Israel and secondly himself has been
20 critical of the state of Israel's practices and policies.
21 Now had you known that at the time when you prepared this
22 report, is that something which would've influenced you
23 perhaps in not making the double standard argument?

24 PROF FRIEDMAN: No, M'Lord. I was
25 perfectly well aware of that at the time he wrote it

1 because I had responded to his submission and his
2 submission at various stages, at one stage says that he has
3 been critical of the state of Israel. My problem is that
4 he, as I've said repeatedly, he's drawing a boundary on
5 what is permissible and what isn't and the issue is not
6 whether the state of Israel should be criticised, the issue
7 is whether the critics of the Israel are racist and my
8 problem with Dr Hirsh's argument is precisely the double
9 standard. If we're going to say that supporters of the
10 state of Israel are entitled, it must be taken very
11 seriously when they claim racism, then we must say that
12 Palestinians must be taken very seriously when they claim
13 racism and I see no reference in his framework which will
14 allow that to happen. In other words if I say that the
15 state of Israel is racist I'm reflecting the view of very
16 many Palestinians. If Dr Hirsh is consistent then I'm, I
17 must be taken very seriously and treated with a great deal
18 of respect.

19 MR BESTER: Of course to be fair to Dr
20 Hirsh he was responding to a case advanced on the basis of
21 anti-Semitism against Jewish people. The case before this
22 court does not concern racism against Palestinian people.
23 That's the point of distinction. You see, his expert
24 summary was prepared on that basis. Do you accept that?

25 PROF FRIEDMAN: I accept that, M'Lord,

1 but the point is that if you say, he says very explicitly
2 that to call the state of Israel racist is anti-Semitic.
3 In other words he is denying flatly that the state of
4 Israel is racist despite the fact that many Palestinians
5 say it's racist. That is a double standard.

6 MR BESTER: You keep on saying that,
7 that he says in his expert summary those words that you've
8 uttered now. I really want you to take me there because
9 I've looked and I'm not finding it. I know you've tried to
10 construct that argument on the basis of inference and on
11 the basis of some implied reading, but, Professor Friedman,
12 really I need to ask you take me to where he says that -

13 PROF FRIEDMAN: Well I've already taken
14 you -

15 MR BESTER: - state of Israel is racist.

16 PROF FRIEDMAN: He does not say all
17 criticism is - we've been over this. He says that critics
18 in the state of Israel are racist, including criticism
19 which says that the state of Israel is racist. I read you
20 a section in which he says that comparing the state of
21 Israel to apartheid is racist. That is not a valid
22 statement. It is a perfectly acceptable exercise of free
23 speech to compare the Israel system to apartheid, whether
24 you agree with it or not.

25 MR BESTER: Yes. Fortunately this case

1 doesn't concern any utterance where that particular analogy
2 stands to be determined. The veracity of that comparison
3 whether it's good or bad is not something His Lordship
4 needs to decide. Let me just ask you this, the Israeli
5 embassy is in Pretoria, not so?

6 PROF FRIEDMAN: That is correct.

7 MR BESTER: It's not in Orange Grove.

8 PROF FRIEDMAN: No, Orange Grove is the
9 headquarters of the South African Zionist Federation of the
10 South African Jewish Board of Deputies.

11 MR BESTER: Yes and -

12 PROF FRIEDMAN: - not Orange Grove but
13 people seem to regard it as Orange Grove. It's Highlands
14 North if you're really -

15 MR BESTER: Yes. It's in fact, I
16 believe it's called Raedene, if I'm not mistaken.

17 PROF FRIEDMAN: That's correct.

18 MR BESTER: Yes.

19 PROF FRIEDMAN: I preach in the building
20 next door to that so I know it well.

21 MR BESTER: Then if I can ask you -

22 PROF FRIEDMAN: Sorry, M'Lord, if I could
23 just draw the Court's attention in response to counsel's
24 question to page 23 of the summary of Dr Hirsh's evidence
25 to page, to paragraph 41 in which he says and I quote "The

1 kind of anti-Zionism that declares that Israel is uniquely
2 definitional and essentially a racist state is a great
3 explanatory way to a partial and one-sided reading of a
4 particular idea. This kind of anti-Zionism tends to
5 understand Israeli - that diverts or diverges from social
6 scientific approach to nationalism and to comparative
7 methodology" and he then goes on to accuse Mr Masuku of
8 doing that. So clearly the tenant here is, and he goes on
9 in number 43 that "To call, to refer to racists, fascists
10 and Zionists who belong to the era Hitler is racist". So
11 I'm simply citing that as evidence that he quite clearly
12 does argue that, accusing the Israeli state of being racist
13 is a form of hate speech.

14 MR BESTER: Of course let's just go back
15 because you omitted to read from paragraph 41 two key
16 sentences in the middle of that paragraph. 1, "It portrays
17 decades of ongoing life conflict, peace processes,
18 successors and failures, is little more than the
19 manifestation of a single ideal in the world. In reality
20 the contradictions within the history, practices and
21 practicalities of the Israeli state are not so different
22 from those in other states" and those are important points
23 to make, not so?

24 PROF FRIEDMAN: Ja, they're entirely
25 contentious points which I would argue are refuted by the

1 empirical evidence.

2 MR BESTER: I beg your pardon.

3 PROF FRIEDMAN: I would say they're
4 highly contentious points which are contradicted by the
5 evidence. I don't know too many other estates as I pointed
6 out earlier which force people to declare their ethnic
7 group on their passport.

8 MR BESTER: We'll deal with that but let
9 me ask you, Professor Friedman, as I understand your
10 perspective on the conflict between Palestinian people and
11 Israel you are of the view that the Palestinian people have
12 really, it seems to me, if I understand you correctly have
13 received a raw deal. Would that be a fair conclusion put
14 in colloquial terms of how you would describe the position?

15 PROF FRIEDMAN: Yes, certainly, M'Lord.

16 MR BESTER: But at the same time you
17 would agree with me that it would be hugely problematic if
18 we, if there are people in South African society who wanted
19 that same "raw deal" to be the consequence and to be
20 followed on South African Jews living in South Africa, not
21 so?

22 PROF FRIEDMAN: Of course, M'Lord, yes.

23 MR BESTER: And that would not be
24 acceptable.

25 PROF FRIEDMAN: No, it's entirely

1 unacceptable.

2 MR BESTER: It's not the way one goes
3 about resolving a conflict of this nature, not so?

4 PROF FRIEDMAN: Well it's not only not
5 the way you resolve conflict. I am opposed as I have, all
6 human beings are, it's a raw deal for anybody. You don't
7 correct one raw deal by giving a raw deal to another group
8 of people, clearly.

9 MR BESTER: You make a reference during
10 your examination in chief to Israeli law. Let me just
11 understand this, you don't proclaim to have any particular
12 expertise in Israeli law, am I correct?

13 PROF FRIEDMAN: No, I'm not a lawyer but
14 I do read copiously on what Israeli law is and isn't.

15 COURT: Sorry, I missed that.

16 PROF FRIEDMAN: I do read, sorry, M'Lord,
17 I do read regularly, daily almost about developments in
18 Israeli law although I'm not a legal scholar.

19 MR BESTER: So you wouldn't claim to be
20 an expert on Israeli law then?

21 PROF FRIEDMAN: No, I wouldn't claim to
22 be an expert but I would claim to be familiar with it.

23 MR BESTER: Then Professor Friedman, if
24 we can just move on. I just want to touch, deal with, not
25 with a reference to this case because I can't ask you what

1 the words mean and I have no intention of doing so, but
2 just there's a, in political discourse, even on social
3 media what one sees people very quickly comparing any
4 particular situation sometimes unfortunately to Hitler or
5 to Nazi Germany. In fact I think there's a phrase that
6 describes that. There's been some research on that to
7 suggest it happens within three minutes of a political
8 debate.

9 PROF FRIEDMAN: Yes.

10 MR BESTER: Someone will be compared to

11 -

12 PROF FRIEDMAN: That's correct.

13 MR BESTER: - to Nazis or to Hitler.

14 But when that's done with reference to Jewish people, let
15 me just understand it as you have it. Hitler's programme
16 of extermination wasn't directed at Zionists, it was
17 directed at Jews.

18 PROF FRIEDMAN: Correct, M'Lord.

19 MR BESTER: In other words if I was a
20 good Jew as Mr Masuku would have it, one that adopted an
21 anti-Zionist perspective, in Hitler's books that would not
22 mean that I got onto a train to the south of France whereas
23 all the Zionists went to Krakow and to Auschwitz, correct?

24 PROF FRIEDMAN: Correct, M'Lord.

25 MR BESTER: We can accept that there was

1 no distinction drawn.

2 PROF FRIEDMAN: Absolutely not, yes.

3 MR BESTER: Then you made reference to
4 the IDF with reference to the example in South Africa.
5 You're not aware and I didn't understand your evidence in
6 chief to suggest that, but you're not aware of any other
7 ethnic group in South Africa who joins the IDF other than
8 Jews, am I correct?

9 PROF FRIEDMAN: I haven't done a study of
10 - I would imagine that it would be almost overwhelmingly
11 Jews but I don't think it's impossible that other groups
12 might be part of it. I haven't - I don't have any
13 information on it.

14 MR BESTER: Would you accept that it
15 would be overwhelmingly Jews?

16 PROF FRIEDMAN: I would expect that but I
17 don't have hard evidence.

18 MR BESTER: Yes. Then are you familiar
19 with the work of the author Benjamin Pogrund?

20 PROF FRIEDMAN: I am.

21 MR BESTER: Yes and you would know that
22 he was the deputy editor at the Rand Daily Mail and he in
23 fact -

24 PROF FRIEDMAN: I most certainly would.
25 I worked under him at the Rand Daily Mail. I'm perfectly

1 well aware of who he is.

2 MR BESTER: I know you did and that's
3 why I'm asking you.

4 PROF FRIEDMAN: Yes.

5 MR BESTER: You would also then know,
6 Professor Friedman, that he wrote a book "Drawing Fire".

7 PROF FRIEDMAN: I am aware of the book.

8 MR BESTER: Yes. Where in fact he
9 investigated the accusation that Israel stands to be
10 compared to the apartheid state.

11 PROF FRIEDMAN: I'm aware of that.

12 MR BESTER: In fact although he was very
13 critical of Israel's settlement policy and its oppressive
14 practices in the occupied territories he also, I want to
15 put to you, made a compelling case in showing how apartheid
16 and the regime that was apartheid stands not to be compared
17 accurately with Israel but in fact is used as a cynical
18 attempt to delegitimise Israel's right to exist. How do
19 you respond to that?

20 PROF FRIEDMAN: I would disagree that
21 it's a compelling case, M'Lord. I think that the evidence
22 - first of all I did deal with this earlier on. A lot of
23 Pogrund's argument is precisely based on the idea that
24 there is not in Israel what we would've called in South
25 Africa petty apartheid. That is obviously true. However,

1 what he fails to address in the points I made earlier. He
2 fails to address the fact that because of their race or
3 ethnicity or religion, whichever way you want to define it,
4 people are denied access to land. They are denied access
5 to education. They're allowed a vote as long as they're
6 not in a majority and very many of them live under
7 perpetual occupation. That to me is rather more important
8 than whether people are allowed into various institutions
9 or not.

10 MR BESTER: And you accept that in
11 Israel all Israeli citizens have full political rights,
12 whether they are Arab, Christian or Jew.

13 PROF FRIEDMAN: Formally that is the
14 case, yes.

15 MR BESTER: Yes.

16 PROF FRIEDMAN: But not necessarily
17 informally.

18 MR BESTER: And unlike South Africa
19 where during the height of apartheid there was a
20 prohibition against mixed marriages, Israel is a state that
21 does not legislate to prohibit mixed marriages.

22 PROF FRIEDMAN: Well mixed marriages are
23 not allowed in the state of Israel.

24 MR BESTER: You say they are not
25 allowed?

1 **PROF FRIEDMAN:** **No, they're not allowed**
2 **and they are recognised if they happen elsewhere because**
3 **the law of the state of Israel insists that you need to be**
4 **married by an orthodox Jewish court which will not, which**
5 **will only marry a non-Jewish person to a Jewish person if**
6 **they've converted to Judaism. So what Israeli's tend to do**
7 **if they wish to marry people from other groups is that they**
8 **go elsewhere and then return with their marriage from**
9 **another jurisdiction.**

10 **MR BESTER:** **Are you saying then that**
11 **there's an expressed statute on the books in Israel that**
12 **prohibits mixed marriages?**

13 **PROF FRIEDMAN:** **No there's an express**
14 **statute which says that marriages are recognised if they're**
15 **performed by orthodox Rabbi and that has the same effect.**

16 **MR BESTER:** **So I want to put to you that**
17 **my understanding of the position that Israel has no such**
18 **prohibition but we can differ on that.**

19 **PROF FRIEDMAN:** **Okay.**

20 **MR BESTER:** **Then in Israel education**
21 **would not be segregated like it was at the height of**
22 **apartheid in South Africa.**

23 **PROF FRIEDMAN:** **It is segregated.**

24 **MR BESTER:** **You're saying it segregated.**

25 **PROF FRIEDMAN:** **There is a Jewish school**

1 stream and there is what is called an Arab school stream, a
2 Palestinian school stream.

3 MR BESTER: Do you accept that in Israel
4 when one sees unfortunate graffiti or examples of graffiti
5 on walls like "death to Arabs" people in Israel condemn
6 that, not so?

7 PROF FRIEDMAN: Well some cabinet
8 ministers do not, M'Lord. Some cabinet ministers repeat in
9 the current government.

10 MR BESTER: And you accept that in the
11 case of Hamas who controls the Gaza Strip they themselves
12 do not condemn anti- Semitism but in fact openly call for
13 the killing of Jews. Do you accept that?

14 PROF FRIEDMAN: No, I do not accept that,
15 M'Lord. If you consult the record, in 2005 when Hamas
16 became the elected government before it was overthrown, the
17 leader of Hamas, and this was repeated several times,
18 proposed a ceasefire negotiation with the state of Israel
19 in which there would be a cessation, an indefinite
20 cessation of hostilities that was rejected. Hamas for the
21 next year meticulously observed the ceasefire in which
22 nobody was killed. So in other words the party in that
23 particular conflict which has consistently offered a
24 negotiation is Hamas. Your reference is presumably to a
25 clause in the Hamas Charter which expresses, well it

1 doesn't talk about killing Jews but it rejects the Israeli
2 state and it rejects the Jewish presence in the Middle
3 East. That is not a clause I would support but the claim
4 that they are trying to kill Jews rather than make peace is
5 not supported by the recent historical evidence.

6 MR BESTER: Would you regard that clause
7 in the Hamas Charter as being anti-Semitic?

8 PROF FRIEDMAN: The clause is anti-
9 Semitic.

10 MR BESTER: Yes, you accept that.

11 M'Lord, if I can just confer with my learned friend for a
12 moment.

13 COURT: Maybe he must come nearer to you.

14 MR BESTER: He's a little far I think,
15 yes.

16 COURT: Yes.

17 MR BESTER: M'Lord, I'm coming towards
18 the end of my cross-examination. There's just one or two
19 issues I'd like to take stock of.

20 COURT: Yes.

21 MR BESTER: But perhaps if I can ask
22 Your Lordship's indulgence. I'm not going to be long if,
23 and when we continue after lunch. If we can take the
24 adjournment now and then we will, I don't think we will
25 take very long after the lunch adjournment.

1 [12:40] COURT: Mr Bester, you seem to ignore all
2 my attempts to finish this matter by tomorrow, the
3 scheduled time and you left with a problem on Friday
4 afternoon, I tried to resolve it. Now you still want to
5 take another 15 to 20 minutes of the scheduled time.

6 MR BESTER: Indeed -

7 COURT: I will tell you what let me go
8 into it now, what do you want to do now?

9 MR BESTER: I just need to consider and
10 see -

11 COURT: Don't tell me confidential
12 things, I want to know what you want to consider.

13 MR BESTER: It really is just a question
14 of just considering what loose strands of the cross-
15 examination I still need to mop up if I can put it
16 colloquially.

17 COURT: But we're finishing this matter
18 tomorrow despite this adjournment.

19 MR BESTER: Well I don't believe my
20 learned friend intends calling any further witnesses, so -

21 COURT: Fine, I will accede to your
22 request and I shall adjourn -

23 MR BESTER: I'm indebted to Your
24 Lordship.

25 COURT: - now for lunch hour and come

1 back at 2 o'clock, Professor.

2 PROF FRIEDMAN: Thank you.

3 COURT: Thank you, court adjourned.

4 [COURT ADJOURNS COURT RESUMES]

5 [14:01] PROF FRIEDMAN: Yes.

6 COURT: Yes, Mr Bester, you're still busy
7 before the adjournment.

8 CROSS-EXAMINATION BY MR BESTER (CONTD.):

9 Yes, M'Lord. Prof Friedman, are you specific, or rather
10 are you familiar with the specific facts of the Gaza War?

11 PROF FRIEDMAN: I am, M'Lord.

12 MR BESTER: And was it a war that was
13 specifically directed at women and children?

14 PROF FRIEDMAN: Well, it's had that
15 effect. I can't talk about what was in the minds of the
16 people who organised the war, but it had the effect of
17 killing many women and children, that's correct.

18 MR BESTER: But as far as you're aware it
19 certainly was not the objective of the war -

20 PROF FRIEDMAN: No, I said that -

21 MR BESTER: - to specifically target
22 women and children?

23 PROF FRIEDMAN: Well, I said I don't know
24 whether it was or not. I was not privy to the thinking of
25 the people who launched that exercise.

1 MR BESTER: And do you know how many
2 casualties were sustained on both sides during the war?

3 PROF FRIEDMAN: Well, there were various,
4 but the estimate I'm familiar with is something in the
5 region of 1400 on the one side and 13 on the other, 1400 on
6 the Palestinian side and 1300 on the Israeli side.

7 MR BESTER: How many on the Israeli side?

8 PROF FRIEDMAN: 13, according to one
9 estimate I've seen.

10 MR BESTER: I see. Insofar as the
11 casualties on the Palestinian side are concerned -

12 PROF FRIEDMAN: Well, I'm -

13 MR BESTER: - what was the composition of
14 that number, civilians, military personnel? Do you know?

15 PROF FRIEDMAN: I can't give you a
16 percentage, but the vast majority was civilians.

17 MR BESTER: Because Mr Masuku came to
18 this court and said that on the Palestinian side it was
19 mostly women and children.

20 PROF FRIEDMAN: I would have to check
21 that, but it's certainly not impossible. I would have to
22 go back, I was looking at absolute numbers. I haven't seen
23 the gender and age breakdown, but it's possible.

24 MR BESTER: The reason why I ask is
25 because Hamas has acknowledged that over 700 of the

1 fighters were in fact militants. What would you respond to
2 that?

3 PROF FRIEDMAN: I don't know. I would
4 have to - that 700 were militants? I would be surprised,
5 but I'm not - if that is your information I'm not
6 contradicting.

7 MR BESTER: But overall insofar as the
8 composition of the casualties on the Palestinian side,
9 you're not really in a position to comment as to the
10 precise number of civilians -

11 PROF FRIEDMAN: No, I haven't - I mean I
12 followed it. I haven't done any sort of analysis of how
13 many people, of the breakdown of people who died, no.

14 MR BESTER: Assuming Mr Masuku for a
15 moment is correct, that it in fact was mostly women and
16 children -

17 PROF FRIEDMAN: Yes.

18 MR BESTER: - on the Palestinian side,
19 that is hardly the fault of South African Jews. Am I
20 correct?

21 PROF FRIEDMAN: No, of course not.

22 MR BESTER: Are you -

23 PROF FRIEDMAN: I suppose he, you know
24 accept in a sense that if you actively support that kind of
25 action, if you deliberately and actively support it I

1 suppose you could be held accountable for it.

2 MR BESTER: Accountable in what sense?

3 PROF FRIEDMAN: Well, in the sense that
4 if you're aware of what happened and you don't distance
5 yourself from it then you're subject to the criticism that
6 you endorsed it and supported it.

7 MR BESTER: You're referring to moral
8 culpability. Surely you're not referring to anything else
9 than moral culpability?

10 PROF FRIEDMAN: No, purely moral
11 culpability, of course.

12 MR BESTER: Yes. Then are you aware of
13 the Israel Declaration of Independence and the fact that it
14 said that Israel will ensure complete equality of social
15 and political rights to all its inhabitants, irrespective
16 of religion, race or sex? You're aware of that?

17 PROF FRIEDMAN: I am aware of it, yes.

18 MR BESTER: Yes. So to the extent that
19 it is suggested that people are denied their rights because
20 they are of a different religion, well that's inconsistent
21 with the Israeli Declaration of Independence, is it not?

22 PROF FRIEDMAN: It is indeed, but that's
23 not the first, it wouldn't be the first state in history
24 which violated its own declaration of independence and its
25 own constitution.

1 MR BESTER: I'm going to ask you, on your
2 witness summary, page 45 -

3 PROF FRIEDMAN: Yes, I have it.

4 MR BESTER: I just want to read to you
5 what you say here. The first paragraph you say, "Hirsh's
6 submission is not a neutral discussion of anti-Semitism.
7 It is a highly partisan attempt to silence critics of the
8 Israeli State by labelling them anti-Semite, people who
9 harbour hatred of the Jewish people." I want to pause
10 there, and that's your definition of anti-Semitism really,
11 it's a hatred towards Jewish people, as I understand it.

12 PROF FRIEDMAN: That is correct, M'Lord.

13 MR BESTER: Yes, then you say, "It's
14 always been a key strategy of the Zionist movement but has
15 been given added momentum in recent years by governments
16 and politicians in Europe and North America who in their
17 desire to protect the Israeli State have sought to suppress
18 legitimate and non-violent action which seeks to pressure
19 it to change its policies." Let me just stop there.

20 You're not suggesting that Dr Hirsh is somehow associated
21 with or in the service of these governments and politicians
22 in Europe and North America? You're not suggesting that?

23 PROF FRIEDMAN: No -

24 MR BESTER: You accept that he's an
25 academic?

1 PROF FRIEDMAN: I accept that he's an
2 academic. I'm pointing out the consequences of his
3 argument. I'm not expressing opinion about his personal
4 motives.

5 MR BESTER: No further questions for the
6 witness, M'Lord.

7 COURT: Thank you. Any re-examination?

8 RE-EXAMINATION BY MS DE KOK SC: Prof
9 Friedman, just one question; Mr Bester referred you to
10 slogans in Israel reading "Kill the Arabs" and you
11 responded and I couldn't clearly hear your response. Your
12 response said something about cabinet ministers. Could you
13 just clarify for me what you said and what you meant?

14 PROF FRIEDMAN: There are Israeli cabinet
15 ministers in the present government who'd like -

16 COURT: Sorry, let me -

17 PROF FRIEDMAN: Sorry.

18 COURT: - get that as well.

19 PROF FRIEDMAN: Sorry, M'Lord. I should
20 have done that. There are in fact ministers in the current
21 Israeli cabinet who've expressed similar sentiments, both
22 let me say about Palestinians in the state of Israel and
23 about black people from Africa who happened to be in the
24 state of Israel at the time. They hadn't, they haven't
25 directly said that they should be killed, but they've said

1 they should be forcibly removed from the territory.

2 MS DE KOK SC: Thank you, M'Lord, I have
3 nothing further.

4 COURT: Thank you. Prof Friedman, just
5 one or two issues in clarification. Are you aware of the
6 specific legislation in Israel in regards to mixed
7 marriages?

8 PROF FRIEDMAN: I am, M'Lord.

9 COURT: Do you know the act or the
10 provisions there? We're dealing here with foreign -

11 PROF FRIEDMAN: I can't cite the act, but
12 as I said in my testimony it doesn't actually say - it
13 doesn't, there's not a law that says mixed marriages are
14 not allowed. The law says that the marriage may only be
15 performed by a Jewish orthodox rabbi and the rules of
16 Jewish orthodox rabbis is that they will not marry a Jewish
17 person to a non-Jewish person unless that non-Jewish person
18 has converted to Judaism.

19 COURT: I see. Then in regard to Mr
20 Masuku and COSATU, what is or was your relationship with Mr
21 Masuku? How would you describe the relationship?

22 PROF FRIEDMAN: We cooperated on a number
23 of - I spoke, I -

24 COURT: With Mr Masuku -

25 PROF FRIEDMAN: Yes, I spoke at a couple

1 of meetings he organised, but I'm not aware of any other
2 cooperation. We certainly didn't formally cooperate on
3 anything. But I do recall speaking at a couple of meetings
4 at his invitation.

5 COURT: So you know him well, hey?

6 PROF FRIEDMAN: I do. I haven't seen him
7 for some years until today, but I do know who he is and we
8 have interacted in the past, yes.

9 COURT: Finally on what appears to me the
10 most crucial question that this court will have to consider
11 at the end of the evidence and argument here, I'm sure
12 you're aware what task is facing me.

13 PROF FRIEDMAN: I am, M'Lord.

14 COURT: Yes. It's really put very
15 generally, it is for me to balance the freedom of
16 expression as guaranteed in the Bill of Rights which Mr
17 Masuku has or enjoys, and the limitations of course put on
18 section 16 of the Constitution, which section basics -

19 PROF FRIEDMAN: Yes.

20 COURT: - to limit that right in the Bill
21 of Rights, and to compare that with what Mr Masuku said.
22 I'm sure you're aware of the three or four or so
23 transcripts where he made the utterances.

24 PROF FRIEDMAN: I am.

25 COURT: You must have studied those when

1 you drew up your opinion and when you prepared to come to
2 court, isn't it? The question really in my mind is, at
3 this stage is - and considering all the relevant factors
4 objectively and circumstances, whether it could be said
5 that Mr Masuku rather went a bit overboard in his
6 expressions in these recordings. That's what I should be
7 considering at the end of the hearing here and I hear your
8 view that, if I understand it correctly, there is nothing
9 really anti-Semitic that he said.

10 PROF FRIEDMAN: Correct.

11 COURT: There's nothing hatred.

12 PROF FRIEDMAN: Correct.

13 COURT: And in the evidence I did not
14 hear of subsequent violence after these utterances except
15 for people throwing something, something at Wits during the
16 march or something. Taking all these into consideration
17 you still maintain that there's nothing anti-Semitic?

18 PROF FRIEDMAN: Very definitely, M'Lord.

19 COURT: Well, counsel for the applicant
20 took this aspect further in cross-examination, or during
21 the evidence of their expert to say that not only did Mr
22 Masuku say what he said, but he also mapped out a plan what
23 should happen to these Jewish people. For instance they
24 should be driven out of South Africa and things like that.
25 Would that change your view that he actually went further

1 to say something must happen to them, especially those who
2 send their daughters and sons to the army, or Israeli
3 Defence Force? If they don't like our democracy in South
4 Africa they must go away and go and live elsewhere. That
5 too does not change your opinion, hey?

6 PROF FRIEDMAN: No, it - for two reasons,
7 first of all I think it's very important to stress that
8 whatever he said or didn't say it was not directed at Jews
9 as a group.

10 COURT: Yes?

11 PROF FRIEDMAN: It was directed at a
12 particular group of people with whom he disagrees
13 politically.

14 COURT: Yes.

15 PROF FRIEDMAN: I think the question - I
16 mean it's clearly not my role to tell M'Lord what to find.
17 I'm trying to distinguish between very rough political
18 speech - I think if you look at that transcript you will
19 see that on both sides there was extremely rough speech.
20 There were all sorts - there was one side which was
21 accusing Mr Masuku of being something like Hitler. There
22 was another, so he responded in the way in which you
23 describe. I think we have to ask ourselves whether that
24 kind of robust exchange ought to be regarded as hate speech
25 because the danger we always have as a society is that no

1 matter how unpleasant some of the things that are said
2 were, if we start excluding that sort of speech then we may
3 find ourselves perhaps unintentionally restricting what
4 people should feel and say in public. So my own view would
5 be that as long as you do not make a direct threat to
6 people - and I'm not sure that he, you know, it's for you
7 to decide but first of all the question that you should
8 live, you shouldn't live here I've heard many times in
9 South Africa. It doesn't necessarily mean I'm going to
10 drive you out of here. It means if you don't like our laws
11 you can go and live in another country. I've heard that
12 said of whites who are considered racist many times.
13 Similarly I, you know, I don't know what Mr Masuku said
14 under cross-examination, but if you say that a particular
15 course of action which some people consider to be illegal,
16 that there will be consequences for that action, are you
17 saying that there will be violent consequences or legal
18 consequences? I think my answer would depend on what the
19 answer to that question is.

20 COURT: No, there was not implicitly
21 violent direction to be taken.

22 PROF FRIEDMAN: Well, surely you're
23 entitled to take action against people who you considered
24 broke the law. You could prosecute them or you could bring
25 a civil suit against them. I, you know, that's part of the

1 possible intentions. I can't speak for him.

2 COURT: Yes. Well, I also heard that the
3 atmosphere was hostile inside the hall at Wits. There was
4 haggling with Masuku as well from the other side.

5 PROF FRIEDMAN: Yes. This was the point
6 I was making, M'Lord. You see the point is that what
7 happened in the situation is something which happens very
8 frequently on this particular issue, which is that people
9 who support the state of Israel feel very strongly that
10 they want to stop anybody else expressing a view. As I
11 understand the transcript I was shown they arrived at this
12 meeting and insisted on very vigorously trying to heckle
13 and to make their point. That is obviously something
14 they're entitled to do in terms of our Constitution and I
15 would defend their right to do it, but my point is that in
16 that kind of environment on both sides very heated things
17 get said and as long as those things are not hate speech
18 and they're not directed at violence I think that's
19 probably the inevitable part of that situation.

20 COURT: Well, we all recognise and should
21 know that freedom of speech as guaranteed in the
22 Constitution is a very significant right in a growing
23 democracy like ours and we should be careful that we don't
24 contravene or abuse that right. Is it not so?

25 PROF FRIEDMAN: I agree, M'Lord.

1 COURT: You have all that in mind.

2 PROF FRIEDMAN: I do, M'Lord, yes.

3 COURT: Yes. Right, thank you,
4 Professor. Any questions arising from the court's
5 questions by either side?

6 MS DE KOK SC: Prof Friedman, just to
7 clarify, prior to today when last did you have contact with
8 Mr Masuku?

9 PROF FRIEDMAN: Oh, it must be seven or
10 eight years ago, I would think. We haven't interacted for
11 some time now.

12 COURT: Some time when?

13 PROF FRIEDMAN: It would probably be
14 about seven or eight years, M'Lord. That's a guess, but
15 certainly no shorter than that.

16 MS DE KOK SC: Thank you, M'Lord, nothing
17 further.

18 COURT: Thank you. Mr Bester, you have
19 something to ask?

20 MR BESTER: I certainly do, thank you,
21 M'Lord. Prof Friedman, you mentioned the meetings where Mr
22 Masuku asked you to speak at.

23 PROF FRIEDMAN: That's correct.

24 MR BESTER: How many of these meetings
25 would there have been?

1 PROF FRIEDMAN: I remember two of them,
2 M'Lord. I'm subject to correction, but I - two, I can
3 certainly remember two of them. I don't think there were
4 any others.

5 MR BESTER: What did you speak on?

6 PROF FRIEDMAN: On Palestine.

7 MR BESTER: On Palestine.

8 PROF FRIEDMAN: Yes.

9 MR BESTER: And the people in attendance
10 would no doubt have been people with a particularly pro-
11 Palestinian slant. Is that correct?

12 PROF FRIEDMAN: More or less. The one
13 meeting was a collection of - particularly were a large
14 number of activists from Swaziland and the purpose of the
15 meeting was to discuss the situation in Palestine and the
16 situation in Swaziland. But there would have been - ja,
17 ja, a substantial number of people who would have the same
18 view on Palestine as I do, yes.

19 MR BESTER: And you would consider Mr
20 Masuku to be one of those persons -

21 PROF FRIEDMAN: As I've said -

22 MR BESTER: - who had a similar view to
23 you on Palestine?

24 PROF FRIEDMAN: Well, as I said not
25 identical. There may be differences, but we share a view

1 that there needs to be pressure on the Israeli State to
2 change its current behaviour, yes.

3 MR BESTER: I accept that there may be
4 differences here or there, but your particular perspective
5 on the situation in substance, would you concede is more or
6 less the same?

7 PROF FRIEDMAN: I would think it would be
8 broadly similar, yes.

9 MR BESTER: And either before or after
10 these meetings that you addressed you would have no doubt
11 had an opportunity to engage with Mr Masuku at a one on one
12 level?

13 PROF FRIEDMAN: I would, yes.

14 [14:21] MR BESTER: So the two of you in fact
15 have discussed this issue extensively at those meetings.

16 PROF FRIEDMAN: That's correct, M'Lord.

17 MR BESTER: So Mr Masuku has known since
18 seven or eight years ago of the fact that you share his
19 perspective on Palestine.

20 PROF FRIEDMAN: Well I would assume so
21 yes.

22 MR BESTER: No further questions, M'Lord.

23 COURT: Thank you. Professor Friedman,
24 thank you for your evidence. You are excused.

25 PROF FRIEDMAN: Thank you, M'Lord.

1 [NO FURTHER QUESTIONS - WITNESS EXCUSED]

2 COURT: Counsel De Kok, what is the story
3 now?

4 MS DE KOK SC: M'Lord, that is the case
5 for the respondent.

6 COURT: Thank you. Mr Bester.

7 MR BESTER: M'Lord, all that now needs to
8 be arranged and logistical arrangements rather put in place
9 is for presentation of closing arguments and preparation of
10 heads of argument to assist Your Lordship. That's the only
11 real outstanding matter before judgment can be prepared
12 from where we stand. It's -

13 COURT: Before I finalise that aspect
14 could I maintain my fairness which I perceive I was during
15 the trial, you complained that some of the issues on which
16 Professor Friedman testified were not mentioned in his
17 summary or something. And we debated the question whether
18 there would be an opportunity to rebut or not. You have
19 considered your position now.

20 MR BESTER: We have, M'Lord, if I could
21 just confer with Mr Seape.

22 COURT: Yes.

23 MR BESTER: It's a matter which we don't
24 believe will be necessary to recall Dr Stanton, instead
25 it's a matter that we are of the view we could simply deal

1 with during the course of our argument.

2 COURT: Yes.

3 MR BESTER: Of course, M'Lord, let me
4 just clarify, we don't concede that as a matter of strict
5 law, technical process that he was entitled to testify on
6 those issues, but it doesn't matter for present purposes.
7 We believe it's something insofar as the content of what he
8 said that we can deal with quite comfortably during
9 argument.

10 COURT: I understood that to be your
11 attitude previously.

12 MR BESTER: Yes.

13 COURT: Right thank you, then I know
14 where we stand. We're back to the subject of the further
15 conduct of this matter. It is now about almost going to
16 half past two, we have the whole afternoon for the heads to
17 be prepared and tomorrow is our last day. Where do you put
18 me, before I give my directive, both of you? I think
19 there's sufficient to prepare heads today, there may be a
20 problem of not being able to complete argument tomorrow,
21 that's where the problem should come in. But counsel has
22 been on this case before I came into it, they've been in
23 the case during the evidence, they should be knowing which
24 way to draw up their heads of argument by now. I am sure,
25 I am not going to reserve judgment in this matter for heads

1 and anything else as I pointed to you. I'd rather have the
2 argument and the heads concluded and I go away and write a
3 judgment. But to come back after a few weeks or months to
4 get heads and then to read the whole papers again, I don't
5 think it's acceptable.

6 MR BESTER: We certainly understand that
7 and appreciate that, M'Lord. However, I do believe there
8 is perhaps if I can call it, the middle road, if I can call
9 it that, but again we're in Your Lordship's hands, to the
10 extent that we could prepare heads of argument and perhaps,
11 subject to Your Lordship's availability, make arrangements
12 to come and argue the matter later on in the week, to the
13 extent that that's possible. For instance -

14 COURT: Not if I make, that you're going
15 to go home today and not prepare your heads. I think I
16 should put you under pressure now. In fairness again I
17 have indicated to the Judge President and the JDJP that
18 there is a possibility that I may not finish tomorrow. To
19 that extent I've been allowed to continue partly on
20 Wednesday. So we have tomorrow, this afternoon, tomorrow
21 and Wednesday. I don't think that's unreasonable. You are
22 even better, you have a junior next to you, whilst you
23 cross-examined he was busy drafting heads or - Mr Seape
24 should have been drafting heads in the meantime. I'll
25 accept wholly that it's not expected now after the last

1 witness just to commence sommer so with argument. And I
2 think it's not one of those matters, but I'm sure it's
3 reasonable to try and finish this matter by Wednesday. If
4 we don't finish tomorrow we can go into Wednesday and I go
5 back again on your behalf, a day again or half a day this
6 week, but I must finish this matter this week.

7 MR BESTER: We perfectly follow that
8 concern, no doubt, M'Lord. The difficulty that I have, as
9 I indicated on Friday that my availability on Wednesday is
10 unfortunately non-existent. But to the extent that we have
11 to then prepare heads of argument my suggestion would be
12 that we do so and come back tomorrow afternoon to argue the
13 matter. Because what it does do it at least gives us the
14 benefit of also some time tomorrow, in the morning to
15 prepare and finalise the heads of argument. At the end of
16 the day we do want to do justice to the case and provide
17 Your Lordship with all the scholarship and the law
18 necessary to - and to assist the court really in preparing
19 its judgment. So at least if we have that window of
20 opportunity tomorrow morning to continue our preparations
21 on the heads of argument, that would go some way to assist.

22 COURT: I'm a bit worried that you're not
23 available on Wednesday hearing this case. You should be in
24 it until it's finished. As I said to you the matter should
25 originally have been set down for 10 days instead of seven

1 days now and -

2 MR BESTER: It was set down for seven and
3 it -

4 COURT: Yes but -

5 MR BESTER: - but my diary was arranged
6 on that basis.

7 COURT: You should be available for me
8 here until I finish if I had to apply the rules strictly.
9 Is Mr Seape not available to take over from you on
10 Wednesday if you are not here? You can commence some
11 argument tomorrow and give it to him and if he's not happy
12 with what he has presented to me he can tell me so. But
13 for you to go away now to leave us here after seven days -

14 MR BESTER: He would be available to
15 continue on Wednesday -

16 COURT: Yes just to dump me like that
17 after I have become accustomed to you for seven days you
18 now go to the magistrates court or to the maintenance court
19 to go and finish another matter.

20 MR BESTER: We'll do what is necessary to
21 assist Your Lordship in finalising the matter
22 expeditiously, but as I say, we can start the heads of
23 argument, that process today and we can certainly continue
24 that in the morning -

25 COURT: Yes.

1 MR BESTER: And then perhaps see whether
2 we could argue the matter, the second part of tomorrow if
3 that's possible.

4 COURT: Can I then postpone it to
5 tomorrow say about 11:30 then? Then you have this
6 afternoon, the whole of tonight if things work as I knew
7 them before and then on Wednesday, I mean tomorrow
8 afternoon one party can argue from half past 11 to say 2
9 o'clock tomorrow and the party can take the rest of the two
10 hours. If there's a need to expand the time we'll do so
11 until Wednesday. I think that's the best arrangement I can
12 make in these circumstances. But to come back to this
13 matter of a few weeks or even months in this division and
14 try and get used to the facts again and - it's not on for
15 me really.

16 MR BESTER: Certainly, M'Lord.

17 COURT: Well I think we should see how it
18 goes tomorrow. If there are any real visible problems or
19 palpable problems we can discuss the matter again. Counsel
20 De Kok, what is your input here? You seemed to agree with
21 me all the way.

22 MS DE KOK SC: I will always try to do
23 so, M'Lord. M'Lord, from our side obviously it would have
24 been preferable if we had a bit more time to prepare heads
25 of argument, but if Your Lordship is not available later in

1 the week then that seems to me to be the only way that we
2 can go about it. So if Your Lordship wishes us to start at
3 11:30 we will make sure that we're ready.

4 COURT: No I'm not just giving 11:30, I
5 am giving it with a purpose, for you to do something in the
6 morning as well.

7 MS DE KOK SC: Yes, no any time will be
8 useful and is appreciated, M'Lord.

9 COURT: Yes thank you very much. I think
10 let's keep an open mind again and see how it goes tomorrow.
11 All right the formal order I make is that the trial is
12 adjourned until tomorrow the 14th of February which is
13 Valentine's Day by the way, at 11:30, not 10 o'clock, at
14 11:430. If you feel you're ready before 11:30 let me know.

15 MS DE KOK SC: As Your Lordship pleases.

16 MR BESTER: As Your Lordship pleases.

17 COURT: The court will adjourn.

18 [COURT ADJOURNED]

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1 [PROCEEDINGS ON 14 FEBRUARY 2017]

2 [11:37] MR BESTER: May it please the court,
3 M'Lord.

4 COURT: Yes, Mr Bester, let's hear if you
5 can show me that the applicant has made out a case, prima
6 facie case against the respondent. I think that's -

7 MR BESTER: Indeed, M'Lord. Perhaps by
8 way of housekeeping if I can hand up to Your Lordship
9 copies of our heads of argument.

10 COURT: Thank you.

11 MR BESTER: Coupled with just two
12 decisions that we have referred to in the heads of
13 argument, both from Canada.

14 COURT: Thank you. Yes.

15 MR BESTER: And I intend to take Your
16 Lordship through the heads of argument briefly. Your
17 Lordship obviously would not have had an opportunity to
18 consider them beforehand, but -

19 COURT: Yes.

20 MR BESTER: - under those circumstances
21 perhaps it's best if I do exactly that and where necessary
22 I will elaborate. So at the very outset Your Lordship will
23 know that the crux of the issue pertains to the incident on
24 the 6th of February, as well as offending speech by Mr
25 Masuku on the 5th of March where he made three further

1 statements which on the transcripts are clearly common
2 cause, read with the affidavits, and we will refer to these
3 as the offending statements.

4 The key question for Your Lordship to decide at
5 the end of these proceedings is this; simply put, do these
6 statements fall within the ambit of section 10 (1) of the
7 Equality Act, and if that is the case we submit at a
8 simplified level then the next leg of the inquiry would be
9 the remedies. Your Lordship will know what the act allows
10 for and which we asked for at the outset of these
11 proceedings is a declaratory order to be made by the court,
12 coupled with a public apology to be made by Mr Masuku and
13 COSATU.

14 Perhaps let me just pause right here and say that
15 the case is not premised on the blog and all three
16 statements collectively constituting hate speech. It would
17 be sufficient if only one of these satisfy the requirements
18 of the statute. So certainly the case is not brought on
19 the basis that collectively every word and every statement
20 that we'd been referring to during the course of the
21 evidence collectively makes out a case of hate speech
22 within the ambits of the act. One needs to naturally look
23 at the entire factual matrix within its context, but at the
24 same time the inquiry will pertain as to whether each of
25 the offending statements relied on fall within the purview

1 of section 10 of the Equality Act.

2 COURT: It means the statements must be
3 read together, yes.

4 MR BESTER: They stand to be read
5 together.

6 COURT: Yes.

7 MR BESTER: But it is also perfectly
8 permissible for Your Lordship to determine whether each of
9 the statements viewed in isolation fall within the ambit of
10 section 10 of the act. Therefore by way of an example, the
11 fact that one statement may not fall within the ambit of
12 the act does not fall, and it does not follow then that
13 that is destructive of the entire cause of action. The
14 other statements may well fall within the ambit of the act.
15 So our approach as always been that they all do satisfy the
16 requirements for section 10, but certainly it would be
17 within the exercise of Your Lordship's discretion to find
18 that one or more in fact do find application under section
19 10, and that one statement viewed on its own does not find,
20 or does not trigger the application of section 10.

21 Then if I can refer Your Lordship to paragraph 6
22 of the heads of argument. Our learned friends for the
23 respondents oppose these proceedings and they do so on the
24 following grounds; they say the statements are true and
25 constitute fair comment on matters of public interest and

1 constitute Mr Masuku's bona fide beliefs on Zionism and the
2 plight of the Palestinian people.

3 Perhaps let me just make two introductory remarks
4 there. We will take Your Lordship to the applicable
5 passages of the Canadian case that we cited, but also it's
6 plain to see on the application of section 10 itself is
7 that the so called defamation defences which we encounter
8 in our law on a daily basis, and one can simply uplift
9 Amler's to see what those defences are, truth and public
10 interest, fair comment, simply do not find application
11 within the context of these proceedings. It's clear on a
12 plain reading of the statute and we will refer Your
13 Lordship to the comparative Canadian case law, which I
14 might add is of great persuasive value in hate speech
15 litigation in this country, given the fact that our
16 Constitution borrows heavily from the Canadian experience
17 in matters of this nature, but we will deal with that in a
18 little more detail as the argument develops.

19 Second, it is said by COSATU and Mr Masuku that
20 the statements constitute legitimate expression of the
21 right to freedom of expression set out in section 16 of the
22 Constitution. Perhaps let me also pause here and it may be
23 useful to reflect on the fact that the right enshrined in
24 section 16 is of course not an absolute right. It has
25 certain limitations, and while our law does not by any

1 means set out a hierarchy of rights set out in the Bill of
2 Rights, as important as freedom of expression is for robust
3 engagement and debate, it certainly is of not such
4 importance, M'Lord, that it necessarily trumps the right to
5 human dignity, which we submit together with equality and
6 freedom would be one of the three tiers of the so called
7 foundational values set out in our Bills of Rights. So
8 certainly from a textual perspective there is some
9 suggestion that human dignity is in fact, and human dignity
10 and equality would in fact be more important than freedom
11 of expression.

12 But ultimately I just say that by way of some
13 background because as we see this case and as we saw the
14 evidence unfold it's not going to be necessary for Your
15 Lordship to grapple with constitutional problems to the
16 extent where one has to decide the constitutionality of the
17 statute. In this particular case, as Your Lordship is
18 fully aware, there is no challenge to the section, there's
19 no challenge to the act and we must therefore proceed from
20 the premise that the legislation is in fact
21 constitutionally compliant and it must accordingly
22 therefore be enforced.

23 The point that I touched on very briefly is made
24 in paragraph 7 of our heads of argument and that is the
25 fact that the Equality Act specifically was promulgated to

1 give effect to the right of equality. One of those pieces
2 of constitutional legislation that followed perhaps like
3 the Promotion of Administrative Justice Act, like the
4 Promotion of Access to Information Act, to give effect to
5 certain constitutional rights, M'Lord.

6 In our heads of argument we address a few issues.
7 We address the principles that should inform the
8 interpretation of the relevant sections of the Equality
9 Act. We deal with principles that inform the
10 interpretation of the offending statements, and then we
11 also deal with the offending statements themselves as to
12 why we say they fall within the purview of the act, and
13 finally we just deal with an issue which really pertains to
14 Prof Friedman which we deem it necessary to deal with
15 specifically.

16 Firstly on page 5, paragraph 10, I'm not going to
17 read this particular section in great detail because we
18 submit that these are ultimately trite principles of
19 interpretation, but the first principle we refer to is that
20 set out in section 39(2) of the Constitution, which
21 requires section 10 of the Equality Act to be interpreted
22 in a manner which best promotes the spirit, purport and
23 objects of the Bill of Rights, and this necessarily we say
24 applies to the rights of equality, human dignity and bodily
25 and psychological integrity.

1 Importantly, M'Lord, section 39(2) creates two
2 obligations, the so called Hyundai and the Wary obligation.
3 The Hyundai obligation comes from the well-known case of
4 the Serious Economic Offences Office versus Hyundai Motor
5 Corporation which requires, in fact enjoins a court to
6 interpret a statute through the prism of the Bill of
7 Rights, and then also the Wary Obligation from Wary
8 Holdings versus (inaudible) makes it clear that to the
9 extent that there are one or more interpretations the court
10 must always adopt the interpretation which better promotes
11 the spirit, purport and objects of the Bill of Rights.

12 On page 6 of our heads of argument we refer to
13 the well-known passage of His Lordship Mr Justice Wallace
14 in the Supreme Court of Appeal in the well-known matter of
15 Natal Pension Funds, which more often than not lawyers in
16 this jurisdiction refer to the passage with reference to
17 contracts, but it's equally apposite in the case of
18 legislation. I'm not going to read the passage.

19 In paragraph 12.1, M'Lord, we make reference to
20 the Equality Act, the preamble and it's certainly of some
21 importance when Your Lordship prepares the judgment to have
22 regard, we submit, to the preamble because the preamble
23 tells us what the underlying motive or rationale for
24 legislation of this kind was when the legislature
25 introduced it. Simply put, the preamble inter alia states

1 that this implies the advancement by special legal and
2 other measures of historically disadvantaged individuals,
3 communities and social groups who were dispossessed of
4 their land and resources, deprived of their human dignity
5 and who continue to endure the consequences. So clearly
6 the legislation is aimed at protecting people who are
7 marginalised, or who face the prospect of some form of
8 marginalisation, but it is not just retrospective looking
9 in its application. The legislation also applies in a
10 prospective manner and therefore one cannot argue that
11 because a particular segment of the white population, be
12 they Afrikaners or Jews, were privileged in the previous
13 dispensation, that they are therefore somehow excluded from
14 protection by section 10. Certainly we're not suggesting
15 that that is what our learned friends are arguing, but the
16 protection offered by section 10, M'Lord, is of equal
17 application to all people in South Africa.

18 Then section 2 of the Equality Act sets out the
19 objects of the act and that is to give effect to the
20 prohibition of advocacy of hatred based on race, ethnicity,
21 gender, religion, and that constitutes incitement to harm
22 as contemplated in section 16(2)(c) of the Constitution.
23 I'm not going to read out section 16(2)(c), M'Lord, but
24 clearly that would be the provision in the Constitution
25 where speech if it falls within that category, it's not

1 banned but what it is, it does not enjoy any constitutional
2 protection and therefore the limitation clause would not
3 apply to speech that falls within section 16(2)(c). In
4 other words if speech is advocacy based on hatred together
5 with the incitement to cause harm, it's not necessary
6 before limiting that speech to apply a limitation analysis
7 as set out in section 36.

8 COURT: Maybe at this stage I should
9 interrupt you on this question of interpretation. I seem
10 to recall that there is authority for the proposition that
11 section 10 of the Equality Act somewhat restricts the right
12 of freedom of expression as envisaged in section 16 of the
13 Constitution, but that's a question of interpretation. I
14 seem to recall that there is authority for that proposition
15 that courts must be careful that section 10 is somewhat
16 limiting.

17 MR BESTER: Yes.

18 COURT: What the Constitution allows, but
19 these are some of the issues I will have to battle with at
20 some stage.

21 MR BESTER: Yes. Certainly that is
22 indeed the case.

23 COURT: Yes.

24 MR BESTER: In that section 10, its
25 application will necessarily create some kind of friction

1 with the right enshrined in section 16.

2 COURT: Yes.

3 MR BESTER: That much to us certainly
4 appears to be uncontroversial and we accept that. There is
5 no dispute about that. Your Lordship is quite correct, but
6 that necessarily is with respect the difficulty which one
7 encounters not just in matters of this nature, but in many
8 instances where hate speech complaints will be brought
9 before our courts. It will position the right to human
10 dignity and equality perhaps on the one hand, and the court
11 will necessarily then have to engage with that friction
12 with the right to freedom of expression, and ultimately the
13 two competing rights will have to be balanced in a way
14 which we submit gives due constitutional weight to the
15 right to human dignity, but also to the right of freedom of
16 expression because as I've indicated previously, M'Lord, we
17 accept that in a constitutional democracy robust criticism
18 is permissible, but what we intend showing to Your Lordship
19 is that in this instance Mr Masuku for exceeded the bounds
20 of what is permissible criticism. Even criticism which
21 might offend and which in certain instances people might
22 disagree with, because we can accept that people will never
23 disagree on everything and anything -

24 COURT: And criticism which is in context
25 here also internationally.

1 MR BESTER: Yes, but there's an important
2 point to be made insofar as the international context.

3 COURT: Yes.

4 MR BESTER: It's a point we make in our
5 heads of argument.

6 COURT: I see.

7 MR BESTER: And seeing that Your Lordship
8 has focussed on that, perhaps let me just deal with that
9 very briefly.

10 COURT: Sorry to interrupt you, but I,
11 these questions come up as we listen to argument -

12 MR BESTER: Yes.

13 COURT: - from time to time. But you're
14 welcome to -

15 MR BESTER: Perhaps if I can just ask
16 Your Lordship at this juncture to turn to paragraph 41,
17 page 19 of our heads of argument.

18 COURT: Page 19?

19 MR BESTER: Yes, paragraph 41, page 19.

20 COURT: Yes, yes, yes.

21 MR BESTER: And it's a point that we
22 made, that I made perhaps within the first 10 minutes of
23 the commencement of these proceedings, that the conflict in
24 Israel and Palestine is a matter of international debate
25 and I could add there it's a matter of domestic debate in

1 South Africa too, and it has attracted widespread interest
2 all over the world and has been the subject of
3 international concern for a long time, and we know
4 certainly from the evidence we've heard in this court,
5 M'Lord, that it's been the subject of numerous debates,
6 petitions, letters of complaint, resolutions by the United
7 Nations, and it's been investigated by numerous
8 organisations. That much we know, and as these proceedings
9 yet again have demonstrated, M'Lord, perhaps unique in the
10 South African context, but perhaps not so unique in terms
11 of a global evaluation of the matter, the issues underlying
12 that dispute between the Palestinian people and the Israeli
13 people, more specifically the Jews, is a conflict which is
14 historical, it's complex and it's heavily contested,
15 M'Lord. That much is clear. The issues by their very
16 nature attract widely divergent and strongly held views and
17 we submit with respect that it's not within the court's
18 jurisdiction, nor is the court equipped to act as an
19 arbiter in deciding on the truth or otherwise of these
20 issues, and nor is it necessary for this court to determine
21 whether in the final analysis, M'Lord, whether one party is
22 correct and whether the other party is incorrect.

23 Your Lordship will no doubt take note of the
24 affairs in the Middle East, but it's not for Your Lordship
25 ultimately to make a finding as to whether one party in

1 that conflict is the aggressor or one party is the victim
2 because ultimately what needs to be done is.

3 [11:57] The statements made by Mr Masuku need to be
4 interpreted, meaning needs to be given to them and they
5 need to be interpreted against the backdrop of section 10
6 of the act and we submit that inquiry does not require this
7 court to make a finding as to who is morally more culpable
8 in the Middle East. But let's accept for a moment, M'Lord,
9 that one party and in this case Israel has a case to answer
10 at an international level, let's just accept that for a
11 hypothetical scenario for one moment, that would never
12 justify hate speech against South African Jews. In fact
13 Professor Friedman conceded as much yesterday when he said
14 that whatever the position there is it would not justify
15 South African Jews from being victims to, of ill treatment
16 and of, and really of hatred if one can call it that. So -

17 COURT: Well the starting point would
18 always be a domestic one, is it not?

19 MR BESTER: Yes.

20 COURT: And then -

21 MR BESTER: Certainly.

22 COURT: - see what other people think
23 about it elsewhere but our law is based here and the
24 findings must be made on what occurred here.

25 MR BESTER: Findings must be made on

1 what occurred here.

2 COURT: Yes.

3 MR BESTER: The events in February and
4 March 2009 and we submit that does not require or demand of
5 this court in fact to make findings of an international
6 nature.

7 COURT: But of course one is not limited
8 or restricted from looking at how the subject is approached
9 elsewhere and -

10 MR BESTER: Certainly.

11 COURT: - how interpretation is placed on
12 words, words, words internationally and yes, I hear your
13 point.

14 MR BESTER: That much is true, M'Lord.
15 Then if I can perhaps just go back to where we left off
16 insofar as section 2 of the Equality Act is concerned, in
17 paragraph 12.2.3 what we do say is it is there to provide
18 remedies to victims of unfair discrimination, hate speech,
19 harassments and persons whose right to equality have been
20 infringed. And as we see from the AfriForum versus Malema
21 judgment which we do refer to in our heads of argument,
22 M'Lord, hate speech, and His Lordship Mr Justice Lamont
23 embarks upon a preliminary analysis in that judgment where
24 he clearly identifies one underlying objective of
25 legislation of this nature as being to ensure that people

1 who are a particular minority in any given country to seek
2 refuge in legislation of this kind and the underlying
3 principle which His Lordship Mr Justice Lamont -

4 COURT: Well before we go there, the
5 Malema case actually had its origin in the Pretoria High
6 Court, the urgent court before my brother, Bertelsmann J
7 and I think he made a prima facie finding that the matter
8 is so important it must go to trial and that there was
9 reference to Dubula Ibhunu was prima facie and hateful
10 speech and -

11 MR BESTER: Yes.

12 COURT: - but then the full blown case
13 came here I think.

14 MR BESTER: Indeed.

15 COURT: Yes. But it's essential to have
16 regard to what Bertelsmann J said -

17 MR BESTER: Yes.

18 COURT: - about the need for the matter
19 to be fully ventilated in due course as it turned out to be
20 -

21 MR BESTER: Yes.

22 COURT: - in this court later on.

23 MR BESTER: Yes and that -

24 COURT: It doesn't say that I'm saying
25 there's a prima facie case here.

1 MR BESTER: No, no, certainly. But
2 certainly the need, if I can just touch on what Your
3 Lordship has just said, the need for matters of this nature
4 to be decided by way of a fully-fledged hearing stems from
5 the fact that the Act as we know provides for an inquiry
6 and it would from that perspective perhaps be less
7 comforting to the various interested parties who are
8 participants in equality court, a litigation for this
9 matter of this kind to be decided on motion. If only
10 because it does not allow the victim of the offending words
11 or speech to set out its views and why it happens to feel
12 aggrieved by the speech and similarly it does not really
13 allow for a full ventilation of issues by the respondent or
14 the party then who has to answer to the complaint. We do
15 know that motion proceedings by their very nature are
16 somewhat imperfect in that sense. So the entire structure
17 of the Act, creating the legislative room for an inquiry
18 really aims at addressing those concerns we would submit
19 and from that perspective these proceedings have been ideal
20 in that sense in that they have allowed the parties to
21 really grapple with the issues and to set out their various
22 perspectives on these issues, both insofar as the words,
23 the context, as Your Lordship would not doubt be alive to
24 the greater international debate within which all of these
25 matters currently take place. But just if I can return

1 briefly to what His Lordship Mr Justice Lamont said because
2 his remarks were interesting in that judgment for this
3 reason and that he spoke the need for legislation of this
4 nature and the rationale behind legislation of this nature
5 as giving protection to minority groupings and what he said
6 was as we understand it is that minority groupings in
7 particular country do not necessarily enjoy a position of
8 protection from the executive in government at a particular
9 juncture because often they may find themselves in a
10 position where they did not vote for a particular political
11 party and therefore they may not enjoy representation in
12 the executive but what legislation of this nature does, it
13 allows minority groupings to seek refuge and assistance
14 from the courts and that's precisely what section 10 of the
15 Equality Act seeks to achieve, M'Lord. It does give
16 minority groupings that degree of protection.

17 COURT: In other words there has to be a
18 departure from established democracy because minority
19 groups are unable to get the vote for instance and in a
20 democracy which is fair but then they additionally have to
21 be looked after, is that what you are saying?

22 MR BESTER: Certainly, M'Lord. Because
23 what we do know and the remarks were made by the late Chief
24 Justice Chaskalson and I believe it was the Makwanyane
25 decision where he said, although he was referring to

1 matters of the abolition of capital punishment and that
2 nature and he was dealing with human dignity, what he did
3 say is that matters of public opinion are never decisive.
4 It's never the decisive consideration. In other words, we,
5 in a democracy we do not necessarily decide contested
6 issues, all of them simply on the basis because that is the
7 majority view point. So from that point of view in this
8 country the constitutional jurisprudence does create that
9 carve out position whereby public opinion therefore is not
10 decisive. So one might very easily find a minority
11 grouping in a country who has a slightly different
12 perspective on matters who could then still seek refuge
13 from the courts by invoking the application of for instance
14 Section 10 in this instance.

15 Now we deal with in paragraph 12.3 of our heads
16 of argument, M'Lord, we refer to section 3 which says that
17 in short as we understand it and that the Inequality Act is
18 to be interpreted with due regard to the Constitution as
19 well as the preamble, the objects set out in section 2, as
20 well as the guiding principles and comparable foreign law
21 and importantly we also refer in paragraph 12.3 to the
22 context within which the dispute or the words were uttered.
23 We do accept that context is of some importance.

24 Then in paragraph 14, M'Lord, we say that we do
25 not consider the defences, that the statements were fair

1 comment and are matters of public interest or the so called
2 bona fide beliefs of the respondents to constitute a
3 defence under section 10 because whatever the subjective
4 beliefs, this is of no moment as the test is ultimately an
5 objective one, that enquires into whether the words
6 complained of could reasonably be construed to demonstrate
7 a clear intention of being hurtful, harmful or of promoting
8 or propagating hatred and there we refer to the Canadian
9 decision of the Canadian Human Rights Commission, the
10 matter of Canadian Human Rights Commission versus Winiki.
11 We have handed up a copy of that decision to Your Lordship
12 where that court found that in human rights enquiries,
13 enquiries brought by human rights bodies in the context of
14 hate speech, M'Lord, the focus is on the effect of the
15 words and not on the intent of the speaker with truth and
16 fair comment not constituting a defence in the case of hate
17 messages.

18 And although the facts were different in that
19 matter it also pertained to remarks that were said to have
20 been of an anti-Semitic character. But these principles
21 insofar as a general guiding beacon we submit are of
22 application in this instance and section 10 if one has
23 regard to section 10 it in fact follows a similar
24 structure. Because nowhere in section 10, M'Lord, will one
25 find any suggestion that the defence of truth and public

1 interest or fair comment would constitute a defence to an
2 attack of hate speech. And importantly as the Canadian
3 case has indicated one considers the effect of the words
4 that seems to be an important consideration.

5 Paragraph 16, we set out the section, read with
6 the proviso in section 12. Section 12 is of some
7 importance, not the whole section we submit but only the
8 proviso because what it provides for if one is engaging in
9 bona fide engagement in artistic creativity, academic and
10 scientific enquiry, fair and accurate reporting in the
11 public interest or publication of any information,
12 advertisement or notice in accordance with section 16, that
13 would then not fall within the ambit of the hate speech
14 provision. But again these are, we submit, at the end of
15 the day none of these grounds would enjoy application in
16 this particular instance.

17 In paragraph 19 of our heads of argument, M'Lord,
18 we refer briefly to the AfriForum versus Malema decision of
19 His Lordship Mr Justice Lamont and there, the quotation
20 that we've set out really sets out the reasons why hate
21 speech would be prohibited, to prevent disruption of public
22 order and social peace, stemming from retaliation by
23 victims and to prevent psychological harm to target groups
24 that would effectively impair their ability to positively
25 participate in the community and to contribute to society.

1 And importantly on the next page, page 10,
2 M'Lord, the court there found that it's also important to
3 prevent visible exclusion of minority groups that would
4 deny them equal opportunities and benefits of society and
5 invisibly exclude their acceptance as equals. Perhaps I
6 must pause here and say as we interpret the remarks made by
7 Mr Masuku, that's precisely the consequence which his
8 remarks have and that is the remarks are targeted at a
9 particular community, the Jewish people, and we'll deal
10 with the interpretation in due course but effectively
11 members of the Jewish community, he does not agree with
12 their particular sentiments. He disagrees strongly with
13 them and he then seeks to effectively dehumanise them,
14 M'Lord. They are to be treated as somehow a grouping that
15 stands to be separated out from the rest of the country and
16 in fact as the transcript demonstrated he in fact wants
17 them to leave. That is the very antithesis of an inclusive
18 constitutional democracy where everyone is welcome.

19 COURT: But we don't know, I think it's
20 common cause what happened to them or any Jewish person
21 after these utterances is it. We do not know if they
22 actually left the country, we do not know if they are
23 actually harmed or physically or otherwise and it somewhat
24 becomes even more problematic.

25 MR BESTER: Your Lordship raises an

1 important question but -

2 COURT: But can make it more complicated
3 for you and say that it becomes more complicated when one
4 listens to Professor Friedman who is a Jew himself who
5 appears to be not affected by that. To him there's nothing
6 wrong with what Masuku said and one would expect a Jewish
7 person to be one of the first to say they are offended by
8 these remarks, but that's another debate. It just becomes
9 more complicated for me -

10 MR BESTER: Let me -

11 COURT: - when a Jewish person takes the
12 stand and say perfectly right, nothing wrong with those
13 words, within his rights and but I don't expect ready-made
14 answers here.

15 MR BESTER: And in fact I've taken notes
16 of what Your Lordship said and perhaps let me just address
17 in fairness each of the points which Your Lordship made.
18 It's three points which I should really address. The one
19 is as a fact of matter, have any Jews left.

20 COURT: Yes.

21 MR BESTER: Well we don't know. There's
22 no evidence to that fact, but that is not a requirement for
23 this section to be triggered. There's nothing to suggest
24 that there must be some manifestation of the words which
25 had a dire practical consequences. The Section 10 doesn't

1 put the threshold as high as that. Secondly, was there
2 physical harm? Again we have no evidence of that, but
3 importantly and it ties in with the point I've just made,
4 M'Lord, Section 10 does not require the words to have
5 triggered or to have caused some sort of physical harm.
6 Because unfortunately if we come to a point in our
7 constitutional democracy where speech is only banned as
8 hate speech once it has caused physical harm then we are
9 unfortunately very far down the road already towards the
10 ten steps of genocide. What is required by the legislation
11 and what Section 10 requires, M'Lord, is that there must be
12 some intervention at an earlier stage long before it gets
13 to a point where there are physical consequences and
14 section -

15 COURT: The issues of aspects like
16 sequelae are irrelevant you say?

17 MR BESTER: Indeed, M'Lord.

18 COURT: On your interpretation of Section
19 10.

20 MR BESTER: On our interpretation of
21 Section 10 -

22 COURT: Ja.

23 MR BESTER: - there is no requirement in
24 the Act which makes physical harm or violence or a threat
25 thereof a jurisdictional requirement for the Act to enjoy

1 application. Nowhere does one find that in the
2 legislation.

3 COURT: Do you mean, Mr Bester, that even
4 if I do find in your favour as a proposition and in the
5 process of considering penalty, I don't have to look at
6 sequelae? Is that your submission?

7 MR BESTER: Indeed, M'Lord. Let me
8 perhaps give another example -

9 COURT: Did I make myself clear?

10 MR BESTER: Yes. Let me perhaps give
11 another example, M'Lord.

12 COURT: Yes.

13 MR BESTER: Well we do know there have
14 been unfortunate remarks by, I believe she's a Durban
15 estate agent, a woman by the name of Penny Sparrow who -

16 COURT: Yes.

17 MR BESTER: - on social media have made
18 some derogatory statements. There's no suggestion there
19 that when she referred to black people as monkeys if I'm
20 not mistaken that there was going to be any physical
21 violence to black people because of those statements, but
22 there can be no doubt M'Lord, that on the application of
23 Section 10 the Section would enjoy application because if
24 the test, if in other words the goal posts are shifted to
25 the point where the physical dimension becomes the key

1 consideration and we say it can't because it's nowhere
2 found in the Act, but even if such an interpretation had to
3 be made, we submit, M'Lord that a large category of what is
4 considered as objective hate speech would then be immune
5 from sanction by the court. It would give free license to
6 people like Sparrow to propagate hate and rely on the
7 defence in saying I can use the word monkey glibly and with
8 free license because there is no physical manifestation of
9 violence as a consequence of that. And that simply from
10 where we stand, M'Lord, cannot be the law and Section 10
11 does not permit that. The section does not enquire into
12 violence, whether violence was a consequence and put more
13 softly it does not require into, it does not enquire into
14 the probability of harm. In other words it's not a
15 requirement for the Section to find application or one to
16 show that on the probabilities physical harm would've
17 resulted from these words and it's trite, M'Lord, that the
18 word harm as employed by the Section certainly incorporates
19 a psychological dimension, psychological and clear
20 emotional dimension. It cannot be limited just to physical
21 instances.

22 [12:17] Because the consequence would be that a vast
23 category of otherwise racist and hateful speech would in
24 fact be constitutionally protected. And that, we submit,
25 can never have been the intention of the legislator.

1 COURT: Well maybe I should refrain from
2 interrupting you.

3 MR BESTER: Certainly, Your Lordship is
4 more than welcome. Perhaps let me just deal with the third
5 issue which Your Lordship raised and that was the
6 interpretation by Professor Friedman.

7 COURT: Ja.

8 MR BESTER: The test for the
9 interpretation is an objective test, it's one which the
10 court needs to embark upon based on the reasonable reader
11 or the reasonable hearer of the statement. And I'll take
12 Your Lordship shortly to those principles. Mr Friedman is
13 not the reasonable person because he's a witness. If one
14 had to allow a situation where the court deferred to what a
15 witness said as to what the words meant it would very much
16 open the door to a subjective consideration to creep into
17 the analysis. And that we submit, is not permitted by
18 section 10. It's not permitted by the section and it's not
19 permitted by case law which I will take Your Lordship to
20 shortly where clearly the test is at all times an objective
21 one. By of analogy if I can say this, it's a little bit
22 like asking an expert witness to interpret what the words
23 in a contract mean. The law is clear on that, it's an
24 objective test, it's for the court to decide that. And no
25 factual or expert witness can assist the court with that

1 inquiry.

2 COURT: This thing is full of questions
3 and provokes one to ask so many questions and I'm trying to
4 refrain from them, whilst we're discussing Professor
5 Friedman I immediately think about your own expert, one of
6 the two is it, Dr Stanton or Dr Hirsh who said that in this
7 context Mr Masuku was very sly and carefully used the
8 words. Do you remember him -

9 MR BESTER: Yes, yes.

10 COURT: - I think it's one of your two
11 experts -

12 MR BESTER: Yes in fact it was Dr
13 Stanton.

14 COURT: Ja his said these words were so
15 carefully couched and planned which I got the impression it
16 was a bit problematic to him, that is to your expert. But
17 ultimately I think he went on to say that it amounted to
18 what you're contending it was.

19 MR BESTER: Yes yet again insofar as -
20 let me unequivocally -

21 COURT: So I must ignore your expert as
22 well and say they don't help me -

23 MR BESTER: Let me -

24 COURT: I shouldn't follow their
25 interpretation, but then again at the end of the day when I

1 sit alone somewhere I will be faced with the issue of
2 conflicting expert witnesses opinions. That's another task
3 ahead for me, but yes as I say I should refrain from
4 interrupting you until you're finished.

5 MR BESTER: No, no certainly Your
6 Lordship raises weighty matters and it's important that I
7 deal with to assist the court in coming to the right
8 conclusion. Insofar as the experts are concerned Your
9 Lordship would have noted that I did not, at any stage seek
10 to ask them what do they think the words mean and I did
11 that precisely because of the fact that the test is
12 objective. The answers that they ultimately gave were
13 elicited in a different context without me having probed
14 them on that subject. But because the test is ultimately
15 objective whatever the experts said where they gave, during
16 the course of their testimony, their subjective
17 interpretation as to what the words mean that is in those
18 instances evidence which Your Lordship should not take into
19 account.

20 But let me just say this, the experts were not
21 called with the objective of saying what the words mean.
22 They were really called with the objective of giving
23 context to the various phrases found in the words, anti-
24 Semitism, Zionism and to really assist the court with the
25 necessary tools that inform the interpretation of the words

1 concerned. Really just tools, but leaving the
2 interpretation exercise to the court itself. One will
3 recall that in the case of Professor Stanton he did make
4 some remarks to the effect that Mr Masuku disguised his
5 words carefully and chose his words carefully, I don't
6 recall whether he used the word sly, but perhaps words to
7 that effect.

8 COURT: Just a general tone now -

9 MR BESTER: But the importance of that is
10 this, M'Lord, he did so in the context of illustrating and
11 based on his examples and his research of countries where
12 genocide has taken place to merely demonstrate to the court
13 that very often hate speech is not directed or suggested in
14 explicit terms. Often there is a subtext, a meaning which
15 is not explicit, but in fact implicit, but which the
16 reasonable reader will understand to mean exactly that
17 which the utterer of the words said. So in other words if
18 one uses the word cockroach in the context of Rwanda, it's
19 not explicitly stating the word Tutsi, but there's a
20 subtext and everybody who hears the word on the radio in
21 Rwanda knows that that is a reference to the Tutsi people.
22 That's just by way of an example, M'Lord. But the subtext,
23 Professor Stanton's testimony, we submit, was important in
24 sketching the background to how important the subtext is
25 because if courts were to limit hate speech simply on that

1 which was expressly stated yet again a vast category of
2 speech would escape the trigger of the particular section
3 whether it's in this country or elsewhere. Because people
4 often in the open vernacular do not speak in express
5 explicit terms, they use metaphors, they give implied
6 meanings to words and that's how ordinary conversations are
7 held on a daily basis. So from that perspective, M'Lord,
8 it's, we submit, fundamental that one understands that
9 words in the context of hate speech do have a sub-textual
10 meaning. In other words another meaning which is not
11 explicit, but which may well, if the subtext meaning is
12 fully appreciated and brought to the surface, then that
13 triggers the application of the section.

14 COURT: Yes.

15 MR BESTER: But certainly just to
16 conclude on Professor Friedman we submit that the evidence
17 he gave yesterday as to what he thinks the words ultimately
18 mean is inadmissible and of no probative value. Because
19 the test is objective, Professor Friedman is just another
20 witness in this inquiry and therefore it's not open to him
21 to say what the words mean and he construed them.

22 M'Lord, paragraph 20 of our heads of argument
23 we've referred to the well-known Canadian case of Keegstra,
24 Rex versus Keegstra was a criminal matter involving hate
25 speech, but it catches on the instances of harm which we

1 dealt with briefly yesterday in the context of hate speech
2 causes and what harm means. Firstly it causes harm to
3 members of groups that are targeted by that speech, it
4 causes emotional damage that has grave psychological
5 consequences which humiliates and degrades persons
6 belonging to the target group. Second it has a negative
7 impact and harms society by fostering divisions and
8 creating discord between various groups in society. And
9 that regrettably, M'Lord, we submit on the plain reading
10 Your Lordship must find was the consequence of Mr Masuku's
11 language employed. It creates divisions, it creates
12 divisions between us and them. He clearly sought to
13 polarise communities by saying we are going to march to
14 Orange Grove and therefore that creates that sort of
15 division which hate speech jurisprudence really seeks to
16 counter.

17 It's particularly insidious because the
18 alteration of views held by the recipients of hate
19 propaganda may occur subtly and will not always be
20 attendant upon conscious acceptance of the communicated
21 ideas. Again it really goes to the point that the
22 manifestation of harm is not something which necessarily
23 encompasses a physical component and if it does not that
24 certainly does mean it is not hate speech. Then we refer
25 to a very recent decision, M'Lord, of the Canadian Supreme

1 Court in the matter of the Saskatchewan Human Rights
2 Commission, one the Canadian provinces versus Whatcott and
3 there the court made some interesting remarks and I'm just
4 going to highlight the bold portion. The court made
5 interesting remarks, M'Lord, as to the effect that hate
6 speech can have on a particular society. The attacks can
7 range from discrimination to ostracism, segregation,
8 deportation and I point there at deportation, M'Lord
9 because that's clearly what Mr Masuku had in mind that Jews
10 according to his construction of matters should leave South
11 Africa, violence and in the most extreme cases to genocide.
12 Your Lordship clearly sees here comparable foreign
13 jurisdiction where clearly the courts have identified that
14 if hate speech is allowed to fester and if it's not nipped
15 in the bud at an early stage a consequence could possibly
16 be genocide.

