

1 Wednesday, 3 December 2008

2 (10.00 am)

3 THE CHAIRMAN: Good morning, ladies and gentlemen. Welcome
4 to the Baha Mousa Inquiry. This is our first directions
5 hearing and at the outset, I would just like to make
6 a few preliminary observations.

7 First of all, I would like to thank and compliment
8 Lee Hughes, and also his staff, for preparing this room.
9 If you had seen it about three weeks ago, you would have
10 been astonished now to come in and see
11 the transformation. I very much hope it will provide
12 a convenient and comfortable working environment for
13 the Inquiry. I daresay as we go along, particularly in
14 the oral hearings, there will be various matters which
15 we will discover that can be improved upon and we will
16 endeavour to make any improvements or deal with any
17 issues which you may raise during the course of the
18 hearings. The amount of work that has been done on it
19 has really been tremendous and I would like to thank
20 the Secretariat very much for what they have done.

21 Just to say this, and one or two other observations:
22 this is our first directions hearing. There will be
23 a second directions hearing and I will give you the date
24 of that before we finish this hearing. In all
25 probability, we shall have a third hearing before

1 the oral hearings take place.

2 For today, I propose to take the items on the agenda
3 in the order in which they appear. I think you have all
4 been circulated with the agenda, but you have, I hope,
5 got copies of it if you have not brought them with you
6 on your desks.

7 I shall ask counsel to the Inquiry to introduce each
8 of the items and to address me first on them and then
9 I shall listen to any representations which need to be
10 made by any of those who are here present on behalf of
11 individual groups or on behalf of individuals. There
12 are at present, as I understand it, and it is the first
13 item on the agenda, some issues in relation to
14 representation. It is the first item on the agenda.
15 We will come to it in a moment.

16 Without in any way committing myself or anyone else
17 on these issues, for today I am prepared to hear or to
18 listen to one counsel for each group or individual
19 represented before me this morning.

20 The next thing I want to say is that I have
21 carefully read the written representations made by all
22 of you, for which I may say I am very grateful. I shall
23 not expect counsel to repeat what is in
24 the representations; merely, if necessary, to amplify or
25 clarify any particular point that they want to, or

1 indeed to raise an issue or deal with an issue that is
2 raised by counsel for the Inquiry or a request from me.

3 The final thing that I want to say before going on
4 to the first item on the agenda is this: as far as I am
5 concerned, you may stand or sit to make submissions to
6 me. When it comes in due course to cross-examining
7 witnesses, equally you may stand or sit. It is entirely
8 up to you.

9 Very well, we will take the first item on the
10 agenda, representations. And I shall ask Mr Elias,
11 counsel to the Inquiry to make a few preliminary
12 observations about it. Yes.

13 MR ELIAS: Thank you, sir, may I then introduce counsel that
14 are present today and for the record simply record
15 the fact that I appear with my learned friends
16 Mr Nicholas Moss and Patrick Halliday as counsel for
17 the Inquiry.

18 The family of Baha Mousa and the detainees are
19 represented by my learned friends Mr Rabinder Singh and
20 Miss Tessa Hetherington. Soldiers represented
21 at present by the Treasury Solicitor; Mr Neil Garnham
22 and Mr David Evans appear today.

23 Soldiers represented by the solicitors
24 Kingsley Napley are represented today by my learned
25 friend Mr James Dingemans and Miss Clare Dobbin and we

1 understand, as I think you know, sir, that Mr Dingemans
2 is to lead on the legal issues in relation to
3 the grouping that we have been calling the
4 Court Martial 7.

5 As far as the Court Martial 7 are concerned, they
6 are represented today in this way: Colonel Mendonca by
7 my learned friend Mr Timothy Langdale; Major Peebles by
8 my learned friends Lord Thomas and Mr Dingle Clark;
9 Warrant Officer Davies by Mr Jeremy Carter-Manning and
10 Mr Mark Ashley; Sergeant Stacey and Kingsman Fallon by
11 my learned friends Mr Jeremy Baker and
12 Miss Fiona Edington. Mr Donald Payne is today
13 represented by Mr Andrew Scott and Lance Corporal
14 Crowcroft by my learned friends Mr Richard Ferguson and
15 Mr William England and finally, the Ministry of Defence
16 is represented by my learned friend Mr David Barr.

