

IN DIE HOOGGEREGSHOF VAN SUID-AFRIA

(TRANSVAALSE PROVINSIALE AFDELING)

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SAAKNOMMER: CC 482/85

PRETORIA

1988-08-24

DIE STAAT teen :

PATRICK MABUYA BALEKA EN 21  
ANDER

VOOR:

SY EDELE REGTER VAN DIJKHORST en  
ASSESSOR : MNR. W.F. KRUGEL

NAMENS DIE STAAT:

ADV. P.B. JACOBS

ADV. P. FICK

ADV. H. SMITH

NAMENS DIE VERDEDIGING:

ADV. A. CHASKALSON

ADV. G. BIZOS

ADV. K. TIP

ADV. Z.M. YACOOB

ADV. G.J. MARCUS

TOLK:

MNR. B.S.N. SKOSANA

KLAGTE:

(SIEN AKTE VAN BESKULDIGING)

PLEIT:

AL DIE BESKULDIGDES: ONSKULDIG

KONTRAKTEURS :

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COURT RESUMES ON 24 AUGUST 1988.

MR CHASKALSON : My lord, I am informed that all the accused are in court. I understand that my learned friend, Mr Bizos, undertook to let your lordship have copies of a judgment given by Van der Walt, J. May I hand that two copies of the judgment to your lordship.

We turn now to answer the state's argument that the policy of the UDF was to overthrow the state by violence. That argument is dealt with at pages 1 to 82 of the state's written argument and at pages 24 835 to 24 887 of the (10) record where the oral argument is recorded. What is quite extraordinary about this part of the argument which is directed to the central allegation in the case, is that there is not a single reference either in the written or in the oral argument to any of the evidence given by any of the witnesses in the case. The record covers some 24 823 pages, yet the state apparently saw nothing in that evidence that was relevant to this part of the case and what it did was to cite extracts from documents and speeches and as we will show your lordship as we go through them, did so without (20) necessarily having regard to their contents, frequently without having regard to the admissibility of such material and always without regard to any of the evidence which may be relevant to the conclusions which they sought to draw.

According to the state the primary purpose of the freedom struggle is to overthrow the government by violence and to replace it with a democratic government based on the principles of the freedom charter and it characterises a struggle as being one of violent revolutionary warfare, a struggle in which the black masses were to be involved and a struggle (30) with/...

with the ultimate goal of overthrowing the existing government and violently taking over the authority of the state. That proposition was persistently put to witnesses and persistently rejected by them and what emerged from the evidence, the oral evidence and we will come to this in more detail as we go through the argument, was that there are various aspects to the freedom struggle and that the perception of the accused and of other witnesses is that the struggle has a character entirely different to that advanced by the state. The aspects which they stressed in their evidence and the (10) character of the freedom struggle as they described it, were these. First that the freedom struggle is a struggle against all aspects of apartheid including in particular quite privileged which is bound up with white minority rule. Secondly that the struggle has its roots in the fact that the majority of the people of South Africa who have not had the right to vote for the government had been ruled by laws over which they have had no say. That the political power has been used by those who have held it to the disadvantage of those who had been powerless, denying them the right to own and (20) occupy land in most of the country, forcing them to live in places where the government decrees that they should, subjecting to harsh and discriminatory policies such as influx control, forced removals and bantu education, all of which are relevant to central issues in this case and that their perception of a struggle for freedom is essentially a struggle for access to power by those who are presently powerless. So that the government would be one which represents all the people of the country and not only the white minority and that the goal of the struggle was to secure (30)

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the abandonment of apartheid, the ending of white privilege and the extension of the vote and that is stressed by all the witnesses, the extension of the vote to the disenfranchised people of the country. So that the government of the day would be responsive to the needs of all the people and not as has been the case only or primarily to the needs of the white elite.

Now, the evidence shows that these were the issues which lay at the heart of the efforts of the UDF to mobilise opposition against the new constitution and the Koornhof (10) laws and that it was essentially to these issues that the freedom was directed. That was made quite clear in the evidence of the first of the officials of the UDF who was called to speak about the UDF policy. That was Mr Molefe, accused no. 19. He explained it in his evidence-in-chief and he was questioned about it in cross-examination both by your lordship, your lordship's assessor and by counsel for the state.

Let me give your lordship a few passages now. Others I will pick up as we go through different aspects of the case relating the evidence to the activities of the UDF. (20) In volume 249 page 13 256 in examination-in-chief Mr Molefe is asked "Can you say something about the importance of day to day problems?" and his answer was "Any community, any individual, any organisation worth its salt seeks to improve the immediate problems, the immediate conditions of life. Now, when the United Democratic Front came together they called together these organisations in a conference and when these organisations came together in conference to launch the United Democratic Front. They were coming there as organisations that had been involved in the past in dealing (30) grappling/...

grappling with problems that were affecting them in a variety of ways. In education for organisations that had been dealing with these problems. There were those organisations that had been dealing with problems of housing and high rental. There had been organisations, trade unions, dealing with problems affecting them on the factory floor. There were a whole range of these organisations dealing with those kinds of problems. These organisations were coming together. In coming together under the banner of the United Democratic Front this did not mean that their struggle to improve (10) their problems on a day to day basis, the day to day issues affecting them, was to come to an end and that a broad organisation that was going to be formed in opposition to the new constitution had to understand the relationship between the new constitution that was coming up and the day to day problems of the people. We have already said that a whole range of problems that had existed would not be changed fundamentally by this new constitution. Therefore it was only proper that on this day at this conference these day to day problem organisations of communities be seen as (20) part of the overall problem that the people were experiencing." He was then interrupted, but continued his answer, which went on as follows "Now this was the view as expressed by the organisations that came from communities affected by these things differently." Then the question was put to him "Is there any link that you see between day to day problems and the way political power is exercised in the country?" and his answer was "Certainly, the exercise of political power would mean that if all people are currently in this country, we know that they are not voting, this means that we have (30)

no way of influencing policy in such a way that it can uplift the conditions, improve the conditions of the black people in the black areas. Now, if all the people in the country are voting, there would be an even development as I have said earlier on."

Then he gave the example of people living in rural areas and then at line 14 on page 13 258 he continues : "Now, the day to day problems therefore have a direct link to the policy, the national policy that arises out of the vote, because if people do not vote, they cannot change the (10) conditions effectively. Their influence is a very limited one." A question is then put to him "Do you think governments pay more attention to those who vote them into office and those who do not have the vote?" and his answer is "That is so, because it is important that they must ensure that when the next election comes they get the highest vote and that is not, they do not need the votes of the black people and that is why they would find it easy to do things that please white people." Then the question is put to him "If black people have the vote, what do you think would happen(20) insofar as educational problems and housing problems and other day to day issues are concerned?" and his answer was "I actually think that a vote in a central government of the country is fundamental to the solution of all problems. I do not want to single out education. The education would not be inferior obviously and any other problem that there is there, once you have a vote, you have power."

Then he is cross-examined and at volume 254 page 13 654 line 8 to page 13 655 line 23 the issue of the freedom struggle is taken up with him by the cross-examiner and (30)

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the question put to Mr Molefe is this "But the important part is that the masses must accept that they are engaged in a freedom struggle. They must associate themselves with the freedom struggle. That is why it is so overstressed." And his answer was "The masses of our people have long been part of the freedom struggle. They have known that many, many years ago, since the implementation of the policies of apartheid, they have known that they were involved in the struggle against apartheid. I grew up as a child. Once I started talking to other people and seeing what was (10) happening around me, I knew that I was part of the struggle. I belong to a community that was involved in the struggle against apartheid. Therefore the struggle for freedom, it is not as if you are talking to people who are not conscious of what is happening to them and you are manipulating them to accept that there is something which is foreign to them which is called the national liberation struggle. We are talking here about people whose daily life is the life of experience of apartheid, shunted from pillar to post and suffering under the conditions of deplorable conditions (20) of shortage of houses, no proper facilities in the townships, walking in the winter without a pair of shoes on, going to school with a pair of trousers that is torn at the back and the buttocks are sticking out. All those things are the things that people experience and they become part of the struggle against apartheid. That is not something new to them. All what perhaps could be said is that the UDF is a front through which you can articulate your feelings and your aspirations in an organised fashion. When you talk about the black community, you are not talking about people(30) who/...

who are like white people, who have lived the rest of their lives as lives of privilege and protection from the government. You are talking about people who have suffered, who had gone through pain of suffering and depreivation, who have experienced extreme militaracy, who have gone through a situation where they had to work for pittance, low wages, they had to go through a situation where they could not organise themselves to bargain for better wages. The situation that did not exist in the white community so that when we really deal with the situation in the black community, we(10) must understand that we are not talking about people to whom suffering is a foreign thing. We are talking about people who at different times in the historical development have addressed in various ways the problems that they were experiencing. All we are saying is that we are now saying that we can co-ordinate all these feelings and articulate them in a much more organised way through the UDF."

Each one of the accused that gave evidence described in greater or lesser detail to your lordship their own backgrounds and how they came to be involved in community orga-(20) nisations and those who took office in the UDF explained to your lordship how they came to find themselves in that position. Their own personal experience demonstrates what Mr Molefe is saying in this part of his evidence. I urge your lordship to read the start of Mr Molefe's examination-in-chief where he describes his own background, his growing up, his going to school, the difficulties he had in getting to school, the difficulties he had in pursuing his education, his experiences with the police and ultimately his movements in the community organisations and political activities. (30)



I ask your lordship to ask yourself the question what you might have done if you had been in Mr Molefe's position. Would you have acted any differently? Would you have thought that these were issues worth struggling for? Would you have thought that the skills which you had might best be used to help advance the cause of those who were powerless in this country?

Mr Molefe was questioned by your lordship also on some aspects of this and I shall give your lordship that passage. It is in volume 256 . There is a long passage from page (10) 13 761 to page 13 766. I do not want to read that all to your lordship, but at page 13 764 your lordship asked this question "Can I put it this way. If I agree to documentation correctly a problem or an issue, let us call it a problem, was not addressed and dealt with as a problem as such but it was always relation to apartheid. The issue was always dealt with on the basis that the people should realise that the cause of each and every problem was apartheid and that therefore the demonstration should not be so much against the particular issue but against apartheid as such. Was (20) that not the approach?" Mr Molefe's answer is "Well, there are instances where the approach would be that, because when you deal for instance with these, your high rentals, we might protest to the local authorities and say look, you are increasing the rent, we cannot afford it, do not increase it, but then they decided that they are not going to increase it, but for us to solve the problem at least for a reasonable period of permanently, we must understand the source of that problem." Then Mr Molefe goes on to say "The source of that problem would ultimately be government policy" and then (30) he/...

he goes on to say "So that in that context" and this is at page 13 765 roundabout line 15 "it would really be linked up with the issue of the government, but if it was an issue of principle, suspending five students in the school from classes, the matter would be tackled as between the community and that principal." Then your lordship said "That is between the affiliates and the principal, not between the UDF and the principal?" and he answers "Well, even if the UDF was to be called upon to participate, it would still be between the UDF and the affiliates, I mean between the (10) UDF and the principal." Then he continues "The situation in the black communities is a very unfortunate one, because possibly 99% of the problems that are experienced there - that are experienced in those communities, are directly caused, directly or indirectly the results of the application of the apartheid policies. The situation would not be the same in the white area. Why? Because people there can vote. If a problem arises in Pretoria it is a purely a Pretoria problem. It can be tackled there. If the NP (I think that is a typing error but it is actually quite an accurate (20) typing error) responsible is available, he can be called upon to address the matter or it can just be handled by community and the particular authority at that local level, but in our community even if we want to do that, it is simply impossible because the policies of apartheid make it impossible."

There was another passage in volume 254 where he was cross-examined in regard to the issue of a voting a fourth chamber of parliament. That is at page 13 633 line 14 to page 13 636 line 25. He is asked "Can you tell us what (30) is/...

is the official stand and the official policy of the UDF on the question that if the government was prepared to give the blacks in this country a vote also in a fourth chamber in the same parliament would it have been acceptable?" His answer is "We would reject that and my reasons are as follows. We do not want a chamber that has got no power to change the legislation in the country. We do not want a chamber that wants to keep the black people confined to 13% of the land and the homelands and group areas. We wanted a vote, a meaningful vote, a vote that would enable us to change (10) the laws of the country in such a manner that what South Africa can offer, the wealth of the country can be shared by all. That all people would have a meaningful participation in the government. If I wanted to stand as the prime minister of South Africa, I should be allowed to do so. If I wanted to elect somebody as the prime minister in the central government, I should be allowed to do so. Not a fourth chamber that would operate in the accordance with the unworkable equations that the government had set out for this tri-cameral parliament where all the time white (20) people have got to be in the majority. Notwithstanding the fact that they do not constitute the majority of the society in South Africa. Where they have control over all important matters, like finance, defence, foreign ministries and so on. We wanted a government where all the people would have access to all those important areas of government. So that a fourth chamber would still have been rejected as a non-starter." Then the cross-examiner says

"Out of your answer can I accept that the struggle that the UDF is engaged in is not a struggle for (30) political/...

political rights but is a fight for the seizure of power in South Africa?" Well, I do not think that that is what the answer said at all, but in fact the answer given by Mr Molefe is very firm "That is not so. I rejected the proposition. The struggle that the UDF is involved in, is a struggle for political rights but meaningful political rights. Political rights that would enable all the parties of this country, the black people of this country who have hitherto not been allowed to determine their own future, to do so as part of the broad society of South Africa. (10) We are not involved in the seizure of power. It is very clear in our call for a national convention, we are not saying that we are the only representatives of the people of South Africa and we want the government to hand over power to us. We are not saying so. We are saying" and then there is an interruption and he continues "We are saying that a national convention must be convened with the leaders of the people of this country, the nationalist party, the PFP, various constituencies including people in the homelands, all of them is accepted, voted for by their own constituencies (20) to represent them at a national convention. They could sit there and hammer out what they considered to be the best constitution for the future of South Africa." The question then goes off onto the circumstances in which the national convention out of which the union was established, took place and then the cross-examiner continues "Do you agree that the realities in South Africa and the de facto position is that if there is a national convention, it will mean in fact a seizure of power by the blacks, because they are in the majority by far?" and the answer is "I do not accept that. (30)

That/...

That is what is being propagated by those who are opposed to meaningful political change in this country. We are committed to non-racial South Africa. Trade unions which matter in this country, bigger trade unions are committed to that approach and ever so many organisations. They are led today by some people who are white. We in the UDF have got white people in our executive committees. We elect them, we elect them as patrons and so on. It is not true that when a change comes, the black people will take over. I made this point that we are not looking for a black (10) majority rule. We are looking for a government in which all the people of the country will govern together. It is true that in terms of ratios, in terms of the ratios relating to the figures of each population group as it stands now, that the African people are in the majority and that it is very likely that once a government is set up, the majority of cabinet ministers might come from the African sector, but whatever government is set up, it is guided by the broad principles agreed upon and to which the parties are committed and if it is a principle of non-racialism where people (20) are not regarded as whites, coloureds and indians and having special treatment because of the colour of their skin, then you will have no problem. People are treated equally. The law will protect everybody equally, not because of the colour of their skin."

That is the evidence. It is the evidence which is repeated continually throughout the cross-examination. It is the evidence which emerges from all of the witnesses who were asked about this and it is the evidence which is simply ignored by the state. The state is incapable in its (30)

argument/...

argument as it was in its questioning of understanding the concept of a non-racial society in which people see each other as people and ultimately vote as different people vote all over the world according to political philosophies, to attitude, to their own particular backgrounds possibly and it is that inability to understand how there could be a non-racial society that leads the state continually to talk in terms of seizure of power. Take over of power as if the UDF were on a war of conquest, seeking to overthrow the government violently and instal itself in the place of (10) the government. That was rejected totally whenever it was put to the accused and there is no evidence which goes the other way and no reasons have been given to your lordship why you should reject that evidence. We are going to show your lordship later how these issues were related to the campaign against the Koornhof laws and the new constitution and how they were related to the other issues that were taken up by the UDF.

We also want to show your lordship that the attitudes of other organisations who saw themselves as part of the (20) liberation struggle and how they also talk in terms of liberation and a non-racial society as those associated with the UDF, though their attitudes are not the same on different issues and their tactics are not the same on different issues.

In the evidence of Mr Dangor in volume 372 page 21 489 lines 6 to 17 he confirmed that he was present when Dr Bengu of Inkatha spoke on behalf of Inkatha at the labour party annual conference in December 1977 and a speech which was put in as EXHIBIT DA119 was confirmed by him, as indeed (30)

later/...

later he, at about that part of the record, confirmed all the exhibits which he put in and says he was present at all those conferences. It is Professor Bengu and in his address to the labour party he says - you will find it in the first paragraph - in his capacity as secretary general of the national cultural liberation movement Inkatha "I bring you greetings from my president Chief Buthelezi." Then about the third or fourth paragraph he says "May I now take the opportunity to inform you how the bond of brotherhood in the liberation struggle was forged between the national cultural (10) liberation movement and your party, after your recent rejection of government policy which aimed at finally sealing the separation of a coloured community from the rest of the black people in South Africa. Inkatha congratulates you on your having refused to sell your birth right for a supposedly democratic gimmick calculated to isolate you from your fellow black sufferers. Inkatha applauds your having seen through the trick which was aimed at perpetuating our subjugation. We stand for one South Africa with justice for all population groups regardless of their ethnic affiliations. (20) Our rejection of the Pretoria type of independence and your refusal to become an appendage to an all white parliament has already given us a base for common political strategy. Before we establish a common strategy, however, it is necessary for us to remind ourselves of the lessons we ought to learn from the history of the liberation struggle in South Africa."

