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CHAIRPERSON: Good morning.

ADV SIBEKO: Good morning Chair.

CHAIRPERSON: Can we ask the witness to confirm that he is still under oath.

5 MR ESTERHUYSE: Yes, I do.

ADV SIBEKO: Thank you Chair and Commissioner Musi. At the outset I would like to express our apologies for the late commencement of today's proceedings, there is a matter that has arisen with regard to some of the annexures that are in the
10 bundle which we hoped the witness will be able to deal with in the course of his testimony and which we anticipate we will reach during the course of today.

The documents in question Chair and Commissioner Musi start as at page 361, this would be Annexures "EE28",
15 "EE29", "EE31" and "EE32". These are entitled "Minutes of the Strategic Defence Package Briefing on 31 August 1998". These, the significance of these minutes Chair is that the witness's testimony and involvement in the acquisition process relating to the packages ends at that time. Now there are, as
20 you would have seen four recordals of the proceedings of that minutes with regard to a paragraph 11 thereof relating to a decision that was purportedly taken during the course of that meeting.

CHAIRPERSON: Sorry Advocate, will that be paragraphs 11
25 and 13?

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ADV SIBEKO: Indeed Chair.

CHAIRPERSON: Also 13?

ADV SIBEKO: Yes. Now during the course of preparing the evidence of Mr Esterhuysen it became necessary for us, together with the ARMSCOR team, to seek direction regarding the classification of the minutes and we requested that they be declassified. Now these minutes together with other Cabinet minutes, during the course of Tuesday some minutes were delivered that were declassified except for these and the response that has been conveyed to us, that is Advocate Sello and I, is that the director-general in the Office of the Presidency has not found a record of these minutes in the Cabinet records as a result of which they took the stance that these are not Cabinet documents which require declassification by the Office of the Presidency or the director-general in the Presidency acting in his capacity as Secretary for Cabinet.

I am advised that a letter was written to the DoD in terms of which the DoD was called upon to declassify these minutes. Now that has not happened because the person responsible for declassification of the minutes had previously been instructed to declassify and after he had declassified the document he was accused of declassifying a document without any proper authority. Needless to say at a subsequent occasion a further instruction was given to him to declassify the document.

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Now the official within the DoD who is designated to declassify documents finds himself in a predicament that he doesn't know whether this is a proper instruction for him to declassify and if he does declassify he will be acting under proper authority, he has as a result not declassified these documents, so the DoD would also seek direction as to what steps to take for the Commission to be able to use these documents.

Chair, there is a view that we have provisionally taken regarding the status of these documents, is whether or not they are in fact a minute of the meeting of the (indistinct) August 1998 and if they are, of the four or five versions that have been produced which one purports to be a minute of that meeting what is glaringly conspicuous in these versions is that the person who is the chairperson of the Ministerial Committee has not signed any of those documents, notwithstanding that provision is made in the various versions of the documents for him to sign, which then begs the question whether the document constitute a minute of that meeting on the one hand, and on the other hand whether these documents merely are a recordal of, or purport to be a recordal of the proceedings of the day, and this is as a result of the various versions that seem not to be consistent with regard to whether a decision was taken with regard to a particular capability. So in this regard Chair we find ourselves in a very invidious position as

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to the manner in which we should proceed with this matter and I have raised this issue to seek direction from Chair as to how to proceed because we would like to have this matter dealt with in order to enable this witness to complete his testimony.

5 I have been informed that counsel for the DoD would also like to address the Commission on the issues arising from those minutes, however, the DoD counsel is not present at the proceedings today, but the attorney for the DoD is available, perhaps she may address that aspect of what the
10 DoD seeks to do.

MS ZIKALALA: Thank you Chair, thank you Commissioner Musi. My name is Lerato Zikalala, I am (indistinct). Chair, as was said by the Evidence Leader the counsel for the DoD is not present today and so my attendance here at the Commission
15 (indistinct) merely, however, the position of the DoD with regards to the Cabinet Minutes of 31 August 1998 was set out in the DoD's letter and sent to Advocate Mdumbi yesterday on 24 April 2014, so what we wanted to request from you Chair is if I could read the letter which sets out the DoD's position, if
20 the chair, if the letter was not brought to the Chair's attention.