17 THE CHAIRMAN: Yes, thank you.

18 MR ELIAS: I hope, sir, I have left no one out.

19 Representation issues

20 Agenda item 1 is the representation issues. May
21 I briefly simply say this.

22 Sir, as we understand the position, detailed
23 arrangements for the representation of the detainees
24 have been presented to the Inquiry and they are
25 receiving consideration in the usual way. The position

1 with regard to the soldiers and particularly the
2 soldiers which, as I say, we have been calling the
3 Court Martial 7, their position before the Inquiry
4 remains more problematic.

5 We know that that attempts have been made to achieve
6 a situation where the number of parties is confined to
7 manageable proportions and that groupings commensurate
8 with the need to provide fairness for all are achieved
9 and we also know, as you do, sir, that the lead in this
10 area has been taken by Mr Steven Parkinson of
11 Kingsley Napley.

12 The result of those attempts are set out in a letter
13 received last Friday from Mr Patel of the Treasury
14 Solicitors and that letter has been circulated to all
15 parties.

16 If we may, we respectfully remind the Inquiry and
17 all parties of your powers and duties, sir, in this area
18 to ensure that parties with similar interests or relying
19 on similar facts are to be jointly represented, unless
20 it would be unfair so to order.

21 The convention that an employer or former employer
22 provides legal representation for an employee appearing
23 before a public inquiry has effectively been set in
24 train by the Ministry of Defence and it may be
25 appropriate today, sir, for you to ascertain where that

1 process has reached and to set some timetable for its
2 progression.

3 Perhaps I may finally say this: yesterday Mr Barr
4 kindly informed me, but too late in the day for it to be
5 circulated, of a development as far as the Ministry of
6 Defence is concerned and it may be, sir, that you should
7 hear from Mr Barr first?

8 THE CHAIRMAN: Yes, that seems sensible, Mr Barr?

9 MR BARR: Sir, the position is that the Ministry of Defence,
10 as my learned friend Mr Elias has correctly indicated,
11 is that the Ministry expects to follow the usual
12 convention of funding the legal representation of
13 soldiers who appear before the Inquiry.

14 THE CHAIRMAN: Yes.

15 MR BARR: In relation to those soldiers who were court
16 martialled and acquitted, you will have read, sir, from
17 Mr Patel's letter, how matters are being progressed.

18 As far as the funding of their representation is
19 concerned, the Ministry intends to seek a robust
20 agreement with those concerned, to fund their
21 representation, an agreement perhaps modelled on
22 the protocol which the Inquiry itself has produced, for
23 funding arrangements.

24 THE CHAIRMAN: Yes. What about Mr Payne?

25 MR BARR: Mr Payne, as a soldier who was convicted is

1 perhaps in a unique position and it may well be that he
2 is an exception to the usual rule, who may need
3 alternative arrangements.

4 THE CHAIRMAN: By alternative arrangements, do you mean that
5 he may apply for a section 40 award?

6 MR BARR: Yes, sir.

7 THE CHAIRMAN: That is all you want to say, is it, at this
8 stage?

9 MR BARR: At this stage, yes, sir.

10 THE CHAIRMAN: I just want to ask one or two questions of
11 you, for the moment. It may be that you are the wrong
12 person to ask this question of. I gather Mr Parkinson
13 of Kingsley Napley has been coordinating responses from
14 the Court Martial 7; is that right?

15 MR BARR: That is correct, sir.

16 THE CHAIRMAN: As I say, you may be the wrong person to ask,
17 but do you know whether or not he is prepared to go on
18 doing that?

19 MR BARR: I think perhaps it would be best, sir, if
20 Mr Garnham and Mr Dingemans dealt with those points.

21 THE CHAIRMAN: Let's see straight off. Mr Garnham?

22 MR GARNHAM: I hate to begin my appearance at the Inquiry by
23 passing the buck, but I am reluctant to answer for
24 Mr Parkinson given that Mr Dingemans is here
25 representing those people.

1 THE CHAIRMAN: Very well, let us try Mr Dingemans.

2 MR DINGEMANS: As far as I understand, this is a proposal
3 that has come slightly unexpectedly from the Ministry of
4 Defence. Those instructing me were not aware of it
5 until very shortly before we came into this room and so
6 we are not in a position, as it were, to give a fully --

7 THE CHAIRMAN: I would not expect you to commit yourselves
8 completely but I would hope that that situation would
9 continue.