Then we go into the history beginning with the formation of the African National Congress in 1912. You see this, the theme of a common struggle with a historical background, a (30) struggle/...

struggle to which people who have been excluded from power identify themselves, associate themselves, their goal being the part of a common society and not excluded from it, the goal being to end the powerless situation in which they find themselves and obviously they start with their history, because it is not something that the accused told you in their evidence, it is not something which as it were just dropped out of the sky when the UDF was formed in August 1983. It is a struggle which has been going on for a long time and they talk about liberation movements and they see themselves (10) as being in pursuit of a goal in which there will be a common society.

It does not matter whether your lordship agrees or disagrees with their goal of a common society. That is not the issue in this case. The issue in this case is not whether a non-racial society where all people vote will be better than a society structured differently.

The issue is whether the people legitimately can aspire to such a society. Whether they genuinely can believe in such a society and whether they see such a society as one (20) which will not only change their position of powerlessness and give them a stake in a common society, but will be better for the whole country. One cannot say simply because people aspire to that, and your lordship knows it is an aspiration which people all over the world have, people at all times in history who have been excluded from power, have always struggled to be incorporated into the power and the history of the world is full of illustrations of liberation struggles, of people who see themselves as being oppressed and in fact have been struggling to be incorporated into a common (30) society/...



society.

The issue is whether that struggle, people who undertake that struggle, necessarily must be said to have committed themselves to the violent overthrow of the state, because that is what the state is saying. The state says anybody who embarks upon the struggle, must engage in violent tactics. I do not want to repeat what I said to your lordship when I started my argument a week or two ago. That is a non sequitur. Violence is one method of struggle, but it is not the only method and it would be quite disastrous if a conclusion (10) were to be reached that the only way in which those engaged in the freedom struggle can hope to achieve or pursue their goals is through violence. Such a judgment were to come down, it would be catastrophic to anybody.

At the bottom of page 2 of Professor Bengu's address he says "Firstly we ought to define ourselves in terms of our liberation aspirations. What do we really mean when we refer to ourselves as blacks? Is this term acceptable to all the oppressed people in the country or is it a term of convenience to some of us and to the oppressors?" Its (20) concept of blackness as the victims of the apartheid society, the concept of oppressor and oppressed, goes through and must inevitably be part of the rhetoric and the language of everybody engaged in the freedom struggle.

If your lordship looks back in history your lordship will see the same terms and the same expressions and the same attitudes being expressed in the 1930's by people like Dr Diedericks and others in their writings of the time.

At page 3 in the first paragraph we have this "Please do know that I make the suggestion very humbly. I have (30) not/...

not come to criticise the labour party, but to make suggestions in the interest of all liberation movements in South Africa." The state's thesis is that the only liberation movements in South Africa are the ANC and the PAC, but that is not so. Everybody engaged in the struggle talks of liberation movements, knowing that there are differences, knowing that there are those who are struggling violently knowing that there are those who are struggling non-violently and I think you will find in the evidence that Mr Molefe I think it was said that - I will find that passage for you as we move along, (10) "People like Inkatha and others perceived themselves as being one of the liberation movements in South Africa. It is important for us to see ourselves doing the same thing when we call power to the people. We are referred to a strategy that has not been tried in South Africa before. The slogan power to the people is directly opposed to the strategy of power to the leaders. It is the people who have power. We therefore need to conscientise and mobilise the people in order to generate power in the people. If the Vorster government were a type we could negotiate with, we will be (20) generating power in our leadership. South Africa is going to be liberated by the force of the power of the people. By the way, when we refer to the concept of conscientisation we refer to something more than the awareness by the oppressed of the oppressive situation. It should mean the awareness by the people that they have power to change their situation. It is not enough for the people to be members of parties and organisations. They should be getting prepared for the disaster that awaits us. In mass nationalism that will set us free. The politics of a situation in South Africa demand (30)

that/...

that we invest heavily in the masses of our people, engage them in the freedom struggle and then set them free to set the country free." That is militant rhetoric and you will find militant rhetoric in all the speeches of people engaged, nor necessarily all, in many of the speeches of people engaged in the liberation struggle and I am later again going to address your lordship in relation to the use of militant language and how our courts have approached the use of such language and why such language is used in political speeches and political writings and what purpose it serves. (10)

At page 4 Professor Bengu says "The fact that we call ourselves a liberation movement operating within the country, speaks for itself. Our motives are identical with those of the liberation movements engaged in fighting on the borders of this country. The only difference is we have adopted a strategy of non-violence. We hope we should be understood as saying that we want to explore all non-military fronts in our struggle. In this case non-violence does not mean non-action, but rather various self-help activities stem from the people. After conscientising and mobilising the (20) people, the Inkatha leadership will work out a clear cut and well graduated program of positive action. We do not hide the fact that some day God knows when, we shall have to take liberatory action. Freedom cannot come in any other way." Then he goes on to say that ... (Court intervenes)

COURT : What does that mean?

MR CHASKALSON : Then he says that non-violence is merely a strategy. What he is saying is that - I would not like to talk too much about what Professor Bengu may or may not have in mind, but what he seems to be saying, we have not had (30) any/...

any evidence about it, but he seems to be saying ... (Court intervenes)

COURT : What does liberatory action mean then?

MR CHASKALSON : It means mobilising and activating the people ... (Court intervenes)

COURT : That he has already been doing. So, he says some day, God knows when, we shall have to take liberatory action. So, it cannot refer to what has been done so far and what he intends doing.

MR CHASKALSON : There are non-violent liberatory action. (10) I do not know whether he had in mind that Inkatha should turn over to violence or whether he had in mind that Inkatha should pursue action such as boycotts, stay-aways, strikes, protests and non-violent passive resistance. There are all sorts of ways in which direct action can be taken.

You will see at page 5 he finishes his speech "Amandla Ngawethu. Power to the people." That too your lordship has been told is an ancient slogan. It is a slogan used by people engaged in the liberation struggle. It is not an ANC slogan, although it may be a slogan used by the ANC. (20) It is a slogan used by all engaged in the struggle. That is the evidence. That is what your lordship was told and here your lordship sees it confirmed in that evidence.

Your lordship will even see another example in EXHIBIT DA123. It is the very conference at which the labour party resolves to go into the tri-cameral parliament and the leader who addresses that conference, the Reverend H.J. Hendrickse begins his speech "Mr Chairman, distinguished guests, comrades in the struggle for liberation.

ASSESSOR (MR KRUGEL) : What page is that? (30)

MR CHASKALSON/...

MR CHASKALSON : It is page 11 of the numbering and page 10 of the typing. I have got written on my page 11 in the numbering and 10 in typing, DA123.

Your lordship will see that at DA120 page 6 under resolution S, it is page 6 again of the handwritten numbers "The labour party of South Africa sends fraternal greetings to all liberatory movements in Southern Africa and wishes them well in their fight for true liberation."

Then your lordship will see at DA124 in paragraph 6 page 2 of that particular document, it has got a typed number (10) 17 page 2 "Conference confirms and reiterates its statement of identification with the goals of the ANC and the PAC and expresses its confidence in our membership of the South African black alliance." South African black alliance, I think your lordship has had evidence that it consisted of Inkatha, the labour party, the reform party, I am not sure, but there is some evidence about it. "It is only through a united front that we can rid ourselves of discrimination in the country of our birth and therefore conference considers it imperative and a priority that the labour party makes (20) an all out effort to effect unity of purpose within the diverse SA community and formulate a united modus" I cannot read this word, it might be vivendi, I cannot read it, my copy is poor, and promote alliances to undo the successful divide and rule tactics hitherto employed by the government and its predecessors throughout the history of South Africa. Although there are divergent strategies a common unity could be effected against the dispossessed and disenfranchised community and which will be a guarantee for our victory over the minority government of South Africa." (30)

You/...

You will see also in I think it is DA120, I must go back to that.

COURT : Page?

MR CHASKALSON : I just want to check my reference and then I will give it to your lordship. DA119 page 5, where there is reference to the fact - it is both typed page 5 and written page 5. Your lordship will see in the third paragraph "The president of Inkatha has constantly called for a national convention of all race groups in South Africa."

Your lordship will see that this is some years (10) before - what I am trying to show your lordship is these concepts which we are told by the state are ANC concepts, these concepts are around in the politics of the liberation struggle for years. The state starts putting in its documents at 1982. We are showing you talk years before that of united fronts of unity of national conventions of solidarity in the liberation, all these things have been there and when the accused told you that, they are borne out by the evidence which we have called by other people to show that that was indeed the case. (20)

Then your lordship will see in DA121 the reports of the secretary of the labour party.

COURT : Page?

MR CHASKALSON : It is the second page of the exhibit. My page has been cut off. It says the "12th annual conference Oudtshoorn December 1977."

COURT : Paragraph?

MR CHASKALSON : The first paragraph, your lordship will see ... (Court intervenes)

COURT : Well, it says "We said we would expose and this (30)

we/...

we did.

MR CHASKALSON : I will go back to the first page then the first paragraph - the page before that "To deny we have shortcomings would serve no purpose and possibly lead to complaisancy. However, our achievements since the establishment of the party have been such that in the circumstances we can justifiably be proud of our role in the liberatory struggle." And then at the very bottom of the page "Our confrontation politics paid off. We rapidly became a thorne in the flesh of the government. History will (10) prove that our presence on the CPRC was justified. We said we would expose this. We did. We said we would embarrass, this we did. We said we would obstruct, this we did. We said we would reveal separate institutions as fraudulent created to re-echo government senseless and accept government policies. This we did. Furthermore, if we had co-operated, agreed to serve on the CPRC liaison committee and not frustrated the implementation of separate development, there would have been no need to create a cabinet council and much less devise new constitutional proposals. (20) In the process we have destroyed the CPRC as well."

Your lordship will see as we go down to the last paragraph before the heading "National executive committee" the statement "But the fight has only begun. There is still a long struggle ahead."

Again the accused when they talked about the history of the struggle, pointed to the gains which had been made by non-violent strategies, to the way in which boycott and obstruction had demonstrated the unacceptability of government created structures to the people to whom they (30) matter/...

matter and that that in turn led to changes in the government policy. We are going to show your lordship as we look at the evidence and we turn to the evidence of the campaigns how there are other examples and illustrations that particular policies, non-violent strategies, have imposed pressures to which the government has responded and has resulted in changes.

Your lordship will also see in EXHIBIT B2, this is an AZAPO document, the cover is the clenched fist, said by the state to be the ANC slogan or the ANC symbol, but it is (10) a symbol of all engaged in the liberatory struggle and I think it is not confined to this country as well. Your lordship will see a reference on page 3 of the typed speech, it is a speech of Muntu Myeza where AZAPO describes itself as a people's liberation movement and your lordship will see on page 10 that it concludes with Amandla.

The state in this section of its argument relies on certain of the documents and extracts from those documents and extracts from speeches and we intend going in detail into its argument dealing with the particular passages on (20) which it relies. First we want to deal with the way in which we suggest that this part of the case should be approached by the court.

I have already referred your lordship to the judgment of the court which heard the case S v Adams a treason trial of the late 50's and early 60's, a judgment which was delivered in 1961. It was a judgment which resulted in the acquittal of all the accused. We want to begin this part of our argument by looking in more detail at that judgment. It is an important judgment because of the close similarity(30) which/...



which exists between that case and the present case. I have already referred your lordship to the structure of the indictment and I do not want to go over that again.

COURT : Could I just pause there. The judgment does not give is the indictment. I do not think I should call for the indictment in any case, because it will be volumes and volumes I am sure, but was the indictment structured the same as in this case?

MR CHASKALSON : I have read the extract, there are large extracts from the indictment ... (Court intervenes) (10)

COURT : I have read the judgment.

MR CHASKALSON : Perhaps I should go into the libraries and try and find the indictment and then I will be able to answer your lordship.

COURT : I think it may become relevant if you rely on this judgment for an argument on our indictment.

MR CHASKALSON : Well, I will look at it, but I think the central part of the indictment is very similar to the central part of the indictment here. Certainly the - in this case the fact that the state tied themselves to violence, its (20) language may not have been precisely the same as the language in the other case, but in each one it was quite clear that that was what the allegation contained in the indictment was and in this case is. Counsel informed the court that that was the case. So, on that area there seems to be no difference.

What I want to turn to now is the question of how do you proof policy. It is dealt with in the judgments of Rumpff, J. and Bekker, J. Rumpff, J. puts it this way at pages 31 to 32 of his judgment. It is at the bottom of (30) page/...

page 31 :

"I do not think that the meaning of the word policy raises any real difficulty. The policy of a political organisation or party has always been a question of fact. One obviously looks to the constitution first, if there be one, with its amendments. One looks at resolutions taken at conferences, declarations of responsible leaders and at any other relevant fact. If responsible leaders or publications issued by the party regularly or over a lengthy period of time (10) proclaim or announce a certain policy directly or indirectly and the annual conferences or general meetings of the party confirm such policy either expressly or tacidly, the policy so proclaimed will be held to be the policy of the party. In order to draw comparison between the professed policy of the African National Congress and its conduct, it is necessary to consider briefly what the organisation claimed its policy to be."

Bekker, J. after dealing with an argument by the state that an organisation, if it is alleged that an organisation is (20) committed ... (Court intervenes)

COURT : Page?

MR CHASKALSON : Page 21 to 22, after dealing with the argument that if an organisation was committed to violence, one would not expect to find it in its constitution.

COURT : There are a number of pages missing in this volume I have. It does not matter so very much it seems. Does your volume also have pages that jump around?

MR CHASKALSON : It is Kennedy, J.'s judgment. When I refer to that judgment I think I can help your lordship through (30)

it/...

it. What happens is this. In Kennedy, J's judgment he quotes from certain schedules and when he quotes from the schedule he puts the schedule into his judgment and says schedule B and schedule B starts at page 1. So, you will get a judgment which starts page 65. The next page will be numbered 1. When I will take your lordship through passages of Kennedy, J.'s judgment, I have always gone back to the main page in the judgment and I will be able to show your lordship how that ... (Court intervenes)

COURT : Well, let me just see where I can pick up Bekker, (10) J.'s judgment.

MR CHASKALSON : His is the last judgment or should be the last judgment in the file. It is the last judgment in my file and your lordship's file was put together in the same way as mine.

COURT : I also remember it that way. MR CHASKALSON : The numbering of the pages of his judgment are consecutive. So, you would not have the trouble that your lordship has with Kennedy, J.

COURT : Is the top of the page "National congress"?

MR CHASKALSON : Yes. The state argument was that if an (20) organisation was committed to a policy of violence, one would not expect to find it in its constitution and Bekker, J. says that subject to certain qualifications which I shall mention, there appears to be merit in this suggestion and then he continues :

"In the present instance the enquiry turns on the policy of the African National Congress. Its policy is a question of fact and if for instance the evidence shows that a particular trend manifested itself in the rank and file of its members to an extent that it would(30)

be/...

be safe to conclude that it become a matter of general knowledge enjoying the approval and support of its membership, that trend may with justification be declared to be the policy of the organisation, even if its constitution is silent thereon. Obviously the constitution lays down the policy of an organisation, but if circumstances such as being mentioned are present, the policy could be moulded dehors the constitution. Whether such a policy has come into being would depend entirely on circumstances of each case, for instance on how (10) often, in what manner, on what occasions, by whom such trend is suggested or advocated and on the reaction of its members. It is on this basis that I shall now proceed to analyse the evidence and deal with the question whether it has been proved that the African National Congress had acquired a policy to overthrow the state by violence."

Then he goes on to deal with direct evidence to the contrary which have been given. I will take your lordship through the papers. (20)

COURT ADJOURNS.

COURT RESUMES.

MR CHASKALSON : I have referred your lordship to page 22 of the judgment of Bekker, J. where he dealt with the question of policy and then his approach, if I could continue at page 22 :

"Direct evidence to the contrary that the African National Congress had embraced a policy of non-violence was given by Luthuli, Matthews, Mandela, Dr Konko, Geshe and a number of less important officials of the organisation. The nature of the onus which rests on the prosecution(30) requires/...

requires it to prove that this testimony is false. If it fails in this regard, it fails altogether. It is not for the accused to prove that the evidence is true. If the evidence might reasonably be true, it suffices to secure their acquittal. I make mention hereof because the documentary support which Luthuli and Matthews, the two acknowledged leaders of the organisation enjoy in regard to the exposition of its policy and which also brings into true perspective the task which the prosecution have set itself." (10)

Except for gross generalisation which I shall deal with as I go through these 82 pages, the state has not advanced any reason in its argument why the evidence of Mr Molefe, Mr Lekota and other witnesses who spoke to the non-violent policy of the UDF should be rejected.

At page 43 of Bekker, J.'s judgment he says this halfway down the page :

"In any criminal trial a doubt may arise on the evidence placed before the court, but it often happens that a doubt arises because of the lack or absence of evidence before a court. In the present instance both these considerations apply to the case for the prosecution." (20)

We will make the submission to your lordship that both those considerations apply to the facts of the present case.

Then his lordship says :

"Admittedly the number of speeches to which we were referred was great, but this number fades into insignificance when the evidence of a total number of speeches made during the indictment period is brought into perspective/..." (30)

perspective."

He says :

"As will appear from the judgment of my brother Kennedy, an analysis of the evidence shows that the prosecution in support of its allegation that a nationwide conspiracy to overthrow the state by violence existed, relied on the net result on alleged violence utterances made by some but not all the speakers at 85 meetings out of a total of some 15 000 meetings which were held by the organisation during the period of the indictment. In(10) other words, the total percentage of meetings relied on is under 1%. The analysis also reveals that there is no reliable evidence to support a finding that any form of violence was advocated in the Cape, the Orange Free State and the Natal province. Furthermore that even at meetings where alleged violent speeches were made, the speaker on occasion either contradicted himself or was contradicted by other speakers in advocating non-violence in some form or another."