CHAIRPERSON: We haven't seen the letter. Maybe just read it into the record and we'll ask for a (indistinct).

MS ZIKALALA: Thank you Chair. Chair, (indistinct) the Presidency that in terms of Chapter 4, clause 2 of the Minimum
25 Information Security Standards that the responsibility for the

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grading and the regarding of document classification rests with the institution where the documents have their origin. This function rests with the author or the head of the institution on its database. (Indistinct) further advise that in terms of clause 5 1.3 of the Minimum Information Security Standards the classification assigned to the document shall be strictly observed and may not be changed without consent of the head of the institution or its delegates, thus we noted that in terms of these minutes brought to our attention the meeting in 10 question was chaired by the Deputy President, the-then Deputy President Mr Mbeki, and included Ministers Erwin, Modise, Sigcau and Casrils.

We also note that in one version of the minutes the ministers in attendance have signed it even though as it was 15 pointed out by the Evidence Leader that the chair had not signed it. In light of this it does not appear to our client that the minutes of the Special Ministerial Briefing held on 31 August 1998 can be said to be minutes which have their origin from the Department of Defence such that our client 20 could change the classification assigned to the documents, however, our client has given us the instruction that if the documents do have their origin within the Presidency then our client would be willing to attend to the classification of the documents provided it receives a proper delegation of authority 25 to do so.

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Yesterday afternoon I had a discussion with Advocate Mdumbi regarding the DoD's position and I was informed that the Commission would bring our letter to the attention of the Presidency to see if they would provide us with the delegation of authority to attend to the documents. As of
5 now we have not received any delegation of authority or information in that regard, such that our clients cannot attend to this, the declassification or reclassification of these documents.

10 CHAIRPERSON: If you do receive authority to declassify the minutes of that meeting which one (indistinct), which one would you declassify?

MS ZIKALALA: Chair in that regard I do not have instruction as to which document (indistinct) is the authentic
15 document and this is presuming we get proper instructions from the Presidency. The documents that they give us delegate authority to us to declassify will be the ones that we would declassify.

ADV CHOWE: Chairperson, Commissioner Musi, Advocate
20 Chowe from the State-Attorney. My colleague Mr Pieter (Indistinct) is the representative to, the legal representative for the (indistinct) Committee which was involved in the SDPP's. Chairperson, my submissions will be to the effect that I could hear that our colleagues and evidence leaders are
25 making reference to the Presidency and maybe to the SANDF

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regarding the declassification of the matter and also their uncertainty as to who or where does these minutes originate or where do they have their origin.

I would suggest that maybe we should allow the Ministerial Committee, which is represented by Advocate Moirane and Advocate (Indistinct) to give us directions. Maybe I can be allowed to give a call to the Presidency directly and Mr (indistinct) one of the counsel to advise us as to, because we do not know exactly where these minutes are placed, he must maybe give us direction as to where these minutes are placed because I'm afraid that they are as they appear and I would suggest it's common cause that they are classified minutes because I see all over it's written "Secret", "Secret", so the fact that if there might not be a signature of the chairperson (indistinct) that particular minute is actually not classified, because they are signed but maybe not by the chairperson, so I suggest that Commissioners, we contact the Ministerial Committee, provide them with copies of these minutes so that they can indicate where will they be signed, maybe they might be able to give us directions.

I was under the impression that they will be signed within the Presidency but as it has been indicated that the Presidency has already disowned, if I might use the word loosely, (indistinct) the minutes, so maybe the Ministerial Committee should be the port of call. Thank you

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Commissioner.

ADV MASILO: Chairperson, if I may on behalf of
ARMSCOR ...

5 CHAIRPERSON: I think we should apologise, I should have
asked you first even before Advocate Chowe.

ADV MASILO: I appreciate that Chairperson, I sought to
allow Chairperson and Commissioner Musi (indistinct) to confer
first before I could seek your Chairperson's leave to speak.
Chairperson, true that the ARMSCOR, it is true that this
10 particular four sets of minutes are very important for the
purposes of the evidence of ARMSCOR and specifically with
reference to this witness. Chairperson would note that in
essence from the witness statement paragraph 5.6 up to on
page 36 to page 39 it deals specifically with these minutes and
15 Chair as early as the last meeting that we had with the
Commissioners as well as the Presidency this particular issue
was raised which is about 10 days ago, to specifically request
that this issue of the minute be clarified.