17 We therefore say that it is - there is a real and
18 pressing and legitimate need to stamp out speech of this
19 nature. And then, M'Lord, let me move onto paragraph 24
20 our heads of argument. Your Lordship will know that in
21 section 10 the words hurtful, harmful or to incite harm or
22 promote hatred are all used. We say that they stand to be
23 read disjunctively, they should not be read conjunctively,
24 in other words as we see it the application of one, the
25 triggering of one will be sufficient to find an instance of

1 hate speech. It's not necessary for speech to be found to
2 be both hurtful, harmful and to incite harm and the reason
3 for that is because they all really mean different things.
4 They are all there to prevent different forms of hate
5 speech. Hurtful, as we say in paragraph 24.1 refers to
6 psychological or emotional harm experienced by individuals
7 and the target group. Harmful includes but is not limited,
8 to physical harm, discrimination and other forms of harm
9 experienced by individuals and the targeted group beyond
10 psychological and emotional harm that is hurtful. And then
11 thirdly promoting and propagating hatred refers to the
12 effect of words on the target group or the group, but on
13 the groups of persons in whom hatred for the target group
14 is promoted or propagated including communities and society
15 as a whole.

16 Then we simply say in paragraph 26 in section
17 16.3 of the Constitution hate speech is defined as the
18 advocacy of hatred that is based on race, ethnicity, gender
19 or religion and that constitutes incitement to cause harm.
20 The definition in section 16.2C, M'Lord, is therefore
21 narrower to the definition in the Equality Act in that it
22 applies to expression which constitute efficacy of hatred
23 and is coupled with an incitement to cause harm. Certainly
24 section 16.2 is a more onerous test to satisfy for purposes
25 of hate speech, but it's not necessary for us to rely on

1 section 16.2C because the legislator specifically created
2 section 10 of the Equality Act as the appropriate vehicle
3 through which the hate speech analysis stands to be
4 conducted. In paragraph 28 and it's a subject which Your
5 Lordship raised a little earlier and that is the interplay
6 between section 10 and freedom of expression. Well we
7 submit that any limitation of the right to freedom of
8 expression is reasonable and justifiable and we accept that
9 the court would necessarily in certain instances have to
10 engage in a limitation analysis which would require one to
11 embark upon a consideration of the various elements in
12 section 36, the nature of the right, the importance of the
13 purpose of the limitation and so forth. But in this
14 instance, M'Lord, we submit that the meaning of the words
15 would be clear. We then turn under the next heading,
16 M'Lord, to certain principles which inform the
17 interpretation of the words used by Mr Masuku. And this is
18 important in a sense that it sets out the framework or the
19 guidelines within which one would embark upon interpreting
20 the words uttered by him at Wits in March 2009 and the
21 words used by him in the blog statement.

22 And we submit that the principles relating to the
23 interpretation of defamatory statements and the Law of
24 Defamation do serve as a very useful guideline as to how
25 the offending statements made by Mr Masuku stand to be

1 interpreted. The first inquiry is, of course, what do the
2 words mean. What is the ordinary meaning of the words and
3 there we say the court is not concerned with the meaning Mr
4 Masuku intended to convey or with the meaning given to it
5 by persons to whom it was published. So how a particular
6 person who read the blog or a particular person who
7 attended the meeting at Wits interpreted the words is not
8 going to be definitive in the inquiry precisely because of
9 the fact that it is an objective test.

10 It also does not matter whether someone who heard
11 or read the words believed them to be true or whether or
12 not they thought less of the particular person or class of
13 persons upon reading or hearing the words. In the footnote
14 we refer to then, M'Lord, the Constitutional Court's
15 decision in Le Roux versus Day where these principles were
16 set out, not for the first time, but His Lordship, Mr
17 Justice Brandt, acting Justice Brandt and that decision
18 really just encapsulated the principles of the Law of
19 Defamation. We say at the base of page 13 that the test is
20 objective and the inquiry pertains to how a reader of
21 ordinary intelligence would attribute the statement
22 expressed in writing or orally.

23 Also, M'Lord, the dictionary meaning of the words
24 is not necessarily the meaning that the ordinary,
25 reasonable reader would give to the words and that stems

1 from the fact that our courts have long since accepted that
2 ordinary readers do not necessarily attach dictionary
3 meanings to words. And then in paragraph 32, M'Lord, we
4 set out a host of principles which we have sourced from the
5 various cases which sets out how one should go about
6 interpreting words in any given context. The first one,
7 I'm just going to deal with them briefly, is judges and I
8 quote "must discard their judicial robes and the
9 professional habit of analysing and interpreting statutes
10 and contracts in accordance with long established
11 principles and must adopt the mind-set of the reasonable
12 lay citizen. And when determining the words the court must
13 take into account careful attention to detail coupled with
14 an alertness to and aware of subtle nuances and the meaning
15 of words. But it cannot be expected that the ordinary
16 reader would apply his mind with the utmost level of
17 concentration. Because we do accept that the ordinary
18 reader or person who hears words operates with a certain
19 looseness of thought." Then "Of course the ordinary reader
20 has no legal training or other discipline and therefore
21 does not give detailed consideration to the words." And
22 also as we say in paragraph 32.5, page 16 "He has certain
23 limitations and that he does not engage in elaborate or
24 overly subtle analysis of the words used. The words spoken
25 or written cannot be read in isolation" and importantly in

1 paragraph 32.7 "The cases have also held that the trial
2 courts should be alert to the danger of considering itself
3 to be the ordinary reader."

4 Then we refer to an article by Jonathan Maynard
5 and Susan Benish and we will make that available to Your
6 Lordship during the lunch adjournment where they propose a
7 two part inquiry. It assesses both the context and the
8 content of the words used. The context is described as
9 systematically with reference to four if its features or
10 aspects any of which can confer greater force on the
11 speech. The first contextual message is the speaker or
12 source of the message. A speaker may be a powerful
13 contextual element, a speaker may have authority over the
14 audience derived from political office or de facto
15 leadership. Let me pause here. In the case of Mr Masuku,
16 Mr Masuku is a figure of some importance. He addressed the
17 meeting at Wits on behalf of COSATU, he was - well he still
18 has in fact, he still does occupy a position of some
19 importance in COSATU as head of international relations and
20 this is after all an organisation with almost 1.8 million
21 members. If I recall his testimony, it's part of the
22 Tripartite Alliance and it certainly is the largest trade
23 union federation in South Africa and it certainly at that
24 stage enjoyed lots of support. So it's important for Your
25 Lordship, we submit in having regard to this first element.

1 [12:37] To give due weight to the fact that the speaker
2 of the words is not simply a private citizen who expresses
3 views on the internet to the privacy of a few friends on
4 Facebook, but it is someone who is head of the
5 international relations department at COSATU and is a
6 public figure of some importance, and stemming from that we
7 submit that he - what he says and what he does is of some
8 persuasive value to his particular constituency.

9 The second element would be the audience itself.
10 We do know that in the case of the Wits meeting there was a
11 meeting convened by the Palestinian Solidarity Committee.
12 Most of the people there would no doubt have been
13 supporters of the Palestinian cause, but similarly we do
14 know there were Jewish students there who were on the other
15 side of the divide. Insofar as the blog entry is concerned
16 we do know that the people who read that particular blog,
17 Supernatural, are predominantly Jewish people. There's no
18 suggestion on the evidence as we understand it that it is a
19 blog of more general application.

20 Third contextual element is the social and
21 historical context and that really refers to the social
22 component thereof would be where were the remarks made,
23 what sort of setting, and the historical context in this
24 case, M'Lord, is important, because whilst freedom of
25 expression is important in this country, the Equality Act

1 very much is geared towards ensuring that polarised debates
2 and polarisation of members of the community, as happened
3 in South Africa in the previous dispensation, is done away
4 with so that we create an inclusive democracy. So from
5 that import, from that perspective the interpretation given
6 to section 10 must take into account this historical
7 context.

8 Then the final contextual element is the means of
9 dissemination. At the Wits meeting there were students
10 present at the Wits campus. We do know that the Jewish
11 students make up a minority on the overall campus. Insofar
12 as Mr Masuku's remarks on the blog post are concerned, they
13 were disseminated on the internet and once remarks are
14 disseminated on the internet then they potentially have
15 widespread unlimited reach.

16 Then in paragraph 38 we deal with what is the
17 content of dangerous speech. It may comprise various
18 elements, including the dehumanisation guilt attribution,
19 the threat construction, the destruction of alternatives
20 and future bias. Certainly from where we stand we submit
21 that the words used by Mr Masuku at the meeting in Wits was
22 very much aimed at the threat construction if one refers to
23 the passages and the remarks that he made, and we will deal
24 with that a little later.

25 We then deal with the offending statements and

1 why they constitute hate speech. As we say at the outset,
2 M'Lord, and we've made this point before, is that the
3 notion that the defence of truth and public interest and
4 fair comment is a defence which our learned friends for the
5 respondents would be able to rely on is as we submit simply
6 wrong. While these are recognised defences at common law
7 and in the Law of Defamation it does not follow that they
8 may be raised in a matter such as this, which really
9 concerns a statutory delict of sort. Section 10 creates a
10 statutory sort of delict and from that perspective it
11 simply does not allow within the ambit of the section, read
12 with the proviso in section 12, for these defences to be
13 ventilated, and we do refer to the Winiki case there,
14 M'Lord, where the court said "Another fact to be taken into
15 consideration is that truth or fair comment is not a
16 defence in cases of hate speeches. It is now well
17 established that the focus of human rights inquiries" - and
18 that case, M'Lord, was also a complaint brought by the
19 Human Rights Commission - "human rights inquiries is on the
20 effect and not the intent of the speaker." So those are
21 important remarks from where we stand, M'Lord.

22 Then page 19 we deal at the bottom of the page
23 with the offending remarks. The first one would be the
24 blog post made by Mr Masuku and we submit that it falls
25 within the ambit of section 10. We say so for the

1 following reasons; firstly we submit, M'Lord, on a proper
2 interpretation it was a veiled threat directed to Jews.
3 The witnesses for both parties confirmed that in their
4 evidence both Jewish people in South Africa and around the
5 world would regard themselves as Zionists. In fact the
6 evidence on both sides was to the effect that the majority
7 of Jews, M'Lord, are Zionists. The blog was intended to
8 refer to Jews - that the blog was intended to refer to Jews
9 is further evident from the reference to Zionists as
10 belonging to the era of their friend Hitler. All of the
11 witnesses were ad idem, M'Lord, that when one refers to
12 Hitler, Hitler did not target Zionists. It's a matter of
13 public record that Hitler pursued a campaign to exterminate
14 Jews during World War II. That was the primary objective
15 of his campaign. It was not a campaign directed at
16 Zionists, but rather Jews, and therefore the moment one
17 refers in matters of this nature in this particular context
18 to Hitler, M'Lord, it simply takes the nature of the debate
19 beyond what is permissible criticism, what the respondents
20 would contend is simply Zionism, but takes it into a
21 different world where it is really criticism directed at
22 Jews. So the reference to Hitler can therefore only
23 reasonable be intended to call upon a direct association
24 with Jewish people.

25 Also, M'Lord, Your Lordship will recall that

1 although Mr Masuku sought to suggest that he was always
2 careful to draw a clear distinction between Jews and his
3 strong anti-Zionist comments, evidence made it quite clear
4 every now and then he failed to draw that distinction. For
5 instance the e-mail that we took him to shortly after the
6 march to Wits where he engaged with one of the people on
7 the blog, it's in fact found on page 15 of the record, he
8 referred to Jews as being arrogant, M'Lord. It wasn't a
9 remark specifically directed to Zionists. He did not say
10 Zionists are arrogant. He referred to Jews specifically.
11 So clearly if one analyses we submit the evidence within
12 its proper context it's clear that Mr Masuku's anti-Semitic
13 sentiments do filter through. They do come to the surface
14 notwithstanding his attempts to pretend that he is a friend
15 of Jews and takes no issue with Jews.

16 Also as the transcript revealed, M'Lord, Mr
17 Masuku himself said on page 266 that he's not concerned
18 about Semitic or whatever name you call it. All he wants
19 is justice. So in his mind, M'Lord, what he regarded as
20 the pursuit of justice for the Palestinian people meant
21 that he was somehow given free rein to disregard this
22 careful distinction which he purported to draw between
23 anti-Semitism and his hatred of Zionism as he calls it an
24 ideology, on the other hand. He also said, "Whether anti-
25 Semitic or not, it's none of my business and I don't care."

1 So simply put, we submit that on the record there's
2 evidence to demonstrate that Mr Masuku failed to maintain
3 that distinction and therefore the careful edifice of a
4 case that he purported to craft with a view to show that
5 that distinction was always maintained therefore simply
6 crumbles, M'Lord, because on his own papers, on his own
7 utterances both orally at Wits and the weeks before that in
8 his engagement with people on the Supernatural blog he
9 failed to maintain that critical distinction.

10 COURT: You mean there is no, or there
11 was no justification at all to the extent that he relied on
12 justice for making the utterances? Surely everyone is
13 entitled to pursue justice?

14 MR BESTER: Certainly, M'Lord -

15 COURT: Or to do things in the name of
16 justice.

17 MR BESTER: Yes.

18 COURT: We always refer to the interest
19 of justice in justifying some of our decisions.

20 MR BESTER: Certainly.

21 COURT: But you say there was no
22 justification at all?

23 MR BESTER: M'Lord, we don't take issue
24 with someone's entitlement to pursue justice.

25 COURT: Yes.

1 MR BESTER: But justice, the pursuit of
2 justice does not free licence to guilty oneself of anti-
3 Semitism.

4 COURT: Well, then we're back to
5 limitation of those rights.

6 MR BESTER: Certainly that is the case,
7 but once Your Lordship finds the words are anti-Semitic,
8 that they are of application to Jewish people on a proper
9 application of the requirements in section 10, we submit
10 that's the end of the inquiry because then there is simply
11 no defence. Then it must follow that the section is a
12 reasonable and justifiable limitation of that right. Your
13 Lordship is not called upon to consider whether section 10
14 passes constitutional muster.

15 COURT: Yes.

16 MR BESTER: In that instance it may well
17 be that one is required to embark upon an analysis to
18 determine the nature of the right and all the requirements
19 set out in section 36, but it simply, we submit once the
20 words uttered and spoken by Mr Masuku are properly
21 interpreted and found to be anti-Semitic then the need to
22 balance out free speech becomes irrelevant because simply
23 put, M'Lord, the right to freedom of expression enshrined
24 in section 16 does not in this country permit one to embark
25 upon anti-Semitic discourse. Just as much as the right to

1 freedom of expression does not permit one to be a racist in
2 one's utterances, it does not allow one to embark upon
3 anti-Semitic discourse. There is absolutely no
4 constitutional protection in speech of that nature. In
5 other words M'Lord, hatred is not in the interest of
6 justice. There is no constitutional imperative or benefit
7 in spewing about hate. The right in section 16 does not
8 give rise to any of that.

9 COURT: But also I think it may be an
10 issue that you will readily concede that in interpreting
11 the provisions of section 10 of the Equality Act one must
12 always also think about allowing those provisions to
13 advance our democracy, which is fledgling and 20 years into
14 it now we're still struggling with a lot of social issues
15 and other issues. Once more it's a question of balancing
16 and not to interpret section 10 so as to stifle democratic
17 growth. I think you hear what I say.

18 MR BESTER: Your Lordship is quite
19 correct.

20 COURT: Yes.

21 MR BESTER: The leg of the inquiry where
22 Your Lordship will conduct that exercise we submit will be
23 right at the outset when the section is interpreted, and
24 that's where we refer to section 39(2) of the Constitution
25 which would enjoin Your Lordship to interpret the

1 legislation in line with the spirit, purport and objects of
2 the Bill of Rights, and that's the juncture at which Your
3 Lordship will give due regard to the principles which Your
4 Lordship have now just referred to. That's the appropriate
5 juncture where that will happen, but once Your Lordship has
6 done that and due regard has been given to the conflicting
7 rights enshrined by the Bill of Rights, which as I've said
8 repeatedly it does create a tension between human dignity
9 on the one hand and freedom of expression on the other
10 hand, but once that interpretative exercise is conducted as
11 to what the section means then we submit the application of
12 the section must follow. It must necessarily follow and
13 then the words once interpreted as to what their proper
14 meaning is, requires the court to find we submit that the
15 words expressed by Mr Masuku would amount to hate speech.

16 COURT: You know it's not also tension,
17 it's a lot of overlapping here.

18 MR BESTER: Yes.

19 COURT: Excessive overlapping of
20 interpretation.

21 MR BESTER: Yes.

22 COURT: Anyway, you're about to complete
23 your written -

24 MR BESTER: Then, M'Lord, the point we
25 make in paragraph 45.2 is that the blog can reasonably be

1 construed to demonstrate a clear intention to be hurtful,
2 harmful, or to promote hatred. It's common cause that at
3 the time of the blog Israel was engaged in a war with the
4 Palestinians in the Gaza Strip and therefore Mr Masuku's
5 call for every Zionist - and we know that the majority of
6 Zionists are in fact Jews, M'Lord, it's just a code word if
7 one applies the proper subtext - to be made to drink the
8 bitter medicine they are feeding our brothers and sisters
9 in Palestine. Well, let's pause here. Mr Masuku will know
10 that Jewish Zionists in the United States of America or in
11 Israel are beyond his reach, but Jewish Zionists in South
12 Africa are within the geographical space where they can
13 possibly be harmed and the notion to suggest that they must
14 be made to drink the bitter medicine they are feeding our
15 brothers and sisters in Palestine we submit, M'Lord, is
16 just an obvious reference to persecution and harm that
17 befell the Palestinian people that must be applied to
18 Jewish people in this country, and there can simply be no
19 basis for speech of that nature. It does not advance the
20 contestation of ideas insofar as the debate between the
21 Palestinians and the Jews are concerned. It does not
22 contribute to that. What it does suggest is a veiled
23 threat that they must be subjected to what he considers to
24 be the suffering which the Palestinian people are being
25 subjected to, and there can be no qualms about that,

1 M'Lord, there is no constitutional protection in speech of
2 that nature.

3 COURT: If I were to say in today's terms
4 that all white Afrikaners who were supporters and
5 initiators of apartheid South Africa should be made to
6 drink the same medicine they made us to drink as blacks, is
7 that now overboard? If I were today, sitting where I am
8 and thinking back what happened to me in the last 60 years
9 or more, and just said well you know, ja, those Afrikaners
10 from HW Verwoerd to Botha to Malan to Jan Smuts - I can't
11 remember them all - their children must now today be made
12 to drink the same medicine, in other words I mean they must
13 be oppressed as well in South Africa now. They must feel
14 how it was. Am I overboard?

15 MR BESTER: We submit Your Lordship would
16 be, and I say that with due respect because that's
17 obviously a very sensitive issue.

18 COURT: Yes.

19 MR BESTER: But in the discharge of my
20 brief let me say this as I see the matter. We do know that
21 apartheid was an evil, pernicious system that dehumanised
22 and degraded people based on race, and we know as a result
23 of that system as it was institutionalised black people
24 were deprived of opportunities which were reserved to white
25 people and they were disallowed the right to freely engage

1 in commerce, the professions and all sorts of things -

2 COURT: A host of -

3 MR BESTER: We know what the history
4 certainly is. But it goes beyond that. It was also an
5 evil violent system where people were physically
6 victimised, detained without trial, killed, maimed, with
7 great psychological damage having been inflicted. Speech
8 which today wishes to, or is directed at inflicting the
9 same very foundations of an evil regime on a particular
10 minority, or ethnic, racial grouping as it were in a
11 country, I submit would fall within the ambit of hate
12 speech, and one simply has to look at the preamble of the
13 Constitution which speaks about the need to create an
14 inclusive democracy. In fact if I recall it borrows
15 heavily from the Freedom Charter to say that South Africa
16 belongs to all who live in it.

17 So to answer your question, M'Lord, the answer as
18 we see it would be in the affirmative. Speech like that
19 would certainly trigger section 10. There's no
20 constitutional protection in speech of that nature.

21 COURT: But these are beautiful words in
22 the preamble, Freedom Charter.

23 MR BESTER: They are, M'Lord.

24 COURT: Beautiful ideal words, but we
25 have to face practicalities.

1 MR BESTER: Indeed so, M'Lord. But it's

2 -

3 COURT: And that is a point, I hear you.

4 MR BESTER: Yes. M'Lord, I see it's 1
5 o'clock. I'm still going to be, I'm going on for a little
6 while after lunch. There still some ground that I would
7 like to cover.

8 COURT: I'd like to give your colleague
9 the same time after lunch as you.

10 MR BESTER: Certainly.

11 COURT: Before end of the day.

12 MR BESTER: Certainly.

13 COURT: Thanks. I'll take the lunch
14 adjournment. Court adjourns. Sorry, before I go, where
15 are your heads, Ma'am?

16 MS DE KOK SC: M'Lord -

17 COURT: Maybe I could read them during
18 lunchtime to facilitate the hearing of the matter
19 thereafter, or you're not ready yet?

20 [COURT ADJOURNS COURT RESUMES]

21 [14:01] COURT: Mr Bester, you're still busy.

22 MR BESTER: Indeed so, M'Lord. M'Lord,
23 if I can just hand up a copy of the Maynard article that we
24 referred to in our heads of argument.

25 COURT: Yes. Thank you.

1 MR BESTER: Then M'Lord, I'd paused
2 before the lunch adjournment on page 20 of our heads of
3 argument, paragraph 45.2. The second submission we wish to
4 advance in respect of the blog is that it can reasonably be
5 construed to demonstrate a clear intention to be hurtful,
6 harmful, or to promote hatred. It's common cause that at
7 the time when the blog was written Mr Masuku made his
8 contribution. Israel was of course then engaged in a war
9 with the Palestinians in the Gaza Strip. Mr Masuku there
10 called for Zionists to be made to drink the bitter medicine
11 they are feeding our brothers and sisters in Palestine.
12 Clearly on an objective reading we say, M'Lord, that this
13 is a reference to the persecution and harm that befell the
14 Palestinians during the Gaza War which he similarly would
15 like to be meted out to people in this country, and that we
16 submit is plainly unacceptable and there's no
17 constitutional protection in that. We say it's a direct
18 incitement to cause harm to South African Jews similar to
19 the harm he believed Palestinians were suffering in the
20 Gaza Strip. Although he states that all Zionists must be
21 targeted and what must be done is to subject them to
22 perpetual suffering until they withdrew from the land of
23 the others. It's clear as I've indicated to Your Lordship
24 before the lunch adjournment that he was in fact referring
25 to Jewish people and not simply limiting himself to

1 Zionists, because if he was simply intent on limiting the
2 subject of his attack to Zionists then there would have
3 been no need to make reference to Hitler. Reference to
4 Hitler takes it clearly within the ambit of an attack on
5 Jewish people, and we say in short the post was made to
6 instil detestation, enmity, ill will and malevolence
7 towards Jewish people. Calling for such harm to people
8 amounts to the advocacy of hatred and therefore we believe
9 that this particular speech made no contribution to public
10 discourse or debate in a greater or meaningful manner, but
11 in fact was a direct threat towards the Jewish people.

12 Then with reference to the statements made at
13 Wits, the first one we refer to in paragraph 47 is where Mr
14 Masuku says "COSATU has got members here. Even on this
15 campus we can make sure that for that side it will be
16 hell." Now the first point we make, M'Lord, is that the
17 only members of the audience who were on the other side or
18 who held a different view to Mr Masuku would have been
19 Jews. There's no evidence before this court that any other
20 religious or ethnic group heckled him or disagreed with his
21 views. The court must accept on our submission that the
22 only students who heckled him or had disagreement with Mr
23 Masuku would have been Jewish students and he was in fact
24 alive to that reality.

25 COURT: But we heard other people as

1 well. It's not conclusive. The people supporting the
2 Palestinian authority or whatever it's called, the Jewish
3 students, and we don't know who the others were. It's not
4 identified on -

5 MR BESTER: Well, certainly there's
6 evidence to suggest that the hecklers would have been
7 limited to Jewish students, and clearly one can accept that
8 the people who then heckled would have been people who were
9 as it were on the other side to Mr Masuku in reference to
10 these mocks, to these remarks.

11 COURT: That's the only reasonable
12 inference to be drawn from that?

13 MR BESTER: We submit exactly that,
14 M'Lord. So there's no suggestion to the effect that the
15 heckling came from another quarter or another ethnic group
16 or that there were other people outside the immediate
17 Jewish community who in fact heckled Mr Masuku. The reason
18 why we deal with the heckling is because the heckling
19 clearly indicates an expression of disagreement with the
20 views expressed by Mr Masuku and therefore when he made
21 these remarks, in other words that it will be hell for the
22 other side, he was clearly targeting a particular group
23 with whom he disagreed at that particular event and he
24 would have been under no illusion that those were Jewish
25 students. In fact during this testimony he conceded as

1 much, that he was aware of the fact that there were Jewish
2 students in the audience who heckled him. There's no
3 dispute about that. So his remarks in that sense must be
4 interpreted within that particular context.

5 COURT: He arrived late and he replaced
6 somebody else and -

7 MR BESTER: He replaced Mr -

8 COURT: He was not there earlier to fully
9 acquaint himself with who was there and who was not there.

10 MR BESTER: Of course.

11 COURT: Ja.

12 MR BESTER: Invariably any speaker in a
13 particular setting will never be in a position to fully
14 acquaint himself with the exact precise composition or make
15 up of the people in his target audience, but that being
16 said, M'Lord, it's we submit a reasonable inference that
17 can be drawn from the facts before the court that the
18 students who heckled him, who openly disagreed and
19 expressed disagreement with Mr Masuku were in fact Jewish
20 students, and when he made these particular remarks he was
21 therefore definitely addressing objectively seen those
22 particular students because they were the students who were
23 on the other side, who had a different perspective as to
24 the one that he had on the very nature of the subject which
25 they were engaging with on that particular date.

1 The point we then make in paragraph 49, M'Lord, is
2 that the reference to the word hell is not simply a neutral
3 term but it's a clear term whereby a threat is made to
4 these persons on the other side to subject them to
5 treatment by COSATU on the Wits campus, because he says,
6 "We've got members here. COSATU has got members here on
7 Wits." So he was openly suggesting that those members of
8 COSATU would be enlisted and that these people would be
9 subject to hell, and we know hell, M'Lord, is really a
10 metaphor for a place of internal condemnation or suffering.
11 So instead of a person being subject to hell in the
12 afterlife he wanted to bring that forward to subject those
13 people to the very state of hell on the Wits campus. We
14 submit that sort of speech is unacceptable. Not only is it
15 hurtful, it's most definitely harmful, but it also
16 threatens that particular target group with harm because
17 one must accept as a general proposition, M'Lord, that when
18 one goes through a situation which can be equated with hell
19 that harm will necessarily follow during that experience.
20 To go to hell, M'Lord, is by no means - and of course I
21 haven't been there, but -

22 COURT: None of us.

23 MR BESTER: - from what I know from a
24 theological perspective it certainly is not a pleasant
25 experience if one has regard to the scriptures.

1 The next statement we deal with, M'Lord, in
2 paragraph 50, he said as follows, "The following things are
3 going to apply to any South African family - I want to
4 repeat so that it is clear to anyone - any South African
5 family who sends its son or daughter to be part of the
6 Israeli Defence Force must not blame us when something
7 happens to them with immediate effect." Now insofar as
8 this point is concerned and these particular marks, the
9 first point we make, M'Lord, in paragraph 51 is that the
10 evidence established that insofar as South Africa is
11 concerned it is only Jews who join the Israeli Defence
12 Force. No admissible evidence was presented where any of
13 the witnesses spoke of having personal knowledge that any
14 other ethnic or racial group in this country would have
15 joined the IDF. Mr Masuku could not pinpoint to any other
16 racial group that he personally knew of who had joined the
17 IDF and the evidence from our side was that it certainly
18 most definitely was only Jews. In fact Prof Friedman
19 himself conceded that it is overwhelmingly Jews. Those
20 were his precise words. So objectively, M'Lord, we say the
21 statement must therefore be understood to have been one
22 made of and concerning Jews. There can be simply no other
23 interpretation which the reasonable reader would attribute
24 to the particular statement.

25 Second, Mr Masuku's reliance on the Foreign

1 Military Assistance Act of 1998 is of no assistance to him
2 and we set out the reasons for that submission in paragraph
3 52 because even if the statute does criminalise the
4 soldiers who have South African citizenship who join the
5 IDF - and again, M'Lord, that's an issue which is vexed and
6 Your Lordship is not called upon to decide that question,
7 but even if the statute does criminalise them it certainly
8 must be mentioned that the statute was not referred to by
9 Mr Masuku during his remarks. The entire context of the
10 meeting had nothing to do with foreign military assistance.
11 The explanation given by him in the papers and subsequently
12 during evidence where reliance on that statute is placed is
13 really an afterthought and it is done with the deliberate
14 purpose in mind to disguise the true anti-Semitic
15 sentiments which he expressed. Nowhere in the statement
16 will one find that Mr Masuku made any reference to this
17 legislation and when viewed in its context it's quite clear
18 that those remarks were not concerned with foreign
19 mercenary activity. That was not the tenor of the
20 discussion. The discussion was the plight of the
21 Palestinian people for justice and people who join the IDF
22 in South Africa who he perceives to be the aggressor and
23 who stands in the way of the Palestinian calls for justice.
24 So with respect, reliance on that particular act is of no
25 assistance in giving context to the remarks.

1 But more importantly, M'Lord, the statute even if
2 it was to apply would only criminalise the actual soldiers
3 themselves, based on section 3. It does not criminalise
4 the members of the families. So it's no good to rely on
5 the Foreign Military Assistance Act if the speech is
6 directed at the family members of these people. That is a
7 classic case of call it an overkill on the part of Mr
8 Masuku where he's gone much further than what is
9 permissible criticism. In fact he goes so far, M'Lord,
10 that he says that they must not be blamed when something
11 happens to them, these people, with immediate effect. It's
12 a clear imputation of a direct threat of some form of harm.
13 The suggestion of immediate harm is in fact clear. He uses
14 the word "immediate," M'Lord. It's not some vague
15 generalised statement, it's something to do with an
16 immediate effect that will happen here and now and we say
17 in paragraph 52 that such speech is plainly impermissible
18 in a constitutional state and it's contrary to the rule of
19 law, M'Lord, because if these people are guilty of any
20 crime - and we're not suggesting for one moment that family
21 members are guilty of a crime - then they must be
22 prosecuted, but they must be dealt with in the appropriate
23 forum and that's in accordance with the law. Yet Mr Masuku
24 goes much further; in fact his rhetoric suggests and
25 invites some sort of vigilantism against these Jewish

1 families. There's no suggestion that on the papers that he
2 made any reference or remarks to the effect that if these
3 people are to be criminalised that they must be reported to
4 the police stations, that they must be prosecuted by the
5 National Prosecuting Authority. That's not what he does.

6 He says they must not concern themselves or worry
7 or blame us when something happens to them with immediate
8 effect. Clearly he's suggesting personified action on his
9 part or his supporters. He's not suggesting some law
10 enforcement process which would be executed in a manner
11 consistent with the rule of law. In fact his entire
12 rhetoric is plainly inconsistent with the rule of law and
13 from that perspective, M'Lord, we submit that that
14 particular section of his address would also fall within
15 the ambit of the section. It targets a specific
16 constituency in this county, minority grouping, Jewish
17 families. We know that they are the only possible ones who
18 would send their children to go fight in the IDF. Mr
19 Masuku's remarks are clear in that sense.

20 Finally, M'Lord, the remarks that we address in
21 paragraph 55 is where he says, "COSATU is with you. We
22 will do everything to make sure that whether it's at Wits
23 or whether it's at Orange Grove, anyone who does not
24 support equality and dignity, who does not support the
25 rights of other people must face the consequences even if

1 it means that we will do something that may necessarily
2 cause what is regarded as harm." He threatens the same
3 words, the same language employed by the statute, same
4 language which the statute seeks to impress upon the courts
5 that parties should not be allowed to make those sorts of
6 threats, M'Lord.

7 What we say in paragraph 56 is that there's
8 nothing in the statement which suggests that it was an
9 attack limited to Zionists. In fact from what we know from
10 the evidence is that Orange Grove is not just some sort of
11 Zionist enclave, but it is a traditionally Jewish
12 neighbourhood and the reasonable reader will come to
13 associate Orange Grove as a traditionally Jewish
14 neighbourhood. Neighbourhoods in South Africa, M'Lord, are
15 not determined on the basis of ideology, it's often
16 determined on the basis of where people from a particular
17 demographic origin would have housed themselves. So we
18 know for instance in the south of the city, places like
19 Turffontein traditionally that would have been Portuguese
20 neighbourhood, and so on, but it's not determined on
21 ideological grounds. So when one refers to Orange Grove
22 the reasonable reader will clearly understand that to mean
23 a reference to a Jewish neighbourhood.

24 Then remarks that he made in that particular
25 section, M'Lord, he purported to suggest that his remarks

1 were limited to those people who do not support the rights
2 of other people, but we know that as a matter of fact there
3 are many people over South Africa and all over the world
4 who do not support the rights of other people, but his
5 remarks were limited to two geographic locations. The one
6 was Wits. He chose Wits because he knew whilst he was
7 making those remarks there were Jewish students in the
8 audience, and secondly he made those remarks with reference
9 to Orange Grove, which we do know is traditionally a Jewish
10 neighbourhood and the reasonable reader will certainly
11 interpret the statement to have been one made with
12 reference to Jews.

13 The harm speaks for itself, is the third point we
14 make, M'Lord. It's not to be understood as some sort of
15 metaphor for intellectual engagement, that he wishes to
16 debate topics with them or wishes to march onto premises,
17 as the case may be. If one refers to the notion that harm
18 will follow with immediate effect, or don't blame us when
19 something happens to them with immediate effect, it clearly
20 is a threat, M'Lord. When something happens to a person in
21 the context of these remarks it's not something positive,
22 it's something negative, but he was careful enough not to
23 express the harm that will be visited in precise terms
24 because that may very well have resulted in the speech
25 being criminalised for direct incitement, but nonetheless

1 it still finds application under the auspices of the act,
2 M'Lord, because although the threat is not specified it's
3 quite clear that he does not discount the fact that
4 something will happen to these people, and it's not a
5 positive thing. It most definitely must be interpreted in
6 the context of the remarks made as something negative,
7 something negative which may result in harm following upon
8 these people. So we submit again this particular section
9 would have fallen within the ambit of the act.

10 Then finally, M'Lord, we deal with Prof
11 Friedman's evidence and we submit that no reliance can be
12 placed on his evidence. Firstly we say his qualifications
13 and scholarly output demonstrate that he's not an expert on
14 the topic of anti-Semitism and its relationship with anti-
15 Zionism within the context of the broader
16 Israeli/Palestinian conflict. At best these may be matters
17 that are of interest to Prof Friedman, but they certain
18 have not been the focus of his academic career. By his own
19 admission in a 30 year scholarly period of his career where
20 he's published 73 articles only three of them really as
21 reference by his CV directly concerned these topics one way
22 or another, and by his own admission secondly he conceded
23 that he was highly partisan and from that point of view,
24 M'Lord, we say that he was really called upon to defend the
25 position of Mr Masuku at all costs.

1 COURT: I'm not so sure, because he said
2 some other articles are on the way coming out and as an
3 academic, despite the concession he reads extensively on
4 this topic.

5 MR BESTER: Yes. Of course, M'Lord -

6 COURT: To keep himself abreast of
7 things.

8 MR BESTER: Of course, M'Lord -

9 COURT: It's not his speciality, one can
10 say, from the concession.

11 MR BESTER: Yes.

12 COURT: But he certainly gave me the
13 impression that he is not ignorant on these issues.

14 MR BESTER: Well, few people who have an
15 interest in Middle Eastern affairs can claim to be truly
16 ignorant because one can certainly read up a lot on the
17 matter.

18 COURT: Yes.

19 MR BESTER: But it certainly does not
20 make one an expert, an absolutely specialist when it comes
21 to a particular field. By way of perhaps an imprecise
22 analogy, M'Lord, I can have an interest in birds and watch
23 birds and study their behaviour. It certainly would not
24 make me an ornithologist. So the fact that I read up
25 extensively on birds and watch birds and know bird calls

1 and I have the capacity to identify different sorts of
2 birds would not make me an ornithologist. Similarly Prof
3 Friedman may have an interest in these matters, he may read
4 widely on them, but it does not make him an expert because
5 the test for an expert under these circumstances, at the
6 very least if he's an academic one would expect some
7 scholarly output of a significant volume to demonstrate
8 that he's grappled with these very issues at a high
9 academic level which allows him to therefore speak from a
10 position of authority.

11 [14:21] COURT: In any event it's a matter for
12 the courts to decide at the end of the day. I think the
13 guiding principle is whether his testimony is helpful to
14 the court in a field in which the court itself does not
15 have knowledge and expertise. I mean that's a yardstick
16 really generally -

17 MR BESTER: Yes.

18 COURT: - speaking.

19 MR BESTER: Yes. We do say on the next
20 page, we refer Your Lordship to the decision in
21 PricewaterhouseCoopers and National -

22 COURT: Yes.

23 MR BESTER: - Potato Cooperative -

24 COURT: Yes, I see.

25 MR BESTER: - where His Lordship Mr

1 Justice Wallace really sets out the benchmarks as to how
2 one goes about assessing an expert. I'm not going to
3 belabour the point other than to say, M'Lord, that we
4 submit that Professor Friedman's evidence falls to be
5 rejected on this score simply because he is not an expert.
6 He's not neutral and certainly he is not an expert as
7 understood in the sense that he can assist the court in
8 guiding the court by reason of special knowledge and skill.
9 He may well know something about the conflict but then
10 again, M'Lord, most people in South Africa or in America or
11 in Israel or anywhere else who has, who have a passing
12 interest in the affairs of what's happening in the Middle
13 East would have some basic knowledge of these various
14 topics. However, it does not mean that every such person
15 who reads widely can be called upon to satisfy the test as
16 an expert. Therefore, M'Lord, in conclusion we submit that
17 the offending statement fall within the definition of hate
18 speech as are understood within the ambits of Section 10 of
19 the Act and within the courts very broad powers under
20 Section 21 of the Act we submit that the court is entitled
21 to declare the speech to be hate speech and to direct the
22 respondents to issue a public apology. All those remedies
23 are within the remit of Your Lordship's specific powers
24 entrusted under the statute. Unless Your Lordship has any
25 further questions those are our submissions. We've just

1 received, just before Your Lordship came back after the
2 lunch adjournment we received my learned friend's heads of
3 argument. We will deal with anything contained therein
4 during reply.

5 COURT: Yes. Thank you. I may revert to
6 you later on today regarding the aspect of in the event of
7 you being successful, the appropriateness or otherwise of a
8 remedy.

9 MR BESTER: As the court pleases.

10 COURT: But we must first get there.

11 Thank you, Mr Bester. Mrs De Kok.

12 MS DE KOK SC: Thank you, M'Lord.

13 M'Lord, may I just enquire at the outset how much time I
14 have available?

15 COURT: You have until 4 o'clock which is
16 more or less on par. If there's a problem you'll let me
17 know but I've just been told now and my registrar has
18 actually gone there, I've got a pile of files for tomorrow.
19 So -

20 MS DE KOK SC: So we will aim to finish
21 my argument -

22 COURT: 4 o'clock.

23 MS DE KOK SC: - and the reply.

24 COURT: Yes.

25 MS DE KOK SC: Thank you, M'Lord.

1 COURT: May I propose this, that if at
2 the end of the day there is a feeling from either
3 yourselves or me that there is more time needed, I will
4 gladly allow parties to file supplementary heads after
5 today. I don't want to rush you now but I think you've got
6 more or less the same time.

7 MS DE KOK SC: As Your Lordship pleases.

8 COURT: Yes. I have had little time but
9 I've got the gist of your heads which came about half past
10 1.

11 MS DE KOK SC: Thank you, M'Lord.

12 M'Lord, we -

13 COURT: In my chambers for which I thank
14 you.

15 MS DE KOK SC: - we handed to Your
16 Lordship the heads and then a file with the authorities.

17 COURT: Yes, I saw that.

18 MS DE KOK SC: The authorities file is
19 paginated but the judgments have been organised in an
20 alphabetical sequence.

21 COURT: Thanks, I saw that.

22 MS DE KOK SC: M'Lord, in -

23 COURT: But really without limiting, all
24 you have to do is to report, if any, prima facie case made
25 out against your client and to demonstrate and show to me

1 on the balance of probabilities that Mr Masuku has not
2 crossed the line here, that's all.

3 MS DE KOK SC: Yes. M'Lord, in order to
4 get there -

5 COURT: Yes.

6 MS DE KOK SC: - I do however have to
7 address Your Lordship about the, regarding the proper
8 interpretation of both Section 16 in the Constitution and
9 Section 10 in the Equality Act.

10 COURT: Yes.

11 MS DE KOK SC: And, M'Lord, the
12 submission that I make at the outset in paragraph 1 is what
13 I submit the nub of the matter is and the nub of the matter
14 is the issue of whether political speech which is what this
15 clearly is which offends some members of an ethnic or
16 religious group, not all members, but some members,
17 therefore constitutes hate speech. And, M'Lord, in
18 paragraph 5 of the heads of argument I highlight to Your
19 Lordship what the case is not about and I would submit to
20 Your Lordship that it is important to bear that in mind so
21 that we don't get distracted and I make the submission,
22 M'Lord, that what it is not about is it is not about
23 whether Israel or Palestine is wrong or right. Your
24 Lordship is not called upon, I agree with my learned
25 friend, Your Lordship is not called upon to make some sort

1 of judgment as to who is the aggressor and who is the
2 victim. All that I will ask Your Lordship to find and bear
3 in mind is to recognise that this is a legitimate area of
4 debate. Mr Masuku and COSATU's views on the matter are not
5 irrational or unreasonable. Their views is a view that is
6 held by many in the international community and so it
7 indeed forms the basis of legitimate political discourse.

8 The second submission that I make in 5.2, M'Lord,
9 is what is also not about. It is not about whether Mr
10 Masuku's words were offensive or insulting or inflammatory
11 or whether he could have expressed himself in a more polite
12 or in a better manner. I will demonstrate to Your Lordship
13 that the bar that is set for hate speech is for good reason
14 a high bar. We do not easily condemn someone as having
15 committed hate speech. In 5.3, M'Lord, I make the
16 submission that Your Lordship is also not called upon to
17 consider the constitutionality of section 10 of the
18 Equality Act insofar as it seems to go much further than
19 the provisions of 16.2 of the Constitution.

20 COURT: I'm very happy about that -

21 MS DE KOK SC: Yes.

22 COURT: - because we would have at the
23 commencement of the hearing started -

24 MS DE KOK SC: But, M'Lord, I just want

25 -

1 COURT: - but -

2 MS DE KOK SC: - I just want to stress
3 why that is so and the reason why that is so is because of
4 the particular way in which the applicant has pleaded its
5 case. It has pleaded its case, M'Lord, as being that that
6 is quoted in paragraph 3 that the words constitute hate
7 speech because they were directed towards Jewish people and
8 to propagate hatred and violence towards Jewish people.
9 And I've referred in the heads, I won't take Your Lordship
10 through it, but I've referred in the heads of argument to
11 the other references in the pleadings, in trial particulars
12 where the applicant made its case very clear that it is
13 complaining about words based on ethnicity and religion and
14 that it is complaining about the propagation of hatred and
15 violence and I stress that, M'Lord, because in my learned
16 friend's argument there were perhaps slippages where he
17 made submissions to Your Lordship regarding the words being
18 hurtful. And so I wanted to draw to Your Lordship's
19 attention that the case has been pleaded and prepared and
20 run on the basis that the complaint is restricted to the
21 propagation of hatred and violence which falls within the
22 Constitution.

23 COURT: But you say it is on a limited
24 basis.

25 MS DE KOK SC: Yes. So if the applicant

1 had some and said its case was really that it was hurtful
2 there may very well have been a constitutional challenge
3 but there isn't one because the words which are based on
4 ethnicity and religion and which propagate or demonstrate a
5 clear intention to propagate hatred and violence would meet
6 constitutional muster. And then, M'Lord, I make a, in -

7 COURT: But you're raising something
8 which is very provocative now. Supposing you're right that
9 the case has been pleaded on a limited basis what if there
10 is a finding to show that there is more than the
11 limitation? I ignore that.

12 MS DE KOK SC: Yes, M'Lord. Your
13 Lordship - because as I've indicated there was no, there
14 was, Your Lordship will recall that at the commencement of
15 the trial, after my learned friend had made his opening
16 address I stood up and I said to Your Lordship I want to
17 explain why there is no constitutional challenge.

18 COURT: Yes.

19 MS DE KOK SC: The case was run on that
20 basis, M'Lord. So this would not be an instance where Your
21 Lordship could find that well there hasn't been prejudice
22 to the other side because the pleadings were impliedly
23 amended during the course of the trial. There would indeed
24 be a real prejudice because if the case goes beyond what is
25 envisaged in Section 16 there would have been a

1 constitutional challenge.

2 So, M'Lord, in paragraph 6 of the heads of
3 argument at page 4 I make the submission that all that is
4 in issue thus in this matter is whether the four statements
5 complained of constitute hate speech in that they were
6 based on the Jewish on the Jewish ethnicity or faith and 2,
7 they demonstrate a clear intention to incite violence or
8 propagate hatred against Jewish people and I agree with my
9 learned friend, M'Lord, that the defamation defences truth
10 and public benefit and fair comment would not avail the
11 respondent if Your Lordship finds that this is hate speech.

12 COURT: Inapplicable you say.

13 MS DE KOK SC: M'Lord, in paragraph 7
14 and onwards of the heads of argument I deal with the
15 legislative structure and I make the submission that where
16 we must start in this inquiry is we must start at Section
17 16 of the Constitution which in sub-section 1 guarantees
18 the right of freedom of expression but then in 2 it says
19 that this right does not extend to hate speech which is
20 then defined in a very, in a particular manner. And I
21 refer Your Lordship to the decision in Print Media South
22 Africa where this structure is explained and essentially
23 what was said is that whatever isn't hate speech falls
24 within the hate speech definition is an exclusionary closed
25 category. Whatever doesn't fall in that category is

1 protected under section 16.1 and for that to be limited
2 would therefore have to meet the general limitations
3 clause.

4 And I make the submission, M'Lord, in paragraph
5 10 that the definition of hate speech in the Constitution
6 is carefully circumscribed and is restricted to speech
7 based on race, ethnicity, gender and religion and in
8 Islamic Unity Convention versus the Independent
9 Broadcasting Authority the court described the reason for
10 the law maker's choice of these four grounds as follows.
11 The court said that the hatred and stereotyping of people
12 on the basis of immutable characteristics is particularly
13 harmful to the achievement of the constitutional project as
14 it reinforces and perpetuates patterns of discrimination
15 and inequality. So, M'Lord, what the Constitution is
16 concerned about is the targeting or the propagation of
17 hatred against people based on, that which they cannot
18 change, immutable characteristics. And that, M'Lord, as we
19 know is why racism and sexism is so ambiguous because you
20 cannot change your race. You cannot change your gender so
21 for you to be discriminated against or condemned or hated
22 because of that is contrary to all our values. And why I
23 stress this, M'Lord, is because in this, what is very
24 important in this case is to determine whether the words
25 complained of are aimed at or based on an immutable

1 characteristic of being Jewish as an ethnicity or as a
2 religion or is it based on the following of a political
3 ideology. And the submission is, M'Lord, that section 16.2
4 has in mind that hate speech is directed at those things
5 that you cannot change, that are not a conscience decision
6 but a part of you.

7 M'Lord, in paragraph 11 onwards I refer to some
8 of the leading authorities on the importance of freedom of
9 speech. Your Lordship will be aware of the decision in
10 Khumalo. In Islamic Unity Convention as well as in some
11 other cases the Constitutional Court referred with approval
12 to the decision in the European Court of Human Rights and
13 decide which stress, "that the protection of freedom of
14 expression is applicable not only to information or ideas
15 that are favourably received or regarded as inoffensive or
16 as a matter of indifference but also to those that offend,
17 shock and disturb. Such are the demands of that pluralism,
18 tolerance and broad mindedness about, without which there
19 is no democratic society."

20 If I can then refer Your Lordship to the decision
21 in Democratic Alliance versus African National Congress.
22 M'Lord, this case is to be found at page 48 of the bundle
23 of authorities and I refer particularly, M'Lord, to
24 paragraphs 121 onwards which Your Lordship will find at
25 page 72. Your Lordship will recall that what this case was

1 about was that during the previous election the one
2 political party had sent an SMS which the other party
3 considered to be false and this then led to proceedings in
4 the electoral court pursuant to a provision in the
5 electoral -

6 COURT: The -

7 MS DE KOK SC: - Elections Act. Ja.

8 COURT: The seat on the Electoral Court.

9 Just a coincidence.

10 MS DE KOK SC: What is His Lordship Mr
11 Justice Cameron holds at 121, he says " We start with three
12 obvious propositions, the cherished value of being able to
13 speak freely and uninhibitedly; the importance of this
14 value to our country's elections; and the need to interpret
15 penal provisions restrictively". His Lordship then in
16 paragraph 122 emphasises the value of freedom of expression
17 and the role that it plays and he then says in paragraph
18 126 towards the bottom of the page "The corollary is
19 tolerance. We have to put up with views we don't like.
20 That does not require approval. It means the public airing
21 of disagreements. And it means refusing to silence
22 unpopular views". On the next page, M'Lord, at paragraph
23 130 is of importance, M'Lord, but what His Lordship says
24 here is he says, "the Act imposes penalties or potential
25 penalties of various descriptions on political parties.

1 [14:41] And therefore in accordance with our common law
2 principle of interpretation there must be a restrictive
3 interpretation of any penal provision. Beneath it lies
4 considerations springing from the rule of law, the subject
5 must know clearly and certainly when he or she is subject
6 to penalty by the state. If there's any uncertainty about
7 the ambit of a penalty provision it must be resolved in
8 favour of liberty." I would pause, M'Lord, to make the
9 submission that if Your Lordship has regards to section 21
10 of the Equality Act Your Lordship will see that the court,
11 this court is empowered to make a whole range of orders
12 which could have a punitive effect on the person found
13 guilty, I put that in quotation marks, but found guilty of
14 hate speech.

15 COURT: The first one is not appropriate,
16 i.e. interim order, clearly.

17 MS DE KOK SC: No, M'Lord. But Your
18 Lordship will see in 2D Your Lordship can order the payment
19 either to the complainant or to another body or
20 organisation, Your Lordship can make an interdict, Your
21 Lordship can require of a respondent, not necessarily in
22 this case, but we must interpret the Act as it applies in
23 various instances. An order require a respondent to
24 undergo an audit, an appropriate order of a deterrent
25 nature including the recommendation to the appropriate

1 authority to suspend or revoke the license of a person.

2 So, M'Lord, the Equality Act -

3 COURT: Sorry to - the applicant has
4 restricted themselves to J, paragraph 3.

5 MS DE KOK SC: Yes, but, M'Lord, in terms
6 of how we interpret the Act we must look at not what is
7 specifically sought in this case, but we must look at the
8 nature of the act.

9 COURT: Of the penalties.

10 MS DE KOK SC: Of the penalties.

11 COURT: Yes.

12 MS DE KOK SC: And the submission that I
13 make to Your Lordship is that we find in the Equality Act
14 the potential for a person found guilty of hates speech to
15 be subjected to penalty. And that in accordance with the
16 general interpretation, rules of interpretation that means
17 that hate speech, this section, section 10 must be
18 interpreted restrictively. And that, M'Lord, also fits in
19 with the general interpretation, the constitutional
20 principles that freedom of speech is important and should
21 not be unnecessarily restricted. A practical application
22 or a similar sentiment, M'Lord, of this principle Your
23 Lordship will find in the Hart's case at page 90, M'Lord.
24 M'Lord, this is a case that arose out of the fees must fall
25 protest at UCT and one of the respondents painted certain

1 slogans and banners and Your Lordship will find them at
2 paragraph 15. I'm too modest, M'Lord, so I'm not going to
3 read them out to Your Lordship I will just refer you to the
4 paragraph. It's at page 94, paragraph 15.

5 COURT: Yes.

6 MS DE KOK SC: And M'Lord, in addition to
7 those slogans the particular respondent had also - he wore
8 a T-shirt, Mr Mulandu that read "kill white people or "kill
9 whites." The court had no difficulty with finding that
10 that was hate speech, they said it promoted violence purely
11 on the basis of race. But importantly at paragraph 67,
12 page 102 the court said the following. "The issue of the
13 contents of the slogans whether painted on a war memorial
14 and a bus stop or worn on a Tee shirt as well as statements
15 such as those made by the third appellant in a
16 confrontation with a student is a delicate one. Freedom of
17 speech must be robust and the ability to express hurt, pain
18 and anger is vital. And this is the part that I would like
19 to stress, M'Lord, at paragraph 68, page 103 the court held
20 "A court should not be hasty to conclude that because a
21 language is angry tone or conveys hostility it is therefore
22 to be characterised as hate speech even if it has overtones
23 of race and ethnicity."

24 COURT: There's no religion here, hey?

25 MS DE KOK SC: No, M'Lord, no religion.

1 COURT: Yes.

2 MS DE KOK SC: So the essence of my
3 submission to Your Lordship is that the authorities
4 indicate that section 10 of the Equality Act must be
5 restrictively interpreted and that we must be very
6 circumspect in finding that speech constitutes hate speech.
7 And I will make the submission later again, M'Lord, when I
8 deal with the specific statements. But where we are
9 dealing with niceties about whether something is implied
10 and whether it perhaps means this or perhaps means that, as
11 soon as we venture into that field where there uncertainty
12 about the meaning I would submit to Your Lordship that it
13 would very seldom be appropriate to conclude that this
14 constitutes hate speech.

15 M'Lord, in paragraph 13 onwards I deal with the
16 provisions of the Equality Act and I quote section 10.1 at
17 page 8. In paragraph 18 M'Lord I deal with the respects in
18 which the Equality Act extends beyond what is envisaged in
19 section 16.1. I won't repeat those submissions, but I do
20 want to draw to Your Lordship's attention the submission
21 made in paragraph 19, one nine at page 10 that there is a
22 further difference between section 16, the definition of
23 hate speech in section 16 and the definition in section 10
24 of the Equality Act. In the Constitution, in section 16
25 hate speech is defined essentially on the basis of a likely

1 effect. Section 16 talks of advocacy of hatred that is
2 based on race, ethnicity, gender or religion and that
3 constitutes incitement to cause harm. So the focus is on
4 what the likely outcome of the words will be. But
5 curiously in section 10 of the Equality Act we find a focus
6 rather on the intention of the person who is speaking.
7 Section 10 says, M'Lord, that it is hate speech if it
8 demonstrates a clear intention to be hurtful, be harmful or
9 to promote or propagate hatred.

10 COURT: I seem to recall that one of the
11 experts said to me that it was difficult to ascertain the
12 intention of Mr Masuku.

13 MS DE KOK SC: Yes.

14 COURT: I don't know which expert it was.

15 MS DE KOK SC: M'Lord, I accept -

16 COURT: You talk about intention, I'm
17 just saying that the expert told me that it was difficult.
18 I think it's one of the applicants expert witnesses.

19 MS DE KOK SC: I think it was Dr Stanton
20 who said that he couldn't tell what Mr Masuku -

21 COURT: Yes.

22 MS DE KOK SC: M'Lord, I accept that
23 section 10 of the Equality Act when it talks about
24 reasonably construed that it also imposes an objective
25 standard, so Your Lordship must look at all of the facts

1 and circumstances, but to see whether objectively that
2 justifies a finding that Mr Masuku intended something.

3 COURT: So intention can be inferred.

4 MS DE KOK SC: Yes, yes. But what I do
5 want to stress, M'Lord is that section 10 speaks of to
6 demonstrate a clear intention.

7 COURT: And you say it's not present here
8 or established or -

9 MS DE KOK SC: So the submission that I
10 make, M'Lord, is that when the legislature puts before the
11 word intention in an act clear, I mean that's quite
12 unusual, but what it does - we must give a deliberate
13 meaning or a meaning to every word in the statute. And
14 here on the face of it the legislature has elected to say
15 you can only be guilty of hate speech if the circumstances
16 are such that it demonstrates on your part a clear
17 intention and that is a high bar, M'Lord. And again when
18 we are unsure what the words mean, are we unsure of what Mr
19 Masuku intended a finding of hate speech and its
20 consequences can never be appropriate.

21 The further submission that I make in paragraphs
22 21 and 22 of the heads of argument is that section 10 says
23 it is only hate speech if it is based on one or more of the
24 prohibited grounds. Well, M'Lord, based on in its ordinary
25 usage indicates that the words must have as their

1 foundation, as their reason or origin must have one of the
2 prohibited grounds. And the same word based on is also
3 used in section 16 of the Constitution. In other words,
4 M'Lord, there must be a direct link and a correlation
5 between the words spoken and the prohibited ground. In
6 this the issue is whether Mr Masuku's words were based on,
7 had as their foundation the Jewish faith or Jewish religion
8 or Jewishness if I may call it that. If I may use the
9 following example, M'Lord, if I were to make a speech or to
10 make a statement to say that all rapists should be
11 subjected to some punishment, Your Lordship can accept that
12 most rapists, but not all, would be men.

13 COURT: Would be what?

14 MS DE KOK SC: Men.

15 COURT: Men.

16 MS DE KOK SC: Male, male.

17 COURT: Male, oh.

18 MS DE KOK SC: Male, M'Lord. That does
19 not make my speech one based on gender because the reason
20 for my speech, the foundation of my speech, for my
21 statement has got nothing to do with gender, it has to do
22 with a certain conduct.

23 COURT: Well that example you gave has
24 nothing obnoxious -

25 MS DE KOK SC: No, M'Lord, no, no I'm

1 just illustrating -

2 COURT: It's general, it is -

3 MS DE KOK SC: No I'm not saying it's
4 hate speech, I want to demonstrate to Your Lordship what it
5 means to say that words are based on something.

6 COURT: Yes.

7 MS DE KOK SC: M'Lord, in paragraphs 24
8 to 27 I deal with the - how we must go about in determining
9 the meaning of the words in this case and I agree with my
10 learned friend that it entails an objective test. I have
11 some hesitation, Your Lordship will recall that your
12 brother Lamont, in the AfriForum case essentially applied a
13 defamation type of approach to what the words meant. And
14 with great respect I have some hesitation of whether that
15 is necessarily the correct way of approaching it and there
16 I can also refer Your Lordship the decision of Cameron in
17 DA versus ANC where the court guarded against using a
18 defamation test when it isn't a defamation case and when
19 one is really dealing with the construction of a statute.

20 But be that as it may, M'Lord, I don't want to
21 spend too much time on - this is really an academic debate,
22 I don't think that it matters much to the outcome of the
23 matter whether the words are interpreted as Your Lordship
24 would interpret any other statute or whether one uses the
25 construct of a reasonable man. I think one would come to

1 the same result. But what is clear on both approaches is
2 that evidence as to what someone subjectively meant and
3 what someone subjectively understood would not assist the
4 court. That would be inadmissible and also, M'Lord, that
5 that also applies when it is an expert who is testifying
6 about the meaning of words. And there I agree with my
7 learned friend's submission and I've referred Your Lordship
8 to the relevant authority in this regard. So that takes us
9 then, M'Lord, in paragraph 28 of my heads to the issue on
10 which the experts testified. And I make the submission,
11 I'm somewhat embarrassed to make the submission, but the
12 point is, M'Lord, we have listened to days of evidence by
13 experts about what is meant by Zionism and what is meant by
14 anti-Semitism and ultimately, M'Lord, with respect I submit
15 that that evidence cannot affect the outcome of the case.

16 COURT: Affect it.

17 MS DE KOK SC: I will offer in defence of
18 the respondents that our expert witness was called in
19 rebuttal of the applicant's expert evidence.

20 COURT: I have some difficulty with your
21 submission now. What was said and defined and explained to
22 me by this expert is certainly helpful. Zionism I thought
23 I knew the case started. I know it better now.

24 MS DE KOK SC: No, M'Lord -

25 COURT: Anti-Semitism I thought I knew

1 and I was far below the required standard of correct
2 knowledge of it. So what I'm saying is I've learned
3 something, it's not the end, it does not resolve the
4 problem here, but I think certainly the court is in a
5 better position -

6 MS DE KOK SC: No it certainly played -

7 COURT: The only other expert that did
8 not help me largely and I may say it now, is the second
9 expert Dr Stanton who spoke about the big topic on -

10 MS DE KOK SC: On genocide yes.

11 COURT: Ja genocide all over Africa and -
12 but we are not aware this led to genocide. So - but I also
13 know the threat in the background of genocide, but I just
14 have to recollect, I must discard all of this.

15 [15:01] MS DE KOK SC: No, M'Lord, it's an
16 overstatement to say that Your Lordship must discard all of
17 it. It certainly gives us helpful background information -

18 COURT: Yes.

19 MS DE KOK SC: -as to this conflict, but
20 much of the debate between the witnesses, between Prof
21 Friedman and Dr Hirsh was about what is meant by the word
22 Zionism. Prof Friedman says Zionism is a political
23 ideology that was initially aimed at establishing the
24 Jewish State and after its establishment is aimed at
25 preserving that state. Dr Hirsh had I think said that one

1 can't define it so clearly, that it depends on how the word
2 is used, when it's used, and that different people would
3 define it differently.

4 COURT: Well, he said that at the outset
5 of his paper -

6 MS DE KOK SC: Yes, yes.

7 COURT: The definition being inconclusive
8 and -

9 MS DE KOK SC: But the submission that I
10 make in this regard, M'Lord, is that it is not necessary
11 for Your Lordship to find I prefer this person's definition
12 of Zionism to that person's definition of Zionism, because
13 what Zionism is, is directly relevant in this case only in
14 one respect and that is that in one of the four statements,
15 the blog, Mr Masuku refers to Zionists. He doesn't use the
16 word in the speech and he refers to it only in the blog and
17 it is relevant and Your Lordship will have to decide what
18 did Zionist mean in that context, in the context of the
19 blog. But that question, M'Lord, is not, can't be what do
20 the sociologists or a professor in international relations
21 or history think it means in general. The question must be
22 how the reasonable man would interpret that document, that
23 word used at that time in that context.

24 There, M'Lord, I say that we then have to turn to
25 what is the ordinary usage of the word because the

1 reasonable man would understand the word Zionist not in
2 some academic fashion, he would understand it in its
3 everyday usage, and for that, M'Lord, we go to the
4 uncontroversial sources of the meaning of words, we go to
5 dictionaries and the dictionaries, M'Lord, define Zionism
6 as a movement for the re-establishment and now the
7 development and protection of a Jewish nation in what is
8 now Israel, and a Zionist as a supporter of Zionism, a
9 person who believes in the development and protection of a
10 Jewish nation in what is now Israel. So the common day, or
11 everyday usage of the word Zionist connotes simply, M'Lord,
12 someone who follows or adheres to a political ideology, and
13 it is that political ideology which Mr Masuku and COSATU
14 oppose.

15 Again M'Lord, there was sharp difference between
16 the two experts as to what really is meant by anti-
17 Semitism. That is interesting, M'Lord, but not - because
18 Your Lordship will recall that Prof Friedman said anti-
19 Semitism is no more and no less than hatred of Jews based
20 on them being Jewish. Dr Hirsh had a much more extended
21 definition of anti-Semitism which could include criticism
22 of Israel in certain circumstances.

23 But again, M'Lord, it's not necessary for Your
24 Lordship to resolve this debate or prefer one expert's
25 evidence over another because the Equality Act does not

1 prescribe anti-Semitism. We don't have to determine what
2 exactly is included in that word. The Equality Act,
3 M'Lord, prescribes speech based on race or ethnicity.

4 COURT: But the Equality Act, the problem
5 with it is, as I see it is it's a relatively new piece of
6 legislation.

7 MS DE KOK SC: Yes.

8 COURT: But therefore it must also open
9 up to other interpretations of better equipped people, like
10 some of the experts I heard here. Very little has been
11 written about the interpretation.

12 MS DE KOK SC: Yes, M'Lord the difficulty
13 of course with that -

14 COURT: I recall only the -

15 MS DE KOK SC: - that both Dr Hirsh and
16 also Dr Stanton, he was the main culprit in that regard,
17 spoke of hate speech without any specific reference to how
18 it is defined in our act. Now M'Lord, across the world, if
19 Your Lordship will have regard to those Canadian cases and
20 the United Kingdom has an equivalent act, but they all,
21 there are important differences between all of the sets of
22 legislation.

23 COURT: Well, we have to build up our own
24 jurisprudence around these things, and -

25 MS DE KOK SC: Yes, but it must be

1 jurisprudence, M'Lord, with respect, that is based on the
2 wording of our act.

3 COURT: No, I hear you.

4 MS DE KOK SC: M'Lord, on page 14 onwards
5 I then deal with the statements and whether they constitute
6 hate speech as defined and of course, M'Lord, these
7 statements must be interpreted in their context. In
8 paragraph 29 I set out the context of the comment on the
9 blog and what I've tried to do, M'Lord, is in 29.1 and
10 onwards is to summarise to Your Lordship the facts that are
11 really common cause. We know that it takes place in the
12 context of this war. We know that there is international
13 condemnation of this. We know that there is local
14 condemnation of this, and then M'Lord, importantly we know
15 that the South African Jewish Board of Deputies and the
16 South African Zionist Federation published an open letter
17 in which they declare their support for the war. So, and
18 this M'Lord, is clearly a political choice, a political
19 statement. So they enter the political fray at this stage,
20 which in turn leads to members of the Jewish community to
21 write an open letter to say you do not have our support on
22 this issue and we condemn the war in Gaza. So what we have
23 is we've got various conflicting views, not only
24 internationally but also amongst Jewish people themselves,
25 and we have the South African Zionist Federation taking a

1 particular political stance which leads to COSATU and
2 various other entities organising a march to the head
3 offices of the South African Zionist Federation and the
4 South African Jewish Board of Deputies.

5 COURT: But this won't help me to
6 interpret these words, do they?

7 MS DE KOK SC: It does. It is relevant,
8 M'Lord, because we must consider what Mr Masuku's mean when
9 it ultimately -

10 COURT: No, I mean about the support for
11 Israel and, it doesn't help - it won't help me.

12 MS DE KOK SC: But the point that I want
13 to make, M'Lord, is that I want to locate this speech
14 firmly in the political sphere. This is not an attack on
15 Jewish people, their culture or their community values.
16 This is all to do with a bubbling political debate. The
17 other thing that I would ask Your Lordship to -

18 COURT: Which was not limited to the
19 audience there, hey. It was not only heard by the
20 audience. What was said there went outside as well, hey?

21 MS DE KOK SC: Is Your Lordship talking
22 about the meeting or the blog post?

23 COURT: In the meeting.

24 MS DE KOK SC: Oh, the meeting.

25 COURT: Yes. Maybe I'm not clear, but

1 there was no limitation on the publication. But I
2 interrupted you.

3 MS DE KOK SC: Yes, M'Lord, in 29.10
4 onwards I deal with the specific events that led up to Mr
5 Masuku commenting on the blog, and why I submitted this is
6 it does form part of the context, is that when he then
7 posts his comment Your Lordship will see - well, this is
8 not a situation where Mr Masuku for no reason whatsoever
9 other than perhaps to provoke or pick a fight chose to post
10 a comment on this blog. It follows on attacks against
11 COSATU posted on the blog and Your Lordship will see that
12 Mr Masuku's comment then the tenor, the motivation of the
13 comment is that COSATU will not apologise. It will not
14 apologise for its solidarity for the Palestinian people.
15 That is essentially his message in the comment and it makes
16 sense, M'Lord, in the context of the events and the prior
17 publications that preceded the comment.

18 I deal in paragraph 30, M'Lord, with the proper
19 interpretation of the statement and the first point - and
20 this is perhaps the most fundamental point, is the
21 submission, M'Lord, that it is immediately clear that the
22 statement does not refer expressly to Jewish people,
23 whether as an ethnic group or as a religious group. The
24 target of the remarks is those from whom we struggle to
25 liberate Palestine. "Bongani says hi to you all as we

1 struggle to liberate Palestine from the racists, fascists
2 and Zionists who belong to the era of their friend Hitler.”
3 So he’s addressing those from whom we struggle to liberate
4 Palestine. M’Lord, this immediately places the statement
5 in a political context, namely that it is directed at the
6 occupying force, the people from whom Palestine must be
7 liberated, and those who support that state. These people
8 are then further described as racists, fascists, Zionists
9 and friends of Hitler. M’Lord, what racists, fascists,
10 Zionists and friends of Hitler have in common is that they
11 all refer to some or other ideological or political belief.

12 I submit in paragraph 30.4 that the pejorative
13 racist and fascist, it is insulting, no doubt about that,
14 but it has nothing to do and connotes no race or ethnicity
15 or religious persuasion. He’s saying that based on what
16 you, your conduct or your support for this system, I
17 consider you to be a racist and a fascist.

18 Similarly, M’Lord, then term Zionist; as I’ve
19 indicated to Your Lordship on its ordinary meaning how
20 someone reading this blog post would consider it, Zionist
21 does not refer to religion or ethnicity, but it refers to
22 support for the State of Israel. And M’Lord, we are on
23 comfortable ground in saying that Zionist is clearly not a
24 synonym for Jewish person because Your Lordship heard from
25 both experts, Dr Hirsh and Prof Friedman, and also from the

1 lay witness Mr Shulman, that not all Jews are Zionists and
2 not all Zionists are Jews.

3 Then "who belong to the era of their friend
4 Hitler", I make the submission, M'Lord, in paragraph 30.5
5 that we can accept that it is offensive and that a Jewish
6 person would be very uncomfortable to be accused of sharing
7 the values of a Hitler.

8 COURT: Excessively so.

9 MS DE KOK SC: Yes, yes, and we
10 appreciate that. Now I make the submission, M'Lord, that
11 similarly if a black person were to be accused of acting
12 like a HF Verwoerd or a PW Botha they would find it
13 particularly offensive, but that it is an offensive
14 comparison or an offensive reference does not make it hate
15 speech, M'Lord, and that is so because the comparison is
16 not based on race but on conduct and ideology, and whether
17 it is a legitimate or fair comparison does not arise in the
18 context of adjudging whether this statement is hate speech.

19 My learned friend made the submission that Your
20 Lordship must read in there that this was really an attack
21 on Jewish people and Your Lordship must do so because there
22 is a reference to Hitler. With respect, that sort of
23 extended interpretation can simply not assist. We heard
24 from the experts and everybody knows that a great many
25 people are wrongly, or perhaps in a silly way or facetious

1 way or stupid way described as Hitler. A reference to
2 Hitler is not a code word for Jew, M'Lord. Your Lordship
3 will recall that Mr Masuku when he commenced his speech Mr
4 Shulman shouted at him, "Heil Hitler." So while Hitler is
5 an unpleasant and nasty accusation, when you are referring
6 to Hitler it does not mean that somehow your words now
7 carry a different meaning and should read Jew.

8 Your Lordship put to my learned friend an
9 interesting analogy. Your Lordship asked him whether if we
10 took this statement, or if there was a statement that said
11 white people treated black people badly in the past and now
12 it's the turn for their children to suffer.

13 COURT: Afrikaners, I said.

14 MS DE KOK SC: Your Lordship used the
15 word Afrikaner, yes, that it's now time for them to suffer,
16 and M'Lord, I agree with my learned friend that depending
17 on the full text of that statement that may constitute hate
18 speech, but it also illustrates, M'Lord, the difference
19 between that statement and what we're dealing with here
20 because if you were to make a statement to say white
21 Afrikaners today must suffer, you are not doing so on the
22 basis of anything that that particular white Afrikaner did.
23 You are doing so purely because they belong to a particular
24 race.

25 COURT: Well, let's accept, Counsel, that

1 no two historical backgrounds -

2 MS DE KOK SC: No.

3 COURT: - would ever be the same. I
4 heard some argument somewhere that although apartheid was a
5 horrible policy it's even better than what Israel is doing
6 to the Palestinians. I think I did mention this, that -

7 MS DE KOK SC: Yes, yes.

8 COURT: - in South Africa the group areas
9 and all those horrible laws and people were taken off their
10 land and place and towns and put somewhere, but they were
11 allowed to develop in Bantustans. They had prime
12 ministers, they had elections, they had Transkeis and the
13 Ciskeis and government was supporting them, but not in the
14 Gaza Strip, not in Israel and Palestinian. So there is
15 always -

16 MS DE KOK SC: No, M'Lord, none of -

17 COURT: - the distinction between
18 historical -

19 MS DE KOK SC: Why I use the example, and
20 I juxtapose that example of saying I will -

21 COURT: No, I'm just making the point
22 that it will never be the same.

23 MS DE KOK SC: No, but why I made the
24 example about saying that there's a difference between
25 saying white Afrikaners today must suffer versus making

1 this speech while apartheid was still going on and then
2 saying to all those nationalists who support apartheid.
3 [15:21] Because the distinction is M'Lord, it is based on
4 race, it is based on conduct and political belief, to
5 support for a system. And Your Lordship will recall that
6 Dr Hirsh testified that if we in this statement replace the
7 words "Zionist" with "Afrikaner nationalist" and if we
8 replace "Palestine" with "Black South Africans" he would
9 not consider it hate speech.

10 So M'Lord to conclude what my submissions are in
11 respect of the first statement, this blog comment, the
12 essence of the submission is, M'Lord, that this is not
13 words based on race or ethnicity, these are words based on
14 a political stance, a political ideology and if that is the
15 case, M'Lord, none of the further issues arise about
16 whether it is, propagates hatred or is harmful. But I make
17 the submission in paragraph 30.7 M'Lord, that the statement
18 in any event does not demonstrate a clear intention to
19 propagate hatred against the Jewish people or to incite
20 violence against Jewish people. It has nothing to do with
21 Jewish people, M'Lord. The reference to bitter medicine
22 and, that should read "perpetual suffering" M'Lord, is
23 plainly metaphorical and political speech. And I make the
24 submission that if they were read literally, i.e. as
25 implying treating the support of Israel like the

1 Palestinians it would entail a reading that COSATU intended
2 to launch an air and land invasion on Israel. That is the
3 equivalency, M'Lord that no one could read it like that.
4 Everybody reading this would understand that this is part
5 of a political speech using political slogans and
6 metaphors. And I make the submission, M'Lord, that the
7 words "targeting, exposing, doing all that is needed" in
8 the context refers, M'Lord to the ongoing, COSATU's ongoing
9 campaign of marches and support for the BDS.