We will come back to that as well when we come to look (20) at what the state does rely upon at the end of the case.

I am going to continue with this judgment. I want to show your lordship what were the facts which were found to be proved in the 1961 case and I am going to take your lordship through different judgments to show them, but largely I will be working from the judgment of Rumpff, J. to begin with. At page 70 of the judgment :

"First it was found as a fact that the ANC was struggling for a fundamentally different form of state."

That is a passage which begins :

(30)

"The/...

"The former state based on the demands set out above is in our view radically and fundamentally different from the form of the present South Africa in regard to its political, social and economic structure. This difference was realised and emphasised by leaders of the African National Congress."

Secondly he draws attention to the fact that it was realised that the fundamentally different form of state could only be achieved by organising mass struggles against government policies. He refers to an article written by Mr Nelson (10) Mandela who was an accused in that case. It was an article called "In our lifetime" and this is a passage which is cited by Rumpff, J.

"The charter is more than a list of demands for democratic reforms. It is a revolutionary document, precisely because the changes it envisage cannot be one without breaking up the economic and political set-up of a present South Africa. To win the demands, calls for the organisation, launching and development of mass struggles on the widest scale. They will be won (20) and consolidated only in the course and as a result of a nationwide campaign of agitation through stubborn and determined mass struggle to defeat the economic and political policies of a national government by repulsing their onslaught on the living standards and liberties of the people. The most vital task facing the democratic movement in this country is to unleash such struggles and a development on the basis of a concrete and immediate demands of the people from area to area. Only in this way can we build a powerful (30)

mass/...

mass movement which is the only guarantee of ultimate victory and a struggle for democratic reforms. Only in this way will a democratic movement become a vital instrument for the winning of the democratic changes set out in the charter."

Thirdly that and I here will be drawing your lordship's attention to passages at page 41 of Rumpff, J.'s judgment, in pursuing the struggle a number of tactics were advanced. First we are told that in pursuing the struggle the ANC adopted a strong anti-imperialist posture. That is at pages (10) 41 to 43.

"In addressing the court on the issue of a liberation movement, the prosecution argued that the evidence is consisting of resolutions and propaganda material and some of the reported speeches proved that the African National Congress considered the liberatory movement in South Africa as part of a liberatory struggle in the world. It supported and expressed solidarity with the liberatory struggles of the freedom forces throughout the world. The prosecution submitted that the African (20) National Congress, a liberatory movement, had consistently propagated the view that on the world front there were two hostile and opposing camps. On the one side there was the camp of the warmongering capitalist and imperialist oppressor. On the other side there was the camp which stood for peace, freedom and democracy. The African National Congress told its followers that the imperialist camp was headed by the United States of America and that it consisted of imperialist and colonial powers such as Britain, France, Belgium, Portugal, Spain and Holland. (30)

The/...



The object of the camp was to keep the oppressed people in the colonial countries in Asia and Africa in a permanent state of subjugation and oppression. South Africa was a capitalist country and have chosen to be in the western camp. The followers of the African National Congress were told that the camp of freedom, peace and democracy was fighting oppression to end man's humanity to man. It supported the colonial people who were fighting to shake off the shackles of colonial impression. The African National Congress represented the (10) imperialist powers as bent upon ruthlessly suppressing and crushing the national liberation movements by brutal wars to forestall what the congress described as a revolutionary democracy in Africa and Asia. The imperialists were described as reactionary powers prepared to plunge the world into a bloodbath and with this object in view they formed alliances such as Nato and Cito. The African National Congress considered the liberation movement in South Africa as part of the liberatory struggle in the world. It propagated the (20) view that liberation is inexplicably linked with the fight for peace and the fight against imperialism and that imperialism had to be destroyed because it was a threat to peace. It often referred to the struggles in China, Korea, Malay, Vietnam and Kenia describing them as struggles for freedom and liberation. In violent language the conduct of the constituted authorities was condemned and invariably the conduct of the suppressed people was justified by suggestions that they were resorting to methods which were forced upon them by (30)

the/...

the oppressor. The African National Congress told its people that inspite of the fact that the oppressor resorted to force, in the end the people's movement will break through the net of imperialist oppression. A consideration of all the evidence put before us showed that the above submission by the prosecution on the attitude of the African National Congress towards a so-called liberatory struggle is justified."

Your lordship has here been referred to one or two resolutions condemning imperialism, but that is as far as the (10) state's case goes on that aspect of its case. Nothing approaching this body of evidence which was put before the court there which was dealt with and accommodated within the verdict acquitting all the accused.

It was also found - Rumpff, J. found as a fact that the propaganda campaigns were run against the government, which were calculated the cause for resentment to the then present form of state. There was an aspect of that case which was concerned with communism which we do not have in the present case but his lordship continues after saying (20) he will deal with the communist part of the - the allegation of communism later in his judgment. He then continues at the bottom of page 43 as follows :

"From the attitude and conduct of the African National Congress as set out above, we were asked to draw the inference that in preparing the masses for a struggle against the state and in placing South Africa in a capitalist imperialist camp led by the so-called war-mongering powers of the west, the African National Congress was building up and fermenting hatred and (30) resentment/...

resentment in the minds of the people towards a type of state found in South Africa and was undermining their allegiance and loyalty to the state in preparing the people to count no cost too great in their struggle for freedom and liberation. On this issue I do not think that it can be disputed that the natural and probable consequence of the propaganda of the African National Congress was or were to cause resentment towards the present form of state. That by itself could not of course help the prosecution and we were (10) asked to consider this aspect of the case together with all the other features in order to arrive at a verdict that the accused intended to overthrow the state by violence."

C1510

Then it appears from the judgment that the African National Congress in fact contemplated pursuing its goals by illegal means and that it realised that in doing so, the state might resort to the use of force to maintain law and order. That is dealt with by Rumpff, J. at page 32 of his judgment.

He says :

(20)

"In 1949 a program of action was adopted which in der alia described the method or weapons to be employed to achieve its objects as being 'immediate and active boycott, strike, civil disobedience, non-co-operation, and such means as may bring about the accomplishment and realisation of our aspirations. According to the defence evidence the African National Congress took up the attitude that it was compelled to use these methods because petitions and protests have proved ineffective.

The evidence also disclosed that the African

(30)

National/...

National Congress in applying those methods did not exclude the possibility of laws being breached and envisaged the possibility of the state using force to maintain law and order."

Bekker, J. also refers to that at page 14 of his judgment.

He says this :

"Although there are many more similar references to be found in his evidence, the foregoing are sufficiently clear to indicate that the African National Congress as a matter of policy sought to achieve its aim by (10) coercing the government or the electorate to accept its demands by employing methods which envisaged illegal action on the part of the masses and a possible undermining of the economy of the state and that it was realised that the state might, in order to maintain law and order, have to rely on its police or other armed forces. Whether this justifies the contention of the prosecution in the light of all the other evidence, that the organisation intended to overthrow the state by violence, will be dealt with later on. At the (20) moment I am concerned only with the evidence insofar as it throws light on the program of action and the possibilities which could arise from its application and which were known or realised by the organisation or the leading members."

Then the evidence shows that certain of the leaders of the African National Congress had made speeches which were construed as incitements to violence. I am going to refer your lordship so that your lordship can see the context in which this judgment was ultimately given to some of those (30) speeches/...

speeches which were referred to in the judgment. The first is in the judgment of Rumpff, J. at the bottom of page 2 :

"One of the speakers was the accused Geshe who was at that time inter alia a member of the national executive committee of the African National Congress and a volunteer in chief of the freedom volunteers in the Transvaal."

So, he was indeed a high ranking officer of the ANC.

"His introduction by the chairman of the meeting and portions of the recorded speech which was made, read as follows :

(10)

'Chairman: So, the one I am going to call upon to speak now is the volunteer in chief. You know that some time ago we said we wanted fifty thousand volunteers. I think today we still want those volunteers. We want those volunteers to be there and the one I am going to call upon to speak now is the volunteer in chief. He is just going to speak in his capacity as volunteer in chief.'

Then we have Geshe's speech.

"Afrika.

(20)

Audience: Mayibuye.

Afrika.

Mayibuye.

Afrika.

Mayibuye.

Mr Chairman, sons and daughters of Africa, war has been declared. War has been declared. Your leaders have spoken to you, but you must not be afraid. When war has been declared it is the duty of those to whom war has been declared against, not to panic. War has been

(30)

declared/...

declared. The government has decided not only to oppress the African people but to exterminate it from the surface of this earth, their mother country. Your leaders have told you what the position is. Your leaders have told you that among other things the government of this country, the Strydom, Swart and Verwoerd clique want to arrest yet another two hundred."

Then another passage is quoted :

"The time has come for congress to take the offensive. We are tired of the bluff of Strydom and others. Time(10) has come now for congress to tell Strydom and others what to do. Time has come for Chief Luthuli, for Moretsele and for Reverend Kgabi to say who must be arrested, who is this wanted. It must be congress which must give those wanted, not those fools to come and choose amongst us who is to be arrested. How can that be done? How can Chief Luthuli decide who must be arrested and when? Only when Chief Luthuli has 50 000 volunteers then 200 will be a simple matter. Out of the 50 000 volunteers he can give Swart 200 and(20) that will cost Swart the whole of the union of South Africa. Friends, my task this afternoon or this evening is not to speak to you about what is happening in this country. My task it to give you duties. War has been declared and we must be ready. Volunteers are those people who do and guide. Volunteers are those people when they are given leaflets to do, they go out and distribute that leaflets. Volunteers are those people who do not ask questions. A volunteer is a person who has pledged himself to carry out the works of the (30) African/...

African National Congress where evirate is involved without questioning. A volunteer is a person who has dedicated his entire life to the liberation of his African people during the whole time. A volunteer is a person who is disciplined. This is the key of the volunteer, discipline. When you are disciplined and told by the organisation not to be violent, you must not be violent. If you are a true volunteer and you are called upon to be violent, you must be absolutely violent. You must murder. Murder. That is all." (10)

At the bottom of page 6 there is another extract from Mr Geshe's speech. It carries on on pages 5 and 6, but I will only read the extract at the bottom of page 6 :

"Well, friends, Mr Nkadimeng has said we are meeting here this evening at a most critical time in the history of South Africa and in explaining that Mr Dumanokwe(?) said we are meeting at a time when it is in our hands to destroy or build or freedom. Mr Masinya showed us the way out when he said do unto your enemies as they would do unto you. When you are a worker, the(20) duty of an employer is to exploit you and your duty to your enemy is to refuse the labour. If your leaders are going to be arrested it becomes the task of the volunteers, the task of those who are going to remain what you are going to do with those who are remaining and those who have been arrested, our leaders, that becomes a task. Friends, war has been declared and I call upon you today to become volunteers. Everyone of you must go and sign in his branch and I say to the leaders that before you leave this meeting, please see(30) the/...

the provincial secretary and tell him what you want me to get there. I will not be going there to discuss politics. I will be going there to find soldiers.

I think we are called upon in this country to do direct and opposite of what is happening in Egypt today. In Egypt it is the imperial forces that are moving into Egypt, but in South Africa we want the freedom forces to eradicate evil in this our mother country, South Africa."

Your lordship might like to contrast that language (10) with the language that was used in the UDF volunteers handbook of how people should conduct themselves when going about the affairs of the UDF. It is one which I think I have referred your lordship to already. I think it is C52, but we are just checking the record. It is W52. "The million signature campaign. A volunteer's handbook." Your lordship will find the references we rely on in the first part of the argument which I addressed to you. I do not want to go through all those documents which I referred your lordship to at the time, which dealt with direct instructions to people cam- (20) paigning for the UDF to avoid violence, to avoid confrontations and how to conduct themselves.

The next passage that I want to draw to your lordship's attention is a passage in the speech which was cited in the judgment of Kennedy, J. That fortunately appears at a place where the pagination is accurate. It is page 29. It is towards the beginning of his judgment and it is page 29. It was one of the accused. It was Mr Moretsele who acted as chairman of that meeting. Your lordship will see at page 29 that the chairman was the accused Moretsele and I (30)



set out various extracts from his opening remarks recorded by Coetzee and then at the bottom of page 30 we have this.

"I said earlier that when you stand here where I am standing and look at the conference, you will see that it is fully represented by all the nations of this country and the day when we take over the government, all the nations will sit like this in the house of assembly. We will not be like this when there are people in the police to teach other people to say we are traitors. I have already explained to you that this mass confe-(10) rence is a conference that is going to take over the government and rule this country. Everybody will have the right to chose a certain suburb where to stay and there will be no such things as you, because of your colour cannot live and reside."

Your lordship will see here is direct statements, we intend to take over the country and rule, whereas the language that you are confronted with here is not the language, it is a very different language. The language is we want a national convention and we want the vote for all where (20) all will decide on the future of the country. Nothing like this could be pointed to anywhere in the state's argument on take over of power and there is a lot of direct evidence to reject that that was indeed the proposition.

Then we are told that the next speaker was a co-conspirator who was a member of the African National Congress executive. At the bottom of page 31 he says :

"He stated that he was speaking on behalf of his congress and that one of the most important tasks of the conference was the struggle against the western areas removal (30)

scream/...

scream and its action to defeat it."

At the bottom of page 32 he says :

"For those of you who follow events very closely in the western area, it is clear that the national party government intends to aggravate the already strange relations between the government and the people with its rule of violence and brutal force. The government intends to turn the area into a bloodbath for its own political ends. On the other hand, the congress in a series of resolutions have condemned and rejected the (10) removal and has openly called upon the people to refuse it."

And lower down he says :

"This conference was organised (he refers to the freedom day protest) by the African National Congress. The meeting condemned the inhuman attitude of the nationalist government to uproot the people from their homes and resolved uncompromising and relentless opposition. It further resolved to defend the people's homes and properties to the bitter end and it called upon the (20) residence of Sophiatown, Martindale, Newclear and upon landlords and tenants, Africans, Chinese, Coloureds and Indians to stand united and to defeat this plan by consistent action."

At the bottom of page 34 the same speaker who was a member of the executive of the African National Congress dealt with the call for the 50 000 volunteers and he put it this way.

He says :

"In the affected area Fascism has been displayed to the Africans. There is a growing body of serious men and (30) women/...

women who feel that the affected areas of the place to call a halt and all except nothing also than a fight to the death in defence of their homes and properties. This is the essence of the fight that faces congress today. On the one hand you have a Fascist government who believes that the weaker must be put against the wall and destroy it. A group of people who are determined to push through removal with force blood and iron. On the other hand you have a group of people who are equally determined not to move. It (10) is an ugly situation with which to deal."

Again the state argues that the accused, the United Democratic Front in our case, because it propagated resistance in the sense of opposition to the government policies and was mobilising masses to make their views known, to take action must have contemplated that at some stage there will be violence and that that was the true goal. Nothing could be pointed to, like this speech which talks about the blood-bath, which talks about the intention to put through the removal with force and called upon to resist. (20)

What I am going to show your lordship is that in all of the state's submissions here which it makes, are the submissions which are put forward in this case, in the 1961 case. In each instance the evidence in the 1961 case was very much stronger, very much more direct and dealt very much more with the issues that the state seeks to spell out in the documents and speeches that it relies on, than we have in this case. Yet not sufficient to show the policy was to be a policy of violence.

There is another speech also in Kennedy, J.'s judgment (30)

page 46 and it is still the correctly numbered page 46. It was a speech by a Mr Matlu who is described in the judgment as a member of the executive committee of the African National Congress branch and at page 46 halfway down the page it says :

"The time has now come, now the policemen, the detectives, the informers, the pimps, everybody must take up their position in the affairs of this country. In due course in a matter of days we shall be everyone taking up his true position in the affairs of the country and in the(10) affairs of this township particularly. It has been told to you for years now that one day our homes are going to be stolen from us. It did seem as if that day was far off. Today that day is at hand. It is very clear that the government of this country have for a long time been asking for bloodshed. One must ask oneself whether bloodshed cannot be given to them. I want you to realise clearly that when you make up your minds to defend your homes, there is going to be great suffering. I want everyone of you hear to know what (20) is going to happen if you fall into the hands of the Dutch who is standing here. There is nothing that they will not do to you. But we will do to them what they have done to the English in this country. They knew when people are ready to move forward, that there is nothing that will stop them. We will have to fight our own brethren. People have to make a living somehow and someone of Africa are now policemen and detectives but they will have to choose. Then only can they live. Nothing fears me more than that the African people (30) are/...

are being driven into a position where they are being forced to take up positions whether they like it or not. We are forced to take our freedom in our lifetime. Ordinarily it would have taken us thirty years to achieve freedom. It is now going to take us one-fifth of that period to achieve freedom."

Then there was a speech referred to by Mrs Keraye(?) who was a member of the executive committee of the ANC in Sophiatown and that is at the bottom of the page.

"It is a fact that the Afrikaners have come across (10) to us to oppress us. They have come to stop us. They have come to step on us and this business must end. We must take our stand, man and woman. As the position is today we have come where every man must ask himself the question and that question is where is my place? We must know and what we are going to do is foul. We are going to kill these people. We know very well what we had done in the past is nothing. What these people have given us is poison and they are aware of it. Let us place them where they have placed us all the (20) time. They have killed us. Now we will kill them. Every man must ask himself this question. The white people say there is a commandment. You must not kill, but they do not heed this commandment. They are placing upon us difficulties which they are not prepared to bear, but we are not afraid to die for our freedom like the children of Israel."