Now as the Chair has correctly asked which one of
20 the minutes is the minute, it's a question that still today
Chairperson we have to grapple with and we have not been able
to get clarity and direction as to which one specifically is to be
declassified and it is important for this witness's testimony to
be able to have these minutes declassified, but as Mr Chowe
25 has indicated I would agree that perhaps the (indistinct)

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insofar as the status of this particular minute and as to how to deal with the minute further now that the Presidency has distanced themselves from these minutes might be to resort to the Ministerial Committee itself under the leadership of Advocate Moirane to guide us as to what exactly is it that this, the status of this minute is and so that we are able to decide whether or not to proceed with the minute as it is not a Cabinet minute, or to proceed with the minute as a Cabinet minute.

NOTE: Caucus.

10 ADV SIBEKO: Chair, might I be permitted to make just one final submission which is to this effect that we have heard our colleagues on the other side talk or suggest that there might be some wisdom in allowing the members of the Ministerial Committee to perhaps give some kind of direction regarding this matter. While at first glance that might sound like an (indistinct) course of conduct we would submit that (indistinct) the following; that the Secretary for Cabinet has disavowed ownership of these minutes.

Now to the extent that the Ministerial Committee are members of Cabinet it is quite clear a decision has already been taken on behalf of Cabinet, disallowing ownership of these minutes, whichever version thereof may be. There is a danger, assuming we go for the advice or direction of the members of the Ministerial Committee, that they may come with a decision that will contradict that of Cabinet at this point, so

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it is our respectful submission that what we have as disavowed by the Secretary for Cabinet of ownership of these minutes should guide the manner in which we ought to proceed going forward in dealing with these minutes.

5 CHAIRPERSON: Advocate Sibeko, would I be right to say that (indistinct) and the evidence that Mr Esterhuysen is still going to lead depends entirely on the minutes or on the minutes of that meeting of the 31st of August, will that be the correct assumption because the other issues that he raises
10 other people had already testified about that and in fact he was not involved there, so I don't see you know, how can he possibly be of assistance about issues in which he was not involved.

My understanding of his statement seems to be the
15 one critical and important issue that he raises relates to that meeting of the 31st of August. Will that be the right assumption for one to make?

ADV SIBEKO: Chair, we submit that that is so, together with the establishment of SOFCOM and its mandate. Yes, that
20 would sum it up, indeed.

CHAIRPERSON: Now if that is the position would it not be prudent for us at this stage to suspend the leading of evidence of Mr Esterhuysen until we find clarity about the minutes of that particular meeting on the 31st of August? Two; we are not
25 certain who or where are those minutes supposed to be located

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at this point in time, there are one or two people who were members of the Ministerial Committee or subcommittee that are supposed to come and testify, would it not be prudent to hold back the evidence and have finalisation on the evidence of Mr Esterhuysen until we call one of those Cabinet ministers who was present in that meeting to come and tell us exactly what happened? We've got three, four versions of a set of minutes relating to that meeting, would it not be better if at all we call Mr Esterhuysen after have established one; which one, which set of minutes are the proper minutes of that meeting and then two; who is supposed to declassify them, will that not be a much more prudent approach to this issue, because my difficulty is that if we are going to wait for somebody to go to the Cabinet Committee or to go to the legal team of the Cabinet Committee to determine which minutes are those, or which is the proper set of minutes of that particular meeting, are we not running the danger that when a Cabinet minister comes and testify he might say (indistinct) the proper set of minutes for our meeting?

ADV SIBEKO: Chair, I do not take issue with the approach suggested, save for the rider that the evidence of Mr Esterhuysen relates to what transpired on the day he was present at that meeting. Perhaps it would be helpful to place his version so that if anybody has to take an issue with that version perhaps that could be done at the appropriate time,

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however, I merely say that for what it is worth, I do not have any difficulty with the suspension of his testimony, I have had a quick glance at Mr Esterhuyse and I saw him nodding his head, he does seem to agree with the suggestion made by the
5 Chair.