10 MR DINGEMANS: Indeed. The situation as you know after
11 Mr Parkinson spent considerable time dealing with
12 the representatives of the court martial 7, if I can
13 call them that for convenience, is set out in the letter
14 of the 1 December 2008, which represents our current
15 position.

16 As far as anything else is concerned, we will of
17 course attempt to assist everyone in ensuring that
18 the least worst way forward is effected.

19 THE CHAIRMAN: Unless anybody specifically for other
20 soldiers wants to say anything, I am not going to invite
21 representations in respect of that. It may be that it
22 would be better if they did not at the moment. I am
23 simply going to say this about it.

24 In my view, the Court Martial 7, as I shall call
25 them, must continue talking to Kingsley Napley and

1 I hope with the object of reaching a realistic and
2 sensible solution to the representation issue. If they
3 don't, I will need to know why it is that they are not
4 able to accept any funding that the Ministry of Defence
5 is prepared to make when they know what it all entails.

6 I think I should perhaps say one or two things by
7 way of, if you will allow me to do so, provisional
8 views. They are these: there are a large number of
9 people present here today: solicitors, two counsel for
10 most people. If this Inquiry is to be manageable and if
11 it is to be conducted with the costs proportionate, then
12 there has to be, in my view, some rationalisation as far
13 as representation is concerned.

14 So I do urge all parties to do their level best to
15 come to some sensible conclusion. Perhaps I might also
16 just add this: as far as the level of representation is
17 concerned, and if I may express what is a provisional
18 view and I stress, only a provisional view, it would
19 seem to me that there will need to be some combination
20 between the soldiers and the Court Martial 7 and indeed,
21 as far as any individuals are concerned, if they are to
22 remain as individuals, then in my view -- and it is
23 a purely provisional view -- the level of representation
24 would or may well be for one counsel and one solicitor.
25 I stress: a purely provisional view. I will need to be

1 persuaded and to be informed about all these matters.

2 Now as I say, I think it is probably best if none of
3 you say anything and I hope you will get on in the time
4 available to try to reach a solution. I would like to
5 know by 15 December, which is a Monday, at the end of
6 the day, what the up-to-date situation is.

7 There must be some resolution as soon as possible.
8 Now, as I say, I am not encouraging anybody else to say
9 anything. If anybody specifically wants to make some
10 observation, I will of course listen to it.

11 Right, I shall take silence as nobody wants to say
12 anything at present. Thank you very much.

13 Very well, we will go on to the next item on
14 the agenda which is representations in respect of
15 undertakings.

16 Undertakings re domestic courts and proceedings

17 May I just again say this before I invite Mr Elias
18 to say something. I have read the written submissions.
19 I do not propose to make public any decision I make
20 today. I will give my decision in writing at a later
21 stage, as soon as possible.

22 I am not going to invite lengthy submissions from
23 those who have put in written representations. You can
24 take it that I have read the written representations and
25 read them carefully. By all means amplify, clear up any

1 ambiguities you may perceive or answer any question, but
2 I do not expect to have lengthy submissions on those
3 this morning.

4 If I do not mention in any of your submissions any
5 specific point, please don't think that it necessarily
6 means I accept what is in the written submission; it
7 merely means that I have read it and I shall take it
8 into account when making my decision.

9 One final general remark: I have been provided with,
10 on this issue, six lever-arch files of authorities.
11 I am of course extremely grateful for that volume of
12 authorities. May I just invite you next time we have to
13 have submissions of this sort to see if you can reduce
14 the volume to a very slim core bundle of authorities.
15 That would be helpful. Thank you very much.

16 Mr Elias?

17 MR ELIAS: Thank you, sir. May I then deal with item two in
18 two parts, what we are calling the Attorney General's
19 undertaking and any possible extension to that and then
20 an undertaking in relation to administrative
21 proceedings. I will deal, if I may, with the first part
22 of the Attorney General's undertaking and simply remind
23 parties that prior to your opening statement and for
24 the reasons that you set out in it, an undertaking was
25 sought from the Attorney General with a view to

1 assisting the search for the truth.