There is another speech at the bottom of page 50, Mr Geshe from Rumpff, J.'s judgment. He was on the national executive of the ANC and was a volunteer in chief. At the bottom (30)

of page 50 he says this :

"We will not move. We will not move. We will not move. I want to put a very pertinent question to you. If I say you will not move and by saying that you mean you will sit down and will not move, but a man is determined to move. You will lift your body and soul and put you outside and what will happen? I can answer that question or perhaps you will answer it for me. I can answer the question, yes, but I cannot decide for you. You must decide for yourself. Personally I have satisfied(10) myself and if you ask me what my answer is, I say you shall not move. The white man considers himself next to God and when he says 'move, he expects you to move. Therefore, friends, the decision you must make must be one you must be defend to the bitterest end."

At the bottom of page 52 his lordship characterises what has been said as containing at the minimum elements of incitement to commit violence by prominent members of the Sophiatown branch of the African National Congress.

Then there is a speech by Mr Seshaki and if your lord-(20) ship would go to page 59 of Kennedy, J.'s judgment your lordship would see that there is a reference to schedule B. It was a speech made at the freedom charter meeting and we turn to the following page for the speech. The speech now takes its own numbers. So, you will see the very next page which is headed Schedule No. B has page number 1 and that is what happens in the judgment. If I could take your lordship through page 4 of that speech. There is a passage at page 4, I do not want to read the whole speech to you. I will give your lordship Kennedy, J.'s assessment of the speech. (30)

"One/...

"One must be prepared to clash for the servants of the state and if the struggle assumes very large and country wide dimensions, one shall have to clash even with the armed forces of the country. That is the test we pass before we can have work and security."

Kennedy, J. at page 63 - we are now back to the correct numbering :

"It does not affect my view that Seshaki's speech at this meeting contained a number of suggestions that violence should be used in the future in the attainment of (10) freedom."

Then at page - if your lordship could then go on to page 66 and your lordship will there see that Schedule C is another speech by Mr Geshe and this is a speech made at the African National Congress Youth League meeting held in 1956. When one goes beyond page 66 the numbering goes back to speech numbers. So, if I could ask your lordship to turn to page 5 of Mr Geshe's speech, there is this passage :

"Therefore we must see who our enemies are and it does not matter who it is. Somebody somehow must pay for (20) that blood. Yes, if an african kills a european in this country we know that not only the african that has committed the crime is going to suffer, but all of us are going to suffer. Why should we sleep when an african is killed, just because these Afrikaners have decided to kill him? It is clear to me, youth of Sophiatown, that this country will never be free from oppression and exploitation that we receive from the white people until the youth take it upon themselves to say we can give it to them. The day, friends, is (30) coming/...

coming and I call upon the youth to join the youth league because you may not be there, so that when the day comes we know where to get you. We have now run ourselves into a river and we have decided, rather than drown ourselves, it is better for us to turn back and save the men and women who live in the country."

At page 68 Kennedy, J. says this :

"Apart from no one expressing disapproval at the meeting of Mr Geshe's sentiments, I have already indicated by what was said about the chairman and others that (10) there was in fact active support for Geshe's opinions."

There is nothing in our case which even approximate the direct calls for violence made by speakers of the African National Congress during their campaigns which were the subject of the 1961 trial. More than that, there is nothing which approximates the knowledge and purpose with which the campaigns were undertaken, because there is reference to the fact in the judgment that these campaigns were undertaken with the purpose of defying laws knowing that the methods which had been chosen which was the (20) defiance campaign, would undermine the security of the state. That appears from Rumpff, J.'s judgment. I take you lordship back to Rumpff, J. at page 132.

COURT : Are we coming back to Kennedy, J.'s judgment?

MR CHASKALSON : I do not think so. At page 132 in Rumpff, J.'s judgment he refers to an article which had been written by Mr Nelson Mandela under the title "No easy walk to freedom."

"In 1953 the accused Nelson Mandela wrote an article under the title 'No easy walk to freedom', which the executive of the African National Congress Transvaal (30)

submitted/...



submitted to the annual conference as a presidential address. It was thereafter published with an introduction written by the accused Geshe in his capacity as president of the African National Congress Youth League Transvaal." If your lordship will go towards the bottom, your lordship will see what Rumpff, J. says there :

"The article refers inter alia to the defiance campaign of 1952 and claims, it was one of the best ways of exerting pressure on the government and extremely dangerous to the stability and security of the state." (10)

Then at page 133 he deals - the article deals with the measures taken by the government against the defiance campaign and it states :

"These developments require the evolution of new forms of political struggle which will make it reasonable for us to strive for action on a higher level than the defiance campaign."

So, they must strive for a higher level than the campaign which had been extremely dangerous to the stability and security of the state. (20)

At the bottom of page 134 to 135 we find this :

"Here in South Africa as in many parts of the world, a revolution is maturing. It is a profound desire, the determination and the urge of the overwhelming majority of the country to destroy forever the shackles of oppression, that condemn them to serve under slavery. To overthrow oppression has been sanctioned by humanity and is the highest aspiration of every free man. If elements in our organisation seek to impede the realisation of this lofty purpose, then these people (30) have/...

have placed themselves outside the organisation and must be put out of action before they do more harm. In his evidence before us Mandela explained that by the phrase 'powerful revolutionary eruptions' he meant political struggles for reform and independence and militant struggle such as in South Africa, the defiance campaign. By the use of the words 'day of reckoning' he said he meant to convey that the government would not be able to resist the demand by the oppressed people for the changes they felt it their right to (10) enjoy and the phrase 'in South Africa a revolution is maturing', was meant to indicate that there was a movement for profound 'change.'

His lordship leaves those explanations without comment.

I also want to show your lordship that apart from the evidence which was in that case of direct calls for violence with a knowledge that what was being done was dangerous and subversive to the security of the state, the degree of militance, the degree of challenge which emerges from other speeches which are referred to, is far stronger than (20) anything said or written in our case. I will give your lordship just give examples.

I stay with the judgment of Rumpff, J. page 141. The judgment says that this was a presidential address delivered by Mr Moretsele who was an accused in the treason trial and was delivered at the annual conference of the African National Congress Transvaal. If we go to the bottom of the page. There are a lot of quotations. I am just taking extracts :

"In criticising the government's banning of leaders (30)

of/...

of progressive organisations, the speaker said: The Malan government derives its support from a most politically backward and reactionary section of the white electorate in this country. The big farmers and landlords and then commenting on the future he stated, in this triumphant march towards Fascism, the so-called white opposition has collapsed. So, now the only effective opposition to the government are the national movements and their allies. Theirs is to grapple with the potential Fascist beast to the bitter end. The address is concluded (10) as follows: The government has provoked the attack, but we have remained disciplined. In other words we have not allowed the government to choose the time, the place and the battlegrounds for us. Today I say to the African people intensify your organisation and stand by awaiting instructions."

Then Rumpff, J. goes on to quote an article by the editor of African Lode Star and according to the evidence your lordship - it appears that the African Lode Star was the official organ of the ANC Youth League and the passage (20) cited there is at the bottom of the page :

"Thus one of the numerous talents of the octopus that is white civilisation, found a puthold on our beloved motherland Africa, thus began an era of plunder usurpation of looting and robbing of deceit and deception as ever the world has known or is likely ever to know. Throughout two centuries the greedy and blood-thirsty nations of Europe led by the islands of Britain unleashed a campaign of subjugation that Africa shall never forget."

(30)

Then/...

Then at pages 144 to 145 there is a reference again to African Lode Star. At the bottom of the page Rumpff, J. says :

"It purports to analyse the political situation, refers to the nationalists as bandits, whose police state has become a hinderance to the development of the country, suggesting (at the top of page 145) the elimination of the nationalist Fascists, hangmen of the people, is a major task of the day. It is a just cause in the interest of human dignity, justice and peace, The (10) article deplores the organisation's weakness of lagging behind the masses suggesting that such issues like the fight against rent increases are examples of talism on our part. The role of the youth is to find on the following advice. On the one hand serve as a spearhead and soft brigade of the liberation movement. On the other hand broaden as wide as possible the base of the youth movement itself. As far as apartheid is concerned the article suggests that the song of the Rascist advocates, the Verwoerds and the Strydoms, is echoed in a (20) more or less disconsonant style by the Straus's, some ministers of religion, buffoons and downright criminals."

At page 146 there is a reference to the secretarial report of the national consultative committee to the joint executive of the African National Congress of South Africa and Indian Congress of South Africa Coloured People's Organisation, the South African Congress of Democrats and the South Africa Congress of trade unions. At the bottom of the page your lordship will see paragraph 2 of that report :

"Can victory be one in a single battle? In such a long(30)  
drawn/...

drawn out war as the war against the pass law. It will be foolish to expect that victory can be won by a single action of the people. The pass system is a foundation of the whole cheap labour system in South Africa. The ruling class will not easily be forced to give it up. It follows that victory in the struggle against pass laws must not be looked for in every minor skirmish against the enemy. In a long drawn out battle there will be many victories, minor defeats, many advances, many retreats. The final victory for the people means the (10) end of the cheap labour system of South Africa can only be achieved finally by the overthrow of the ruling classes and by the winning of the freedom charter as the ruling policy of South Africa."

Then at page 151 there is a reference to a speech by Mr Henry Magotshe who at page 148 is referred to by Rumpff, J. as then being the president of the African National Congress Youth League in 1954 and 1955 and who was later elected to the national executive of the African National Congress and that was in 1955. At the bottom of page 151 the last, the (20) concluding part of the speech :

"We would like to live in peace, free men cannot live in peace. Progress creating wonderful things and creating wonderful opportunities to lead a better life, that is what we would like to achieve and all these are the things which we are prepared to fight for and determined to fight for. We want peace and we want to live in peace. If need be, we shall die for peace and for the realisation of a better life. Thank you. Mayibuye."

(30)

I think I have already referred your lordship to page 30 to 31 in which Mr Moretsele had made it clear that the goal was to take over the government and there is another passage and I have a wrong reference to it. I do not think I need to come back to it. There is enough in the judgment that I have already given to your lordship.

The argument in that case that the state advanced on evidence which we submit to your lordship is very much stronger than that produced by the state in the present case, was first that the non-violent - the professed non-(10) violent policy of the African National Congress at that time was a rouse. You will see the reference to that argument at page 27 of Rumpff, J.'s judgment. The state argued - let me tell your lordship what the argument was. Perhaps I should just read it to you so that I do not misinterpret the state's argument at the bottom of page 27 the second half :

"After all the evidence had been led, the prosecution argued this case on the basis that whatever the constitution of the African National Congress contained (20) and whatever had been formally decided on the congress or publicly announced by it or its leaders on its avowed non-violent policy, should be tested by what the congress had done by way of propaganda, instruction and campaigns over the period of the indictment. It was argued that such a test would show that irrespective of what he proclaimed, the policy of the African National Congress was to prepare politically immature non-european masses for a struggle to achieve a new state and the struggle which the African National Congress (30) wanted/...

wanted, was a unconstitutional struggle in which ultimately the masses would be brought into violent with the forces of the state. The prosecution submitted that because of its policy to bring about a violent conflict between the masses and the state, the official declarations of the African National Congress and its protestations that it was a non-violent organisation, were a rouse and should be rejected."

In Bekker, J.'s judgment there is a reference to the state argument on these terms ... (Court intervenes) (10)

COURT : Page?

MR CHASKALSON : 105 :

"The speakers and documents show very clearly, he said, that the minds of the leaders of the African National Congress were not running along lines of persuasion or legitimate pressure or a change of heart on the part of the electorate. Their minds are running along the lines of unconstitutional action, illegal action, coercion and intimidation. They were aware of but indifferent to the likelihood of a violent conflict in (20) the consequence thereof. Counsel contended that although the western areas campaign was not necessarily directed towards a violent overthrow of the state on the day of removal. It was in the minds of the leaders a prelude to the struggle on a higher level, both as to the scope and the forms of action to be taken throughout the country in order to achieve their ends."

Then at page 108 he sums up the argument, Bekker, J. does, as follows :

"These factors that were submitted could lead to only (30)  
one/...

one conclusion, namely that as a natural and probable consequence of the manner in which the campaign was conducted, not only a possibility but a probability of violence arose and that it would be idol for the African National Congress to suggest that this result was not intended. It is deemed in law to have intended the natural and probable consequences of its act."

But the state failed and the reasons why it failed appear from the judgments of Bekker, J. and Rumpff, J. At the bottom of the page his lordship says this : (10)

"It is true that propaganda which appeared in bulletins, pamphlets and lectures ..."

COURT : I am sorry, what page?

MR CHASKALSON : 158.

COURT : Of whose judgment?

MR CHASKALSON : Bekker, J.

"It is true that propaganda which appeared in bulletins, pamphlets and lectures which the organisation either supported or made use of, was from time to time vitriolic in its attacks on the government, condemna- (20) tory of western forms of government and white supremacy in South Africa. These facts may of course be reconciled with an intention on the part of the organisation for the masses to become violent, but they are not consistent with only such a trend of thought. This type of propaganda could have been to further the political aspirations of the organisation and to achieve its objects without it necessarily entertaining any thought of violence be it direct or by retaliation."

Then he continues :

(30)

"The/...



"The fact that some important members of the organisation such as Geshe for instance, did on occasions incite or encourage violent action, does not amount to proof that such was the policy of the organisation. Whilst it may show that he, on those occasions, perhaps desired a policy to be, his utterances can in now way be equated with or changed the policy of the organisation as a whole."

Pages 168 to 169, at the bottom of page 168 to page 169 :

"The evidence shows that the organisation thought to (10) achieve its objects by the 1949 program of action and as my Brother Rumpff has correctly indicated in his judgment that the accused might reasonably have believed that by exerting the forms of pressure there set out, the government and the electorate could be coerced into accepting their demands."

Rumpff, J. at page 164 of his judgment says at the bottom of page 164 - the judgment grows out of the argument that the opposition to the western areas removal scheme was part and parcel of a broader policy which contemplated action on a (20) higher level later on and his lordship says this :

"In presenting this argument the prosecution was faced with the difficulty a problem of inference. The difficulty arose as follows. The issue before the court was whether the African National Congress at the time of this campaign had a policy to commit violence against the state through the masses of non-europeans at some undetermined time in the future. How far that day of violent action lay ahead, depended on how long it would take to educate the masses and make them politically (30) conscious/...

conscious on whether boycott or strike action will be successful or not on how the government would act and how the masses would react to the alleged forcible repression of their methods by the government. In effect the argument for the prosecution amounted to this. That although no instructions were given in the western areas campaign to commit violence, but because the African National Congress was reckless as to whether violence occurred or not, the inference must be made that it had at that time a policy in terms of which (10) it would instruct the masses to commit violence on some later occasion when the final clash occurred. In my view the court could not possibly make such an inference. There was nothing in the evidence about the campaign, either standing by itself or taken in conjunction with the other facts of the case which linked the attitude of the African National Congress in 1954 towards the possibility or probability of violence occurring in the western areas with a plan to instruct the masses to use violence at some future date or (20) which indicated that such an attitude was prelude to positive violence in the future."

Of course, that is really what the state is asking your lordship to do in this case. The state case is that the UDF had a policy which contemplated making the country ungovernable and that that was to be a prelude to a violent revolution by the masses. We submit to your lordship - we will submit to your lordship that your lordship as Rumpff, J. said, cannot possibly draw such an inference from all the evidence in this case. (30)

I should perhaps give your lordship the argument which had been advanced which led up to this finding by Rumpff, J. It is at page 159 :

"In concluding this chapter, I must revert to the submission by the prosecution that the African National Congress because of its attitude towards the present state and its object to establish a state so different from the present state, knew that the achievement of its purpose would involve the masses in a violent clash with the state and would be realised only by (10) a seizure of power and the overthrow of the present state. Here the case of the prosecution was that the African National Congress must be deemed to have a knowledge of what eventually happened in relation to the masses of non-europeans when it slated the present state and the ruling classes and at the same time propagated the state of such a nature and so different that it would have to be forced on the ruling classes. In my view the evidence indicated that the expectation of a violent clash at the culmination of the struggles of the (20) African National Congress was an inference which might be drawn against certain leaders of the African National Congress and perhaps certain schools of thought in the congress movement. But that was not the case for the prosecution. The issue was one of policy and the question was whether the evidence proved that the African National Congress is a body with some degree of universality should have expected a violent clash. The prosecution failed to prove that general expectancy and from the evidence as a whole the inference could (30) fairly/...

fairly be made that as a matter of policy the majority of the members of the African National Congress might well have thought that by economic pressure the ruling class would in the long run be compelled to surrender." His lordship concludes his judgment at the bottom of page 167 as follows. He refers to the fact that in evidence Mr Geshe had said that the reference in his speech to murder by volunteers was meant to be an example of discipline and not an illustration of how they were supposed to commit violence and then he continues :

(10)

"Even if one were to reject his explanation, one is faced with the volume of evidence which showed that to the public at large and in the organisation itself, non-violence was consistently held out to be one of its essential attributes. In addition there was no evidence of parades, drilling or any form of military exercise or any other feature from which violence might be inferred. Of course the political organisation which members who are supposed to wear a type of uniform and who are liable to strict discipline and to the carrying out of orders without question and who intend to bring the government to its knees and establish a new form of state through mass action, must not be surprised if it is not regarded with suspicion by the state. In the present case the prosecution proved the existence of such an organisation. It did not prove that the African National Congress had acquired a policy to use the freedom volunteers for violent action. For all these reasons the court's view was that it had not been proved that over the indictment period the African

(20)

(30)

National Congress had, as a matter of policy, decided to use violence as a method to achieve its ends to establish a form of state having the fundamental attributes of a Marxist/Leninist state."

The evidence in our case, let alone, was there no evidence of parades drilling or any other form of military exercise, but there was no evidence, as there was in that case, of a political organisation with members supposed to wear a type of uniform. There was no evidence of persons liable to strict discipline. On the contrary, the very structure of(10) the front resulted in the fact that the front itself was not in a position to exercise discipline if one might use that word, over individual members of affiliates. That was what the affiliates, if they chose to discipline their members, would have to do, but the front was not in a position to do that.