CHAIRPERSON: And I think why I also make this suggestion somewhere in the papers I think there seems to be a suggestion that maybe the decision would have been taken after (indistinct). That is also the suggestion that you know, I
10 know Mr Esterhuyse was one of the invitees and I think there seems to be a suggestion that you know decisions were taken after the invitees had left and we can only get authority from those who were present at that meeting and who were members of that Committee. And Mr Esterhuyse thereafter has
15 (indistinct) probably you know, only then can he be in a position to finalise the presentation of his evidence, it's not an ideal situation but I have (indistinct) difficulty that we seem to be having that might be the best way of dealing with this issue. Maybe before we finalise let me hear what Mr Esterhuyse has
20 got to say.

MR ESTERHUYSE: Good morning Commissioners. Chair yes, you're correct, I left at the point after the presentations to the Committee, the indication I got that there's been a decision after the closure of the meeting came from the Chief of
25 Acquisition and that was, is part of my testimony, that's correct

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yes.

CHAIRPERSON: I thought you would also comment about my suggestion that you know, we do not continue with the tendering of your evidence now until one of the members of that subcommittee has testified and indicated to us which
5 version is the proper version of the recordal of the discussions at that particular meeting.

MR ESTERHUYSE: Chair, as far as I'm concerned it's not only a case of which version is correct because the minutes were
10 changed after the event and I would like to take the Commission through the steps that led to what looks like a final version that was also not signed by the chairman. I would like to raise the process from after the meeting until we have a final version of minutes, if it is a final version.

CHAIRPERSON: Yes, I'm not trying to say that we were going to limit your evidence only to that portion, we're just trying to find a process on how should we deal with this issue, particularly if at all you know we don't have anybody who wants to own the minute and say that you know these are our minutes
15 and we are entitled to declassify. The difficulty now is that we will be dealing with documents which have not been declassified, and I (indistinct) that issue. Thank you.
20

MR ESTERHUYSE: Chair, that's fine from my perspective.

ADV SIBEKO: I beg your pardon Chair, just one last
25 remark just to say that on the face of these documents, the

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various versions (indistinct) is a claim or a suggestion that there may have been a second meeting after the invitees had left, the document does not seem to suggest that *prima facie* and one of the other versions has been signed by Mr Esterhuysen, so there are various issues that arise from them, so just perhaps would have been ideal for Mr Esterhuysen to just complete his version of the evidence of, relating to the events of the day, however, I take the point that there may be prudence in proceeding in the manner that you suggest.

5
10 COMMISSIONER MUSI: Did I hear you to say that the (indistinct) of SOFCOM is also in dispute?

ADV SIBEKO: Well, it is more with regard to the mandate of SOFCOM. You will recall Commissioner Musi that perhaps it is a matter dating back to the evidence of Captain Jordan with, in relation to the letter that was signed by Mr Shamin Shaikh acting, or purporting to be the Secretary for Defence, so that raises also those issues. You will recall Mr Esterhuysen was co-chair of the Management Committee which then evolved into the International Offers Management Committee and ultimately then became SOFCOM. So, there is also that aspect of his testimony and that hints to the whole issue of the integration of results modification and so on.

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25 COMMISSIONER MUSI: Just maybe just a comment on the (indistinct) and the origin of the minutes. Were they (indistinct) from the DoD or from (indistinct)? It's a meeting of

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the subcommittee of (indistinct). I suppose those people are attending the meeting in their capacities as Cabinet members and it's a meeting of the subcommittee of Cabinet, how can it be said that it's not, does not resort under (indistinct) because certainly it's not the structure of DoD. You see, I it was the Council on Defence or the Armaments Acquisition Council that would be a different story, but that's not the case. There is a Cabinet Subcommittee. Other people who were there were invitees, the meeting was that of the Cabinet Subcommittee and therefore (indistinct), those are the minutes of Cabinet.

ADV SIBEKO: While I accept the reference of that meeting as relating to the briefing of the Ministerial Committee which is a committee of Cabinet and while I accept further that the business of that meeting had to do with Cabinet or the Ministerial Committee being briefed on the progress of the Strategic Packages at that time the issue of the disavowal by the director-general of the Presidency who also acts as Secretary for Cabinet does pose this dilemma which cannot just be discounted out of hand, because he is the person who went to look for these minutes upon his investigation of the documents, or of the register relating to these documents he formed the view that these documents do not belong to Cabinet.