2 At that time, this undertaking was felt to be
3 the least which the Inquiry felt appropriate to aid its
4 fact-finding role but the Inquiry was reluctant to go
5 further at that stage without allowing the parties an
6 opportunity to consider the position.

7 Now, that opportunity has of course been given and
8 the soldiers' teams, as you know, sir, have submitted
9 that a wider undertaking should now be sought: broadly
10 to preclude the use of any material provided to this
11 Inquiry for the purpose of further investigation and/or
12 deciding whether to bring criminal proceedings.

13 The soldiers' teams point to some authorities that
14 suggest that without this, the rights to decline to
15 answer questions, the privilege against
16 self-incrimination, may remain for some soldier
17 witnesses.

18 Mr Singh's submissions accept that the privilege may
19 go this far, and it seems in the spirit of supporting
20 the successful outcome of what he refers to as
21 the Inquiry's fact-finding role, he accepts that an
22 amended undertaking may appropriately be sought.

23 We don't, wish, sir, to counsel a different course
24 and bearing that in mind, we have drafted and circulated
25 with the agenda an amended possible extension to

1 the Attorney General's undertaking which we believe
2 would meet the position contended for.

3 That is all we say on that aspect of the
4 undertaking. But there are two related matters which
5 perhaps I may briefly comment upon at this stage.

6 It is suggested that an undertaking should be sought
7 from the Attorney General that the evidence given by any
8 witness to the Inquiry be not used by way of hearsay
9 evidence against any other witness to the Inquiry.
10 Mr Dingemans' and Mr Garnham's submissions in particular
11 make that point.

12 The rationale for such an undertaking is said to be
13 that if witnesses are encouraged to be frank and to be
14 honest, they must be sure that their evidence will not
15 be used against their colleagues.

16 It does not, however, appear to be suggested that
17 without such an undertaking, the right to refuse to
18 provide evidence on this ground is raised, but it is
19 said, rather, that the wall of silence, as it has been
20 referred to, might thereby be broken down.

21 Mr Singh, on the other hand, in his submissions
22 describes the request for such an undertaking for these
23 reasons as, and I quote him, "a staggering and deeply
24 disappointing threat".

25 The Ministry of Defence oppose such an extension in

1 the submissions of Mr Barr as being an unwarranted
2 fetter on the system's ability to bring a person
3 suspected of criminal justice to account and further,
4 they contend it is not a necessary step in the Inquiry's
5 search for the truth. We would simply comment at this
6 stage that we are unaware of such an undertaking being
7 given in any Inquiry hitherto and no one suggests there
8 is any authority that it should be sought in
9 the circumstances of this Inquiry.

10 There is a third related matter: it is suggested
11 that the Attorney General's undertaking be, as it were,
12 replicated by the Director of Public Prosecutions.
13 I will not go into the reasons, they are set out in
14 the submissions. We would simply say this, sir: it may
15 be that that would not be a problem but we ask whether
16 it is necessary, having regard to the fact that the
17 Attorney General acts for the government and it is
18 inconceivable either that any Director of Public
19 Prosecutions taking over the prosecution function would
20 ignore such an undertaking or that a court would not
21 have regard to any prosecution in the face of such an
22 undertaking as being an abuse of process. And that is
23 a view which is forcefully put forward in
24 the submissions of Mr Barr for the Ministry of Defence.

25 So, that is what we seek to say in relation to

1 the Attorney General's undertaking.

2 THE CHAIRMAN: Thank you very much.

3 Mr Dingemans, I think it is probably convenient if
4 you speak first on this matter?

5 MR DINGEMANS: Sir, can I then deal with the two contentious
6 parts of that, the undertakings?

7 First of all, the Criminal Justice Act hearsay
8 extension: my learned friend Mr Singh rightly makes
9 the point that this does not engage directly
10 the privilege against self-incrimination but
11 undertakings in the past offered by inquiries have never
12 been so limited to simply the question of privilege
13 against self-incrimination. In the Hutton Inquiry and
14 in the Bloody Sunday Inquiry, as your Lordship well
15 knows, administrative undertakings were provided which
16 went beyond the privilege against self-incrimination.