In the section of the argument to which we will address ... (Court intervenes)

COURT : Will we refer to Adams case? (20)

MR CHASKALSON : Not now.

COURT : When?

MR CHASKALSON : I may come back to it later, but not before lunch certainly and probably not today again. I cannot remember whether I have a note to it a little later on. I am reminded there is a passage in Adams to which I am going to refer later.

The state in its argument to which we are responding relies on extracts from 21 speeches made by 18 speakers at some 9 meetings. Later I am going to give your lordship (30)

as/...

as we go through them, we will allocate them and in the end I will show your lordship exactly how all these figures are arrived at. Of those 9 meetings only 4 were meetings which were organised wholly or partly by the United Democratic Front and one of those meetings was the launch. So, as far as we are dealing with organisations of which the United Democratic Front is shown to have been either the sole or part organiser, we have the launch and three other meetings that are dealt with in the state's argument.

The state also relies on 52 documents according to our (10) count and in fact I should tell your lordship that there are another 4 documents cited but we could not see any connection between the documents and what was said. So, it may be 52, it may be 56. I do not think the number matters. It is less than 60.

We are going to go through those documents and we will submit to your lordship that a great majority of those documents have not been proved for the purposes of the main count of treason and a very substantial amount of those documents have either not been proved at all for the purposes of any (20) of the counts, or that they have no significant evidential value.

Two of the speeches relied upon by the state out of the total of the 21 speeches that I have given to your lordship, were made prior to the launch of the United Democratic Front and 6 of the speeches relied upon were made at the launch of the United Democratic Front. Of the remaining 13 speeches we have speeches by two members of the national executive committee who between them - I think we have two speeches from the Reverend Chikane. So, there are three speeches made (30)

by/...

by two members of the national executive committee. We have a speech made by the Reverend Allan Boesak who was a patron, one was made by a member of the Natal regional executive committee and the remaining speeches were all made by members of affiliates and we have one - there was a speech by Mr Monareng of SOYCO, by Mr Moseneke of AZASO, by Mr Naidoo of the Natal Indian Congress, by a Mr Montsisi who was the co-ordinator of the international youth year and the national youth organisation, by Benedict Namane from AZASO, by Amanda Kwadi from FEDSAW, by Cedric Kekana of SAYO and by someone (10) who is described as Kate Mboweni, but she appears not to be mentioned in the indictment or to be identified elsewhere. So, of these eight speakers five were from youth organisations, one from the Natal Indian Congress, one from FEDSAW and one unidentified speaker. Well, the name is mentioned, but the organisation - she is not mentioned in the particulars at all. She is apparently not alleged to be a co-conspirator. No evidence about her as far as I know.

If we look at the meetings which are referred to, we know that the launch was in Cape Town, but of the eight (20) other meetings, three were held in Soweto, one was held in Johannesburg, one was held in Lenasia. So, we have five meetings in the Transvaal. We have a meeting in Durban and a meeting in Ladysmith. So, we have two meetings in Natal and we have one meeting in Cape Town. So, we have five meetings in the Transvaal, two in Natal and one from the Western Cape. So, on the basis of that, your lordship is being asked to hold that despite the direct evidence to the contrary, the UDF as a matter of policy was planning to overthrow the state by violence. (30)

The/...

The evidence given in fact shows that UDF officials and that does not include people who were members of affiliates, but the UDF officials addressed hundred of meetings around the country and if one has regard also to the fact that there were hundreds of affiliates, over one hundred affiliates have been admitted by the defence and many more have been proved prima facie by the state through the production of documents. So, if one has regard to the fact that there were hundreds of affiliates carrying out their affairs around the country and that UDF officials themselves addressed (10) hundreds of meetings around the country, that was not disputed in the evidence and I will give your lordship the passages, then we have before us only a minute fraction of the speeches which must have been made and discussions and decisions which must have taken place over the period of the indictment.

We really know practically nothing about the activities of most of the affiliates. Only two of them have really been - we only really had evidence about what was said at meetings I think in regard to the Vaal Civic Association, (20) to a lesser extent the Soweto Civic Association and there are really spatterings of evidence about what the affiliates may have been saying, what was taking place at their meetings, what was happening at the annual meetings, what discussions were taking place, what the members were being told.

COURT ADJOURNS UNTIL 14h00.



THE COURT RESUMES AFTER LUNCH

MR CHASKALSON: May it please your lordship. I wanted to give your lordship the reference to Mr Molefe's evidence concerning the fact that there is only a fraction of the meetings which have been dealt with in the court. It is volume 268 page 14 509 where it was put to him that the UDF would support the - conveying the impression that it supported the government under the Freedom Charter and he says: "I think counsel has forgotten my evidence-in-chief. I personally have said that many, many times at public meetings and I know many other people who have said it in so many meetings ", that is the fact that the UDF had not adopted the Freedom Charter: (10

"In the meeting where I addressed over 1 000 people in P.E. I said so.."

and I think the press report, press cutting of that meeting was - I do not think possibly it was handed in as an exhibit to indicate that. I have said so and I have said it many times in public meetings. And then the question, "It is not one of the public meetings of which we have got the transcript here before the court, is that correct?", and the answer is: "I do not know. I have not checked that, but in any event the UDF officials addressed hundreds of meetings. The few transcripts that we have here are not necessarily or are not a reflection of the activities of the UDF. It is just a minute section of that. I personally addressed not less than 30 minutes, 30 to 40 meetings. What we have here is possibly three or four or five of the meetings at which I was present." And then there was some suggestion that all the material that the state had, had been made available to the (30  
defence /..

defence and then at a later stage`I think something was put on record to show that there weren't videos of any other meetings. And then at page 14 511 lines 3 to 22 he is asked whether, Mr Molefe is asked whether he had gone, he and accused no.20 had gone through other documents and he says: "When I looked at the documents I was not looking for the Freedom Charter. Counsel is putting to me that it does not appear in any one of these transcripts so I am saying firstly that what we have here is not really an accurate reflection of all the meetings of the UDF. There had been virtually (10 hundreds of those meetings of the UDF and I have spoken in meetings of the UDF where I spoke about the Freedom Charter, the position of the Freedom Charter and the ANC. That thing is not here. I had to remember that we had to go and look for press reports of that. We were fortunate to get that but I am saying that one cannot base a conclusion of fact that because it does not appear in these exhibits it was not done. I have done it many times and I remember Rev Chikane saying it in a number of meetings. I know that we said it in a number of press releases that we made in the news- (20 papers, many of them".

COURT: Can I just get clarity while we are on this page. Counsel for the state put it to the witness that all documents and transcripts of videos and tapes which were available to the state were put to the disposal of the defence team. This he said is not so: "I was given a list of tapes, I remember that very well", but wasn't this cleared up?

MR CHASKALSON: It was and I will find the passage. I told your lordship it was cleared up and I believe that Mr Bizos made a statement. It was cleared up and it is not our (30 suggestion/..

suggestion that anything was kept back from us, m'lord. I thought I had made that clear that everything that the state had was made available. I think what the witness is saying is you have only got a small fraction. There were hundreds of other meetings which officials of the UDF addressed and you have only got a very small fraction of that here. And I also think that Mr Lekota also said that as far as he himself was concerned that there have only been a few of the meetings, a few of his own speeches are referred to here. I think your lordship will find that as far as Mr Lekota personally is (10 concerned at volume 285, page 15 640 line 27 to page 15 641 line 17 and volume 299 page 16 952 lines 15 to 28.

Now of course the state has the onus of proving the allegation concerning policy on which it bases its case and it will be our submission that on the evidence that has been placed before the court there is simply no basis for concluding that the UDF as a matter of policy had set itself the goal of overthrowing the state by violence. Now apart from the fact that the speeches and documents relied upon are insufficient in number and in geographic area to enable (20 the court to draw the inference that the state asks the court to draw there are two additional factors that are in our submission destructive of the state case. First of all and that we will deal with when we look at the document relied upon, the contents of the documents frequently do not support the statements made in regard to them by the state in its argument and as I have already mentioned there are questions of admissibility, relevance and interpretation of language which have simply been assumed by the state but which on a close analysis of the material can be shown, we (30 will / ..

will submit to your lordship to be falacious assumptions. And then very importantly there is the direct evidence which has not been shown to be incorrect and which contradicts fundamental arguments put forward by the state. Now apart from the evidence of the accused persons themselves there were two state witnesses and seven defence witnesses who were associated with affiliates of the UDF and which have given evidence to contradict the state's allegations. The two state witnesses were McCamel who was with the VCA and IC.12. Now IC.12 was the chairman of COSAS in Soweto and (10 he also subsequently became chairman of a branch of AZASO, and it is clear from his evidence that he was engaged in no unlawful activities at all. As far as the defence witnesses are concerned there is Dr Motlana of the Soweto civic association, dr Nkomo of the Atteridgeville/Saulsville residents' association, Miss Cachalia of the Lenasia women's group and FESAW, Miss Platsky of the UDF anti-forced removal committee and she was also a member of the Gardens area committee of the UDF, Mr London of the Huhudi civic association, Mr Skweyiya of the Cradock residents' association and Miss (20 Molelefe of the Worcester branch of the Western Cape civic association. Now there was really no serious attempt made to contradict the evidence given by these witnesses and some instances as the case went on that proposition simply was not challenged, that as far as these persons were concerned they saw the UDF and they were on these committee of the UDF as having a policy of non-violence. And when the state stops seeking to support its case through witnesses called by the defence of course the defence is under no obligation to call hundreds of witnesses to repeat what has not been (30 seriously/..

seriously challenged. Apart from that it is the state's obligation to prove its case, it is not the defence's obligation to prove the contrary and we can show your lordship that there are these nine witnesses - the only direct evidence really is nine witnesses all of whom give direct evidence contrary to the state case, apart from the evidence of the accused themselves.

Now his lordship BEKKER J in a passage I have already referred your lordship to at page 43 to 44 of the judgment says at the bottom of page 44: (10

"In the net result I have available and am accordingly confined to an infinitesimal fraction of the total relevant and necessary material from the prosecution asks me to infer that the African National Congress had this violent policy. In these circumstances I venture to suggest that it will be rash to come to a conclusion that the speeches said to be a vital factor in determining the policy of the organisation are sufficiently representative to prove that the African National Congress possessed a policy to overthrow the state (20 by retaliatory or any other forms of violence. I am in this connection not unmindful of the fact that some members of the organisation made speeches of a violent character and that others criticised the government past and present in vitriolic and extravagant terms. Nevertheless, having regard to the lack of evidence, it would be unsafe to infer therefrom that the prosecution's contention is correct."

How much more difficult is the state's case here where it seeks to establish a policy not of a disciplined and (30 cohesive/..

cohesive unitary political organisation but of a front consisting of hundres of affiliates with independence to pursue their own affairs and where it has not even begun to show your lordship what the affiliates said or did or perceived the policy of the UDF to be.

As I have this page open perhaps I should save your lordship the trouble of turning back to it at a later stage because I am going to read another passage from it. I will take it a little earlier than I intended to but it is there at page 45 of his lordship BEKKER J's judgment. His lord- (10 ship said this:

"Insofar as the documents are concerned, not a single one advocated the use of violence in plain language or direct term. The prosecution, however, argued that terms such as clash, conflict, a fight to the death, a bloodbath, supreme sacrifice and the like appearing in many of these documents, were in the circumstances consistent only with the idea of a physical clash. Naturally, if those terms are to be construed in a literal sense there might be some merit in the sugges-(20 tion, but I am unable to find any valid reason for doing so. It is perfectly clear that these and like terms are capable of being used and were often used in a metaphorical sense. At most from the prosecution's point of view it can be said that the terms are capable of a literal interpretation but to find that they were used in that sense only and not in a metaphorical sense would be incorrect. With reference to speeches and documents generally I think it is also convenient to mention here in argument addressed to the court by (30

Mr Kentridge insofar as political language is concerned used either in public documents or on public platforms counsel contended the court should be slow to infer that catastrophic results would follow from strong political language. Furthermore that the courts have been careful in the past not to curtail the right to express unpopular political views even when expressed in strong language. Furthermore, that the courts have always made due allowance for emotional and metaphorical language. These submissions are fully supported by a number of authorities to which counsel has referred, in particular R v Roux, Pienaar v Argus Printing & Publishing Company and R v Bunting in which WESSELS J said at page 586: (10

'We must not judge an article of this kind (political) by its possible effect on a few supersensitive individuals. We must ask ourselves what effect it is calculated to produce on the man with a normal mind and normal human experience.'

and I will come back in a somewhat different context a little later. And then there is the passage of his lordship RUMPF J. which I do not intend to read again at page 35 to 36 where RUMPF J. refers to the fact that there is really a very small proportion of material from which one would hope to determine the policy of an organisation that had been placed before the court. (20

Now insofar as the question of general principles applicable to interpretation of political speeches and writings are concerned, apart from the passage in the judgment of BEKKER J at pages 45 to 47 to which I have referred, (30

There is a passage in the judgment of his lordship RUMPF J which is relevant to this case. It is at page 100. He says this:

"In dealing with the documentary evidence a distinction must be made between publications issued by the African National Congress itself and those issued by persons or committees not purporting to act on behalf of the African National Congress. We have it for instance that the publications like "Fighting Talk, "Liberation and Advance", later "New Age", were issued in support of (10 the liberation movement in South Africa, but independently of the African National Congress. The contents of these bulletins do not constitute the policy of the African National Congress by reason of the publication thereof. On the other hand the African National Congress and the Congress Alliance urged its readers to read and study these publications."

I do not think we had any such evidence in this case that the UDF urged anybody to read the community newspapers which had been put before the court, but that is not really the point (20 m'lord, the point is that there is a difference between a publication issued by an organisation and issued by persons or committees not purporting to act on behalf of the organisation. Now the distinction between a statement or a publication by an individual on the one hand and the United Democratic Front as a front on the other hand and between an affiliate and the Democratic Front as a front on the other hand is a distinction which has simply eluded the state throughout this case and it has eluded the state in its argument, because it continually puts forward propositions (30



based upon statements made by individuals who are not shown to be part of or associated with or speaking on behalf of the United Democratic Front and then says "UDF verklaar" and it put forward documents coming from affiliates and says "UDF verklaar". And that of course is not so, m'lord, and if one wants to know the relevance of that document as far as the affiliate is concerned one would then have to have a representative, a representative sample of the affiliate's publications and see whether that single document or two or three documents or whatever it may be in the context of the (10 publications of the affiliate as a whole give you any indication of the policy of that affiliate. And then you have got to take another step. If you cannot infer from the few documents of a particular affiliate what the affiliate is, how less can you say that because a particular affiliate may or may not have been militant, that that affiliate's attitude can be transposed into the attitude of the Front as a whole. So those are problems which confronted the state in its use of documents and the manner in which it was used. But I want to go a bit further than (20 that. I want to show your lordship how our courts deal or have dealt..

COURT: Can I now put Adams' judgment away because I am still holding it down with one hand.

MR CHASKALSON: Mr Marcus says he put mine away.

COURT: Yes, thank you.

MR CHASKALSON: I want to make some general submissions to your lordship about the way in which our courts have always approached questions of political speech. They have always accepted that unless there is some legislation which (30 specifically/..

specifically limits the right to speak on particular subjects that courts should accept the use of strong language and that they should give as wide latitude as possible to persons who exercise a right to attack the government and to mobilise opposition to its policies and that that includes even the vilification of individuals and the government itself and it really flows from the basic principle that our common law sees freedom of speech as a fundamental right.

I think that principle is stated by his lordship RUMPF J in Publications Control Board v William Heinemann 1965 4 (10 SA 137 (A) at 160E-G his lordship said this:

"The freedom of speech which includes the freedom to print is a facet of civilisation which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it, the other is the inclination of those who want to protect it, to repress more than is necessary. The latter is also fraught with danger. It is based on intolerance and it is a symptom of the primitive urge in mankind to prohibit that with which one does not agree. When a court of law is called upon to decide whether liberty should be repressed, in this case the freedom to publish a story, it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard one and precious asset and yet easily lost and its approach to the law including any statute by which the court may be bound, it should assume that parliament, itself a product of political liberty, in every case intends liberty to be repressed only to such extent as it in clear terms / .. (30

terms declares and if it gives the discretion to a court of law only to such extent as is absolutely necessary." Now that statement was made in a dissent, the dissent went on the facts but it has subsequently been approved of in a number of judgments. I will give your lordship the judgments where it has been approved of. It is approved of in the case of S v Mbiline 1978 3 SA 131 (EC) at 140H; it has been approved of in United Democratic Front v Acting Chief Magistrate Johannesburg 1987 1 SA 413 (WLD) at 416C-G and the United Democratic Front Western Cape Region v Van der Westhuizen 1987 4 SA 926 (CPD) at 928G-J. There are other judgments where it had been approved but I have given your lordship one from the Eastern Cape, one from the Witwatersrand and one from the Cape. (10

Your lordship will recollect that in the judgment of his lordship BEKKER J and the passage that I cited to your lordship where he deals with the interpretation of political speech and the fact that one does not construe political speech literally but one construes it sometimes metaphorically. He referred to the judgment of his lordship LUDORF J in Pienaar v Argus Printing & Publishing Company and there is another passage in Pienaar's case to which I would like to refer. Pienaar's case is 1956 4 SA 310, it was a judgment of his lordship LUDORF J in the Witwatersrand Local Division and at 318F he says: (20

"I agree with Mr Fischer that whereas a language by its very access may in many cases be appointed to the anumus iniuriandi of the writer, allowance must be made in the present case because the subject is a political one which had aroused strong emotions and bitterness (30

whereof / ..

whereof the reader was aware and he would not be carried away by the violence of the language alone. It is on this background that I will turn to the article when I pass on to a consideration of its meaning."