Whether rightly or wrongly that disavowal was made the fact of the matter is it just cannot be ignored because subsequent to the decision being taken to disavow ownership of

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these documents an instruction, as we have heard from the representatives of the DoD was then transmitted to the DoD to declassify this document, the DoD's position on the matter is well, until we get a proper delegation from who we believe, and
5 this is the position taken by the DoD that they believe these documents belong to Cabinet, so until they are properly delegated to deal with these matters Cabinet should also be highly involved and take a responsibility regarding the resolution of the dilemma we are facing presently.

10 COMMISSIONER MUSI: You see, there is a follow up to that. Obviously a decision was taken on (indistinct) and that decision (indistinct) at Cabinet level, and the testimony of Mr Esterhuyse also is that it's a decision that (indistinct). So, if you look at it from whatever angle those minutes can only
15 (indistinct) and I think (indistinct) an interaction between the Cabinet and (indistinct), I think those two entities must come together and agree on how best to resolve this question of (indistinct).

ADV SIBEKO: Commissioner Musi and Chair, I can take
20 the matter no further, save to report that what was purportedly taken at that meeting of the Ministerial Committee or purportedly taken at the Ministerial Committee was only that a recommendation that would have been presented to Cabinet and Cabinet took the decision as you correctly point out, but having
25 said that I can take the matter no further.

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COMMISSIONER MUSI: But are you saying Advocate Sibeko that apart from the dispute around the minutes Mr Esterhuysen can just give us the version of what he knows, (indistinct) only the issue of that (indistinct) because that can only be resolved
5 once (indistinct) and I know the former president (indistinct) testified at some point and I think those are (indistinct).

ADV SIBEKO: Commissioner Musi, if one has regard to the statement prepared by Mr Esterhuysen regarding the events of the ministerial briefing of the 1 August 1998 it is clear that Mr
10 Esterhuysen is talking of matters that fall within his personal knowledge, however, his rendition of the events of that meeting is also assisted by the controversial sets of what purports to be minutes of that meeting, so it would be my respectful submission that while he may give evidence on matters that fall
15 within his personal knowledge regarding the proceedings of the meeting of 31 August 1998 he would also require the assistance of the minutes that have become the subject of the controversy.

CHAIRPERSON: I think probably in all fairness to Mr
20 Esterhuysen we must go back to my suggestion. You are correct that he, despite what he has written in his statement now when he (indistinct) supposed to be the proper minutes of that particular meeting that might assist him in giving his evidence. I know that (indistinct) co-chairperson of SOFCOM, very little
25 seems to turn around SOFCOM, apparently there was only one

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or two meetings. That to me doesn't seem to be important, the important issue is the question of that meeting of the 31st of August and we all know why that meeting is at (indistinct) people say that it was recommended, (indistinct) others say there was supposed to be a further investigation of the Italian aircraft which never happened, so the thing (indistinct) seems to centre around the outcome of that particular, of the discussions of that particular meeting. Maybe in order to be fair to him I'm going to release him now and as soon as the question of the minutes has been resolved he can be recalled.

ADV SIBEKO: Thank you Chair, I take the matter no further.

CHAIRPERSON: (Indistinct) Mr Esterhuyse?

15 MR ESTERHUYSE: Chair, that's fine with me.

CHAIRPERSON: Unfortunately I cannot give you a date now because we are not sure when the other ministers are going to be called and on which days we will, we require your evidence. If it would, if (indistinct) would it be okay if we give you a subpoena but (indistinct) before you appear before the Commission again?

MR ESTERHUYSE: Chair, that's in order for me.

CHAIRPERSON: Thank you. Then in that case we are going to adjourn and Mr Esterhuyse will be advised at a later stage when his evidence will be recorded.

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ADV CHOWE: Mr Chairperson may I just make just one submission from my side. I'm aware of the, as Mr Sibeko have (indistinct), I'll agree that (indistinct) controversial, ...

5 CHAIRPERSON: I'm sorry Mr Chowe, can you just pick up your voice, we're struggling a little bit to hear you.

ADV CHOWE: I will do so and apologies Chairperson. I was suggesting that if the Commission will be inclined to do so that (indistinct) request that these minutes, because they are already in circulation if I may say so, just within the
10 Commission, that they should not be distributed any further than those who would have them in their possession until this issue has been resolved because I'm afraid it might maybe go further, but I was just requesting if the Commission can maybe issue such an embargo, if I may use the word, to the
15 distribution of these minutes until the issue has been resolved. Thank you Chairperson.