10 And if I could just pause there to make a
11 submission that relates to all of these statements, my
12 learned friend says that Mr Masuku disguises his words. Dr
13 Stanton said, Your Lordship will recall that Mr Masuku is
14 sly or clever not to make it clear what is meant by
15 consequences or anything or something will happen. But
16 having said that, having said that it is unclear or
17 disguised or that the threat must be implied, the applicant
18 wants Your Lordship to find that his words demonstrate a
19 clear intention. The applicant wants Your Lordship to
20 disregard any possible non-violent interpretation of these
21 words. And M'Lord, if we look at the objective facts
22 there's simply no basis on which Your Lordship case seize
23 on some potential sinister meaning of these words and
24 reject the, if I may call it innocent explanations because
25 the objective facts, M'Lord, indicate that COSATU was busy,

1 and had been for some considerable time, busy with a
2 campaign against Israel and that this campaign took the
3 form of recognised, non-violent peaceful protest. It took
4 the form of marches, it took the form of press releases, it
5 took the form of a boycott and support for a boycott.
6 There's no indication that before or since COSATU's
7 campaign against Jewish people, Jewish, the Jewish state or
8 the Israeli state has ever manifested in any, any form of
9 violence. Now in those circumstances if the words are
10 ambiguous, if he says something will happen or there will
11 be consequences, on what basis are we entitled to say well
12 that means violence? And there is no such basis, M'Lord.

13 COURT: Well the argument against you is
14 that even if the intention is not spelled out it can be in
15 fact reasonably from what was said and that takes us right
16 back to Rex versus Blom 1930 something, that it ought to be
17 the only reasonable inference to be inferred from the
18 proven facts and blah-blah.

19 MS DE KOK SC: And M'Lord -

20 COURT: That's what the argument was,
21 that I can infer it, even if it was disguised or not.

22 MS DE KOK SC: But I would just ask Your
23 Lordship to bear in mind that the test on section 10 is
24 that it must, there must be a clear intention.

25 COURT: We're back to interpretation.

1 MS DE KOK SC: Yes. M'Lord, I deal then
2 further with the second to fourth statements and their
3 context and the context of the meeting. Your Lordship will
4 recall that Mr Masuku testified that he had been asked to
5 come and speak at this meeting arising out of the protest
6 by or the refusal by SATAWU workers to offload goods that
7 were being imported from Israel and that the work, and that
8 the students had asked him to come and share with them
9 strategies or examples of how practical solidarity with
10 Palestine could be achieved. And if we look at the topics
11 of, well if we consider this general topic, Your Lordship
12 will see it being reflected in the transcript and I deal
13 with that at 31.5 of my heads of argument. Because what we
14 must not overlook M'Lord, in the context of this case is
15 that what the applicant has done, it has cut out, out of a
16 long speech three phrases being the ones that it relies
17 upon. And because we have been so focussed on those three
18 particular statements we perhaps forget that it formed a
19 very small part of the speech and that it was certainly not
20 the overarching topic or tenor of the speech. The
21 overarching topic or tenor of the speech, M'Lord, certainly
22 had nothing to do with Jewish people. In fact it really
23 had not much to do with Zionism at all. The overarching
24 topic was from a union, trade union perspective, what steps
25 could be taken and what could be done to support the BDS

1 campaign.

2 COURT: Well, then the inescapable
3 question would be, supposing you're right about the
4 innocence of the statements why was it necessary to map out
5 a plan of action and to emphasise that it must be clear?
6 Let me repeat, clear to everybody, let it be clear to
7 everybody, then there's a plan of action what would happen?
8 Isn't that really the most difficult part of your case
9 before me? If statement 1 or the others were innocent,
10 aimed at resolving trade union issues and pure political
11 comment or - but why do you then map out a plan of action?

12 MS DE KOK SC: Well M'Lord, if Your
13 Lordship can just assist me with -

14 COURT: Somewhere the statements say what
15 is going to happen to the Jewish people.

16 MS DE KOK SC: Not the Jewish people,
17 M'Lord.

18 COURT: I mean the families that send
19 their children to Israel.

20 MS DE KOK SC: Oh is Your Lordship
21 talking about the -

22 COURT: Yes, but that's a clear plan of
23 action.

24 MS DE KOK SC: M'Lord, it's a plan of
25 action -

1 COURT: Yes.

2 MS DE KOK SC: To prevent, prevent or to,
3 ja to prevent support for the Israeli army. There's
4 nothing illegitimate about that, M'Lord. If COSATU
5 believes, as they do, that the Israeli army is committing
6 war crimes and our law in South Africa has a legal
7 instrument which says you may not go and fight in another
8 country's army, why is COSATU not entitled to its plan of
9 its action to say we want to see that that is implemented?
10 That doesn't make it, M'Lord, it is a quite legitimate
11 political position to take to say we should not allow South
12 African citizens to go and support an occupation army or
13 fight voluntarily for an occupation army who we believe to
14 be wrong when it is prohibited by, according to them, by
15 South African law. That's not a non-political stance or a
16 stance that has anything to do, M'Lord, again with Jewish
17 ethnicity or religion. It is aimed, M'Lord, at a certain
18 conduct.

19 And again, M'Lord, I stress that if one has
20 regard to the entire transcript, Your Lordship will see
21 that Mr Masuku refers to Jewish people in two instances.
22 Where he speaks of the campaign and the steps to be taken
23 in the campaign and where he talks about opposing Israel,
24 Your Lordship will see from the transcript that there are
25 numerous interjections which mention Jewish people, words

1 to the effect of "especially Jews" or "what about Jews".
2 So we can see from the transcript M'Lord that the audience
3 was seeking to make it about Jews.

4 COURT: Not him.

5 MS DE KOK SC: Not him, M'Lord. And the
6 only two places where he refers to Jewish people, Your
7 Lordship will find, I put the reference in footnote 19 but
8 we can perhaps quickly refer to it. It's page 267.

9 COURT: Of the trial bundle?

10 MS DE KOK SC: Yes, M'Lord.

11 COURT: Yes.

12 MS DE KOK SC: His sentence actually
13 starts at page, line 15 on page 267 where he says "we
14 fought for our liberation", talking about people who fought
15 for their liberation "and no human being in the world
16 including Israelis themselves would accept someone to come
17 and invade your land, occupy your land and then oppress
18 you". And then he goes on to say "that's why I appreciate
19 the letters are from ordinary Jews in Israel who say, who
20 continue to say the Zionists are leading us Israelis in a
21 destructive way." And he goes on to say at page 268,
22 "Certainly one day you'll live peacefully with Arabs,
23 Palestinians and everybody else." M'Lord, if I can perhaps
24 just record the transcript reflects here at page 268, the
25 top of 268, male speaker, and I'd asked my learned friend

1 to just listen to it again because having listened to it we
2 think that this is Mr Masuku, will you listen? Mr Bester
3 says he still needs to confirm.

4 COURT: Oh I see. But what is the point
5 you're making about the transcript?

6 MS DE KOK SC: The point that I'm making
7 M'Lord is that this is the one instance where Your Lordship
8 will clearly see no anti-Semitism, no hatred of Jews and a
9 clear distinction between Zionism as fought for a certain
10 political position and Jewishness. The other reference
11 Your Lordship will find at page 272 at the bottom of the
12 page. The one's a democratic front, "that's why I
13 appreciate the Jews like Kasrils and many others who have
14 said the murder of his own brothers, people, it is not done
15 in our name" and so forth. So again, M'Lord, it is very
16 clear distinction drawn between Jewish people and Zionism
17 and absolutely nothing remotely anti-Semitic about Jewish
18 people.

19 COURT: Ja, well that can be accepted as,
20 it's also interpreted, hey?

21 MS DE KOK SC: Yes. But the point that I
22 want to make, M'Lord, is that when we interpret the whole
23 document we have before us an express statement which
24 indicates Mr Masuku does not hate Jews because they are
25 Jews. Opposed to that the applicant wants Your Lordship to

1 find hidden and implied in words or in other little bits
2 and phrases in the speech that this is actually about
3 Jewish people. Now why would one do that? Why if Mr
4 Masuku makes it clear that he makes the distinction, would
5 you now on a conspectus say his words somewhere else in the
6 speech must be read as really meaning I hate Jewish people?
7 M'Lord, specifically in relation to the second statement
8 which is the one which is alleged to be "COSATU has got
9 members here even on this campus. We can make sure that
10 for that side it will be hell." I pointed out to Your
11 Lordship in the heads of argument that the transcript
12 doesn't in fact have any such a line. There is some
13 references to hell but there's no reference in the
14 transcript to the other side. And well I've dealt with
15 that in the heads so I don't want to belabour that point
16 M'Lord, but the submission that I made to Your Lordship is
17 that even if it's found that that is exactly what he said,
18 even though that's not what the transcript shows, then the
19 other side, M'Lord, is not Jewish people, the other side is
20 broadly the side who supports Israel, who we know to
21 include many non-Jewish people or specifically in the
22 immediate context, the other side is the group of people
23 who are heckling him. There's no indication, M'Lord, that
24 Mr Masuku thought or knew that they were all Jewish. In
25 fact the evidence is to the contrary. If Your Lordship has

1 regard to the transcript of Mr Masuku's evidence, it's
2 really essentially 500 to 503, M'Lord.

3 [15:41] Your Lordship will see that Mr Masuku testified
4 that he remembers seeing some South African Jewish, Union
5 of Jewish Student t-shirts but that he didn't know who the
6 heck, other than that he didn't know who the hecklers were
7 and he specifically refers to an Afrikaans heckler. So
8 there's absolutely no basis on which it can be concluded
9 that when Mr Masuku refers to the other side he is in fact
10 meaning to or would be understood as meaning that he's
11 referring to Jewish people. As far as the third statement
12 is concerned, to the extent I've covered that already,
13 M'Lord, this is the statement relating to sending the
14 children to the army. I should point out to Your Lordship
15 that when we looked at this statement again it struck me
16 that it is somewhat ambiguous in the sense that the them,
17 it refers must not blame us when something happens to them
18 with immediate effect. I'm not sure, just on a reading of
19 the statement whether the them refers to the South African
20 families or the sons and daughters. But either in -

21 COURT: Or they must be read together I
22 think, all the statements

23 MS DE KOK SC: Well what I'm saying is
24 whether the object there is the, when it talks about them
25 something happens to them, whether open should read that to

1 refer to something should happen to the family or something
2 should happen to the sons and daughters. But be that as it
3 may, M'Lord, I've made my submissions in that regard that
4 again here it is clearly not based on someone being Jewish.
5 It may very well be that most of the people, the more
6 likely people to do so would be Jewish but the statement is
7 based on conduct not on race or religion. If Your Lordship
8 could postulate for a moment that this particular
9 statement, if one just refer, replaces Israeli Defence
10 Force with ISIS -

11 COURT: And then?

12 MS DE KOK SC: My submission to Your
13 Lordship would be that although it might be most likely or
14 likely that most people who would send their children to
15 fight in ISIS would be of the Muslim faith that statement
16 would not be based on religion because what you are basing
17 your statement on is a voluntary course of, is an action
18 that someone takes. Your focus and it is indeed irrelevant
19 what ethnicity or race that or religion that person belongs
20 to. M'Lord, I deal with the proper interpretation of the
21 fourth statement in paragraph 34 of my heads of argument
22 and I again make the submission that these words really
23 have nothing to do with Jewish people. They are directed
24 at anyone who does not support equality and dignity. Who
25 does not support the right of other people in the world.

1 Read in this context of this whole speech, M'Lord, what Mr
2 Masuku is referring to is supporters of the Israeli State
3 and I make the submission that the reference to Wits and
4 Orange Grove are easily explained. If you're at a meeting
5 at Wits you're likely to say at Wits, it's explained simply
6 by the fact that that is where the speech was taking place
7 and the reference to Orange Grove is easily explained in
8 the context of the recent march.

9 There's no indication, M'Lord, that Mr Masuku
10 knew or that it is so notorious that he must be deemed to
11 be known, to have known that there are many Jewish people
12 who live in Orange Grove. His evidence was to the
13 contrary. He said all he knew was that is where the
14 Zionist Federation's offices were and that is why they
15 marched there. M'Lord, I will wrap up because I, although
16 I leave my learned friend's 15 minutes for reply which I
17 hope will be enough. In conclusion, M'Lord, the submission
18 is that if one applies section 10 of the Equality Act in
19 the manner in which we must and in light of the other
20 constitutional principles there's simply no basis on which
21 Your Lordship can conclude that these words were based on
22 ethnicity or religion and that they demonstrate a clear
23 intention to propagate hatred against Jewish people or
24 violence against Jewish people. M'Lord, we submit, I
25 submit therefore that the complaint ought to be dismissed

1 and I submit, M'Lord, that the complaint ought to be
2 dismissed with costs. I know that the applicant hasn't
3 asked for costs against the respondent but I would submit
4 to Your Lordship that on a proper application of the
5 principle in BioWatch, if Your Lordship does dismiss the
6 complaint then the respondent ought to be awarded it's
7 costs. This is a case, M'Lord, where an organ of state is
8 litigating against what is a private party, COSATU is a
9 private party, it derives its funds from its affiliates who
10 in turn derive their funds from their members and when -

11 COURT: Normally when people come to
12 court in pursuit of constitutional rights and the question
13 of cost does not arise.

14 MS DE KOK SC: M'Lord -

15 COURT: But this is not as we heard. So
16 the -

17 MS DE KOK SC: This is -

18 COURT: It's a question of interpretation
19 from your argument of section 10 of the Equality Act and -

20 MS DE KOK SC: And M'Lord, when a private
21 party comes to court to assert a constitutional right then
22 BioWatch says that even if the private party loses he
23 mustn't be marked in costs. But if the state loses the
24 state must pay the costs. That's basically the principle.
25 We're saying here, M'Lord, here it is the state which has

1 taken the private party to cost, private party to court it
2 cannot, if it is found to have been wrong in that regard
3 then there's no valid reason why the private party should
4 pay the or should pay its own costs and because M'Lord, the
5 whole rationale for BioWatch is that it would have a
6 chilling effect if private parties were too scared to go to
7 court to assert their constitutional rights because they
8 could end up with a costs order. But in this case, M'Lord,
9 it would be have with respect a tremendously chilling
10 effect on speech if you could know that the state can't
11 take you to court, wrongly accuse you of hate speech and
12 then even if you win you are not entitled to get your costs
13 back from them.

14 COURT: I hear you.

15 MS DE KOK SC: Thank you, M'Lord.

16 COURT: I just want to ask you one thing
17 which occurred to me here last night is that it is common
18 cause that the Human Rights Commission had already heard
19 this matter and made a finding against Mr Masuku.

20 MS DE KOK SC: Yes. But it, as I
21 understand it -

22 COURT: That is irrelevant for the
23 current -

24 MS DE KOK SC: That's irrelevant.

25 COURT: For current purposes, yes. I

1 should not even look at it.

2 MS DE KOK SC: No, M'Lord.

3 COURT: Oh. Thank you. Mr Bester, there
4 shouldn't much be -

5 MR BESTER: M'Lord, Mr Seape will be
6 conducting -

7 COURT: Oh thank you.

8 MR BESTER: The reply. He will hopefully
9 finish within the allocated time.

10 COURT: Thank you.

11 MR SEAPE: May it please the court,
12 M'Lord. I'll do my best to try and get the submissions and
13 make sure we finish on time. M'Lord, there is a couple of
14 topics that I would just like to deal with and the first
15 one is the submission made by my learned friend to the
16 effect essentially that because of the matter or the manner
17 rather in which this matter has been pleaded in some sense
18 the applicant has limited itself to Section 16.2 of the
19 Constitution and is thus not entitled to rely on section 10
20 of the Equality Act and the short answer, there's two
21 answers to that. The first is a factual one or based on
22 facts which is that the applicant has not limited itself
23 simply to section 16.2, if Your Lordship, it's not
24 necessary for you to turn it up but I'd ask that Your
25 Lordship just refer to page 12 of the pleadings bundle

1 which contains the applicant's founding submissions.

2 COURT: We had a debate with Counsel De
3 Kok about that. We had a debate about the limited manner
4 in which she said the applicant approached the court.

5 MR SEAPE: Well, M'Lord -

6 COURT: We had a debate with her during
7 her argument.

8 MR SEAPE: Yes, well -

9 COURT: I had it.

10 MR SEAPE: I understood my learned friend
11 to be saying that if indeed we are relying on Section 10
12 then it is in those circumstances that a constitutional
13 challenge would have been launched.

14 COURT: Yes.

15 MR SEAPE: And it was in the context of
16 that debate that I make these submissions. I say to Your
17 Lordship that it is quite clear from page 12 and paragraph
18 7 where the heading is basis for action in the Equality
19 Court that reliance is placed on section 10.1 of the
20 Equality Act. So that's the first reason. Now the second
21 reason is a legal one, M'Lord, and there's authority for
22 the proposition as we have debated at some length in these
23 proceedings, that these are not ordinary clinical
24 litigation procedures where the court must have or strict
25 observance with the rules of court. I'd like to refer Your

1 Lordship to a matter, to a case rather that's not in our
2 heads of argument, but it is the reported case of Woodways
3 CC versus Valley, it's 2010 volume 6 SA 136 Western Cape
4 High Court and it's a judgment by a full bench consisting
5 of His Lordship Justice Erasmus and Justice Zondi. And
6 I'll refer to Your Lordship to paragraphs 30 to about,
7 sorry M'Lord, I just have it here in front of me. 38 and
8 in essence a similar complaint was read and this is what
9 the court had to say. The court speaks about the mechanism
10 through which proceedings are brought before the Equality
11 Court and then the court says "the informal nature of
12 proceedings before the Equality Court was considered in
13 George and others versus Minister of Environmental Affairs
14 and Tourism. NC Erasmus held at paragraph 12, "an integral
15 part of the Equality Court then is the focus on creation of
16 a user friendly court environment where proceedings are
17 conducted along inquisitorial lines with an emphasis on
18 informality, participation and the speedy processing of
19 matters. This objective itself goes to the essence of what
20 the equality is about because emphasis, because it
21 emphasises the need to make the judicial process available
22 to all including the poor and oppressed who are usually the
23 victims of unfair discrimination and equality. The formal
24 adversarial often expensive and potentially intimidating
25 proceedings that prevail in ordinary Magistrate Court and

1 High Court and which may act as a barrier to those seeking
2 justice have no place in the Equality Court" and then His
3 Lordship Justice Zondi goes on to say at paragraph 36. "It
4 is clear to me that the act creates an informal and
5 inexpensive platform for the adjudication of unfair
6 discrimination disputes. It marks a shift from the
7 conventional way of litigation which emphasises elegance in
8 the formulation of pleadings. It creates a space for the
9 victims of unfair discrimination to tell their stories so
10 that the systematic inequalities and unfair discrimination
11 which as the preamble states remains deeply embedded in
12 social structures may be eradicated." So in essence,
13 M'Lord, the submission is that these are not the types of
14 proceedings where parties should be hold strictly and
15 clinically to their submissions as they appear in the
16 pleadings.

17 COURT: - argument when your senior was
18 objecting to expert witnesses of which notice was not given
19 in time, so -

20 MR SEAPE: Yes, but Your Lordship will -

21 COURT: We had that debate that I don't
22 have, this is an inquiry, this is not a strict adherence to
23 the adversarial nature of proceedings we normally have.

24 MR SEAPE: Yes, M'Lord, but you'll recall
25 M'Lord, that the response to that, which I would align

1 myself with was that the objection raised in relation to
2 the experts went to the question of fairness.

3 COURT: Yes.

4 MR SEAPE: And it was that, it was that
5 issue that was, that detained you and Mr Bester. This is
6 not a question of fairness. The respondents have not been
7 prejudiced because firstly it is clear from the pleadings
8 that reliance has been placed on Section 10 and secondly
9 throughout these proceedings the matter has been conducted
10 on the basis that the applicants rely on Section 10.

11 COURT: I'm sure there was a request for
12 particulars and supplied in this matter at some stage,
13 initial stages, I'll have regard to that as well.

14 MR SEAPE: Yes, M'Lord, but I do make the
15 point to you that rather than to concern yourself to
16 strictly with what is contained in those particulars and
17 what may emerge there from one should be guided by the
18 manner in which the case was prosecuted and the nature of
19 the evidence that was given. You'll recall, M'Lord, that
20 Mr Benji Shulman testified specifically to which there was
21 an objection, which we dealt with, he testified
22 specifically on the hurt that these words had caused him.
23 So what his subjective feelings may have been about the
24 words. So it's clear, M'Lord, that at least from our
25 perspective it has always been the intention to conduct

1 this matter and run it as though reliance had been placed
2 on section 10 of the Equality Act. Now, M'Lord, the next
3 point that I would like to raise with Your Lordship is the
4 issue relating very briefly to the expert witnesses and
5 I've been listening to the debates that Your Lordship had
6 had, not only with Mr Bester but with our learned friend
7 for the respondents and very briefly, M'Lord, I would
8 summarise our position as follows. The experts as both
9 parties have conceded would not be entitled to give you
10 their views or rather it would be irrelevant what their
11 views on the meaning of the words but that was not why we
12 called at least our experts, M'Lord. Our experts were here
13 to enable Your Lordship to make a determination on why it
14 is these particular claimants would have felt aggrieved by
15 the particular statements and to allow Your Lordship or to
16 give Your Lordship the tools that would assist the court in
17 making a determination as to whether or not the statements
18 constituted hate speech or not.

19 So as an example you would have remembered,
20 M'Lord, that Professor Stanton spoke at some length about
21 some of the stages of genocide and hate crimes and he spoke
22 about dehumanisation. Now there is precisely the type of
23 tool we would ask Your Lordship to take into account when
24 making an assessment because if Your Lordship finds that
25 there is dehumanisation in some of the speech that we have

1 been referring to then of course one that leads to the,
2 doesn't necessarily follow but it leads to the conclusion
3 that there may be hate speech and that the particular
4 statements in this case fall within the provisions of the
5 act.

6 So ultimately, M'Lord, it, we do not say that you
7 should reject the evidence of the witnesses, especially the
8 expert witnesses but what we do say is that Your Lordship
9 should have due regard to the tools that they were there to
10 provide Your Lordship and we would, and it is our
11 submission that many of those tools find application in
12 this case for example, Your Lordship made reference to the
13 definition of Zionism, of course the expert we would say
14 our experts definition of Zionism or what he interpreted
15 Zionism given his expertise in the area would be the
16 definition that Your Lordship would prefer and that again
17 would be another tool in assisting Your Lordship to make a
18 proper assessment on whether the words constitute hate
19 speech or not. We would also resist, we would ask Your
20 Lordship to resist the temptation to make reference to
21 dictionary meanings as you would have seen, M'Lord, in our
22 heads of argument in the famous Le Roux versus Day matter.
23 His Lordship Justice Brandt in the Constitutional Court
24 specifically made or drew the court's attention to the
25 pitfalls in relying on dictionary definitions because of

1 course when people consider statements they do not have the
2 entire dictionary in their mind. So that is not the
3 ordinary sense in which they perceive words.

4 [16:01] It is, can be a useful but we would submit that
5 in this area or this area of debate where it's such a hotly
6 contested issue it would be inappropriate to simply have
7 regard to a two-line definition that one may find in the
8 dictionary.

9 COURT: It depends which dictionary.

10 MR SEAPE: Well, I would say, M'Lord, I
11 don't think there are any dictionaries that has
12 comprehensive as the definition Dr Hirsh gave but be that
13 as it may, we would simply ask that Your Lordship resist
14 that inclination because it can prove to be quite
15 unhelpful. The next topic I would just briefly like to
16 deal with, M'Lord, is the, this, the submissions made by my
17 learned friend, Ms De Kok in relation to the intention.
18 Now we do not rely, M'Lord, as we have said on numerous
19 occasions simply on the express terms, although we do place
20 some reliance on the express terms. I will not ask Your
21 Lordship to turn it up but you will recall at page 266 of
22 the transcript is the reference by Mr Masuku or the
23 statements by Mr Masuku where he says you know what, I
24 actually don't care about the distinction between anti-
25 Semitism or anti-Zionism, I'm simply here fighting for

1 justice. That is an express disavowance on any distinction
2 and we say that's a clear indication in the express wording
3 used by Mr Masuku himself that he had the intention to
4 target Jews.

5 COURT: Can one put that as strong as
6 recklessness?

7 MR SEAPE: I would certainly put it as
8 strongly as, and that has been the basis for our argument
9 M'Lord. You will note obviously, M'Lord, that the Act just
10 speaks of an intention. Now of course we know in law
11 there's three forms of intention, eventualis, directus and
12 indirectus. And quite frankly if one is so reckless in the
13 way that they speak M'Lord, one can infer from that
14 recklessness that there was an intention to target a
15 particular group.

16 So yes we would say that that form of
17 recklessness is sufficient to bring us within the confines
18 of the section. I would also ask Your Lordship to just
19 turn up page, not to turn it up but to note page 262 which
20 is where Mr Masuku talks about the specific consequences.
21 Your Lordship referred to it as the plan of action. Again
22 there is an explicit reference to the conduct or the
23 actions that will be taken to others. And then in other
24 places of course, M'Lord, we rely on inferences and for
25 reasons that have been debated at length. We will say that

1 the only reasonable inference to be drawn in this case is
2 that the speech was directed at people of a particular
3 ethnicity and religion. And we say, M'Lord, that it is not
4 a defence to say well I didn't make my statements clear
5 enough so therefore I do not fall within the ambit of the
6 act. We would also ask Your Lordship to turn to note page
7 262 which makes specific reference to, where Mr Masuku
8 makes specific reference to the monopoly of violence.
9 Again there the clear indication is that to those who he
10 disagrees with they must entertain the illusion - was the
11 words, that they are the only ones that have a monopoly of
12 violence, again clearly indicating that that is what he is
13 prepared to do.

14 So M'Lord, just on this intention point, I think
15 the final point that needs to be made is that an intention
16 can still be clear even if that intention has been cleverly
17 disguised. So in other words, M'Lord, as Professor Stanton
18 alluded to in his evidence throughout history we have seen
19 very provocative, powerful and persuasive speakers who tap
20 into particular subjects and are very clear to make their,
21 or very cleverly hide their true intentions. On my learned
22 friend's interpretation those types of powerful speakers
23 who history have shown have been very effective would not
24 be able to be prosecuted under this act simply because
25 their statements were not clear. As in the case of, just

1 to use a loose example, as in the case of a matter of
2 contractual interpretation, there may be ambiguity in a
3 document but ultimately it's the court's duty when such a
4 matter comes before the court to identify what the party's
5 intention was, even though it may not have been expressed
6 in the clearest of terms. We find similarity here. We say
7 to Your Lordship look beyond what some of the explicit
8 statements are, look beyond that, look at the context, look
9 at what was known to the parties, and it is from that
10 analysis that Your Lordship will come to the conclusion
11 that these statements fall within the prohibition or within
12 the four corners of section 10.

13 So we submit to Your Lordship that you should not
14 be deterred if Your Lordship comes to the finding that
15 certain phrases may not have been expressed clearly. There
16 is certainly a hidden meaning and we'd invite Your Lordship
17 to uncover that meaning and from that meaning you will
18 glean what Mr Masuku's intentions really were.

19 On the final topic M'Lord, is the issue of costs.
20 We would submit M'Lord that first of all the applicant in
21 this matter is a chapter 9 institution, it is not an organ
22 of state. It is here to defend the rights and to prosecute
23 a complaint that has been brought by a particular body and
24 it is entitled to do that. This is clearly a
25 constitutional matter in the sense that it implicates

1 constitutional rights and we submit, M'Lord, that it would
2 be inappropriate in circumstances where we have not asked
3 for costs, recognising the fact that it would be
4 inappropriate to do so, for Your Lordship to order costs
5 against this applicant.

6 COURT: But this chapter 9 has got a huge
7 budget, which is under-utilised.

8 MR SEAPE: M'Lord, I'm not too sure that
9 that's -

10 COURT: Money is sent back to Treasury
11 every February.

12 MR SEAPE: M'Lord, I'm not aware of those
13 facts -

14 COURT: What I'm saying is that they have
15 got the funds but that is not the test. They are not -

16 MR SEAPE: Certainly not, that would be
17 my second point.

18 COURT: Yes, they are not poor, but
19 they've got an important public function to play.

20 MR SEAPE: Precisely, M'Lord.

21 COURT: That is the point to be made.

22 MR SEAPE: That's precisely it. We are
23 here fulfilling our constitutional mandate and it simply
24 cannot be the position that every time -

25 COURT: Mr Seape, you know that the

1 question of costs is the last thing that, the last order we
2 make in the judgment.

3 MR SEAPE: Precisely, M'Lord.

4 COURT: If I reach that stage where I
5 feel one party has been wasting time and misleading me and
6 delaying, then I think I'll properly make the appropriate
7 cost order.

8 MR SEAPE: I accept that fully.

9 COURT: Either way, as a matter of huge
10 discretion, hey, it's a matter of huge discretion to this
11 court. But I hear what you say I should not make any cost
12 order.

13 MR SEAPE: No M'Lord. And I would just
14 make the final point -

15 COURT: Even if you lose.

16 MR SEAPE: Even if we lose, M'Lord. I
17 would just make the final point. There was a suggestion
18 even in the responding submission, Mr Masuku's responding
19 submissions that this is a sort of a frivolous case and
20 it's a waste of everybody's time. We would reject that
21 M'Lord. We would say that there was substance to this
22 complaint and it is an issue that does not often receive
23 judicial consideration and we were well within our rights
24 to bring it before Your Lordship. Finally M'Lord, we will
25 make this case available but it was the famous Penny

1 Sparrow case that my learned friend Mr Bester referred to
2 when he says, and in the judgment it says here, "The
3 question of costs is accordingly in the discretion of the
4 court inasmuch as the complaint has not sought an order for
5 costs in the event of non-opposition and bearing in mind
6 that parties should not be discouraged from approaching the
7 Equality Court for fear that costs may be awarded against
8 them, considering the particular circumstances of this case
9 including the non-attendance of the respondent at the
10 hearing and to mark my disapproval of reprehensible conduct
11 by the respondent, in my view warrant an order for costs
12 against the respondent." So there M'Lord there was a
13 specific finding of reprehensible conduct which I don't
14 think can seriously be made in this case. Those are our
15 submissions.

16 COURT: Thank you.

17 MS DE KOK SC: M'Lord, may I just beg
18 leave to hand up the BioWatch case and its follow up that I
19 referred to?

20 COURT: It's a well-known one in the
21 motion court but ja.

22 MS DE KOK SC: Since I have it M'Lord.

23 COURT: By the time we come to the
24 judgment it may be necessary to have a re-look at it.

25 Thank you. Anything you want to say on the question of

1 costs?

2 MS DE KOK SC: Not on the question of
3 costs M'Lord, I think I've made my submissions clear. This
4 is not a case where, this is a case where the applicant has
5 elected to pursue the respondent.

6 COURT: Well I've come to a stage where I
7 am convinced that both parties have had their say here in
8 this matter. I kept open the option of filing
9 supplementary heads but I think it is, one almost feels
10 saturated with the argument. Unless I'm convinced
11 otherwise but I'll leave the door open. If you go out of
12 here today and you sleep tomorrow and you feel that you
13 want to agree to file further heads, supplementary, you can
14 agree amongst each other, exchange and send to me, fine. I
15 think that's the fairest way to do it. The other thing is,
16 let me just do some housekeeping before I go. I now have
17 the complete transcript as of today.

18 MR BESTER: Sorry, M'Lord -

19 COURT: That is the whole day, hey. Will
20 that be made available as well? Thank you. Then there is,
21 I'm aware that this case is of, cases of this nature, in
22 terms of the Act must be finalised as soon as soon as
23 possible. I think there's particular reference to
24 expeditious handling of cases of this nature. So what I'm
25 saying is that I'll do my best to bring out the judgment

1 but instructing attorneys who are here, please don't write
2 to me until I tell you that I can't deliver the judgment as
3 soon as possible. There's a tendency to write to us every
4 day after the first week. We now hide behind a Chief
5 Justice's standards and norms that we have about three
6 months. And what else did I want to say? Housekeeping -
7 oh ja there is the question of the video that I listened to
8 in court. It was played by somebody externally, is it?
9 The question really is what if I want to listen to it
10 again? Can one party come and play it with me and my
11 Registrar at the relevant stage or would you object that
12 you were not there, you were not invited, I tampered with
13 the video?

14 MR SEAPE: M'Lord, we can make an
15 electronic version or a CD, whatever suits Your Lordship.

16 COURT: Ja, I don't want one party to
17 come here and the other one says they came to influence me
18 one way or the other.

19 MR SEAPE: M'Lord, I don't think that -

20 COURT: I just want to refresh my memory
21 at some stage. It may or may not be relevant, I mean
22 necessary. I think -

23 MR SEAPE: Would Your Lordship prefer a
24 cut CD or by e-mail?

25 COURT: Something I can play when I'm

1 alone without arguments and faces, to draw my own
2 independent picture even if I can play it in my car going
3 home or coming to work, every morning. But I'm sure you'll
4 make a plan then, let us know as soon as possible what is
5 the best practical way of doing it. The final thing I wish
6 to say is that the formal order I will make in the matter
7 is that judgment is reserved and that I thank both counsel
8 on both sides for having worked under such tremendous
9 pressure from me yesterday to have these heads available
10 today and the manner in which you presented your respective
11 cases. These are rare cases in this court and there are
12 very few designated judicial officers who do them. Each of
13 them comes with a novelty. There may be some novelty here,
14 I don't know. You may be making some law, Advocate
15 Erasmus, if you win. The same with Mr Bester. So thank
16 you for working with me for the last six or seven days, I
17 have not been bored by you at all. The court will adjourn

18 [COURT ADJOURNED]

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<p>abandon 106:11 abandoned 608:25 Abbas 299:13,20 304:3 304:5 Abe 336:20 aberrations 308:9 abhorrence 378:10 abide 549:15 ability 387:21 544:4 704:24 762:17 able 41:5 64:16 80:10 142:24 209:8 306:22 327:8 344:22 354:21 355:4 371:16 388:24 389:3,11 401:10 417:2 446:10 496:20 526:18,19 527:2,14 568:10 679:20 724:5 759:12 803:24 abolished 218:22 abolition 702:1 abreast 747:6 abroad 1:24 absence 604:8 absolute 431:25 632:4 664:22 688:24 absolutely 211:9 217:8 225:4 235:22 240:2 266:13 319:13 331:16 360:25 361:1,2 378:14 432:21 436:16 440:7 444:9 460:17 464:5,23 467:7 474:10 482:21 486:9 487:2,6,11 488:3 510:22 514:4 517:7 533:14 549:5 552:7 555:6,17 565:20 567:9 600:2 621:10 639:11 641:22 647:20 656:2 729:3 747:20 787:17 789:8 abstract 283:15 abuse 458:5 459:11 674:24 abusers 580:10 abuses 249:11,20,21 351:9 352:11,21 abusing 458:11 abusive 530:15 academic 13:2 66:4 83:4,22 84:4,11,14,16 104:10 174:7 176:4 229:14 247:6,10,10 248:7 249:25 250:4 252:1 281:19 341:21 345:14 460:18 579:5 579:6 605:20 610:12 610:14 613:10,15 615:3 616:19 620:23 641:23,24 642:6 667:25 668:2 704:9 746:18 747:3 748:6,9 767:21 771:2 academics 252:2,3</p>	<p>265:11 293:4 345:9 345:10,15 485:24 618:6 accede 662:21 acceptability 385:12 acceptable 569:24 635:23 650:22 653:24 680:5 acceptance 637:19 641:20 642:2 705:5 715:20 accepted 176:3 183:10 191:18 192:3 297:2 329:12,15 331:18,20 369:6 372:21 373:5 596:12 601:24 640:21 640:24 644:23 720:1 787:19 accepting 134:22 accepts 419:16 628:14 645:5 access 29:14 32:13,17 32:19 262:4 306:2 355:4 592:25 593:1,2 658:4,4 690:4 accommodate 542:23 562:19 Accord 622:3 account 195:13 196:13 196:14 198:15 200:20 201:21 217:10 436:4 601:5 712:19 720:13 723:6 799:23 accountable 666:1,2 accounted 37:24 65:23 accounting 162:2 accounts 561:7 accuracy 609:11 accurate 13:3 219:10 258:21 555:16 647:10 704:10 accurately 582:18 584:8 657:17 accusation 233:8 315:1 657:9 778:5 accusations 626:13 accuse 204:8 400:17 626:4 631:22 648:10 652:7 793:11 accused 123:3 205:4 289:14 317:14 341:12 341:12 458:13 548:5 648:9 777:6,11 accuses 195:23 accusing 195:19 200:12 200:21 204:13 205:14 210:6,8 323:13 626:2 652:12 672:21 accustomed 7:6 682:17 achieve 41:8 426:5 521:22 701:15 achieved 783:10 achievement 757:13 achievements 520:19 acknowledge 105:24 405:2</p>	<p>acknowledged 664:25 acknowledges 246:5 acquaint 738:9,14 acquire 296:21 acronym 28:22 34:10 acted 31:10 616:22 acting 21:21 124:15 399:3 582:1 719:17 777:11 action 5:17 6:23 46:11 81:15 179:14,24 180:9,22 227:19 339:1 359:21 361:13 361:14,18 367:5 380:11 435:25 436:4 476:8 517:21 553:6 575:11 577:16 631:6 634:24 665:25 667:18 673:15,16,23 687:13 743:8 784:5,7,11,23 784:25 785:9 790:17 795:18 802:21 actions 18:24 62:9 80:2 81:17,18 98:5 100:12 100:17 106:22 107:5 107:25 114:14 115:13 123:6 181:23 183:12 201:3 209:25 210:12 210:15,18,21 287:10 287:18 288:6 325:8 326:4 347:23 509:18 582:7 623:22 802:23 active 34:3 35:3 38:15 379:12 598:15 actively 618:12,21 665:24,25 activism 35:8 60:5,7 61:3 72:15 76:11 189:17 464:16,17 activist 34:16 66:20 252:14 activists 34:4 486:3 547:25 676:14 activities 34:24 60:20 131:1,6,18 252:12 432:3 433:5 435:24 activity 35:5,9 154:12 227:23 370:22 380:13 632:1 741:19 acts 195:21 200:24 389:9 397:3 451:23 actual 25:19 26:1 47:6 153:7 166:8 325:15 325:15 377:2 383:20 426:10 472:16 493:19 512:12 608:5 742:2 acutely 102:23 ad 4:15,19 50:18 725:11 add 21:14 192:17,22 212:16 218:19 223:1 223:13 224:7 243:21 249:22 272:3 425:16 447:18 451:4,9 483:6 521:18,19 577:1,2 581:20 615:15 688:14</p>	<p>695:25 added 3:14,18 227:16 667:15 adding 541:23 addition 24:19 192:25 252:11 762:6 additionally 701:20 address 3:23 5:21 18:11 22:17 44:17 51:23 97:19 151:8,14 183:21 209:23 216:7 225:17 255:5 481:6 515:18 569:11 658:1 658:2 690:6,7 706:16 706:18 743:14,20 752:7 755:16 addressed 23:23 229:13,15,16 231:16 233:1 250:9 677:10 721:16 addresses 320:13 addressing 248:18 250:19 700:18 738:21 776:3 adherence 797:22 adheres 771:12 adjourn 109:14,19 143:23 167:25 168:16 170:23 171:1 206:15 284:15 333:3 378:21 429:20,22 468:17,17 528:8,24 567:25 570:20,24 662:22 684:17 810:17 adjourned 54:25 109:20 111:8 171:2 284:16 285:24 429:21 429:23 570:25 663:3 684:12,18 810:18 adjournment 3:13 21:16 54:18,20,23 167:22 206:5,8 207:1 207:11 468:15 528:9 529:14,18 616:7 661:24,25 662:18 663:7 721:6 734:14 735:2,24 750:2 adjourns 21:11 55:1 143:25 206:16 333:5 378:22 468:18 528:25 616:2 663:4 734:14 734:20 adjudged 257:16 adjudging 777:18 adjudication 797:5 administered 585:20 588:14 591:1 administration 303:18 477:24 administrative 304:21 690:3 administrator 88:14 90:14 administrators 88:12 95:19 admiration 619:7</p>	<p>admirer 619:22 admires 620:2 admissible 740:12 admission 746:19,22 admit 496:20 506:24 admitted 365:19 598:19 ado 15:6 23:22 26:16 Adom 163:3 adopt 194:16 214:6 637:23 691:10 720:11 adopted 191:18 192:3 194:25,25 195:2,8 199:2,10,11,19,21,22 199:24 200:1 330:18 330:21 331:11,13 332:12 618:24 620:15 655:20 adopting 35:21,22 Adv 3:8 advance 133:6 433:8 448:23 729:13 731:19 735:4 advanced 9:3 132:19 246:4,17,17 521:18 649:20 advancement 692:1 advances 246:19 advantage 504:12 adversarial 6:23 7:7 796:24 797:23 advertised 61:24,24 advertisement 12:23 13:5 704:12 advice 501:8 advisable 483:6 advise 511:14 advised 534:20 advising 433:2 advocacy 692:20 693:4 717:18 736:8 764:1 advocate 16:5,7,21 45:12 328:2,4 810:14 advocates 631:6 affairs 66:18 89:11 111:2 585:3 598:16 606:11 696:24 747:15 749:12 796:13 affect 483:3,4 768:15 768:16 affidavit 3:5,6 9:1 10:7 16:5 173:5 450:25 564:5 affidavits 686:2 affiliate 29:22 442:15 442:16 466:3 affiliated 71:14 affiliates 462:20 616:23 792:9 affiliation 64:22 affinity 478:16,17 affirm 106:2 172:19 affirmative 339:1 359:21 733:18 Afghanistan 636:2 afield 224:25 239:21</p>

<p>afraid 44:6 98:12 151:6 220:4 271:10 287:3 383:13 401:8 607:22</p> <p>Africans 127:16 154:25 166:22 290:8,10 291:3 313:21 427:15 434:19 455:14,20 456:6,8,15,16 505:22 511:5 515:12 516:25 517:1,1,2,9 518:11 548:2 549:9,11 557:25 558:10 594:2 594:13,24 595:2 647:6 780:8</p> <p>Africa's 612:2</p> <p>Africa's 606:1,4</p> <p>AfriForum 46:3 47:8 698:20 704:18 767:12</p> <p>Afrikaans 342:17 502:16 503:3,6,12,14 503:20 505:10 507:24 508:2 647:15 789:7</p> <p>Afrikaner 290:12,16,21 342:13 502:18,25 542:24 543:1 575:4 646:23 647:7 778:15 778:22 780:7</p> <p>Afrikaners 344:5,7,17 502:19 508:12 575:5 643:25 644:1,2,6,21 647:3,5,9 692:12 732:4,9 778:13,21 779:25</p> <p>afterlife 739:12</p> <p>aftermath 367:17</p> <p>afternoon 86:23 110:13 111:8 128:20 167:17 168:13 170:11 224:12 528:23 568:17 662:4 679:16 680:20 681:12 683:6,8</p> <p>afterthought 741:13</p> <p>age 6:3 31:13 664:23</p> <p>agencies 103:9 485:25</p> <p>agency 194:13 330:2,13 585:20</p> <p>agent 708:15</p> <p>aggregate 611:21</p> <p>aggression 80:3 106:3 119:24 249:18</p> <p>aggressive 35:3,9 38:15 40:4 60:2,6 71:4 83:9 83:11 131:1,6,10,13 131:15 132:4,6,11 241:15 242:1,8,12 324:6</p> <p>aggressively 58:24</p> <p>aggressor 645:6 697:1 741:22 753:1</p> <p>aggrieved 51:3 700:12 799:14</p> <p>agitated 85:19</p> <p>ago 133:4 191:14 195:8 277:21 410:21 589:18 590:7 591:8 622:22 675:10 677:18</p>	<p>agreed 100:7 144:23 146:19 168:20 194:11 205:13 356:18 435:22 462:2 463:5 480:5</p> <p>agreement 2:11,19 12:3 213:13 220:3 380:10 511:22</p> <p>agrees 334:15 419:6 461:25</p> <p>Ah 418:22 587:20</p> <p>ahead 168:24 236:21 388:10 568:2 712:3</p> <p>aid 103:9 197:15 199:3 271:6 332:17 388:18</p> <p>aiding 195:15</p> <p>aids 93:22 197:14 438:17 473:23 474:8</p> <p>aim 89:4,5 125:16 242:23 288:20,23 289:2,3 380:18 400:13 750:20</p> <p>aimed 122:22 126:19 126:25 140:4 151:10 208:1 252:19 332:15 379:16,17,21 412:5 414:9,13,24 426:7,9 483:12 581:14,16 692:6 723:22 757:25 769:23,24 784:10 785:17</p> <p>aims 700:18</p> <p>air 98:24 217:15 263:1 263:1 268:10 399:23 399:23 781:2</p> <p>airing 759:20</p> <p>airport 167:20 170:25 442:4 496:18</p> <p>akin 46:10 129:13</p> <p>AK47 389:13</p> <p>alarming 463:6</p> <p>albeit 201:12 229:14 641:15</p> <p>Albright 369:23</p> <p>alert 721:2</p> <p>alerted 444:22</p> <p>alertness 720:14</p> <p>Algeria 554:3</p> <p>alia 5:25 45:1 269:25 271:25 618:18 691:25</p> <p>alien 51:2</p> <p>align 797:25</p> <p>aligned 462:25</p> <p>alive 5:14 481:22 700:23 736:24</p> <p>Aliyah 93:24 94:4,5,6,7 438:19</p> <p>allegation 225:18 226:15,22 229:1 232:9 233:1 516:3 538:25</p> <p>allegations 195:19 411:7 564:9 630:19</p> <p>allege 230:8</p> <p>alleged 6:20 70:12 788:8</p> <p>allegiance 558:12,14,20</p>	<p>alliance 65:2 66:22 94:17 432:15 441:20 461:19 462:20 463:9 463:23 466:2 721:22 758:21</p> <p>alliances 336:4</p> <p>allied 368:19,20 399:17 399:18 442:14</p> <p>allocated 568:13 794:9</p> <p>allow 6:25 52:13 103:8 271:5 347:6 360:23 362:19 425:24 434:2 457:15 485:13 560:19 569:3 578:4 599:14 635:13 637:24 649:14 700:10,13 710:14 724:11 729:2 751:4 785:11 799:15</p> <p>allowed 40:18 49:8 51:21 61:7,8,9 85:6 155:14 292:5 298:6 306:16 307:22 310:11 352:2 358:18,23 506:13 560:18,21 578:11 590:4 628:16 628:17 658:5,8,23,25 659:1 669:14 680:19 700:20 716:14 744:5 779:11</p> <p>allowing 14:22 197:6 526:10 593:4 729:12</p> <p>allows 7:19 393:1 460:14 585:20 628:12 636:4 686:9 693:18 701:13 748:9</p> <p>alluded 803:18</p> <p>all-encompassing 645:24</p> <p>almostsupernatural... 97:19</p> <p>alongside 299:16 358:5</p> <p>alphabetical 751:20</p> <p>Alright 136:3 260:14 268:13 366:17 367:21 368:23 390:19 391:23 550:23 551:5</p> <p>alteration 715:18</p> <p>altering 628:8</p> <p>alternative 84:23 170:9 170:9 302:11,12 570:20 602:12</p> <p>Alternatively 600:17</p> <p>alternatives 723:19</p> <p>altogether 297:5 310:1</p> <p>Al-Fashir 399:24</p> <p>Amandla 70:3 138:20 151:3</p> <p>ambassador 369:24 464:11</p> <p>ambiguity 804:2</p> <p>ambiguous 330:20 757:19 782:10 789:16</p> <p>ambit 8:19 10:11 12:15 13:15 50:24 156:15 234:17 634:6 686:6 687:9,11,14 704:13</p>	<p>724:11,25 733:11 736:4 743:15 746:9 760:7 803:5</p> <p>ambits 686:22 749:18</p> <p>ambulance 163:4,5</p> <p>amended 285:12 755:23</p> <p>amendment 285:7 393:14</p> <p>amendments 4:10</p> <p>amenities 561:17 562:8 562:16</p> <p>America 36:15 194:25 199:20 216:20 227:17 321:6 331:1 395:10 478:11 551:23 584:24 636:2,3 667:16,22 731:10 749:10</p> <p>American 257:9 329:17 331:2 366:11,23 368:15,15 374:20 392:10 478:6,10 499:25</p> <p>Americans 366:25 395:13 419:20 585:4</p> <p>America's 636:2</p> <p>Amler's 688:9</p> <p>Amnesty 427:2 566:6 567:1</p> <p>amount 35:9 36:15 41:25 75:22 328:21 635:23 730:15</p> <p>amounted 711:17</p> <p>amounts 736:8</p> <p>amplifier 130:1</p> <p>analogies 292:24 320:14 593:21</p> <p>analogous 211:16 351:10 352:11</p> <p>analogy 155:24 190:6 204:16,20 211:5,7 223:25 298:22 299:18 312:24 313:15,19 323:11 324:8,8 346:11 477:22 560:23 578:17 592:21 594:3 646:23 651:1 710:21 747:22 778:9</p> <p>analyses 726:11</p> <p>analysing 382:12 720:9</p> <p>analysis 163:25 596:11 665:12 693:6 696:21 698:23 710:17 718:3 718:10 720:24 728:17 804:10</p> <p>ANC 36:16 65:3 94:18 94:18 313:21 314:4,6 435:15 436:19,19 461:19 462:18 463:9 552:12 767:17</p> <p>ancestors 217:15</p> <p>and/or 192:15</p> <p>anger 36:15 40:4 98:2 249:18 762:18</p> <p>angle 520:12</p> <p>Angola 514:18</p>	<p>angry 40:10 76:13 141:22,25 142:2,4 762:21</p> <p>annexure 294:22</p> <p>annexures 3:6,9</p> <p>anniversary 586:3</p> <p>announced 58:7 591:9</p> <p>annual 60:4,18 129:3</p> <p>annually 441:20</p> <p>answer 85:5,23 155:5,6 160:6 162:13 196:24 268:18 282:8,14 298:7 299:3 321:21 322:13 325:25 327:8 379:6 448:6 453:2 462:4,5 477:9,13 478:14 518:16 528:2 536:3 562:3,12 599:15 673:18,19 697:9 700:14 733:17 733:17 794:20</p> <p>answered 144:21,22 324:9 518:5 544:4 641:17</p> <p>answering 3:6 513:6 562:12</p> <p>answers 84:18,18 543:8 706:14 712:12 794:21</p> <p>anthem 395:11</p> <p>Anthony 256:8</p> <p>anthropologist 381:22 381:25 382:5,11,11 397:2</p> <p>anthropologists 381:9 381:22</p> <p>anthropologist's 382:16</p> <p>anthropology 20:3</p> <p>anti 34:21 175:9 181:11 181:13 183:20 185:23 189:6 192:13 194:17 201:24 208:17 226:16 230:2 239:24 240:12 240:21 242:1 245:17 246:24 248:16 250:22 253:1,7 261:6 271:12 273:13 317:9 323:4 326:15 328:16 337:21 349:6,23 417:24 546:11 547:5,22 574:8,19 579:11 585:9 609:15 625:15 628:15 637:19,23 641:3,8 660:12 661:8 712:23 726:24 728:2 746:14 771:16,18 801:24</p> <p>anticipated 232:20</p> <p>anticipating 160:6</p> <p>antipathy 177:18 383:24 385:13</p> <p>antiracist 339:16 340:24</p> <p>antiretrovirals 612:7</p> <p>antithesis 705:17</p> <p>antizionism 338:12,15</p>
---	---	---	---	--

<p>338:18 339:5,9,16,22 340:5 antizionist 338:6,10,16 antizionists 335:16 338:13 anti-apartheid 328:3 359:6 427:9 anti-black 181:13 anti-colonial 186:25 anti-Israel 89:6 anti-Jewish 182:4 246:10 383:17 387:6 388:4 408:8 413:4,5,9 575:3 anti-racism 560:17 anti-Semantic 622:4 anti-Semite 337:12 342:4 631:21 636:17 667:8 anti-Semites 227:13 623:10 626:4 anti-Semitisms 14:16 109:3 anti-Semitists 187:17 188:5 anti-West 186:25 anti-Zionism 234:18 240:13 241:5,24 242:1,3,9,10,12 252:21 253:1 575:9 575:14 646:17 652:1 652:4 801:25 anti-Zionist 221:14 239:11,20 240:16,18 241:13 575:3 608:22 655:21 726:3 anti-Zionists 238:15 239:4,8,23 240:6,7,19 240:22,25 272:15,21 484:11 Anton 475:19 anxious 624:19 anybody 155:18 379:15 418:3 505:12 519:24 541:9 580:7 581:5 584:16 593:17 620:22 620:25 621:4 633:12 633:15 636:16 654:6 674:10 anybody's 621:1 anybody's 239:19 anymore 43:9 308:22 518:12 569:21 anyway 111:7 408:16 428:6 440:2 444:22 451:1 490:3,6 601:16 638:13 730:22 apart 261:25 379:14 436:14 apologies 73:19 129:23 148:25 172:12 354:25 477:14,14 538:6 596:24 apologise 9:9 36:17 43:18 51:7 53:4 115:5 121:6 125:7 130:3</p>	<p>142:19 162:8 201:10 348:23 349:3 537:22 538:2 547:15,16,18 775:13,14 apology 7:21 393:9 686:12 749:22 appalled 454:10 appalling 316:10,12 319:20,21 320:3 369:14 463:6 apparent 151:3 apparently 25:1 78:4 93:4 101:22 229:7 255:6 appeal 111:3 488:12 691:14 appeals 169:23 appear 1:3,7 95:4 175:5 241:21 243:2 383:3 468:22 474:25 514:13 519:14 532:2 551:6 612:2 619:6 797:15 appeared 96:18 253:21 appears 7:18 11:7 21:21 112:7 144:25 244:1 265:10 336:20 339:20 398:18 428:2 428:18 459:2 514:14 514:14 519:10 562:19 572:22 595:7 597:6 625:20 643:8 670:9 694:4 706:5 appellant 762:15 appendix 191:8 209:16 211:8 635:8 applaud 392:21 applicable 17:25 688:4 758:14 applicant 96:17 97:14 318:5 428:15,22 454:21 671:19 685:5 754:4,12,25 761:3 781:17,19 783:15 787:25 792:2 794:18 794:22 795:4 804:20 805:5 808:4 applicants 170:18 764:18 798:10 applicant's 795:1 applicant's 600:14 768:19 application 12:11,18,20 599:8 626:18 687:18 687:20 688:6,10 692:9,17 693:25 702:13 703:22 704:15 708:1,22,23 709:15 714:13 716:24 722:19 728:8,9 730:11 746:1 761:21 792:4 800:11 applications 111:3 applied 46:24 47:11 249:13 731:17 767:12 applies 17:21 249:15 602:9 690:24 692:9</p>	<p>717:22 731:7 760:22 768:5 791:18 apply 10:13,15 44:13 48:13 77:12 203:6 404:7 455:2 512:7 514:8 580:4,4,6 599:12 621:15 682:8 693:3,6 720:16 740:3 742:2 applying 203:5 580:17 636:19 appointed 369:7 appointment 391:13 opposite 691:17 appreciate 141:15 142:14 154:7 231:8 379:7 384:19 403:11 419:2 617:3 626:16 680:7 777:10 786:18 787:13 appreciated 684:8 714:12 appreciation 189:12 190:11,17 approach 7:25 46:7,10 46:18 84:11,12 393:5 503:8 519:24 560:9 620:18 652:6 687:15 767:13 approached 256:11 698:8 795:4 approaches 503:10 768:1 approaching 767:15 807:6 appropriate 22:10 51:19,23 54:20 81:18 155:9 156:18 212:22 212:24 251:4 517:21 594:3 718:2 730:4 742:22 760:15,24,25 763:13 765:20 806:6 appropriateness 750:7 appropriation 105:15 approval 168:21 758:11 759:20 approves 578:8 approximately 486:23 567:7 645:15 approximation 75:24 aptnly 583:21 Arab 185:16,20,22 186:1,4,8,9,10,13,14 186:24 187:2,4,7,9 188:19 208:22 223:18 260:10 297:1,3,12 301:18,18 310:15 334:22 335:14,22 336:3 346:10 348:6 583:14 658:12 660:1 Arabic 241:3 258:19 Arabs 186:10,11 297:8 353:18 358:22 359:15 562:16,19,21 660:5 668:10 786:22 Arafat's 362:13</p>	<p>arbiter 7:2 234:25 636:12 696:19 arbitrary 216:22 429:18 archive 164:5 area 38:19 40:7 56:19 67:15 75:5 261:19 295:24 302:22,23,24 303:2,3,4,8,9,10,21 303:23,23 304:6,15 305:1,3,5,6 306:15,16 359:16 363:4 516:5 533:21 534:6,10 536:24 588:17,18 589:6,9 590:15 593:8 753:3 800:15 801:5,5 areas 197:7 303:5,7 304:12,25 305:8 307:6 359:16 453:11 561:3,8,9,19,20,20 562:13 589:7 779:8 aren't 179:4 388:11 arguably 319:3 423:23 423:25 424:10 argue 7:2,15 8:18 22:9 85:10 127:18 128:2 128:14 392:4 407:25 412:6,8,19 416:22 421:13 490:12 543:7 543:25 568:7 569:3,6 581:6 592:23 593:24 603:13 614:25 620:13 633:24 637:5 652:12 652:25 680:12 681:12 683:2,8 692:10 argued 235:17 600:15 601:3,8 arguing 60:10 245:23 395:25 569:12 578:6 692:15 arguments 22:16 244:11 320:13 323:20 569:4,7 678:9 810:1 arisen 82:20 arises 17:15 232:11 arising 362:2 620:18 675:4 783:5 arm 367:6 armament 355:16 armed 387:2 422:10 Armenian 377:11 Armenians 376:16 399:6,7,11,17 armies 588:8 594:21 Armistice 588:7,9 arms 442:24 590:23 army 153:17 154:19 155:1 157:3 158:1,10 158:15 159:10,16 160:1,14,18,21 209:9 335:19 353:1,7,11,24 354:10 355:14 404:19 422:10,15 423:10 424:22 504:23 506:11 510:18 591:1 594:25 595:3,11,21 672:2</p>	<p>785:3,5,8,12,13 789:14 arose 35:1 362:14 761:24 arrange 111:2 arranged 678:8 682:5 arrangement 238:18 683:11 arrangements 678:8 680:11 arrested 376:3 arrive 110:12,18 168:12 539:2 arrived 68:17 674:11 738:5 arrives 110:11 167:18 arriving 110:15 167:16 arrogant 471:23 472:6 472:11,11 726:8,10 art 61:2 395:13 Arthur 114:8 article 90:3 276:9,9 293:19,20,23 294:1,2 294:22,25 295:3 298:23 299:1 305:12 305:22 312:24 336:20 337:9 340:21 373:7 397:8,10,11,18,21,21 585:2 607:4,20 611:17 721:4 734:23 articles 31:15,15 175:19 252:18,20 253:4,16 294:9 585:2 607:7,18 608:3 610:2 610:19 611:4,21,23 612:2,5,18 613:17 614:6 746:20 747:2 artistic 13:2 704:9 ascendency 478:5 ascertain 411:19 501:22 764:11 ascribed 10:10 51:24 aside 152:5 173:3 asked 96:16 121:1 155:13,19 221:25 281:25 326:12 345:24 346:20 366:19 369:10 525:2 527:18 529:14 536:6 573:16 627:18 627:18 675:22 686:10 778:9 783:4,8 786:25 792:3 805:2 asking 22:8 30:21 35:16 44:8 84:17 98:10 220:13 250:3 258:23 259:1 283:22 335:18 345:13 465:17 465:18 473:12 477:12 497:9,10 518:13 520:3,4 521:20 522:23,24 524:2 542:17 566:9 631:8 646:11 657:3 710:22 asks 44:7 aspect 21:15 23:19 177:9 206:25 219:5</p>
---	--	--	--	---

<p>255:10 257:13 379:6 596:2 671:20 678:13 750:6 aspects 208:5 401:9 707:15 721:10 aspiration 239:25 240:1 343:12 assault 106:10 267:3 assembly 223:8 587:4 589:11 assert 792:21 793:7 assess 634:8 assesses 721:7 assessing 749:2 assessment 799:24 800:18 assigned 369:6 assist 25:21 29:4 32:5 81:5,6 94:3,6 162:11 197:20 230:15 234:15 234:16 401:10 445:21 455:21 546:7,8 568:23 625:14,15 629:16 678:10 681:18 681:21 682:21 710:25 712:7,24 749:7 768:3 777:23 784:13 799:16 assistance 45:21 105:23 154:3 173:25 234:22 328:25 432:15 461:1 509:1,8,19 510:6,12 510:17 511:23 512:21 513:3,7,21,25 514:3 562:5 594:20 701:13 741:1,1,10,25 742:5 assisted 228:1 618:21 630:6 assisting 29:13 456:6 800:17 assists 191:4 associate 175:15 441:4 744:13 associated 114:24 287:13 667:20 associates 608:24 association 29:19 195:2 199:15 308:7 485:20 491:12 522:11 557:21 618:8 725:23 Association's 190:24 assume 30:10 117:9 145:22 256:18 271:7 308:3 316:24 327:11 346:5 404:16 412:11 643:16 677:20 assumed 544:3 assuming 82:20 317:17 485:15 493:2 665:14 assumption 11:13,19 79:5,11 525:20 526:3 545:7 assumptions 243:3 assurance 1:13 assure 556:8 assured 1:10 asylum 216:21 218:9</p>	<p>218:11 310:16 Atkinson 606:3 atmosphere 60:13 68:19,22 134:21 375:12 674:3 atrocities 636:1 644:22 attach 178:18 720:2 attached 294:2 347:8 350:8 attaches 231:5 attachment 216:18 219:5,10,16 220:20 220:21,21,22,23,23 220:24 222:5,12,16 237:9 255:9,9 346:21 346:24 347:8,14 478:10 584:19 646:12 646:14,20 attachments 87:19 attack 19:18 43:25 49:18 126:16 231:20 241:17 250:17 260:5 263:2,2 268:23 269:6 275:8 291:2 404:20 404:21 541:12 595:8 624:9 704:2 736:2,4 744:9 774:14 777:20 attacked 360:11 591:22 attacking 268:5 399:23 attacks 9:14 43:24 53:16 205:2 261:17 268:4 622:5 623:5,8,9 716:6 775:10 attempt 211:13 227:12 259:17 292:2,3 332:6 362:13 627:15 657:18 667:7 attempted 583:11 attempting 211:11 400:17 attempts 583:15 662:2 726:14 attend 2:5 62:4,6 64:13 75:8 412:8 462:12 495:25 496:15 attendance 72:20 495:14 496:24 497:1 497:3 676:9 attendant 715:20 attendants 496:2 attended 3:3 58:5 72:18 76:23 82:25 118:6 150:2 314:24 409:13 441:16,17 443:18 462:11 467:4 484:18 494:19 495:21 497:5 719:7 attending 61:21 attention 339:12 438:8 438:10 439:9 456:13 591:3 607:3 617:24 651:23 720:13 754:19 763:20 800:24 attitude 15:23 242:25 244:1 624:23 679:11 attitudes 236:13 243:2</p>	<p>243:3 attorney 256:2 537:24 587:14 attorneys 809:1 attorney's 294:13 attract 66:7 696:16 attracted 642:20 696:1 attracts 595:4 attribute 47:2 51:9 719:21 740:23 attribution 723:18 audience 76:15 377:24 380:9 381:8 385:9,9 385:11,14 410:17,17 410:21 411:20 417:3 421:2 444:8,20 500:20 501:2 721:14 722:9 736:17 738:2 738:15 745:8 774:19 774:20 786:2 AUDIO 25:10,24 26:9 26:13 audit 760:24 Aung 554:21 Auschwitz 655:23 auspices 38:4 52:5 746:1 Australian 146:9 407:13 408:1 548:21 560:13 Australian 146:13 authentically 297:18 author 90:14 91:10 94:11 116:1 256:5,7 294:25 330:2 356:12 397:12 613:17 614:16 614:17,19 656:19 authored 7:10 authorised 296:24 authoritatively 67:7 authorities 34:25 294:9 751:16,18 758:8,23 763:3 authority 66:10,16 180:22,23,23 303:6 303:12,14 304:2,12 304:21,22,25 314:15 358:3 359:17 362:10 362:12 384:25 421:3 518:6 589:2,16,21 693:10,14 721:13 737:2 743:5 748:10 757:9 761:1 768:8 795:21 authors 116:1 356:4 593:23 automatic 196:11,17 automatically 404:6 601:4 autonomy 359:25 avail 756:10 availability 680:11 681:9 available 1:23 2:11,15 25:4 172:6 294:10 356:17 567:22,22,23 569:22 570:7 600:22</p>	<p>681:23 682:7,9,14 683:25 721:5 750:14 796:21 806:25 808:20 810:9 average 388:3 Aviv 214:15 562:9 avoid 167:24 168:4 172:12 381:7 452:17 avowedly 267:21 await 111:21 awarded 22:11 792:6 807:7 awarding 7:24 aware 58:1 78:19 92:8 92:21 96:1 102:23 116:17,20 165:8,24 166:23 187:12 277:22 312:2 354:2 355:13 356:5,8 363:3 366:24 367:1,11 371:5 388:13 425:10 481:23 483:10 495:19 533:6 537:8 552:23 554:12 580:5 617:22 620:22 622:13,16,21 623:4,7 623:9,10 641:23 642:3,4,7,9 643:11,14 646:6 648:25 656:5,6 657:1,7,11 663:18 666:4,12,16,17 669:5 670:1,12,22 689:18 720:14 738:1 758:9 769:12 805:12 808:21 Awethu 138:21 151:4 awful 215:16 220:6 360:6,6,7 AZAPO 462:19 A-G-G-I-D 32:4</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>B 302:24 303:2,4,21,23 303:25 304:6 305:8 306:16 588:17,25 589:1 593:4 BA 431:19 460:6,9 babies 93:23 123:9 438:18 backdrop 697:5 background 11:9 62:8 274:2 427:7 431:2 433:17 444:10,11 453:10 460:19 505:9 515:8 689:13 713:24 769:13,17 backgrounds 779:1 backs 39:2 backwards 57:12 bad 183:13,15 203:25 219:17 223:22 225:20 226:15,22 231:10 232:9,13 233:3,9,13 261:4,5 339:18 340:11 341:13 350:3 465:1,4,6 581:19 582:1,8 626:16 651:3 badly 181:22 224:21</p>	<p>310:15 778:11 Bagdad 208:21 bait 204:17 baited 205:6 baiting 204:21,23,24 205:18 323:20 balance 13:8 392:19,20 393:11 670:15 728:22 752:1 balanced 89:7 273:13 273:16 694:13 balances 392:14 balancing 729:15 Balkan 387:4 ballpark 204:1 317:15 317:19 banal 249:19 Bank 105:16 106:5,11 225:7 279:19 297:15 297:22 298:2,11 300:10 302:15 304:12 308:12,19,23,25 309:16 314:13,16 338:8 359:24 360:6,8 588:12,14,17,22,23 589:11 590:24 591:8 banker 200:25 210:11 bankers 210:9 banned 431:25 693:1 707:7 banner 64:2 493:3,6,8 493:15,18,18,20 banners 762:1 Bantustan 314:13 Bantustans 312:22 779:11 bar 104:5 753:13,14 765:17 barb 323:12 Barbara 371:19 barred 81:19 barrel 386:20 barrels 443:1 barrier 797:1 base 59:25 72:11 166:16 181:7 255:17 255:18 399:24 531:14 531:17 538:24 565:22 719:19 based 17:13,22 44:24 45:4,12,19 47:18 49:14 119:10 127:21 127:25 161:2 192:19 234:6 304:8 397:21 405:17 414:9 420:10 420:14 425:11 432:14 446:18 454:19 460:18 460:20 486:22 534:20 535:17 556:9 612:5 612:22 613:16 617:19 634:8 636:5 644:17 645:3 657:23 692:20 693:4 697:23 710:10 713:11 717:18 732:22 742:3 754:13 755:3 756:6 757:7,17,25</p>
---	--	---	--	---

<p>758:2 764:2 765:23 765:24 766:2,6,19 767:5 771:19 772:3 773:1 776:15 777:16 780:3,4,13,13 790:4,7 790:16 791:21 794:21</p> <p>bases 91:20 538:13 basic 87:2 312:3 412:21 479:6 591:16 600:1,3 749:13</p> <p>basically 164:12 375:21 376:24 384:23 792:24</p> <p>basics 670:18</p> <p>Basil 346:3</p> <p>basing 790:16</p> <p>basis 6:24 7:25 19:6 34:23,24 50:17 51:16 72:19 156:9 185:6 242:21 254:23 258:5 335:9 346:6 351:22 362:14 411:19 433:6 534:1 538:18 597:14 598:11 599:21 618:15 622:9 649:20,24 650:10,11 682:6 686:19 688:8 702:6 714:7 731:19 744:15 744:16 753:7 754:20 754:24 755:9,20 757:12 762:11 763:25 778:22 781:22 782:11 782:12 789:8 791:20 795:18 798:10 802:8</p> <p>battle 19:25 116:3,6 272:12 693:19</p> <p>battles 14:5</p> <p>BDS 227:22 252:19 267:11,11,13 273:18 438:10 553:12 618:1 618:1 624:15,18 781:9 783:25</p> <p>beach 561:10,11,15 562:9</p> <p>beaches 359:23 561:16</p> <p>beacon 703:21</p> <p>bear 44:15 161:9 294:6 583:6 752:20 753:2 782:23</p> <p>bearing 807:5</p> <p>beast 342:15</p> <p>beaten 457:20</p> <p>beautiful 733:21,24</p> <p>becoming 360:20 456:1 570:1</p> <p>befell 731:17 735:13</p> <p>beg 4:3,23 23:6 26:17 38:2 52:15 63:14 68:5 73:18 78:25 111:15 172:6 176:25 186:21 187:23 201:9 238:1 285:11 394:14 467:16 472:2 490:19 511:1 522:15 536:12 543:10 547:9 558:17 614:18 622:15 653:2 807:17</p> <p>began 194:16 298:2</p>	<p>346:3,4 367:20 368:9 642:19</p> <p>beginning 73:22 137:23 139:24 145:11 151:2 151:13,13 184:2 267:12,13 275:16,16 275:20 276:21 314:23 315:25 346:7 377:9 627:6</p> <p>begins 56:6 185:15 245:8 246:3 371:11</p> <p>begun 60:14</p> <p>behalf 1:7 21:18,19 22:13,24 428:19,20 522:8 681:5 721:17</p> <p>behaved 224:21</p> <p>behaviour 151:1,3 152:6 249:2 292:25 342:7 389:8 624:19 636:20 677:2 747:23</p> <p>Beinart 585:3</p> <p>beings 142:18 637:19 654:6</p> <p>Beirut 208:21</p> <p>Beit 162:4,5 163:9,19</p> <p>Bekker 596:20</p> <p>belabour 749:3 788:15</p> <p>Belgians 390:2</p> <p>Belgium's 390:15</p> <p>belief 6:3 88:5 130:6 236:2 237:15 339:3 574:13,14,23 776:11 780:4</p> <p>beliefs 146:4 385:8 688:1 703:2,4</p> <p>believed 46:22 62:10 160:24 383:16 386:17 719:11 735:19</p> <p>believers 405:10</p> <p>believes 338:22 584:4 771:9 785:5</p> <p>bell 277:14,16,17 444:3 491:23</p> <p>belong 9:8 42:21 123:7 123:15 124:13,23 247:13,23 286:17 374:15 567:9 618:3 652:10 776:2 777:3 778:23</p> <p>belonging 442:13 646:3 715:6 725:10</p> <p>belongs 733:16 790:19</p> <p>Ben 321:5</p> <p>bench 169:23 796:4</p> <p>benchmarks 749:1</p> <p>beneath 77:17 412:21 760:3</p> <p>benefit 169:14 504:9,11 569:4 628:6 681:14 729:6 756:10</p> <p>benefits 388:17 705:4</p> <p>Benish 721:5</p> <p>Benjamin 26:21 27:4 55:4 111:9 478:24 656:19</p> <p>Benji 26:17 798:20</p>	<p>Ben-Gurion 618:8,16 618:20</p> <p>Berlin 175:9</p> <p>Bertelsmann 699:6,16</p> <p>best 20:1 32:1 37:8 57:21,23 59:6 63:21 109:1 136:18 155:8 168:5 170:25 219:22 355:9 363:8 383:7 388:19 429:17 443:17 458:24 459:3 481:11 495:20 502:8,12 523:16 544:4 608:3 614:2 683:11 685:21 690:22 746:16 794:12 808:25 810:5</p> <p>Bethlehem 611:14,15 615:11</p> <p>better 67:15 129:24 252:5 301:11 342:14 358:16 360:16 370:18 375:5 394:2,18 407:13 415:9 422:4 425:22 453:4 480:2 519:8 520:9,10 532:12 638:7 680:22 691:10 753:12 768:23 769:5 772:9 779:5</p> <p>Beyachad 62:17,22 117:17,18,19,20 162:2</p> <p>beyond 106:12 203:19 325:14 402:14 406:5 407:24 408:4 418:11 423:20 521:6 717:9 725:19 731:11 733:4 755:24 763:18 804:7 804:8</p> <p>bias 89:6 723:20</p> <p>bible 80:13,14,14 383:15 607:5 611:11</p> <p>biblical 80:12</p> <p>big 53:24 177:12 198:10 242:16 350:13 373:5,7,15 407:6,23 408:2 443:21 465:21 493:3 769:9</p> <p>bigger 184:22</p> <p>biggest 74:24 228:24 396:13 515:7</p> <p>bigoted 179:1</p> <p>Bill 670:16,20 689:1 690:23 691:6,11 730:2,7</p> <p>Bills 689:7</p> <p>binding 23:13</p> <p>BioWatch 792:5,22 793:5 807:18</p> <p>bipolar 392:15,15</p> <p>bird 747:25</p> <p>birds 747:22,23,25,25 748:2</p> <p>birth 6:4 383:4</p> <p>bit 24:24 31:8 63:21 71:18 79:14 97:21 110:2 129:22 169:5</p>	<p>170:20 173:23 178:13 194:24 224:18 230:15 230:20 236:15 257:14 269:2 282:10,16 329:11 348:21,24 396:13 431:7 434:5 438:5 443:20 449:20 477:23 519:19 535:14 555:12 600:2 604:8 611:9 671:5 681:22 683:24 710:21 711:16</p> <p>bits 788:1</p> <p>bitten 514:20</p> <p>bitter 9:10 43:19 44:2 53:5 125:8 488:1 489:4 731:8,14 735:10 780:21</p> <p>black 67:6 177:7,17,18 190:2 216:1 290:8,10 300:20,23 301:4 320:1 393:17 407:9 502:15 552:18 559:1 560:5 561:8 586:11 592:15 668:23 708:19 708:21 732:23 777:11 778:11 780:8</p> <p>blackmail 545:25</p> <p>blackmailing 545:23</p> <p>blacks 402:17 459:12 483:22,23 732:6</p> <p>blah-blah 782:18</p> <p>blame 10:19 77:15 246:9 397:8 398:18 398:20 404:1 512:10 515:5 740:6 743:7 745:18 789:17</p> <p>blamed 122:16 742:10</p> <p>blaming 399:16</p> <p>blank 244:6</p> <p>blatant 393:2</p> <p>blatantly 152:14</p> <p>block 33:4 91:2 94:16 437:25 589:1,3 592:25,25 593:1</p> <p>blockade 259:6 260:18 261:11,12 271:7 302:8 523:12 591:5 591:11,19</p> <p>blocked 590:3</p> <p>blocking 556:5</p> <p>blocks 588:24,25</p> <p>bloggers 31:14,18,20</p> <p>blogs 404:11</p> <p>Blom 782:16</p> <p>blood 205:5 376:12 465:1,4,6 527:10</p> <p>bloody 386:23</p> <p>blow 307:7</p> <p>blown 699:12</p> <p>blue 96:5 302:18,21,22 473:9 588:18 589:6,6</p> <p>bluntly 50:9</p> <p>blurred 79:15</p> <p>board 21:19 29:20,23 30:3,5 36:16 37:21 84:5 100:22 101:13</p>	<p>115:16 161:25 233:7 256:14,19 269:23 428:19,20 437:3 513:17 534:17 535:16 536:7 538:8 651:10 773:15 774:4</p> <p>boats 42:5</p> <p>bodies 164:21 486:2 491:13 514:18 640:21 642:2,6 703:13</p> <p>bodily 690:24</p> <p>body 28:20,23 36:4 95:4 98:9 104:23 234:6 274:6 278:21 330:16 375:3 501:20 627:11 760:19 804:23</p> <p>Body's 283:16</p> <p>Boer 644:25</p> <p>bold 192:24 641:1 716:4</p> <p>bombard 98:1</p> <p>bombs 307:4,6</p> <p>bona 13:1 688:1 703:2 704:9</p> <p>Bongani 33:4,5 42:19 94:19 123:13 150:2 290:3 430:5,9,17 775:25</p> <p>book 174:25 175:19 176:2,11,14,15,16 349:25 350:1 356:7 356:10,15 371:20 520:23 521:9 604:8 604:10,11,13,14 605:25 606:3,5,25 607:23 608:6,11,24 610:2 614:17,20 657:6,7</p> <p>books 164:7,9 201:2 593:23 605:24 606:7 606:14 608:5,5 655:21 659:11</p> <p>border 259:9,10 262:14 301:16,19,20,22 361:21 523:10 586:7 588:9</p> <p>borderline 452:17</p> <p>borders 106:12 259:9 262:1 300:11 301:13 586:17 595:15</p> <p>bored 810:17</p> <p>born 431:3,4,8</p> <p>borrows 688:16 733:14</p> <p>Bosnia 386:18 387:3</p> <p>Botha 732:10 777:12</p> <p>bother 545:18</p> <p>bothered 23:4</p> <p>bottle 117:5</p> <p>bottom 71:17 74:10 78:24 91:2 113:24 176:21 201:11 238:2 418:24 446:24 512:6 525:9,16 543:9 544:11 545:5 581:17 594:13 598:16 636:13 638:24 642:18 724:22</p>
--	--	--	---	---