Now that passage has been cited with approval in Waring v Mervis 1969 4 SA 542 (WLD) at 549E-G and also it is cited with approval in The Free Press of Namibia (Pty) Ltd v The Cabinet of the Interim Government of South West Africa 1987 1 SA 614 (SWA) and the passage is cited with approval at page 622H. I am going to come back to that in a different (10 context a little later but we are certainly in this case dealing with subjects which are politic, subjects which have aroused strong emotions and bitterness and according to the evidence, subjects of which the listeners were aware and the use of language which is common place and understood by them. I will come back to that too.

Now if I can continue the review of the path which our courts are taking in dealing with political language. There is the case of S v Turrell 1973 1 SA 248 (CPD). The passage that I cite is at 256G-H: (20

"Freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and parliament guards these rights jealously for they are part of the very foundation upon which parliament itself rests. Free assembly is a most important right for it is generally only organised public opinion that carries weight and it is extremely difficult to organise if there is no right of public assembly."

and of course your lordship will recollect Mr Molefe's evidence which we will deal with later, where he talks about the (30

need for mass organisation to demonstrate organised public opinion because without that the government would pay no attention to what a few individuals might say and why organising and mobilising and bringing together people for political purpose is necessary if you want to have an impact upon the government.

Now in the case of United Democratic Front v Theron N.O.  
1984 1 SA 315 at 320C-E ..

COURT: What is the name of the..against Theron?

MR CHASKALSON: Theron N.O. Now this is a judgment of (10  
his lordship ROSE-INNES J. It was subsequently reversed on  
appeal on an entirely different point. It had nothing to do  
with this, it had to do with notice to the magistrate whose  
decision had been set aside but it was decided on a different  
point, but what his lordship says is this:

"The power conferred by section 46(1) is a considerable  
one since its exercise may result in the prohibition  
or curtailment of rights to freedom of assembly and  
speech, which members of the public as a general rule  
enjoy submit to the limitations which the common law (20  
and the statutes impose upon those rights. In the  
present instance the power to prohibit a public gathering  
of members of the general public to hear speeches,  
discussion and the expression of opinion upon a matter  
of general public interest and importance, such as the  
proposed changes in the constitution of the country and  
the referendum to be held in regard to which public  
discussion is clearly desired."

So that is the context in which the next statement is made and  
it is - (30

"I refer to the freedom of assembly and discussion not as philosophical suppositions, they are rights recognised, protected and enforceable by law in this court."

Now the courts have even supported speech and allowed wide latitude in matters which go the very heart of government policy for instance in relation to the suppression of communism. There is a judgment in the case of Du Plessis v Minister of Justice 1950 3 SA 579 ..

ASSESSOR: 1960?

MR CHASKALSON: 1950 3 SA 579 (WLD) . The court was there (10 concerned with a pamphlet and the judgment proceeds as follows:

"Die pamflet bevat 'n aanval op die regering en die Nasionale Party en dié se beleid. Die politiek in die wetgewende program van die regering word skerp gekritiseer en word bestempel as ondemokraties, fassisties en waar die die kleurvraagstuk aangaan ten opsigte van die Naturelle, Indiërs en Kleurlinge word dit beskryf as onderdrukkend en stremmend. Die skrywer verwys na die beleid van blanke heerskappy as deel van die beleid van die regering en sy party en doen 'n beroep op alle (20 liberale, demokratiese gesinde burgers om saam te werk, hulle geledere te sluit en 'n gemeenskaplike front aan te bied in die stryd om die huidige regering uit die kussins te lug, om sodoende die vryheid en demokratiese regte van die landsburgers te beveilig en te handhaaf. Die pamflet verwys in sy aanhef na die houding en handeling van die Nasionale Party in die verlede en beweer dat die beleid van die party die vryheid van elkeen in Suid-Afrika bedreig, of hy Engels of Afrikaans of Zoeloe praat. Dan handel die pamflet oor die (30

sogenaamde/..

sogenaamde apartheidsbeleid, die stemreg, die Indiër-  
vraagstuk, die moontlike oplossing daarvan deur groot-  
skaalse deportasie. So gaan die pamflet aan en beskuldig  
die regering en sy party van 'n bedoeling te koester om  
alle opposisie lam te lê, alle georganiseerde liggame  
te onderdruk en alle strewende om betere (?).... in die  
wiele te ry. Terloops verwys die skrywer na die Smuts-  
bewind van voor Mei 1948 en sê dat wat die belange van  
die Naturelle betref die Smutsregering niks beter as  
die teenswoordige regering was nie. Die pamflet is (10  
klaarblyklik geskryf uit kommunistiese oogpunt, die  
skrywer is 'n kommunist. Dit is 'n politiese pamflet en  
as 'n slotsom roep hy alle sogenaamde gematigde demo-  
kratiesgesinde, regsdenkende liberaliste om bymekaar te  
staan om deur verslaan van die huidige regering 'n program  
uit te voer wat in hooftrekke uiteengesit word."

Now at page 581 his lordship proceeds as follows. He says:

"Die wet maak 'n ernstige inbreuk op die regte van die  
landsburger. Vryheid van spraak, vryheid van die burger  
is hoekstene van ons grondwet. Die artikel moes dus (20  
eerder in beperkte sin as in breëre sin uitgelê word.  
Soos ek reeds gesê het, die pamflet is 'n aanval op die  
beleid van die Nasionale Party en regering. Persone wat  
die regering van die land op hulle skouers neem moet  
kritiek, selfs uiterste skerp kritiek en veroordeling  
van hulle beleid en wetgewing deur hulle meerderheid  
bewerkstellig verwag. Algemeen staan dit elkeen vry om  
sulke kritiek uit te spreek en die bedoeling van die  
wetgewer kon nooit gewees het om geoorloofde kritiek en  
propaganda vir 'n verandering van regering verhinder nie."

(30

And there is the case of R v Roux which is referred to in the judgment of his lordship BEKKER J. It is reported in the 1936 appellate division at 271 and it was concerned with what was alleged to be the crime of crimen laesae venerationis and it the court assumed that that was still part of our law and it was the article against which these remarks need to be construed - I should tell your lordship it is a pamphlet against King George. It says:

"Who is King George anyway? Who is this King George? Remember the blood that was shed at Cartwright's flats. We, the Bantu people and workers of Durban have been asked to celebrate the silver jubilee of King George V on May 6th, the 25th anniversary of his succession to the throne. Who is this King George and why should we celebrate his jubilee? King George is the figurehead of the English and Boer imperialists whose local representatives are Hertzog and Smuts. These oppressors are robbing and exploiting the poor people and workers of South Africa, in particular the Bantu people. The soldiers of King George's father, King Edward VII killed the Bambarter and cut off his head because he led the struggle against the poll tax. It was the police of King George's lickspittal South African government who shot down the people of Durban and the ICU riots in 1929. It is the police of the Durban Borough Council which is calling upon you to celebrate King George's jubilee that murdered Johannes Nkozi, brave leader of the Communist Party on these very Cartwright Flats, at the pass burning on Dingaan's day 1930. Workers and oppressed people of Durban



do not be bluffed by this King George nonsense, do not kiss the boot that kicks you. Refuse to worship King George, he is not our king but the king of our oppressors. Unite in protest against pass laws, liquor laws and all other forms of oppression. Demand freedom in our land of your fathers, refuse to go to Cartwright Flats, the place where our martyrs were murdered in 1929 and 1930. God behoed die Koning. What a parasite.."

and then there follows a series of statistics, accurate or inaccurate, do not know about what is paid to the King and (10 Queen, our smiling Prince of Wales, the Duke of York, the Duke of Connaught and other and then that is contrasted with: "what a Native miner on the Rand gold mine nets 1/6d for a day's labour digging out gold at the risk of his life. 50 African miners were drowned at the Magabi mine a few days ago. He would have to work for over 20 000 years to earn for his family what George's family gets in one year for doing nothing" and so it goes on, contrasting the position of the King and Queen with that of the black people in South Africa. There is a cartoon which says: "One law for (20 whites another for blacks", "Killing Niggers is not murder", "Justice but not for natives", all these in King George's rule.

COURT: A real republican pamphlet.

MR CHASKALSON: A republican pamphlet. I think that that is referred to by his lordship CURLEWIS J. They assume, the courts assume that crimen laesae venerationis was an offence, and his lordship CURLEWIS J says that in interpreting the article in question, he says at 289:

"We must interpret the language complained of by the (30  
light / ..

light of modern thought and freedom of speech and not by the light of restrictive ideas of the middle ages." and his lordship went on to say that the article was obviously intended as an appeal to its native leaders not to take part in the late King's jubilee celebration and it purported to give reasons for their not doing so, reasons which were expressed in language strong and stupid, coarse and distasteful to one's sense of propriety. And then he comments at 282 to 183 about:

"One usually hear capitalist for the mining magnates or the mining industry as personified in the mythical personage of Hoggenheim who are described as the oppressors of the workers and the labouring people or as those whom the government represents and whose interests are the concern of the government as against the interests of the people and the workers."

He says it is an innovation -

"..that the English and Boer imperialists and not the capitalists are now mentioned as the oppressors of the people."

Then he goes on to say:

"Whoever these imperialists may be or however much these words may be a reflection on them, the words do not in my view amount to a dishonouring or bringing into contempt of the King and his government in South Africa. To me they seem rather in the nature of stupid and ridiculous nonsense."

and then he analysis at 283 the phrase: "He is not our King, but the King of our oppressors". He said that that could be construed as having some repudiation of kinship (30

and then he goes on in the language of the times to say:

"Even so whether the Native workers of Durban have republican sentiments or not and as such disapprove of the titular kingship the phrase is not used to incite them to do anything unconstitutional but merely to protest against pass laws, liquor laws and all other forms of oppression and if the language is unnecessarily strong we must remember that the Natives of Durban have no voice or vote in the passing of those laws or in the government of the country and that they can only protest against what may be regarded by them as grievances. It (10  
may be said that the very fact that this appeal is addressed to Natives should cause us to take a more serious view of the language used, but on the other hand if the appeal is intended to be effective, one can well imagine strong and extravagant language being used in order to influence the Natives."

and his lordship BEYERS J handed down a short concurring judgment and at 293 he said:

"Die Unie is 'n demokratiese staat en 'n mens sou so (20  
'n prosekusie onder krygswet of onder outokrasie kon verstaan, maar nie in 'n verligte eeu en geslag nie waar die regering van die staat gegrond is op die vrye en onbelemmerde volksmond en waar dit iedere burger vrystaan om sy mening omtrent die openbare stand van sake en die politiek vrylik te uiter."

and that particular dictum was approved by the appellate division in the case of R v Sachs 1953 1 SA 392 at 410H to 411A. And then there is a case of Nathie 1964 3 SA 588..

COURT: Just give me the reference again?

(30

MR CHASKALSON / ..

MR CHASKALSON: 1964 3 SA 588, it is a judgment of the appellate division and it was concerned that the charge there, the allegation there was that the appellant had wrongfully and unlawfully and at a meeting incited certain Indians to commit offences specified in the Group Areas Act and the court was concerned with the report of the joint secretaries of the Transvaal Indian Congress. At 592F-G we find that in that report there is a statement:

"Yet crowded our contribution has been, 1960 for us was also a year of stocktaking, a year of fresh (10 challenge. With all our unchallenged contributions we still have to commemorate the centenary under the shadow of oppressive apartheid rules and rigorous racial discrimination. We still remain second-class citizens, insulted, humiliated, pushed about, our freedom is getting less and less, our rights blighted with impunity; our future and the future of our children presenting a picture of gloom and despair. While extending to us with the one hand recognition as permanent inhabitants of this country, white authority held out its other (20 fist threatening us in no uncertain manner with the future of perpetual subservience. After a hundred years of toil and labour for the common good of all this is the lot of the Indian people, this their reward."

And at 593A the judgment says:

"The report proceeds to refer to the conduct of one Nana Siter, a former president of the Transvaal Indian Congress who is described as the stalwart of Indian politics in South Africa. It appears that Nana Siter an elderly man of failing health and bedridden for (30

most of the time had made a public declaration that he would refuse to obey an order requiring him to move from his Pretoria residence to an area set apart for occupation by Indians. It is stated that he was fully aware of the consequences of his stand namely possible financial ruination and even imprisonment."

and the report then continued:

"He threw up a challenge to the perpetrators of this crime. The end of October has passed and Nana Siter is still in his old house. The houses in the group area of Laudium remains empty. We have no doubt that the cruel arm of Nationalist persecution will come down heavily on Nanabai. Fascists show no respect for any moral standards recognised in a civil world."

and the report continues:

"But the question is, are we, the rest of the Indian people going to remain silent when this happens? Are we just going to acquiesce because some mad men in the department sit and decide what is going to be our future and the future of our children? I want to declare that to remain silent and face a persecution is an act of supreme cowardice. Basic laws of human behaviour require us to stand and fight against the injustice and inhumanity. Not for a moment must Nanabai or the other people of Ventersdorp or any other people similarly affected be allowed to imagine that they are alone in the stand that they have taken. The Nationalists must be made aware of the fact that the attack against these people is an attack against the Indian people as a whole and will be met by the organised strength of

the entire community."

And the way the speech was interpreted m'lord at 595A-D:

"The passage in question does not contain any unequivocal direction to the listeners to refuse to obey removal orders issued in terms of the Group Areas Act or to commit any of the other offences referred to in the charge. The contention advanced on behalf of the state was, however, that the equivocation is removed if the passage in question is considered in the context of matters referred to earlier in the report. The (10 inquiry so it is contended establishes beyond reasonable doubt that in exhorting the listeners not to remain silent but to stand and fight against the injustice and inhumanity and to make it clear to Nana Siter and others that they are not alone in that stand that they have taken, the appellant intended to convey to them that they too should refuse to comply with the provisions of the Group Areas Act."

and his lordship then goes on to analyse the document and to suggest that the context does not lead to that particular (20 conclusion. And at 596 his lordship says this against B:

"It is reasonably possible in my opinion that the appellant had in mind that the persons attending the meeting of the congress should not remain silent but should declare their opposition to and condemnation of the Act so that the Indians who had been affected would not feel that they are alone in the stand that they have taken. This does not necessarily imply that the listener should proceed to act unlawfully. I may at this stage refer to a later passage in the report (30

where / ..

where mention is made of one Nelson Mandela, a member of the African National Congress who was then in Britain. It is stated that "we must assure him that he is not alone" and that the Indians must show their solidarity with him. This is to be done by the Indians rendering assistance to any friends and well-wishers among the African people who have undertaken to look after the family and children of Nelson Mandela. It is true that there is a reference in the report to the fact that the Indians are required to stand and fight against (10  
injustice and inhumanity. These words are part and parcel of ordinary political parlance and did not necessarily relate either to violence or unlawful conduct."

The concluding sentence of the passage in question lends some support to the suggestion that all the appellants may have aimed at was an authoritative expression by the Transvaal Indian Congress to the effect that the rest of the Indian community was in sympathy with those persons who had been affected by the provisions of the Group Areas Act and (20  
approved of their stand as moral, notwithstanding the fact that they have acted unlawfully in refusing to obey removal orders.

Now the passage which I draw attention to, that the "words are part and parcel of ordinary political parlance and did not necessarily relate either to violence or unlawful conduct". There has been a lot of evidence given to your lordship about the language of black politics, about the use of particular terms, about the use of particular expressions. We have nothing to the contrary from the state (30

and I will come back to that too in a different context.

There is the case of R v Nkatlo. It is reported in 1950 1 SA 26. It is a judgment of their lordships OGILVY-THOMPSON and HERBSTEIN J in the Cape Provincial Division. At 28 - it was a speech which was being made at a meeting held under the auspices of the African National Congress and portions of the speech which are set out in the judgment are these; they are numbered in the judgment, they are numbered from 1 to 6.

"They encourage the Africans to attack the Indians (10  
and then they come in and mow us down.

2. I am informed that more than 200 Africans were  
killed at Durban. They were simply mowed down.

3. Get a savage and place him in parliament and you  
will be governed in just the same way as your are now.  
Dr Malan and most of the present ministers are graduates  
of Stellenbosch University. How these people were  
taught there is beyond my understanding. These people  
have not benefited from their education. They tell us  
they want to maintain white supremacy in South Africa. (20  
It is the scientific fact that civilisations cannot be  
maintained by selfishness.

4. White civilisation is bound to go down, that is a  
certainty. It cannot strive indefinitely on sufferings  
of other races. White supremacy is based on injustice  
and as such it is doomed. The day will come when we  
still simply defy the discriminatory laws of the land.  
The day will come when we will resist the discriminatory  
laws of this country and those unfortunate to have white  
skins will suffer because people will not choose in (30

their / ..



their blind fury."

I think I should tell your lordship that the charge was one of having uttered words with the intent to promote a feeling of hostility between Natives and Europeans:

"5. I have no quarrel with the white man for his presence in this country, but if it is not right for the Indians to here it is not right for the white people to be here.

6. When a persons comes here and he tells you we must fight in a constitutional way it is because he (10 is afraid of going to jail. The only people who can fight by constitutional ways are those people who have the vote, but we have no vote. The only way we can get our freedom is by revolution, but we cannot do that if we are not organised. We must be strong enough to meet force by force. We have men of brains who can work out the plans for such a revolusion. You do not need guns, aeroplanes and tanks, your numbers are enough. If we all stand together I tell you it will take only 24 hours to change the present state of affairs." (20

Now at page 30 to 31 the approach of the court was described as follows:

"It seems to me that in the absence of direct evidence of intention, the court must examine what the accused said in the light of the rule that he must be presumed to intend the natural and probable consequence of his act. If it is clear the the necessary consequence of the utterance would be to promote a feeling of hostility between Natives and Europeans, the courts will ordinarily in the absence of any evidence to deny this, hold that (30

it was made with that intention."

and of course the question here is whether statements were made in our case with the intention of furthering a goal of overthrowing the state by violence. It is really a question of intention on both cases:

"It should however be emphasised that care must be exercised in the application of the rule. A person cannot be convicted under this section for uttering words which are calculated or liable to promote feelings of hostility without proof that he had the (10 intention to do so and there may be cases where though the language used is liable to promote those feelings of hostility, the speaker has clearly not that intention."