17 THE CHAIRMAN: Can we deal with that in a moment?

18 MR DINGEMANS: Exactly, my Lord, but it meets the point that
19 my learned friend Mr Singh is relying on, namely that
20 your powers and undertakings should mirror the privilege
21 against self-incrimination and the reasons we
22 respectfully submit that justified the administrative
23 undertakings in the Hutton Inquiry and the Bloody Sunday
24 Inquiry apply to this direct undertaking that we request
25 in relation to the hearsay provisions, namely to

1 encourage the frank exchange of evidence to the Inquiry.

2 My learned friend Mr Singh has described, as my
3 learned friend Mr Elias has referred to, the request for
4 this undertaking and the implicit threat, he says, as
5 "staggering and deeply disappointing".

6 May I make it perfectly plain: Those instructing me
7 have had no direct contact with any of the soldiers.
8 The Court Martial 7, as your Lordship has already
9 pointed out, are today represented by their own
10 individual representatives, and the other soldiers have
11 not yet been identified. This is so that when those
12 instructing me do go and contact and interview directly
13 the soldiers, they will be able to ensure them and
14 provide them with the fullest possible reassurance.

15 A point that has been made in my learned friend
16 Mr Singh's submissions is well, this is all contrary to
17 the international law and international abhorrence of
18 torture, suggesting that all of these persons, and
19 Kingsley Napley represent those who appear to have
20 witnessed what took place, were involved in the event,
21 which of course is nothing to the point.

22 These are not necessarily people who will have
23 themselves engaged in any wrongful acts. And for those
24 reasons we do respectfully submit, unprecedented though
25 it is, this is a perfectly proper extension of the

1 undertakings which have been provided.

2 THE CHAIRMAN: Just before you sit down, have you seen what
3 Mr Elias says is a possible extended undertaking from
4 the Attorney General?

5 MR DINGEMANS: Yes, sir, I have.

6 THE CHAIRMAN: It does not deal with your section 116 point,
7 the hearsay evidence, but it deals with your other
8 point. Have you any comments to make about that?

9 MR DINGEMANS: No, the first point I am happy with and don't
10 address. The second point I have just addressed, which
11 is the hearsay point. The final point on the Attorney
12 General's undertaking is whether there should be an
13 extension from the DPP. Can I just address that very
14 briefly.

15 THE CHAIRMAN: Yes.

16 MR DINGEMANS: I think my learned friend Mr Elias' point
17 was: what is the point? If one is to give the fullest
18 possible comfort to persons about to be interviewed,
19 rather than saying, well, the legal effect of the
20 Attorney General having provided this undertaking is
21 very likely to bind the DPP when the DPP becomes
22 responsible for prosecution functions and you will also
23 have an argument for abuse of process, but everyone is
24 saying in those circumstances they are not going to
25 provide you the undertaking, you may well understand

1 that people misunderstand or misappreciate the true
2 extent of the undertaking being offered.

3 We respectfully submit that if there is nothing
4 between the two, then there is no harm in getting, in
5 view of the forthcoming constitutional reorganisations
6 that are likely to take place between the distribution
7 of prosecution functions between the Attorney and
8 the Director, absolute clarity on the point.

9 THE CHAIRMAN: Is there force in the argument that is put
10 forward on behalf of the Ministry of Defence, that
11 realistically, any DPP who is given those powers, if he
12 is given them in a due constitutional rearrangement as
13 you describe, it would not go against an Attorney
14 General's undertaking?

15 MR DINGEMANS: We do respectfully submit that when you are
16 talking with issues which are engaged, for example, what
17 is torture, what is the State's duties to cooperate, if
18 you look, as you will have done, at some of the articles
19 that have been written about human rights obligations,
20 then it is perfectly possible for a new director to come
21 in and misappreciate that his international obligations
22 compel him to take a task which is different from that
23 promised by the Attorney.

24 THE CHAIRMAN: When you say misappreciate, what do you mean,
25 make a mistake? Then you would judicially review him.

1 MR DINGEMANS: Yes. We would submit that my learned friend
2 Mr Barr's analysis would be right. You shouldn't do
3 that, but you only need to look at what has happened in
4 relation to indemnities that have been offered in
5 the past.

6 For example, Argentina, in an attempt to draw a line
7 under their problems, offered undertakings which were
8 then held not to be binding in Mexico.