<p>759:18 787:11 bought 298:8 boundary 649:4 bounding 81:15 bounds 694:19 box 55:16 568:4 boycott 106:15 146:12 150:24 252:1 267:6 292:1,1,16 314:17 315:13 317:1 318:19 318:21 345:9,19 346:2,4,7 412:5,10,15 413:3 580:24 581:10 581:11,14 607:21 620:10 630:9,10,14 631:24 782:5,5 boycotted 328:5 346:1 boycotting 61:1 boycotts 581:1,8 brackets 94:21 152:16 Brand 46:17 brandishing 38:16 brands 41:23 Brandt 719:17,17 800:23 Brand's 50:22 Brazil 348:10 breach 133:14 423:8,13 423:25 424:10,11 break 143:20 206:15 615:25 breakdown 486:24 505:20 664:23 665:13 breaking 370:17 breath 77:18 Bresheeth 266:1,2 brief 3:22,24 11:24 69:23 222:8 223:1 224:2 285:6 397:14 648:19 732:20 briefed 61:12 274:1 briefly 6:8 8:22 14:8 56:2 82:18 164:25 174:10 179:11 183:24 184:12 222:22 223:25 242:17 367:12 374:1 480:23 568:21 574:10 599:24 616:8 685:16 689:23 695:9 701:1 704:18 715:1 720:7 799:4,7 801:15 bring 15:5 22:21 261:16 269:21 295:23 301:7 368:10 369:3 372:11 380:13 521:9 540:12 673:24 739:12 802:17 806:24 808:25 bringing 13:14 14:23 22:23,24 193:3 323:22 368:8 402:20 520:22 brings 21:18 66:10,11 176:4 244:17 278:8 395:12 Brink 46:17 Bristol 176:6</p>	<p>Britain 177:13 194:18 252:3 369:20 488:17 489:3,11,21 522:19 British 106:13,13 185:24 191:19 195:7 199:21 279:23 329:15 329:18 331:4,10,12 456:8 458:21 507:9 broad 127:15 164:12 494:17 749:19 758:18 broadcast 12:22 broadcasting 391:21 757:9 broader 98:14 115:9 123:1 152:8 257:24 258:10 262:23 746:15 broadly 292:20 334:18 335:16 432:23 494:15 494:16 540:16 677:8 788:20 Broederbond 542:24 543:1 broke 369:9 673:24 brother 46:3 699:6 767:12 Brotherhood 187:3 brothers 9:10 43:20 44:2 53:5 125:9 419:3 488:1 489:5,9,20 731:8,15 735:11 787:14 brother's 142:16 brought 8:18 16:21 80:16 167:20 168:4 228:8 233:13 391:14 399:1,21,22 438:9 456:12 463:23 617:24 686:18 694:8 703:13 714:12 724:18 796:10 804:23 brown 93:5 bubbling 774:16 bud 716:15 Buddhism 214:11 Buddhists 236:11 budget 433:3 805:7 build 142:18 237:12 261:17 298:2 323:10 457:16 772:23 building 37:20,23 40:19 56:20 69:16,20 117:20 162:2 299:25 303:15 323:4,5 587:5 604:15 605:24 651:19 buildings 62:21 264:5 built 208:2,2 397:3 590:7,21 bulldoze 562:18 bullet 70:11 200:11 201:23 203:9 209:19 209:23 bully 339:10 578:18,19 578:20 bullying 370:20 371:21 372:7,11 bunch 60:7 409:16</p>	<p>bundles 301:8 burden 589:23 Burma 77:9 351:17 352:11,21 551:3,8 552:1 554:11,12,13 555:2 556:15 Burmese 352:1,19 554:21 burning 119:24 393:16 burnt 41:18 Burundi 348:18 392:5 392:16 bus 117:5 762:14 buses 307:7 470:18 business 81:7 243:17 243:22 546:9,18 616:15 625:16 726:25 busy 144:7 333:6 403:17 450:14 468:19 616:4 663:6 680:23 734:21 781:25 782:1 buy 581:13 B-E-I-T 162:7,13 163:10</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 302:22,23 303:3,8,9 303:10 304:13,15 305:1,3,5,6,8 306:15 588:18,25 589:3,6,9 590:15 cab 168:3 cabinet 660:7,8 668:12 668:14,21 Cairo 208:21 calculated 462:23 calendar 59:2 60:18 calling 1:23 14:8 15:9 56:9 90:4 91:12 93:19 110:10 169:6 195:15 324:6 361:8,12 395:22 502:1 524:12 556:24 585:18 662:20 736:7 calls 98:2,3 125:12 340:9 546:25 581:18 584:3 726:23 741:23 747:25 Cambodia 366:5 367:3 367:18 636:3 Cambodian 368:7,13 Cambodians 367:16 Cameron 759:11 767:16 Cameroon 348:16 camp 379:16,24 553:9 campaigned 618:12 campaigners 227:22 campaigning 361:3 523:14 campaigns 61:2 150:8 218:17 361:10 433:7 433:8 458:20 523:3,8 523:14 580:24 630:9 630:14,14 camps 166:4 208:2</p>	<p>376:3,22 484:2,4 553:16 554:2,3 campus 9:21 29:12,18 34:2,4,15,22 35:1,6 42:10,15 59:7,10 60:8 60:13 61:19 66:2,9,20 66:25 69:14 70:15,21 71:1,8,10 72:7,13,14 72:15 83:10 130:13 132:9 150:4 153:3 205:21,22 297:20 323:25 325:5 341:10 361:13,19 447:1 490:24 491:5,9 494:18,19 723:10,11 736:15 739:5,13 788:9 campuses 29:9 58:22 252:3 292:3,5 316:25 Canada 175:11 464:25 685:13 Canadian 688:5,13,16 703:8,9,10 704:2 714:23 715:25 716:2 772:19 cancer 375:3 candidate 321:5 canvassed 2:10 22:4 167:21 can't 3:4 19:11,13 36:24 59:8 70:4 71:11 89:1 108:24 116:23 119:25 148:22 155:13 213:3 243:13 246:21 247:22 248:1 282:8 284:10 288:12,15 292:4 295:23 354:21 355:3,4 416:4 420:24 424:2 455:20 457:16 467:21 474:22 479:13 479:15 485:8 487:21 490:6 491:24 516:15 516:18 517:11 523:20 528:13 533:22 535:22 535:23 537:2,3 663:15 664:15 669:11 674:1 732:10 770:1 770:19 809:2 cap 499:2,5 capable 105:14 155:12 capacity 18:22 32:18 71:8 75:9 432:24 463:25 467:6 572:4 748:1 Cape 75:21 221:24 253:25 254:1 442:1,7 496:18 796:3 capital 702:1 capitalist 387:10 car 810:2 cardinal 433:22 cards 391:4,9,18 care 36:6 63:8 81:7,17 161:23 177:3 184:18 185:19 188:11 189:14 546:10,19,20,21</p>	<p>547:21 625:16 626:1 726:25 801:24 career 76:23 469:3,8 603:22 605:10 746:18 746:19 careful 234:5 451:17 632:5 674:23 693:15 720:13 726:2,22 727:3 745:22 carefully 711:7,15 713:5,5 757:6 Caribbean 508:20 carried 42:4 341:11 384:8 538:5 carries 23:12 419:1 523:8 carry 23:11,18 295:5 348:14 395:8 435:21 778:7 carrying 41:14,16 442:24 cars 117:22 Carson 321:5 322:1 Carson's 321:13 carve 702:9 carves 635:22 cases 252:25 254:4 346:8 376:8 482:24 483:2,5 583:10 590:10 591:18 622:21 716:11 720:5 721:1 724:16 758:11 772:19 808:21,24 810:11,11 cast 28:15 33:10 65:10 98:16 99:4 258:14 434:16 453:18,19 469:2 618:5 casualties 100:9 102:20 263:5,7,14 333:15,20 486:23,25 487:4 565:9,18 566:18 664:2,11 665:8 catches 714:25 categories 17:6,19 335:10,13 category 692:25 709:3 709:23 714:1 756:25 756:25 Catholic 390:8 cattle 390:16,17,22 caught 201:1 648:2 cause 5:17 11:6,25 33:16 54:3 76:3,17 107:9 365:19 370:20 370:20 379:18 387:4 436:7 441:15 462:3 480:4 496:25 497:4 531:24 596:14 624:6 624:21,25 633:18 686:2 687:13 693:5 705:20 717:19,23 722:13 731:2 735:6 735:18 744:2 764:3 773:11 793:18 caused 51:8 103:19 260:4 707:5,8 798:22</p>
---	--	--	--	---

<p>causes 405:22 715:2,2,4 caution 413:18 647:23 cautious 451:11 caveat 635:20 CC 796:3 CD 809:15,24 cease 301:23 302:1 ceased 584:9 ceasefire 105:22 660:18 660:21 CEC 442:21 central 224:4 413:25 centrality 433:22 centre 164:1,5 194:15 221:23 330:1,12 527:22 611:14,15 century 42:13 43:11 184:3 185:18,23 193:14 390:24 609:4 ceremonies 60:25 certain 3:4 7:11 9:20 14:24,25 20:18 36:24 45:6,17,24 70:4 75:13 87:16 138:1 155:7 156:14 160:24 187:13 192:11 194:8,9 201:24 203:15 234:16 234:18 254:21 282:10 285:16 294:9 328:21 381:4 382:20,21 384:25 385:1 386:5 395:5 425:19 457:24 467:12 518:9 561:8 575:18 576:16 578:4 578:16 590:4 594:8 598:6 623:17 628:12 641:1 645:25 688:25 690:5 694:21 718:9 718:16 720:18,22 746:17 761:25 766:22 771:22 785:17 787:9 804:15 certainty 19:13 59:9 cessation 660:19,20 chain 92:13,21 chair 71:8 75:9 316:5 chairing 493:25 chairman 28:19 30:9 34:6 114:17 315:25 chairperson 9:2 39:18 61:4 64:20 challenge 15:15 125:6 132:16 231:23 689:18 689:19 755:2,17 756:1 795:13 challenged 15:19 challenges 338:7 challenging 18:3 chambers 1:10,21 4:14 204:4 751:13 chance 25:14 529:18 change 200:3 227:20 334:1 442:2 488:16 490:8 579:14 620:11 667:19 671:25 672:5 677:2 757:18,20,20</p>	<p>758:5 changed 105:12 200:5 350:8,9 359:10 367:7 442:6 450:5 583:23 changes 350:11 466:10 changing 642:24 chants 151:4 chaos 526:16 chapter 605:1 804:21 805:6 chapters 175:20 606:17 606:18 610:2 character 229:6 703:20 characterise 238:22 characterised 762:22 characteristic 82:24 373:14,16 408:9 758:1 characteristics 757:12 757:18 charge 183:7 228:3 230:8 232:12,15,19 233:2,3,9,12 250:4 253:7 314:10 319:23 319:25 320:6 322:18 323:17 339:18 363:10 369:15 519:25 581:19 626:16 charged 60:16 charges 232:9 Charny 398:7 charter 267:22 314:4 660:25 661:7 733:15 733:22 chase 327:20 Chaskalson 113:22 114:8 701:24 check 111:25 192:5 194:3 285:14 306:20 306:21,24,25 307:3 392:19,21 664:20 checked 570:13 checkpoints 306:10,25 307:2 590:2 checks 392:14 chemical 638:9 cheque 244:6 cherished 759:12 chief 100:23 101:14 108:18 125:6 166:1 269:23 363:25 429:16 448:8 452:5,7 480:23 504:10,13 540:11 551:12 552:2,6 565:8 654:10 656:6 701:23 809:4 child 422:10 childish 152:6 children 99:18 100:9 204:11 325:6 375:15 399:25 408:7 422:10 437:12,12 453:20 490:1 515:10 516:2 520:25 538:17 539:1 539:13,22 565:10,19 566:18 594:10 595:10</p>	<p>595:14 626:9 663:13 663:17,22 664:19 665:16 732:11 743:18 778:12 784:19 789:14 790:14 chilling 793:6,9 China 556:15 Chinese 442:23 551:24 choice 215:2 343:22 344:18 757:10 773:18 choices 220:21 choose 159:20 215:23 331:5 404:17 405:23 455:5 595:13 chooses 405:1 423:8 chose 114:24,25 115:16 357:9,10 482:20 646:8 713:5 745:6 775:9 Christ 183:5,6 367:6 383:13 Christian 182:13 183:4 183:13 334:21,25 382:23,24 383:6,8 399:7 611:15 658:12 Christians 399:12 chronologically 446:11 chronology 278:13 church 367:5 383:16 390:8 463:4 Churches 118:11,14 367:6 436:21 462:19 463:4 CIA 80:7 circulated 440:1 circulating 150:5 440:8 circumscribed 757:6 circumspect 763:6 circumstance 367:13 393:25 circumstances 12:17 35:4 423:16 594:21 617:3 671:4 683:12 685:20 748:5 765:1 765:15 771:22 782:9 795:12 805:2 807:8 Ciskeis 779:13 citation 371:20 cite 669:11 cited 622:22 688:5 cites 602:1 cities 208:20,22 303:6,7 307:5 350:12,12 358:17 561:23 citing 652:11 citizen 154:18 158:1,13 159:7 422:15,18,22 422:25 720:12 722:2 citizens 38:18 43:10 54:13 83:20 153:21 157:11 159:3,3 238:25 307:19 308:11 308:13,14,17 311:18 342:24 353:11 354:6 354:6 455:4 548:9 574:25 583:11,11,15</p>	<p>586:2 592:19 658:11 785:12 citizenship 312:6 343:9 343:17 359:16 374:17 374:19 404:7 414:21 424:21 583:2 741:4 city 39:3 297:19 744:18 civil 6:13 36:3 37:7 238:17 239:6,10,19 239:22 240:5 251:3 273:23 358:3 360:1 393:1,3 396:5 598:17 601:13 612:4,6 673:25 civilian 268:4,6 279:20 295:24 297:8 303:12 303:15,17 307:6 civilians 99:15 102:21 260:25 263:18 279:13 295:19 303:15 307:7 664:14,16 665:10 civilisation 383:18 408:10 claim 202:14 222:23 239:4 240:2 242:11 243:16 246:16,16 249:3,23 280:7 297:21,25 311:2 312:6 399:24 400:6 450:25 451:12,13 459:11 509:22 541:6 575:9 577:7,13 586:12,13 595:20 622:23 636:22 649:11 649:12 654:19,21,22 661:3 747:15 claimant 255:5,8 456:20 claimants 417:11 799:14 claimant's 417:7 claimed 229:18 383:22 509:25 646:9 647:7 claiming 201:16 202:1 227:23 581:25 636:13 639:9 claims 106:11 249:1 325:15 399:21 441:1 441:3 576:6 578:4 633:15 clamp 57:8 clarification 74:3 669:5 clarified 534:3 clarify 15:7,23 23:19 25:16 51:6 177:1 195:25 200:16 217:20 321:25 322:6 410:10 463:11 488:25 503:13 506:5 513:4 517:16 530:25 539:10 542:9 569:9 619:21 630:22 668:13 675:7 679:4 clarity 22:7,12,22 328:24 448:1 class 250:12 387:10 719:12</p>	<p>classes 64:12 375:19 classic 200:24 204:24 402:4,5,8,9 742:7 classification 374:8 classifications 374:11 classified 379:12 clause 660:25 661:3,6,8 693:2 757:3 clean 297:13 313:24 cleansing 441:5 clearest 804:6 clearly 13:7 70:25 76:16 106:18 160:5 205:13 241:7,18 243:25 312:24 325:25 366:21 414:13 420:9 420:9 467:21 484:8 515:21 528:1 540:22 577:3,14 584:3 585:17 602:9 620:1 622:22 625:19 626:12 626:20 628:15 633:13 634:21 646:13 652:8 652:11 654:8 668:11 672:16 686:1 692:5 692:24 698:24 710:20 715:12 716:9,12,13 726:11 735:12 736:4 737:7,19,22 743:8 744:22 745:19 752:15 760:5,16 770:1 773:18 776:23 787:8 790:4 803:12 804:15 804:24 clerk 110:3 clever 403:22 404:10 417:23 781:14 cleverly 381:7 385:11 803:16,21 click 94:25 95:5 client 8:11 19:17 751:25 clients 318:5 clinical 12:4 795:23 clinically 797:15 Clinton 369:1 clips 136:14 close 92:4 136:8,10 164:16 168:13 169:7 170:13 205:5 319:11 430:21 432:7 485:20 522:11 534:6 636:25 closed 85:8 428:22 600:24 756:24 closely 286:24 354:19 426:25 646:6 closer 391:1 closest 183:9 closet 389:14 closing 678:9 clothing 74:6 clubs 184:6 clustered 37:20 coalition 199:23 421:4 436:17 cockeyed 170:20 562:3</p>
--	--	--	---	---

<p>cockroach 713:18 cockroaches 372:25 375:2 391:22 code 381:4,6 395:1 731:6 778:2 coded 385:20,20 codified 400:8 coexistence 267:2 coffee 21:8 coherent 249:10 coincidence 759:9 coincidentally 470:19 cold 194:23 198:21 248:14 261:18 359:9 368:10,18,21 376:12 611:25 collaborate 314:17 collapsed 358:21 colleague 537:24 734:8 colleagues 104:5 265:14 613:25 614:2 621:6 collect 198:20,22 collecting 197:19 511:15 collection 176:6,11 606:17 676:13 collections 606:18 collective 78:10,10 103:5 192:19 193:9 271:2 collectively 209:24 210:11,14,20 686:16 686:19,21 collectivities 324:5 collectivity 193:2,19 college 174:9 228:21 254:13,22 266:12 423:5 colloquial 653:14 colloquially 624:13 662:16 colloquium 176:7 collusion 493:14 colonial 106:3 185:24 185:25 186:3 338:8 346:13 colonialism 186:2 339:12 434:17,20 453:15 455:15,22 495:10 548:2 554:9 554:10 colonialists 207:19 313:7,11 colonies 182:2 390:4 Coloroso 371:19 colour 6:2 300:20,22,22 302:17 637:25 coloured 301:1,3 587:24 column 96:10 399:8 columns 60:1 combatant 263:16 281:2 combatants 588:8 Combating 175:6,9,11</p>	<p>comes 11:12,12,16 49:22 50:3,18 55:15 55:18 79:4,4,8 80:13 232:3 247:15 304:6 307:15 314:6 315:12 323:14 341:5 427:12 445:23 446:12 525:10 525:18,19,25 534:16 576:3 598:9 601:10 691:3 747:20 792:21 804:4,14 810:13 comfortable 213:6,16 215:8 776:23 comfortably 213:23 679:8 comforting 700:7 coming 40:7 52:6 83:4 83:9 119:8 132:6 257:11 402:9 421:25 428:9 442:2 503:17 516:12 661:17 712:7 747:2 810:3 commandment 74:5 commemorate 554:19 commence 15:8 23:13 27:24 86:18 110:21 167:25 170:17 172:5 576:15 681:1 682:10 commenced 27:25 111:19 778:3 commencement 21:16 167:13 271:23 294:8 695:23 753:23 755:14 commences 455:1 commencing 114:8 commentary 486:19 commentators 302:6 commented 92:17 commenting 83:19 92:19 361:3 775:5 comments 36:13 48:16 55:21 82:9 92:10 94:21,24,25 95:5 97:2 98:7,8 123:4 151:9,11 242:25 275:5 276:8 276:10 278:13,17,19 278:20 476:5,5,6 504:8 564:14 596:8 596:10 602:2 726:3 commerce 733:1 commission 1:4 5:19 9:1,4 10:1 21:17 22:21 23:5,10 191:2 194:17 198:2 247:11 428:20 447:13 481:20 481:25 482:8,19,25 483:8 509:7 513:18 521:16 536:22 563:11 563:14 578:24 703:9 703:10 716:2 724:19 793:18 commissioned 521:16 553:12 Commission's 190:20 commit 170:7 307:12 371:16 372:10 375:6</p>	<p>378:2 395:15,16 400:17 596:14 commitment 218:3,4 223:20 239:13 624:24 commitments 568:18 commits 517:21 committed 160:19 195:20,21,24 200:13 200:23,24 392:9,12 518:4 636:1 644:21 753:15 committee 9:18 34:13 61:17 66:18 194:19 435:2 436:18 462:18 492:7,9 493:4,12 494:18 495:7 553:11 722:11 committing 155:2 377:3,4 378:4,8 396:21 397:24 398:3 509:19 785:5 common 11:25 33:15 38:14 51:17 62:5 131:18 177:6 181:10 208:9 227:21 313:22 332:4 365:19 394:5,6 398:21 400:2,5 436:6 441:14 440:4 581:2 592:11 623:13 626:2 641:23 686:1 705:20 724:6 731:2 735:6 760:1 771:10 773:11 776:10 793:17 commonly 232:11 communal 58:20 91:24 92:1 161:17 162:3 165:13 203:1 317:4 324:1 communicate 44:23 45:12 communicated 439:17 715:20 communication 94:23 380:8,10 381:10 384:20 387:23 388:16 394:25 504:23,25 506:12 communications 384:8 communicator 388:15 394:23 communism 248:14 373:15,16 communist 65:2,5 66:22 223:16 348:5 367:15 373:19 436:18 441:19 462:18 494:8 494:10,18 495:7 608:17 609:7 communists 376:4 communities 193:5 204:12 205:3 505:15 622:5 692:3 715:13 717:14 community's 41:8 164:20 companies 439:24</p>	<p>company 527:18,19 611:8 comparable 319:17 702:20 716:12 comparative 652:6 688:13 compare 203:17 208:6 555:14 650:23 670:21 compared 43:10 209:1 209:10 358:22 655:10 657:10,16 comparing 207:24 358:12 527:23 593:23 650:20 655:3 comparison 124:25 125:2,3 205:7 207:13 316:18,19 317:12 319:6,9 320:18 458:1 555:16 592:2,4,7 593:13 651:2 777:14 777:15,17 comparisons 203:9,15 209:19 224:14 compelled 49:9 compelling 657:15,21 competent 7:15,18 competing 694:13 competition 187:2 complain 161:2 417:11 626:17 648:11 complainant 17:9 760:19 complained 16:9,23 254:20,21 514:16 678:15 703:6 756:5 757:25 complaining 482:8 488:15 754:13,14 complains 454:21 456:21 585:4 complaint 3:6 5:18 9:3 10:1 16:1,3,7,20 17:10 23:5,8 41:6 55:18 70:9,19 225:19 233:7 250:4,8 258:3 335:9 426:8 450:25 468:25 481:19,24,25 482:18 509:6 513:17 563:16 564:6 648:13 696:6 700:14 724:18 754:20 791:25 792:1 792:6 796:8 804:23 806:22 807:4 complaints 7:4 30:16 254:21 482:23 694:8 complete 5:1,3 169:17 278:12 530:3,10 666:14 679:20 730:22 808:17 completely 19:11 32:9 89:12 130:6 140:12 140:14,17 194:6 202:16 205:15 210:23 361:17 400:12 422:1 complex 13:18 239:2 338:12 696:14</p>	<p>complexity 153:8 compliant 689:21 complicated 123:17,18 123:20 186:13 350:7 612:19 615:4 646:10 706:2,3,9 comply 106:14 267:6 558:1 component 715:23 722:22 components 217:1,2,9 452:4 646:1 composition 67:2 664:13 665:8 738:14 comprehensive 46:2 568:24 576:25 801:12 comprise 723:17 comrade 438:10 comrades 519:23 527:10 concealing 342:11 concede 639:22 642:24 677:5 679:4 729:10 conceded 52:16 246:15 697:13 737:25 740:19 746:22 799:9 concedes 10:2 conceive 371:12 conceived 192:18 193:2 193:8 concentration 166:4 376:3,22 484:2,4 720:17 concept 55:12 390:24 conception 238:10 286:24 545:15 conceptualisation 523:6 concern 18:14 39:21 40:16 54:3 58:25 170:8 233:25 235:3 510:2 519:19,22 568:12 649:22 651:1 681:8 696:3 743:6 798:15 concerned 13:20 21:1 22:8 36:8 46:19,21 61:7 66:1 72:16 81:1 119:19 125:24,25 155:25 166:8 188:15 200:5 221:7 228:13 230:15 234:24 253:12 281:6 352:15 361:18 361:20 427:11 512:1 513:5 534:5 538:10 541:5,6 545:12 551:7 553:20 558:10 563:25 566:18 568:9 582:12 625:10 635:1 664:11 698:16 712:8 713:1 719:3 722:15 723:12 726:17 731:21 740:8 740:11 741:18 746:21 757:16 789:12 concerning 30:7 81:21 181:1,3 191:4 630:7</p>
--	--	---	--	--

<p>740:22 concerns 13:10 105:24 166:4 371:5 465:3 509:17 519:5 547:15 700:18 724:9 concession 747:3,10 conclude 54:15 85:3 336:19 405:25 474:13 474:15 501:23 502:2 714:16 762:20 763:13 780:10 791:21 concluded 169:8 253:6 379:1 398:9 502:5 680:2 789:8 concludes 320:17,17 concluding 186:17 187:16,24 188:2 conclusion 52:1 111:21 170:17 222:9 228:10 412:8,17 421:9 471:23 539:2 556:1 595:23,24 603:2 643:13 653:13 712:8 749:16 791:17 800:2 804:10 conclusions 584:18 conclusive 637:9,14 737:1 concrete 41:4 concur 288:10 concurrent 288:16 condemn 103:6 271:3 524:4 660:5,12 753:14 773:22 condemnation 490:10 739:10 773:13,14 condemned 100:12 130:21 273:4 757:21 condemning 265:1 271:24 condemns 273:18 conditions 586:4 602:23 626:10 conduct 108:9 145:18 146:4,18 155:7 156:14 167:11 254:21 271:24 272:1 273:5 286:19 289:15 338:20 345:2 363:24 404:21 413:8 679:15 729:22 766:22 776:16 777:16 780:4 785:18 790:7 798:25 802:22 807:10 807:13 conducted 6:23 718:4 730:10 796:17 798:9 conducting 130:22 163:25 234:21 794:6 Confederacy 395:11 confer 661:11 678:21 721:10 conference 175:6,9,10 198:7,8,9 329:19 376:8,11,14 611:14 conferences 292:6 conferring 557:10</p>	<p>confidence 50:9 358:2 529:21 confident 168:6 confidential 662:11 confined 598:17 confines 802:17 confirm 3:14 86:9 144:2 149:14 174:17 285:24 294:25 479:13 483:20 485:9 508:3 515:10 517:11 529:1 529:7,7,8 531:3 533:22 572:24 595:24 787:3 confirmed 2:1 151:12 725:3 confirming 529:4 confirms 327:16 conflate 339:9 340:5 conflated 339:22 conflict 20:9 34:18 35:13,14,17,20,22 41:15 82:21 123:18 150:6 224:19 289:9 291:21,22 296:24 298:10 346:11,11,12 349:17 356:3,18 359:11 433:15 494:13 605:12,21 606:14 611:5 612:21 613:22 618:25 620:4,15 621:5 645:4 652:17 653:10 654:3,5 660:23 695:23 696:13 697:1 746:16 749:9 769:19 conflicting 712:2 730:6 773:23 conflicts 13:19 14:5 224:21 231:9 confrontation 762:16 confronted 1:25 42:11 344:17 confronting 79:21 confronts 231:17 confuse 340:5 641:8 confused 287:3 503:13 confusing 500:12 confusion 8:11 10:7 51:7 172:12 conglomerate 465:21 congregate 31:12 congregated 85:11 congregation 613:11 613:12 congress 369:1 758:21 conjunctively 716:23 connect 87:21 connected 42:3 43:8 57:8 78:7 127:14 248:13 335:13 345:20 connection 54:14 118:14 215:3 216:7,8 216:11,13,15 217:1,2 217:6,7,10 226:4 293:5 323:7 343:23</p>	<p>346:17 490:5 593:20 643:7 646:3 connections 87:20 218:6 408:16 connects 558:22 connote 316:8,17 connotes 87:15 120:22 121:7 122:4 588:21 645:24 771:11 776:14 conquer 347:5 conquered 219:1 222:18 conquest 590:24 conscience 142:17 354:9 510:7 559:3 595:18 758:5 conscientious 354:2 595:19 conscious 158:19 159:10 179:4 715:20 consciously 160:11 178:24 conscripted 158:25 conscription 159:2 353:1 514:17 consent 155:2 consequence 11:5 14:22 45:25 108:11 582:10 653:19 705:7 709:9,12,22 715:10 716:15 consequences 14:25 20:18 74:16 105:19 349:15 357:17 371:10 372:19 404:3 421:17 421:18 425:4 467:13 468:1 531:22 582:4,5 598:4 621:23 634:20 668:2 673:16,17,18 692:5 706:25 707:13 715:5 743:25 765:20 781:15 782:11 802:20 conservative 182:16 183:21 334:22 consider 12:1 19:7,22 123:16 181:11,12 215:14 217:14 223:17 231:11 244:3 253:11 271:9 302:6 313:9,10 313:17 315:1 345:19 420:19 528:20 529:14 662:9,12 670:10 673:15 676:19 685:18 702:25 728:13 753:17 774:8 776:17,20 780:9 783:11 801:1 considerable 594:14 782:1 considerate 54:22 consideration 601:1 671:16 702:4 704:4 709:1 710:16 718:11 720:21 724:15 806:23 considerations 482:11 760:4 considered 15:5 74:5</p>	<p>80:15 82:6 158:5,6 283:5 286:2 291:2 298:4 308:13 390:17 390:20 616:8 621:5 673:12,23 678:19 709:4 759:3 796:12 considering 369:7 372:17 662:14 671:3 671:7 708:5 721:2 807:8 considers 423:10 704:3 731:23 consistency 636:23 consistent 249:10 410:23 548:3 642:11 649:16 743:11 consistently 459:16 660:23 consisting 796:4 consolidated 297:11 conspectus 788:5 conspiracy 184:8 205:6 242:6 244:19 340:14 341:3,4 376:10 constant 102:24 constituency 624:8 722:8 743:16 constituents 522:10 constitute 7:17 201:24 210:3 564:14 626:25 687:25 688:1,20 703:2 704:1 717:22 724:1 754:6 756:5 773:5 778:17 800:18 constituted 799:18 constitutes 205:18 244:12 692:21 717:19 752:17 763:6,14 764:3 constituting 686:16 703:16 constitution 6:7 13:6 17:7,15 239:14 362:10 457:7,17 458:3,6 525:1,4,4,5,5 526:8,9,22 548:16,17 548:20,23,25 549:3,8 549:10,14,16,17 557:24 558:5 560:14 560:16 666:25 670:18 674:14,22 688:16,22 690:20 692:22,24 693:13,18 702:18 717:17 729:24 733:13 752:8 753:19 754:22 756:17 757:5,15 763:24 766:3 794:19 constitutional 8:14 46:15 50:21 549:19 558:2,3 689:15 690:2 690:5 693:1 694:14 694:17 702:8 705:18 707:7 719:14 728:14 729:4,6 732:1 733:20 735:17 742:18 755:2 755:6,17 756:1</p>	<p>757:13 758:11 761:19 791:20 792:12,21 793:7 795:12 800:23 804:25 805:1,23 constitutionality 15:13 15:18 689:16 753:17 constitutionally 689:21 709:24 construct 46:12 47:3 291:19 446:5 650:10 767:25 constructed 215:16 construction 19:23 249:4 641:16 716:10 723:19,22 767:19 constructively 464:22 construe 211:7 construed 12:24 20:6 44:25 45:5,16,23 47:19 703:6 714:21 731:1 735:5 764:24 consult 537:24 608:24 613:15 630:8 660:15 consultant 616:22 consultation 198:5 consulted 206:12 428:17 615:13 consulting 577:12 contact 148:6,7,10,11 345:10 432:8 449:25 539:18 675:7 contacted 498:4 contain 242:25 444:23 447:5 514:2 contained 750:3 798:16 containing 365:5 contains 219:24 283:8 795:1 CONTD 55:25 112:4 144:8 209:14 286:6 529:12 663:8 contemplated 692:22 contemplates 6:14 contemporary 176:7 177:21 195:11 196:21 200:19 203:9,16,18 209:20 214:18 335:5 612:3 contend 402:22 594:25 725:20 contending 711:18 contends 593:13 599:19 content 33:6 124:10 150:4,7,19 153:7 207:23 276:12 482:13 565:2 637:25 679:7 721:8 723:17 contention 365:8 contentious 331:15 423:17 652:25 653:4 contents 762:13 contest 237:2 contestation 231:19 260:12 638:12 731:20 contested 194:4,4,11</p>
---	---	---	---	---

<p>198:16,16 232:14 234:19 235:19 260:4 331:21 423:13 637:16 638:3 696:14 702:5 801:6 contesting 240:2,2 contexts 194:8 298:19 contextual 381:10 721:11,13 722:20 723:8 contextualise 19:15 continent 204:2 366:22 contingent 76:24 continue 34:19 42:17 42:18 51:21 68:24 69:10 76:1 141:17 163:8 180:2 199:8 217:25 228:18 240:1 294:23 298:22 332:19 381:6,9 415:22 525:23 538:7 546:1,3 554:22 661:23 680:19 681:20 682:15,23 692:5 786:20 continued 151:12 476:8 continues 81:3 300:1 377:10 419:4 426:1 444:18 585:24 591:14 continuing 384:18 continuous 34:24 contract 710:23 contracts 691:17 720:10 contractual 804:2 contradicted 653:4 contradicting 490:20 665:6 contradictions 652:20 contrary 35:21 121:19 485:1,11 486:6 742:18 757:22 788:25 791:13 contravene 674:24 contravention 594:19 contribute 130:22 473:24 704:25 731:22 contributed 130:24 139:13 606:16,18 609:8 contributing 602:19 contribution 2:12 32:8 58:2 473:20 475:3,4 607:23 612:5 613:21 614:2,3 615:8 627:11 735:8 736:9 contributor 57:22 control 36:14,15 106:12 259:13 260:23 295:9 303:5,12,14 304:16 305:4,9 362:17,18 390:8 521:7 589:1,4 591:14 591:23 592:12 controlled 304:1 controls 242:7 262:14 590:5 591:16 660:11</p>	<p>controversy 594:14 convened 722:11 convenience 4:4 111:16 168:21 172:7 285:13 convenient 21:2 Convention 295:12,15 295:16 757:8 758:10 conventional 456:7 797:7 conversation 413:15 474:21 475:20 502:25 503:9 620:7 conversations 714:6 conversely 648:12 conversing 557:10 converted 659:6 669:18 convey 46:20 50:6 140:10 719:4 conveys 124:7 762:21 convictions 460:21 convince 43:12 convinced 241:25 808:7,10 cooperate 670:2 cooperated 669:22 cooperation 329:20 670:2 Cooperative 748:23 coordinate 435:8,14 453:21 454:9 coordinated 435:1 443:6 coordinating 433:4 copies 685:9 copiously 654:14 copy 2:11 4:3 27:12 44:18 96:17 111:15 172:7,10 174:15,18 294:3 300:23 301:1,3 376:16 703:11 734:23 cord 558:22 cordon 40:23 41:17 core 88:2,5 514:10 corners 804:12 corollary 759:18 Corporation 691:5 corrected 285:18 correcting 83:12 correction 676:2 correctly 90:11 132:24 285:15 292:23 346:24 347:21 461:5 463:22 468:24 572:25 574:1 653:12 671:8 correlation 412:14 766:4 correspondent 603:24 corridor 69:17 COSATU's 56:11 70:16 98:5 150:2 275:7 433:14,22 434:11 453:7 455:4 469:3 781:8 782:6 COSATU's 123:6 753:4 Cosmopolitan 175:1</p>	<p>cost 2:12 7:25 624:2 792:13 793:1 806:7 806:11 costs 7:24 22:8,9,11 527:8 746:25 792:2,3 792:7,23,24 793:4,8 793:12 804:19 805:3 805:4 806:1 807:3,5,7 807:11 808:1,3 couched 632:6 711:15 couldn't 41:16 67:7 73:5 112:19 118:3 148:21 152:23 331:19 332:16 457:4 528:12 668:11 could've 598:8 600:8 council 29:24 118:10 118:14 256:20 293:8 367:6 369:16 436:20 462:19 463:4 521:15 543:20 566:24 councils 486:2 566:5 counsel 2:2 50:8 52:9 55:5 96:9 234:23 255:5 378:20 477:11 598:23 671:19 678:2 679:21 683:19 778:25 795:2 810:7 counsel's 569:21 651:23 count 390:16 496:13 550:8 610:17,19 counted 610:21 counter 116:16 715:16 countermeasures 61:8 countervailing 337:21 countries 197:15 227:25 322:17 420:7 432:4 433:9 560:17 713:11 country's 157:12 759:14 785:8 county 743:16 coup 304:4 360:14 362:23 couple 61:14 195:8,14 399:15 669:25 670:3 794:13 coupled 7:20 395:7 685:11 686:12 717:23 720:13 courtroom 229:17 courts 251:5 331:5 583:19 644:23 693:15 694:9 701:14 702:13 713:25 716:13 720:1 721:2 744:4 748:12 749:19 court's 46:16 362:2 617:24 675:4 696:17 800:24 804:3 court's 231:4 651:23 719:14 cover 54:19 176:19 355:15 734:7 covered 224:12 332:5</p>	<p>400:23 513:2 517:20 520:7 602:7 612:9 789:12 covering 73:5 610:8 coverings 73:4 covers 457:7 512:21 co-existence 106:7 314:17 co-hosting 493:17 Co-operation 194:22 200:1 craft 727:4 create 13:7 108:22 109:2 119:25 186:8,9 324:3 325:1,11,12 368:6 373:18 374:12 380:16 387:2 396:18 693:25 702:8 723:4 730:8 733:13 created 89:18 184:19 238:19,22 309:9 358:17 369:17 396:14 578:8 718:1 creates 578:20 691:1 715:11,11,14 724:9 797:4,8 creating 39:24 182:2,4 238:10 602:23 700:17 715:8 creation 296:25 310:5 583:22 796:15 creativity 13:2 704:9 creature 342:13 credence 282:13 credibility 47:16 credible 48:21 103:9 credit 49:10 creeds 244:25 245:15 creep 710:16 crescendo 56:24 cricket 345:25 346:3,4 346:6 cried 85:20 86:2 cries 138:20 139:25 crime 370:19 375:11,11 375:15 377:3,4 395:17 396:17 416:1 416:3 515:12 517:21 518:4 576:5 742:20 742:21 crimes 160:19 210:7 365:23 368:16 370:21 371:7,11,15,17,25 378:8 389:9 509:19 785:6 799:21 criminal 106:8 157:7 158:3 370:22 393:3 396:4 510:21 519:25 714:24 criminalise 741:3,7 742:2,3 criminalised 155:7 156:16 743:3 745:25 criminally 510:12 511:24 criteria 46:25 196:13</p>	<p>196:19 197:12 203:5 203:6 243:5,10,12,13 634:9 criterion 636:17 critical 12:8 241:24 242:10 244:8 273:13 273:14 275:7 276:9 331:18 361:9 413:12 468:10 628:2 635:5 648:20 649:3 657:13 727:9 criticise 160:20 242:22 360:23 405:21 407:22 540:25 541:17 578:7 578:11,19 580:11,12 580:13 602:10 628:11 628:17,18 635:25 criticised 541:4 649:6 criticises 635:24 criticising 84:21 252:19 361:4 414:10 421:11 criticisms 345:7 critics 153:7 227:12 246:7 339:10 547:6 575:10 578:9 580:11 595:3 626:4 649:7 650:17 667:7 critique 189:18,22 223:5 225:18 606:6 critiques 189:20 Croatia 386:19 387:3 cross 20:12 76:13 111:10 251:8 354:22 355:4 393:16 400:25 489:1 506:16 513:6 540:11 543:5 603:15 616:4 662:14 crossed 752:2 crossovers 336:2 cross-exam 402:15 cross-examination 1:18 86:17 87:1 112:4 144:8 161:16 166:2 169:11 251:10 282:16 286:6 333:7 356:18 401:2 428:6 429:12 459:23,24 529:12 543:8,19 544:1 568:4 568:11 603:17 661:18 663:8 671:20 673:14 cross-examine 49:9 283:19 603:9 cross-examined 20:10 47:15 680:23 crowd 40:3 66:11 69:2 69:3 84:8 117:22 118:1 138:13 crowds 84:3 crucial 111:24 670:10 crude 246:3 crumbles 727:6 crux 685:23 cry 116:3,6 233:10 crying 140:7 culminated 98:25 583:22</p>
---	--	---	---	--

<p>culpability 157:7 666:8 666:9,11</p> <p>culpable 697:7</p> <p>culprit 772:16</p> <p>cultural 29:15 75:19 89:20 218:4 234:13 381:21,22,25 382:4 385:23 388:7 410:2 645:25</p> <p>culturally 87:21 184:7</p> <p>culture 6:3 385:8 388:2 396:14,18,19 397:3 425:19 647:15 774:15</p> <p>cultures 517:6</p> <p>cup 21:8</p> <p>cured 93:22 438:18</p> <p>curiously 764:5</p> <p>current 110:25 238:18 330:16 389:2 579:11 584:1 589:16 595:9 602:18 623:6,7,9 660:9 668:20 677:2 793:23,25</p> <p>currently 233:20 245:4 572:4 700:25</p> <p>currents 188:21</p> <p>curriculum 75:20 603:19</p> <p>customary 138:19 206:15 537:20</p> <p>customs 168:2</p> <p>cut 75:21 554:6 558:21 783:15 809:24</p> <p>cuts 590:11</p> <p>CV 174:14,15,18 252:17 253:20 293:18 294:2,14 365:7,17 572:22 606:20 607:23 607:24 616:11 746:21</p> <p>cynical 657:17</p> <p>C-H 162:22,23</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>DA 767:17</p> <p>daily 19:6 490:8 603:25 654:17 656:22,25 688:8 714:7</p> <p>damage 209:7 715:4 733:7</p> <p>damaging 383:11</p> <p>Damascus 208:21</p> <p>danger 215:1 343:21 396:6 672:25 721:2</p> <p>dangerous 323:9 392:4 392:5,16 723:17</p> <p>dangers 602:13</p> <p>Daniel 136:5</p> <p>dare 20:5 153:4</p> <p>Darfur 397:24 399:20 399:21,24</p> <p>Darfurian 399:22</p> <p>data 197:19 198:20,22</p> <p>date 4:7 37:1 192:6 302:3 416:11 467:3 570:9 738:25</p> <p>dated 10:2 70:10</p>	<p>dates 62:1 194:3 259:9 599:24</p> <p>daughter 10:18 77:14 157:2 160:10,13 403:25 423:7,9 512:9 515:4 740:5</p> <p>daughters 153:17 404:18 421:15 672:2 789:20 790:2</p> <p>David 14:15 120:17 163:3 165:14,17 172:15,18,22 206:18 285:25 573:14</p> <p>day 15:1 22:9 37:25 39:7,16 46:16 48:21 50:22 62:2 64:5 70:13 82:23 85:20 95:25 108:25 128:3 187:6 282:24 283:1 284:9 300:1 326:5 331:8 423:4 467:5 484:19 488:6 491:20 530:1 539:5 547:8,10,11 567:23 568:3,5,5 570:6 599:5 601:3 679:17 681:5,5,16 684:13 704:15 711:25 719:15 734:11 748:12 751:2 771:10 786:22 800:22 808:19 809:4</p> <p>days 1:13 484:18 548:18 632:11 681:25 682:1,13,17 768:12 810:16</p> <p>day-to-day 6:24</p> <p>DBS 267:9,10</p> <p>DC 110:14 167:15</p> <p>dead 396:1</p> <p>dealing 34:6,17 51:12 57:14 156:6 164:9 207:1,11 242:18 249:10 286:8 320:6 326:10,12 340:4 405:15 464:12 470:7 592:1 597:6 631:11 669:10 702:2 763:9 767:19 778:19</p> <p>deals 5:15 30:6 153:7 169:1 182:11 232:8 247:2 482:5 577:20 604:13,18</p> <p>dealt 46:6,17 109:7 128:12 166:1 190:11 190:13 209:18,22 219:3 224:15 232:1 249:25 333:11 336:10 348:1 397:6 480:23 517:13 535:25 593:12 597:21 598:8 600:5 610:1 632:19 715:1 742:22 788:14 798:21</p> <p>death 208:2 660:5</p> <p>deaths 395:22</p> <p>debate 10:8 19:16,16 32:20 106:25 125:5 160:25 189:17 230:4</p>	<p>234:14 236:10 244:18 250:15 294:11 302:6 311:6 337:19 360:2 365:21 411:18 422:12 452:17 463:18 490:14 497:21 508:24 566:14 566:22 627:12 637:1 640:4 655:8 689:3 695:24,25 700:24 706:8 725:18 731:20 736:10 745:16 753:4 767:21 769:20 771:24 774:16 795:2,3,6,16 797:21 801:5</p> <p>debated 623:21 639:14 678:17 795:22 802:25</p> <p>debates 454:15 566:21 584:1 642:6,6 696:5 723:1 799:5</p> <p>decades 237:11 344:4 349:17 652:17</p> <p>decedents 312:10</p> <p>December 59:23 98:20 434:14 460:24 599:4</p> <p>decency 142:17 419:4</p> <p>decide 13:23 45:19 48:20 160:11,12 185:7 234:9 283:6 390:9 418:2 473:24 578:14 614:3 635:4 651:4 673:7 686:4 689:16 702:5 710:24 741:6 748:12 758:13 770:17</p> <p>decided 51:16 116:12 132:13 185:8,9 390:5 437:6 457:4 538:16 538:21 553:10 590:17 700:4,9</p> <p>decides 636:9</p> <p>deciding 234:25 696:19</p> <p>decision 23:13 46:3,16 47:17,20 62:4 101:9 158:19 159:10,22,22 160:20 234:5,7 244:15 270:1 414:5,7 434:21,22,23 435:5 460:25 634:9 701:25 703:9,11 704:18 715:25 719:15,17 748:20 756:21 758:5 758:9,12,20 767:16</p> <p>decisions 434:13 575:12 685:12 727:19</p> <p>decisive 435:25 702:3,4 702:10</p> <p>declaration 666:13,21 666:24</p> <p>declaratory 7:20 686:11</p> <p>declare 118:23 134:19 216:15 653:6 749:21 773:17</p> <p>declared 39:21 118:18 119:4 223:9</p> <p>declares 273:22 587:4</p>	<p>652:1</p> <p>declaring 7:16 115:17 115:21</p> <p>decline 643:8</p> <p>declining 584:25</p> <p>decommissioning 377:17</p> <p>dedicated 610:11</p> <p>deem 690:14</p> <p>deemed 791:10</p> <p>deep 39:21 40:6 187:10 385:13 388:22 389:4</p> <p>deeper 388:6</p> <p>deeply 78:2 106:18 108:1 646:18 797:11</p> <p>defamation 46:11 688:7 718:24 719:19 724:7 756:9 767:13 767:18,18</p> <p>defamatory 718:23</p> <p>defeat 267:23 281:3</p> <p>defeated 359:10 386:23 386:24</p> <p>defence 10:18 77:15 78:5,21 166:22 384:3 384:7 403:25 404:5 408:8 418:4 419:7 421:16 422:11 423:3 455:3,5,7,9,11,25 456:17 468:24 504:9 512:10 515:4 594:10 622:17 672:3 703:3 703:16,25 704:1 709:7 724:3,4,16 728:11 740:6,11 768:17 790:9 803:4</p> <p>defences 392:1 564:9 688:7,9 702:25 724:6 724:12 756:9</p> <p>defend 205:24 209:8 239:19 268:16 328:9 458:9 459:17 527:7,8 528:14,18,18 674:15 746:24 804:22</p> <p>defended 437:7,11</p> <p>defender 143:8</p> <p>defending 214:13</p> <p>defensible 437:8</p> <p>deferred 710:14</p> <p>define 180:19 196:12 208:4 216:25 244:7 577:4 615:17,18 634:17,19 658:3 770:1,3 771:5</p> <p>defined 16:2 186:9 215:4,20 235:20 272:17 343:24 576:21 717:17 756:20 763:25 768:21 772:18 773:6</p> <p>defines 642:10</p> <p>defining 17:19 176:7 181:8 215:8,11,12 234:15 338:12,12</p> <p>definite 72:2,8 412:7,17</p> <p>definitely 110:16 170:8 494:20,24 569:17</p>	<p>671:18 738:21 739:15 740:18 746:5</p> <p>definitional 652:2</p> <p>definitions 243:10 336:19 337:10 637:8 638:1 800:25</p> <p>definitive 126:24 486:6 719:8</p> <p>degraded 732:22</p> <p>degrades 715:5</p> <p>degrading 42:8</p> <p>degree 319:11 431:17 431:19 460:6,9 468:1 701:16</p> <p>degrees 366:10 555:7</p> <p>dehumanisation 374:25 375:7 377:16 378:1 379:2 391:25 401:12 402:2,9,10,19 425:5 723:18 799:22 799:25</p> <p>dehumanise 705:13</p> <p>dehumanised 402:22 732:21</p> <p>dehumanising 42:11 195:18 405:12 406:3</p> <p>delay 168:6</p> <p>delaying 806:6</p> <p>delays 167:24</p> <p>delegation 84:14 118:11 489:12,13</p> <p>delegations 555:24 556:8</p> <p>delegitimise 657:18</p> <p>delegitimize 218:17 228:16 247:1</p> <p>deleted 96:17 97:11 98:9</p> <p>deliberate 234:5 593:3 638:23 741:13 765:12</p> <p>deliberately 339:8,9,22 340:10,10 341:16,16 665:25</p> <p>delicate 762:16</p> <p>delict 724:9,10</p> <p>deliver 809:2</p> <p>demagogue 66:10</p> <p>demagoguery 384:14</p> <p>demagogues 371:15</p> <p>demand 307:21,22 393:9,10 698:4</p> <p>demanded 215:4 343:24 636:21</p> <p>demanding 435:24 436:3</p> <p>demands 106:15 205:19,20 617:2 758:17</p> <p>democracy 245:3 299:8 299:10 434:10 589:18 589:18 605:6,17 612:3 624:24 672:3 674:23 694:17 701:18 701:20 702:5 705:18 707:7 723:4 729:13 733:14</p>
--	---	---	---	---

<p>democratic 106:1 142:14 214:22 218:24 223:20 249:2 306:1 307:24 308:6 348:6,8 348:25 359:8,8 363:10 415:25 419:1 427:10 491:17 548:19 548:22 611:18 636:21 729:16 758:19,21 787:12</p> <p>democrats 376:5</p> <p>demographic 502:10 502:14 744:17</p> <p>demolished 264:5</p> <p>demonising 190:5 195:18</p> <p>demonization 189:13</p> <p>demonstrate 12:25 17:11 44:25 45:6,16 45:24 49:21 358:4 703:6 713:12 727:2 731:1 735:5 746:13 748:7 751:25 753:12 755:4 756:7 765:6 767:4 780:18 781:18 791:22</p> <p>demonstrated 17:23 41:19 615:3 696:9 705:16</p> <p>demonstrates 764:8 765:16</p> <p>denial 339:14 377:8,8 398:6,14,22 400:2</p> <p>denied 374:19 376:24 658:4,4 666:19</p> <p>denies 628:11</p> <p>denigrate 393:13</p> <p>denim 68:3,6</p> <p>denominator 623:13</p> <p>denounce 281:4 289:10 341:6</p> <p>denounced 249:18</p> <p>deny 153:4 179:15 260:10 397:11 398:13 579:10 615:6 617:17 705:4</p> <p>denying 201:15,25 397:23 399:13,16 493:20 638:24 639:1 639:7 650:3</p> <p>department 162:2 194:25 199:20 329:17 330:24 369:3,6,13,23 370:3 377:7 432:17 432:24 433:3,7 434:24,24 435:8 463:25 523:3,4,6,7,8 523:13,14 722:5</p> <p>departments 228:25</p> <p>department's 523:4</p> <p>departure 701:18</p> <p>depend 19:14 673:18</p> <p>depended 60:22</p> <p>depending 1:18 169:10 248:2 420:18 568:4 568:11 778:16</p>	<p>depends 83:2 106:7 250:10 267:1 341:19 524:3,4 530:22 770:1 801:9</p> <p>depict 588:5</p> <p>deplore 102:22</p> <p>deploy 466:21</p> <p>deportation 716:8,8</p> <p>deposed 9:1</p> <p>deprived 692:4 732:24</p> <p>depriving 590:10</p> <p>depth 32:21</p> <p>deputies 21:19 29:21 29:23 30:3,5 36:16 37:21 100:23 101:14 115:16 162:1 233:8 256:14,20 269:23 428:19 437:3 513:17 533:24 534:18 535:17 536:7 538:8 651:10 773:15 774:4</p> <p>deputy 36:11,12 556:5 556:7 656:22</p> <p>derive 792:10</p> <p>derived 721:14</p> <p>derives 792:9</p> <p>derogatory 708:18</p> <p>Des 266:12</p> <p>Desai 64:20 69:6</p> <p>descendants 309:17 310:11,14</p> <p>descended 403:25</p> <p>descent 353:12</p> <p>describe 59:18 73:11 129:15 267:18,19 272:22 311:8 316:13 336:6 343:1 453:8 582:16 621:12 645:20 653:14 669:21 672:23</p> <p>described 152:19 227:24 316:9 394:11 582:18 583:12,14,21 634:20 721:8 757:9 776:8 778:1</p> <p>describes 124:1,3 275:7 316:14 655:6</p> <p>describing 324:13 353:17 579:21 609:19</p> <p>description 138:7 360:3 583:15 601:23 602:8 641:7 647:11</p> <p>descriptions 759:25</p> <p>desert 399:13</p> <p>deserts 376:23</p> <p>deserve 145:17,17</p> <p>deserving 402:7</p> <p>designate 322:15</p> <p>designated 810:12</p> <p>designed 154:11 385:11 575:12,15 581:24 647:9</p> <p>desire 227:18 667:17</p> <p>desk 112:15</p> <p>despite 1:11 490:9 650:4 662:18 747:3</p> <p>destroy 248:3 392:24</p>	<p>562:18</p> <p>destruction 103:1 264:4 723:19</p> <p>destructive 141:18 600:14 687:13 786:21</p> <p>detail 109:7 170:5 236:20 239:7 260:2 367:22 374:2 688:18 690:17 720:13</p> <p>detailed 331:23 576:16 720:21</p> <p>details 155:15 259:8 261:10 304:18 305:5 335:24 555:12</p> <p>detained 733:6 798:5</p> <p>determinant 493:15</p> <p>determination 179:23 202:6 223:22 639:4 799:13,17</p> <p>determine 6:18 12:11 45:3 46:13 47:11 197:17 288:3 496:20 497:13 500:22 577:15 687:8 696:20 728:18 757:24 772:1</p> <p>determined 12:10 14:2 50:24 203:22 495:9 651:2 744:15,16,20</p> <p>determining 12:8 46:8 230:16 243:5 634:23 720:12 767:8</p> <p>deterred 626:13 804:14</p> <p>deterrence 8:3</p> <p>deterrent 760:24</p> <p>detestation 736:6</p> <p>detract 645:6</p> <p>detriment 183:11,12</p> <p>detrimental 254:23</p> <p>develop 358:18,24 368:4,4 569:3 779:11</p> <p>developed 329:7,8 367:25 379:3 633:2</p> <p>development 370:22 371:14 771:7,9</p> <p>developments 654:17</p> <p>develops 370:7 688:18</p> <p>devoted 163:25 252:20 368:8</p> <p>dialogue 105:24</p> <p>diary 682:5</p> <p>Dias 611:14</p> <p>diaspora 489:21</p> <p>diasporic 222:21</p> <p>dichotomy 648:15</p> <p>dictator 244:16</p> <p>dictionaries 771:5,5 801:11</p> <p>dictionary 331:25 332:2 719:23 720:2 800:21,25 801:2,8,9</p> <p>didn't 67:4 147:9 150:14,19 215:23,24 274:25 282:18 292:19 297:4 344:19 370:6 426:11,12 437:9 456:15 461:24 476:8</p>	<p>481:21 482:2,4 483:7 511:17 518:11 528:2 535:12 537:2 539:20 604:7 605:19 656:5 670:2 672:8 803:4</p> <p>die 438:17</p> <p>died 60:25 93:22 263:21 399:13 453:20 459:10 473:23 474:8 487:4 539:22 665:13</p> <p>differ 231:7,8 457:16 457:18 458:4,11 460:15 464:21 503:9 526:22 554:8 622:9 632:18 639:14 659:18</p> <p>differed 464:25</p> <p>difference 49:7,19 207:15 359:13 405:25 465:9 478:22 628:10 763:22 771:15 778:18 779:24</p> <p>differences 181:11 374:13 478:15 574:19 676:25 677:4 772:21</p> <p>differential 20:1</p> <p>differentiate 82:25</p> <p>differently 214:14 280:20 350:22 482:5 770:3</p> <p>differing 623:22</p> <p>differs 51:25</p> <p>difficult 71:20 116:8,19 146:14 162:8 170:2 218:10 309:2,4,6 311:6 312:13 325:24 357:5,17 359:12 366:13 403:2 452:25 495:11 521:9 555:13 764:11,17 784:8</p> <p>difficulties 406:22 407:3 579:2</p> <p>difficulty 2:14 25:9 48:17,19 49:1,4 129:21 282:22 487:13 579:4 599:25 681:8 694:6 762:9 768:20 772:12</p> <p>dig 628:23</p> <p>dignity 9:14 11:3 43:24 53:16 74:14 145:17 453:14 454:1 531:21 532:3,8 689:5,9,9 690:24 692:4 694:10 694:15 702:2 730:8 743:24 790:24</p> <p>digress 408:17</p> <p>digression 194:24</p> <p>dimension 20:23 645:25 708:25 709:19 709:20</p> <p>diminish 386:5</p> <p>dinner 391:6</p> <p>diplomacy 464:13</p> <p>diplomat 464:11</p> <p>dire 706:25</p> <p>direct 43:25 76:18</p>	<p>124:24 125:2 231:20 237:21 246:7 366:5 367:22,23 381:8 395:14,15 396:9 416:5 420:20 589:4 673:5 725:23 735:17 736:11 742:12 745:25 749:21 766:4</p> <p>directed 16:10,25 19:18 19:21 82:1 192:14 240:14 258:4 414:9 475:18 476:12,14 512:1 530:4,12 539:21 580:16 581:12 594:4,4 601:25 641:4 655:16,17 663:13 672:8,11 674:18 713:13 725:2,15,21 726:9 733:8 742:6 754:7 758:4 776:5 790:23 803:2</p> <p>direction 673:21</p> <p>directions 343:10,18</p> <p>directive 679:18</p> <p>directly 161:4,6 167:20 521:11,12 591:10 604:7 668:25 746:21 770:13</p> <p>director 367:5 369:9</p> <p>directus 802:11</p> <p>disability 6:3</p> <p>disadvantaged 692:2</p> <p>disagree 84:10 106:18 108:1,2 120:24 121:9 122:24 126:2,3 129:14 130:5,8 132:11 145:3 230:6 236:17 246:20 272:19 289:4 292:11 293:13 293:15 309:21 311:12 313:3 320:23,24 338:9 340:16 345:2 625:22 633:8 657:20 694:22,23</p> <p>disagreed 464:24 501:18 736:20 737:23 738:18</p> <p>disagreeing 73:7</p> <p>disagreement 179:17 180:11 272:14 281:11 501:13 736:22 737:19 738:19</p> <p>disagreements 759:21</p> <p>disagrees 260:6 419:10 672:12 705:12 803:10</p> <p>disallowed 732:25</p> <p>disallows 455:14</p> <p>disapproval 807:10</p> <p>disapproved 589:14</p> <p>disassociate 270:9 557:18</p> <p>disavow 284:7 343:23 344:23 558:13</p> <p>disavowance 802:1</p> <p>disavowed 344:18</p> <p>disavowing 215:3</p>
--	---	---	---	--

<p>disband 218:18 discard 720:8 769:14 769:16 discarded 86:3 discharge 13:12,14 732:19 discipline 616:16,17 624:14 720:20 disclose 109:8 discord 715:8 discount 241:8 524:15 746:3 discounting 526:13 discourage 8:4 discouraged 807:6 discourse 82:7 204:6 205:9 208:7 655:2 728:25 729:3 736:10 753:7 discovered 62:7 398:4 discovery 173:4 364:22 discredit 84:18 339:10 647:10 discretion 231:5 599:13 601:10 687:17 806:10 806:10 807:3 discriminate 12:25 386:7 506:12 583:9 593:10 594:1 discriminated 308:8 374:16 581:7 583:2 757:21 discriminates 124:5,6 576:9 578:10,12 discrimination 4:2 5:13 6:18 223:10 307:11 307:14,15 374:14,24 427:7 585:22 592:24 698:18 716:7 717:8 757:14 796:23 797:6 797:9,10 discriminatory 328:17 389:8 576:8 discuss 243:15 248:22 250:14,21 676:15 683:19 discussed 66:3 168:17 435:17 568:21 639:18 677:15 discussing 243:11,17 255:24 474:23 711:4 discussion 83:17 157:10 189:16 198:17 227:11 244:17 248:7 250:23 251:3 256:23 341:8 503:2,5 526:11 614:24 667:6 741:20 741:20 discussions 1:9 248:17 255:21 341:11 355:19 566:25 disease 375:3 disgraceful 184:5 disguise 741:14 disguised 580:22 713:4 781:17 782:21 803:17</p>	<p>disguises 781:12 disgust 150:23 dishonest 229:5 230:9 dishonestly 225:20 226:21 dishonesty 230:8 582:12 disintegration 622:3 disinvest 292:16 disinvestment 146:12 267:7 413:3 disinvestments 106:16 disjunctively 716:23 dislike 626:3 dismayed 102:11,17 dismiss 792:5 dismissed 791:25 792:2 disparity 523:9 dispassionate 620:17 620:19 dispel 8:10 dispelled 232:2 dispensation 484:1 548:23 692:13 723:3 dispersed 85:8 display 12:23 displays 60:6,23 131:8 disposed 50:17 51:17 dispositive 634:3,14 dispossessed 692:3 disproportionate 102:18 103:5 268:15 271:2 dispute 10:12,23 13:25 14:2 21:23 231:24 394:7 490:15 522:20 527:2 535:3,6,10,12 536:6,9,23 537:1,3 628:3,4 694:5 696:12 702:22 738:3 disputes 51:16 232:15 233:15 797:6 disputing 560:7 disregard 283:13 337:11 417:9 726:21 781:20 disregarded 639:19 disrespect 401:8 disrupt 457:15 524:18 524:21,25 disrupted 526:17 disrupting 151:10 disruption 153:9 450:5 457:3 458:5 500:12 704:21 disruptions 446:4 disruptive 152:13 457:4 disseminate 12:22 disseminated 623:16 723:13,14 disseminates 623:20 dissemination 723:9 dissent 369:22 574:9 distance 57:1 535:25 666:4</p>	<p>distanced 535:22 distancing 246:3 distinct 194:6 distinction 14:16 156:16 177:21 187:19 188:8,16,20,25 189:2 189:12 198:10 207:15 207:22,23 208:12,13 208:24 240:12,21,23 241:1 272:20 280:24 322:5 344:7 353:21 359:1,14 361:5,23 468:23 472:5 479:1 538:12 540:19,22 541:6,8,10,11,13 574:21 602:22 624:8 625:21,23 636:4 639:4 647:23,24 649:23 656:1 726:2,4 726:22 727:3,5,9 779:17 780:3 787:9 787:16 788:4 801:24 802:1 distinctions 207:18 distinctly 366:18 distinguish 50:10 672:17 distinguishable 156:9 distinguished 396:8 distinguishes 241:18 602:25 distracted 752:21 distributed 56:9 disturb 758:17 disturbed 71:4 disturbing 35:10 43:3 74:23 81:15 divergent 696:16 diverges 652:5 diverse 118:6 409:16 504:24 609:13,14 diversity 517:2,4 divert 339:11 547:14 diverts 652:5 divestment 412:5,10 620:10 divide 620:16 621:16 722:15 divided 375:19 divider 173:8 277:1 418:17 473:14 572:15 dividing 463:14 602:20 624:13 division 374:10 389:24 390:1 683:13 715:15 divisions 421:7 715:7 715:11,12 Dixie 395:10 dock 442:12,13,23 520:19 docket 510:25 511:2,6 511:9 518:10,23,25 dockets 511:16 517:20 doctor 207:5,6,7,10 231:21 232:17 356:1 394:14 428:14 487:21</p>	<p>document 57:20 104:8 239:14 270:10 286:9 286:10 328:24 329:3 329:6 332:15 336:11 367:23,24 400:10 401:23 408:12 417:4 439:7 447:18 489:23 572:25 573:20,25 574:5 576:13 596:16 629:19,20 636:11 641:7 770:22 787:23 804:3 documents 3:4,18 4:25 5:4 112:18 264:9 275:17 336:12 doesn't 95:4 201:22 210:10,22 211:13,13 244:15 251:1 271:21 292:7 335:9,12 338:2 339:4 345:8,16 346:24 347:6,22 389:1,6,7 417:21,22 421:24 441:3 457:5,6 457:9 458:3 484:22 488:13 490:8 541:17 541:19 575:5 577:9 613:6,8,9 625:25 626:13,14 628:14,15 635:1 640:6 642:9 651:1 661:1 669:12 669:13 673:9 699:24 706:25 756:25 770:15 774:11 785:10 788:12 doing 22:23 27:19,22 35:8 59:25 72:23 107:3 111:18 122:11 128:5 138:13 139:18 140:12 155:12 179:15 189:17 225:5 226:20 252:6 274:10 366:20 368:9 375:24 404:24 421:12 452:10 479:16 511:6 516:6 518:11 539:16 545:23 569:22 597:11 652:8 655:1 778:21,23 779:5 781:7 810:5 domestic 467:1 606:11 695:25 697:18 Dominican 555:22 Donald 177:22 178:1 261:4,6 499:24 door 47:23 246:10 600:24 651:20 710:16 808:11 Doreen 606:3 dot 528:22 double 636:19,19,22,25 648:10,15,23 649:8 650:5 doubt 1:19 5:14 10:8 13:17 19:19 86:22 168:12 169:7 234:22 320:18 326:3 371:5 464:20 479:4 496:24 529:23 533:11 586:18</p>	<p>611:25 614:22 676:10 677:10 681:8 696:23 700:23 708:22 722:12 776:13 downplayed 289:11 downward 375:1 downwards 550:17 dozen 161:22 Dozens 77:1 drafting 680:23,24 drafts 480:1 drastically 602:12 draw 84:3 222:9 463:13 472:5 538:12 552:16 560:24 574:21 607:3 624:8 646:23 647:23 651:23 679:24 726:2 726:4,22 754:18 763:20 810:1 drawing 14:20 203:9 203:15 209:19 224:14 320:14 558:12 649:4 657:6 drawn 292:24 343:10 343:11,13 439:9 541:7 656:1 737:12 738:17 787:16 803:1 draws 628:13 636:4 dreamed 224:22 225:9 dreamt 225:5 dressed 229:21 drew 293:10 671:1 800:24 drink 9:9 43:19 44:2 53:4 125:8 155:19 388:8 488:1 731:7,14 732:6,6,12 735:10 drive 155:19 282:11 379:14,15 386:6 395:2 673:10 driven 129:12 203:24 208:20 309:13,24 312:9 350:10 358:17 671:24 drives 371:22 driving 156:2 402:24 drunken 156:2 dual 404:6 422:17,22 422:25 424:21 Dubula 626:24,24 644:25 699:9 dudes 261:4,5 due 7:2,13 8:18 33:6,17 40:15 132:20,25 150:24 479:4 603:14 606:24 637:5 694:14 699:19 702:18 705:10 722:1 730:3,6 732:16 800:9 dump 682:16 Durban 198:8,13 520:19 708:14 Dutch 344:7 duties 466:25 duty 77:10 230:16 351:18 434:12 458:8</p>
---	---	--	---	--

523:5 526:21 551:4 804:3 D'Oliveira 346:4	366:10 562:16 593:1 658:5 659:20 educator 250:20 432:16,16 Edward 228:1 effective 386:13 803:23 effectively 10:5 132:7 233:12 283:14 387:7 648:9 704:24 705:10 705:13 effects 379:9 380:7 514:21,24 efficacy 717:22 efficient 7:5 effort 368:10 efforts 295:11 Egypt 187:2,6 193:12 259:10,16,20 260:5 260:10,22 261:14,24 360:11 588:15 Egyptian 383:21 Egyptians 297:15 eight 275:23 370:10 425:9 426:2,20 519:3 589:17 675:10,14 677:18 either 2:12 22:11 36:19 44:8 120:16 168:10 189:23 215:2 222:4 252:19 256:19,24 281:2 312:9 317:9 330:22 333:15 343:22 344:18 346:25 360:23 362:2 379:23 411:16 463:14 506:24 536:9 545:21 548:16 590:3 626:4 647:17,22 675:5 677:9 751:2 760:19 789:20 806:9 elaborate 36:7 184:18 185:20 212:16 218:19 221:6 224:8 575:22 639:6 640:25 685:22 720:23 elaboration 455:19 641:12 elastic 340:20 elders 400:9 elect 154:25 589:11 elected 299:6,11 304:2 589:13 660:16 765:14 808:5 election 177:23 178:1 759:1 elections 306:8 358:20 363:4 759:7,14 779:12 electoral 759:4,5,8 electric 41:4 electricity 103:9 271:6 355:5 electronic 809:15 elegance 797:7 element 72:2 371:24 372:18 721:13,25 722:9,20 723:8	elements 592:10 718:11 723:18 Eli 571:9,17 elicit 52:14,17 384:13 384:15 386:9 387:21 395:5 elicited 712:13 eliminate 375:4 399:10 else's 581:5 emanate 166:24 emanates 648:13 embark 605:10 710:10 718:11,19 728:17,24 729:2 embarked 483:11 embarks 698:23 embarrassed 768:11 embarrassment 150:23 embassy 38:11 56:14 91:22 108:6 436:4 437:2,4 537:6,10,12 538:16,23 556:20,23 557:2,3 651:5 embassy's 38:22 embedded 797:11 emblem 42:4 emerge 798:17 emerged 187:3 194:12 emergence 248:13 emerging 197:15 eminent 339:20 emotional 41:25 60:15 69:2 76:13 138:16 646:12,14,20 709:20 715:4 717:6,10 emotions 384:13 395:6 395:12 emphasis 328:19 796:17,20 emphasise 341:15 784:5 emphasises 340:10 759:16 796:21 797:7 emphasising 484:14 519:9 empire 399:19 empires 399:9 empirical 653:1 empirically 249:3 employ 98:4 439:25 employed 432:16 572:4 647:2 709:18 715:11 744:3 employees 123:7 483:5 employers 123:7 employing 593:3 employment 254:10 386:13 empowered 760:11 empowering 390:6 enable 7:4 244:23 799:13 enact 131:25 encapsulate 641:24 encapsulated 719:18 enclave 744:11	enclaves 39:3 457:6,10 457:11,12 encompasses 715:23 encounter 688:7 encountered 150:11 encountering 199:4 encounters 694:7 encourage 328:15,16 380:19 595:10,13 encouraged 416:3 encourages 323:24 encouraging 324:21 328:10 encyclopaedia 398:9 endeavour 1:15 201:17 202:2,11 616:15 636:14 639:10 ended 368:11 377:7 448:7 452:2 589:19 647:5 endemic 360:22 endorse 194:17 641:6 endorsed 666:6 ends 112:6 179:2 endure 692:5 enduring 359:12 enemies 185:4 enemy 184:24,25 185:3 185:4 368:21,22 398:23 energetically 639:13 enforce 395:20 459:14 enforced 689:22 enforcement 197:20 199:4 455:21 456:3 743:10 enforcer 455:10 enforcing 455:15 456:11 457:25 engage 19:25 251:13,19 251:22,23 252:5,6,9 253:10,12 426:4 464:2,7,10,18,22 465:5,6 477:22 581:8 626:21 631:25 677:11 694:11 718:10 720:23 732:25 engaged 60:21 71:12 227:23 241:24 341:3 726:6 731:3 735:8 engagement 8:15 13:2 36:16 83:16 119:22 689:3 704:9 727:8 745:15 engaging 61:19 704:8 738:25 engineering 69:16,20 England 216:20 399:18 English 254:16 344:8 346:6 366:12,25 502:15 enjoin 729:25 enjoins 691:5 enjoy 428:10 553:17 583:2 589:19 693:1 701:7,11 704:15	707:25 708:23 enjoyed 428:2 647:6 721:24 enjoying 562:8 enjoys 670:17 enlisted 739:8 enmity 736:6 enormous 36:15 41:25 53:23 54:2 enquire 2:21 598:20 709:11,13 750:13 enquires 48:5 703:5 enquiries 205:11 703:12,13 enquiring 631:14 enquiry 704:10 enrol 245:6 enshrined 6:6 13:9 688:23 694:1 728:23 730:7 ensure 454:18 455:18 552:12 631:22 666:14 698:25 ensuring 723:1 entail 259:7 781:1 entailed 98:23 entails 287:19 312:2 767:10 enter 591:12 773:19 entered 457:20 607:23 entering 561:9 enterprise 340:11 entertain 11:13,17,19 79:5,8,10 525:20 526:1,3 803:10 entertains 415:20 enticing 18:18 entire 24:25,25 25:5 76:10 588:23 590:24 686:23 687:13 700:16 741:9 743:11 785:20 801:2 entirely 209:10 222:14 250:11 269:6 350:17 481:5 590:3 592:7 618:19 625:1 640:7 640:11 652:24 653:25 entities 101:4 774:2 entitled 114:2 128:15 235:18 284:6 345:3 356:16 398:18 543:13 549:12 558:11 586:14 586:16 589:11 592:21 597:18 599:8 618:3 645:7,10,18 649:10 673:23 674:14 679:5 727:13 749:20 782:11 785:8 793:12 794:19 799:9 804:24 entitlement 727:24 entity 360:12 entries 57:14 entrusted 749:24 entry 33:8 42:16 53:3 56:6 57:16 486:12 487:13 508:21 722:15
--	---	---	--	--