And then his lordship later goes on to say:

"Therefore, in applying the test that a person is to be presumed to intend the natural and probable consequence of his acts, the court must be astute to see that the inference of intention to promote feelings of hostility is the only inference which can reasonable be drawn. If the language used is reasonably capable of (20 another explanation, the inference of intent cannot be drawn. If is because of the inherent dangers that it is essential in my opinion to have regard to the whole statement made by the speaker. To judge a speaker's intention on extracts of a long speech taken out of their context is on the face of it quite wrong. It is worse when portions of the extracts are omitted."

So that I should not fall into that trap m'lord, I am looking to see what the passage was that I left out, because I have forgotten. I cannot find it but I have left out a few (30

words and I cannot remember what they were. I think that the gist is there. And then at page 33 in dealing with the last extract there, and the last extract was the one about the person who tells you to fight in a constitutional way is a person who is afraid to go to jail, you can change everything in 24 hours if you come together and that the only way that you can get your freedom is by revolution. His lordship said this:

"The distinction drawn by the speaker between fighting by constitutional ways and by revolution without the (10 addition of the words "but we have no vote" might have justified an inference that the accused was advocating the use of violent measures but if these remarks are looked at as a whole, it is clear that he was dealing with the possibilities open to the Native and his fight against white supremacy and for equality. Any suggestion that it might be necessary for the Natives to take steps in the furtherance of their rights might have the effect of promoting feelings of hostility between the Natives and the Europeans but again it must be reiterated that (20 that is not the issue. If it were to be held that any criticism of the lack of the Native's right to vote and any suggestion that this alleged wrong could only be remedied by methods which did not rest on the right to vote, led to an inference of an intention to promote feelings of hostility there would be in the words of GRAHAM JP in R v Bunting, "a dangerous interference with honest and impartial criticism of policy or doctrine upon which divergent views and opinions might reasonably be held". Before a conviction can follow the court (30

"must be satisfied that the words must necessarily or inevitably promote feelings of hostility between Natives and Europeans and so afford evidence of an intention to create them. An examination of the whole speech does not satisfy me that the accused had such an intention. He was setting out the Natives' side on a matter of vital importance to them and his utterances at least equally consistent with an honest criticism of the policy of white supremacy as was the inference that he was out to promote feelings of hostility between (10 races."

and in dealing with the passage about "the only hope we have to change affairs is by a revolution and a revolution means bloodshed", the judgment at page 36 was as follows:

"These are strong words and the accused repeated them in slightly different forms, but they must be read in the light of the whole of the remarks of the accused. If that be done it is clear that what he was saying was because the Native had no vote and the power to bring about a change by constitutional means, the only (20 alternative was a revolution which would bring about bloodshed. Language of this kind is liable to promote feelings of hostility between Europeans and Natives but I do not think that it leads necessarily to an inference of an intention to promote such feelings. It is at least as possible that the accused was weighing up the dangers in the present situation and issuing a warning of the dangers in the future."

And of course in the state's argument wherever we find reference to the conflict which is taking place within the (30 country / ..

country and to the warning that that conflict might continue and will continue unless apartheid is ended, unless the leaders all got together to provide a new basis for living together in the country. That is taken as a threat, it is said to be a threat, it is said to evince an intention to overthrow the state by violence because attention is drawn to matters such as that. Now in our submission that is quite the wrong way on which such statements should be approached. It is consistent either with logic or with the way our courts have always dealt with such matters in the past. (10

Then there is a judgment in R v Sutherland 1950 4 SA 66 and it is another case dealing with the same section of the statute which penalises making of statements with the intention of promoting hostility between Natives and Europeans and in passing I should mention that in the course of this judgment the case of Du Plessis which I have previously referred to was approved. It concerns a cartoon. The cartoon was headed: "Won't you come in?" and on the right there were two Natives in tribal dress - I think your lordship will..I think I should find the page where that description(20 is given.

COURT: Is the carton reprinted?

MR CHASKALSON: I am quoting from the judgment, the cartoon is not reprinted. It is described and your lordship will find it at page 69:

"The cartoon is headed: "Won't you come in?" and on the right.."

and this is now an extract from the judgment at page 69:

"..on the right are two Natives in tribal dress representing the protectorates. The central figure is that(30

of the Prime Minister, Dr Malan. He is bowing to the two Natives representing the protectorates and indicating a portal on his right. He is clearly extending the invitation to come in. Within the portal, which represents the Union is depicted a European with his left hand gripping the throat of the Native. In his right hand which is raised high in the act of striking, there is a heavy blunt instrument. The Native has his left hand flung high and there is a look of terror on his face, clearly the European is in the act of brutally assaulting him. Immediately to the rear of the European there is the prone figure of a Native who has either been killed or rendered insensible. "

His lordship MURRAY J at page 71 after referring to the statute and the fact that what was being penalised was the intention to promote hostility, says this:

"Although the probable consequences of the words or deeds are most material in ascertaining the speaker's purpose they are not conclusive. An individual who bona fide believes that a certain state of affairs (20 constitutes a social disease requiring drastic reform might well use language which was likely to inflame feelings of hostility on the part of the victims against the people responsible for the state of affairs, nevertheless if there was a reasonable possibility not necessarily a probability that his object was in truth the amelioration of conditions and the eradication of what he honestly considered to be an evil, he would clearly not have been shown to have had as his purpose the promotion of hostility. Presumably as Samuel (30

Wilberforce/..

Wilberforce in vying against the evils of slavery in his endeavour to secure its abolition could scarcely have been said to have deliberately proposed to create hostility between slave and slave-owner whatever feelings might have been aroused in the minds of his listeners by his condemnations of the evils of slavery. Obviously of course the language uttered or the actions employed in each case must be taken into consideration, for if they disclose such violence, such prejudice, such recklessness that a reasonable man could only infer (10 that the individual's true objective was the promotion of hostile feelings, the individual's protestations of another purpose will be rejected and he would rightly be convicted of an offence as charged in these proceedings."

and his lordship then cited with approval the passage from R v Nkathle to which I have already referred your lordship. And then at page 74 his lordship MURRAY J who gave the judgment of the court said this:

"It is obvious that the cartoon was a symbolic (20 expression of opinion not to be taken literally. It is impossible that reasonably interpreted.."

I think he probably means it is possible -

"..that reasonably interpreted it allege physical brutality and maltreatment. What it was designed to convey and what it probably was understood to convey was oppressive and brutal treatment in realms other than the physical. To my mind there are at least three main considerations which support the appellant's denial of any intention to promote racial hostility. (a), the (30 denial / ..

denial is strongly corroborated by the fact that in the very same issue of the newspaper there appeared on page 13 an editorial written by the second appellant headed: "The Republic marches on", in which the attitude of the Prime Minister in regard to the incorporation of the territories is vigorously attacked. (b), the cartoon itself discloses a political flavour. The central figure is that of prime minister labelled Malan inviting the two Natives labelled protectorates to enter a room or enclosure and must prima facie be considered to have (10 reference to the political question of the incorporation of the protectorates which was in October 1949, a matter of considerable public interest. It is therefore only reasonable to assume that the prime minister was there being treated as the representative of the Union government seeking such incorporation and not as representative of the entire European population of the Union." and then (c) there was the circumstances of the publication which was said to be in the appellant's favour because the publication was directed to a public which was overwhelm- (20 ingly European by race though it is said in the judgment that Native readers may have purchased the paper and noticed the cartoon.

Then there is the case of S v Mbelini. I have given it to your lordship in a different context, it is 1978 3 SA 131. It is a judgment of the ECD.

ASSESSOR: Sutherland's case was in what court again, please?

MR CHASKALSON: I think I should just give your lordship the reference again, it is 1950 4 SA 66 (T). Again it is that same statute. The pamphlet is entitled: "Heroes of (30 yesterday / ..



yesterday, martyrs of the struggle". It is quite a militant pamphlet. It is set out at page 135 to 137. It deals with matters such as Sharpeville uprisings, black people who had been shot by the police, disturbances in Soweto, death of political detainees, such matters. It refers to Sharpeville for instance as the day on which "unarmed Africans registering their legitimate protests against unjust laws were mowed down by the heavy fire of the law and peacekeeping agencies:

"A day we used to commemorate with our heads bowed in mourning."

(10)

It refers to the 1976 uprisings in Soweto. It contains a message in which it states:

"We believe that all the people.."

it is a publication of the Black People's Conference:

"We believe that all the people known to have died under such circumstances, have lost their lives in the course of the long struggle by Blacks against the injustice and political deprivation in South Africa. There are thousands others unnumbered and unreported. Those that lost their lives in sporadic incidences of (20 uprisings in places like the potatoe farms in the platteland where Blacks live and work under such conditions as can only lead to discontent and friction."

There is a reference also on the last page to there being a time, a tribute to the minister of justice, Mr Erasmus, referring to the Sharpeville "Hullabaloo" of 1960, as a time "when we could shoot as many people as we liked and the world did not seem to care".

Well m'lord, that was the pamphlet and his lordship

ADDLESON J at 139H said:

(30)

"As / ..

"As has been noted in other decisions on the Act, race relations is a central issue in South Africa and strong criticisms of racial policy and its enforcement must necessarily involve repeated reference to Blacks as persons affected by, and Whites as formulators of the policy."

Now why is it that our courts have so consistently adopted this attitude to speak and I know of no better formulation of the underlying reason why the common law sees speech as a fundamental right and why the common law sees a greater (10 danger in suppressing speech than in permitting it, than that given by Justice BRANDEIS which though it deals with the American constitution and their first amendment rights to freedom of speech is really I suggest to your lordship at the heart of all of our own cases and at our common law recognition for the protection of freedom of speech. I will give your lordship the judgment later but the judgment is in the case of New York Times Co v Sullivan. The passage is at page 270 where - it is a judgment of the Supreme Court of the United States of America. It is reported at 376 US page (20 254. It was in 1963 and the judgment itself is one of the leading opinions on the freedom of speech. It was given by BRENNAN J and in it he contains a survey of attitudes to freedom of speech and what I want to refer to is a passage from BRANDEIS J. He says:

"Those who won our independence believe that public discussion is a political duty and that this should be a fundamental principle of American government. They recognise the risks to which human institutions are subject, but they knew that order cannot be secured (30 merely / ..

merely through fear of punishment for its infraction. that it is hazardous to encourage thought, hope and imagination, that fear breeds repression and repression breeds hate, that hate menaces stable government, that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies and that the fitting remedy for evil councils is good ones. Believing in the power of reason as applied through public discussion, their assumed silence coerced by law, the argument of force in its worse form. Recognising (10 the occasional tyrannies of governing majorities they amended the constitution so that free speech and assembly should be guaranteed."

Now of course m'lord, we do not have a constitution and our parliament is free to pass laws which can curtail freedom of speech and they have done so, and they can pass laws which enable the state to take actions to prohibit particular individuals, particular organisations and particular speakers. You may be prohibited from speaking on a particular subject, you may be prohibited from taking part in political meet- (20 ings as individuals, organisations can be stopped; but our courts have very consistently taken the approach that unless the legislature intervenes then this fundamental principle is to be respected. And it is to be respected for the reason that BRANDEIS J gives, and in that same opinion BRENNAN J cites from another case of Cantor v Connecticut, that is at page 271, the passage from BRANDEIS J is at page 270. And that passage cited there is this. It says:

"In the realm of religious faith and in that of political belief sharp differences arise. In both fields the (30 tenets / ..

tenets of one man may seem the rankest error to his neighbour. To persuade others to his own point of view, the pleader as we know at times resorts to exaggeration, to vilification of men who have been or are prominent in church or state and even to false statement, but the people of this nation have ordained in the light of history that in spite of the probability of excess and abuses these liberties are in the long view essential to enlightened opinion and right conduct on the part of citizens of a democracy." (10

And his lordship then goes on to say that erroneous statement is inevitable in free debate and that it needs to be protected. Now exaggeration, vilification, error, sharp differences, these are all part of life at political meetings, political discussion and that is what the courts have recognised in our judgments; that the judgments of our courts have recognised and your lordship has this very difficult task. Your lordship has to construe speech in the context of an environment which, and I say with all due respect to your lordship, must be very strange to your lordship. Your lordship and your (20 lordship's assessor both come from backgrounds, your life experience has not brought you into contact with political meetings and political rhetoric of the type which is used in this case and which has been referred to in this case. You really have little life experience of what happens at black political meetings, at the rhetoric used at such meetings, at what the speakers would understand by such rhetoric, what they would expect, how they would react, and so you really have in some way to grapple with that as a real problem because your understanding of particular language or your (30

understanding/..

understanding of how people might be expected to behave in a particular situation is not necessarily the understandings of people from a different background in a different situation dealing with political issues about which the greatest bitterness exists, with feelings which are more than bruised and where language and rhetoric are used in a way in which they would not necessarily be used in white politics - though I do believe from what I read and his lordship LUDORF J mentioned that in his judgment, that there too one expects invective in strong language and strong words. But your (10 lordship has direct evidence here. You have direct evidence that this is the type of language which is used in black politics. Mr Molefe told you: I grew up in that environment. These were the words which were used, this is how I always understood them and we will see time and again when we look at the passages that he will always say well, that is how the audience would understand it. How can your lordship say differently if that is reasonably possible and indeed how can your lordship say it is not reasonably possible if you know so little about the language of the genre of (20 black politics, how people behave and what they say and what they do with it. I ask your lordship to bear that in mind when you come to look at the documents as I now propose to do.

It is against that background that I now want to turn to deal with the state's written argument and after the general introduction the statement is made at page 3 of the written argument..

COURT: Which one is it now, the present "betoog" or the previous one?

MR CHASKALSON: It is the present "betoog", volume 1. (30

COURT / ..

COURT: Yes, one needs a guiding light through all these "betoë" and arguments.

MR CHASKALSON: Apparently our volumes are not necessarily numbered in the same way as your lordship's.

COURT: You will only be referring to volume 1?

MR CHASKALSON: Only to volume 1, m'lord. I shall always at times refer to the oral argument which is at volume 426 page 24 840 something.

COURT: Yes well, that we..(gives instructions in background)  
Yes, go ahead. (10

MR CHASKALSON: At page 3 it is said in general terms that the primary goal of the UDF is to overthrow the government and to replace it with a democratic government of the masses according to the Freedom Charter and that proposition was repeated at the beginning of the state's argument at 24 841 line 1 to 3. Now that is at the beginning of the state's argument and it simply ignores the evidence, that the UDF had decided as a matter of policy notwithstanding the fact that important affiliates supported the Freedom Charter that it would not adopt the Freedom Charter as a policy document(20  
Instead it asked affiliates to adhere to the UDF declaration and according to the evidence this was the policy throughout the period of the indictment. In volume 251 page 13 415  
Mr Molefe is asked in chief:

"In your time prior to your arrest can you tell us what the policy of the UDF was in relation to the Freedom Charter?"

and the answer was:

"The attitude of the UDF to the Freedom Charter was that although the Freedom Charter was a significant document  
that / .. (30

that embodied the broad aspirations of South Africans could not as a front adopt the Freedom Charter, the reason being that the UDF sought to unite a broad range of organisations, many of which had nothing to do with the Freedom Charter or were opposed to the Freedom Charter and the UDF felt therefore that if it was to adopt the Freedom Charter that might have had the effect of making it difficult for it to win more organisations into its ranks and also possibly leading to those organisations which had already affiliated to the UDF (10 disaffiliate. So it shows.."

It says so it shows, I am sure it is "so it chose -

"..therefore not to commit itself to the Freedom Charter.

Was that made publicly known that that was the position? -- That is so. I myself made that public several times."

And your lordship will see that repeated by Mr Molefe, volume  
K1512 265 page 14 285 line 17 to page 14 286 line 24. ... by Mr  
Lekota at volume 286 page 15 939 line 28 to 15 940 line 2  
(portion of sentence not recorded as machine switched to (20  
new cassette). Mr Molefe again at volume 249 page 13 270  
line 28 to 13 271 line 4. In fact Mr Molefe confirmed  
EXHIBIT DA.18 which was a report of a speech which he made  
in which he publicly said that the UDF had decided not to  
make the Freedom Charter its policy.

Now against that introduction the first document that  
the state relies upon in support of the proposition, I think,  
that the policy of the UDF was to take over the government  
and replace it with a government based on the Freedom Charter  
is EXHIBIT C.1. And they refer also in that context to (30

EXHIBITS J.1 and J.3. Now EXHIBIT C.1 according to the evidence is not a policy document of the UDF. The evidence shows that it was a paper prepared for discussion at the November meeting of the national executive committee of the United Democratic Front. The evidence also shows that at that time the majority of the people who had been elected to the national executive committee were in detention and that as far as the Transvaal delegation was concerned they regarded that as a workshop and did not treat it as a national executive committee meeting at all. Now I will give your (10 lordship the references, it is Mr Chikane's evidence, volume 303 page 17 319 lines 9 to 12 and he referred to EXHIBIT S.14 Yes, EXHIBIT S.14 page 3 made it clear that the Transvaal delegates would go to the meeting without a mandate and EXHIBIT S.15 page 2 against the letter P of the minutes:

"The report was informal as the NEC will prepare a formal report. It was also made clear that the meeting of 10 and 11 November 1984 was not a meeting as such but it was a workshop. However, this focussed on administration restructuring and accountability of the national (20 office."