CHAIRPERSON: Advocate Mdumbi, these documents, are they already on our website?

ADV MDUMBI: No Chairperson, we have not posted them
20 yet and, the only parties who are in possession of these documents are the evidence leaders, the DoD, ARMSCOR and the (Indistinct), and the witness Chair, we have not distributed them to third parties. I know that the Lawyers for Human Rights have requested copies and we have not provided them
25 with copies pending the finalisation of this matter or

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(indistinct) on this issue. So Chair, only the parties that have been dealing with the declassification of these minutes are in possession of the minutes are in possession of the minutes, (indistinct) office, I understand they have copies of the minutes.

ADV MASILO: Chairperson, before Chairperson makes the final conclusion from ARMSCOR we would also like to request the Chairperson that also over and above the five sets of minutes, that also the statement of the witness, given the fact that from page 36 up to page 39 relates to these minutes, that the statement of the witness also not be published on the website and also that it not be distributed until such time that the issue has been resolved.

CHAIRPERSON: Talking for myself, I've looked at that statement, I can't see any reason why it can't go on our website. I've looked at that statement. There is absolutely no reason why it should not go on our, on the website, it discusses very little details about that particular meeting of the 31st, even the (indistinct) that meeting of the 31st, nothing sensitive, and it's already on our website, so you know the horse has already bolted, the statement has already been made available to other people and I can't see what purpose is going to be served for saying that the statement should not be (indistinct).

I think what is important is the minutes of the

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meeting of the 31st, those parties who don't have copies of those minutes will make sure, I think (indistinct) the administration to make sure that they make the copies of those minutes available as soon as they are declassified. I've looked
5 at those minutes, (indistinct), even if you are given those minutes you know shortly before we start I'm sure you should be in a position to (indistinct) very little. And as I say the only two paragraphs where the dispute seems to (indistinct) report, I think it's paragraph ..., maybe three, 9, 11 and 13. So, even
10 those who end up being given these minutes at a late stage, they will not be (indistinct) prejudice. Advocate Sibeko, we are going to adjourn now and Mr Esterhuyse will be advised about the (indistinct) he must come and testify. What is going to be the next step?

15 ADV SIBEKO: Chair, I think the next step with regard to this witness and the minutes will be the declassification. We are not certain what the programme stands for next week.

CHAIRPERSON: I suppose the question of declassification must be dealt with although I'm not quite sure which minutes
20 are going to be declassified. You, I think the three departments would have to liaise and decide which minutes are they going to declassify or are they going to maybe it might even be better to declassify any purported recordal of the minute of that particular meeting, but then that was not my
25 question, I suppose that one of trying to deal with those

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minutes it must be done and (indistinct) Esterhuyse might have to be recalled at a later stage. I was just trying to find out about the next sitting because I maybe know that the problem was (indistinct) whether to come with this type of request.

5 ADV SIBEKO: Chair, I have not looked at the programme in the last two days but I am, we are, we have been given notice that there may be cross-examination of Mr Esterhuyse once he concludes his testimony, so it would have been possible that if we did not finish today we may have had to
10 proceed at the next earliest date but I am aware that in the light of what has happened the other witnesses that are to appear before the Commission would be the DoD witnesses.

ADV MDUMBI: Chairperson, the Commission would not be sitting next week, the hearings will resume on the week, on the
15 4th, the 4th would be a Sunday in fact, the next witnesses who are scheduled to appear before the Commission are Captain (SAN) Reed and Admiral Howell from the DoD. They will appear before the Commission on the week of the 5th, the only day on which the Commission will not sit is the 7th. On the 4th
20 and the 5th we will be sitting and ..., on the 5th and the 6th we will be sitting, and the 8th and the 9th.

CHAIRPERSON: So, we are going to adjourn until the 5th, 5th of May but I think in the meantime can you make certain that they make public the programme so that people should
25 know who is going to come when. Thank you. Mr Esterhuyse,

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we will adjourn and you will be advised when you are supposed to come and give evidence again.

MR ESTERHUYSE: Thank you Chairman.

CHAIRPERSON: Thank you.

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(COMMISSION ADJOURNS)