<p>environment 82:8 674:16 796:16</p> <p>environmental 37:22 796:13</p> <p>envisage 169:3</p> <p>envisaged 693:12 755:25 763:18</p> <p>equal 307:19 359:19,19 593:1 692:16 705:4</p> <p>equally 337:24 691:17</p> <p>equals 705:5</p> <p>equate 346:25 347:4</p> <p>equated 739:18</p> <p>equates 252:21 253:2 347:2</p> <p>equipped 696:18 772:9</p> <p>equivalency 781:3</p> <p>equivalent 16:4 254:16 642:7 772:20</p> <p>era 9:8 32:6 42:21 123:15 124:14,24 286:17 395:8 623:14 652:10 725:10 776:2 777:3</p> <p>eradicate 105:13 203:22</p> <p>eradicated 797:12</p> <p>Erasmus 796:5,14 810:15</p> <p>error 228:7 350:14 638:19</p> <p>errors 153:8</p> <p>escape 714:2</p> <p>escaping 208:17,19</p> <p>escorts 117:22</p> <p>especially 23:4 146:21 181:25 198:20 206:13 328:6 372:6 379:16 395:13 423:18 672:1 786:1 800:7</p> <p>essence 24:2 102:5 197:2 344:1 438:20 443:5 454:1 547:4,5 553:24 554:7 561:12 763:2 780:12 796:8 796:19 797:12</p> <p>essential 699:15</p> <p>essentially 83:17 212:14 390:8 393:6 406:4 414:20 421:25 563:24 577:23 579:24 580:1 652:2 756:22 763:25 767:12 775:15 789:2 794:16</p> <p>establish 47:4 242:18 242:21 318:11 529:15 598:20 629:14</p> <p>established 115:3,7,12 193:17 247:11 584:10 584:11 701:18 720:10 724:17 740:10 765:8</p> <p>establishing 46:18 769:23</p> <p>establishment 583:24 769:24</p> <p>estate 708:15</p>	<p>estates 653:5</p> <p>estimate 466:11 664:4 664:9</p> <p>estimated 59:11 114:18 309:21</p> <p>estimates 114:23 310:8 569:21</p> <p>estimation 110:25</p> <p>etcetera 37:22 60:7 70:3</p> <p>Ethiopia 396:1</p> <p>Ethiopians 505:22 506:1,5</p> <p>ethnic 17:13 78:20 166:24 237:22 238:7 238:11 240:14 344:10 353:21 458:16 504:15 505:4,9 580:14 583:15 593:8,9 602:21 620:8 653:6 656:7 733:10 736:20 737:15 740:14 752:15 775:23</p> <p>ethnicity 6:1 17:10,14 17:23 51:13 122:23 125:22 127:21 128:1 161:3 186:10 258:5 405:17,20 414:9 420:11,14 425:11 644:17 658:3 692:20 717:18 754:13 755:4 756:6 757:7 758:1 762:23 764:2 772:3 776:14,21 780:13 785:17 790:19 791:22 803:3</p> <p>ethno 582:18 592:13</p> <p>EU 247:13</p> <p>EUMC 193:22 194:14 200:9 247:3,4,6,9 248:7,25 249:7 330:21 579:1 628:24 629:25 630:6,8 635:7 636:11,16 640:19,24 641:1,7 642:7</p> <p>EUMC's 247:16 248:13 249:14</p> <p>Europe 181:25 182:1,3 182:5 184:15 185:5 185:12 194:22 198:21 200:1 203:24 205:3 208:15,16,16,18 209:4 223:17 224:6 227:17 235:24 248:11 248:12,18,19,19 323:15 329:20 350:10 358:11 465:2 624:2 667:16,22</p> <p>European 190:20 191:2 194:13,14 197:15 198:2,12 199:16,16 199:17 247:11,13,22 247:23 248:5,9,21 283:15 329:25 330:3 330:4,11 390:24 578:23 758:12</p>	<p>Europeans 402:16</p> <p>evaded 544:1</p> <p>evading 543:12</p> <p>evaluating 605:6,17</p> <p>evaluation 696:11</p> <p>evasive 543:8</p> <p>evasiveness 543:22</p> <p>event 33:13 62:4 63:1,3 64:5 65:9,16,23 68:17 72:19 84:23 129:3,8 152:9 269:12 429:16 492:5 497:3,11 538:20 599:13 737:23 748:11 750:6 780:18 807:5</p> <p>events 7:9 9:17 12:2,7 14:11 21:3 29:15,15 29:25 30:17 33:17 34:7,22 42:15 57:8 58:10 59:21 61:5,9 62:6 63:12 64:6 66:3 66:6 82:8 128:22 138:8 153:11 198:13 257:17 260:9 354:19 441:9 484:18 496:16 497:10 505:2 529:21 698:3 775:4,16</p> <p>eventualis 802:11</p> <p>eventually 36:17 62:2 103:22 177:14 425:4</p> <p>everybody 183:13,15 183:16 203:6 384:4 602:3 620:24 626:12 713:20 777:24 781:4 784:6,7 786:23</p> <p>everybody's 31:24 645:9 806:20</p> <p>everyday 771:3,11</p> <p>Everyone's 488:15</p> <p>evident 725:9</p> <p>evidential 13:13</p> <p>evidently 253:11</p> <p>evil 42:12 43:11 98:5 122:11,12 123:6 189:23 212:14 215:13 299:19,20,21 319:11 323:6,8 328:5 349:7 351:3,6,24 352:7 371:20 580:2 732:21 733:5,9</p> <p>evils 212:15</p> <p>evoke 232:16</p> <p>evokes 41:24</p> <p>evolve 20:18</p> <p>evolved 190:21 198:25 199:1</p> <p>exact 103:24 259:8,9 261:10 448:3 479:15 639:7 738:14</p> <p>exactly 50:5 55:18 68:13 77:1 110:21 116:9,23 233:8 237:6 291:24 334:16 353:16 368:5 377:19 381:19 394:9 447:6 467:24 473:4 491:24 511:20</p>	<p>554:24 580:11,13 593:6 620:3 634:17 634:19 635:24 638:9 646:7 685:21 713:16 737:13 772:2 788:17</p> <p>exaggerate 109:2</p> <p>exaggeration 593:25</p> <p>exam 369:6</p> <p>examination 27:11 55:25 111:11 166:1 172:25 209:14 251:9 363:24 364:18 401:1 420:21 430:19 452:5 540:12 551:12 552:2 552:6 565:8 571:20 603:16 616:5 654:10 662:15</p> <p>examined 20:13</p> <p>examining 448:7</p> <p>examples 195:11,14 196:22 200:19 201:12 201:12,19 386:12 388:20 532:23 551:20 551:23,25 556:14 621:21,22 622:25 629:24 635:19 637:11 641:13 660:4 713:11 783:9</p> <p>exceeded 694:19</p> <p>exception 51:18</p> <p>excess 610:8,8</p> <p>Excessive 730:19</p> <p>Excessively 777:8</p> <p>exchange 526:10 527:8 568:22 672:24 808:14</p> <p>exchanges 433:6</p> <p>excitability 66:6 84:8</p> <p>excitable 68:21</p> <p>exclaim 116:2</p> <p>exclamation 145:22</p> <p>exclude 292:3 352:8 705:5</p> <p>excluded 588:12 692:13</p> <p>excludes 590:11</p> <p>excluding 252:2 673:2</p> <p>exclusion 316:25 320:11 580:24 581:2 630:15 705:3</p> <p>exclusionary 756:24</p> <p>exclusive 202:24</p> <p>exclusively 338:7,23,24 338:25 339:3 574:17</p> <p>exclusivity 441:2 562:25</p> <p>excuse 62:20 127:7 158:5,12 340:1 388:8 398:17</p> <p>excused 167:7,9 363:16 363:18 428:12,13,15 567:17,18 677:24 678:1</p> <p>executed 743:10</p> <p>executive 701:8,12</p> <p>exercise 234:20 481:18 632:10 647:22 650:22</p>	<p>663:25 687:17 713:2 729:22 730:10</p> <p>exercised 238:19</p> <p>exercising 227:22 374:17</p> <p>exhaustive 197:3</p> <p>exhibit 5:9 8:23 11:8 27:12 316:22</p> <p>exile 386:7 420:6 432:8 488:17</p> <p>exiled 406:2</p> <p>exist 109:3 218:21,25 221:14,14,15 314:20 388:2 579:11 657:18</p> <p>existence 87:24 129:17 201:17 202:2 218:7 221:11 301:20 636:14 639:9</p> <p>exists 108:23 218:10 220:15</p> <p>exit 75:12 591:12</p> <p>expand 683:10</p> <p>expansive 645:23 646:4</p> <p>expect 52:17 151:1 160:19 221:9 263:22 360:18 443:20 524:19 524:23 525:1 546:25 656:16 706:6,13 748:6</p> <p>expected 150:25 233:19 249:2 434:17,21 586:8 600:5 636:20 680:25 720:15</p> <p>expeditious 7:5 808:24</p> <p>expeditiously 682:22</p> <p>expelled 373:1</p> <p>expensive 796:24</p> <p>experience 42:9,11 150:14 239:24 369:19 371:7 372:17 393:24 412:2 449:19 450:3 485:3,18,19 487:10 487:13,16 515:13 528:13 533:25 646:2 688:16 739:19,25</p> <p>experienced 150:8 410:9 487:17 533:5 533:12 552:18 717:6 717:9</p> <p>experiences 36:7 367:3 442:12 457:19 489:14 554:19 556:2,9</p> <p>experiencing 102:25</p> <p>expertise 261:20 365:7 365:21 423:20 573:1 614:23 615:1 654:12 748:15 800:15</p> <p>experts 19:25 20:8 170:5 234:11 244:13 244:16 577:13 711:11 712:8,15,20 764:11 768:10,13 771:16 772:10 776:25 777:24 798:2 799:8,12,12 800:14</p> <p>expert's 771:24</p>
--	--	--	---	---

<p>explain 39:6 58:14 66:15 68:15 80:9 97:13 177:3 181:18 182:18,23 188:11 189:14 193:8 240:19 296:20 306:3 349:5 368:3 371:6 377:18 381:18,25 384:19 386:12 397:14,16 425:12 441:16 470:22 471:22 489:8 513:20 513:22 523:2 539:18 563:22 574:10 582:21 588:4,20 594:15 755:17</p> <p>explained 253:16 329:6 373:8 541:14 562:23 628:10 756:22 768:21 791:4,5,7</p> <p>explaining 61:15 94:6 520:17</p> <p>explanation 81:3 224:2 546:5 563:24 625:13 741:11</p> <p>explanations 781:24</p> <p>explanatory 652:3</p> <p>explicit 76:17 211:12 211:15 524:8,13 713:14,15 714:5,11 802:22 804:7</p> <p>explicitly 81:16 195:8 215:3 329:14 343:23 650:1 713:19</p> <p>exploit 388:21</p> <p>exploitation 387:9</p> <p>exploited 387:12</p> <p>exploiting 644:12</p> <p>explore 157:5 389:18</p> <p>exported 262:12</p> <p>expose 9:11 43:21 53:13 125:13 521:25</p> <p>exposed 20:21</p> <p>exposing 89:6 781:7</p> <p>express 19:4 108:3 141:14 143:13 144:10 145:1 155:11 178:22 220:24 242:3 243:3 270:25 271:12 338:3 345:3 457:13,15 458:10 467:18,20,21 468:5 595:19 597:18 632:24,25 633:18 659:13 714:4 745:23 762:17 787:23 801:19 801:20 802:1,2</p> <p>expressed 57:15 84:10 107:24 114:1 150:16 192:12 221:2 222:4 241:14 391:20 465:2 469:5,8 501:13 579:7 600:12 641:2 659:11 668:21 719:22 730:15 737:20 738:19 741:15 753:11 804:5,15</p> <p>expresses 121:10,11 122:9 352:14 660:25</p>	<p>722:2</p> <p>expressing 107:8 142:9 143:17 144:17 235:3 281:11 391:19 519:19 647:2 668:3 674:10</p> <p>expression 13:10 122:21 131:12 233:15 287:18 289:7 291:5,7 579:21 637:4 647:8 648:3 670:16 688:20 688:21 689:2,11 693:12 694:12,16 717:22 718:6,8 722:25 728:23 729:1 730:9 737:19 756:18 758:14 759:16</p> <p>expressions 58:23 283:8 671:6</p> <p>expressly 19:18 351:20 632:21 714:1 775:22</p> <p>extend 756:19</p> <p>extended 771:20 777:23</p> <p>extends 763:18</p> <p>extensive 372:17 638:2</p> <p>extensively 166:2 575:13 604:5 677:15 747:3,25</p> <p>extent 3:17 30:1,4 54:4 58:12 61:17 80:9 117:21 161:24 200:3 372:9 482:18 519:21 591:23 592:18 666:18 680:10,13,19 681:10 689:16 691:9 727:11 789:12</p> <p>exterminate 483:15 725:13</p> <p>extermination 377:2 483:11 655:16</p> <p>exterminatory 207:25 239:13</p> <p>external 285:8 357:21</p> <p>externally 809:8</p> <p>extra 168:7</p> <p>extraction 506:23</p> <p>extraordinary 245:9,23 371:20 384:15</p> <p>extreme 66:6 241:21 242:1,12 360:7 388:25 391:25 594:3 647:17 716:11</p> <p>extremely 40:3 65:25 81:13 221:10 233:10 325:13 672:19</p> <p>extremist 195:17</p> <p>extremists 623:13</p> <p>eye 586:5</p> <p>E-M 162:24,25</p> <p>e-mail 56:8 90:12 92:21 97:15 416:9 438:12 438:16 439:8 469:19 470:2 471:11 472:22 473:21 474:12,18,24 475:4,5,23 482:15 536:11 619:19,20</p>	<p>726:5 809:24</p> <p>e-mails 98:3 438:12,15 475:16 476:7 536:14</p> <p>E-N-G-A-G-E 251:19</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 11:4 74:15 203:23 223:16 404:3 421:6 474:24 489:23 531:22 551:6 625:19 633:7 692:7 733:25 743:25 765:14</p> <p>Facebook 722:4</p> <p>faced 215:15 282:23 712:1</p> <p>faces 810:1</p> <p>facetious 777:25</p> <p>facie 685:6 699:7,9,25 751:24</p> <p>facilitate 734:18</p> <p>facilities 192:16 641:6</p> <p>facing 31:16 403:2 670:12</p> <p>facto 301:21 588:9 721:14</p> <p>factor 377:23</p> <p>factors 190:12 420:20 420:21,22 421:1 671:3</p> <p>factory 203:24</p> <p>facts 12:17 83:12 87:3 91:18 147:18 260:2,4 260:4,7,16 268:1 283:18 311:24 402:21 496:10 564:14,18,20 564:21 617:23 628:7 663:10 683:14 703:18 738:17 764:25 773:10 781:21,25 782:18 794:22 805:13</p> <p>factual 1:17 14:8 83:15 110:9 153:8 155:6,18 169:7 288:4 318:4 348:4 352:25 354:18 429:7,8,9 505:14,17 538:25 686:23 710:25 794:21</p> <p>factually 139:18 561:24</p> <p>fact-finding 330:9</p> <p>Faculty 572:6</p> <p>failed 369:21 624:8 726:4 727:2,9</p> <p>fails 658:1,2</p> <p>failure 536:3</p> <p>failures 349:18 358:9 652:18</p> <p>faint 63:21</p> <p>fair 13:3 30:10 211:7 465:13,23 496:3 598:7 609:1 620:19 643:16 649:19 653:13 687:25 688:10 701:20 702:25 703:16 704:1 704:10 724:4,15 756:10 777:17</p> <p>fairest 808:15</p>	<p>fairly 136:9 141:21 192:24 602:8 623:6 640:5</p> <p>fairness 55:12 128:13 358:14 600:1,4 678:14 680:16 706:17 798:2,6</p> <p>faith 30:13 89:20 122:22 125:21 225:20 226:15,22 232:10,13 233:3,9,13 245:23 339:19 340:11 341:13 436:20 581:19 582:1 582:9,12 585:5 626:16 756:6 766:7 790:15</p> <p>faithfully 646:19</p> <p>fall 156:14 305:9 335:10,12 466:6 467:10 621:3 686:6 686:25 687:9,11,12 687:14 690:12 704:13 733:11 743:14 749:17 756:25 761:24 800:4 803:5 804:11</p> <p>fallen 463:15 746:9</p> <p>falls 692:25 693:3 724:24 749:4 754:21 756:23</p> <p>false 96:4 373:9 400:9 646:13 759:3</p> <p>falsely 253:7</p> <p>familiar 5:20 30:15 33:7 69:17 88:8 103:25 150:9 270:17 509:1 510:10 627:10 654:22 656:18 663:10 664:4</p> <p>families 153:16 159:21 160:11,12 325:6,8 352:19 361:14 404:16 404:17,17 421:14 489:12 506:19 507:3 507:8,10 512:2,13 513:1 514:13,16,18 514:20,23 515:2,9 516:1 594:9 742:4 743:1,17 784:18 789:20</p> <p>family 10:16,17 42:2,7 77:13,14 78:6,7,9,11 157:2 160:10 216:19 218:5 222:17 308:25 312:13 323:17 393:17 403:24 423:7,8 455:2 490:6 512:8,9 514:8 514:11,21 515:3 520:25 740:3,5 742:6 742:20 790:1</p> <p>famous 177:13 228:1 614:17 800:22 806:25</p> <p>fanatical 405:10</p> <p>far 6:25 8:16 13:24 14:6 20:22 46:1 54:12 61:6 68:11 71:13 72:16 83:18 100:7</p>	<p>102:19 116:17 136:16 192:20 194:1 204:19 205:8 224:6 225:9 247:16 269:9,11 303:13 318:3 327:15 390:23 392:23,23 443:12 460:13 479:6 479:8,10 482:22 483:9 495:19 520:9 521:18 538:10 553:20 622:13 637:23,25 661:14 663:18 707:9 742:9 769:1 789:11</p> <p>farfetched 319:10</p> <p>Farming 390:20</p> <p>fascinating 401:7</p> <p>fascism 287:20,23,25</p> <p>fascist 9:7 123:14 124:3 215:5 289:15 343:25 631:6 776:13,17</p> <p>fascists 42:21 280:16 281:5,13 286:16,22 286:25 287:13 344:21 652:9 776:1,8,9</p> <p>fashion 771:2</p> <p>fast 178:13</p> <p>fathers 490:1</p> <p>Fatima 36:12 62:25</p> <p>Faulkner 459:1</p> <p>fault 19:25 665:19</p> <p>favour 269:16 273:18 293:16 361:2 495:1 603:11 636:18 641:20 708:4 760:8</p> <p>favourably 758:15</p> <p>FBI 80:7</p> <p>fear 76:21 82:14 307:11 360:14 807:7</p> <p>fearful 134:24</p> <p>feasible 106:14</p> <p>features 592:8 721:9</p> <p>Feb 59:2</p> <p>February 1:1 7:10 9:5 18:25 33:16 36:9 37:1 56:7 57:20 58:16 59:7 91:6 94:19 110:1 170:24 172:1 277:8 285:1 415:19 429:22 430:1 436:7 438:2 451:15 469:21 470:4 570:21 571:1 684:12 685:1,24 698:3 805:11</p> <p>February's 285:8</p> <p>federation 56:9 90:4,13 91:3 100:23 101:14 107:8,13,24 108:8,15 109:9 114:13 115:16 115:23 161:18 166:14 166:18,20 269:23 272:1,13,20 273:3,22 273:25 274:5,7 288:5 433:1 437:4 442:21 465:20 533:24 534:8 534:18 538:9 651:9 721:23 773:16,25</p>
---	--	---	---	--

774:3 Federations 584:7 Federation's 791:14 feeding 9:10 43:20 44:2 53:5 125:8 488:1 489:5 731:8,14 735:11 feeds 342:6,7 487:20 feel 43:1 48:11 53:17 55:21 70:23 71:4 72:1 74:21 76:8 78:1 79:16 81:10 94:2 107:12 122:15,16 141:20,24 169:24 188:25 205:1 209:8 214:14 216:23 218:1,2,6 219:15 233:16 252:15 343:20 372:9 478:10 508:17 508:18 514:20,24 540:18 551:6 558:11 578:18 626:13 636:24 646:12,14,20 673:4 674:9 684:14 700:11 732:13 806:5 808:12 feeling 49:7 81:14 150:23 177:3,6,10 184:4 222:20 347:4 508:22 634:5,7 751:2 feelings 47:22 58:24 220:22,24 221:3 346:21 387:13,21 388:6,7,21 389:4 495:1 634:1,14,16 798:23 feels 44:10 336:7 372:7 633:12,15 808:9 fees 761:24 fellow 371:13 felt 47:14 49:10,11 50:1 52:1 141:19 147:19 188:9 220:23 221:13 508:20 646:9 799:14 female 550:18 females 353:5 fence 41:4 fester 716:14 fictitious 400:9 fiddling 201:1 fide 13:2 688:1 703:2 704:9 field 18:15 365:23 366:1 367:5 460:14 613:4 615:1,4 623:21 747:21 748:14 763:11 fields 612:9 fifth 102:9 103:2 375:9 399:8 fight 11:12,21 79:4,12 98:18 153:17 158:1 158:15 160:1,13 384:6 408:7 418:4 419:7 421:15 423:9 424:22 506:22 516:2 516:19 517:9 525:11 525:19 526:4,19,23 538:22,23 612:20	743:18 775:9 785:7 785:13 790:15 fighter 434:17 fighters 665:1 fighting 11:13,17 79:5 79:8,21 399:19 433:19 495:10,10 525:19,25 539:17 801:25 fight 159:10 510:18 512:12 figure 66:10,16 80:12 80:18,21 180:23 181:2,3 310:9 466:9 466:11 486:25 721:16 722:6 figures 216:16 221:18 221:24 263:10 540:7 540:8 file 3:4,11,15 27:14 84:4 92:25 93:1,5 172:10 173:6,7,10 264:9,11 275:16,18 275:19,21 276:18 277:25 278:1 310:21 310:23 364:24,25 401:13 409:1,1 430:22 438:22 440:12 440:15 447:9 454:24 471:5,7,8 473:2,9,13 479:20 572:1 587:10 587:14 591:25,25 599:9 627:3 751:4,16 751:18 808:13 filed 5:4 232:20 600:6 files 173:2 364:20 430:21 571:22 750:18 filing 808:8 filled 150:5 filter 726:13 final 3:2 12:8 113:14 230:15 234:25 509:16 696:21 723:8 803:15 804:19 806:14,17 810:5 finalise 169:16 678:13 681:15 finalised 808:22 finalising 682:21 finally 12:14 14:7 98:25 112:24 166:21 175:18 360:20 366:9 368:14 376:20 377:1 386:2 445:14 670:9 690:13 743:20 746:10 806:24 financial 8:1 603:23,25 finder 412:23 finding 13:23 19:8 23:8 23:10 182:2 183:16 323:14,16 412:17,25 418:22 495:3 650:9 696:25 697:7 699:7 755:10 762:9 763:6 765:2,19 793:19 804:14 807:13 findings 14:5 20:5	23:17 221:6,8 697:24 697:25 698:5 finds 49:15,20 312:4 343:10 728:7 746:1 756:11 799:24 fine 103:15 162:10 230:5 348:22 422:8 506:8 540:1 662:21 808:14 finish 1:13 86:22 170:8 422:7 429:11,15 516:17,18 568:7,8,10 568:13 569:14,24 596:21 662:2 680:18 681:3,4,6 682:8,19 750:20 794:9,13 finished 110:7 176:2 569:25 681:24 712:4 finishing 662:17 fire 123:7 301:23 302:1 657:6 firmly 101:9 270:1 774:14 firstly 150:9 210:20 228:4 243:1 264:18 306:3 445:2,5 491:3 505:13 576:19 690:16 715:2 725:1 746:12 798:7 fit 10:10 138:5 169:17 216:9,10 407:15 560:8 fits 761:18 fitted 184:24 five 275:23 569:23 586:8 614:8 fix 357:17 flag 41:18 493:9 flags 67:20 119:24 flatly 650:3 flawed 152:12 249:3 635:12 fled 297:8 309:11,22,23 312:10 fledgling 729:13 flee 380:18,20 fleeing 216:22 flight 110:14 167:14 169:1 256:17 257:6 363:20 380:4 442:3 flights 442:6 flip 9:24 493:7 floor 444:18 flow 14:23 575:6 flowed 34:6,22 flows 213:3 fluctuates 59:16 focus 89:10,21 186:5,6 191:23 237:21 240:11 287:2 333:10 351:8 401:11 416:17 444:23 499:18 504:8 505:1 512:23 514:10 520:16 520:23 541:8,9 545:24 574:7 612:2 612:19 703:14 724:17	746:18 764:3,5 790:18 796:15 focuses 89:14 292:2 focussed 33:1 183:4 695:8 783:17 focusses 338:19 follow 24:4 90:20 131:22 135:21 141:23 197:1 207:3 274:23 274:25 294:11 303:20 385:5 426:24,25 427:3 524:16 582:3 584:1 598:5 601:4 613:6 681:7 687:12 711:24 724:7 728:11 730:12,12 739:19 745:18 800:2 807:18 followed 330:8 354:19 411:18 653:20 665:12 690:2 follower 89:25 92:8 278:14 647:14 followers 59:20 380:14 381:3 following 10:15 77:12 151:3 189:8 196:22 198:7,21 269:25 339:7 350:3 351:13 442:24 455:1 512:7 514:7 525:10 568:5 582:5 687:24 725:1 740:2 746:7 758:2 762:12 766:9 follows 46:10 187:17 214:21 246:3 280:16 322:21,22 352:18 357:14 641:12 703:23 740:2 757:10 771:12 775:10 799:8 follow-on 381:19 food 29:14 103:8 145:17 261:12 271:5 foodstuffs 591:17 fool 340:12 foot 223:11 football 346:10 495:4 footnote 719:13 786:7 fora 175:5 force 10:18 23:11,17 77:15 78:5,21 102:18 105:14 106:8 166:23 204:12,14 268:11,15 298:10 302:7 329:4 329:12,21 387:2 399:23,23 404:1 422:11 455:3,5,7,9,11 455:25 456:17 504:9 512:10 515:4 549:21 560:15 581:5 589:15 590:23 594:10 653:6 672:3 721:10 740:6 740:12 776:6 790:10 forced 36:17 215:2 298:20 343:22 416:3 488:20 556:3,6 590:12	forces 268:8 279:13 384:3,7 399:18 404:5 408:8 418:4 419:7 421:16 423:3 495:12 forcibly 669:1 fore 193:3 foreign 36:11,12 89:7 89:11 103:9 154:3 157:12,14 271:6 369:5,10,12 370:11 455:13 464:2,3 467:2 509:1,8,18 510:5,12 510:17,18 511:23 512:20 513:2,7,21,25 514:3 585:3 594:19 594:21 669:10 702:20 716:12 740:25 741:10 741:18 742:5 foreigners 184:4,8 186:7 foremost 433:16 435:13 475:11 foresee 47:12 forever 337:20 forfeit 590:12 forget 783:18 forgiveness 383:5 form 13:8 78:10 181:17 183:1,20 190:22 203:13 210:3 223:9 329:16,23 332:9 449:10 450:3,4 562:15 577:11 579:11 579:13,14 634:13 640:3,12 645:11 647:9,25 652:13 692:7 742:12 775:6 782:3,4,4,5,8 802:16 formal 583:2 684:11 796:23 810:6 formally 199:19,21 307:17 330:21 658:13 670:2 formation 29:25 496:22 604:1,10,21 formed 595:18 604:12 783:18 former 240:13 376:17 forms 94:23 129:11 131:11 156:14 178:23 181:10,15 182:12 189:1 212:9 322:17 335:9 350:5 435:12 435:24 454:15 553:4 553:7 554:8,18,23 574:5 578:4 579:21 585:22 717:4,8 753:7 802:11 formulation 797:8 forth 44:23 104:11 163:6 256:17 336:19 370:15 375:20 376:5 379:19 382:10 386:19 390:12 421:7 425:5 435:1 521:8 718:13 787:15
---	---	--	---	---

<p>forthcoming 176:5,14 fortified 55:21 fortunate 394:11 615:10 fortunately 18:21 614:23 650:25 forum 28:9,11 31:6 152:6 466:22 497:7 742:23 forums 454:15 461:17 566:24 forward 58:10 78:24 127:19,22 151:4,4 350:4 401:5 428:5 739:12 forwarded 476:7 fostering 715:7 fought 423:3 455:20 551:22 786:14,14 787:9 found 106:24 148:24 157:25 177:14 185:2 208:23 216:20 218:9 221:18 233:15 244:25 245:14 294:13 310:16 343:16 369:14 376:16 383:21 391:15 393:25 495:22 496:19 506:10 592:9,10 598:10 703:12 705:2 709:2 712:23 717:1 726:7 728:21 758:22 760:12 760:13 761:14 788:17 793:2 foundation 766:1,7,20 foundational 689:7 foundations 733:9 founded 230:17 338:24 founding 3:5 8:25 80:15 239:14 267:22 795:1 four 16:6,24 220:20 258:3 275:23 378:17 384:23 396:17 398:3 416:17,17 420:22 421:1 426:14 446:18 605:24 606:7 670:22 721:9 756:4 757:10 770:14 804:12 fourth 295:12,14,16 374:24 456:20 783:2 790:21 fourth-year 150:7 framed 599:2 framework 14:1 191:4 308:1 630:6 649:13 718:18 France 220:13 399:18 575:8 623:5,9 655:22 frank 419:18 frankly 427:2 598:7 802:12 Fraser 254:12,19 255:5 fray 115:17 773:19 freaked 81:14 free 80:5 123:16 227:25</p>	<p>262:3 279:9 288:11 288:17 295:4 308:20 314:19 339:11 361:24 392:24 407:21 415:22 416:1 419:22 457:13 458:21,22 463:18 526:10 548:23 559:20 559:23 560:14,19 575:16 626:20 650:22 709:5,8 726:21 728:2 728:22 freed 552:13 freedom 13:10 57:9 306:1,9 307:25 308:7 308:7 314:3 361:22 452:21 453:24 454:11 454:17,18 458:9 459:10,18 485:5 533:8 589:22 590:9,9 626:1 628:19 631:23 632:10,11,16 670:15 674:21 688:21 689:2 689:6,10 693:12 694:12,15 718:6,7 722:24 728:23 729:1 730:9 733:15,22 756:18 758:8,13 759:16 761:20 762:16 freely 262:12 306:13 458:4,10 732:25 759:13 French 185:24 614:16 614:19,21 623:3 frequent 432:3 437:5,5 frequently 378:7 385:18 580:8 674:8 friction 693:25 694:11 Friday 128:20 169:10 442:2 470:8,9,16 528:23 567:23 568:17 570:7 662:3 681:9 Friedman's 746:11 Friedman's 231:18 232:18 235:10 596:25 597:4,8 598:10,21 599:2 749:4 friend 9:8 17:4 18:8 22:4,16 24:8 42:22,25 44:7,18 50:16,17 51:14,22 94:5 123:15 124:14,24 155:10 165:12 167:21 168:20 170:4,10 215:6 282:7 283:11,18 284:6 286:17 287:25 322:6 343:25 363:24 368:21 398:7 410:10 423:12 444:19 448:6 452:1 480:3,10 501:25 568:21 593:14,17 599:7,19,24 661:11 662:20 725:10 726:14 752:25 755:15 756:9 767:10 776:2 777:3 777:19 778:8,16 781:12 786:25 794:15</p>	<p>795:10 799:6 801:17 807:1 friendly 796:16 friends 43:13 77:23 93:24 127:14 280:17 281:5 286:23,25 287:13 324:22 372:8 372:8 388:5 423:2 459:3 559:1 687:22 692:15 722:3 724:4 776:9,10 friend's 15:17 791:16 803:22 friend's 750:2 754:16 768:7 fringe 225:3 397:1 frivolous 806:19 front 16:16 57:12 68:6 92:25 112:10 113:13 142:14 156:12 194:15 262:1 264:9 354:13 364:20,23,25 393:17 401:13 416:15 419:1 427:10 430:23 552:11 571:21 587:1,23 787:12 796:7 fruits 590:24 frustration 150:24 frustrations 387:13 fuel 103:8 271:6 fulfil 466:25 fulfilled 406:6 fulfilling 805:23 full 25:7 26:19 65:16 68:18 152:9 169:14 169:23 172:16 185:13 238:17 239:6,10,19 240:5 308:6 326:23 364:5 374:17,19 378:5 430:7 446:5 450:8 569:4,13 571:7 586:1,1,20 592:19 658:11 699:12 700:13 711:2 778:17 796:4 fullness 10:8 fully 109:6 450:1 451:13 481:23 613:13 689:18 699:19 714:12 738:8,13 806:8 fully-fledged 700:4 fulsome 569:4 function 377:17 805:19 functional 200:8 functionally 329:8 functions 6:9 432:23,23 432:25 Fund 162:4 fundamental 194:13 330:13 714:8 775:20 fundamentalist 335:1 fundamentally 308:10 345:13 357:23 funding 605:7 funds 691:15 792:9,10 805:15 further 536:7</p>	<p>future 308:1 723:20 F-U-T 163:14,15</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gain 8:1 gas 204:3 gathered 62:25 gathering 52:24 Gautrain 168:2 Gaza's 262:14 geared 723:1 Geffen 165:3 gender 5:25 664:23 692:21 717:18 757:7 757:20 764:2 766:19 766:21 general 36:4 58:23 59:10 62:6 75:4 94:8 133:13 201:3 204:14 210:8 223:8 226:1 251:4 274:8 347:1 369:10 411:15 433:6 439:21,23 441:22 449:15,24 452:2 462:7,8 463:11 467:14 469:5,9,10 484:9,12 497:10 518:14 519:2 532:3 540:16 587:3 640:24 703:21 713:8 722:19 739:17 757:2 761:16 761:19 767:2 770:21 783:11 generalisation 648:1 generalise 443:16 generalised 742:15 generally 61:24 63:13 64:6 75:18 131:17 156:8 181:11 202:4 298:5 343:1,3,4 356:17 393:25 411:14 432:25 442:9 467:23 476:9 487:9 586:10 596:12 670:15 748:16 generis 52:6 generous 637:25 genesis 5:11 Geneva 295:12,15,16 554:14 genocidal 267:21,22 323:8 391:9,16 396:14,19 genocides 319:13,14 367:19 368:9 371:4 372:18 375:18 376:12 378:7 398:2,3 gentlemen 64:16 genuine 547:25 geographic 75:19 745:5 geographical 58:11 74:18,20 644:14 731:12 geography 27:22 508:23 geopolitical 14:5 19:4 257:25 605:11</p>	<p>George 796:13 German 163:20 175:8 184:22 605:6,17 germane 24:1 Germany 42:6 43:9 122:6,10,15 166:5 204:19 248:15 376:2 387:6 621:21,22 642:19 655:5 Gestapo 80:8 gesturing 57:1 getting 69:2 230:14 257:3 309:17 311:24 340:11 375:8 393:24 550:11 getuie 285:2 GH 397:9 ghastly 378:7 ghettos 376:22 giant 614:20 gift 357:7 gifts 524:19 525:1 gigantic 105:17 gild 108:21 gist 452:11 751:9 given 16:8,22 20:19 35:3 46:21 60:13 96:21 98:11 128:12 168:12 220:21 222:25 226:6 227:15 239:7 247:15 277:15,18 385:25 448:7 489:13 501:9 510:9 511:21 515:8 543:16 586:20 593:16 595:6 599:14 603:10 612:8 632:18 641:13 667:15 688:15 697:4 699:1 719:4 720:6 723:5 726:21 730:6 741:11 797:18 798:19 800:15 gives 5:14 223:4,4 243:3,4 244:6 599:13 634:22 635:18 681:13 694:14 769:17 giving 84:23 362:15 433:1 452:24,24 457:6 474:21 489:9 539:7 544:20 585:25 654:7 684:4,5 701:5 712:22 741:25 glad 464:8 525:3 gladly 751:4 glancing 224:16 glean 804:18 Glenn 39:13 Glenn 228:2 glibly 709:7 global 129:8 194:18 198:8,9 345:10,23 433:2 455:9 553:6 554:17 696:11 globally 454:12 522:3,4 gloss 12:8 glossed 237:14 goal 105:12 225:22</p>
--	--	---	--	---

618:13 624:16 708:24 God 27:3,4 183:7,8,11 364:14,15 401:25 430:16,17 571:16,17 576:5 Goebbels 373:6,11,12 goes 10:5,13,21 11:23 17:17 22:10 111:7 146:7 156:10 159:9 159:14 176:24 183:8 205:2 238:4 242:11 377:9 404:2,23 405:3 418:11 445:14 478:22 516:25 526:7 562:8 563:21 619:23 625:11 633:5 652:7,8 654:2 683:18 684:10 715:21 733:4 739:18 742:9 742:24 749:2 755:24 786:18,21 796:19 797:3 Goldman 201:1 Goldsmith 174:8 228:21 Goldsmiths 228:24 265:15 Goldstone 521:15 good 84:18 176:4 219:15 220:16 230:24 245:23 274:11 360:8 366:20,21 378:17 384:11,11 386:15 387:5 388:20 389:5 389:11 392:25 393:5 393:12 409:3 413:22 420:6 426:3,8 493:10 537:20 582:12 603:18 651:3 655:20 742:4 753:13 Goodness 363:1 goods 261:12,22 262:4 262:5 442:22 443:1 591:12 783:6 goose 327:20 gosh 388:4 gospel 382:25 383:14 gospels 383:15 governance 605:6,17 government 30:8 36:3 58:22 101:9 106:13 189:19,20 191:19 195:7 199:21 214:20 222:19 268:8 269:19 270:2 271:25 273:4 273:15 287:16,22 293:9 304:16 307:17 329:15 330:24 331:8 331:12 344:19 345:7 345:15,16 346:5 347:23 361:9 362:6,7 362:9,18,21,22 368:17,18 397:23 398:2 399:21 413:8 413:13 420:2 435:25 455:18 464:15 478:12 537:5,9 552:14	583:18 589:14,15 660:9,16 668:15 701:8 779:13 governmental 392:14 governments 198:19 227:16 247:13,23 295:10 296:9 298:5 362:23 464:4 465:2 485:25 486:1 667:15 667:21 government's 273:5 287:10 graffiti 660:4,4 grandmother 42:5 214:17 grant 454:17 grapple 689:15 700:21 grappled 748:8 grave 715:4 graves 366:8 great 13:17 60:24 69:17 69:19 84:7 85:12,14 120:7 180:22 208:20 214:17 317:12,22 358:7 369:20,20 382:8 384:13,14 428:1 508:18 595:5 619:6,22 623:16 636:25 649:17 652:2 688:14 690:17 733:7 767:14 777:24 greater 6:25 13:25 102:25 234:13 306:1 386:19 494:13 605:11 611:4 613:22 618:25 700:24 721:10 736:10 greedy 184:9 Greeks 399:12 green 300:10 301:12 588:4,6 Greenwald 228:2 greeting 141:8 Gregory 364:4,7,15 596:3 ground 12:6 45:19 47:18 54:19 56:7 91:4 91:13 116:2,13 230:21 276:5 522:10 522:25 523:1 555:4 734:6 766:5 776:23 grounds 5:23,23 17:4 44:24 45:4,13 51:12 231:8 237:24 576:1 580:13 600:16 687:24 704:15 744:21 757:10 765:24 766:2 grouping 54:2 458:16 567:8 644:14 702:11 705:14 733:10 743:16 groupings 20:19 458:21 483:25 508:9 644:13 701:5,6,13,16 groups 28:12 34:3 37:7 66:11 353:21 354:2 379:13 436:20 441:2 441:4 456:13 457:14	461:18 462:6 505:4 506:14 516:19 541:6 563:2 590:17 593:9 593:11 602:21 603:1 646:13 656:11 659:7 692:3 701:19 704:23 705:3 715:3,8 717:13 Grove 11:2 39:4,8,10 74:13,19,25 91:22 92:2,5 128:18 164:17 457:19,20,21 459:1 470:21 471:15 527:9 527:10 531:20 532:19 532:25 533:3,21 534:5,7,12,16,21 536:24 537:13 538:7 539:1 651:7,8,12,13 715:14 743:23 744:10 744:13,21 745:9 791:4,7,12 growing 105:1 674:22 grown 590:19 growth 729:17 guarantee 218:8 guaranteed 670:16 674:21 guarantees 248:20 548:24 560:14 756:17 guarded 548:16 767:17 Guardian 294:21 603:25 guerrilla 131:8 guess 66:18 272:4,16 402:14 462:23 675:14 guessing 272:10 guest 31:15 441:22 guidance 332:7 guide 104:24 637:10 guided 798:17 guideline 634:23 718:24 guidelines 718:19 guiding 702:20 703:21 748:13 749:8 guilt 723:18 guilty 205:5 636:24 647:25 728:2 742:19 742:21 760:13,13 761:14 765:15 guise 8:8 gun 375:14 guns 457:22,23 guys 33:4 42:19 278:9 278:10,20 gypsy 483:24	333:1,2 399:11 569:7 679:16 681:5 683:8 751:9 halfway 646:25 hall 65:13 69:17,20 76:20 108:14 443:11 674:3 Hallam 176:6 halt 425:15 halted 500:14 Hamas 35:25 101:10 102:24 239:10,14 260:25 261:1,15 268:8 270:3 273:14 304:4,8,10 313:22,23 314:8,9,12,14 335:20 362:10,10,12,14,19 660:11,15,17,20,24 660:25 661:7 664:25 hand 4:3,24 27:3 82:9 111:15 172:7 189:21 189:21 241:19 250:16 272:13 281:2 285:11 285:18 289:20 294:1 294:3 300:22 314:1 338:6 364:14 395:21 430:16 437:7 571:16 685:8 694:10 726:24 730:9,10 734:23 807:18 handed 44:19 703:11 751:15 handle 84:24 442:22 443:1 handling 808:24 hands 21:2,6 428:15 680:9 handy 572:1 hang 196:21 hanging 217:15 happen 2:17 59:1 60:6 60:9 61:11 71:5 110:9 193:25 324:12,14 369:3 370:16 372:12 427:6 444:22 450:6 518:1 548:9 553:9 589:12 620:3 632:9 649:14 659:2 671:23 672:1 730:5 742:16 746:4 781:15 782:10 784:7,15 790:1,2 happened 34:23 36:1 38:17,19 95:17 116:19 120:22 122:5 138:24 198:13 217:16 248:11 262:23 270:7 301:10,25 302:2 316:13 317:2,3 319:17 359:9 426:23 436:6,7 443:6 444:14 449:14,23 451:14 453:19 457:2 519:4 529:23 590:17 591:7 605:19 622:21 638:17 666:4 668:23 674:7 705:20 723:2 732:8	happening 18:15 34:2 36:18 53:9 59:4,24 60:8 61:13,25 83:18 121:8 122:4 269:13 358:13 459:13 485:7 514:18 552:10 749:12 happens 10:19 77:16 78:12 82:4 109:19 129:5,9 157:4 169:25 317:6 341:9 350:3 358:16 372:14 382:15 404:1 450:7 453:16 512:11 515:5 521:1 540:23 601:23 602:8 624:21 655:7 674:7 700:11 740:7 742:11 743:7 745:19,20 789:17,25 happier 251:4 408:2 happily 359:5,5 happy 134:19 140:24 189:4 190:16 207:24 310:8 481:7 524:21 621:3 629:6,8 682:11 753:20 harass 75:3 harassed 254:23 harassment 6:19 harassments 698:19 harbour 227:14 667:9 hard 76:25 108:25 418:21 656:17 harder 98:3 hard-hitting 152:11 harm 11:6 72:9 76:3,17 177:17 396:10 406:7 408:3 531:2,4,7,24 692:21 693:5 704:23 707:2,5,8,24 709:14 709:16,18 714:25 715:2,2,22 716:21 717:2,6,8,8,10,19,23 731:16 735:13,18,19 736:7 739:16,19 742:12,13 744:2 745:13,17,23 746:7 764:3 harmed 705:23 731:13 harmful 703:7 716:21 717:2,7 731:2 735:6 739:15 757:13 764:8 780:16 harming 195:16 harmony 426:6 harms 715:7 Harold 606:5,25 608:11 harsh 153:3 281:12 307:9 313:14 harsher 249:15 Hart's 761:23 hasn't 150:16 426:20 594:17 755:21 hasty 762:20 hat 150:15 hated 50:1 757:21
H				
	habit 720:9 Habyarimana 376:18 391:14 hadn't 98:10 668:24 haggling 674:4 Haim 266:1 Hajag 36:12 63:1 half 111:6 162:13 185:18 313:9,10			

<p>hateful 144:11,20 372:3 379:20,20 389:9 393:13 395:4 407:24 412:18 414:22 425:19 648:3 699:9 709:23 hates 178:2,2 337:13 761:14 Hatfutsach 163:9,19 hatred 17:1,12,13,24 20:21 45:1 49:22,25 142:9 143:17 144:17 177:18 178:21,22,24 192:12 224:4 227:14 240:13 371:21 384:15 386:9 395:8 427:8,11 574:23 577:4,12 596:14 601:25 623:23 641:2 647:8 667:9,11 671:11 692:20 693:4 697:16 703:8 716:22 717:11,13,18,22 726:23 729:5 731:2 735:6 736:8 754:8,14 754:21 755:5 756:8 757:11,17 764:1,9 771:19 780:16,19 787:8 791:23 hatreds 385:13 haven't 15:19 93:16 94:15 101:3 148:7 246:15 253:3,4,5 289:19 327:13 333:11 352:17,18,22,23 570:13 610:21 616:10 616:24 641:17 664:22 665:11,12 668:24 670:6 675:10 739:21 Hazel 39:13 head 53:23 66:18 73:4 73:5 263:7 432:17,24 463:24,25 465:11,19 465:22 469:3 496:13 586:10 721:19 722:4 774:2 heading 89:2,4,14,15 112:7,11 113:1 114:3 189:6 223:24 247:4 585:13 718:15 795:18 headquarter 535:9 headquarters 317:4 533:23 534:7,20,22 534:25 535:2 651:9 heads 111:20 255:4 568:6,22,24 569:1,8 569:11 570:1 678:10 679:16,19,24,25 680:2,4,10,15,23,24 681:11,15,21 682:22 683:24 685:9,12,16 687:22 689:24 690:6 691:12 695:5,17 698:21 702:15 704:17 714:22 716:20 734:15 734:24 735:2 750:2 751:4,9,16 752:18 754:9,10 756:2,14</p>	<p>765:22 768:9 783:13 788:11,15 790:21 796:2 800:22 808:9 808:13 810:9 health 322:4 hear 13:17 22:19 47:5 48:7,18 79:22 82:11 108:24 127:4 157:15 231:9 235:1 288:12 288:14,15 366:21 377:24 391:15 403:1 406:23 420:24 421:2 424:2,5 435:3 437:9 452:25 453:4 467:21 598:20,23 601:12 603:10 616:3 668:11 671:7,14 685:4 698:12 729:17 734:3 773:3 793:14 806:11 heard 16:24 23:5,7 40:17 70:23 71:25 74:19 76:7 79:16 81:9 96:11 115:23 154:2 154:20 180:7 251:11 267:10 314:22 355:18 355:18 364:1 365:21 376:15 403:16 411:21 433:12 444:17 484:19 484:21,23 498:8 506:11 508:2 519:18 544:18 570:1,2 580:8 648:18 673:8,11 674:2 696:4 719:10 736:25 772:10 774:19 776:24 777:23 779:4 792:15 793:18 hearer 710:11 hearing 48:14 108:25 129:21 484:22 519:5 535:11 671:7 681:23 700:4 719:13 734:18 753:23 807:10 hears 48:5 385:9,11 713:20 720:18 hearsay 85:23 heart 291:25 434:11 heated 83:16 674:16 heating 611:25 heavily 234:19 688:16 696:14 733:15 Hebrew 94:7 297:20 343:15 607:5 611:11 heck 789:6 heckle 674:12 heckled 497:22,22 498:4,5,6,9 500:8,20 500:23 501:1,19 502:9,13,14 736:20 736:22 737:8,17 738:2,18 hecklements 82:9 heckler 498:10 789:7 hecklers 82:6 83:11 737:6 789:6 heckles 545:9 heckling 69:2 82:1,4</p>	<p>83:7,12,23 139:9,10 139:18 450:5,7 498:11 500:12 501:10 502:16 503:19 737:15 737:18,18 788:23 hecklings 457:3 498:8 501:25 528:15 hectoring 71:3 height 643:25 658:19 659:21 heightened 35:14 60:12 heights 77:7 351:14 550:25 heil 139:25 140:7 141:8 151:5,14 314:25 316:3 778:4 heinous 416:4 held 9:18 46:8,9 47:9 64:5,7 66:19 91:21,23 92:1 242:4 268:22 363:4 441:15 488:5,8 491:22 510:12 552:24 554:12 575:1 611:14 619:1 666:1 696:16 714:7 715:18 721:1 736:18 753:6 762:19 796:14 hell 9:22 70:16,22 71:22 72:8,14 447:2 451:20 490:25 736:16 737:21 739:2,9,11 739:13,18,20 788:10 788:13 hello 315:22 help 27:3,4 94:22 137:21 192:24 196:14 196:19 197:17 198:23 199:5 243:10,12 245:10 258:9 295:14 322:10,13 332:15 364:14,15 370:11 382:21 410:19 430:16 430:17 505:25 506:4 571:16,17 587:14 588:3 711:22 769:8 774:5,11,11 helped 368:11 helpful 231:12 281:10 283:7,7 748:13 768:22 769:17 helping 317:9 360:15 helpless 400:1 helps 136:2 198:15 240:19 335:5 577:10 Herzl 349:24 hesitate 362:8 hesitation 767:11,14 hey 4:10 91:5 110:5 296:7 309:17 670:5 672:5 762:24 774:19 774:20 787:20 806:10 808:19 Hezbollah 239:15,19 he'd 92:16,16 he'll 110:15 he's 15:2 44:8 54:16</p>	<p>65:5 76:17 81:20 91:16 141:15 144:23 145:15,17 155:5,11 178:7 242:18 246:14 257:11 266:5,12 278:14 324:23 335:25 336:1,24 339:2,3,5 340:21,22,23 341:1,2 343:16 352:2 417:22 417:24 423:7 452:23 452:24,24 543:13,25 547:12 578:12 614:17 614:20 626:12,14 632:5,6 633:25 635:1 637:9 667:24 668:1 726:17 742:8 743:8,9 746:13,20 748:6,8 776:3,15 789:10 he'll 168:12 HF 777:12 hi 33:4,5 42:19,19 123:13 278:9,10,19 290:3 775:25 hidden 788:1 804:16 hide 212:5 380:18 539:19,20 541:19 545:23,25 547:5 803:21 809:4 hierarchy 689:1 high 6:24 35:6 39:25 171:1 609:16 610:12 699:5 707:1 748:8 753:14 765:17 796:4 797:1 Highlands 651:13 highlight 716:4 752:18 highlighted 94:17 95:20 101:5 117:11 highlighting 34:17 highly 38:15 60:15,16 78:14 82:14 84:4 85:19 117:1 152:13 227:12 331:20 340:20 505:12 621:12 622:14 622:18 636:21 638:3 653:4 667:7 746:23 hindsight 359:5 Hirsch 14:15 232:17 255:16 Hirsh's 227:10 242:17 242:20 244:23 283:7 294:1 573:17 576:16 577:20 579:24 582:5 582:14 628:10,21 629:5,7,14 631:12,14 633:2,8,21,25 634:18 634:24 646:4 667:5 Hirsh's 583:21 584:18 585:14 599:3 649:8 651:24 historical 20:3 163:24 163:25 257:25 260:7 260:16 268:1 410:8 410:20 411:11 661:5 696:14 722:21,23 723:6 779:1,18</p>	<p>historically 87:21 181:24 182:5 692:2 history 76:10 83:4 164:1,10 183:3 186:13,14,15 198:24 226:6 260:13 296:23 345:11 356:2 367:19 421:5,6 425:22 551:15 579:17 581:4 583:4 613:11 621:20 652:20 666:23 733:3 770:21 803:18,23 hitlerite 323:13 631:6 Hitler's 655:15,21 hitting 232:23 HIV/AIDS 612:8 HOF 285:2 hold 6:17 84:23 121:19 124:11 130:10 210:10 210:20 313:19 432:20 488:5,9 591:18 797:14 holding 6:14 209:24 210:14 Holdings 691:8 holds 81:19,19 210:11 210:17 465:10 601:24 648:18 759:11 hole 151:6 holiday 59:23 holocaust 42:2 43:6 120:15,23 121:9 122:17 190:23 195:2 199:15 248:11 278:6 329:13 376:9 384:16 484:6 485:13,13 547:24 548:1,1 Holochem 162:4,5,18 holy 297:25 home 85:19 207:14 358:20 490:6 680:15 810:3 homeland 347:16 homelands 358:16,19 376:23 homogenous 264:20 honest 207:24 303:8 313:19 320:2 617:11 honestly 178:25 277:20 honesty 229:6 582:11 honeymoon 413:23 honour 403:8 412:23 424:20 428:1,1 529:20 535:21 543:23 544:3 548:3 honoured 554:15 hope 109:19 170:24 220:15 281:3 360:16 416:25 427:5 615:15 791:17 hopefully 109:17 185:12 207:9 250:15 307:23 379:24 428:25 794:8 hoping 41:7 168:5 horrible 389:1 779:5,9</p>
---	--	---	--	---

<p>horror 489:14 490:4 545:23 547:2 558:25</p> <p>hospital 163:6</p> <p>hospitals 359:23</p> <p>host 441:20 535:3 720:4 733:2</p> <p>hostile 34:4 186:11 188:14,15,17,17 215:10 216:2 220:9 221:10 223:18 236:1 236:23,25 325:13,13 325:14 674:3</p> <p>hostilities 105:21 193:6 411:3 660:20</p> <p>hostility 176:17 177:7 177:10 187:19 188:8 188:8,24 189:1,1 191:5 194:5,10 212:4 212:6 221:12 255:22 361:6 410:2,7,8 630:7 647:3 762:21</p> <p>hosts 615:12</p> <p>hotly 801:5</p> <p>hour 55:11 333:1,2 372:24 449:24 492:1 662:25</p> <p>hours 167:15 569:6,7 586:9 683:10</p> <p>house 161:17 164:8 435:16 443:12 535:2</p> <p>housed 164:2 744:17</p> <p>housekeeping 2:5 3:24 4:14 111:14,19 172:4 285:6 364:19 685:8 808:16 809:6</p> <p>houses 562:18</p> <p>Howard 364:7,15</p> <p>huge 183:7 805:6 806:9 806:10</p> <p>hugely 653:17</p> <p>humanitarian 105:23</p> <p>Humanities 572:6</p> <p>humiliated 586:9</p> <p>humiliates 715:5</p> <p>hundred 65:15,17 580:16</p> <p>hundreds 53:25 425:25</p> <p>hung 63:12</p> <p>hurry 496:18</p> <p>hurt 81:14 762:17 798:22</p> <p>hurtful 17:20 703:7 716:21 717:2,5,10 731:1 735:5 739:15 754:18 755:1 764:8</p> <p>Hutu 389:25 390:10,21 391:5,19</p> <p>HW 732:10</p> <p>hyped 40:9</p> <p>hypothetical 318:1 542:17 697:11</p> <p>Hyundai 691:2,3,4</p> <p>H-A-T 163:12,13</p> <p>H-O 162:18,19</p> <p>H2O 638:10</p>	<p style="text-align: center;">I</p> <p>Ibhunu 699:9</p> <p>Ibunu 626:24 644:25</p> <p>id 391:4,9,18 624:16</p> <p>idea 41:20 53:25 57:7 67:17 77:19 84:15 92:18 127:15 137:24 183:7 184:9 186:6,8 190:3 209:7 235:24 236:6 237:22 238:6 243:4 248:21 249:12 274:18 297:3,4 315:4 340:4,6,7,8 341:6 349:19,21 350:1,2,5,8 350:16 351:4 375:3 400:11,14 446:8 457:18 498:13 500:4 546:22 584:8,14 592:13 596:13 639:16 640:2 652:4 657:23</p> <p>ideal 652:19 700:19 733:24</p> <p>Ideally 517:24,25</p> <p>ideas 190:1 199:11 214:12 231:20 317:10 338:14 347:9 526:10 639:18 715:21 731:20 758:14</p> <p>idem 4:15,19 50:18 725:11</p> <p>identical 291:19 676:25</p> <p>identification 181:6 190:15</p> <p>identifications 242:19</p> <p>identified 134:25 230:10 374:3 379:4 398:17 534:19 576:22 611:4 716:13 737:4</p> <p>identifies 373:25 698:24</p> <p>identify 64:15,16 72:19 114:1 137:21 197:7 244:24 245:11 272:5 272:6 345:6 384:20 391:18 500:13 527:14 577:11 629:4 748:1 804:4</p> <p>identifying 71:12 176:24 179:7 243:1</p> <p>identity 215:25,25 216:1,14,24 219:5,13 219:17 221:12 222:13 255:11,21 343:16 384:24 611:17</p> <p>ideological 87:22 234:14 644:16 647:16 744:21 776:11</p> <p>ideologies 405:23</p> <p>ideology 20:2 49:17 87:16 124:4 145:18 146:18 195:16 203:22 214:7,11,19 219:23 235:17,20 240:15 241:18 246:8 338:19 478:18,19 575:18 584:4 644:8 645:21</p>	<p>726:24 744:15 758:3 769:23 771:12,13 777:16 780:14</p> <p>IDF 325:7 455:19 504:15,21,22 505:4,8 505:13,15,18,20,24 506:2,6,6,13,22 507:12,18,25 508:10 508:13 512:12 513:16 513:22 514:5,14,22 515:12 516:2,9,14,20 517:10 519:24 520:8 520:25 521:5 656:4,7 740:15,17 741:5,21 743:18</p> <p>IFP 498:16 541:1</p> <p>ignorant 747:13,16</p> <p>ignore 19:10 98:3 403:5 598:21 600:15 662:1 711:21 755:11</p> <p>ignored 151:11 579:15 600:16</p> <p>IHRA 195:1 199:14 200:8</p> <p>II 725:14</p> <p>Ijuda 626:24</p> <p>ill 697:15 736:6</p> <p>illegal 39:21,25 56:11 118:16,18,23 119:4,8 119:10,14 157:8,8,25 158:6 376:15 378:14 421:13 424:21 455:12 594:25 595:1,4 673:15</p> <p>illegally 38:17</p> <p>illegitimate 107:21 248:21 455:10 644:23 785:4</p> <p>illicit 451:25</p> <p>illusion 11:17 79:9 274:7 415:21 526:1 737:24 803:10</p> <p>illustrate 47:19 49:24 478:24</p> <p>illustrates 591:22 778:18</p> <p>illustrating 713:10 767:1</p> <p>ILO 486:1 554:14</p> <p>image 300:20 323:22 548:6</p> <p>imagery 189:24</p> <p>imagination 587:2</p> <p>imagine 37:18 67:6 133:19 265:25 316:20 317:7 496:1 578:17 598:4 656:10</p> <p>imagined 195:20,24 200:13,22</p> <p>imbibe 375:12</p> <p>immaterial 520:2</p> <p>immediate 10:20 41:24 77:16 257:23 288:2,4 404:2 421:17 426:17 512:11 515:6 737:16 740:7 742:11,13,14</p>	<p>742:16 743:7 745:18 745:19 788:22 789:18</p> <p>immediately 3:3 77:17 78:14 86:20 101:5 103:8 106:9 149:2,8 267:3 271:5 442:3 711:5 775:21 776:4</p> <p>immigrate 94:9,12</p> <p>immigrates 347:11</p> <p>immigration 42:6 168:2</p> <p>imminent 396:10</p> <p>immoral 455:12</p> <p>immune 8:12 108:10 709:4</p> <p>immunise 635:14</p> <p>immutable 757:12,18 757:25</p> <p>impact 51:11 53:6 715:7</p> <p>impair 704:24</p> <p>impartial 620:23</p> <p>imperative 729:6</p> <p>imperfect 700:16</p> <p>impermissible 742:17</p> <p>impetus 184:14 322:18</p> <p>implemented 785:9</p> <p>implementing 435:6</p> <p>implements 241:19</p> <p>implicated 254:16</p> <p>implicates 804:25</p> <p>implication 396:10</p> <p>implications 157:14</p> <p>implicit 468:6 524:8,13 713:15</p> <p>implicitly 19:18 475:1 673:20</p> <p>implied 143:1 650:11 714:5 763:9 781:17 788:1</p> <p>impliedly 755:22</p> <p>implies 89:20 692:1</p> <p>implying 780:25</p> <p>import 723:5</p> <p>importance 14:19 180:21 465:12 467:9 689:4 691:21 702:23 704:7 713:9 718:12 721:16,19 722:6 758:8 759:13,23</p> <p>importantly 6:7,21 196:20 201:18 370:6 591:15 691:1 702:21 704:2 705:1 707:3 720:25 742:1 762:11 773:14</p> <p>imported 783:7</p> <p>impose 245:5</p> <p>imposed 216:2</p> <p>imposes 759:24 764:24</p> <p>imposing 644:13</p> <p>impossible 190:1 230:7 444:24 450:6 656:11 664:21</p> <p>imprecise 219:6 643:10 747:21</p>	<p>impress 231:12 744:4</p> <p>impression 89:18 96:4 108:22 109:3 119:25 506:14 711:15 747:13</p> <p>improving 375:7 377:5 378:9</p> <p>imputation 742:12</p> <p>inaccuracy 348:4</p> <p>inaccurate 219:8</p> <p>inaccurately 609:19</p> <p>inadmissible 44:11 597:14 598:12 714:18 768:4</p> <p>Inapplicable 756:12</p> <p>inappropriate 208:8 313:16,18 801:6 805:2,4</p> <p>inasmuch 807:4</p> <p>inaudible 206:17 353:10 407:19 449:18 507:8 559:24 566:8 630:15 691:8</p> <p>incensed 117:20</p> <p>incident 40:11 117:3,4 180:6 197:18 317:2,3 425:10 685:23</p> <p>incidentally 640:24 642:8</p> <p>incidents 34:22 116:16 116:21 198:22 199:4 407:8 622:21 637:8</p> <p>incite 152:14 381:3 716:21 717:2 756:7 780:19</p> <p>incitement 56:22 381:8 395:15,15,16 396:6,8 396:9 692:21 693:5 717:19,23 735:18 745:25 764:3</p> <p>inclination 609:3 801:14</p> <p>include 29:13 127:16 195:13 196:15 200:20 201:22 203:15 356:7 620:25 646:15 771:21 788:21</p> <p>included 37:6,6,6 99:14 99:17 270:5 284:4 772:2</p> <p>includes 24:25 37:20,21 164:11 217:12 225:5 257:23 322:20 410:16 717:7</p> <p>including 36:2 72:4 115:12 145:21 191:18 224:3 245:1 255:24 267:6 322:24 339:20 386:18 435:24 457:14 459:15 464:6 476:19 584:6 626:11 650:18 717:14 723:18 760:25 786:16 796:22 807:9</p> <p>inclusive 202:25 705:17 723:4 733:14</p> <p>incomparably 306:1</p> <p>incompatible 548:22</p>
--	---	--	---	---

<p>incomplete 417:14 530:3</p> <p>inconclusive 770:7</p> <p>inconsistent 666:20 743:12</p> <p>incorporates 709:18</p> <p>incorporation 554:17</p> <p>incorrect 96:4 581:9 584:10 595:21 637:7 696:22</p> <p>incorrectly 102:15 228:9</p> <p>increase 388:23 622:4</p> <p>increased 139:9</p> <p>increasing 456:14</p> <p>increasingly 227:21</p> <p>indebted 18:7 23:19 50:15 52:20 111:17 163:1 209:15 235:8 480:9 544:6 562:4 662:23</p> <p>indefensible 437:12</p> <p>indefinite 660:19</p> <p>independence 214:1 339:15 343:12 617:23 666:13,21,24</p> <p>independent 448:2 491:16 617:2,7,10,11 617:18 757:8 810:2</p> <p>Index 174:1</p> <p>India 348:12,14,15</p> <p>Indian 502:15</p> <p>indicate 86:25 147:18 155:14 510:6 584:24 763:4 781:25</p> <p>indicated 1:21 24:8 84:2 88:4 129:21 166:9,12 167:12,18 322:1 436:18 453:21 454:8 461:15 481:10 492:16 518:8 519:6 529:19 535:21 567:21 579:19 591:7 592:17 592:24 598:18 680:17 681:9 694:16 704:3 735:23 755:13 776:19</p> <p>indicates 582:8 592:23 737:19 765:25 787:24</p> <p>indicating 523:9 803:12</p> <p>indication 75:15 147:23 169:21 318:11 332:20 530:12 782:6 788:23 791:9 802:2 803:9</p> <p>indicative 152:8</p> <p>indicator 446:8</p> <p>indifference 758:16</p> <p>indirect 390:3 403:22</p> <p>indirectly 390:4 521:13 585:10</p> <p>indirectus 802:12</p> <p>indistinct 76:6 77:6 526:7 546:4 550:24</p> <p>individual 47:3 48:16 73:13 193:4 210:7,10</p>	<p>230:11 249:9 375:12 388:8 436:20 478:18 478:20,23 556:1</p> <p>individuals 74:5 192:15 239:23 622:5 641:5 692:2 717:6,9</p> <p>indulged 242:5</p> <p>indulgence 86:11 537:25 661:22</p> <p>inequalities 797:10</p> <p>inequality 702:17 757:15</p> <p>inescapable 784:2</p> <p>inevitable 541:25 593:9 674:19</p> <p>inevitably 202:18 558:2</p> <p>inexpensive 797:5</p> <p>infer 782:21 802:13</p> <p>inference 650:10 737:12 738:16 782:17 803:1</p> <p>inferences 802:24</p> <p>inferior 184:7</p> <p>inferred 765:3 782:17</p> <p>infidel 405:11</p> <p>inflamm 60:9</p> <p>inflammatory 324:5,9 753:10</p> <p>inflicted 103:7 271:4 733:7</p> <p>inflicting 733:8</p> <p>influence 386:5 575:12 809:17</p> <p>influenced 235:24 648:22</p> <p>inform 690:7,9 712:25 718:16</p> <p>informal 796:11 797:4</p> <p>informality 796:18</p> <p>informally 658:17</p> <p>information 12:23 13:4 32:16 61:15 62:25 75:23 165:7 331:6 511:16 518:12 566:8 567:1 656:13 665:5 690:4 704:11 758:14 769:17</p> <p>informed 62:3 152:16 411:11 464:20 600:3 613:14</p> <p>informs 234:14</p> <p>infrastructure 208:3 264:4,6</p> <p>infringe 575:16 581:5</p> <p>infringed 698:20</p> <p>inhabitants 310:4 666:15</p> <p>inhabited 585:25</p> <p>inherent 410:2,7,16</p> <p>inhumane 103:4 271:2 484:9</p> <p>initial 798:13</p> <p>initially 98:24 133:11 185:12 198:3,4 410:23 769:23</p> <p>initiated 92:23 442:22</p>	<p>initiators 732:5</p> <p>injustice 387:14 495:12 497:20 548:5</p> <p>innocence 784:4</p> <p>innocent 781:24 784:9</p> <p>inoffensive 758:15</p> <p>input 4:17 234:10 248:8 683:20</p> <p>inquiries 724:17,19</p> <p>inquiry 6:15,17,21 13:3 15:12 51:1,14 52:3 177:15 207:4 329:18 598:14 600:3,3 686:8 686:24 697:6 700:5 700:17 711:1 714:20 719:1,8,20 721:7 728:10 729:21 756:16 797:22</p> <p>inquisitorial 796:17</p> <p>inserted 112:17</p> <p>inside 40:18 56:23 213:5 369:2 380:17 503:18 674:3</p> <p>insidious 715:17</p> <p>insist 247:14,23 361:17 583:16</p> <p>insisted 674:12</p> <p>insists 580:19 659:3</p> <p>insofar 13:10,19 14:5,7 14:9 20:25 21:16 22:7 36:7 71:6 72:17 78:19 82:20 155:24 166:3,8 192:21 200:4 221:6 234:13,24 462:5,25 464:9 466:15 518:23 521:5 522:9,24 534:5 556:13,15 558:10,11 563:25 566:18 597:20 606:25 664:10 665:7 679:7 695:2 698:16 700:22 703:21 711:19 712:8 722:15 723:11 731:20 740:7,10 753:18</p> <p>instance 50:4 58:1 66:8 76:14 142:24 158:5 211:6,6 233:16 253:23 358:18 374:13 376:2,9 377:11 383:1 383:4 395:11,23 399:5 405:10 406:25 425:17 434:14 436:3 444:17 456:9 463:8 482:7 502:15 521:15 521:23 523:10 560:25 561:10 610:14,15 625:25 626:19 635:25 644:4,20 647:15 671:23 680:13 694:19 701:19 702:13,14 703:22 704:16 716:25 718:14 726:5 728:16 744:18 755:20 787:7</p> <p>instances 14:24 45:18 153:5 232:12 253:16 253:17 467:12 527:20</p>	<p>533:3,12 541:20 608:2 623:13 626:19 632:5,15,20 634:8 647:24 694:8,21 709:21 712:18 714:25 718:9 760:23 785:21</p> <p>instil 736:6</p> <p>instinct 140:12,15,19 140:20,21,22,23</p> <p>institute 21:20 22:13 220:18 605:4</p> <p>instituted 6:16</p> <p>institution 228:22,23 247:6,10 400:7 618:22 804:21</p> <p>institutionalised 560:18 732:23</p> <p>institutionally 177:15 425:21</p> <p>institutions 164:20 177:12 192:16 194:16 250:25 641:6 658:8</p> <p>instructed 435:8</p> <p>instructing 809:1</p> <p>instruction 435:1 567:5</p> <p>instrument 785:7</p> <p>insulting 753:10 776:13</p> <p>insults 470:10,16</p> <p>insurgency 399:2</p> <p>intake 77:18</p> <p>integral 796:14</p> <p>integrity 690:25</p> <p>intellectual 20:2 215:18 215:21 229:2 231:20 745:15</p> <p>intelligence 47:1 719:21</p> <p>intelligent 82:13</p> <p>intelligible 219:14 255:10</p> <p>intend 1:16,22 2:21 3:7 14:8 110:10 169:6 685:15 694:18</p> <p>intended 41:10,11 46:20 49:23 51:8 332:14 333:23 379:25 380:15 386:3 426:10 451:20 593:11 594:1 719:4 725:7,8,23 765:2,19 781:1</p> <p>intending 54:16 81:16 81:20 428:24</p> <p>intends 76:18 662:20</p> <p>intense 60:5 360:20 500:12 613:4</p> <p>intensely 520:14</p> <p>intensifying 105:20</p> <p>intent 396:21 400:18 421:2 703:15 724:20 736:1</p> <p>intention 12:25 17:12 17:23 45:1,6,16,24 47:19 49:21,24 177:17 324:14,16,17 325:10 655:1 703:7 709:25 731:1 735:5</p>	<p>755:5 756:7 764:6,8 764:12,16 765:3,6,11 765:17 780:18 781:19 782:14,24 791:23 798:25 801:17 802:3 802:10,11,14 803:14 803:15,16 804:5</p> <p>intentions 70:16 674:1 803:21 804:18</p> <p>inter 5:25 45:1 269:25 271:25 618:17 691:25</p> <p>interact 71:9 382:7 604:25</p> <p>interacted 479:14 485:6 670:8 675:10</p> <p>interaction 59:19 485:15,23 538:19 564:24 565:5</p> <p>Interahamwe 375:17</p> <p>interchangeably 188:23</p> <p>interdict 760:20</p> <p>interest 13:4 28:14 60:11 438:13,15 496:5 509:23 510:2 556:17 564:15 609:11 617:12 687:25 688:10 696:1 703:1 704:1,11 724:3 727:18 729:5 746:17 747:15,22 748:3 749:12</p> <p>interested 66:12 188:20 250:19 260:3 281:15 281:17 435:14 461:4 461:9,16 489:3 541:9 616:18 621:4 700:7</p> <p>interesting 18:18 375:5 387:20 388:1 389:23 401:7 608:17 701:2 716:3,5 771:17 778:9</p> <p>interestingly 343:18 386:22 606:5 612:1 643:1</p> <p>interests 164:20 214:21 247:17 535:9,18 536:8</p> <p>interface 523:5,13</p> <p>interfere 211:23</p> <p>interim 170:19 760:16</p> <p>interject 238:14 630:21 interjection 146:21,22 559:22</p> <p>interjections 785:25</p> <p>interjects 145:21</p> <p>intermarriage 390:15</p> <p>internal 739:10</p> <p>internationally 301:17 522:18 694:25 698:12 773:24</p> <p>internationals 336:25</p> <p>internet 9:6 401:23 623:15 722:3 723:13 723:14</p> <p>interplay 718:5</p> <p>interpret 55:19,20 156:13,24 281:20,24</p>
--	---	--	--	---