There is Mr Chikane's evidence also at volume 304 page 17 357 lines 16 to 23 and page 17 365 line 6 to 9.

Indeed if one turns to EXHIBIT J.1 your lordship will see from EXHIBIT J.1 at paragraph 4: Input on political aspects of UDF. See attached input. Out of the discussions on the paper the following agreement was reached:

1. The Declaration and the Freedom Charter. The two documents are not incompatible, however the Freedom Charter is a document of far greater stature. (30

Organisations/..



Organisations which have adopted the Freedom Charter should campaign for this document. It would be unwise for the Front per se to adopt the Charter at this juncture. This does not, however, preclude this position from being achieved later."

So the input paper is discussed, the agreement reached is that those affiliates which wish to campaign for it should go ahead and do so; the Front should not adopt the Charter at that stage but that did not mean that it could not do so later if it chose to do so. So we find that as late as November (10 of 1954 the policy which Mr Molefe had spoken about, not to adopt the Freedom Charter notwithstanding the fact that there were important affiliates who had done so, was still the policy of the Front. And indeed if one looks at EXHIBIT C.1 you will see from it yourself that it is a discussion paper and not a policy document. And what it does, if one looks at EXHIBIT C.1 - apparently I am reminded that EXHIBIT C.1 is a handwritten document and that EXHIBIT J.3 is a typed copy of it. I have not checked to see that it is exactly the same. (20

ASSESSOR: C.1 and there is a typed copy of that as well.

MR CHASKALSON: I think J.3 is the typed copy of C.1.

ASSESSOR: There is one of C.1, there are two documents.

I think so.

MR CHASKALSON: I see. But if one looks at the document one will see that the Freedom Charter is put forward in the context as an example of a more just and democratic system and not as the UDF policy because it specifically refers to the fact, I think that appears also in the paragraph cited by the state when it deals with EXHIBIT C.1. The text is: (30

"Our / ..

"Our objective is to dismantle apartheid and replace it with a more just and democratic system as in the Freedom Charter for those of us who subscribe to it."

In other words it is being put forward as an illustration of a more just and democratic system and not as the policy of the UDF.

COURT: Why did the UDF need as stand on policy on this aspect?

MR CHASKALSON: Of what, m'lord?

COURT: On the Freedom Charter or no Freedom Charter?

MR CHASKALSON: It needed it because a lot of its affilia- (10  
tes had adopted the Freedom Charter and you will find..

COURT: Yes, but on your construction the UDF is merely a point where a lot of affiliates come together on common ground so what is not expressed as policy on your stand is not policy of the UDF.

MR CHASKALSON: No, m'lord..

COURT: Now if there is no common ground on the Freedom Charter why is it even discussed?

MR CHASKALSON: Because your lordship will see and I will find the document for you, there was pressure being put on the (20 UDF by some of its affiliates to adopt the Freedom Charter and it was declining to do so. And I will find that, I will find that document for your lordship. I think there is a reference in a secretarial report to the effect that some of the affiliates were making militant demands and wanting the UDF to adopt the Freedom Charter. And obviously it had to decide it was a Front, its policy was to accommodate a lot of people who would come together for a common purpose, common grounds and some of those would be Freedom Charter people and some of them would not. Mr Molefe explained: we deliberately did not (30

want / ..

want to get into that problem of adopting the Freedom Charter because then we would exclude everybody, so as a matter of policy whether the majority did or did not support the Freedom Charter the UDF as a front would not adopt it. Then the argument continues. It says:

"Dit is belangrik om daarvan kennis te neem dat hierdie dokument so belangrik geag was dat dit versprei was onder die verskillende geaffiliëerde organisasies vir hulle kennisname en behels verskeie belangrike beginsels van UDF se strategie. So was dit gestuur aan VCA per (10 BEWYSSTUK C.2."

Now first of all EXHIBIT C.2 is not a copy of EXHIBIT C.1.

COURT: No, it does not say so. "Per BEWYSSTUK C.2" means it is sent by means of or accompanied by.

MR CHASKALSON: No, m'lord, there is an envelope and C.2 was the document which was sent. If your lordship would look at C.2 - perhaps your lordship should get EXHIBIT C.2.

COURT: Yes?

MR CHASKALSON: You will see that it is a letter addressed to the Secretary of the Vaal Civic Association. It bears (20 a date in 1985 - I cannot work out the full date from my copy. I do not know whether your lordship can. It says 1985.. it looks like..

COURT: It is 07/01/1985 it seems.

MR CHASKALSON: It looked like that.

COURT: 16h00 (4 o'clock) in the afternoon.

MR CHASKALSON: Whatever it was, it was after all the Vaal Civic Association, the accused in this case had been arrested and had been in detention for some time. So they would never have seen this document insofar as there may be any (30 relevance / ..

relevance to it. The document is not the same as EXHIBIT C.1 it is similar to C.1 but different to it.

ASSESSOR: The wording appears to be the same.

MR CHASKALSON: It is not, there are parts of it which are the same and there are parts of it which are different. If your lordship looks at EXHIBIT C.1, the handwritten document EXHIBIT C.1, what has happened is that the typed copy which was put behind EXHIBIT C.1, the handwritten one, is not a true copy of C.1, it is actually C.2. If your lordship looks at the handwritten C.1 your lordship will see it is headed: (10 "Introduction":

"We meet at a very crucial period in the history of our struggle.."

and the document C.2 begins quite differently

COURT: But now are you saying that the second document of C.1 was sent or are you saying that the second document of C.2 was sent?

MR CHASKALSON: I do not know what was sent because there is no evidence about it.

COURT: But there must be an agreement about this? (20

MR CHASKALSON: No, there was merely an agreement that EXHIBIT C.2 was found on a Mr Motobatsi.

COURT: Found with Motobatsi?

MR CHASKALSON: Yes.

COURT: Where?

MR CHASKALSON: I think Mr Motobatsi is identified elsewhere as having been the secretary of the Vaal..or having been in the Vaal.

COURT: Secretary of?

MR CHASKALSON: I am not sure that he was the secretary. I (30 think / ..

think that there was evidence that Mr Motobatsi has admitted to be a member of the Vaal Civic Association. We will find the precise submission from WAS.4

ASSESSOR: Anyway the admission is that it was found with Mr Motobatsi, Sebokeng. E. Motobatsi.

MR CHASKALSON: The admission is that Mr Motobatsi was a member of zone 7 area committee of the VCA, but the point is there is no evidence at all as to who sent the document to Mr Motobatsi or why it was sent, for what purpose it was sent and all that we know is that that document is found with (10 him some time, and if the date is right we know that it was posted in January of 1985. Now the document which seems to be..

COURT: Now C.1, where was that found?

MR CHASKALSON: C.1 is the input document to the NEC meeting which was the workshop.

COURT: It was found at the UDF office at Johannesburg.

MR CHASKALSON: Yes, it was the input document, that was the evidence; the evidence, I have given your lordship the passages it is the input document for that meeting. This is what (20 was discussed.

COURT: Yes, that is stated at the top of J.3 in any event.

MR CHASKALSON: Yes, and it is not the same as C.2. In fact the document for the meeting does not contain any reference to the Freedom Charter at all.

COURT: And AAA.7? Well, anyway, go ahead. We are wasting your time now.

MR CHASKALSON: If your lordship will see that EXHIBIT C.2, it is not the same as EXHIBIT C.1. Somebody seems to have drafted EXHIBIT C.2 using..well, again I cannot really...I (30

do not know which one came first. One is handwritten, C.1 is in handwriting, whether C.1 was drafted by someone who had seen C.2 or whether C.2 was drafted by someone who had seen C.1, we do not know, but clearly the two in their content bear a strong similarity to each other and it would be reasonable to infer that whoever the author is of C.2 had seen C.1 or alternatively whoever had seen C.1 - whoever the author of C.1 was, had also seen C.2. But the only point I want to make to your lordship is this, that first of all EXHIBIT C.1 does not say what is put out in paragraph 1.1 on page 3. (10 It does not in fact contain words: "Our objective is to dismantle apartheid and replace it with a more just and democratic system, as in the Freedom Charter for those of us who subscribe to it." C.1 which was the input paper does not contain any reference to the Freedom Charter at all and that was the paper which was discussed at the national executive committee.

COURT: I am sorry I am still not with you. You say C.1 which is the same as J.3 does not refer to the Freedom Charter, is that right?

MR CHASKALSON: Yes, does your lordship - which one does (20 your lordship have in front of you, C.1 or J.3?

COURT: Well, let me take J.3 which is much easier because it is typed.

MR CHASKALSON: Look under paragraph 2:

"Our objective is to dismantle apartheid and replace it with a more just and democratic system.."

and that is where it ends. Now that is the document which went to the NEC.

COURT: Is there no reference in this document to the Freedom Charter at all? It does not look like it. (30

MR CHASKALSON / ..

MR CHASKALSON: I did not see one. Certainly the passage which is cited - I am trying to show your lordship that the passage which was cited in 1.1 comes not from C.1, it comes from C.2. C.2 was not a document which went before the national executive committee, C.1 went before the national executive committee and that is the evidence. We know nothing about C.2 at all other than where it was found. We do not know who wrote it, we do not know for what purpose it was prepared, we do not know whether somebody who - we do not know whether it was drafted by..it could have been drafted by anybody. It could have been drafted by an affiliate which supported the Freedom Charter; it could have been drafted by an individual who supported the Freedom Charter. We simply do not know at all who drafted it, when it was drafted or for what purpose it was drafted. (10)

COURT:. But then in J.1 you have a direct reference to the Freedom Charter?

MR CHASKALSON: It clearly was a discussion at that stage in regard to the Freedom Charter at the meeting. That I have already drawn your lordship's attention to. There was a discussion of the Freedom Charter at that meeting and a decision not to depart from the policy which was that the Freedom Charter should not become the policy of the UDF and I will find the document later where they deal with the question of pressure on some affiliates to adopt the Freedom Charter. Now we do not know anything about C.2 other than where it was found. We do not know, and there is simply no support for the proposition that it was considered such an important document that it was distributed to the affiliates for their information. There is just no evidence to support that. (30)

Well /..

Well, I have been shown one exhibit, it happens to be nearby. It is EXHIBIT C.3, a letter dated 13 September where there is reference to the fact that many of the activists have asked the following question: Why does the UDF not become a Freedom Charter front? But there are other passages which I will find your lordship and will refer to.

What I want to say to your lordship now is that what is said to be in C.1 does not appear in C.1. That C.1 was not a policy document, it was an input paper. There is no evidence that C.2 was considered so important that it had (10 to be distributed; there is no evidence about its origin at all. We do not know why it was prepared, who prepared it or for what purpose it was prepared. All we know is where it was found. It may have been that there were certain people who were wanting to push the Freedom Charter. There could have been all sorts of reasons for it, I simply do not.. what I want to say to your lordship is there is just no evidence at all on which that proposition which is made in paragraph 1.1 can be accepted. It might have been sufficiently important to distribute to one or two people. We do not know whether they asked for it or not, we do not know what happened; we do not know what led up to it. All we know is where it was found.

Then your lordship will see that the next document which is relied upon is EXHIBIT C.130. Of course as far as EXHIBIT C.2 is concerned one would know nothing about it for the common law offences other than that it was a document found with someone, whatever inference one might draw from that. But paragraph 1.2 then refers to a document EXHIBIT C.130. It is said to be a letter to the ANC from Curtis Nkhondo. (30



It does say that it is a letter to the ANC, it is a handwritten letter.

COURT: Is it handwritten?

MR CHASKALSON: I beg your pardon?

COURT: It is typed?

MR CHASKALSON: No, it is handwritten. Your lordship has a typed copy.

COURT: I see, I have a typed copy?

MR CHASKALSON: Yes. It was in fact handwritten m'lord, there is a typed copy. It is addressed to: "Dearest sister and comrade". Now it may or may not have been written to the ANC but it is not really relevant. First of all it is not admissible at common law. The handwriting of the document has not been proved and so for the purposes of the common law counts your lordship must simply ignore the document. It has not been proved at all, but in any event if one reads the document it is apparent that it was written in 1981. Now if it was written in 1981 the fact that Mr Nkhondo some two or three years later became associated with the United Democratic Front does not give any evidential value to the letter. (10) It cannot be put forward as an executive statement of someone alleged to be party to the UDF conspiracy. And it cannot be used for any purpose against the accused in this case. (20) COURT: Let us just pause there a moment. As far as the truth of the allegations in the document is concerned - it cannot be used as an executive statement because it cannot be .. there was no conspiracy according to the indictment. Can the letter not afford a glimpse into the character of the writer if it is proved that Mr Nkhondo was the writer; that is a different matter. (30)

MR CHASKALSON: Yes, I do not know how it helps your lordship.

COURT: Well, it may or may not be relevant, on admissibility.

MR CHASKALSON: Not on the common law count because it has not been proved that Mr Nkhondo was the writer.

COURT: But on the basis that it was proved that he was the writer..(simultaneously)

MR CHASKALSON: If it was proved that he was the writer..

COURT: If one takes that can one - you cannot use it as proof of the statements because it is not an executive statement and there was no conspiracy at the time. Can it be used (10 for any other purpose?

MR CHASKALSON: I would think on the ordinary principles you could not receive it because what Mr Nkhondo may or may not have thought in 1981 is not really relevant.

COURT: On the basis of relevance, if it is relevant is there any other objection?

MR CHASKALSON: If it were relevant and if it were shown that Mr Nkhondo could use it then on ordinary principles it would be admissible. I am saying it is neither relevant nor shown that Mr Nkhondo wrote it, for the common law crimes. So (20 it is not receivable on the common law charges. On the statutory charges it falls within the scope of section 69(4) and so it would be admissible for a limited purpose under section 69(4), not as an executive statement of the conspirators but for whatever use one could make of it. Now what use does the state seek to make of it? The state says that it shows he has communicated with the ANC the principles upon which the UDF bases its struggle. Now that with all respect is a ridiculous proposition. The UDF was not in existence in 1981, it had not been thought of in 1981. How a letter (30 written / ..

written in 1981 could be said to demonstrate the principles upon which the UDF bases its struggles - there is just no logic which justifies that assumption. It is a letter written two years before the first steps were taken to establish the UDF. At the most it would show - at the very most it could show Mr Nkhondo's personal views as at 1981.

COURT: Well, can it not show you that as at 1981 he was let us say a propagist or propagandist for the ANC's views possibly?

MR CHASKALSON: I do not know if one could go that far, but (10 it could show that at 1981 he held certain views.

COURT: Yes, in August 1981.

MR CHASKALSON: Yes, we also know from the evidence that in 1978 he was the first president of AZAPO and we know that certainly between 1978 and 1981 he had changed his views - we do not know when exactly he resigned from AZAPO but we know that in 1978 he was the first president of AZAPO. We know certainly within a period of a couple of years he had changed his views so that he referred to AZAPO's policies as (20 Also in the letter there is a statement that adhering to the Freedom Charter "is the only way we can mobilise the masses. Any deviation from this is in my humble opinion a complete betrayal of the struggle for liberation". Well, one thing is absolutely clear, one thing that the UDF did not do was to mobilise the masses on the basis of the Freedom Charter, so what use the state seeks to make of this I do not know. It is in our submission not admissible on the principal count, it has no evidential value we submit on the statutory counts. The most it can say is that Mr Nkhondo, assuming that we make the leap which the state (30

does / ..

does, that this is a letter written to the ANC; assume it to be, the most that you can conclude from that is that one of the persons who became associated with the United Democratic Front two years later was a covert - had covert connections with the ANC and I do not know how that advances the state case at all. There is nothing to show that anybody was aware of this letter, that anybody knew of Mr Nkhondo's communications in 1981; whether he still held these views in 1983 and if he did whether they were known to anybody, but it was put to Mr Lekota in volume 292 page 16 279 and his answer (10 was this:

"No, I have no knowledge of Mr Curtis Nkhondo's connection with the ANC if there was any. I do not know that he supported the ANC at the time that was put to me by the state. If, however, that is the position that had nothing to do with the UDF. He has never informed us about it, we never sanctioned it. We did not know about it and certainly if he had links with the ANC he would not have had those links on behalf of the UDF. Perhaps the fact that this was in (20 1981 may also show that it has nothing to do with the UDF."

and that is the evidence. Our submission to your lordship is that that letter is of no value whatever in this case and you can draw no inferences which are in any way adverse to the accused. Indeed, if you show that Mr Nkhondo was part of the ANC the furthest it would ever take the case, if it was shown that he was still part of the ANC, make that assumption in 1983 that amongst people who were in the UDF was one person who had a connection with the ANC. We do not know (30 what / ..

what that connection was and we do not know whether it still existed in 1983 but even assuming it was there, it does not help the state. If anything it hampers it because it would show that there might be one or two people within the broad membership of the United Democratic Front and its affiliates who had connections with the ANC. It does not take the next stage which is, therefore, because there are one or two people who had connections with the ANC, therefore the UDF is an ANC front; therefore the policy of the UDF is to overthrow the state by violence. It cannot possibly bring you to (10 that stage. It merely shows that there may be people who are carrying out the exhortations of the ANC to try to get into the UDF and your lordship will remember the passage that I wrote to you at the very beginning of my argument, the passage which is relied upon by the state from the Dawn publication: try and get into the..the only way we can influence the UDF is to hold, to get office with it. That is the furthest it would take the state's case. It is really of no evidential value whatever in this case. I cannot go beyond 16h00, m'lord. (20

THE COURT ADJOURNS UNTIL 25 AUGUST 1988

## **DELMAS TREASON TRIAL 1985-1989**

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