282:9 325:19 406:18 412:20 414:3 417:2 420:22 426:10 631:9 691:6 705:6 710:22 729:16,25 745:11 759:14 760:22 761:6 767:24 770:22 774:6 787:22 interpretation 12:9 15:19 45:20,22 47:21 50:19 91:18,21 127:19,20,25 154:10 154:14,17,17,25 156:11 157:11 158:7 210:23 234:4,20 325:18 326:1,6 352:24 406:9,11 426:14 477:19 539:24 540:6 553:20 558:7 560:1 632:19 638:16 690:8,10,19 691:10 693:9,13 698:11 705:10 707:18,20 709:2 710:6,9 711:25 712:17,25 713:2 718:17,23 723:5 725:2 730:20 740:23 752:8 760:2,3 761:16 761:16,19 772:11 775:19 777:23 781:20 782:25 790:20 792:18 803:22 804:2 interpretations 691:9 772:9 interpretative 730:10 interpreted 46:14 286:18 326:4 410:15 690:21 697:4,5 702:18 719:1,7 728:21 729:23 730:13 738:4 746:5 761:18 763:5 767:23 773:7 787:20 800:14 interpreters 2:22 interpreting 384:23 416:23 426:19 718:19 720:6,9 729:10 interrogate 132:18 interrupt 35:12 143:19 176:13 282:16 404:15 429:17 615:20 693:9 695:10 interrupted 1:11 34:20 151:9 206:22 269:2,3 775:2 interrupting 710:2 712:4 intervention 357:21 707:12 interview 369:25 interviewed 370:3 inter-parliamentary 175:10 194:18 199:23 intimate 248:10 intimidate 41:10 379:25 407:23	intimidated 147:19 intimidating 796:24 intolerable 419:21 introduce 444:7,13 600:10 612:7 introduced 138:9 315:20 574:6 605:1 691:25 introduces 196:9 introducing 70:4 introductory 688:3 invade 259:17 786:17 invaded 297:4 387:3 invalidly 641:8 Invariably 738:12 invasion 99:1 107:1 268:2 356:21 781:2 investigate 481:25 investigated 657:9 696:7 investigation 62:7 517:23 investigations 62:11 invisibly 705:5 invitation 72:9 461:16 462:5,7,9 493:21 670:4 invite 461:21,24 804:16 invited 441:21 442:5 444:10,11 461:23,24 493:19 615:10,12 809:12 invites 742:25 invoked 138:9 invoking 702:13 involve 248:7 451:23 involved 13:24 36:2 62:9 77:8,9 88:23 111:18 158:2 159:21 248:8 250:22 251:17 252:8 340:10 351:15 351:16 431:21 432:4 441:5 516:5 519:7 520:9 551:1,2 605:16 involvement 28:17 involving 714:24 Iranian 239:18 Iraq 419:19 636:2 irrational 205:15 219:17 313:18 753:5 irrelevant 44:11 47:22 334:24 335:3 707:16 728:22 790:18 793:22 793:24 799:10 irrespective 666:15 irresponsibly 621:24 ISIS 623:12 790:10,15 Islamic 239:12,15 757:8 758:10 Islamism 187:7 Islamist 185:17 186:20 186:23 187:1,8,8 188:19,22 208:22 261:1 334:23 335:15 335:22 336:3 362:11 Islamists 187:13 623:8	623:12 Islamophobia 181:14 isn't 210:13 243:13 245:9 246:21 294:2 295:25 335:12 338:25 353:2 425:17 477:3 634:22 639:4 671:2 784:8 isolation 232:4 687:9 720:25 Israelis 98:24 99:3 102:19 141:17 159:2 205:14 213:14 218:18 248:4 258:13 262:10 263:12 279:12 281:1 292:3,5 297:6,7,11,13 297:14,17,21,22 298:3 299:16 306:7 307:1,8,15,18 316:25 322:19 333:20 345:17 358:5 590:17 595:16 612:22 613:22 648:11 786:16,20 Israeli's 659:6 Israeli/Palestinian 746:16 Israel's 100:12,17 103:4 105:14,15 109:10 114:14 115:13 271:1 272:6 288:6 339:12,13 539:16 628:2 Israel's 648:20 657:13 657:18 issued 81:12 100:22,24 269:24 455:17 issues 2:5 13:18 14:1 15:7 18:18 29:17 30:7 31:12,16 34:17 35:1 37:19 44:10,11 58:20 58:21 82:20 89:20 169:20 198:15 215:20 333:10,10 338:2 339:12,23 340:2,12 356:1 360:19 361:21 361:22 396:13 452:3 490:15 520:10 574:7 601:2 613:21 661:19 669:5 678:15 679:6 690:6 693:19 696:11 696:15,20 700:13,21 700:22 702:6 707:15 729:14,15 747:13 748:8 780:15 784:10 italics 97:20,21 276:12 Italy 220:14 item 74:6 ITF 442:20 539:7 it'll 409:1 Ivy 245:5,16,18,21,24 IW 133:5 I'd 30:18 57:6 65:14 99:2 101:24 379:3,6 380:23 381:18 394:13 397:5 629:7 661:19 734:8 735:1 786:25	794:24 795:25 I'll 17:5 40:5 55:23 89:5 109:1 139:14,14 257:13,14 327:8 381:19 419:17 480:20 540:8 734:13 806:6 808:11,25 I've 1:10 2:4 10:3 35:8 57:5 96:11 110:3 112:9 118:13 119:15 119:21 176:2 215:7 219:12 253:4 270:17 270:20 296:11,11 356:12 379:5 383:19 388:4 416:14 418:5 418:22 436:17 457:23 471:19 484:23 485:6 485:11 488:18 514:7 514:9 516:4 531:16 532:19 535:24 537:15 538:18 570:19 611:21 612:8 613:25 615:7 616:18 629:19 664:9 673:8,11 676:21 694:16 730:7 735:23 773:9 776:18 788:14 808:3,6 i.e 127:14 209:9 760:16 780:24	160:20 404:5 504:21 505:13,20 522:9 555:18 740:11 741:4 741:21 joined 166:22 369:5 504:15 505:4,15 506:11 507:12,17,25 508:10 521:5 740:15 740:16 joining 78:5 379:24 456:6 505:18 519:24 joins 455:19 656:7 joint 292:4 jointly 454:14 joke 337:10 joking 514:19 Jonathan 721:4 Jordan 297:16 588:14 Jordanians 279:24 jou 285:2 journal 175:19 585:3 610:15 journalist 228:1 journals 292:6 610:14 Journey 606:1 Judaism 161:3 187:10 611:10 659:6 669:18 judge 6:12,13 25:3 55:13 170:3 177:15 179:2 197:9,11 198:23 201:5 202:14 202:14,17 243:25 249:20 258:24 412:2 412:24,24 418:1 520:3 530:6 592:22 614:1 680:17 judged 181:4 611:8 621:1,2 judgement 197:13 630:7 judgements 197:21 199:6 389:11 judges 249:21 720:7 judging 196:17 judgment 46:1,2 179:9 179:11 180:3,5,10 189:11 190:11,17 191:4 196:10 231:11 243:1,4,14 255:3 332:7,15,16 383:23 577:6,10,12,17 582:11 635:3 678:11 679:25 680:3 681:19 691:21 698:21,23 701:2 753:1 796:4 806:2 807:2,24 808:25 809:2 810:7 judgments 196:19,20 751:19 judicial 720:8 796:21 806:23 810:12 judiciary 391:11 Julius 255:6,17 256:1,8 Julius's 255:19 jump 415:1,5 jumping 278:3 414:23
J				
J 699:6,16 761:4 jail 554:16 Jan 732:10 Jani 149:18 January 59:23 99:1 100:21 105:6 269:25 475:16 599:6 JDJP 680:17 Jerusalem 237:8 297:19 576:1 Jesus 183:9 382:25 383:5 Jew 122:16 142:8 188:23 204:21,22,24 205:18 238:24 254:24 323:14,16,20,23 415:22 416:2 417:19 458:25 459:4 478:15 485:7,12 499:14,21 505:12 542:11 549:13 549:15 619:21 620:3 626:6 639:22 655:20 658:12 706:4 778:2,7 Jewishness 161:3 185:6 219:7,11 404:20 766:8 787:10 jihadists 187:13 job 642:5 jobs 593:2 Joe 459:5 Johannesburg 38:25 164:16 171:1 361:19 427:10 572:7 618:7 John 383:14 join 56:10 115:17				

<p>414:24 junction 21:4 695:16 701:9 730:2,5 June 10:2 447:12 448:2 448:15 451:14 475:15 490:21 554:14 563:16 jungle 548:17 junior 537:24 680:22 jurisdiction 5:15 21:20 659:9 691:16 696:18 716:13 jurisdictional 707:25 jurisdictions 15:3 jurisprudence 702:8 715:15 772:24 773:1 justice 46:17 47:8 50:22 81:2,4 106:7 113:22 114:8 267:2 368:8,10,14 387:17 393:15 433:8 453:14 454:1,19 459:17 495:9,12 497:19 508:22 545:7,13,14 545:15,18,21,24 546:6,23 547:14,15 547:17,18,23,25 548:4 553:24 558:1 568:23 624:25 625:11 625:14 681:16 690:3 691:13 698:22 699:3 701:1,24 704:19 719:17,17 726:19,20 727:12,13,16,19,24 728:1,2 729:6 741:21 741:23 749:1 759:11 796:5,5 797:2,3 800:23 802:1 Justice's 809:5 justifiable 718:8 728:12 justification 227:24 307:11,14 398:17 727:11,22 justifications 434:15 justified 225:21 452:12 557:7 justifies 399:25 765:2 justify 127:24 400:20 541:3 547:2 559:1,2 697:12,14 justifying 195:15 399:4 727:19 juxtapose 122:1 779:20 juxtaposes 121:24</p> <hr/> <p style="text-align: center;">K</p> <p>K 32:2 Kagera 395:25 Kahn 256:12 Kampf 376:16 Kaplan 221:23 Kasrils 83:9 142:15 419:2 459:4 619:22 787:13 Keegstra 714:23,24 keep 55:13,23 260:16</p>	<p>346:8 396:17 502:20 514:12 539:18 572:1 601:16 613:13 650:6 684:10 747:6 keeps 611:8 kept 102:15 373:3 391:21 541:13 808:8 key 4:20 9:16 13:1 29:16 84:17 183:14 185:3,4 189:23 208:23 227:15 229:12 250:19 280:21,24 322:14 323:10 341:9 377:23 385:10 452:4 453:11 464:13 465:9 593:7 652:15 667:14 686:4 708:25 Khmer 368:8,16,17,19 369:4,8 375:18,18 387:8 Khmers 367:14 Khmer-rouges 368:10 Khumalo 758:10 kick 186:2 kicked 393:3 488:22 kid 180:25 kids 418:3 kill 166:4 203:24 205:25 307:7 317:22 318:16 375:14 378:2 392:3 400:18,19,20 483:17 644:24 661:4 668:10 762:8,8 killed 99:11 102:20 183:11 350:10 373:3 375:23 437:12,13 484:2,5,9,11,13 660:22 668:25 733:6 killers 383:13 killing 195:15 225:1 375:24 378:5,5 399:25 400:21 660:13 661:1 663:17 killings 105:2 kinds 38:13 62:9 155:7 188:24 189:8,9 190:3 190:4 191:5 245:14 335:15 380:13 395:6 545:25 630:7 king 431:25 432:6 Kingdom 104:14 177:13 205:12 221:19 254:10 265:11 575:8 772:20 kink 301:24 Kinyarwanda 376:17 Klevansky 147:24 148:8,16 149:18 150:1,13 152:5,15,23 153:1,11 knew 92:15 148:13 274:25 275:2 366:9 376:13 381:8 385:21 404:12 534:4 683:6 740:16 745:6 768:23 768:25 788:24 791:10</p>	<p>791:13 knowing 547:3 679:23 knowledge 30:5 32:1 37:8 57:21,24 59:6 86:2 88:25 118:13 119:5,14,20,21 136:18 179:8,11,20 179:21 180:5 189:10 189:11 190:11,17 197:12 329:23 363:8 394:5 495:20 502:9 504:20 505:3 508:5,8 515:23,24 516:1 535:6 544:4 615:2 740:13 748:15 749:8 749:13 769:2 known 64:23 156:8 198:9 372:11 411:13 438:11 470:9,16 474:3,9 488:18 492:6 498:21 499:6 627:7 648:21 677:17 791:11 791:11 804:9 knows 94:22 328:25 384:4,12 389:5 602:3 713:21 777:24 KOCK 627:4 Kosovo 386:21 Krakow 655:23 Kranstorf 31:21 32:2 88:20 Kranstorf's 32:2 Kurds 186:11 Kyi 554:21</p> <hr/> <p style="text-align: center;">L</p> <p>L 162:20,21 label 547:3 548:6 labelled 233:2 labelling 227:13 242:21 545:24 667:8 laboratory 12:5 laborious 482:9 labour 385:3 421:4 464:3 465:20 603:23 603:24,24 lack 532:12 615:3 638:7 laid 297:21,25 513:17 536:21 Lamont 47:8 698:22 699:3 701:1 704:19 767:12 Lamont's 46:3 land 9:13 43:23 83:5 87:20,20 99:1 105:15 125:15 126:9 237:8 237:10 261:25 263:2 295:18,19 296:7,17 296:20,21 297:17 298:7,8,8,11 299:13 309:10 313:12 362:15 419:15 434:19 453:24 453:25 488:20,22,23 489:16 490:8 496:18 559:4 562:17 585:19</p>	<p>585:19,21 590:10,11 590:12,12,20 592:25 658:4 692:4 735:22 779:10 781:2 786:17 786:17 lands 53:15 297:2,24 297:24,24 358:20,24 587:4,5 language 6:3 17:20 178:19 210:22 393:13 508:8 624:2 632:6 715:11 744:3,4 762:21 Lanka 348:15 large 20:24 35:9 41:4 54:1,9 66:7,10 84:3 151:1 219:4 443:13 502:9 575:25 676:13 709:3 largely 57:6 199:15,16 199:16 226:16 303:6 357:21 769:8 larger 375:16 largest 75:24 721:22 lasted 383:25 late 110:2 128:20 141:21 167:15,17 248:16 386:16 403:12 426:2 449:24 496:18 499:11 599:5 600:10 701:23 738:5 latest 105:10 266:17 466:12,13 Latin 551:23 636:2,3 latitude 635:4 Latrine 301:25 launch 101:10 269:5 270:2 291:25 781:2 launched 98:20 231:20 268:2 591:21 663:25 795:13 launches 581:10 launching 105:20 268:23 lawns 60:24 131:20 laws 374:16,19 562:15 586:12 673:10 779:9 lawyer 154:8 295:20 422:5 608:12 654:13 lawyers 7:7 361:23 518:9 519:6 691:15 Laxity 452:22 lay 246:9 254:7 312:6 481:19 482:18 519:25 720:12 777:1 layman's 154:9,14 layout 67:13 laziness 321:2 Le 46:16 50:22 719:15 800:22 lead 1:17 47:23 98:16 99:4 170:4 258:14 349:11 389:1,6,7,8,9 389:9 396:16 434:16 434:24 453:18,19 523:6,13 602:4</p>	<p>leader 256:13 385:4,4 389:5 421:4 467:15 467:17 542:25 554:16 554:22 660:17 leaders 117:21 118:1 376:20 381:3 383:16 466:12 553:13 leadership 39:22 40:16 66:25 360:14 433:2 440:1 721:15 leaderships 270:22 leading 36:8 50:14 59:21 141:17 407:17 434:22 448:5 451:25 452:6 523:11 758:8 786:20 leads 180:8 181:22 370:13 582:10 634:19 773:20 774:1 800:1,2 lead-up 69:24 league 64:23 65:2,3,5 66:22 245:5,16,18,21 245:24 436:19,19 441:20 462:18 494:9 494:10,18 learn 61:21 learned 15:17 17:4 18:7 22:4,16 24:8 44:7,18 50:16,17 51:14,22 155:10 165:12 167:21 168:20 170:4,9 282:7 283:11,18 284:6 322:5 363:24 370:19 410:10 412:2 423:12 448:6 452:1 480:3,9 568:21 569:20 599:7 599:19,24 661:11 662:20 687:22 692:15 724:4 750:2 752:24 754:15 755:15 756:9 767:10 768:7 769:2 777:19 778:8,16 781:12 786:25 791:16 794:15 795:10 799:6 801:17 803:21 807:1 learning 443:3 leave 4:3,23 26:17 28:3 32:7 50:7 75:13 111:3 111:15 147:9 156:17 168:1,7 172:6 244:2 284:12 285:11 404:24 405:4 406:1 407:16 414:19 415:1,22 416:1,3 419:8 420:4 432:10 438:18 444:19 502:1 538:1 548:11 548:14 549:1,22 559:20,23,24 560:11 560:19 604:8,11 682:13 705:17 716:10 791:16 807:18 808:11 leaving 147:22 159:15 407:23 503:8 560:13 713:1 Lebanon 239:17 lecture 10:5 65:13</p>
---	---	--	---	--

70:20 83:8,11,22 133:3 447:17 481:1 490:23 500:25 534:14 564:1,14,22 625:8 lecturer 66:4 281:23 lecturers 84:3 lectures 60:7 61:1 82:16,19 85:9 131:8 150:17 495:24 led 98:25 260:9 284:3 352:23 373:17 391:16 423:14 477:5 484:19 759:3 769:12 775:4 left 20:17 64:19 96:3 150:23 155:8 283:14 309:23 335:25 372:19 372:20 403:9 432:8 432:12 463:22 474:22 478:21 548:21 662:3 698:15 705:22 706:19 left-leaning 608:13 609:3,20 leg 686:8 729:21 legal 12:12 23:18 40:15 47:3 118:23 155:4,11 158:5 250:18 303:8,9 305:6,23 306:2,4 329:3 359:19 381:7 423:17 654:18 673:17 692:1 720:20 785:6 795:21 legalised 393:16 legally 510:6 561:25 562:1 legislate 658:21 legislation 5:11,25 6:5 6:14 7:22 52:6 155:15 156:7,12,25 157:9,14 405:16 422:12,13,14 510:1,11 520:23 586:19 669:6 689:20 690:2 691:18,24 692:6,9 698:25 699:2 701:3,4,12 707:10 708:2 730:1 741:17 772:6,22 legislative 589:11 700:17 756:15 legislator 709:25 718:1 legislature 13:7 691:24 765:10,14 legitimate 8:8,13,17 107:12,17,19 189:13 189:20 190:4 209:10 225:21 226:14,21 227:19 228:23 231:25 269:4,6 361:6,6 362:22 405:21 546:25 578:14 579:21 581:4 585:18 635:15,23 637:4 667:18 688:20 716:18 753:3,7 777:17 785:10 legitimately 260:10 legitimise 212:5 lend 84:7	length 132:12 317:12 795:22 799:20 802:25 lengthen 25:2 lengthens 49:11 lengthy 47:13,24 135:4 428:25 590:5 Leon 395:23 letter 70:18 100:21 101:3,4,7,22 103:10 103:21,25 104:9,16 104:23 106:19 113:4 113:5,6,15,22 114:3,7 149:17,23 165:2,5 265:6,7,10,16,21,23 267:18 270:9 271:12 271:14,17 272:18 273:12 335:17 448:1 448:14 450:15 451:10 480:24 490:21 509:11 513:12 773:16,21 letters 141:16 149:4,10 270:17,19,21 696:6 786:19 let's 2:8 11:20 33:2 34:9 41:21 53:12 60:1 70:22 73:8 74:16 75:6 76:1,6 79:11 80:8 82:18 87:2 91:25 111:7 119:9 145:4 162:16 184:11,17 192:19 211:23 218:12 223:6 230:4,4,4 243:7 246:11 260:16 269:17 281:18 285:17 338:5 348:10 379:21 418:10 421:6 438:18,19 472:15 479:17,18 488:25 491:2,19 492:19 494:2 512:23 513:4 521:4 525:4,5 526:4 531:8 532:11 538:6 541:9 542:9 609:19 611:3 614:8 614:10 618:5 619:10 623:12 632:2 685:4 731:9 778:25 let's 231:14 235:11,23 309:10 321:12 398:17 404:16 413:23 414:20 414:21 415:12 445:13 499:24 500:15 504:4 505:1 544:7 545:14 546:3 547:4 551:5,25 552:22 560:23 561:24 562:5 568:2 652:14 684:10 697:8,10 level 28:3 66:25 80:3 82:3 83:9 108:5 393:3 464:12,19 609:15 610:12 636:6 640:4 641:21 677:12 686:8 697:10 720:16 748:9 levelled 211:1,5 232:13 246:2 249:24 250:7 564:9 626:17 635:21 644:10	levels 232:19 384:9 liable 158:2 510:13 511:24 libels 205:5 liberal 245:3 307:24 376:4,4 liberally 141:18 liberate 9:7 33:6 42:20 123:14,22 126:8 279:5 280:5,8,18 286:15 290:4,9 775:25 776:1,3 liberated 124:2,2 776:7 liberating 203:2 281:15 liberation 202:15 208:14 213:11 280:25 281:6,8 288:21 289:7 289:8,11 314:5 432:2 485:4,22 508:20 551:23 552:12,17 609:9 786:14,15 liberational 280:11,17 liberty 760:8 library 37:22 131:20 164:5,5,7 356:13 376:17 licence 728:2 license 325:1 345:22 709:5,8 761:1 licensed 325:1 licenses 323:25 342:7 licensing 324:21 lie 228:11 229:2 373:5 373:7,15 528:13 lies 599:25 760:3 life 71:21,22 72:6,14 146:14 183:15 195:11 229:2 306:12 349:17 360:2,4,5,8,9 366:9 367:7,8 416:20 652:17 lift 127:3 lifted 103:8 271:5 light 20:14 23:4 120:21 410:15 415:21 791:19 liked 194:7 likes 54:10 lily 108:22 limit 245:6 341:24 670:20 713:25 limitation 693:2,6 718:7,10,13 728:5,12 755:11 775:1 limitations 561:8 589:22 670:17 688:25 720:23 757:2 limited 19:21 195:14 196:15,22 200:21 401:9 466:20 490:14 589:18 597:10 598:3 698:7 709:20 717:7 737:7 744:9 745:1,5 754:23 755:9 757:1 774:18 794:18,22 795:3 limiting 693:6,16	735:25 736:1 751:23 limits 108:2 line 14:20 19:25 44:6 51:6,8,20 52:2 71:19 77:6 78:24 80:4 82:5 143:13 145:21 156:17 156:22 231:18 295:11 300:10 301:13,23 302:2 351:13 354:20 394:20 410:13 421:10 463:14 543:9 544:7,9 544:20,21,21 546:5 549:25 550:2,7,8 558:12 586:8 588:4,6 588:7,9 624:14 628:13 630:13 730:1 752:2 786:13 788:12 linear 370:13 374:5 lines 519:23 550:9 796:17 link 181:24 345:18 435:10 454:13 502:24 522:18,18 766:4 linked 239:17 286:22 286:24 287:20,22,24 381:14 432:2 534:21 links 287:14,14 444:12 Linksfield 39:3,11,12 Lipschitz 136:6,7,16 list 62:1 161:23 182:12 196:9,10,11 199:13 199:14,18 272:5,9 636:3 listed 195:15 200:11 203:8 398:6 461:4,6,8 462:24 475:16 605:25 606:20 610:19 611:6 612:18,25 614:7 listen 21:3,13 23:22 24:9,11,25 25:4 26:5 48:15 77:22 144:25 230:20 298:19 403:2 505:13 695:11 787:1 787:2 809:9 listened 24:14,15 135:3 135:11 137:14 768:12 787:1 809:7 listeners 384:2 listening 23:25 81:25 121:5 504:9,13 528:15 799:5 listens 18:19 599:18 706:4 literally 94:8 372:23 373:2 376:7 379:14 387:2 388:24 395:22 399:11 404:12 406:11 425:24 500:13 556:6 780:24 literature 164:13 356:4 614:21 litigating 792:8 litigation 6:13,23 7:7 19:3 617:3 637:3 688:15 700:8 795:24 797:7	little 21:5 24:24 31:8 34:9 63:21 71:18 169:5 178:12 191:15 199:1 224:12 230:14 282:10 298:10,10 301:24 310:8 329:11 349:18 367:22 384:1 388:6 396:13 399:25 434:5 449:20 464:11 477:23 555:12 609:19 611:9 615:14 627:15 652:18 661:14 688:18 710:21 718:5 723:24 734:5 751:8 772:10 788:1 live 8:14 75:1 83:5 145:16 174:3 205:1 236:2 237:16 238:16 238:24 239:1,5,9,19 240:1,4 248:4 299:16 299:21,23 303:7 305:22 306:7 307:15 308:6,10,12,18,23 309:19 343:6,9 358:1 358:5 359:15,16,17 359:18,19 360:13 382:19 406:2 415:24 457:18 505:19 553:16 554:2 585:21 626:10 626:10 640:11 658:6 672:4 673:8,8,11 733:16 786:22 791:12 lived 102:24 222:15 236:9 237:8 297:22 309:10 312:9 313:7 378:11 390:10 lives 72:7 102:22 159:7 216:23 308:25 313:14 474:13,15 488:18 593:6 624:2 living 75:5 158:9,14 207:21 218:16 237:3 241:6 309:16 342:22 371:14 407:12 489:6 489:22 557:5,17 562:7 653:20 LM2 450:24 loaded 518:18 lobbies 485:10 local 32:16 157:13 197:20 269:22 589:23 773:13 locally 356:17 522:25 locate 774:13 located 38:22 164:3,15 location 58:11 locations 74:18,20 532:18 745:5 locked 354:21 355:3 lodged 482:23 logic 368:20,21 374:7 457:6 logical 370:12,17 374:5 603:2 logically 249:3 575:6 logistical 1:25 678:8
---	---	---	--	---

<p>London 174:4,9 175:9 222:15 228:19 266:5 long 2:17 103:6 133:2,4 169:4 187:9 198:19 205:2 241:17 268:7 271:4 284:5,9 296:23 308:1 366:1 374:18 374:18 383:24 421:6 482:9 568:11 578:7 578:11,19 581:4 606:1,22 619:1 620:14 646:16 658:5 661:22,25 673:5 674:17 696:3 707:12 720:1,10 783:16 longer 169:5 220:8 302:3 310:6 332:21 474:13 595:16 longest 136:22 long-term 425:14 looked 180:24 222:14 381:23 398:15 418:22 444:4 490:22 646:6 650:9 701:21 789:15 looking 30:21,23 53:10 54:1 132:7 148:25 179:23 314:13 352:10 371:3 377:24 382:15 397:20 401:5 416:19 418:22 428:5 474:18 573:10 582:2 664:22 692:8 698:8 looks 103:25 570:19 583:4 looms 20:24 loose 112:5 662:14 804:1 loosely 65:2 looseness 720:19 Lord 412:24 lordship's 4:4 21:2,6 48:19 49:1,8 97:2 111:16 120:1 172:7 224:14 285:13 687:17 Lordship's 168:21 233:24 414:6 562:5 661:22 680:9,11 749:23 754:18 763:20 lose 105:22 266:21,25 335:18 806:15,16 loses 792:22,23 losing 99:20,22 585:4 lost 42:2 102:22 148:9 173:23 206:12 373:20 390:25 lot 3:9 19:14 34:4 40:4 40:19,22 58:25 59:24 60:1 68:18,22 79:22 85:11 166:9 176:5 181:10 183:5 186:14 198:11,12 230:1 248:7 253:9 303:7 308:19 310:15 314:18 326:10 328:18 329:12 329:21 370:4 372:5 382:22,25 383:5</p>	<p>384:7 387:17 388:6 390:12,14 392:1 395:12 397:3 408:20 427:16 433:20 657:22 729:14 730:17 747:16 lots 57:14 76:12,12 191:18 193:13 267:11 297:22 332:12 407:14 536:3 721:24 loud 151:5,9 457:3 528:5,6 louder 438:5 love 252:13 526:18 lower 310:8 lowering 99:22 lowly 424:3 loyal 98:4 379:18 399:9 405:6,7,8 419:21 439:24 loyalties 379:22 loyalty 630:17 lucky 394:11 lull 105:21 lunch 54:18,23 55:11 206:5,8,11,15 378:21 491:22 492:1,2 495:14 496:15 528:9 528:9,21,22 529:14 529:18 530:11 661:23 661:25 662:25 721:6 734:6,9,13 735:2,24 750:2 lunchtime 64:7 734:18 Luther 383:16 lying 112:14 226:12,20 227:1,2 229:8 341:13 430:23</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>M 32:3 MA 174:20,23 machine 196:17 197:9 197:10 375:14 machines 455:14 mad 219:14,17 Madam 99:20 288:12 Madeline 369:23 Magen 163:3 Maggid 31:22 32:3 88:20 469:20 470:3 magic 243:13 Magistrate 796:25 magistrates 682:18 Mahmoud 299:13,20 304:3,5 mail 92:13 294:21 416:12 603:23,25 656:22,25 mails 80:6 536:16,19 maimed 733:6 main 14:15 24:19 25:7 35:20 37:19 46:1 166:3 373:12 399:15 399:15 432:25 443:11 449:18 470:21 471:15 496:2 509:23 510:1</p>	<p>584:2 772:16 mainstream 225:4 238:12,13 maintain 671:17 678:14 727:2,9 maintained 540:19,22 541:11 591:23 624:14 625:21 647:25 727:5 maintenance 682:18 major 39:2 421:4,4 593:2 612:15 613:7 613:20 majority 74:23 75:7 207:21 210:19 216:13 218:15 236:16 237:4 238:15 239:4 240:3 322:23 323:7,18 328:11,12 344:4 345:21 346:13 347:6 479:6,8,10 484:20 485:9 486:7 496:4,23 497:2,6 503:22 539:21 585:6,8,9 586:18 609:12,22 612:1 642:19,21,24 643:17,19,20 644:1 644:14 658:6 664:16 702:7 725:6 731:5 maker 46:20 135:12 634:9 maker's 757:10 making 2:11,15 11:8 75:2 84:7 112:25 124:24 125:1 146:5 152:9 179:22 181:4 188:20 191:4 195:17 204:25 205:1 215:15 216:3 219:18 272:12 272:19 316:18 324:5 332:7 344:7 352:18 362:15 394:24 412:7 414:22 419:24 490:2 527:19 541:2,17 548:2 555:22 562:24 582:11 586:1 602:22 603:3 626:12 630:7 648:23 674:6 727:12 745:7 779:21,25 787:5,6 799:17,24 810:14 Makwanyane 701:24 Malan 732:10 male 77:17 145:25 146:21 550:19 766:16 766:16,17,18 786:25 Malema 46:4 47:9 698:20 699:5 704:18 males 353:5 malevolence 736:6 man 46:12,13,13 94:22 246:24 282:3,9,11 313:19 320:1,1 767:25 770:22 771:1 manage 427:17 managing 433:3 mandate 805:23</p>	<p>Mandela 415:23 manhandle 470:22 471:22 manhandled 457:20,22 manifest 58:24 187:18 188:6 manifestation 349:18 350:4,15,16 351:3 652:19 706:24 709:8 715:22 manifestations 192:13 192:17 193:1 641:3 manifested 782:8 manifests 201:13,20 mankind 184:21,23 427:5 manner 6:17 7:5 448:7 452:2,5 464:19 569:4 620:20 634:13 690:22 692:10 736:10 743:10 753:12 756:20 791:19 794:16 795:3 798:18 810:10 manners 537:20 map 300:7,8 302:15 587:24 588:2 591:4 784:4,11 mapped 671:22 maps 84:5 Marcel 614:16,19 marched 37:4 115:22 376:23 399:11 535:2 537:15 541:1 791:15 marchers 40:22 117:5 117:9 166:13 marches 38:13 118:23 380:13 435:23 437:5 454:14 781:9 782:4 marching 38:16 41:8 58:8 123:3 324:4 marginalisation 692:8 marginalised 692:7 marital 6:1 mark 5:8 294:18,19 807:10 marked 63:18 173:2,4 173:8,16 364:22 401:14 792:23 marks 740:8 760:13 797:6 marriage 659:8 669:14 marriages 658:20,21 658:22 659:12,14 669:7,13 married 659:4 marry 659:5,7 669:16 masked 381:7 mass 366:7 400:21 491:17 massacre 99:7 107:5 258:18,21 259:4 266:16 269:9,12 massacres 105:9 266:16 391:9,16 396:20 massive 264:4</p>	<p>Masters 27:22 Masuku's 9:25 42:16 66:2,9 92:9 94:16 95:19 98:8,9,11 115:2 119:22 133:8 137:7 139:25 141:13 151:10 151:14 153:16 278:8 278:8,23 286:11 314:23 335:8,24 381:5 426:19 631:4 631:12 688:1 723:12 726:12 731:4 740:25 743:19 774:8 775:12 789:1 804:18 806:18 Masuku's 123:1 233:22 411:21 594:9 715:10 753:10 766:6 material 61:13 350:11 565:4 617:23 materialised 426:21 materials 261:12,16 matriculate 431:12 matrix 686:23 matters 1:9 3:24 15:14 17:16 20:2 51:15 77:11 233:14 351:19 425:3 463:13 511:12 520:13 547:7 551:5 560:10 563:23 569:10 597:12 620:4 681:2 687:25 688:17 694:7 700:3,25 702:1,3,12 703:1 712:6 716:10 725:17 746:16 748:3 767:22 796:19 Mauritania 554:3 maximum 64:12 Maynard 721:4 734:23 Ma'am 97:17,22 102:13 103:16 104:24 117:18 118:3 145:3 145:24 146:10 148:11 148:18,21 149:1,13 150:17 151:17 154:7 734:15 ma'am 121:5 123:18 128:19,23 132:5,22 133:5,16 135:9 137:25 142:19 143:4 143:10 157:23 158:12 160:3 320:10 Mbuyiseni 64:21 69:7 meaning 10:9 12:1,10 45:18 46:8,19,19,21 47:1,4,11 51:9,23 71:15 94:1 98:11 125:5 128:12 140:11 214:2 219:13 234:2,8 381:9 384:9,10,10 422:13 440:18 468:5 468:6 697:4 713:14 714:10,10,11 718:14 719:2,3,4,23,24 720:14 730:14 763:12 765:13,13 767:9 768:6 771:4 776:19</p>
---	---	--	--	--

<p>778:7 781:23 788:6 789:10,10 799:11 804:16,17,17 meaningful 736:10 meanings 179:3 607:4 607:17 611:10 714:6 720:3 800:21 means 6:22 11:5 19:9 74:16 76:2 77:7 94:6 94:8 110:15 120:20 124:18,22 143:9 154:21 160:16 170:12 205:23 210:19 244:4 270:20 282:8 283:9 287:4 298:10 304:7 351:15 377:19 384:1 393:12 453:22,25 497:22 531:23 546:23 551:1 560:6 562:25 568:5 574:11 617:11 626:9 630:18 646:10 673:10 687:2 689:1 715:2 723:8 730:11 739:20 744:1 759:20 759:21 761:16 763:10 763:10 767:5 770:21 782:12 meant 10:9 47:14 63:3 133:11,13 139:2 177:16 180:6 200:16 213:17 218:16 311:6 315:4 396:1 413:1,1 451:20 589:1 590:18 668:13 710:15 726:20 767:13 768:2,13,13 769:21 771:16 781:14 measure 249:21 304:20 390:23 measured 75:20 609:21 measurement 502:21 measures 454:4,6 455:18 692:2 mechanism 796:9 media 31:13,14 32:6 58:8 89:6 119:7,12 150:6 195:12 266:4 461:17 515:10,16,19 516:3 565:23 566:1,1 566:11,23 623:14,15 623:23 655:3 708:17 756:21 medical 103:8 271:6 343:15 591:17 medicine 9:10 43:19 44:2 53:5 125:8 355:4 487:20 488:1 489:4 489:14 731:8,14 732:6,12 735:10 780:21 medium 216:18 443:16 meet 29:15 408:18 486:1 577:9 755:5 757:2 meetings 29:25 76:22 82:24 138:20,24 139:7 461:9,13</p>	<p>493:14,16 503:11 670:1,3 675:21,24 677:10,15 meets 547:8,10 Mein 376:16 member 51:11 66:22 78:20 148:19 156:5 229:21 254:22 270:3 299:11 329:14 605:5 608:13 members 9:21 11:21 20:22 31:11 37:7 42:2 53:25 56:10 58:6 59:15,20 67:5 69:11 70:14,20 71:7,9 72:17 73:23 79:13 98:5 103:3 114:20 123:8 133:22 152:7 157:12 270:25 276:4 325:5 446:25 458:7,8 475:25 481:17 489:10 489:24 490:6,24 491:4,7,8 494:17,18 497:7 498:16 501:6 502:24 505:15 526:5 542:14,25 593:10 609:5,7 623:5 624:15 705:11 715:3 721:21 723:2 736:14,17 739:6,6,7 742:4,6,21 752:15,16,16 773:20 788:9 792:10 membership 59:17 609:6 memorial 762:13 memory 192:4 564:24 565:5 809:20 memos 369:22 men 159:15 353:6 766:12,14,15 mendacious 195:18 mention 54:5 108:17 117:6 125:21 253:20 310:18 400:5 411:12 417:19 472:23 512:19 517:19 551:8,11,20 565:8 579:16 583:7 628:12 779:6 785:25 mentioned 17:4 32:22 34:10 38:7 62:13 83:21 117:3 244:24 245:2,13 261:2 373:11 383:20 461:2 462:12 463:15,21 487:1 514:21 525:3 537:17 538:7,8,9 556:14,15 579:9 590:2 592:12,20 593:20,22 595:15 607:13 646:14 675:21 678:16 741:8 mentions 3:9 475:24 Mercenaries 455:13 mercenary 154:12 455:13 741:19 mere 153:9</p>	<p>merely 157:6 235:3 283:22 542:17 713:12 merits 613:17 message 437:25 444:23 721:11,12 775:15 messages 391:21 703:17 Messiah 236:3 237:16 576:3,3 met 40:9 464:24,25 465:2 485:11 488:19 499:15 502:18 547:11 617:10 metaphor 125:10 739:10 745:15 metaphorical 780:23 metaphors 714:5 781:6 meted 735:15 method 292:12 methodology 652:7 methods 289:5 394:25 meticulous 203:24 meticulously 660:21 metres 68:14 Metropolitan 177:14 Mexicans 178:2 Michael 31:21 32:2 microphone 130:1 midday 168:17 middle 13:19 14:7 35:5 35:18 38:11 56:5 64:21 69:18 82:22 87:24 89:8 136:25 137:4,6 142:13 185:25 186:7 187:11 188:14 193:16,18 195:10 205:3 208:19 208:20 209:4 239:21 241:6 242:16 247:3,5 297:6,13 323:15 335:16 350:12 358:7 375:23 379:15,18,22 392:10 399:6 446:2 454:18 463:1,12 494:14 545:8 551:19 555:2 559:12,19 582:17 607:10,17 618:25 620:9 645:5 652:16 661:2 680:8 696:24 697:8 747:15 749:12 mildly 51:2 militants 665:1,4 military 101:10 102:18 105:13 106:2 153:21 153:25 154:3 157:13 239:16 270:2 279:19 279:20,23 295:9 296:8 303:14 305:9 404:18 456:9 509:1,8 509:19 510:6,12,17 511:23 512:20 513:3 513:7,21,25 514:3 588:24 589:10 590:1 590:24 591:21 594:14 595:17 602:3 664:14</p>	<p>741:1,10 742:5 militia 335:18 375:17 million 224:5 367:15,16 399:11 466:6,13,14 466:15 467:10 567:6 721:20 millions 240:6 354:20 355:2 624:2 Milosevic 386:17 388:21 mind 13:7 28:15 33:10 55:13,17,20,23 57:7 65:10 120:1,14 322:8 396:13 449:16 469:3 482:4 483:7 525:6 583:7 601:16 602:19 671:2 675:1 684:10 716:9 720:16 726:19 741:14 752:20 753:3 758:4 782:23 801:2 807:5 minded 620:19 mindedness 758:18 minds 384:2 618:5 663:15 mind-set 720:11 mine 104:5 250:12 301:4 398:7 550:6 642:16 minimum 347:9 minister 36:12,12 796:13 ministers 36:3 660:8,8 668:12,15,20 779:12 Ministry 594:19 Minnesota 393:18,19 minorities 186:11 239:1 338:25 339:1 minority 20:19 53:21 209:6,6 221:15,16 358:8 399:7 485:2 562:20 567:7,10,10 586:17 611:17 645:13 699:1 701:5,6,13,16 701:18 702:10 705:3 723:11 733:10 743:16 minus 567:6 minute 44:15 161:9 minutes 54:18 332:23 372:24 378:17 655:7 662:5 695:22 791:16 Miracles 606:4 mirror 212:9 mirroring 400:15 mischaracterisation 238:8 239:2 misheard 107:20 misinterpreted 122:20 misjudgement 226:6 226:20 misleading 806:5 misled 418:5 misnomer 495:11 mispronounced 615:21 missed 110:13 144:16 167:14 169:1 257:8</p>	<p>257:10 339:25 461:7 492:9 502:11 530:5 654:15 missile 262:11 missing 3:7 170:25 514:12 mistake 183:3 214:18 238:22 274:8 333:23 340:5 408:2 507:8 526:20 mistaken 226:19 294:13 441:19 443:11 446:14 554:21 604:2 651:16 708:20 mistakes 229:5 370:1,5 misunderstand 637:7 misunderstanding 515:22 misunderstood 633:24 mixed 658:20,21,22 659:12 669:6,13 MI6 80:7 Mm 49:3 137:12 265:8 381:13,16 417:8 419:17 425:6,8 Mm-mm 409:10 mobilisation 60:1 mobilise 319:25 323:17 341:5 388:24 389:4 mobilised 75:2 mobilising 59:24 319:23 323:11,21 mock 60:25 mocks 737:10 model 370:21,24 374:5 374:5,7 377:7 443:4 moderate 220:21,23 222:5 379:15 moderates 375:23 379:17 modern 94:23 182:1 319:11,13,16 623:14 modest 762:2 Mohamed 64:20 moment 8:12 24:11 50:21 132:16 173:3 201:11 203:1,2 206:8 220:8 229:24 250:13 258:24 259:24 289:21 294:6,13 295:14 297:17 302:1 337:11 370:25 378:18 400:23 435:19 438:22 468:14 541:8 560:8 572:1 579:20 587:9 595:9 645:5 661:12 665:15 697:8,11 703:4 725:16 742:20 790:8 momentum 227:16 667:15 monarchy 390:2,6 Monday 21:7 169:11 567:24,25 568:3 569:1 570:21 monetary 8:1 money 201:2 624:1</p>
---	--	--	---	--

<p>805:10 Monitoring 190:20 191:2 198:2 330:1,12 578:23 monkey 95:8,9,25 96:21 402:7 709:7 monkeys 93:21 123:8 407:10 438:17 472:24 473:22 474:8 475:25 481:18 708:19 monographs 610:2 monopoly 11:14 79:6 525:20 803:8,11 month 7:11 33:18 59:3 months 569:23,23 680:3 683:13 809:6 mood 58:14 130:13 611:24 mop 662:15 moral 180:23 237:23 237:23 377:17 378:15 460:20 510:3,7 547:1 595:5 666:7,9,10 morale 539:7 morally 510:5 697:7 morning 1:24 21:7 110:11,13,19 112:15 167:13,18 229:1 284:13 285:3,5 366:20,21 429:2 452:24 504:10,13 552:6 565:7 569:2 570:23 603:18 615:22 681:14,20 682:24 684:6 810:3 Moroccan 434:9 552:13 556:16 557:5 Morocco 554:4 556:16 556:22,25 Moscow 611:24 Moses 80:6,9,11,12 193:12 mosque 586:6 mosquitoes 514:20 motion 348:9 700:9,15 807:21 motivate 363:10 371:9 371:16 motivated 177:16,17 178:21,24 179:4 380:11 motivation 212:4 370:22 775:12 motivations 229:7,7 motive 178:18,20 227:3 228:14,14 691:23 motives 230:9 668:4 motor 282:11 691:4 mould 560:9 move 56:1 58:10 71:17 78:23 179:9 180:3 184:11 189:5 190:7 212:18 223:6 231:14 235:23 240:10 250:24 306:13,23 363:25 379:3 397:5 490:11</p>	<p>504:4 517:18,19 521:4 531:8 544:7 549:25 564:2 591:15 593:4 606:24 654:24 716:19 moved 52:1 158:24 191:15 199:3 268:8 393:17 movements 185:23,24 186:16 187:1,2,8 188:14 208:22 239:11 239:21,23 240:7 245:1,15 335:15 358:4 552:18 movie 376:9,11 moving 169:22 295:17 295:19 297:8,23 306:10 MP 562:23 muddying 198:10 Mugabe 189:19,22 Mugesera 395:23 Mulandu 762:8 multiculturalism 223:21 mundane 155:22 156:5 municipality 640:10 murder 142:15 184:14 185:11 204:10,11 208:3 378:3,4,11,13 378:13 392:1 419:3 559:21 787:14 murdered 183:6,7 185:10 323:17 367:15 murdering 204:4 224:5 225:7 murderous 405:2 Mushwana 9:2 16:7,22 Mushwana's 3:8 10:7 16:5 music 395:6 Muslim 37:7 67:6 117:21 118:1,10 181:14 187:3 353:14 790:15 Muslims 178:3 353:18 muster 728:14 755:6 mustn't 792:23 MUSUKU 441:13 464:5 527:15,23 528:5,7,12 muzzle 339:10 M-I-C-H-A-E-L 32:2</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>n 62:17 naked 556:3,6 name 21:21 22:22,24 26:20,21 31:5,21,22 32:2 34:10 81:1 83:14 104:10,10 133:8,18 136:5 142:16,25 153:10 172:18 195:16 245:5 285:14 364:5 373:24 374:11 419:4 430:8 443:10 458:24</p>	<p>458:25 459:11,12,16 485:8 521:24 545:12 546:25 554:15,20 566:11 615:21 625:10 644:22 708:15 726:18 727:15 787:15 named 391:5 names 31:23 104:5 134:3 172:17 571:7 narrative 382:24 383:2 395:3 narratives 382:20 narrow 169:1 199:3 260:17 641:16,19 narrower 637:23 645:22 717:21 Nasser 187:5 nasty 298:10 407:8 778:5 Natal 691:15 Nathan 165:3 nation 80:17 214:23,24 220:12,15 235:17,18 249:2 297:2 299:22 299:22 342:17 343:11 582:19 583:17 636:21 771:7,10 national 162:3 202:15 208:14 213:11 367:6 432:16 553:11 620:8 644:2 743:5 748:21 758:21 nationalism 184:22 186:1,4,8,13,14,24 187:7,9 335:14 342:12,13 387:2 575:4 646:23 647:7 652:6 nationalisms 202:17,23 202:24,25 nationalist 185:17,21 185:23 186:10 187:2 188:19 208:22 290:21 334:22 335:22 336:3 582:18 592:13 780:7 nationalists 187:5 203:1 290:12,16 780:2 nationality 583:12,14 603:1 nationals 583:16 nations 18:15 204:3 223:8 299:12 330:2 346:12 348:1,5,6 358:11 369:16,19 453:13 485:25 488:13 490:9 521:14,16 566:5,23 585:23 587:3 642:10 696:7 native 392:9 533:11 natural 378:10 460:13 541:4 638:8 naturally 14:12 502:5 504:10 686:22 nature 7:5 13:24 20:6 24:4 28:10 30:16</p>	<p>34:14 59:19 84:11 139:13 155:4 179:25 232:12,15 233:14 234:11 342:15 356:2 405:13 452:18 453:6 453:8,12 454:4,5 511:12 520:6 583:23 611:12 613:14 623:6 631:18 633:25 654:3 688:17 694:7 696:16 698:6,25 700:3,15 701:4,4,12 702:2 716:19 718:12 725:17 725:18 728:18 729:4 731:19 732:2 733:20 738:24 760:25 761:8 796:11 797:23 798:18 808:21,24 Nazi 122:5,10,15 182:19 184:13 185:2 185:3 204:15,15,18 207:12,13 319:23,25 321:6,17 322:2,16,22 324:8 334:22 621:21 642:19 655:5 Nazis 42:4 184:19 185:9,13 193:15 203:10,16,18,21 204:5,7,7,9,10,18 205:8,15,19,20,21,22 205:23 207:20,21,22 208:8 209:20 223:25 224:3 317:12 319:17 321:2 322:25 323:4 323:17 324:3,6,22 325:14 326:25 327:17 361:16 373:13,19 655:13 Nazism 207:24,25,25 208:4,11 209:10 224:14 320:6,15 322:18 326:13 593:24 594:3 Nazi's 314:21 NC 796:14 Ndebele 507:22 Ndlosi 64:21 69:8 near 56:21 77:24 nearer 207:14 301:7 661:13 nearest 519:25 nearly 218:22,23,23 322:20 359:19 neatly 311:17 necessarily 11:6 76:3 76:16 177:2 231:19 281:23 288:25 332:14 413:5,8 448:17 463:4 463:7 465:5 474:20 476:18 478:11 482:16 482:17 484:14 485:24 486:3 493:15 531:23 541:21 542:20 545:21 554:5 562:24 565:12 569:3 577:24 599:12 615:9 634:5 647:16</p>	<p>658:16 673:9 689:4 690:23 693:25 694:6 694:11 701:7 702:5 715:22 718:9 719:24 720:2 730:12 739:19 744:1 760:21 767:15 800:2 necessary 42:17 125:14 435:17 436:3 478:15 591:19 602:15 678:24 681:18 682:20 685:21 689:14 690:14 693:5 696:20 712:25 717:1 717:25 770:10 771:23 784:4 794:24 807:24 809:22 Nedlac 466:21,25 needed 9:12 43:22 53:14 116:12 117:21 170:3 198:23 218:8,9 369:2 370:12 520:17 751:3 781:7 needs 3:14 10:9 13:22 29:12 180:9 197:12 210:23 322:6 651:4 677:1 678:7 686:22 697:2,4 710:10 787:3 803:15 negative 220:22 221:3 242:25 469:5,8 715:6 745:22 746:6,7 negligible 200:6 negotiated 606:2,4 negotiation 330:8 660:18,24 NEHAWU 458:8 491:6 491:7 neighbour 299:21 neighbourhood 56:23 393:18 744:12,14,20 744:23 745:10 Neighbourhoods 744:14 neighbours 106:8 224:20 360:10 neither 49:25 147:11 Netanyahu 269:19 478:24 network 252:4 neutral 227:11 259:2 617:7,9,10 620:24 621:6 667:6 739:2 749:6 never 24:13 35:8 40:5 49:12 51:15,18 76:14 85:17 92:16,17 105:12 119:15 120:3 126:17 148:11 151:11 194:7 224:21 225:5 238:12 301:18,19 312:5 327:16 330:21 345:24 411:7,12 438:6,11 456:9 488:18 508:21 539:8 542:16,17 543:4,5,19 547:25 548:1 557:6</p>
--	---	--	---	--

570:3 594:23 617:10 694:22 697:11 702:3 702:4 709:25 738:13 765:20 779:22 nevertheless 369:2,14 374:6 389:7 391:3 508:17 new 54:19 56:2 73:23 77:7 80:2 198:21 200:7 248:18,18,19 299:10 307:19 329:8 351:14 373:18 427:5 468:13 477:24 550:25 562:19 611:24 619:2 640:9 644:23 772:5 news 18:19 515:10 562:22 newspaper 84:21 newspapers 566:4,12 566:14 next-door 92:6 NGO 486:2 NGOs 198:6,12,19,20 nice 408:4 409:12 niceties 763:9 niche 28:12 32:17,23 32:23 night 110:14 112:20 167:15 326:5 452:10 793:17 nights 61:3 nilly 393:13 nine 167:19 763:21 nipped 716:14 nit-picking 489:18 nod 120:25 144:4 nodded 121:24 nodding 121:3 noise 444:17 446:5 528:5,6 non 272:13 non-attendance 807:9 non-combatant 263:17 non-contingent 219:12 219:12 222:13 255:10 non-exhaustive 201:12 641:15 non-existent 681:10 non-governmental 248:8 non-Jewish 192:14 641:4 659:5 669:17 669:17 788:21 non-Jews 195:22 200:24 586:20 non-opposition 807:5 non-political 785:15 non-racist 243:6 407:12 non-violent 227:19 581:2 631:25 667:18 781:20 782:3 non-Zionist 607:4 611:10 643:21 noon 168:1,7 170:23 norm 52:17	normal 6:12 7:6 63:4 65:13 66:2 82:7 251:22,23 377:17 456:7,10 583:8 598:17 601:13 normally 36:20 65:14 228:5,6 792:11 797:23 norms 809:5 north 185:25 227:17 239:16 651:14 667:16 667:22 noses 390:23 note 233:6 427:19 696:23 802:9,19 803:6 noted 247:14 712:9 notes 111:24 448:15,16 448:18,24 449:1 450:2 706:15 notice 12:23 13:5 174:20 365:5 460:6 460:22 572:16 599:14 642:8 704:12 797:18 noticed 232:25 504:14 597:25 598:1 notices 93:1,1,3,8,9,10 96:13 173:4,5,8,11 174:1 276:18,20,25 277:3 364:22,23,25 365:1 401:14 430:22 438:23,24 472:22 473:1,13,14 571:22 572:9,10 599:11 603:20 notified 110:13 notion 127:15 177:6 339:4,6 600:4 634:1 724:3 731:13 745:17 notional 46:11 notorious 156:8 791:10 notoriously 156:4 notwithstanding 426:19 644:21 645:4 726:14 novel 50:23 novelty 810:13,13 novo 23:14 nowadays 321:1 NPA 518:6 nuanced 13:19 640:6 nuances 720:14 nub 752:13,13 number 48:12,12 64:12 68:25 70:11 75:12,13 75:14,24 103:25 113:5 115:21 116:9 126:10,13 176:19 198:5,6 199:2,22 219:4 223:17 245:6 265:10 266:11,13 268:6 270:8 305:17 305:19 308:3 315:18 333:15 346:10 369:22 371:5 390:16 397:22 409:21 436:21 456:14	473:5 479:14 485:6 486:4 536:4,25 551:25 565:8 566:17 587:1 610:13,19 622:4 630:25 652:9 664:14 665:10 669:22 676:14,17 numbered 235:11 numbers 66:7 173:17 409:8 587:1 664:22 numerous 37:6 283:8 356:4 696:5,7 785:25 801:18 nut 254:24 nutshell 255:1 284:1 N-G-A-G-E 251:21	objects 596:23 690:23 691:11 692:19 702:19 730:1 obligation 691:2,3,7 obligations 691:2 oblige 106:14 267:5 obliged 106:3 153:6 158:9,14,17 233:17 353:8,9 obliterate 259:17 260:11 obnoxious 766:24 observance 213:10 795:25 Observation 359:3 observe 41:6 573:6 646:18 observed 39:6,19 166:12 660:21 observer 47:3,7 obtained 590:21,23 obvious 72:5,10 731:16 759:12 obviously 28:3 34:10 42:3 106:18 120:24 130:5 166:1 240:15 246:6,14 266:9 307:2 307:2 355:5 366:11 373:25 397:12 403:14 416:13,14 466:2 477:24 484:16 591:22 592:7 594:21 595:1 614:1 615:6 616:18 657:25 674:13 683:23 685:17 732:17 802:9 occasions 307:4 591:20 801:19 occupation 106:3,11 125:25 126:6,14 279:20,20,23 293:21 295:8,9 296:8 303:15 356:23 357:10 390:18 390:21 434:9,18 453:15 455:11,15,22 456:3,11 488:14 552:13 554:4,4,8,24 556:17 557:7 586:2,3 587:4 589:10 595:4 618:21 628:17 658:7 785:12,13 occupied 125:17 129:13 220:3 224:25 260:22 267:4 279:10 279:19,22 292:25 295:24 297:14,15,16 302:3 303:22 312:19 454:16 555:24 588:24 590:18 591:1,8 608:21 657:14 occupies 180:18 295:23 occupy 419:15 465:22 467:9 559:3 585:24 721:18 786:17 occupying 295:18 296:1 302:7 591:1 776:6	occur 590:15 715:19 occurred 367:19 386:21 697:24 698:1 793:17 occurs 425:15 613:14 ocean 262:1 odd 567:6 odious 317:13 319:9 407:8 offence 120:7 141:4 155:2 285:21 Offences 691:4 offend 694:21 758:16 offended 152:2 706:7 offending 685:24 686:3 686:25 690:10,11 700:10 718:25 723:25 724:23 749:17 offends 752:15 offensive 120:20 141:1 320:18 593:18,18,25 753:10 777:5,13,13 777:14 offer 229:6 243:9,11 244:14 768:17 offered 229:8 615:16 660:23 692:16 offering 339:4 360:15 offers 201:23 510:11,17 office 109:12 369:24 385:1 465:16 478:21 589:15 691:4 721:14 officer 364:5,8,11 369:12 officers 7:4 177:16 197:16 332:12 370:11 458:24 810:12 offices 36:20 37:4,5,11 37:14,16 38:17,22 39:17 40:8 58:21 91:24 92:1 98:2 108:15 109:8 115:22 161:17 165:13 273:24 317:4 774:3 791:14 official 66:19 465:10 480:5 493:12 officially 493:11 offload 783:6 off-hand 175:23 oh 39:12 87:8 97:6 107:20 112:16,19 130:2 140:22 143:7,7 144:21 148:9 151:20 162:7 163:23 188:3 204:7 217:8 257:11 265:25 296:15 305:15 330:4 333:1 351:5 388:4 401:25 403:16 409:3,9 436:16 437:1 440:16 441:13 443:25 444:18,19 445:10 449:22 450:20 460:2 470:14 471:9 473:15 498:6 529:3 530:15 530:18 544:23 559:16 565:16 572:16 619:18
--	--	--	--	---

<p>629:18 675:9 766:17 774:24 784:20 787:4 794:3,7 809:7 old 150:14 159:25 183:1 291:22 378:12 older 212:10 old-fashioned 184:10 omitted 21:15 652:15 once 12:10 25:20 56:18 62:6 110:7 167:24 221:22 231:23 285:18 376:14 382:10 514:13 514:21 521:5,9 557:8 578:15 579:18 584:10 637:8 707:8 723:13 728:7,19 729:15 730:5,10,13 onerous 717:24 ones 41:20 72:15 97:4 136:15 144:11,12,20 144:20 375:25 388:8 437:7,10 511:15 514:24 529:24 586:23 611:5 743:17 783:16 803:11 oneself 353:17 728:2 one's 31:21,21 215:25 216:1 615:7,8 639:23 729:2 787:12 one-sided 652:3 ongoing 105:14 150:8 349:17 652:17 781:8 781:8 online 327:22 onset 56:20 onus 13:12,13,14 onwards 197:2 342:9 449:4 582:13 594:7 756:14 758:7,24 763:15 773:4,10 775:4 ooh-ooh 77:19 open 32:7,10 47:23 51:22 55:13,23 94:25 95:15 100:21 101:22 104:9 113:5,14,22 173:6 177:22 263:9 270:9 331:25 344:20 344:24 354:13 396:19 430:23 437:16 448:7 452:2 460:14 461:16 462:8 473:2 495:24 497:6 510:20 511:8 539:9 566:14 587:14 601:16 684:10 710:16 714:4,20 772:8 773:16,21 789:25 808:8,11 opened 332:2 opening 3:23 18:10 137:7 227:9 232:5 255:4 577:6 755:15 openly 76:5 134:19 177:23 231:17 437:7 437:10,11 539:4 660:12 738:18 739:7</p>	<p>opens 510:20 635:3 operate 65:3 458:3 operated 71:14 177:19 operates 53:20 180:5 720:18 operating 456:13 operation 98:16,20 99:4 101:10 258:14 269:17 270:2 434:16 453:18,19 operations 102:21 433:4 591:21 opine 19:3 opinion 47:21 120:22 120:24 121:8,8,10,12 121:16,20 122:4,8,10 122:22 123:24 124:1 124:4,10,11 130:10 150:17 152:8 155:11 160:18 231:12 260:12 271:12 287:18 289:8 289:12 291:6,8 298:21 326:7 337:22 372:5,5 479:3 484:24 576:17 583:21 597:19 598:22 600:13,15 617:11,12 668:3 671:1 672:5 702:3,9 opinions 230:23 264:21 283:8 313:3 337:21 337:24,24,25,25 338:1,1,3 345:3,4 361:3 365:19 574:1 579:24 585:14 600:12 601:5 617:17,17 618:3 639:19 712:2 opponent 283:20 580:6 opponents 211:10 647:2 opportune 3:11 24:11 206:8 468:14,16 opportunities 359:18 359:21 705:4 732:24 opportunity 23:22 168:8 231:22 543:17 558:9 569:9 600:17 677:11 678:18 681:20 685:17 oppose 90:5 214:6 238:18 267:24 272:6 272:21 345:18 479:15 585:10 594:18 595:20 687:23 771:14 opposed 7:1 107:1 115:13 153:9 273:4 273:12 298:3,4 368:17 376:6 461:1 494:21 582:7 583:13 594:24 601:5 602:12 620:8 654:5 787:25 opposes 338:6 opposing 199:24 214:13 223:21 231:9 595:21 785:23 opposite 106:25 558:5 opposition 80:2 153:6</p>	<p>240:14 241:14 247:14 247:24 248:2 338:19 339:6 362:13 584:3 oppositional 270:21 345:14,15 362:11 oppress 313:13 419:15 510:5 786:17 oppressed 77:10 351:17,21 352:15 551:3,7 552:17 732:13 796:22 oppresses 124:5 420:2 576:9 oppressing 124:15 oppression 181:24 193:15 204:25 226:7 552:18 555:9,10,11 648:11 oppressive 657:13 optimistic 360:16 option 79:21 583:6 808:8 optional 353:11 orally 719:22 727:7 Orange 11:2 39:4,8,10 74:13,19,25 91:22 92:2,4 128:18 164:16 457:19,19,21 459:1 470:21 471:15 527:9 527:10 531:20 532:19 532:25 533:3,21 534:5,6,12,16,21 536:24 537:13 538:7 538:25 651:7,8,12,13 715:14 743:23 744:10 744:13,21 745:9 791:4,7,12 Orania 532:13 order 7:16,20,21 8:1 20:14 22:8 23:16 54:11 109:5 117:22 137:21 152:13 177:25 197:13 200:7 214:6 226:13,21 263:10 307:6 313:6,6,7 335:3 337:10 339:10,11,11 340:12 341:5 375:9 388:22 390:9 428:24 429:1 445:22 446:10 446:15,15 452:9 521:18 575:10 620:10 626:6 684:11 686:11 704:22 752:3 760:16 760:18,23,24 793:8 805:4 806:1,7,12 807:4,11 810:6 ORDERLY 26:19,22 26:25 55:2 172:16,19 172:23 206:17 430:7 430:10,13 571:7,10 571:13 orders 760:11 ordinarily 128:11 ordinary 6:22 7:7 47:1 50:25 141:16 356:1 714:6 719:2,21,24</p>	<p>720:2,15,17,19 721:3 765:24 770:25 776:19 786:19 795:23 796:25 801:3 organ 792:7 804:21 organisation 30:6 34:23 53:23 54:1 61:14 164:4 194:21 199:25,25 239:16,16 239:17 251:11 261:7 274:5 281:14 313:23 329:13,20 362:7,11 368:7 375:9 413:12 463:4 491:17 499:19 502:22 535:22 536:5 617:19 618:3,4 721:20 760:20 organisations 29:25 37:18,19 65:4 115:22 118:10 161:21,24 198:6 199:23 248:8 273:6,23 324:2 328:7 328:8,8,9 340:23,24 427:1 433:10 435:16 436:14,17,21 437:2,2 454:13 461:22 464:3 488:14 493:14 494:12 522:11 534:17,23 535:3,8,23,24 536:1 538:8,11,11 567:2 584:6 595:19 617:13 640:22 643:22 696:8 organise 382:21,23 454:14 493:13 organised 56:19 185:5 375:15 458:8 492:10 493:16,17 496:1 526:21 663:16 670:1 751:19 organiser 495:18 organisers 449:25 496:21 498:9 organises 273:24 organising 434:24,25 435:7 523:3,7,11,13 523:14 774:2 orientation 6:2 origin 6:2 699:5 744:17 766:1 original 101:3 256:5 330:2 originally 190:19 332:11,14 590:22 681:25 ornithologist 747:24 748:2 orthodox 659:4,15 669:15,16 OSC 199:25 OSCE 175:5 194:19,20 194:23 199:25 329:19 Oslo 622:3 ostracising 43:14 ostracism 716:7 Ostroff 113:22 Ottawa 175:11</p>	<p>Ottoman 399:9,19 ought 52:4 256:24 569:6 574:24 598:7 672:24 782:16 791:25 792:1,6 outcome 49:8,12 179:24 386:3,4 764:4 767:22 768:15 outcomes 179:2 426:10 426:16 outlaw 575:11 579:21 outlaws 578:5 579:9 outline 11:24 outlined 13:8 output 610:18 614:6 615:3 746:13 748:7 outrage 105:2 outrageous 400:1 586:12 outset 5:9,11 6:10 8:10 232:19 233:4 570:5 685:22 686:10 724:1 729:23 750:13 752:12 770:4 outside 41:17,18,19 56:14 58:20 76:11 116:18,19 117:17,20 118:4 176:9 182:3 213:6 215:23 218:22 242:4 378:20 489:25 495:21,22 496:14 568:15 634:6 737:16 774:20 outsiders 360:23 361:3 outspokenly 361:10 outstanding 352:25 678:11 outwards 182:1 overall 150:24 157:15 195:13 196:13,15 200:20 201:21 386:4 609:21 613:1 665:7 723:11 overarching 232:10 783:20,21,23 overblown 321:8 overboard 671:5 732:7 732:14 overkill 742:7 overlap 1:18 overlapping 730:17,19 overlook 783:14 overly 452:7 720:24 overnight 112:13 286:2 overrule 157:16 286:3 601:17 overruled 424:13 overseas 53:10 474:15 522:7,9 oversight 638:23 overstatement 348:25 769:16 overthrown 368:19 660:16 overtone 179:3 762:22 overturned 359:7</p>
--	--	---	--	---

<p>Overview 574:8 overwhelming 105:12 207:21 210:19 216:13 218:15 236:16 238:15 239:4 240:3 322:23 323:6,18 328:11,12 345:20 overwhelmingly 368:25 656:10,15 740:19 over-sensitive 227:2 231:2 owe 81:4 546:6 625:13 owner 88:13 90:14 95:24 97:20 278:20 owners 95:18 387:15 ownership 296:21 Oxford 331:25 332:2 336:25 o'clock 109:15 110:19 110:21 284:10 429:1 528:22 570:23 734:5 o'clock 206:11 663:1 683:9 684:13 750:15 750:22</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 64:25 PAC 461:18 462:12,18 463:8 pace 553:10 pager 137:18 pages 63:23 64:15 90:17 278:3 294:23 470:24 564:2 paginated 11:8 30:19 751:19 paid 458:19 pain 762:17 painful 43:4 paint 220:10 349:7 painted 761:25 762:13 pair 105:17 Pakistan 222:16,17,17 347:23 356:3 Pakistani 222:19 347:11 Pakistanis 222:15 palatable 281:10 Palestine's 359:15 Palestinian's 360:4 Palestinian/Israeli 611:5 palpable 683:19 pandemic 612:8 paper 176:5 593:20 770:5 papers 11:8 15:17 23:10 320:7 593:23 615:10 680:4 727:6 741:11 743:1 par 750:16 paragraphs 47:9 235:11 334:20 337:9 346:15 381:15 449:2 576:16,20 577:19</p>	<p>579:25 758:24 765:21 767:7 796:6 parallel 210:5 374:23 parallels 293:10 552:16 parameters 19:16 234:17 paraphernalia 63:11 paraphrasing 422:4 426:13 pardon 23:6 38:2 52:15 63:14 68:5 73:18 78:25 176:25 186:22 187:23 201:9 238:1 394:14 467:16 472:2 490:19 511:1 522:16 536:12 543:10 547:9 558:17 614:18 622:15 653:2 parents 160:1 Park 168:3 parking 40:19,22 166:9 parlance 94:8 332:4 parliament 175:8 331:10 562:20 parliamentarians 37:8 parliamentary 82:11 194:17 329:18,19 parliaments 331:8 partial 236:15 620:21 621:8 652:3 participants 700:8 participate 306:9 455:14 511:5,5 566:6 566:6 704:25 participated 40:13 41:7 175:5 participation 609:15 796:18 particularly 35:2,3 40:8 58:24 59:1 60:2 66:21 82:5 83:19 94:9 153:3 190:21 204:9 248:10 324:9 379:19 380:6 387:14 389:22 392:4 441:19 457:5 596:13 625:24 636:11 676:10,13 715:17 757:12 758:23 777:13 particulars 22:2 450:25 754:11 798:12,16 parties 2:10,21 4:15,17 12:2 13:24 18:24 35:21 37:9 60:15 66:12 100:25 111:20 294:8 357:22,24 360:24 362:3 431:24 435:15,16 461:4,9 700:7,20 725:3 744:5 751:4 759:25 793:6 797:14 799:9 804:9 807:6 808:7 partisan 117:1 227:12 621:12 667:7 746:23 partisanship 621:18 partition 297:1,3,4 partly 248:18 360:10</p>	<p>360:12 541:14 603:11 680:19 partner 94:18 parts 25:1 102:23 135:3 186:5 233:19 258:17 297:21 304:19,21 387:3 458:2 548:21 549:16 552:19 575:7 590:8 party 20:7,7 22:11 94:18 107:25 250:8 289:9 400:16,17 515:11 562:20,21 584:3,4 596:15 609:7 644:2 660:22 683:8,9 696:21,22,25 697:1,9 700:14 701:11 759:2 759:2 792:8,9,21,22 793:1,1,3 806:5 809:10,16 party's 804:4 pass 556:5 586:12 passage 10:6 71:19 338:22 392:10 471:18 480:12 514:6 625:20 629:4 691:13,16,18 passages 11:25 688:5 723:23 passed 368:14,25,25 374:16 passes 728:14 passing 20:9 749:11 passive 7:2 passport 583:12 653:7 pastors 29:14 376:4 patriotism 342:12 343:5 pattern 398:5 patterns 757:14 pause 34:8 36:22 41:21 66:14 70:22 74:16 76:6 80:8 164:6 178:4 178:9 180:13 184:17 191:1 192:19 195:22 217:19 236:7 243:7 246:11 378:18 545:14 667:9 686:14 688:22 705:6 721:15 731:9 760:8 781:10 paused 735:1 pay 256:25 792:24 793:4,4 paying 256:16 payment 256:24 760:18 peace 145:16 213:13 220:3 261:19 280:25 281:1,7 299:17,22 307:24 349:17 357:13 358:1,1,5,9 362:13,15 454:18,19 526:18 622:3 626:11,12 652:17 661:4 704:22 peaceful 106:7 267:2 524:25 581:8 620:10 782:3 peacefully 359:8,11</p>	<p>526:20 786:22 peculiar 584:1 peer 175:19,24 pejorative 776:12 pen 289:18,21 305:18 penal 759:15 760:3 penalties 759:24,25 761:9,10 penalty 708:5 760:6,7 761:15 pencil 289:18 penned 165:3 627:15 Penny 708:15 806:25 Pension 691:15 peoples 202:11 people's 434:18 631:25 639:12 people's 589:22 590:9 592:25 593:1,1,6 perceive 82:14 153:11 283:24 678:14 801:3 perceived 49:18 147:5 perceives 214:20 741:22 percent 216:17 percentage 595:9 664:16 perception 192:12 641:2 perfect 373:18,19,20 perfectly 128:15 189:20 202:13 581:4 586:15 636:7 648:25 650:22 656:25 681:7 687:7 706:12 performed 659:15 669:15 period 36:8 37:2 58:25 59:23 64:11 149:11 182:1 268:7 367:16 460:24 605:13,16,21 610:8 611:1 612:17 746:19 periods 35:2 periphery 612:20 Permalink 94:20 permanently 488:22 permissible 8:14 578:16,17 626:20 635:13 636:7 649:5 687:8 694:18,20 725:19 742:9 permission 154:19 permit 709:11 728:24 729:1 permitted 15:23 51:4 393:4 582:6 710:17 710:18,19 pernicious 732:21 perpetual 9:12 43:22 53:14 125:14 658:7 735:22 780:22 perpetuates 757:14 perpetuating 526:23 perpetuation 371:24 persecuted 209:6</p>	<p>376:22 persecution 20:21 376:21 731:16 735:13 persecutors 204:13 Persians 186:12 persistently 339:15 personal 86:2 119:13 289:12 505:3 508:4,7 515:22,24,25 668:3 740:13 personally 39:6 42:5 85:15 88:11,21 100:16 230:10 267:25 269:20 289:4 361:9 396:22 412:3 507:12 511:19 515:16 521:21 566:10 627:8 740:16 personified 743:8 personnel 664:14 persons 46:21 113:7 117:10 270:9 509:17 513:2 676:20 698:19 715:5 717:13 719:5 719:13 739:4 person's 136:5 493:25 582:10 636:22,23 770:11,12 person's 372:4 perspective 22:7 61:11 79:19 81:21 83:6 84:9 84:24 117:2 213:21 219:21 231:21 232:17 259:2 599:1 608:22 653:10 655:21 677:4 677:19 689:8 700:6 700:19 702:12 714:7 723:5 724:10 738:23 739:24 743:13 783:24 798:25 perspectives 460:14 526:11 700:22 persuasion 776:15 persuasive 688:14 722:8 803:19 pertain 686:24 pertained 703:19 pertaining 13:18 31:12 pertains 8:3 685:23 690:13 719:20 Peter 585:2 petitions 696:6 petty 359:22 657:25 pharaoh 383:21 phase 105:10 266:17 PhD 174:21,23 175:3 phenomena 182:7 335:4,6 phenomenon 177:2 181:13 185:16 208:9 241:8 634:4,8 Philip 277:8 482:13,16 Phillip 93:19 95:7 472:23 473:22 474:3 474:6,11 475:12,18 475:21,24 476:9,12 476:17 481:17</p>
--	--	--	---	--

<p>Phillip's 475:5 philosophy 174:21,24 602:11 phone 98:2,3 448:21 phones 475:16 phosphorous 355:10,14 photo 149:8 photograph 63:9,21,25 165:13,15 492:25 photographs 149:3 408:20 409:4 443:24 492:18 phrase 42:25 193:8 448:6 609:18 655:5 phraseology 624:1 phrases 452:3 712:23 783:16 788:2 804:15 physical 11:17 79:8 80:1 192:13 374:12 406:7 408:3 421:18 425:10 525:25 527:8 527:13,20 531:2,4,7 641:3 707:2,5,8,13,24 708:20,25 709:8,16 709:20 715:23 717:8 physically 457:20,21 521:21 527:17 528:15 591:14 705:23 733:5 PIA 444:9 pick 120:25 292:8 346:6 528:10 775:9 pickets 435:23 454:14 picking 224:24 picks 202:6 292:6 picture 67:15 68:1,7 170:20 278:4 494:1 810:2 pictures 459:2 493:23 529:22 piece 63:11 132:11 156:7 157:13 176:10 295:18 299:13 331:6 422:11 562:22 772:5 piecemeal 48:16 pieces 298:11 690:1 pile 750:18 pillars 433:22 pin 387:13 pink 277:1 pinpoint 740:15 pinpointed 17:10 pioneers 237:18 398:8 pitch 301:4 pitfalls 800:25 place 6:19 12:2 20:15 31:10 36:23 38:25 58:10,23 60:5 61:8 64:12 75:1 115:8 128:18,24 183:4 205:14 208:23 328:18 341:11 378:17 384:1 394:4 408:1 443:8,9 492:6 505:3 516:22 516:23 532:12 562:9 568:25 678:8 700:25 713:12 739:10 773:11</p>	<p>779:10 791:6 797:2 801:19 placed 24:19 37:23 56:25 98:9 112:9 217:16 231:24 369:15 698:11 741:12 746:12 795:19 798:8 799:1 places 12:9 183:2 187:6 216:21 217:17,20 309:18 533:8,10 555:25 590:1,4 593:5 629:1 636:1 744:18 776:4 786:6 802:24 plain 688:6,12 715:9 plainly 735:16 742:17 743:12 780:23 plaintiff 46:24 plan 567:24 671:22 784:5,7,11,22,24 785:8 802:21 810:4 planet 189:24 292:8 313:15 322:20 328:5 planned 98:10 224:22 376:8,12 450:12,13 711:15 planning 260:5 376:7 planting 393:16 plastic 117:4 platform 623:16 797:5 play 6:25 14:6 29:8 49:12 132:5,5 371:7 598:15 601:10 805:19 809:10,25 810:2 played 25:10,24 26:9 26:13 35:15 82:21 135:7 408:8 412:18 769:6 809:8 player 495:4 players 36:1 206:13 345:25 346:10 604:25 playing 7:1 36:1 411:10 plays 19:5 82:21 341:8 371:24 645:4 759:17 pleaded 24:3 754:4,5 754:19 755:9 794:17 pleading 531:13 pleadings 16:4,6,14 27:15 93:1 173:4,14 173:15 364:22 430:22 438:22 446:20 450:15 450:17,22 451:1 454:22 471:1,4 480:22 490:19 500:17 557:14 559:8 563:4,4 563:7 571:22 572:1 754:11 755:22 794:25 797:8,16 798:7 pleasant 739:24 please 1:2,6 2:6,7 25:14 26:19 27:2 42:15,18 56:2 93:20 97:25 105:8 111:11 157:23 158:12 162:6 172:3 172:16 196:1 206:20 236:21 245:7 278:1 295:6 298:25 336:14</p>	<p>364:13 366:22 378:20 388:10 401:6 430:2,7 430:15 435:3 453:3 471:5 473:17 499:18 518:16 519:24 529:11 529:13,14 536:2 541:7 571:2,15 603:19 615:25 685:2 794:11 809:1 pleases 21:10 55:22 56:1 157:19 211:21 284:14 286:4,7 378:25 570:22 601:18 603:18 684:15,16 750:9 751:7 plenary 11:22 79:13 526:6 plenty 209:7 396:3 plight 688:2 741:20 PLO 362:12 plot 400:6,8 plural 237:3 pluralism 758:17 plurality 237:13 plus 35:7 221:1 567:6 plus-minus 165:4 PNC 553:11 podium 69:25 444:13 poet 384:11 poetry 61:2 384:13 Pogrunder 656:19 Pogrunder's 657:23 pointed 23:10 347:22 386:24 423:12 590:23 601:9 602:24 639:13 653:5 680:1 788:10 pointing 143:12 582:9 603:4 668:2 points 19:2 70:11 210:20 219:18 306:24 452:9 569:11 596:11 599:16,18 600:7 652:22,25 653:4 658:1 706:17,18 poison 375:12 Poland 248:15 polarisation 375:20 379:5,8,10,13 391:20 723:2 polarise 715:13 polarised 198:17 389:24 478:6 496:6 723:1 police 40:23 41:17 118:17,19,23 119:3,7 119:16 177:14,16,19 197:16 332:12 511:13 517:22,22 518:3 519:25 743:4 policies 8:9 203:16 207:11 227:20 419:11 433:22 581:15 602:18 628:2 648:20 667:19 policy 29:25 89:7 98:4 203:10 207:12,12,13 207:13,15 209:20</p>	<p>214:19 220:16,19 269:18 272:19 287:15 287:19,22 298:3,4 368:15,15 369:23 370:1 433:1 434:13 593:3 620:11 657:13 779:5 Polisario 552:11 polish 548:6 polite 71:3 753:11 politic 36:5 214:4 375:3 politically 291:22 292:12,19 334:18 345:1 609:13,14 672:13 politicians 227:17 667:16,21 politics 28:17 31:13 82:4 89:22,24 185:17 185:17 186:4,20,23 187:8 188:19,22 213:18 219:25 220:1 220:7,7 236:12,18,19 237:13 280:11,12,17 280:18,22,24,25 281:6 289:7,7,10 299:7,24 306:9 334:23,23 335:14,14 335:15 336:3,3 338:13 345:8,16 363:10 413:19 500:2 500:2 508:25 554:6,7 612:3 pondering 211:19 Pontic 399:12 poor 796:22 805:18 poorer 387:12 population 59:10 75:4 297:8 310:3 374:20 390:16 392:10 533:20 589:23 595:12 609:22 692:11 populations 268:4 350:13 port 262:4 508:21 portion 4:21 10:22 53:3 101:6 139:14,15 151:1 232:20 245:7 276:12 420:7 445:13 445:15 629:4 716:4 portray 185:1 350:3 352:6 580:1 portrayed 184:25 portrays 212:13 349:17 652:16 Portugal 348:12,14 Portuguese 744:19 pose 152:10 155:10 position 1:16 24:22 51:6 66:19 86:23 114:13 153:14 167:16 170:10,14 180:14,18 221:10 237:2 238:12 238:13 241:7 244:16 255:22,23 260:15 266:21 269:4,6 273:3</p>	<p>279:16 284:5,8 303:9 312:19 411:6 432:20 465:10,12,19,23 467:9,23 478:5 552:9 555:3 556:15 558:8 579:9 591:3 609:13 618:24 619:7 620:16 620:24 621:1 633:15 644:12 653:14 659:17 665:9 678:19 694:9 697:14 701:7,10 702:9 721:18 738:13 746:25 748:10 769:5 785:11 787:10 799:8 805:24 positioned 40:14 positions 35:21,23 236:12 588:7 positive 144:11,20 427:19 745:21 746:5 positively 704:24 Posner 475:19 possess 106:12 possesses 11:14 79:6 525:20 possession 96:9 possibilities 343:13 possibility 202:23 680:18 possible 154:23 157:7 184:15 202:20 214:5 240:15,16,18 241:12 241:23 357:20 402:11 450:8 478:10 510:1 517:9 577:15 584:13 600:9 639:21 640:1 647:14 648:5 664:23 674:1 680:13 683:3 743:17 781:20 808:23 809:3 810:4 possibly 159:23 160:2 169:10 244:4 323:23 331:19 332:16 716:15 731:13 post 7:9 14:10 18:25 30:24,25 31:4 32:7 33:16,23 36:9,25 53:22 54:5 56:6 57:15 84:19 90:3 94:1 95:25 96:21 98:11,15 116:1 116:1 117:14 125:20 125:24 126:5,19,25 127:1,8,25 289:22 327:4 328:1 416:19 446:19 472:16,18 475:9,23 476:1 489:4 489:19 536:19 723:12 724:24 736:5 774:22 775:9 776:20 posted 32:13 57:20 91:6 92:11 93:18 94:19 95:14 96:5 98:7 105:6 275:6 276:8 277:8 286:11 401:23 440:6,8,11 775:11 poster 61:24</p>
---	--	---	---	---

<p>posters 133:5 postgraduate 28:3 postgraduates 65:14 postpone 683:4 posts 63:2 274:14 476:5 708:24 775:7 postulate 406:21 790:8 Potato 748:23 potent 54:1 399:4 potential 40:1,9 63:4 66:1 592:2 759:24 761:14 781:23 potentially 723:14 796:24 pouring 527:10 power 105:13 118:23 187:5 260:25 261:9 304:11 341:5,5,6 346:13 360:14 362:23 367:17 388:22,23 431:25 624:1 powerful 185:2 240:7 358:6 395:5,6 398:21 721:12 803:19,22 powers 6:9,12 185:25 186:3 369:20 580:9 749:19,23 practical 108:5 332:11 332:14 443:2,5 449:19 450:2 600:25 706:25 761:21 783:9 810:5 practicalities 652:21 733:25 practically 296:20 435:11 527:16 569:5 practice 30:12 62:5 111:23 210:19 217:12 227:24 517:5 613:15 practices 8:9 177:12,20 211:6 224:2 628:2 648:20 652:20 657:14 practise 589:13 pray 586:6 prayers 524:19 525:2 preach 651:19 preacher 568:18 preamble 203:14 691:20,22,22,25 702:19 733:12,22 797:11 preceded 97:10 775:17 preceding 201:19 precipitated 92:10 precise 466:9 481:5 536:22 665:10 738:14 740:20 745:23 precisely 3:5 506:6 554:25 644:3,5 649:8 657:23 701:14 705:7 712:11 719:8 799:22 805:20,22 806:3 preclude 52:4 precluded 13:6 predetermined 450:9 450:11</p>	<p>predictable 398:10 predominantly 501:14 501:19 502:16 565:10 565:18 722:17 prefaced 423:23 598:9 599:15 prefer 170:6 770:11 771:24 800:16 809:23 preferable 683:24 preferred 152:13 prefers 645:23 pregnancy 6:1 prejudge 169:20 prejudice 408:9 429:19 755:21,24 prejudiced 798:7 prejudices 410:16,20 623:17 prejudicial 599:20 preliminary 698:23 premature 383:23 premise 282:18 479:6 502:4 645:3 689:20 premised 5:19,22 6:6 7:8 51:12 526:10 686:15 premises 41:8 161:21 164:15 745:16 preoccupation 613:7 preparation 277:18 376:6 448:25 449:2 603:2 678:9 preparations 681:20 prepare 568:6 573:17 679:19 680:10,15 681:11,15 683:24 prepared 85:5 277:19 277:21 448:19 449:11 450:1,8 573:23 581:13 602:7 610:22 610:23 648:21 649:24 671:1 678:11 679:17 754:19 803:13 prepares 691:21 preparing 4:17 448:21 681:18 prescribe 772:1 prescribed 6:17 364:9 prescribes 772:3 prescription 414:18 prescriptions 576:4 presence 37:25 65:23 66:2,9 118:25 119:2 304:22 522:21 661:2 present 9:19 14:12 27:15 28:7 37:10 65:11,20,22 67:2 76:24 151:2 191:23 211:24 339:16 374:24 383:18 396:6 496:4 498:19 500:4 503:14 579:13 588:17 611:1 627:21 668:15 679:6 723:10 765:7 presentation 450:6 678:9</p>	<p>presentations 84:4 230:20 presented 622:13,14,17 682:12 740:12 810:10 presenters 409:25 preserving 371:13 769:25 presidency 299:11 304:11 president 256:13 299:6 299:14 304:2,5,24 321:16 369:1 376:18 389:2 391:6,13,13 478:2,5,11 556:2,6,7 589:16 680:17 presidential 321:5 presidents 358:20 presiding 7:4 55:13 press 57:1 116:23 435:23 782:4 pressing 716:18 pressure 56:25 226:23 227:20 454:15,16 553:7 568:25 647:8 667:18 677:1 680:16 810:9 presumably 130:19 138:3 474:12 559:22 660:24 presume 262:10 626:8 presupposes 156:10 presuppositions 421:1 pretend 726:14 pretending 228:12 341:2 pretext 474:22 pretexts 437:13 Pretoria 38:23 537:14 540:25 542:8 562:22 651:5 699:5 pretty 34:23 61:18 222:20 306:19 360:9 416:4 426:25 prevail 488:24 796:25 prevailing 153:2 234:6 prevent 5:21 8:8 227:22 367:9 370:12 370:18 374:17 624:19 704:21,23 705:3 717:4 785:2,2,3 prevented 183:15 preventing 14:20 Prevention 4:2 5:12 prevents 594:20 previous 221:22 222:6 410:24 470:8 543:21 692:12 723:3 759:1 previously 57:22 58:19 71:9 84:3 190:13 297:15,16 490:23 597:22,23 616:22 679:11 694:16 pre-existing 212:5 pre-supposes 448:5 pre-1948 213:23 PricewaterhouseCoo...</p>	<p>748:21 priest 385:3 priests 376:4 390:7 prima 685:5 699:7,9,25 751:24 primarily 565:4 primary 437:14 466:22 510:3,8 534:21 541:24 725:14 prime 779:11 principal 41:6 principle 8:3 106:1 176:14 251:2 268:5 434:20 499:23 585:11 589:10 690:19 699:3 748:13 760:2 761:22 792:5,24 principled 453:17 460:25 principles 12:12,12 105:19 453:10 510:4 690:7,9,18 702:20 703:20 710:12 718:16 718:22 719:15,18 720:4,11 730:3 761:20 791:20 print 149:9 756:21 printed 112:10 prior 154:19 155:2 310:4 602:8 675:7 775:16 prioritise 483:2 prism 691:6 prison 354:21 355:3 360:4 prisons 105:17 privacy 722:3 private 457:24 527:17 527:18 722:2 792:8,9 792:20,22 793:1,1,3,6 privilege 644:12 privileged 692:12 privileges 563:1 privy 663:24 pro 463:14 676:10 probabilities 709:16 752:1 probability 709:14 probable 230:23 386:3 probably 39:14 44:15 59:17 65:15 230:11 255:23 256:8,24 336:6 369:12 383:19 389:5 392:6,7 395:19 402:10 427:13 452:16 474:15 499:8,9,11 568:3 585:5 637:22 642:23 674:19 675:13 probative 714:18 probe 52:3 probed 712:13 probing 152:10 388:6 problem 1:11,25 2:7 61:16 62:11 103:20 108:5,7 152:8 177:19 177:25 179:16 183:15</p>	<p>197:7 198:10 215:13 226:11 229:25 243:16 245:3 250:20,21 299:7,8,9 350:21 357:12 367:20 378:1 378:1 395:9,10 429:4 446:6,6 455:24 456:2 456:5,7 478:19,19,25 510:7 515:7 541:2 548:4 549:12 578:3 581:22 596:11 603:4 641:7 649:3,8 662:3 679:20,21 750:16 769:4 772:4 problematic 14:24 20:17 83:7 229:3 267:20 379:9 380:7 598:22 653:17 705:24 711:16 problems 40:15 63:4 205:12 212:25 229:25 357:5 360:22 568:14 601:22 636:9 683:18 683:19 689:15 procedures 601:16 795:24 proceed 3:21 25:23 proceed 10 52:13,25 86:24 111:11 112:3 170:19 172:24 209:13 211:20 216:4 235:7 347:6 364:17 378:23 430:18 457:4 529:11 571:19 587:7 689:19 proceeded 444:22 proceedings 1:1 4:1 6:16 7:1 8:7,16 13:17 18:3 20:15 21:18,20 22:13,22 23:14 24:1 50:23,24 51:1,22 110:1,8,21 167:13,25 168:16 170:23 172:1 172:6 283:2 285:1 333:18 430:1 484:17 571:1 598:19 599:12 611:13 620:19 627:22 685:1 686:5,11 687:23 688:11 695:23 696:8 700:15,19 759:3 795:23 796:10 796:12,16,25 797:14 797:23 798:9 process 24:12 25:2 69:3 198:19 214:22 224:6 330:9 349:17 358:9 370:7,13,14,17 376:1 376:19 377:16 426:1 482:9 484:10 518:22 519:6,16 545:17 547:20 558:2 600:2 624:20 679:5 682:23 708:5 743:10 796:21 processes 7:6 382:5 521:14,17 578:16 652:17 processing 796:18</p>
--	--	---	--	--

<p>proclaim 584:7 654:11 proclaimed 592:14 produced 293:9 producing 569:1 product 433:18 617:1 professional 720:9 professions 733:1 professor 197:24 207:5 207:8 231:18,23 232:18 233:4 235:10 320:8,12 334:15 336:24,24 337:22 338:18 342:3 567:21 570:3,6 572:5 586:21 587:9 596:1,19,25 597:3,7,8,17 598:6,10 598:21 599:1,4,15 600:13 603:10,18 616:6 617:14 648:9 650:11 653:9 654:23 657:6 663:1 675:4 677:23 678:16 697:13 706:4 710:6 711:4 713:3,23 714:16,19 749:4 770:20 799:20 803:17 professors 104:10 profit 313:6,12 profoundly 213:1 219:13 299:23 342:20 program 169:21 programme 61:23 106:15 132:24 133:3 133:8,18 267:6 366:6 483:17 655:15 progress 99:1 332:9 progressive 65:1 176:10 441:20 455:10 495:8,9 prohibit 211:11,14 243:19 361:7 658:21 prohibited 5:23,23 17:4 44:24 45:4,13,19 47:18 103:5 271:3 704:21 765:24 766:2 766:5 785:14 prohibiting 243:23 prohibition 5:16 8:21 13:8 44:22,22 45:9 295:17,19 405:16 562:7 658:20 659:18 692:20 804:11 prohibitions 381:7 prohibits 154:18 422:14 659:12 project 184:21,22,23 193:11 237:12 238:8 247:11 248:3 297:23 338:8 368:7 757:13 projects 184:24 prominent 104:2 113:5 promote 45:1 164:21 252:14 716:22 731:2 735:6 764:9 promoted 432:17 463:24 717:14 762:10</p>	<p>promotes 690:22 691:10 promoting 89:7 558:5 703:7 717:11 promotion 4:1 5:12 415:25 690:3,4 prompted 92:15 promulgated 689:25 prong 406:6 pronounce 18:23 162:16 163:17 propaganda 187:18 188:6 504:22,23 647:9 715:19 propagandist 341:23 373:13 propagandists 339:8 339:15 340:9,20 341:20 400:10 propagate 16:25 17:12 17:24 44:23 45:1,11 49:21,24 709:6 754:8 755:4,5 756:8 764:9 780:19 791:23 propagated 717:14 propagates 780:16 propagating 703:8 717:11 propagation 17:13 754:14,21 757:16 proper 8:8 10:9 25:3 46:18 452:5 725:1 726:12 728:8 730:13 731:7 752:7 775:18 790:20 792:4 800:18 properly 48:2 168:8 465:15 478:14 499:7 587:14 728:20 806:6 properties 638:9 property 192:15 641:5 prophet 80:16 547:12 proposal 167:23 propose 721:6 751:1 proposed 296:25 660:18 proposition 51:2 505:13 644:17 693:10 693:14 708:4 739:17 795:22 propositions 759:12 propping 644:22 proscribe 108:2 prosecutable 509:20 prosecute 518:6 673:24 804:22 prosecuted 396:2 742:22 743:4 798:18 803:24 prosecuting 518:5 743:5 prosecution 157:7 158:3 510:21 518:23 prospect 110:20 524:16 692:7 prospective 692:10 protect 227:18 458:9</p>	<p>548:25 667:17 protected 395:16,17 421:13 458:6 525:1 549:10 645:8,10 709:24 757:1 protecting 549:18 692:6 protection 118:2 692:14,16 693:2 701:5,8,16 729:4 732:1 733:20 735:17 758:13 771:7,9 Protector's 23:12 protects 549:9 protest 107:14 116:7 117:21 118:1 132:12 521:8 522:8,9 556:17 761:25 782:3 783:5 protestors 119:8 protests 582:6 protocols 400:8 proud 485:7,12 646:21 proudly 584:7 Proust 614:16,20 prove 178:2,6 417:2 801:14 proven 782:18 provide 153:6 247:17 681:16 698:17 800:10 provided 13:1 61:13 184:13 596:2 600:8 providers 483:4 provides 7:22 44:22 191:3 623:15 629:25 630:6 700:5 704:8 providing 61:15 provinces 716:2 provision 7:23 15:18,20 392:19,25 692:24 704:14 759:4 760:3,7 provisions 15:12 394:1 394:10 669:10 729:11 729:12 753:19 759:15 763:16 800:4 proviso 12:21 13:15 45:11 704:6,8 724:12 provocative 755:8 803:19 provoke 152:18 775:9 provokes 711:3 provoking 18:9 proximity 430:21 pro-Hitler 215:12 pro-Israeli 494:21 pro-Palestinian 463:14 494:20 prudent 283:5 PS 131:1 PSA 462:20 PSC 34:3,9 37:6 59:20 59:24 60:10,21 63:11 64:21 69:11 76:12,23 76:23 83:3 131:2,3,18 150:2,25 491:13,16 492:6,11,15 494:17 494:25 520:8 522:12</p>	<p>522:18,19,21 PSC's 150:8 152:12 psychological 690:25 704:23 709:19,19 715:4 717:6,10 733:7 public 13:4 23:12 31:12 32:10 60:6,23 108:9 131:8 153:9 156:5,8 165:2 180:23 181:2 195:11 327:24 416:14 454:15,15 463:18 515:18 518:10 564:15 673:4 686:12 687:25 688:9 702:3,9 703:1 703:25 704:11,21 722:6 724:3 725:13 736:9 749:22 756:10 759:20 805:19 publication 13:4 47:7 176:3 611:12 704:11 775:1 publications 294:2 566:2 610:1,12 775:17 publicised 590:7 publicly 109:9 115:21 273:22 288:5 381:3 publish 12:23 44:23 45:11 published 46:22 100:21 101:15 175:2,19,23 176:11 220:18 221:24 274:12 275:6 607:24 610:13 611:11 719:5 746:20 773:16 publisher 176:4 publishes 613:8 pull 389:3 pulled 343:18 punishment 103:5 271:2 702:1 766:11 punishments 325:3 punitive 760:12 purchase 585:21 pure 301:4 373:20 441:3 784:10 purely 246:7 282:17 412:16 421:10 565:25 645:21 666:10 762:10 778:23 purport 690:22 691:11 730:1 purported 726:22 727:4 744:25 purports 103:10 265:6 579:5 purpose 7:3 74:3 155:15 156:21,23 234:20 242:17,20 244:7,23 245:9,10,12 245:12,13 340:11,15 340:19 341:4 366:9 397:19 411:9 495:6 575:13 637:3 676:14 684:5 718:13 741:14 purposes 6:8 15:11</p>	<p>22:12 24:20 27:15 37:18 191:23 197:19 294:15,22 353:23 401:9 480:3 489:1 506:16 513:6 543:5 569:12 679:6 717:24 793:25 pursuant 759:4 pursue 394:20 545:18 727:13,24 808:5 pursued 725:13 pursuit 387:17 545:14 546:23 547:18 726:20 728:1 792:12 purview 686:25 690:12 pushed 223:16 589:15 pushing 63:13,15 178:7 229:17 puts 176:9 278:21 493:18 765:10 putting 60:23 64:1 84:16 204:3 283:23 286:14 287:8 302:10 346:8 424:9,10 450:4 487:24 506:17 PW 777:12 PYA 64:23 65:1 66:23 67:5 492:16 pygmy 390:1</p> <hr/> <p style="text-align: center;">Q</p> <p>qualifications 174:11 365:16 572:25 746:12 qualified 542:21 615:15 qualify 239:15 420:23 615:3 637:11 qualitative 20:25 quality 202:24,25 212:9 613:16 615:9 621:2,3 qualms 731:25 quantify 479:15 quantitative 20:24 quantity 212:13 269:13 quarter 21:4 64:7,8 737:15 quest 606:1 questioning 44:6 51:7,8 51:21 52:13 156:18 156:22 232:25 410:13 questions 50:14 84:15 84:17 85:5,6 86:15 98:10,14 100:2 152:11 161:12 167:4 167:9 216:5 221:25 251:6 283:12 341:25 355:21,24 362:1,2,5 363:18 379:5 381:20 400:24 427:19,21,24 428:13 452:3,6 453:3 459:21,22 477:8,9,12 477:13 513:6 543:12 544:1 559:6 567:11 567:18 603:8 620:18 668:5 675:4,5 677:22 678:1 695:11 711:2,3</p>
---	---	---	--	---

<p>749:25 queue 586:8,10 quibble 91:25 280:3,6,7 280:7 282:1 610:20 614:9 641:11 quibbled 282:1 quick 547:4 quickly 242:11 271:11 378:20 449:15 492:18 557:10 564:2 587:14 655:3 786:8 quotas 245:5 quotation 45:9 704:19 760:13 quotations 351:7 quote 90:12 101:6 397:7 415:23 481:1 608:24 651:25 720:8 763:16 quoted 10:3,6 255:4 480:24 481:7 754:6 quotes 10:5 114:3 276:12 quoting 9:20 404:25 421:20</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>rabbi 100:23 101:14 269:24 659:15 669:15 rabbis 669:16 race 5:25 51:13 127:21 128:1 161:3 195:16 346:6 391:1 404:20 405:17,20 414:9 420:11,14 605:4 644:17 647:5 658:2 666:16 692:20 717:18 732:22 757:7,20 762:11,23 764:2 772:3 776:14 777:16 778:24 780:4,13 790:7,19 races 353:21 racial 223:10 240:13 381:4,6 426:6 504:15 516:19,21,23,24 555:8 602:1,21 606:5 647:2 733:10 740:14 740:16 racially 373:20 578:10 578:12 racisms 334:17 racists 42:21 280:16 281:13 286:16,22,25 287:13 328:12,13 344:20 420:4 459:13 652:9 776:1,8,9 radical 195:16 228:24 radio 372:23 391:21 713:20 Raedene 36:20 39:2 92:2,3 164:15 651:16 raise 3:20 26:17 27:2 129:22 226:3,16,17 226:25 229:9 232:4 294:7 340:6 364:13</p>	<p>430:15 569:10 571:15 799:3 raised 69:3 231:16 232:5 339:19 710:5 718:5 724:8 798:1 raises 225:19 705:25 712:6 raising 176:8 390:17 493:9 755:7 rally 9:17 10:14 56:10 412:4,9 415:18 rampant 371:22 Rand 603:25 656:22,25 range 17:6 37:8 164:9 264:21 716:7 760:11 rape 123:9 rapidly 590:19 raping 93:23 438:18 rapists 766:10,12 rare 810:11 rational 204:20 205:8 220:5 230:2 244:17 rationale 15:4 691:23 701:4 793:5 rationalised 224:6 rationally 219:14 243:15,17 255:10 rats 375:2 raw 653:13,19 654:6,7 654:7 reach 103:9 521:6 618:17 723:15 731:11 806:4 reached 2:10 reacting 82:12,13 reaction 41:25 76:20 241:21 264:19,20 reader 47:1,2,7 244:23 245:11 281:23 710:10 713:16 719:20,25 720:16,18,19 721:3 740:23 744:12,22 745:10 readers 91:13 720:2 readily 183:10 294:10 729:10 reading 102:15 169:24 189:10 217:12 287:11 298:23 607:4 611:10 650:11 652:3 668:10 688:12 715:9 719:13 735:12 776:20 781:1 781:4 789:18 reads 71:7 89:5 192:11 201:15 209:24 447:5 571:22,23 572:10 747:3 749:15 ready 15:8 52:25 86:18 363:19 392:2 569:2 684:3,14 734:19 ready-made 706:13 real 195:20,24 200:12 200:22 229:7,7 324:12 339:5,12 348:2 398:4,5,5 678:11 683:18 716:17</p>	<p>755:24 realised 367:8,18 368:24 370:4 377:8 596:25 realising 369:19 realist 427:7 realistic 110:20 realistically 169:25 reality 373:21 415:24 555:12 652:19 736:24 realm 244:17,18 412:23 reason 64:10 150:22 170:7 194:4,7 201:5 203:19 204:16 205:17 230:21 231:15 299:18 319:9 323:11 372:2 375:22 377:21,25 379:19 437:14 528:13 562:13 586:15 615:11 616:14 664:24 701:3 717:2 737:17 749:8 753:13 754:3 757:9 766:1,19 775:8 793:3 795:20,21 reasonable 46:12,12,13 47:1,2 127:18,20 202:13 281:22 282:3 282:9,10 283:23 460:15 681:3 710:10 710:11,13 713:16 718:8 719:25 720:11 725:23 728:12 737:11 738:16 740:23 744:12 744:22 745:10 767:25 770:22 771:1 782:17 803:1 reasonably 12:24,24 38:14 44:25 45:5,16 45:23 47:19 161:2 260:10 286:18 703:6 730:25 735:4 764:24 782:15 reasoned 230:17 250:15 reasoning 603:5 reasons 75:19 132:19 207:17 219:15 220:5 220:6 228:7 236:4 317:8 370:4 574:1 585:18 672:6 704:20 725:1 741:2 802:25 rebels 399:21 rebut 231:22 600:18 678:18 rebuttable 600:6 rebuttal 599:3,10 768:19 rebutting 232:22 recall 3:4 17:3 65:10 69:23 100:24 101:1 103:23,24 108:19 112:6,8 113:4,8,9 116:9 120:11 132:21 134:10 139:24 140:2 156:25 161:18 166:19 264:19 282:23 333:14</p>	<p>442:8 443:7,9,20 461:12 462:15 466:13 469:12,15 472:22 491:20 499:7 517:15 523:20 524:14 565:10 566:13,22 567:21 570:5 670:3 678:24 693:10,14 713:3,6 721:21 725:25 733:14 755:14 758:25 764:10 767:11 771:18 772:14 778:3 780:5 781:13 783:4 797:24 798:19 801:21 receive 262:4 355:10 355:10 591:16 623:17 641:20 806:22 received 97:14 433:20 470:10,17 472:23 481:24 642:1 653:13 750:1,2 758:15 receiving 380:10 439:25 440:7 514:18 recipient 377:19,22 380:8 387:21,22 recipients 715:18 reckless 802:12 recklessness 802:6,14 802:17 recognise 103:4 104:4 121:19,21 125:9 130:9 270:16 271:1 345:8 419:25 674:20 753:3 recognised 131:11 202:4 301:17,17,19 301:19 341:22 659:2 659:14 724:6 782:3 recognises 153:8 recognising 805:3 recollect 451:13 769:14 recollection 118:18 128:19 443:18 448:2 448:20 471:10 481:11 502:13 523:17 564:23 565:5 recommendation 760:25 recommended 329:17 recompense 393:10 reconsider 284:8 record 24:19 86:4 93:19 97:25 102:10 104:22 120:25 136:12 172:17 294:15,22 383:20 480:3 506:5 529:4 618:20 623:25 660:15 725:13 726:7 727:1 786:24 recordal 481:8 recorded 135:20,22 136:2 326:23 403:10 498:2 528:17 recording 2:6,7,8 4:17 4:18 21:3,14 23:23 24:3,5,20,24 25:4,17</p>	<p>25:20,21 26:4,10 77:18 81:25 135:3,25 528:16 545:2 recordings 23:24 135:4 135:5,7,12,15 136:2 136:22 137:13 144:25 671:6 recourse 78:8 recruitment 594:18 redemption 183:16 redress 8:2 references 122:15 127:13 141:13,14 144:11,17 145:1,1 258:19 754:11 788:13 referral 5:18 referred 9:15 28:24 31:19 96:10 99:6,9 104:17 130:25 151:21 165:12 166:22 258:17 266:16 303:11 375:2 389:15 395:2 446:19 447:18 451:6 458:14 458:15 510:4 513:15 526:8 533:4 537:1 545:1,6 552:2 556:14 588:2 599:24 608:2 611:6 616:11 668:9 685:12 708:19 714:23 726:8,10 730:4 734:24 741:8 754:9 754:10 758:11 768:7 802:21 807:1,19 referring 20:20 36:14 36:22 37:16 62:15 70:16 97:15 112:20 120:8 131:17 173:6 191:1 258:22 264:13 282:4 340:21,22,24 341:1 364:21 367:13 384:4 385:21 404:10 416:6,7 420:18 423:7 439:7 458:7 463:11 463:12 474:19 482:12 488:7 489:6,9,15 512:22 513:1 516:25 527:24 539:11 586:22 604:15 637:9 648:15 666:7,8 686:20 701:25 735:24 778:5 789:11 791:2 800:1 refers 94:8 98:20 100:20,22 142:7,25 213:22 228:1 267:10 271:7 279:5 281:13 287:9,12 288:4 303:2 423:6 455:2 480:3 582:23 602:4,6 630:18 631:4 717:5 717:11 722:21 723:22 725:11,17 744:21 745:17 770:15,16 776:21 781:8 785:21 786:6 789:7,9,17,19 reflect 95:14 444:4 449:10 574:1 617:18</p>
--	---	---	--	---

<p>617:19 688:23 reflected 95:10 351:2,7 351:8 365:17 440:11 588:7 614:15 783:12 reflecting 604:10 649:15 reflection 615:9 reflects 112:11 247:12 300:11 333:19 786:24 refrain 710:1 711:4 712:3 refresh 809:20 refuge 699:2 701:13 702:12 refugee 553:9,16 554:2 refusal 783:6 refuse 98:4 595:16 refused 183:8 442:25 579:18 refusing 759:21 refuted 652:25 regard 8:22 15:24 16:4 19:22 33:3 42:24 46:15 47:16 58:4 62:15 67:15 72:8 134:23 185:20 201:13 201:20 202:12 214:18 476:21,23 505:2 592:5 600:13 634:13 635:12 651:13 661:6 669:19 691:22 699:16 702:18 703:23 721:25 725:5 730:3,6 739:25 768:8 770:10 772:16 772:19 785:20 789:1 790:3 793:2 798:13 800:9 801:7 regarded 8:17 11:6 76:3,17 203:13 211:2 211:17 455:9 456:10 483:24 531:24 592:18 592:19 614:20 635:22 672:24 726:19 744:2 758:15 regarding 2:11 70:16 260:2 338:22 339:18 365:21 379:1 433:14 455:4 479:13 750:6 752:7 754:17 regardless 108:20 241:20 647:1 regards 594:2 634:15 669:6 760:9 regime 187:5 268:8 292:15 295:8 307:8 367:15,15 432:7 477:5 639:24 644:23 647:18 657:16 733:9 regimes 42:12 305:23 306:4 region 357:18 644:15 664:5 registrar 110:3 750:17 809:11 regrettably 624:7 715:9</p>	<p>regroup 85:11 regular 34:23 57:22 89:24 92:8 396:8 regularly 32:19 654:17 regulate 598:15 regulation 154:3 509:1 509:18 594:19 rein 726:21 reinforce 623:23 reinforces 757:14 reject 237:22 238:6 575:24 576:1,7 592:20 640:11 646:19 781:24 800:7 806:20 rejected 183:5,11 236:4 236:6 237:5 557:22 557:24 558:4 575:2 575:19 583:18 660:20 749:5 rejects 642:12 661:1,2 relate 141:8 181:18 228:5,6 323:25 325:2 328:10,15,16 351:9 352:10 353:14 491:18 520:12 related 2:9 164:12 186:23,24 219:13 326:11 383:4 442:12 relates 16:7 210:4 781:11 relating 274:13 320:14 323:3 718:22 789:13 799:4 relation 14:10 32:23 35:22 40:12 67:25 156:18 220:19 224:3 327:20 509:7 522:2 594:9 597:12 599:16 608:4 618:24 788:7 798:1 801:17 relations 336:25 413:20 464:1,13 465:11,20 465:22 466:17 467:2 469:4 605:4 721:19 722:5 770:20 relationship 176:17 181:18 182:6,6 248:10 253:1 255:21 669:20,21 746:14 relatively 443:15 496:7 496:8,11 772:5 relatives 586:7 relax 401:6 relaxed 71:3 release 538:20 554:15 566:25 released 355:14 440:2 475:15 518:10 538:14 539:3 557:7 releases 435:23 782:4 relevance 49:22 178:17 348:2 relevant 20:25 155:21 233:19 245:19 280:23 295:21 335:20 350:17 379:4,19 411:5 475:6</p>	<p>475:7 489:11 645:18 671:3 690:8 768:8 770:13,17 774:7 809:11,21 reliable 230:17 636:12 reliance 284:7 740:25 741:12,24 746:11 795:19 798:8 799:1 801:20 relied 516:4,6 565:25 566:3,12 686:25 727:11 relief 7:8,14,16,18 366:5 relies 423:16 640:18 783:16 religion 6:3 17:11,14 17:23 127:21 128:1 161:3 164:10 195:17 235:25 236:23 237:1 258:5 353:14 405:18 405:19,20 420:11,15 425:11 499:23 500:1 500:2 558:15,20 573:7 613:10 646:19 658:3 666:16,20 692:21 717:19 754:13 755:4 757:7 758:2 762:24,25 764:2 766:7 776:21 785:17 790:7,16,19 791:22 803:3 religions 517:6 religion's 236:2 237:15 religious 29:14,14 74:4 80:11,17,18 87:20 192:16 195:12 213:10 217:6,11,13 218:2 235:13 236:4,13,24 237:5,7,9,24 297:25 405:10 414:13,14,25 458:16 500:1 558:18 568:17 575:24 576:1 576:7 602:1 613:11 613:12 641:6 646:1 646:16,18 736:20 752:16 775:23 776:15 religiously 184:7 reluctantly 170:22 rely 24:2 294:9 564:23 565:4 566:2,3,4,4,6 566:11 569:20 709:6 717:25 724:5 742:4 794:19 798:10 801:18 802:24 relying 24:20 511:19 515:15 516:2 564:18 564:22 634:7 795:11 800:25 remain 615:22 remaining 43:17 remains 241:14 284:5 331:3 428:6 797:11 remake 184:23 remark 513:22 514:2 520:7 543:22 726:9</p>	<p>remarks 7:12,14,17 8:5 9:5,20 10:3,23 48:6 63:1 137:7 151:10 190:16 224:8 233:20 335:8 407:9 411:21 449:9 474:7 475:9 480:24 491:3,20 506:17,18 511:24 514:1 519:16 520:5 520:16,21 523:16,23 525:6 527:12 564:1 688:3 701:2,23 703:19 705:6,8,8 706:8 708:14 713:4 716:3,5 722:22 723:12,13,23 724:21 724:23 737:10,21 738:3,20 741:9,18,25 743:2,19,20 744:24 744:25 745:5,7,8,21 746:6 775:24 remedies 686:9 698:18 749:22 remedy 750:8 remember 52:22 70:1 83:3,9 120:12 137:20 148:22 153:17 175:23 192:8 256:4 265:16 265:17 268:3 277:20 277:22 293:23,24 327:1 348:13 443:10 443:19 445:18,22 472:24 491:24,25 492:2 498:21,22 500:11 502:19,25 509:9,15 512:2 519:3 524:6 556:22 676:1,3 711:8 732:11 remembered 799:19 remembering 199:19 remembers 789:4 remembrance 39:22 190:23 195:2 199:15 329:13 remind 157:22 302:20 452:9 565:4 598:14 reminds 312:18,21 remit 156:8 749:23 remnants 208:16 remotely 787:17 removals 298:20 remove 414:20 removed 95:25 97:24 204:19 205:8 559:22 591:10 669:1 render 23:16 434:21 461:1 renders 12:20 511:23 renewal 105:24 repeat 10:16 31:23 77:13 80:19 158:12 374:4 376:20 416:1 447:17 451:6 512:6,8 514:9 537:7 574:4 617:14 660:8 740:4 763:19 784:6</p>	<p>repeated 372:21 490:10 584:5 587:3 660:17 repeatedly 151:8 501:1 583:18 615:10 649:4 730:8 repeating 372:23 396:18 repetition 371:21,24 372:2 repetitive 372:18 rephrase 448:11,12 461:12 468:21 612:21 replace 442:5 449:15 449:24 780:6,8 replaced 330:13 442:4 467:5 738:5,7 replaces 790:9 replication 90:12 reply 52:8 598:13 617:15 750:4,23 791:16 794:8 replying 403:17 report 23:12 119:6,11 149:11 220:18 275:5 275:6 293:10 482:4 511:12 515:16 596:8 599:2,3,4,9,17 603:24 604:7 621:11 648:22 751:24 reported 116:23 119:12 222:5 483:6 536:21 604:4 743:3 796:2 reporter 603:23 reporting 13:3 482:3 704:10 reports 170:6 274:12 515:19 517:22 reprehensible 807:10 807:13 represent 57:10 362:7 466:16 535:24 609:22 representation 118:11 359:20 701:11 representative 28:20 38:12 250:25 255:6 461:22 467:6 538:22 562:21 represented 537:6,9 589:20 representing 30:7 represents 37:15 301:13 562:21 624:2 repressed 187:4 repression 360:13 repressive 360:10 Republic 555:22 Republican 477:24 repudiate 557:20 request 96:14 168:15 662:22 798:11 requested 22:7 40:17 442:2,5 requesting 170:1 requests 22:2 require 3:3 20:4 169:23 184:24 196:21 249:1</p>
---	--	---	--	---

697:6 698:4 707:4 709:13 718:10 759:20 760:21,23 required 13:23 14:4 18:23 19:3,7 196:10 434:25 707:10 728:17 769:1 requirement 29:16 706:22 707:23,25 709:15 requirements 12:12 686:17 687:16 728:9 728:18 requires 44:13 55:12 155:10 179:8,8,10,20 189:10,11 243:1 557:25 690:21 691:5 707:11 730:14 requiring 630:17 636:20 requisite 47:19 rescinded 642:12 research 175:15 220:19 221:23 293:8 572:5 655:6 713:11 reserve 679:25 reserved 732:24 810:7 reserves 580:14 resident 102:25 residential 75:5 residents 40:10 resist 106:2 272:12,19 800:19,20 801:13 resistance 151:4 resisting 105:14 resolution 223:8,11,19 348:2,5 369:18 586:22 642:10,12 resolutions 369:16,17 585:24 587:3 696:6 resolve 284:10 360:19 360:19 654:5 662:4 769:3 771:24 resolved 760:7 resolving 654:3 784:10 resort 581:9 resources 105:15 233:11 306:2 692:4 respect 7:13 11:23 26:4 35:20 51:20 82:15 110:8 130:10 142:18 152:5 155:3 226:24 282:12 402:7 451:25 464:20 515:2 596:8 598:3 639:10 649:18 694:6 696:17 732:16 735:4 741:24 767:14 768:14 770:14 773:1 777:22 780:11 793:9 respected 181:2 respectfully 334:23 respective 810:10 respects 82:7 458:19 617:8 763:17 respond 48:1 54:6 61:5 219:20,23 225:25	226:5,8,25 228:2 229:22 243:7 249:4 424:19 543:13,17 553:13 615:5 620:20 657:19 665:1 responded 116:5 226:9 226:10,10 476:6,9 649:1 668:11 672:22 respondent 16:9,23 430:5 597:17 678:5 685:6 700:13 756:11 760:21,23 762:7 792:3,6 807:9,11,12 808:5 respondents 1:7 2:2 12:16 13:11,14 19:19 96:16 170:16 687:23 703:2 724:5 725:19 749:22 761:25 768:18 798:6 799:7 respondent's 15:23 responding 506:16 649:20 806:18,18 response 3:8 9:25 10:2 54:8 55:11 56:11 70:19 84:19 96:13 97:1 103:4 123:5 141:24 186:2 222:21 224:13 225:18 229:9 232:4,13,16 233:7 245:1 246:12 247:20 271:1 284:2 334:2 337:19 360:16 407:10 424:5,7,12,14 435:17 447:12 458:17 475:3 475:17,18,23 476:1 476:12,18 481:15,16 509:5 544:2 563:16 564:5 573:17,22 576:16,25 578:2 585:16 593:15 598:22 599:2 600:8 616:3 651:23 668:11,12 797:25 responses 186:1 responsibilities 465:16 responsibility 358:7,9 465:12,25 466:22 467:15,18,19,23 468:2 613:12 responsible 43:8 105:20 195:20 200:12 200:22 201:3 209:24 210:6,9,10,11,15,17 210:21 242:5 388:16 459:8 rest 42:7 43:14 58:18 67:2 125:7 151:8 177:20 350:23 361:11 367:8 428:10 454:2 683:9 705:15 restaurants 413:22 restricted 16:3 698:8 754:20 757:6 761:4 761:21 restricting 632:11,16	673:3 restriction 628:19 631:23,25 restrictions 81:20 579:15 632:8,8 restrictive 760:2 restrictively 759:15 761:18 763:5 restricts 590:9 693:11 rests 357:21 result 15:3 158:19 167:19 234:4 264:4 350:4 367:17 375:6 380:21 386:3 387:9 393:19 473:21 485:14 620:17 638:6 642:20 645:2 732:22 746:7 768:1 resulted 628:7 709:17 745:24 results 373:17 RESUMES 21:11 55:1 143:25 206:16 333:5 378:22 468:18 528:25 616:2 663:4 734:20 retaliation 98:5 704:22 retreats 380:17 retrospective 692:8 return 93:23 94:12 211:22 310:11 311:20 312:2 450:14 474:14 591:25 659:8 700:25 returned 556:20,24 revealed 726:16 reverse 580:18 reversed 368:15 revert 56:2 750:5 review 391:12 607:21 611:9 reviewed 175:19,24 reviewing 55:10 revoke 761:1 revoked 223:12,23 586:23,24 revulsion 378:15 revving 69:1 reworked 193:22 199:12 reworking 191:16,20 200:4,6 Rex 714:24 782:16 re-election 589:17 re-enactment 131:21 re-establishment 771:6 re-examination 161:13 161:15 355:22,23,24 427:22,23 567:13,15 668:7,8 re-look 807:24 rhetoric 150:5 241:2 280:15 420:9,13 742:24 743:12 Rhetorical 192:13 641:3 rich 236:9 rid 297:5,5 375:8	righteous 387:17 rightly 423:10 right-hand 113:23 right-wing 182:16 183:21 225:6 334:25 rile 66:11 139:2 riled 138:13 142:3 ring 277:16,17 444:3 491:23 rings 277:14,16 ring-wing 334:21 rise 5:14 15:1 33:22 35:13 185:22 621:21 729:8 risk 168:4 581:8 ritual 217:12 rituals 382:9 River 395:25 road 47:24 69:18,19 680:8 707:9 robbing 372:25 Robert 189:19 robes 720:8 robust 8:15 526:10 672:24 689:2 694:17 762:17 rockets 102:24 role 7:1 29:7,8,10 49:12 206:12 252:14 358:10 371:7,23 392:18 394:1 598:15 604:25 636:2 672:16 759:17 roll 168:10 Roma 483:24 Ronnie 83:9 459:4 619:22 room 65:15 67:13 68:22 70:25 71:2 80:3 81:13,22 83:19 85:11 147:22 155:19 325:18 700:17 rooted 153:4 rose 362:12 Rouge 367:14 368:8,16 368:18,19 369:4,8 375:18,19 387:8 rough 448:16 672:17 672:19 roundly 130:21 rounds 511:7 Routledge 176:3 Roux 46:16 50:22 719:15 800:22 rows 68:4 rubric 190:13 rugby 345:25 rule 96:13 190:1,2 390:3,4,5 391:10 453:24 548:19 558:3 558:6 742:18 743:11 743:12 760:4 rules 61:7 599:8,11 669:15 682:8 761:16 795:25 ruling 50:22 94:18 283:4 284:12 286:2	393:15 411:16 run 31:14 42:10 61:8 82:8 268:5 304:1,4 376:12 400:6 478:2 527:19 581:8 754:20 755:19 799:1 running 313:13,14 348:14 runs 69:18 104:8 265:7 360:12 445:7 rush 751:5 Russia 205:3 399:18 410:20 611:23 Russian 400:10 Rwanda 369:21 370:1 372:22 375:17 376:18 389:16,22 390:8,11 391:7,12,18 392:4,15 395:24 621:22 713:18 713:21 Rwandan 369:8,11,18 résumé 616:8 R-A-N-S-T-O-R-F 32:3
S				
S 29:5				
SA 93:23 107:23 271:25 474:14 796:3				
Sabbath 38:18 56:20				
Sacks 201:1				
SACP 435:15				
sacrificed 459:9				
safe 42:7 206:14				
safety 218:8				
safe-keeping 203:2				
Sahara 434:9 453:17 551:13,16,17 552:3,6 552:9,13,17,23,24 553:8,16 555:3 556:11,16,18				
Saharawi's 553:8				
SAHRC 22:12 70:10				
Sammy 343:7				
sample 221:21				
SAMU 556:7				
San 554:21				
sanction 292:16 709:5				
sanctions 106:16 146:12 267:7 413:3 620:10				
sand 14:20				
sanity 488:23				
SAPS 457:25 527:17				
sarcastic 151:9				
SASCO 65:2 436:19 441:19 462:18 491:14 491:15 492:16				
Saskatchewan 716:1				
sat 59:17 398:6 485:25				
SATAWU 442:13,13 783:6				
satisfied 12:15				
satisfy 686:17 687:15 717:24 749:15				
saturated 808:10				

<p>SAUJA 72:15 SAUJS 28:23,25 29:1,3 29:8,11,16,20,22 30:10 38:5 39:18 59:14,20 61:5 65:25 71:8 72:25 73:22 75:9 75:22 84:10 148:20 152:7 316:1 428:20 498:21 499:12,14 500:7,9 501:14,17,23 502:23 savage 9:14 43:24 53:15 save 484:11 saved 484:3 saw 40:5 48:11 62:6 72:12 132:24 133:8 166:17 236:1 237:14 265:19 335:17 367:7 367:10,17 384:15 391:6 457:22 471:24 498:7 499:12 500:7 501:22 502:23 516:3 536:11,13,15,18 689:13 751:17,21 sayings 366:16 scale 212:14 Scalia 393:15 scared 147:19 162:14 793:6 scaredness 147:23 scary 36:11 53:11 70:24 74:22 81:22 147:6 357:2 scenario 156:2 697:11 scene 36:2 234:12 sceptical 242:14 schedule 442:3 scheduled 169:17 662:3 662:5 Schlimme 336:21,24 338:18 342:3 Schlimme's 337:22 scholar 229:14,15 230:25 241:2 252:12 654:18 scholarly 175:19 230:19 242:10 292:4 345:10 610:18 612:5 613:20 614:6 746:13 746:19 748:7 scholars 228:5,5 292:2 292:7,8,10 397:22 scholarship 681:17 school 159:14,16 260:5 366:5 375:14 431:10 659:25 660:1,2 schools 75:12,13,15 195:12 359:23 371:22 372:6,12 schoolyard 181:1 Schulman 315:25 316:7,14,18,22 318:13 sciences 293:8 431:19 460:7,10,13,13 638:8</p>	<p>638:11 scientific 13:3 292:4 652:6 704:10 score 12:19 13:21 50:20 553:19 624:16 749:5 scrap 296:6 scream 427:16 screamed 132:17 screams 316:3 script 78:13 scriptures 739:25 scrutiny 244:8 635:5 Sderot 102:22 se 19:21 56:21 83:19 320:21 413:4 475:21 476:19 606:14 642:2 sea 262:1,14 498:7 searched 556:7 seat 430:20 759:8 seated 67:14,18,22,24 68:4,12 173:1 460:1,2 460:4 second 2:9 4:6,13 45:10 53:3 70:11 91:15 113:24 142:23 192:25 203:8 208:12 209:18 214:5 229:11 244:22 246:15 248:25 290:14 290:19 363:21 379:8 380:5 385:7,22 439:19,20,23 445:23 446:20 450:4 470:7 470:13 489:19 630:13 646:25 648:8 683:2 688:19 715:6 722:9 735:3 740:25 753:8 769:8 783:2 788:7 795:20 805:17 secondary 372:12 secondly 45:22 54:11 210:22 323:23 374:10 505:14 648:19 707:1 745:8 746:22 798:8 secret 185:1 230:11 400:7 518:9 539:9 621:17 secretary 133:13 441:22 449:15,24 522:4 secretary-general 133:12 sections 15:12,13 579:20 624:18 690:8 sects 575:25 securities 457:24 security 106:6 194:21 199:25 200:1 267:1 314:18 329:20 340:25 369:16 527:18,19 seeing 498:22 695:7 789:4 seek 5:21 19:15 452:2 464:21 560:23 646:23 699:1 701:13 702:12 712:9</p>	<p>seeking 7:25 8:2 786:3 797:1 seeks 8:8 227:19 280:18 388:17 552:12 635:14 667:18 701:15 705:13 715:15 744:4 seemingly 243:6 seen 35:8 85:17 93:14 94:15 96:11 133:20 183:14 187:6 232:7 270:15,17,19,20 277:12 313:15 318:23 327:13 331:4 352:17 352:18 364:20 366:6 366:7 413:14 457:23 479:14 508:21 617:1 664:9,22 670:6 738:21 800:21 803:18 sees 655:3 660:4 716:12 segment 692:11 segregated 561:10 659:21,23,24 segregation 374:19 716:7 seize 781:22 seldom 763:13 select 184:14 185:6 selecting 204:2 self 202:5 639:3 self-defence 399:3 400:13 self-defined 220:2 self-destructive 283:21 self-determination 106:2 201:16 202:1,5 202:8,10,12,15,16,18 299:15,16 307:21 347:7 453:23 553:17 638:25 639:8,12,15 639:16,18,23 640:1 640:13 self-esteem 372:9 self-explanatory 192:24 self-hating 626:5 seminar 449:17 seminars 495:24 497:6 Semite 579:12 Semitic 34:22 242:2 261:7 271:13 273:14 317:10 323:5 326:16 328:17 349:7 417:25 547:6 625:16 626:8 628:16 661:9 726:18 726:25 Semitism 81:1 175:10 181:12 183:21 189:7 192:14 194:18 201:25 208:18 226:17 230:3 240:13 245:18 246:25 248:17 253:2,8 337:22 545:12 546:12 547:23 574:9 625:10 637:20,24 641:4,9 660:12 712:24 728:3 771:17,19 801:25</p>	<p>senate 369:1 443:12 send 84:14 160:12 262:5 404:18 408:7 414:21 418:3 419:6 423:9 515:9 516:1 594:9 595:10 626:20 672:2 743:18 784:18 790:14 808:14 sending 153:16 390:5 395:24 421:15 422:10 422:10 423:7 594:21 789:13 sends 10:17 77:14 157:2 160:10 512:9 515:3 520:25 740:5 senior 797:17 sense 14:24 20:2 23:11 25:6 40:7 41:9 44:3,8 47:6 49:7,11 67:12 87:18 162:17 177:6 182:6 186:24 193:18 210:5 218:24,24 220:13,15 222:20 231:25 236:17 239:18 262:23 273:16 300:4 314:8 335:20 342:19 347:7 360:15 373:20 387:17 424:20 425:14 425:23 431:2 433:17 444:5 450:9 487:4 491:23 578:15 581:22 617:18 646:2 665:24 666:2,3 700:16,20 718:18 738:3 743:19 749:7 775:16 789:16 794:17 801:3 804:25 senses 273:13 sensibilities 464:20 sensible 219:15 sensitive 226:8 648:14 732:17 sent 97:18 263:1 278:13 278:16 438:11 439:8 439:15 461:16,17 470:2 484:2 759:2 805:10 sentence 42:24 80:20 101:7 137:5 142:12 142:13 185:14 186:17 187:16,24 188:2,5 189:7 211:8,12 221:20 229:11 232:6 237:20 271:7 295:3 315:22 338:15 371:19 377:15 446:5 509:17 639:7 647:1 786:12 sentences 652:16 sentiment 153:4 270:5 383:17 454:13 761:22 sentiments 114:1 377:18 668:21 705:12 726:13 741:15 separate 65:4 93:7 96:11 165:23 361:17 379:11 493:18 500:1 561:16 562:16</p>	<p>separated 40:21 705:15 separating 231:13 separation 459:18 sequelae 707:16 708:6 sequence 751:20 Serb 387:1 Serbia 386:20 387:3 Serbs 386:18,18,22 series 9:5 535:24 serious 227:25 233:12 450:7 467:12 530:24 589:23 691:4 seriously 66:21,24 239:22 240:24 241:1 248:22 250:23,24 341:2 383:15 413:23 465:25 633:13,14 648:12 649:11,12,17 807:14 serve 8:3 74:3 155:1 157:2 158:9 164:21 238:19,22 247:17 354:10 422:11 455:5 455:11 506:2,6,6 535:9,18 595:3,11,17 602:2 618:4 718:24 served 505:23 599:3,6 serves 237:22 238:7,11 246:8 442:20 service 153:21,25 163:4 163:6 367:5 369:5,10 369:12 370:11 404:18 483:4 667:21 services 37:22 servicing 154:18 325:7 353:10 422:15 456:8 456:16 594:13,25 595:20 617:12 session 82:11 set 12:13 85:6 151:7 191:11 192:1 196:18 203:23 234:12 243:5 243:9,11,13 252:4 296:24 307:8 347:9 369:4 372:7 419:3 423:16 447:17 553:10 563:24 564:8 576:5 579:24 593:7 628:7 634:8 681:25 682:2 688:21 689:1,1,7 690:20 693:7 700:11 700:21 702:19 704:5 704:20 719:16 720:4 728:19 741:2 753:13 773:8 sets 311:14 572:25 692:18 704:20 718:18 720:5 749:1 772:21 setting 16:6 251:25 385:24 445:1 555:1 599:9 722:23 738:13 settle 295:23 296:21 590:17 642:6 settlement 562:19 590:19 606:2,4 657:13</p>
---	---	---	--	---

<p>settlements 259:13 260:24 298:2 300:1 356:21,23 421:12 490:9 562:17 587:5 590:14,21 settler 298:1 settlers 295:11 296:17 296:21 305:22,25 590:15 settling 225:6 seven 675:9,14 677:18 681:25 682:2,13,17 810:16 sex 5:25 666:16 sexism 757:19 sexist 197:11,11 sexual 6:2 se4e 402:19 shame 521:25 shames 379:23 shaming 379:17 shape 335:4 640:3 shapes 335:6 share 161:21 269:4 443:2,6 454:13 463:1 463:3 464:6,10,18 578:13 620:9 622:6,7 676:25 677:18 783:8 shared 463:8 shares 522:11 sharing 449:19 777:6 sharp 771:15 sharpness 323:13,19 Sheffield 176:6 Shia 239:17 shift 797:6 shifted 708:24 ship 442:23 shipped 185:9,10 shirt 386:24 500:10 762:14 shirts 498:20 shock 76:20 85:12,14 85:16 758:17 short 5:21 25:1 86:11 225:16 228:2 460:3 554:6 702:17 736:5 794:20 shorter 25:22 135:5 136:15 675:15 shorthand 17:6 95:9 shortly 167:19 191:22 529:13 710:12,20 726:5 shouldn't 292:5 327:19 426:4 673:8 should've 492:1 597:24 598:1 600:4 shout 70:2 83:13 427:16 shouted 132:17 145:23 151:5,14 314:25 778:4 shouting 73:6 79:23 85:7 140:7 151:9 show 41:11 112:24</p>	<p>222:12 242:23 326:6 415:9,13 505:14 512:15,18 527:11 631:14 685:5 709:16 727:4 751:25 755:10 showed 113:4,6 232:21 462:10 showing 152:5 657:15 694:18 shown 117:9 245:1 674:11 803:23 shows 61:25 153:7 383:24 788:18 shul 41:17 shuls 536:25 shunned 205:24 side 2:13,15,23 3:1,24 9:22 15:16 25:9 40:10 70:15,22 71:2 98:18 106:25 113:24 120:16 141:13 169:18 170:3 206:14 263:21 281:2 281:3 299:23,23 333:15 362:4 363:13 429:6 447:1 448:4 463:16 486:24 490:25 545:22 547:23 548:4 615:17 620:16 621:15 664:5,6,6,7,11,18 665:8,18 672:20 674:4 675:5 683:23 722:15 736:15,17 737:9,22 738:23 739:4 740:17 755:22 788:10,14,19,19,20 788:22 789:9 sides 55:12 105:25 106:4 230:21 234:23 297:10 402:11 429:20 432:4 664:2 672:19 674:16 725:6 810:8 side's 569:11 side-line 547:14 siege 103:6 271:4 sight 357:3 360:22 sign 63:12,16 67:19,23 114:25 120:8,21 122:21 265:20,21 384:6 signals 56:24 signatories 114:7 265:23 266:13 signatures 104:23 270:24 signed 61:14 103:11,22 103:22 104:1,17,18 113:5,7,10,17 165:5 265:10 369:1 significance 41:22 80:10 significant 180:25 185:16 533:20 536:25 610:18 643:20 674:22 748:7 significantly 102:25 signs 73:22 120:6</p>	<p>121:24 122:2 166:19 370:7 530:4 sign-ups 75:22 silence 225:22 226:14 226:21 227:12 228:16 244:19,19 380:3 454:19 538:1 547:6 575:10,15 581:24 626:6 633:17 667:7 759:21 silenced 578:21 582:8 silences 639:20 silencing 574:9 silly 204:14 321:9 777:25 similar 23:5,7 47:10 122:5 181:13,20 182:7 210:25 221:18 227:10 312:10 314:7 328:6,9 334:18 345:21,22 346:9,9 631:5,20 635:21 668:21 676:22 677:8 703:23 735:18 761:22 796:8 similarities 298:20 336:2 similarity 593:7,7 804:6 similarly 49:23 338:11 399:20 592:15 673:13 700:12 722:13 735:14 748:2 776:18 777:11 Simon 172:18,22 206:18 285:25 simple 178:22 237:4 249:7 338:16 518:19 simpler 337:12 simplified 686:8 simplify 463:13 simultaneous 370:16 398:3 sing 395:10 singing 644:24 single 189:23 195:21,24 200:13,23 201:3 212:24 349:19,21 350:16 351:3 398:14 400:7 555:1 580:17 652:19 singled 118:2 408:6 532:18 singling 351:23 singular 381:15 sinister 78:2,11 139:2 157:5 781:23 sip 103:17 sir 122:21 125:20 139:23 140:25 141:12 141:18 160:17 352:22 416:7 417:25 419:14 419:24 420:8 422:2 428:11 435:11 440:17 444:6 471:25 473:3 576:12 591:24 595:22 sister 435:10</p>	<p>sisters 9:11 43:20 44:3 125:9 488:2 489:5,10 489:20 731:8,15 735:11 sit 6:12 18:22 136:7 326:5 712:1 site 9:6 373:2 sits 13:25 29:24 sitting 6:11,13 76:14 77:24 110:4,6,7,16 111:4 229:20 460:3 554:18 732:7 situated 40:20 69:14 217:21,23,23 534:12 537:13,13 situation 12:5 19:5 20:19 48:5 66:9 82:15 153:9 239:2 272:22 298:6 303:9 305:6 313:4,5 357:16 358:22 359:19 360:16 369:15 392:16 425:23 454:10 490:13 554:24 554:25 555:13,23 577:6 578:8,18,20 655:4 674:7,19 676:15,16 677:5 710:14 739:18 775:8 six 224:5 277:6 450:19 569:23 810:16 size 443:16 615:7,8 sizeable 443:21 479:14 sketching 713:24 skill 749:8 skirt 385:11 skull 499:2,5 slang 366:23 slant 676:11 slavery 193:12 392:11 sleep 808:12 sliding 366:16 slight 168:6 191:16 285:7 slightly 110:3 190:21 190:22 200:7 296:2 329:16 358:15 366:15 477:21 702:11 slippages 754:16 Slobodan 386:17 slogan 141:8 644:24 slogans 70:3 138:9,10 668:10 762:1,7,13 781:5 slot 294:17 Slovo 459:6 slow 434:4 slower 34:9 slowly 84:6 424:3 slur 315:1 sly 711:7 713:6 781:14 small 39:1 40:6 53:21 149:9 172:4 209:5,6 221:15 308:9 358:8 387:15 433:17 443:14 473:14 479:1 595:11 595:11 606:3 613:1</p>	<p>645:13 783:19 smaller 65:13 178:13 297:11 Smooaha 343:7 SMS 759:2 smuggled 307:5 Smuts 732:10 Snowden 228:2 soaping 266:23 social 6:2 29:15 31:13 32:6 71:21 72:6 174:21,24 177:2 215:25 234:16 237:4 350:6 372:4 376:5 431:19 460:6,10,13 623:14,15,23 634:4 638:11 652:5 655:2 666:14 692:3 704:22 708:17 722:20,21 729:14 797:12 socialism 214:12 350:6 socialist 336:1 343:7 socialists 236:11 socially 372:21 societies 378:12 382:22 382:22,24 388:24 427:6 society 28:14 36:3 37:7 43:15 163:24 180:18 208:9,10 251:3 343:13,14 358:3 360:1 373:1,18,19,20 375:5,8,13,19 377:5 378:9,11,14 382:6,12 382:15 383:2 387:12 387:16 389:8,10,23 391:20 392:6,12,15 392:18 393:8,11,14 393:19 400:12 405:11 407:12,20 419:22 425:14,19,20 426:5 427:4,12 457:17 478:6 612:4,6 643:24 653:18 672:25 704:25 705:4 715:7,8 716:6 717:14 758:19 sociological 638:3 sociologist 213:2 215:18,21,22,22 608:12 sociologists 770:20 sociology 164:11 174:8 174:8,22,23 228:25 281:23 350:5 607:21 610:15 611:9 soft 266:23 softly 709:13 soldier 512:12,16,19 soldiers 260:25 521:5 539:7 586:9 594:18 741:4 742:2 sole 589:1 solidarity 9:18 34:13 56:10 77:6,7 252:6 351:14,15 433:8,18 433:20,23 434:12,21</p>
---	--	---	--	---

434:25 435:2,9,15 436:18 443:2,5 451:22 453:7,11,21 461:1 462:17,20 465:7 492:7,9 493:4 493:11,20 494:17,23 495:7 510:5 520:13 520:14,15 550:25,25 722:11 775:14 783:9 solution 299:14,14 356:8,10 357:3,4,6,11 357:11,20 360:21 solve 359:12 somebody 112:12 180:10,22,22,24 181:2,4 200:25 201:1 201:2 202:6,8 204:6 214:15 215:10,12,15 224:10 287:24 319:18 389:2 405:5 407:19 578:18 581:10 602:12 615:14 738:6 809:8 someone's 120:22 420:14 634:7 727:24 someone's 121:8 559:3 somewhat 50:23 645:22 693:11,15 700:16 705:23 768:11 789:16 sommer 681:1 son 10:18 77:14 157:2 160:10,13 403:25 423:7,9 512:9 740:5 songs 395:4,5,5 644:24 songwriter 384:11 sons 153:16 403:23 404:18 419:6 421:15 515:4 672:2 789:20 790:2 soon 359:9 763:11 808:22,22 809:3 810:4 sort 22:11 32:8 40:6 62:13 64:7 69:17 75:23 85:11 108:10 131:20 156:10 242:10 244:18 250:17 307:8 324:4 350:4 380:16 395:11 399:8 400:8 405:9 427:4 582:17 624:19 628:12 630:17 665:12 673:2 707:5 715:14 722:23 724:9 724:10 739:14 742:25 744:10 745:14 752:25 777:22 806:19 sorts 38:16 42:8 58:23 61:3 62:8 81:12 104:18 205:4 233:15 312:25 353:19 437:13 485:22 496:15 503:10 672:20 733:1 744:5 748:1 Sothorn 626:11 Sotho 507:20 sought 7:8,15 22:22	227:18 667:17 715:12 726:1 761:7 807:4 sound 264:1 sounds 264:2 source 32:16 721:12 sourced 720:4 sources 771:4 southern 102:23 395:11 south-west 69:16,20 sovereign 453:23 Soviet 193:16 208:17 208:17 223:16 248:15 350:13 368:20 387:8 612:1 space 457:7,12,13 635:23 731:12 797:8 spacious 637:25 Sparrow 708:15 709:6 807:1 spat 230:18 speak 51:4 61:22 62:4 116:23 130:3 132:25 133:13 314:23 343:15 366:12,17,25 403:6 431:7 444:7,24 449:20 457:4 458:4 512:12 516:9 520:11 520:15,18 547:13 566:17,19 640:15 674:1 675:22 676:5 714:4 748:9 759:13 783:5 802:13 speaker 152:6 178:18 180:14 242:25 316:18 379:24,25 380:11,14 384:25,25 385:1,2,2,3 421:3 441:22 703:15 721:11,12,13 722:1 724:20 738:12 786:25 speakers 67:13,15,17 68:12 69:1,4,23 70:4 138:8 803:19,22 speaking 62:2,7 70:13 75:18 133:11 325:21 341:13 344:8 382:10 418:25 424:3 432:23 444:15,16 448:21 451:13 476:17 494:16 503:18 512:25 513:14 528:19 636:24 670:3 748:18 764:6 speaks 6:15 180:20 281:12 385:2 733:13 745:13 765:5 785:22 796:9 802:10 special 5:15 220:22,24 483:25 554:18 604:9 692:1 749:8 specialised 366:3 specialist 156:6 244:5 615:2 747:20 specialists 244:3 specialities 616:20 speciality 747:9 specific 7:3 16:2 32:17	33:22 41:15,19 50:24 257:20 262:22,23 283:17 319:22,24 323:12 325:3,7 332:4 344:10 389:21 411:15 414:17 462:6 489:22 506:18 512:13 515:11 532:18 551:8 558:25 561:21 564:18,21 605:11 608:2 622:20 663:9,10 669:6 743:15 749:23 763:8 772:17 775:4 802:20 803:7,8 807:13 specifically 8:19 20:15 20:20 30:6 32:25 46:7 53:10 54:13 72:13 139:12 142:7,25 166:13 173:9 175:24 177:16 180:13 231:16 232:5,25 270:23 279:25 288:3 311:4 326:12 352:23 353:14 379:21 395:2 397:15 398:16 402:18 408:6 415:19 461:21 463:12 466:16 476:13 482:15 486:8,10 489:4,19 507:4 509:7 555:11 558:24 564:18 566:10 566:11 586:22 605:21 608:4 612:6 616:10 628:20 631:13 663:13 663:21 689:25 690:15 696:13 718:1 726:9 726:10 761:7 788:7 788:21 789:7 798:20 798:22 800:24 specifics 208:4 specified 746:2 spectrum 164:12 speculate 412:16 497:14 speculated 498:10 speculating 412:7 538:1 speculation 411:25 speculative 160:6 speeches 318:23 324:6 324:25 325:9 352:19 724:16 speedily 569:25 speedy 796:18 spell 27:5 31:25 162:6 spelled 782:14 spelling 162:8,15 spelt 285:15 spend 34:4 367:8 568:3 767:21 spent 69:1 606:7 spewing 729:7 sphere 31:13 195:12 774:14 spine 173:2 364:21,24 531:12 571:22 spiral 375:1	spirit 615:16 690:22 691:11 730:1 split 272:3 spoke 71:12 333:14 387:20 449:16 450:5 460:23 481:17 514:15 514:15 592:2 669:23 669:25 701:3 740:13 769:9 772:17 799:20 799:21 spoken 69:6,7,12 119:15,17 349:6 467:12 647:22 720:24 728:20 766:5 sponsored 293:9 Spotting 179:9 springing 760:4 squarely 8:19 Sri 348:15 SS 375:16 staff 71:14 206:13 440:1,8 476:7 491:8 stage 2:21 3:12 15:8,11 23:3 48:15 51:18 52:12 61:10 79:15,20 79:24 83:10 103:21 113:6 168:16 206:14 235:2 333:9 370:14 370:14,15 374:7,14 374:24 375:9,20 376:6 377:2,8 379:2,3 379:5,8,11 402:21 422:2 461:13,22 469:4 476:20 524:7 524:15 527:5 567:25 588:8 600:10 601:4 604:7 605:1,10 649:2 671:3 693:8,20 707:12 712:9 716:15 721:24 773:19 798:12 806:4 808:6 809:11 809:21 staged 56:14 stages 141:19 367:25 368:5 370:10,10,15 370:20 373:23,25 374:1 379:2 591:22 649:2 798:13 799:21 Stalin 371:16 Stalinist 373:14,16 stamp 716:18 stance 433:14 455:4 620:15 774:1 780:14 785:15,16 stand 10:11 14:2 26:18 34:11 52:4,7 56:7 91:4,13,13 116:2,12 155:7 156:15,17 172:15 233:20 244:8 276:4 318:5 453:17 484:25 486:5 487:7 497:19,19 568:23 569:5 586:8 621:3 678:12 679:14 687:4 706:12 709:10 716:22 718:25 723:20 724:21	standard 63:10,11 186:2 222:21 229:9 580:9,10 602:8 613:15 636:22,25 648:15,23 649:9 650:5 764:25 769:1 standards 249:13,15,16 549:14 580:3,7,18,19 636:19,20 648:10 809:5 standing 21:17 22:21 65:15 460:2,2 495:9 standoff 261:18 stands 235:20 316:3 511:24 651:2 657:9 657:16 705:15 718:3 741:23 standstill 500:14 Stanton's 597:7,9 598:22 599:4,17 600:13 601:23 602:17 713:23 Star 120:17 165:14,17 stark 215:2 343:22 344:17 stars 374:12 629:16 start 1:9 24:5 25:11,20 98:4 100:3 104:23 110:24 136:25 137:6 138:20 168:7,8 173:1 231:19 259:7 323:3 351:13 380:24 382:15 383:3 388:5 397:7 429:2 446:2 468:13 492:19,20 547:24 602:20,21 627:5 629:24 647:1 673:2 682:22 684:2 756:16 756:16 759:11 started 21:5 59:2,3 63:22 68:16 215:19 251:25 252:2 268:2 398:2 431:22 444:15 444:16 535:20 553:3 553:3 603:22 610:3 753:23 768:23 starting 19:2 80:1 106:15 168:5 268:25 269:16 399:2 697:17 starts 25:17 26:1,7,10 102:11 136:25 137:4 137:5,15 142:12,12 142:13 173:25 176:21 185:15 229:11 237:20 275:14 377:9 401:18 418:25 445:13 480:7 592:1 629:15,22 786:13 stated 10:4 58:19 70:14 70:20 223:2 284:7 288:20,23 289:1,3 447:16 451:5 480:25 490:23 714:1 state's 289:15 581:15 state's 585:19 586:17 stating 9:6 713:19
---	---	--	--	---

<p>station 168:3 372:23 519:25</p> <p>stations 743:4</p> <p>statistics 222:9,10,11 479:12 540:6</p> <p>status 6:1 328:24 611:18</p> <p>statuses 588:25</p> <p>statute 4:3 5:13 155:8 155:21 156:12,14,15 339:15 392:22 406:7 659:11,14 686:18 688:12 689:17 691:6 741:3,7,8,12 742:1 744:3,4 749:24 765:13 767:19,24</p> <p>statutes 720:9</p> <p>statutory 5:17 724:9,10</p> <p>stay 134:14 201:10 428:10 459:21 560:16 649:9</p> <p>stayed 85:9 147:14 251:5 488:17</p> <p>stealing 201:2</p> <p>stela 383:21</p> <p>stem 24:3</p> <p>stemming 467:8 704:22 722:6</p> <p>stems 700:4 719:25</p> <p>Stenographer 2:6</p> <p>stenographers 285:7</p> <p>step 12:10 43:14 45:8 407:23</p> <p>stepped 133:14</p> <p>steps 85:10 106:14 178:13 303:21 511:12 707:10 783:24 785:22</p> <p>stereotypes 184:10 212:10</p> <p>stereotypical 195:18</p> <p>stereotyping 189:25 757:11</p> <p>Steve 31:22 32:3 91:5,6 91:9,16 94:20 459:1 462:1</p> <p>Steven 469:20 470:3 571:4,9,17 619:22</p> <p>Steve's 91:18</p> <p>stick 84:5 548:7</p> <p>sticks 120:13 587:2</p> <p>stifle 637:4 729:16</p> <p>stigmatise 596:15</p> <p>stock 661:19</p> <p>stone 470:17</p> <p>stood 77:3 166:11 314:25 362:14 459:9 459:17 485:12 755:16</p> <p>stop 2:7 9:14 42:17,23 43:23 53:15 106:5 128:5 185:13 259:21 259:23 295:13 375:25 381:24 400:11 426:1 435:18 438:21 476:8 488:12,13,14 545:23 551:5 636:23 667:19 674:10 762:14</p>	<p>stopped 42:6 53:2 119:7 261:15 471:14 527:17</p> <p>stopping 361:20</p> <p>stops 80:8 81:8</p> <p>stories 193:13 217:14 217:16 382:21,25 383:4 797:9</p> <p>story 84:20 117:2 183:8 193:13,17,19 194:22 222:12 262:10 346:3 452:22 508:2 678:2</p> <p>straight 80:13 350:4</p> <p>straightforwardly 188:24</p> <p>strands 662:14</p> <p>strange 368:20 390:24 391:1 494:25 535:14</p> <p>strategies 398:10,22 783:9</p> <p>strategy 152:13,18 227:15 229:13,17 398:22 667:14</p> <p>straw 246:23</p> <p>stream 660:1,1,2</p> <p>street 39:24 470:21 471:15</p> <p>stress 595:6 672:7 754:2,15 757:23 758:13 762:19 765:5 785:19</p> <p>strict 589:21 599:7 679:4 795:24 797:22</p> <p>strictly 235:20 598:16 599:13 608:21 682:8 797:14 798:16</p> <p>strikes 98:24 246:16</p> <p>striking 438:12</p> <p>stringent 590:5</p> <p>strip 35:25 98:25 101:11 270:3 302:2,3 304:9 556:3,6 588:12 591:3 660:11 731:4 735:9,20 779:14</p> <p>strong 82:5 187:1 209:1 216:18 220:21,23 222:4 237:9 255:9 266:21 281:11 392:20 478:10 495:1 508:22 579:19 584:12 726:3 802:5</p> <p>stronger 392:6</p> <p>strongly 107:12 115:13 230:9 233:17 252:15 267:24 336:7 427:9 508:17,18,20 633:8 674:9 696:16 705:12 802:8</p> <p>struck 255:13 393:18 602:16 789:15</p> <p>structurally 310:20</p> <p>structure 38:12 245:22 383:2 398:5 435:5 700:16 703:24 756:15 756:22</p> <p>structures 64:24 88:24</p>	<p>88:24 382:6 434:22 797:12</p> <p>struggle 9:7 33:5 42:20 123:14,22 126:7 187:6 279:5 280:4 286:15 290:4,9 298:1 359:7 432:3,5,5 433:18,23 434:8,9,10 434:10,19 443:3 444:11,13 453:13,14 455:8 459:5 485:4,5 485:22 520:13 553:5 555:18 775:24 776:1 776:3</p> <p>struggles 553:14</p> <p>struggling 142:20 280:8 299:12 729:14</p> <p>student 27:21 28:17 59:10 60:18 66:5 72:20 76:23 82:3,8 114:17,20 131:25 132:6 133:23 147:1 148:3,20 150:7 151:7 151:21 152:16,22,24 229:23 250:12,12,15 328:7 366:4 431:23 438:11 491:13 499:19 501:20 527:1,4 528:3 545:9 762:16 789:5</p> <p>studied 343:8 400:16 670:25</p> <p>studies 15:2 27:23,25 132:7 221:23 266:5 372:17 398:8</p> <p>study 366:2,4 367:20 368:9 605:11 613:4 616:15 627:15 643:2 643:11,15 656:9 747:23</p> <p>stuff 34:25 59:24,25 116:22 131:9</p> <p>stupid 229:4 778:1</p> <p>sub 408:8 410:7,16</p> <p>subfolder 401:14</p> <p>subheading 574:8</p> <p>subject 9:12 12:20 13:17 22:15 43:22 45:11 52:13,16 53:14 125:14 152:12 168:20 234:4 356:4 391:14 479:5 496:6 568:20 580:19 590:5 594:14 597:21 600:25 608:4 609:2 613:16 614:23 616:9 635:5 641:25 648:2 666:5 676:2 679:14 680:11 696:2 696:5 698:8 712:14 718:4 735:21 736:2 738:24 739:4,9,11,12 760:4,5</p> <p>subjected 193:20 487:9 490:4 586:4 589:9,17 731:23,25 761:15 766:11</p> <p>subjecting 8:4</p>	<p>subjective 47:21,22 48:15,16 50:11 177:3 634:1,5,7,14,15 636:22 703:3 710:16 712:16 798:23</p> <p>subjectively 768:2,3</p> <p>subjects 611:22 803:20</p> <p>submission 6:11,21 13:21 45:17 52:10 227:11 234:12 595:7 599:10 600:11 628:12 634:21 646:7,8 649:1 649:2 667:6 708:6 735:3 736:21 741:2 752:12,21 753:8,16 756:3,15 757:4 758:3 760:9 761:12 763:3,7 763:20 765:9,21 768:7,10,11,21 770:9 775:21 777:4,10,19 780:12,17,24 781:6 781:11 788:16 790:12 790:22 791:3,17 794:15 797:13 800:11 806:18</p> <p>submissions 51:25 255:19 618:7 749:25 754:17 763:19 780:10 790:3 794:12 795:1 795:16 797:15 801:16 806:19 807:15 808:3</p> <p>submit 12:8 13:12 47:23 49:5 51:20 234:20 548:16 597:14 686:7 689:5 690:18 691:22 694:14 696:17 697:6 698:4 700:18 703:21 704:7,14 709:3,24 710:17 713:23 714:8,16 715:9 718:7,14,22 721:25 722:7 723:20 724:5,24 725:1 726:11 727:1 728:9 728:19 729:22 730:11 730:14 731:15 732:15 733:11 735:16 737:13 738:16 739:14 743:13 746:8,11 749:4,16,20 752:13,19 763:12 768:14 776:12 791:24 791:25 792:1,3 801:4 804:13,20 805:1</p> <p>submitted 283:2 511:16 775:5</p> <p>subscribing 647:16</p> <p>subsequent 115:20 276:8 671:14</p> <p>subsequently 741:11</p> <p>subset 185:19</p> <p>subsets 182:23</p> <p>substance 200:4 475:7 475:8,9 481:6 520:16 520:21 677:5 806:21</p> <p>substantial 190:22 676:17</p>	<p>substantially 590:8</p> <p>substantive 13:12,14 239:3 496:10</p> <p>substitute 290:1,7,11 290:20,23 332:16</p> <p>substituting 451:16</p> <p>subtext 381:10,18,19 383:10,11,17,25 384:2,10,18,20 386:14 387:1,5,6,7,21 387:24 389:19 394:24 395:2 408:12 410:2 411:11,21 412:18 713:14,20,22,24 714:11 731:7</p> <p>subtexts 383:3 384:12 388:1</p> <p>subtle 402:23,25 403:19,20 720:14,24</p> <p>subtly 715:19</p> <p>suburb 38:24 39:1</p> <p>sub-bullet 201:14</p> <p>sub-divider 276:19</p> <p>sub-file 473:14</p> <p>sub-folder 276:19</p> <p>sub-section 756:17</p> <p>sub-textual 714:9</p> <p>sub-theme 233:14</p> <p>succeeded 151:11 224:5</p> <p>successes 349:18</p> <p>successful 186:3 750:7</p> <p>Successive 295:10</p> <p>successors 652:18</p> <p>Sudan 399:23</p> <p>Sudanese 397:23 398:2 399:20</p> <p>suddenly 42:11 43:10 43:10</p> <p>suffer 295:7 778:12,15 778:21 779:25</p> <p>suffering 9:13 43:22 53:14 71:22 125:14 489:12 490:1,5 731:24 735:19,22 739:10 780:22</p> <p>sufferings 105:25</p> <p>suffers 43:25</p> <p>sufficient 615:2 679:19 686:17 716:25 802:17</p> <p>suggest 71:19 143:21 206:10 231:25 252:5 322:1 332:22 485:1 599:17 643:5 655:7 656:6 706:23 726:1 731:13,22 737:6 744:25</p> <p>suggested 166:18 334:24 358:15 666:19 713:13</p> <p>suggesting 146:13 598:21 634:1 667:20 667:22 692:14 739:7 742:20 743:8,9</p> <p>suggestion 233:12 245:9,11 681:11</p>
--	---	---	--	---

689:9 703:25 708:18 722:18 737:14 742:13 743:1 806:17 suggests 126:6 373:24 584:22 742:24 744:8 sui 52:6 suicide 371:23 372:10 suit 396:5 673:25 suits 244:7 393:1,3 809:15 sum 476:6 614:6 summaries 173:8 174:1 365:1 572:11,17 599:11 summarise 299:4 476:9 574:18 578:1 579:2 633:2 773:10 799:8 summarised 18:10 summarising 254:20 541:16 superiority 441:2 562:25 Supernatural 31:5,9 88:9 93:18 112:7 274:21 437:24 469:20 470:3 722:17 727:8 Supernatural.blogs.c... 9:6 supplement 3:14 supplementary 565:4 600:6 751:4 808:9,13 supplied 23:2 798:12 suppliers 103:8 supplies 271:6 591:17 591:19 supported 70:17 106:22 114:13 223:19 292:19,21 295:10 296:9,16 344:5 348:5 348:9,25 359:6 496:24 502:20 503:23 575:18 585:9 661:5 666:6 supporter 87:12 215:4 286:19 343:24 476:21 476:24,25 639:24 771:8 supporters 476:15,16 476:17 477:1,6,17 497:3,16 498:15 502:2 534:18 541:15 541:24 553:13 558:25 585:1 586:13 647:7 722:13 732:4 743:9 791:2 supporting 77:8,9 93:24 94:5 272:1 287:15 335:17 351:15 351:16 412:5 478:11 506:10 538:15 539:4 539:6 542:7,8 551:1,2 640:2 737:1 779:13 supportive 345:14 644:1 supports 71:21 87:23 101:9 102:3 146:14	270:1 316:25 419:10 454:11,11 477:17 478:25 495:11 503:1 503:20 542:1,3,11,18 549:3 559:21 628:25 649:9 788:20 suppose 22:6 49:1 131:23 138:10 235:2 273:5,16 478:8 497:18,19 665:23 666:1 supposed 110:11,12 355:8 402:15 589:17 589:19 631:21 632:19 supposedly 131:20 supposing 755:8 784:3 suppress 227:19 339:11 667:17 suppressed 187:4 supremacists 543:2 supremacy 441:2 Supreme 391:7 592:23 691:14 715:25 surely 121:18 159:21 244:24 405:20 535:17 623:14 626:18 635:22 636:4 666:8 673:22 727:12 surface 382:17 384:9 412:21 585:19 714:12 726:13 surname 26:20 27:5 32:3 364:6 430:8 571:8 surprise 221:9 247:16 312:17 334:4 surprised 157:4 521:1 665:4 surprising 298:18 surrounding 297:3,12 surveillance 295:9 survey 221:13,15 222:3 surveys 216:17 346:20 584:23 survived 584:12 survivors 366:8 Susan 721:5 suspect 440:19 622:14 622:18 suspend 761:1 sustained 295:8 664:2 sustains 246:8 Suu 554:21 swastika 41:23 42:3 120:17 swastikas 38:16 41:16 120:6,11 swayed 52:2 Swazi 408:16 549:13 Swaziland 374:22 431:5,8,9,10,13,15,18 431:23,24 432:8,11 434:9 453:12 463:22 533:12 553:6 676:14 676:16 Swazis 567:10	swear 26:25 364:11 430:13 530:13,24 558:12 571:13 sweep 185:5 sweeping 236:14 sworn 172:23 symbol 42:12 165:18 165:23 symbolic 391:19 symbolisation 374:10 symbolise 374:13 symbols 41:14 42:8 374:12 symmetrical 105:18 sympathies 462:25,25 sympathise 515:2 sympathised 462:2 sympathy 408:15 synagogue 41:18,19 80:15 synagogues 324:2 536:25 synonym 776:24 synonymous 87:13 Syrian 399:12 system 129:12 246:8,10 322:4 344:19 353:1 358:14,21 359:20 362:17,18 392:14,15 425:22 478:23,25 590:1 593:24 647:3 650:23 732:21,23 733:5 776:16 780:5 systematic 308:8 339:13 797:10 systematically 721:9 systems 262:11 S-A-U-J 29:4 S-H-U-L-M-A-N 27:6 S-T-E-V-E 32:3 s.u.o 55:4	785:22 793:1 802:23 takeover 362:9 takes 60:5 81:18 115:8 163:6 212:9 227:4 278:21 322:17 378:10 384:1 387:16 435:25 578:15 634:6 706:11 725:18,20 726:15 736:4 768:8 773:11 782:15 790:18 talk 11:11,16,20 68:23 79:3,7,12 80:1 85:4 119:23 147:1 150:2,4 150:19,23 151:2 152:17 187:12 215:17 260:15 266:23 280:22 325:3 330:24 334:19 344:6 346:16,19 366:12 371:18,23 374:1 378:20 396:12 398:19 410:19 425:3 431:16 452:23 525:25 526:4,22 532:11 534:2 547:24 602:13 615:12 629:20 661:1 663:15 764:16 talked 31:15 245:24 325:5 366:8 403:23 talking 11:12,16 53:9 54:12,13 66:4 68:14 79:4,7 119:7 125:15 131:17 141:15 145:14 145:15,17 146:4,18 159:6 160:10 229:11 250:11 252:1,2 262:21 300:5 305:1 308:16 314:2,13 325:7 339:2 344:9 346:24 349:22 352:20 367:12 402:20 404:13 404:16,17 408:11 410:8,21 415:15 420:20 426:15 439:7 452:23 489:1,2 503:16 506:15 507:6 513:5,11,12 519:5 525:11,19,24 526:18 527:22 541:21 543:5 555:11,21 558:19,20 565:1,14 622:25 774:21 784:21 786:14 talks 72:13 76:12 143:1 146:8 160:9 339:2 558:24 576:21 764:1 764:23 785:23 789:24 802:20 tally 339:5 tampered 809:12 tangent 413:24 tangentially 66:12 tap 803:19 tape 77:22 79:22 target 9:11 43:21 53:11 53:13,17 54:2,11 72:16 125:13 127:8 127:10,11 192:18,22	193:1 205:1 540:13 541:23 556:16 663:21 704:23 715:6 717:7 717:12,13 725:12 738:15 739:16 775:24 802:4,14 targeted 41:20 70:25 242:4 376:21 380:1 437:1,14 705:8 715:3 717:9 735:21 targeting 81:20 166:13 166:18 533:25 602:24 737:22 757:16 781:7 targets 127:1 743:15 task 46:8 244:2 549:21 670:12 712:2 tasked 435:6 taste 487:20 488:16,23 tasting 487:21 taught 229:1 374:22 383:6 tea 21:9,16 139:14 143:20,24 167:22 327:10 332:19 333:4 468:14 615:25 616:7 teach 174:7 613:10,10 teachable 229:24 250:13 teacher 229:14 252:12 341:21 teaching 228:25 229:2 team 346:6,10 495:4 teams 346:1 technical 331:24 452:7 679:5 technically 300:25 technique 373:6,6,15 386:13 388:17 technology 94:23 623:15 Tee 762:14 teenagers 371:22 Teheran 208:21 Tel 214:15 562:9 tell 30:2 31:8 33:21 35:20 39:18 44:9 55:16 73:6 119:20 126:15 135:19 136:1 138:6 148:21 192:2 193:13 194:22 200:3 204:17,18 213:2,3,3 222:9 233:21,22 243:6 256:14 259:5 263:23 264:18 272:11 273:16 291:16 303:1 309:21 327:11 354:1 413:21 418:12 433:13 438:1 452:22 468:20 511:19 520:5 528:13 591:4 606:23 632:9 632:14 637:3,6 638:22 662:7,11 672:16 682:12 764:20 797:9 809:2 telling 117:2 197:2 263:24 367:2 383:3
T				
	T 498:19 500:9			
	tab 365:1			
	table 67:20,25			
	tabled 597:12			
	TAC 612:7			
	tactic 398:22 400:2 581:3,4			
	tactics 105:19 398:5,10 647:1			
	taint 617:12			
	taken 6:19 38:25 62:10 66:20,23 95:19 114:13 228:8 232:17 234:6,7 235:6 298:9 299:8 335:7 376:10 376:22,22 435:5 453:17 490:9 511:12 562:17 604:8 609:6 615:16 620:14 633:7 633:13,14 648:12 649:10,12,17 650:13 673:21 706:15 713:12 724:14 779:9 783:25			

<p>527:16 tells 50:3 691:23 temptation 800:20 tempted 49:1 ten 35:7 367:25 368:4 370:10 373:23,25 707:10 tenable 633:14,15 tenant 652:8 tend 58:23 60:9 66:6 133:5 659:6 tended 61:11 70:2 643:5 tendencies 188:18 tendency 544:12 545:1 545:6 809:3 tends 345:18,21 652:4 tennis 495:4 tenor 468:24 741:19 775:12 783:20,21 tense 36:4,11 60:14 68:19 81:13 130:13 139:13 tension 69:3 730:8,16 tensions 35:14 60:9 139:9 term 82:10 88:16 98:17 210:13,17 212:25 213:22 214:2 215:22 218:16 286:18,21 287:4,14,24 340:19 626:5,6 634:17,19 640:20,20 739:3,3 776:18 terminate 618:8 terms 6:16 47:24 61:18 62:11 75:25 80:18,21 82:16 90:17 105:19 110:25 215:3,12 223:9 234:16 241:15 270:8 273:12 289:10 296:4 306:3 328:3 342:15 343:23 346:15 405:15 410:24 420:21 421:1,5,8 439:22 452:2 479:15 494:17 497:10 510:10 518:14 519:2 540:13 561:9 578:7 580:12 590:25 609:20 614:5 632:24 632:25 643:11 646:1 653:14 674:14 696:10 713:14 714:5 732:3 745:23 761:5 801:19 801:20 804:6 808:22 terrain 230:2 232:14 234:19 637:16 638:4 terrible 357:16,17 367:20 371:17 372:14 425:4 territories 28:13 125:17 129:13 217:24 220:3 224:25 267:4 292:25 306:8 312:19 454:17 657:14 territory 106:12 129:19</p>	<p>358:6 555:25 582:25 585:25 588:23 590:18 591:1,8 618:22 669:1 terror 103:1 380:16 terrorists 539:17,18 test 44:13 46:24,25 47:5,11 49:5 50:19 51:10 231:4 234:3,9 282:7,12 283:3 284:6 396:7 406:6 486:18 630:17 703:4 708:24 710:8,9,20,24 712:11 712:14 714:19 717:24 719:9,19 748:5 749:15 767:10,18 782:23 805:15 tested 594:17,23 testified 89:24 90:2 98:12 120:3,5 122:15 128:25 130:12 132:12 138:12 140:25 141:18 147:5 150:10 153:15 157:1,5 160:24 254:3 254:9 284:4 317:11 318:9 334:10 339:18 348:4 352:23 491:21 627:21 629:25 630:5 678:16 768:10 780:6 783:4 789:3 798:20 798:21 testifies 50:1 testify 1:24 14:10 19:10 47:13 213:22 411:20 598:18 679:5 testifying 344:2 529:25 597:11 768:5 testimony 14:15,18 58:13 111:14 131:7 131:16 169:4,8 178:14 231:9 379:1 460:23 540:11 586:5 616:9 635:12 643:2 669:12 712:16 713:23 721:21 737:25 748:13 text 81:12 217:13 297:25 384:24 408:8 410:7,16 440:11 607:4,16 611:10 778:17 texts 382:17 412:20,21 textual 689:8 thanks 143:23 163:23 285:20 363:17 453:9 559:18 734:13 751:21 theatre 131:8,23 132:12,12 theme 56:2 176:15 216:6,10 222:23 225:17 232:8,11 233:1 234:12 315:13 381:6,15 384:18 394:24 468:13 themes 176:19 381:15 theological 739:24 theology 80:18,22 183:13 611:15</p>	<p>theory 174:21,24 184:8 242:6 252:21 350:6 thereabouts 103:23 thereof 174:12 620:17 707:25 722:22 thereon 58:12 thereto 14:23 55:11 597:21 600:8 646:1 therewith 5:20 233:17 598:8 thesis 175:3 they'd 577:9 they'll 38:11 173:13 189:23,24,25 they're 62:21 65:4 82:13,13,15 84:7 158:16 181:20 182:7 188:15 189:2,3,3,4 209:6 214:16 221:15 226:4,18,19,20,20 229:5 246:25 247:1 281:16 314:16,17,17 314:19 323:8,8 325:14 328:8 335:2 341:2,3,12 342:24 343:11,12 346:9 353:8,9 359:22 361:19 379:18 387:24 388:23 391:7 395:7 397:1 399:7 400:14 400:17,19 421:17 521:5 533:9 554:3,3 577:8 614:15 630:16 633:11,12,16,19 674:14,18 they've 96:20 459:17 659:6 668:25 805:19 they'd 85:17 136:16 222:16 508:21 thing 3:2 29:16 61:18 81:22 94:3 132:8 137:25 141:22 157:5 157:6 176:2 183:3 189:4 204:9 205:10 205:18 244:13 246:13 246:14,16 250:11 263:25 276:11 307:8 314:4 316:10,12 319:21,24 320:4 322:21,22 323:22 359:14 361:16 372:14 381:22 385:7,22,22 397:2 407:21 417:3 421:24 426:8 427:15 429:2 440:20 446:1 449:18 459:7 463:5 524:19 534:21 556:4 560:8 584:9 619:21 711:2 746:5 774:17 793:16 806:1 808:15 810:5 thinker 341:21 thinkers 164:11,12 236:5 thinking 55:14 177:11 178:7 181:22,22</p>	<p>182:2,4 184:1 213:6 213:16 215:20 218:21 235:24 317:8 324:3 325:11,12,15 327:2 338:14 342:6 349:12 357:12 377:23 663:24 732:8 thinks 620:3 714:17 think-tank 293:9 third 43:6 101:5,8 102:12,16 117:16 138:1 196:3,4 200:11 208:13 235:12 266:3 270:23 305:21 371:19 374:14 385:22 445:24 454:20 550:15 572:14 607:19,22 710:4 722:20 745:13 762:15 789:11 thirdly 179:12 717:11 thought 18:9 46:23 47:14 83:6 84:22 93:6 121:4 177:20 184:8 225:5,8 237:17,17,18 260:6 269:5 275:14 283:24 297:18 319:18 322:24 347:8 350:6 361:15 377:6 385:19 387:6 423:22 429:17 617:2 719:12 720:19 768:22,25 788:24 799:1 thoughtful 241:24 242:10 thoughts 52:25 538:6 though-out 152:10 thousands 53:25 408:10 thread 592:11 threat 53:9 72:3,8 75:2 76:19 78:10 102:24 227:25 236:1 237:14 408:3 458:5 524:8 531:1 586:18 673:5 707:24 723:19,22 725:2 731:23 736:11 739:3 742:12 745:20 746:2 769:13 781:17 threatened 76:15 79:19 79:24,25 527:1,5 528:3 529:17 531:4,7 threatening 78:14 82:14 458:11 threatens 739:16 744:2 threats 81:13 237:15 325:15 381:7 470:10 470:17 527:9,13,20 744:6 three 23:24 24:11 54:17 100:3,8,24 101:4 102:9 135:4,7 136:22 137:13,22 190:12 191:14 258:8 275:24 277:21 333:19,24 367:16 396:17 398:2 409:24 416:18 445:1</p>	<p>529:15 569:7 587:19 606:17 611:5 612:18 614:7 655:7 670:22 685:25 686:15 689:6 706:18 746:20 759:11 783:16,17 802:11 809:5 three-week 99:10 threshold 707:1 thriving 350:13 throwing 117:4 470:18 548:6 671:15 thrust 272:18 Thursday 168:11 169:10 492:5 632:10 ticket 257:1 tickets 256:17 tie 112:5 333:9 tiers 689:6 ties 233:3 707:3 tight 169:21 till 134:15 147:14,15 432:18 timeline 365:25 times 66:5 183:2 253:21 261:15 287:6 291:22 436:2 445:2 482:6 537:16 541:13 580:15 581:3 603:25 647:23 660:17 673:8 673:12 710:20 timid 379:22 tiniest 225:3 tip 626:11 tiresome 233:11 title 132:21 356:15 575:6 titled 356:16 367:24 today 1:17 48:5 110:2,3 213:5 214:14 217:21 217:23,24 228:11 238:16 239:5,9 240:4 279:16 312:5 377:11 432:18,20 488:9 575:7 584:13,16 585:6 604:15 605:24 622:22 642:20 670:7 675:7 679:19 680:15 682:23 732:7,11 733:8 750:6 751:5 778:21 779:25 808:12 808:17 810:10 today's 350:16 570:17 732:3 told 8:6 18:13 85:20 119:5 152:22 161:16 226:18 243:25 244:2 274:1 315:3 382:25 470:20 471:14,24 501:10 502:23 527:18 566:17 570:14 637:8 750:17 764:17 tolerance 76:4 378:13 425:19 526:11 758:18 759:19 tolerant 396:19</p>
--	--	---	--	---

<p>tolerated 295:10 296:9 296:11,13 416:4 427:8 583:5 586:20 592:17</p> <p>tomorrow 1:12,18 109:14,19 110:5,6,11 110:15,16,22 111:6 167:17,18 168:1,13 168:16 170:11,23,24 171:1 284:13 429:2 429:21 604:15 605:24 662:2,18 679:17,20 680:18,20,20 681:4 681:12,14,20 682:11 683:2,5,7,9,18 684:10 684:12 750:18 808:12</p> <p>tone 151:8 638:1 713:8 762:21</p> <p>tonight 683:6</p> <p>tool 799:23 800:17</p> <p>tools 426:14 712:25 713:1 799:16 800:9 800:11</p> <p>top 25:20 31:4 33:4 57:16 68:3,6 80:24 95:20 176:24 200:19 244:22 263:6 435:5 607:9,20 611:7 625:7 634:3 637:10 786:25</p> <p>topic 132:19 309:7 315:13 380:23 413:15 442:9,11 520:18 607:18 613:18 615:11 615:12,13,14 616:18 616:19 746:14 747:4 769:9 783:11,20,21 783:24 801:15 804:19</p> <p>topics 611:21 745:16 746:21 749:14 783:10 794:14</p> <p>Torah 217:13</p> <p>tortured 131:20 132:1 132:8</p> <p>total 165:8 476:6 614:6</p> <p>totalitarian 184:20 208:2</p> <p>totally 369:21 376:24 641:8</p> <p>touch 4:14 5:11 58:12 82:19 176:20 223:25 371:23 608:3 611:4 612:20 646:24 654:24 700:2</p> <p>touched 184:12 387:20 689:23</p> <p>touches 110:19 167:24</p> <p>touching 479:5</p> <p>Tourism 796:14</p> <p>town 75:21 221:24 253:25 254:1 303:15 442:1,7 496:18</p> <p>towns 217:17 303:6,7 307:5 358:17 561:23 779:10</p> <p>trace 380:18</p> <p>track 75:10 169:25</p>	<p>262:17,19</p> <p>trade 36:3 66:19 146:8 249:8,14 261:13,20 273:3,6 335:25 336:6 341:10 392:11 431:21 433:21 464:2,15,24 465:4,21 466:3 482:5 485:20 486:3 604:19 609:6 721:22 783:24 784:10</p> <p>tradition 187:10,12 314:7 335:24 389:24 646:16</p> <p>traditional 390:1,18,21 499:1,5</p> <p>traditionally 383:12 533:20 609:4 744:11 744:13,19 745:9</p> <p>traditions 187:13</p> <p>tragedy 507:7</p> <p>train 390:7 655:22</p> <p>training 382:16 720:20</p> <p>trains 204:3</p> <p>transcends 644:15</p> <p>transcribers 285:8</p> <p>transcribed 446:7</p> <p>transcription 25:19 285:9,12</p> <p>transcripts 79:25 135:6 137:22 324:20,23 325:11 376:10 445:1 445:18,23 446:11 529:15,16,20 530:8 570:9 670:23 686:1</p> <p>transition 608:17,20 612:2</p> <p>Transkeis 779:12</p> <p>translate 347:22</p> <p>translated 376:17</p> <p>translates 236:19</p> <p>transpires 172:9</p> <p>transport 442:14,14,21</p> <p>trauma 85:20</p> <p>Treasury 805:10</p> <p>treat 206:2 345:18,21 538:10</p> <p>treated 205:20,23,25 310:15 322:22,25 557:19 583:16 586:10 586:11 649:17 705:14 778:11</p> <p>treaties 641:24</p> <p>treating 206:3 345:22 780:25</p> <p>treatment 292:7 697:15 739:5</p> <p>treats 345:17</p> <p>tremendous 635:3 810:8</p> <p>tremendously 793:9</p> <p>trenched 546:20</p> <p>trenches 11:18 79:9 526:2</p> <p>trend 579:19 595:9 622:22</p> <p>trends 433:2</p>	<p>trial 4:20,24,24 5:9 6:13,23 8:23 16:15 24:6,7 27:12,16 30:19 42:16 44:16 47:13 49:11 51:1,15 56:3 63:6 90:23 94:15 97:12,15 100:20 111:19 136:1 167:11 169:16,17 173:3,12 264:13 284:3 294:17 300:14 368:16 369:4 369:8 416:25 430:24 437:16 440:14 443:22 469:17,23 471:7 479:22 486:14 490:18 492:18 504:5 531:9 531:11,13 544:13 568:5 571:23 598:17 601:13 619:11 625:3 678:15 684:11 699:8 721:1 733:6 754:11 755:15,23 786:9</p> <p>trials 175:1 569:24</p> <p>triangulating 75:23</p> <p>tribal 230:9</p> <p>tribe 390:25</p> <p>tribunal 254:10 369:18</p> <p>tribunals 254:4</p> <p>tried 253:5 297:5,12 346:5 361:7 390:7,16 400:6 584:11 602:5 611:21 634:21 650:9 662:4 773:9</p> <p>tries 380:18 382:5 398:23 641:8</p> <p>trigger 687:20 714:2 733:19</p> <p>triggered 706:23 707:5</p> <p>triggering 716:25</p> <p>triggers 714:13</p> <p>tripartite 66:22 94:17 466:2 721:22</p> <p>trips 433:5</p> <p>trite 690:18 709:17</p> <p>trivialising 233:11</p> <p>troops 263:1 591:10,13</p> <p>trouble 323:14,15</p> <p>troupes 355:15</p> <p>true 10:4 46:23 70:19 158:21 174:18 208:25 215:24 237:6,16 240:6 245:17 246:6 246:14 272:2 304:17 305:4 306:19 359:24 361:8 379:18 422:21 447:16 451:5 480:25 490:23 564:14,19,22 586:15 602:5 609:12 609:14 623:24 657:25 687:24 698:14 719:11 741:14 803:21</p> <p>truly 12:4 229:21 747:15</p> <p>Trump 261:4,6 478:2 478:17,20 499:24</p> <p>trumps 689:4</p>	<p>Trump's 177:22 178:1 478:11</p> <p>Trust 340:25</p> <p>truth 27:1,2,2 172:20 172:21,21 364:12,13 364:13 373:5 384:5 430:14,15,15 571:14 571:15,15 598:20 632:4 638:10 688:9 696:19 703:15,25 724:3,15 756:9</p> <p>try 50:2 109:1 130:3 152:18 162:9,16 197:7 223:5 226:21 250:24 252:4,5,6 260:16 322:12 326:5 357:25 366:12,17,23 379:14,15 382:6 390:4,21 393:7 395:10 407:22 412:2 414:2 434:2 443:20 444:23 448:10 547:14 548:5 579:20 626:1 626:20 628:24 633:17 681:3 683:14,22 794:12</p> <p>trying 43:5 50:6 164:2 243:18 247:1 260:11 261:15 262:18 288:3 303:20 348:13 368:17 397:22 411:18 412:22 426:5 488:12 545:25 635:9 661:4 672:17 674:12 711:3</p> <p>Tsonga 508:9</p> <p>Tuesday 169:12,13,15 568:7,10 569:2,15 570:2</p> <p>tunnels 261:17</p> <p>Turffontein 744:19</p> <p>Turkey's 399:13</p> <p>Turkish 399:9</p> <p>Turks 386:23 399:5</p> <p>turned 105:16 116:6 359:7 699:19</p> <p>turning 88:7</p> <p>turns 24:10 372:4,5</p> <p>Tutsi 389:25 390:2,6,7 390:9,18,25 391:5,18 395:24 400:19 713:19 713:21</p> <p>Tutsis 372:25 391:22</p> <p>Twa 389:25,25 391:5</p> <p>twelve 397:11</p> <p>twice 418:6</p> <p>two-line 801:7</p> <p>two-nation 356:8,9</p> <p>two-thirds 173:7</p> <p>type 284:3 389:17 767:13 799:22</p> <p>typed 111:15</p> <p>types 334:20 394:1 797:13 803:22</p> <p>typically 60:13 66:3 67:5 133:5</p> <p>T-A-C-H 163:16,17</p>	<p>T-shirt 65:5 73:12,21 73:23 134:9 499:12 499:14,19,20 501:22 502:23 762:8</p> <p>t-shirts 72:25 500:7 789:5</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>Uber 170:25</p> <p>UCF 162:2</p> <p>UCT 761:25</p> <p>UJS 328:13</p> <p>UK 330:24 331:2 347:11 357:22</p> <p>ulterior 227:2 228:14 228:14</p> <p>ultimate 231:4 370:19</p> <p>ultimately 13:11,25 22:15 47:16,22 113:10 165:4 223:12 230:18 234:3,8,19 263:2 281:20 414:4 614:25 634:9 689:12 690:18 694:12 696:25 697:2 703:4 711:17 712:12,14 714:17 768:14 774:9 800:6 804:3</p> <p>umbilical 558:22</p> <p>umbrella 466:7 467:11</p> <p>UN 296:24,25 369:24 586:21</p> <p>unable 591:18 701:19</p> <p>unacceptable 141:11 326:14 549:14 630:16 644:25 654:1 735:16 739:14</p> <p>unapologetically 503:1</p> <p>unarmed 102:21</p> <p>unattended 20:17</p> <p>unavailable 133:14 170:11</p> <p>unaware 583:9 646:16</p> <p>uncertainty 760:6 763:11</p> <p>unchecked 372:19,20 425:24</p> <p>unclear 781:16</p> <p>uncomfortable 205:1 777:6</p> <p>unconditional 7:21</p> <p>unconditionally 106:10 267:3</p> <p>unconscious 388:2</p> <p>unconstitutional 17:17 391:11</p> <p>uncontested 263:25</p> <p>uncontroversial 50:20 99:12 694:4 771:4</p> <p>uncover 804:17</p> <p>undead 208:15</p> <p>undergo 760:24</p> <p>underground 432:1</p> <p>underlying 231:19 382:5 385:8 389:19 691:23 696:11 698:24</p>
--	---	---	--	--

<p>699:2 undermine 84:16 624:21,25 undermines 152:11 372:8 underneath 67:22 382:17 383:1 underpin 311:8 underprivileged 387:9 understanding 28:14 33:19 49:6 53:20,24 62:17 95:1 118:22 158:4 179:10,17 234:17 249:25 350:21 410:25 440:21 450:3 483:10 503:21 506:9 552:9 561:5 611:20 640:20 646:8 659:17 understands 18:2 714:8 understatement 349:3 understood 12:24 47:6 48:8 71:13 74:25 78:14 92:12 110:4 132:24 177:24 204:20 205:9 440:25 679:10 740:21 745:14 749:7 749:18 768:3 789:10 795:10 undertake 380:14 undertaken 606:13 643:3,12 undertaking 15:2 underway 392:1 under-utilised 805:7 unelected 589:21 unequal 305:23 unequivocal 620:16 unequivocally 711:20 uneven 306:4 unexpected 599:20 unfair 4:2 5:13 6:18 600:9 698:18 796:23 797:5,9,10 unfairly 12:25 unfinished 206:25 unfold 689:14 unfolded 519:17 unfortunate 526:14 660:4 708:14 unfortunately 8:16 89:1 101:2 167:14 170:15 233:13 235:11 384:14 385:16 393:14 406:5 420:5 532:8 655:4 681:10 707:6,9 unhelpful 801:15 unified 386:19 uninfluenced 617:2 uninhibitedly 759:13 unintentionally 673:3 uninvolved 102:21 union 28:19 29:11 32:18 34:5 37:21 66:19 114:17,20,24 133:23 134:9 148:20</p>	<p>162:1 190:20 191:2 193:16 194:13,14 198:2,12 205:21 208:17 223:16 247:12 247:23 248:16 249:8 249:14 254:13,22 273:3,6 324:1 328:14 330:3,5 340:23 341:10 350:13 368:20 385:3 387:8 421:4,5 431:21 442:14 458:25 464:16 482:5 485:21 486:3 498:20 499:20 501:6 502:17 578:23 584:3 612:1 721:23 783:24,24 784:10 789:4 unionist 336:1,6 unionists 609:6 unions 36:3 71:14 146:8 433:21 435:10 464:2,24 465:4,21 466:3 604:19 unique 323:6 328:5 351:2,6,24 352:7 367:18 696:9,10 uniquely 212:14 323:8 349:7 580:1 652:1 UNISWA 431:19 unit 65:3 united 14:19 104:14 162:3 175:16 176:11 177:13 184:2 194:24 199:20 205:11 211:6 221:19 223:8 242:7 245:3,15,22 254:10 265:11 330:2 348:1 358:11,11 367:7 368:11 369:16,19 374:18 385:17 389:3 389:14 392:8 396:7 396:25 402:17 407:25 421:7 422:22 424:20 425:20 427:9 459:16 463:7 477:25 478:5 479:2 485:25 488:13 490:9 521:14,16 532:10 566:5,23 575:8,8,25 584:23,25 585:23 587:3 635:25 640:9 642:9 643:3,7 696:6 731:10 772:20 Unity 757:8 758:10 universal 183:12 184:21,23 208:1 387:16 637:18 638:10 universally 331:17,20 universities 75:17,25 129:9 184:6 245:5,16 245:18,21,24 360:1 607:22 university 7:12 9:19 27:19 28:1 29:8 30:18 58:15 59:2 61:6 74:13 74:23,24,24 75:4,11 75:19 76:11 82:5</p>	<p>114:16 134:22 174:9 175:15 221:24 228:18 254:13,22 266:5 297:20 336:25 406:12 431:14,17,17,18 441:9 443:11 491:8 531:19 572:6 611:7 618:7,8,16,20 unlimited 723:15 unnecessarily 761:21 unoccupied 298:9 unpack 560:23 unpleasant 487:10 673:1 778:5 unpopular 759:22 unprecedented 36:19 38:8 76:10 unpredictable 429:14 unreasonable 680:21 753:5 unrestricted 306:23 unsure 765:18,18 unsurprising 150:4,19 222:14 unusual 38:14 150:20 273:6 282:16 596:13 765:12 unusually 609:16 unwanted 20:19 unwelcome 557:20 unwilling 427:3 update 519:6 607:24 uphold 557:25 upholding 558:4 595:4 upholds 560:17 uplift 3:11 688:8 upper 66:24 437:6 upset 79:23 urge 105:23 urgent 56:7 91:3 116:2 699:6 USA 221:19 usage 199:3 765:25 770:25 771:3,11 use 2:22 20:5 28:22 88:15 102:18 105:12 106:8 152:9 165:23 188:22 189:24,25 204:14 210:13,16 227:21 229:24 296:7 320:14 332:12 347:10 359:21 373:15 374:6 383:7 384:12 386:13 391:8 393:7,13 394:15 404:12 406:14 437:13 476:16 515:19 524:5,21 552:22 581:5 609:17 621:21 623:12,15 631:20 632:4,6,15 709:7 714:5 766:8 770:15 779:19 804:1 useful 31:25 191:3 247:18 380:22 433:17 494:3 593:21 614:4 630:6 684:8 688:23</p>	<p>718:24 801:4 user 796:16 uses 142:8 204:5 233:9 415:7 547:2 580:23 631:5 713:18 742:13 767:24 USSR 611:23 usually 347:20 375:16 567:2 796:22 utilised 47:4 utilises 387:16 utmost 624:14 720:16 Utopian 373:18 427:5 utter 70:23 81:9 utterance 651:1 utterances 24:2 55:17 670:23 671:14 705:21 727:7,12 729:2 uttered 12:4,6 14:21 19:1 20:16 145:2 444:18 621:23 650:8 702:22 718:20 728:20 utterer 713:17 uttering 405:12 406:4 407:16</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 46:3,16 47:8 50:22 vague 17:20 742:14 Valentine's 684:13 valid 225:21 241:14 244:4 268:19,21 337:25 359:1 580:5 592:4,7 594:5 602:9 615:13 622:23,23 626:18 636:18 640:14 650:21 793:3 Valley 796:3 value 633:7 688:14 714:18 722:8 759:12 759:14,16 values 407:15 458:9 459:17 557:25 558:5 689:7 757:22 774:15 777:7 variants 186:4,5 variety 29:13,24 36:1 60:5 84:24 236:4 vast 237:4 346:13 484:20 585:8 664:16 709:22 714:1 Vavi 133:12 441:25 467:5 vehicle 282:11 718:2 veiled 725:2 731:22 Venda 508:9 Ventersdorp 532:13 ventilated 699:19 724:13 ventilation 700:13 venture 98:13 763:11 ventured 120:19 venue 65:14 69:13,14 442:7 443:10,14 444:4 veracity 651:2</p>	<p>verbally 451:13 vermin 375:2 vernacular 714:4 version 4:7,18 112:10 113:14 126:25 175:3 260:9 285:12 619:6 809:15 versions 25:22 260:7 versus 374:8 379:11 574:20 691:4,8 698:20 703:10 704:18 714:24 716:2 719:15 757:8 758:21 767:17 779:25 782:16 796:3 796:13 800:22 Verwoerd 732:10 777:12 vexed 17:15 336:19 612:19 615:4 620:18 741:5 vicious 250:17 425:23 victim 43:5 398:20 485:12 633:12,16,16 645:19 697:1 700:10 753:2 victimised 733:6 victims 397:8 398:19 398:23 399:1,16 505:22 633:3,7,11,19 697:15 698:18 704:23 796:23 797:9 video 164:5 809:7,13 Vietnam 368:19 419:19 556:15 636:3 Vietnamese 551:24 viewed 107:5 620:17 687:9,19 741:17 viewpoint 219:22 494:13 609:23 views 56:24 57:10,14 84:10 115:23 120:20 222:25 237:13 247:12 259:2 272:24 273:1 302:12 345:25 412:2 457:16 463:2,11 464:6,10 465:5 469:5 469:8 501:13 526:11 609:22 623:22 633:18 696:16 700:11 715:18 722:3 736:21 737:20 753:4,5 759:19,22 773:23 799:10,11 vigilantism 742:25 vigils 59:25 vigorously 407:21 674:12 vile 204:9 villages 217:18 violate 520:22 626:1 violated 586:23 666:24 violates 595:18 625:23 violation 157:11 295:12 339:13 509:18 510:1 585:23 587:6 594:23 violations 297:9 violence 11:14 15:1</p>
--	--	---	---	---

17:1 40:1,16 79:6,19 116:16 117:9 295:8 307:12 381:8 406:14 421:24 425:10 426:20 427:4 451:23 487:9 523:17,19,24 524:4,5 524:5,9,12,16,21 525:21 526:13,13,23 527:2,5,13 528:3 529:16 530:4,12,22 531:1,2 581:9 630:15 671:14 674:18 707:24 708:21 709:9,12,12 716:11 754:8,15,21 755:5 756:7 762:10 780:20 782:9,12 791:24 803:8,12 violent 40:10 241:15,25 242:9,12 324:5 673:17,21 733:5 virtue 302:7 viscerally 82:12 visible 683:18 705:3 vision 213:13 427:5 visit 308:25 312:13 440:5 586:7 visited 92:16 221:21 222:6 325:4 487:17 745:23 visiting 175:15 562:9 visits 433:5 vis-à-vis 292:25 vitae 603:19 vital 762:18 vocal 147:15 voice 77:17 99:23 109:17 127:3 129:22 145:25 146:1,21 364:2 403:10 521:19 529:5 550:18,19 voices 40:17 volume 93:8 408:23 409:2,3 418:12,13,15 437:17 748:7 796:3 voluntarily 158:19 160:13,20 423:8 548:21 785:13 voluntary 404:18 790:17 volunteer 595:2 vote 94:18,19 223:15 223:15 299:11 306:8 586:14,16 592:21 658:5 701:10,19 voted 358:21	wall 40:23,24 41:1,3 301:25 556:4 590:7,8 590:11 Wallace 691:13 749:1 walls 380:17 660:5 Wannsee 376:8 wanted 18:1 23:18 40:17 111:20 112:24 121:4 132:18 198:20 198:22 282:2 288:21 289:1 297:23 308:25 313:12 335:19 337:18 342:9 348:3 362:21 369:25 397:1 398:13 402:19 403:13 424:5 446:9 479:1 483:17 493:19 516:1 542:23 629:4 653:18 739:12 754:18 wanting 66:5 335:18 wants 11:21 79:12 142:14 147:1 208:6 224:10 283:19 284:6 299:14,14 418:25 526:4 548:5 705:16 726:18 781:18,19 787:25 warming 496:19 warn 11:15 79:6 498:9 525:24 warned 524:17 569:25 warning 370:7 455:16 628:25 warrant 319:5 807:11 Wars 387:4 Wary 691:2,7,7 wash 547:4 Washington 110:14 167:15 wasn't 19:20 65:12 71:3 92:22 112:25 116:18 118:4,6 119:18 152:23,25 177:23 327:21 332:13 338:24 348:25 426:7 437:8 460:3 462:6 475:25 476:1 482:2,5 484:4 515:11 518:23 520:1,21,23 527:25 627:18 655:16 726:8 wasn't 79:20 132:5 133:11 185:7,7 198:24 223:19 264:20 267:12 301:16,16,17 444:21 570:6 588:3 waste 806:20 wasteful 233:11 wasting 536:3 806:5 watch 54:18 413:12 426:25 427:3 567:2 747:22,25 water 103:18 638:9 ways 84:24 177:11 182:2,4 200:9 201:19 208:25 209:1 213:1,2 213:15 214:5,12	242:2,8 250:18 252:5 281:10 325:11,12,15 332:13 338:14 341:9 342:6 352:20 353:16 353:19 357:16 374:20 382:10 386:7 397:11 399:15 426:9 583:3 644:13 weaker 393:19 weaknesses 634:18 wealth 373:1 weapon 292:9 weapons 40:6 261:16 262:11 307:3,6 wear 74:6 wearing 65:5 72:25 73:2,13,25 134:8 wears 499:13,19 web 7:9 32:13 89:3 401:24 648:2 website 33:24 194:16 252:4 253:10 539:5 Wednesday 1:12,24 110:18 469:21 470:3 569:22 680:20,21 681:3,4,9,23 682:10 682:15 683:7,11 week 60:3,4,4,13,14,17 60:18,21 61:22,23 64:1 80:14 128:25 129:3 130:7 131:17 133:6 150:3 169:22 169:23 217:13,13 291:14,18 315:10 351:8 352:1 441:21 552:24 553:4,6 554:13 632:12 680:12 681:6,6 684:1 809:4 weeks 61:15 100:4,8 195:8 553:2,7 554:12 680:3 683:13 727:7 weight 23:18 231:5 639:20 694:14 722:1 weighty 712:6 Weimar 621:21 welcome 41:11 88:15 123:23,25 558:11 592:18 695:14 705:18 710:4 welcomed 310:14 wellbeing 551:7 well-grounded 230:17 well-known 104:2 373:6 389:18 579:17 691:3,13,14 714:23 807:20 Wendy 256:12,12 went 41:17 62:1 85:19 103:16 134:18 198:14 261:13 298:5 313:13 325:3 326:13 329:5 366:5 390:15 391:3 406:5 408:4 423:3 431:10 442:7 443:1 470:10,17 503:17 511:25 555:24 655:23	671:5,25 711:17 774:20 798:2 weren't 41:11 61:7 177:16,17 326:11 weren't 134:24 186:11 223:19 236:24 west 105:16 106:5,11 225:6 279:18 297:15 297:21 298:2,11 300:10 302:15 304:12 308:12,19,23,25 309:16 314:13,16 338:8 359:24 360:5,8 382:23 383:12 588:12 588:14,17,22,23 589:10 590:24 591:8 western 199:17 208:10 227:25 239:24 242:7 343:13,14 383:18 408:9 434:8 453:16 551:13,16,17 552:2,6 552:9,13,17,22,23 553:8,16 555:3 556:11,16,18 580:9 796:3 we'd 250:14 464:25 686:20 804:16 we'll 1:13 22:9 33:6,17 72:13 86:22 112:1,2 179:12 191:20 216:5 337:20 364:21 430:24 454:9,9,14 465:8 486:24 539:23 540:7 556:24 626:10 627:5 we're 2:6,18 21:5 22:8 23:25 26:5 43:9,9,10 43:13 53:20 54:11 102:23 111:3 168:6 179:19 187:12 188:17 188:17 189:16,17 190:3 209:16 249:8,8 249:9 250:11 274:9 314:13 324:11 331:21 346:24 367:22 392:7 392:13,13 393:7,9,9 394:10,11 416:19 425:7 427:1 428:15 470:23 487:23 489:1 513:5 536:2 543:5 555:10,11 610:7 622:25 636:23 669:10 692:14 728:4 729:14 742:20 778:19 782:25 792:25 we've 112:17 115:2,7 115:11 119:17 142:17 166:1 184:12 209:18 209:22 314:22 318:23 336:10 347:25 352:9 392:11 398:14 433:12 437:5 455:2 456:9 464:25 465:1,2 490:22 491:17 517:20 551:6 556:7,14 574:5 610:1 696:4 724:2 739:6 773:23	we'll 199:18 374:2 568:7 569:14 603:13 606:6,23,24 653:8 682:20 683:10 705:9 we're 169:22 197:10 233:23 240:24,25 300:5 377:23 403:9 410:21 415:15 506:15 591:25 649:9 662:17 679:14 680:9 684:3 711:4 we've 135:3 190:10,13 219:3 231:16 235:6 267:10 370:19 406:12 650:17 704:20 714:23 749:25 Whatcott 716:2 whatsoever 775:8 what's 2:16 18:14 54:12,15 60:3 64:23 196:12 250:21 269:13 397:19 426:23 485:7 552:10 554:15 where's 63:18 whichever 22:10 474:23 658:3 whilst 39:17 70:13 680:22 711:4 722:24 745:6 whispering 320:10 white 207:19 291:3 300:20,23 301:5 313:5,9,9,10 344:4,8 344:17 345:24 355:10 355:14 391:1 402:10 403:14 561:9 575:5 585:8,9,10 592:15 594:2 692:11 732:4 732:24 762:8 778:11 778:20,22 779:25 whiter 408:2 whites 459:8,9,11,12 542:25 561:11,14,21 561:22 673:12 762:9 wholly 268:15 304:15 452:11 680:25 whosoever 415:22 416:2 who'd 668:15 who's 66:4,5,11 179:22 179:23 180:24 181:2 215:10,15 343:8 356:10 379:15 388:15 389:3 438:10 487:19 493:17,25 who've 581:7 668:21 who've 507:25 wide 203:24 widely 28:24 268:22 601:24 613:9,13 696:16 748:4 749:15 wider 17:7 199:5 widespread 696:1 723:15 wild 327:20 willing 515:9
W				
Waar 285:2 waged 434:14,15 460:24 waging 105:10 266:17 wait 73:15,15,15 207:4 526:24 596:20 waiving 386:23 walked 366:7 walking 69:19				

<p>wills 644:13 willy 393:12 win 335:19 793:12 810:15 window 168:7 600:23 681:19 wing 623:10,13 Winiki 703:10 724:13 winning 106:6 297:7 wipe 297:13 313:24 wiped 42:7 43:7 208:15 383:22 wise 394:13,15,16,17 wish 22:16 52:8 113:25 209:7,23 224:7 347:5 526:24 539:12 540:12 569:10 659:7 735:3 810:5 wished 32:10 482:18 wishes 15:7 24:4 26:17 51:24 244:6 248:4 313:24 347:5 644:11 684:2 733:8 745:15 745:16 wishing 406:7 487:13 487:15 withdraw 9:13 53:15 122:20 125:15 126:8 160:7 220:2 267:4 357:10 454:16 withdrawal 125:16 withdrawing 591:9 withdrawn 43:23 withdrew 259:12 260:20,24,24,24,25 556:23 735:22 witnesses 1:11,23 14:7 14:9 19:10 47:13,21 110:10 168:25 169:6 169:7,8 170:10,19 231:6,22 260:15 294:9 662:20 712:2 725:3,11 740:13 764:18 769:20 797:18 799:4 800:7,8 witness's 49:6,17 52:1 witness's 241:7 Witwatersrand 7:12 9:19 27:20 30:18 58:15 406:12 441:10 WIZO 164:3 woken 415:24 Wolpe 606:5,25 608:11 woman 68:3,5 216:1 708:15 women 37:21 99:18 100:9 204:12 353:7 437:13 538:17 539:1 539:13,22 565:10,18 566:18 663:13,17,22 664:19 665:15 Women's 164:4 won 297:6,14 458:10 wonder 596:20 won't 1:10 93:23 283:19 332:15 429:13</p>	<p>429:15 474:14 774:5 774:11 Woodways 796:2 word 20:5 32:22 94:3,6 94:7 142:8 144:16 163:20 166:3 219:6 241:3 287:2,12 288:3 290:1 296:6 319:20 337:10 384:5 394:15 403:23 404:12 415:7 415:17 417:19 440:21 440:22,23 451:20 464:13 483:13 484:14 507:9,9,9 547:5 631:5 631:20 632:4 686:19 709:7,18 713:6,18,19 713:20 731:6 739:2 742:14 765:11,13 766:2 769:21 770:1 770:16,23,25 771:1 771:11 772:2 778:2 778:15 worded 392:22 wording 26:1 447:5 638:25 773:2 802:2 wordings 446:1 wore 499:1,5 500:9 762:7 work 15:2 28:8,11 34:1 34:15 95:4 176:5,10 206:11 228:18 235:12 243:13 247:10 288:21 289:1 292:4 308:3,16 308:21,23 313:8 332:9 343:8 389:16 390:9 397:21 432:6 433:7,7 434:12 516:5 516:6,6 562:5 593:5 612:6,15,15 613:1,8 613:16,16 614:10 615:8,9,14 617:18 621:1,2,2,3 627:15,18 656:19 683:6 783:7 810:3 worked 38:1,3 368:6 427:8 459:3 605:4 656:25 810:8 worker 442:12 520:14 520:15 workers 433:9,19 442:13,14,25 466:6 466:15 483:3,4 520:12,12,19 783:6 working 39:17 191:3,9 191:25 192:2,11 328:20 329:15 332:10 367:8 491:8 518:10 578:23 579:3 810:16 workplace 195:12 works 46:11 200:25 304:18 487:21 605:20 worldwide 7:9 32:13 42:1 89:3 288:20 292:16 372:14 401:23 worn 762:14 worried 71:5 179:16</p>	<p>198:12 246:25 569:21 681:22 worries 230:19 worry 226:16,18 246:24 606:24 743:6 worrying 79:18 267:24 worse 108:25 324:4,7,7 342:14 386:6 406:5 worship 66:1 211:19 394:12,19 worst 323:22 worth 371:13 worthless 372:10 worthy 371:14 wouldn't 108:21 207:24 274:7 288:25 332:1 334:3 360:4 495:1 520:11 529:25 535:5,5,12,12 654:19 654:21 666:23 wouldn't 158:5,6 237:17 269:14 360:2 376:15 407:19 445:25 would've 14:12 33:18 37:1,3 42:1 66:20,23 67:13,17 68:4,9,12 69:6,7 70:5 73:24 463:15 484:16,19,21 485:23 491:12,22 would've 599:8 604:1 648:18,22 657:24 709:16 wrap 791:15 wrestling 256:9 write 31:14 80:6 84:20 102:2 103:3 174:8 368:11 434:2 604:8,9 604:11 612:4 680:2 773:21 809:1,3 writer 178:18 180:15 writers 641:24 writes 43:12 123:12 613:17 621:5 writing 53:22 91:16 176:2 215:19 369:15 475:20 606:14 620:23 641:23 719:22 writings 253:5 written 31:15 63:2 90:14 91:5 119:11 123:4 174:25 192:9 197:14,17,20,25 198:1,4,7 219:12 252:18 255:4 265:6 296:12 312:23 327:22 327:24,25 356:11 369:22 449:11 451:15 467:12 575:13 585:2 605:24 606:7 608:3,6 610:3 612:12 615:8 615:14 616:10 647:22 720:25 730:23 735:7 772:11 wrong 20:7 83:6,15 84:22 90:11 103:16 121:16 122:10,10,11</p>	<p>141:11 155:17,20 162:15 208:12 210:20 213:4 220:11,13,14 220:14 226:5,19 227:1 228:10 229:4 229:15 230:19,25 243:18 258:24 268:14 268:23 269:5 272:11 318:1 340:7,11,13,15 340:19 341:4,12 348:23 351:3 352:4 354:25 357:12 405:3 406:14 462:24 487:19 515:13 541:3 552:10 609:18 627:25 706:6 706:12 724:6 752:23 785:14 793:2 wrongdoing 195:20,24 200:13,23 wrongly 228:8 423:10 777:25 793:11 wrongs 540:24 wrote 80:24,25,25 91:3 253:16 270:9 293:19 295:3 320:8 329:7 349:25 369:17 370:9 373:7 377:6 398:8 447:12 448:1,14 469:20 472:9 486:18 487:25 501:4 513:10 545:10,11,11 562:22 593:23 611:16,23 614:16,20 625:9,9 648:25 657:6</p>	<p>277:21 361:10 377:10 378:12 383:19 408:10 410:21 425:9,16,25 426:2,20 580:16 589:18,20 590:7 591:8,20 605:9,19,19 608:21 610:9 611:1 613:5 622:21 667:15 670:7 675:10,14 677:18 729:13 732:8 yellow 302:18,23 303:23 304:3,12 374:12 588:18 yesterday 110:4,14 111:8,19 112:6 135:7 229:1 285:24 287:3 329:6 333:14 335:17 487:1 570:12 697:13 714:17 715:1 810:9 yesterday's 111:14 172:6 285:12 Yiddish 163:21 York 640:9 young 64:22 65:2,5 66:21 67:6 85:16 159:13,15 372:13,15 409:12 436:18 441:19 462:18 494:8,10,18 495:7 561:6 643:6,6 younger 94:22 Youth 65:1,3 436:19 441:20 you'd 275:14 384:22 420:19,25 613:24 619:8 you'll 27:12 30:15 67:14,19 68:15 70:10 77:17 89:4 94:4 97:12 105:5 112:6 113:21 114:7 154:7 173:7 263:22 270:24 273:16 276:3,10 277:7 327:11 333:14 338:17 354:19 386:2 400:15 400:22 418:9 454:21 456:20 472:22 550:8 572:9 573:13 635:8 635:18 786:22 797:24 798:19 810:3 you've 31:19 32:22 34:9 42:24 75:7 88:4 95:8 98:10 148:9 150:10,11 151:12 154:20 174:25 178:6 212:16 270:19 277:12 288:11,16 296:13 315:3 317:11 319:8 326:10,19 339:17 344:1 349:5 379:12 381:14 386:8 398:18 422:7 424:2 462:24 463:15 485:15 486:22 534:3 543:7 573:10 605:24 606:7,7,13 608:2,3 610:3,11,19 611:6 612:4,9,18</p>
X				
<p>xenophobia 178:1 330:1,12 Xhosa 507:9 Xhosas 507:15,17</p>				
Y				
<p>Y 231:6 Yale 175:15 366:4 yard 393:17 yardstick 748:15 yarmulke 74:3 499:1,6 yarmulkes 73:2 74:1,2 Yasser 362:13 Yazidis 186:12 YCL 491:14,15 492:16 493:22 494:6,8 yeah 201:18 203:11 241:16 272:10 372:1 402:13 409:9,9,10,17 410:11 421:20 year 5:6 60:14 73:22 129:6 159:25 194:2 367:16 374:22 441:23 519:4 554:14 586:3 589:13 599:3,4 607:24 660:21 746:19 years 35:7 85:17 105:11 148:8 191:14 221:22,25 222:6 227:16 229:1 266:18</p>				

614:6 616:15 618:24 620:15 621:8 627:14 632:17,19 650:7,9 751:5 Yugoslavia 386:16,17	102 762:12 103 47:9 762:19 109 47:9 11 21:5 100:21 173:10 173:17,18 182:15 183:18 371:4 454:21 454:23 456:20 468:12 468:13 509:14 573:11 629:16,21 683:8 758:7 11th 269:24 469:21 470:4 11.5 564:10,11,13 11:01 607:19 11:05 464:6 11:08 326:5 11:30 110:24 168:5 683:5 684:3,4,13,14 11:37 685:2 11:38 468:19 11:39 21:12 11:40 616:3 11:41 333:6 11:43 144:1 11:430 684:14 11:57 697:3 11:58 482:7 11:59 25:25 111 8:23 9:2,4 112 10:14,25 12 12:21 13:15 15:12 16:6,13 176:21 468:13 563:5,7,9,12 563:14 704:6,6 724:12 794:25 795:17 796:14 12.1 691:19 12.2.3 698:17 12.3 702:15,21 12:00 172:2 631:4 12:01 345:13 12:03 155:17 12:17 709:22 12:18 496:7 12:19 32:22 12:20 184:4 646:18 12:21 358:12 12:23 168:12 12:37 722:1 12:38 510:9 12:39 45:2 12:40 196:20 662:1 12:41 370:9 12:58 527:15 121 758:24 759:11 122 759:16 126 759:18 13 102:19 149:11 176:25 181:7 182:19 184:12 185:15 186:18 187:16,24,25 188:2 333:24 334:8,20 563:23 571:1 633:21 664:5,8 719:19 763:15 13th 415:19 570:21	13:59 206:17 529:1 130 759:23 1300 664:6 136 796:3 14 182:9 185:15 228:25 354:20 355:1 380:24 381:2 576:20 685:1 702:24 773:4 14th 684:12 14:01 663:5 734:21 14:14 55:2 14:15 378:23 14:19 218:4 543:22 14:21 677:14 748:11 14:34 66:14 14:35 390:7 14:39 230:23 558:7 14:41 760:1 14:54 75:17 14:55 402:8 14:59 242:14 570:10 1400 664:5,5 15 145:21 188:1 189:7 336:9 354:20 381:5 469:17,18,22 471:2,3 471:8,9 550:17,18 577:19 630:3 662:5 726:7 762:2,4 786:13 791:16 15:01 769:15 15:14 86:15 15:15 415:18 15:19 255:17 15:21 780:3 15:34 97:12 15:39 270:16 15:41 789:3 15:59 283:11 16 13:5,9 17:14 97:12 97:13 105:6 189:11 201:7 212:1 225:14 232:8 276:10 447:8 447:10 450:14,19,20 451:1 471:2 480:22 481:2 490:16,18,19 490:20 500:15,17,25 563:15,15,17,18,20 632:3 670:18 688:21 688:24 693:12 694:1 704:5,12 720:22 728:24 729:7 752:8 755:25 756:17 763:22 763:23,24 764:1 766:3 16(2)(c) 692:22,23 693:3 16.08 277:8 16.1 757:1 763:19 16.2 717:24 753:19 758:3 794:18,23 16.2C 717:20 718:1 16.3 717:17 16:01 801:4 17 143:6 159:14,25 191:1 336:10 447:6 509:12 563:23 564:3	619:10,16 630:3 170% 143:8 18 77:6 159:14,25 212:1,19 351:13 549:25 550:3,7 564:3 579:25 631:3 763:17 1890 349:24 19 94:21 213:20 579:25 630:9,12,13 632:3 695:17,18,19 704:17 724:22 763:21 786:7 19th 390:24 1920s 187:4 214:18 1930 782:16 1930's 621:22 1933 391:4 1942 376:8 1948 238:8,9 296:24 360:20 584:15 588:9 1949 588:7 1950s 385:19 1960s 245:16,18,22 1967 106:12 259:14 297:12 301:14 360:20 423:4 588:24 590:17 590:23 591:7 1972 431:4,8 1973 348:14 1975 223:7 1978 604:22 1980 366:4 1980s 386:16 1982 368:7 1985 604:1 605:14,15 1986 610:3 611:1 1988 391:5 1989 427:10 1990s 386:16 1991 223:12 1992 395:24 1994 368:14 369:9 391:17 1995 605:15 1998 432:12 463:22 741:1 1999 220:19	2000 5:13 2001 622:4 2003 192:5 194:12 2004 432:16 2005 28:1 221:25 222:4 363:2,2,5 589:13,19 660:15 2006 432:17 463:23 2006/2007 175:16 2007 330:13 2008 98:20 175:9 258:11 293:19 433:12 434:14 453:18 460:24 463:21 479:19 2009 4:16 7:10,11 9:5 9:17 10:2 14:11 19:1 21:3 23:24 27:19 28:2 28:16 30:17 33:17 36:9 56:7 57:20 58:16 59:7 70:10 85:2 94:20 99:1 100:21 105:6 120:16,23 122:5,11 130:13 149:12 175:10 258:11 279:9 293:8 410:1 415:19 425:5 436:7 441:15 447:12 448:2,15 469:21 470:4 490:21 492:5 492:13 563:16 619:5 698:4 718:20 2010 175:11 796:3 2011 618:6 2011(3) 46:16 2012 611:11 2014 28:5 2016 176:8 2017 1:1 110:1 170:24 172:1 285:1 425:7 429:22 430:1 570:21 571:1 685:1 2020 478:21 21 6:9,14,15 218:13,13 225:11,12,12,13 232:8 749:20 760:9 765:22 21(2) 7:19 21(2)(b) 7:20 21(2)(j) 7:21 22 310:25 543:10 544:7 544:9,21 765:22 23 223:7 543:9 544:21 630:25 631:1 651:24 231 525:12 24 78:24 224:1 632:18 716:19 767:7 24.1 717:5 248 479:21,24 480:1,4 25 78:24 544:24 631:2 250 116:9,12 257 4:19,21,22 24:5 25:17,18 71:17 259 25:20 71:17 74:8 136:21 145:5,5 445:3 445:5,7 446:13,14 449:4,5,6 480:5,6,7,8 531:9,13,14,15,17
Z Z 231:6 zealot 334:25 zero 333:20 409:24 587:19,19 Zimbabwe 189:18,22 189:23 190:1 442:22 453:12 523:10,12 554:10 Zimbabwean 434:10 Zion 400:9 Zondi 796:5 797:3 Zulu 507:9 542:1,3 549:13,15 Zulus 461:24 505:10 507:11,13 517:1 540:25 541:9 Zwelinzima 441:25				
0 000 53:21 75:14 116:11 165:10 263:16 309:22 309:22 310:4 312:8 383:18 567:7 645:15				
1 1 48:12 64:7 70:10 77:12 263:7,16 277:6 370:14 399:6,20 408:24 437:12,17 453:19 486:23 512:7 514:8 528:22 563:20 652:16 686:6 734:4 751:10 752:12 756:17 784:9 1% 221:2,13 1-3 187:22 1.5 466:6 1.6 466:6 1.8 466:13,14,15 467:10 721:20 10th 429:21 10.1 763:16 795:19 10:00 568:1 10:01 571:2 10:05 430:2 10:08 285:2 10:18 110:2 10:21 583:4 10:25 441:12 10:28 297:11 10:37 1:2 10:38 120:24 10:41 593:19 10:45 452:6 10:48 312:4 10:57 11:7 10:58 132:15 100 377:10 100% 262:9				
			2 2 48:12 64:8 75:14 206:11 367:15 370:15 383:18 408:24 418:15 479:23 480:14 544:8 550:11 559:9,14 663:1 683:8 692:18 698:16 702:19 756:6 756:18 2D 760:18 20 68:14 71:19 149:12 375:14 550:8 577:19 622:21 662:5 714:22 729:13 735:2 20th 42:12 43:11 184:2 185:18,23 193:14 599:6 609:4 20(1)(f) 21:22 200 410:21	

<p>26 212:19 342:8 717:16 260 10:21 11:8 351:12 354:14 445:8 504:5 512:6,6,23 514:10 549:25,25 550:4,5,9 550:12,13,13 551:25 261 10:21 11:10 78:24 525:6,8,9,13,13,14,15 525:16 262 11:9,11 802:19 803:7 264 80:4 265 540:8,10 543:9 544:7,8,9,12,15,16,22 545:2 587:2 266 80:23 545:10 625:3 726:17 801:21 267 141:15 142:8 419:14 480:13,15,17 551:16,17,18 786:8 786:13 268 354:16,24 786:21 786:24,25 269 4:21,22 445:7,9,10 449:5 27 143:5 767:8 270 26:1 271 26:6 272 26:2,7 137:15,15 142:13 143:3 418:9 418:10,19 445:14 559:7,8,10,12,15,16 787:11 273 142:21,22 143:13 274 46:16 275 445:14 278 26:11 137:18 138:2 445:15 279 164:25 28 191:8,23 192:10 195:10 200:11 201:10 213:20 328:23 342:10 342:11 635:8,18 636:13 637:10 638:20 638:24 641:1 718:4 768:9 280 100:19 101:22 103:10 282 103:10 283 104:8,8 105:5 264:16 265:6,7 284 266:1 285 266:12 29 63:22 203:8 209:15 210:25 443:23 492:18 492:22,23 635:18,19 773:8 29th 494:1 29.1 174:12 773:9 29.10 775:3 292 104:8 265:7 293 336:12,15,16,20 337:9</p> <hr/> <p style="text-align: center;">3</p> <p>3 30:19,20 33:3 42:16</p>	<p>57:13,16 89:2 92:10 94:15 115:6 120:7 123:12,13 165:12 275:14,15 278:2 286:10 289:21 370:15 408:24 418:14 437:17 437:19,20,21 440:11 440:14 472:17,19 473:8,10,20 486:12 486:13,14 500:25 563:21 587:16 702:16 742:3 754:6 761:4 3rd 99:1 475:15 30 64:14 187:21 215:1 264:1 332:23,24,25 333:19 343:19 361:10 375:14 409:7,19,22 409:23 746:19 775:18 796:6 30.4 776:12 30.5 777:4 30.7 780:17 300 113:11 114:2,23 300:4,14,17 301:6 587:11,12,17,18 31 195:1,5,6 217:5 329:14 346:15 493:8 493:9 610:8 611:1 613:5 31-year 612:17 31.5 783:13 310 103:23 165:4 312 300:16 315 113:17 318 113:4,14,20 270:12 32 493:10 720:3 32.5 720:22 32.7 721:1 324 113:14,21 326 112:10,20,21 327 113:21 328 113:23 329 114:7 33 63:6,7,18,20 221:1 33% 220:23 34 218:13 790:21 345 294:20,23 305:14 305:19,20 346 294:20 305:19,20 35 219:3 255:14 35(3) 96:14 36 73:9 220:17 693:7 718:12 728:19 797:3 37 221:18,20 572:8,13 572:19 603:20 38 67:10,16 68:1,2 346:16 408:22 409:5 409:6,9,11 605:7 606:1 610:1 723:16 796:7 39 67:14,16 222:24 223:2,3 311:9 348:1 610:2 39(2) 690:20 691:1 729:24</p>	<hr/> <p style="text-align: center;">4</p> <p>4 5:13 10:2 109:15 284:10 429:1,11,16 448:2,15 451:14 563:16,21 750:15,22 756:3 4th 447:12 475:15 490:21 40 46:9 47:9 223:7,11 443:20 494:2,5,6 562:15 400 263:7,15 437:12 453:19 486:23 41 46:9 47:9 349:4 651:25 652:15 695:16 695:19 43 607:8,14 611:6,7 652:9 45 224:1,2,8 227:5,6,7 227:10 573:20 574:7 627:6 628:8 667:2 45.2 730:25 735:3 46 224:11,16 235:9 294:23 564:4,5 642:15,18 47 238:5 645:20 736:13 48 646:22 758:22 49 242:15 360:20 576:13 49,M^lLord 739:1</p> <hr/> <p style="text-align: center;">5</p> <p>5 110:13 148:17 150:2 441:15 563:21 690:16 752:18 5th 4:16 7:11 9:17 14:11 19:1 21:3 59:21 70:13 467:3 492:5,13 685:25 5.2 753:8 5.3 753:15 50 564:10 567:6 740:2 50th 586:2 500 59:17,18 114:19 133:22 789:2 503 789:2 51 564:12 648:8 740:9 52 741:3 742:17 53 244:22 577:19 54 221:1 247:2 443:23 578:22 54% 220:22 55 148:15,24 149:1,2 743:21 55% 222:5 56 248:24,25 744:7 5700BC 383:22 58 579:23 629:2 59 581:17 59% 221:21</p> <hr/> <p style="text-align: center;">6</p> <p>6 1:1 7:10 9:5 10:2 33:14,15 56:7 70:18 93:12,13 96:13 117:14 176:24,25</p>	<p>277:5,8 401:20 423:4 439:2,3,13 447:16 450:21 451:5 473:2 473:17 474:7,12 480:24 490:22 576:20 634:4 687:21 691:12 756:2 796:3 6th 18:25 33:16 91:6 436:7 438:2,3 685:24 6.2.1 9:2,4,21 6.2.2 446:24 6.2.3 10:15 454:22,25 6.2.4 10:25 456:23 60 53:21 105:11 116:11 165:10 266:18 450:18 500:16 732:8 60s 248:16 61 581:18 582:13 63 582:16 583:20 66 70:7 67 260:4,9,23 279:21 280:1 300:11 762:11 68 9:25 70:18 584:17 585:12 592:1 762:19</p> <hr/> <p style="text-align: center;">7</p> <p>7 110:1 179:7 545:10 563:5,10,13,15,23 689:24 756:13 795:18 7th 285:8 7.3 16:5,17,18 70 53:21 116:11 165:10 378:12 567:7 645:15 70s 248:16 700 309:21 310:4 312:8 664:25 665:4 71 594:7,13 72 758:25 73 595:22 610:19 612:18 614:7 746:20 74 573:20 595:23 750 102:19 79 365:4 603:24</p> <hr/> <p style="text-align: center;">8</p> <p>8 110:19 172:1 367:16 763:17 8th 170:24 80 216:17 80% 222:4 800 59:11,12 114:18,23 309:22 310:4 312:8 81 370:25 82 377:13 380:25 83 397:6 84 604:22 85 603:24 87% 220:24 88 367:24 373:24 88/89 390:11 89 103:11,22 113:7</p> <hr/> <p style="text-align: center;">9</p> <p>9 6:7 56:3 90:8,19,23 111:6 116:1 276:1,2 285:1 334:6 804:21</p>	<p>805:6 9th 23:24 37:1 90 427:11 761:23 92 397:9 93% 585:19 94 398:18 762:4 955 369:18 978 369:18 99 222:3</p>
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