9 Now, whether there is exact parity of course is
10 a different point, but if one is to say to the soldiers:
11 there is no risk of this, why not, we respectfully
12 submit, make it absolutely crystal clear and if
13 the answer is, well, you would need to seek a judicial
14 review, we are at the end of the day trying to avoid
15 further costs, rather than encourage them.

16 THE CHAIRMAN: True. Thank you very much. Mr Garnham, do
17 you want to say anything?

18 MR GARNHAM: Sir, only very briefly. As to the proposed
19 amendment to the Attorney's undertaking, we would submit
20 nothing further. We would be entirely content with what
21 Mr Elias has suggested.

22 As to the suggestion that the Inquiry invite the DPP
23 to repeat the Attorney's undertaking, I echo and adopt
24 what my learned friend Mr Dingemans has said.
25 The rationale behind such an approach is the practical

1 one of enabling those who are acting for soldiers better
2 to reassure soldiers that what all the lawyers
3 anticipate will be the outcome will indeed be the
4 outcome. I take it no further than that, Sir.

5 THE CHAIRMAN: Thank you.

6 MR GARNHAM: As to the suggestion of an undertaking in
7 respect of administrative action --

8 THE CHAIRMAN: Can we deal with that in a moment? At the
9 moment I am trying to deal with the first part of it.

10 MR GARNHAM: Then I say nothing else.

11 THE CHAIRMAN: Thank you very much. Does anybody else for
12 any of the soldiers or group of soldiers wish to say
13 anything in addition to that which Mr Dingemans and
14 Mr Garnham have said? Thank you very much.

15 Now, Mr Singh?

16 MR SINGH: Sir, thank you.

17 Can I deal with the relatively uncontentious matters
18 first?

19 THE CHAIRMAN: Yes. Well, I have read what you have said in
20 your representations and I do not imagine you want to go
21 any further than that?

22 MR SINGH: No. Sir, that is right. In relation to the
23 suggested extended undertaking from the Attorney General
24 which we have seen in draft, like the other counsel you
25 have heard from, we are content with that.

1 In relation to possibly seeking undertaking from
2 the DPP we have said in writing that we have no
3 objection to that.

4 THE CHAIRMAN: I noted that.

5 MR SINGH: Having heard and now read Mr Barr's submissions
6 in particular and having heard counsel to the Inquiry,
7 we see force in their point that it is virtually
8 inconceivable in practice and as a matter of law, it
9 would no doubt be regarded as an abuse of process if
10 there were ever to be a --

11 THE CHAIRMAN: Certainly a substantial risk.

12 MR SINGH: A substantial risk of that. Sir, we see force in
13 those arguments, I do not wish to say anything further
14 but you have seen what we have in writing.

15 THE CHAIRMAN: I have indeed.

16 MR SINGH: As far as the main point which is in contention
17 goes which relates to --

18 THE CHAIRMAN: That is the hearsay point?

19 MR SINGH: It is. I just want to respond if I may to the
20 two main points which Mr Dingemans has made this
21 morning. The first was that as a matter of principle,
22 undertakings at inquiries need not be limited to
23 circumstances where there would be a legal right against
24 self-incrimination.

25 Now, sir, I hope that it is clear from our written

1 submissions that in any event, I make clear now that
2 we accept that, as a general principle. They need not
3 be so limited but nevertheless, we remind the Inquiry
4 that in our submission, a balance needs to be struck
5 between the fact-finding role of an Inquiry and
6 the accountability role of an Inquiry. Now, some of the
7 Inquiries to which Mr Dingemans has made reference, for
8 example the Hutton Inquiry as I understand it were not
9 Inquiries which were in any way fulfilling the article 2
10 and article 3 obligation to have an effective
11 investigation into allegations that a death or
12 ill-treatment may have been caused by agents of the
13 State.

14 So, we respectfully remind you, sir, that in this
15 context, there is that very important factual
16 background, that one major reason why we are all here is
17 because, in our submission, there have been arguably at
18 least violations of articles 2 and 3, and that that that
19 requires the Inquiry to be able to hold people to
20 account in due course, if that is appropriate.

21 We do recognise that you also have to balance that
22 against your ability to get to the bottom of the facts
23 as fully as possible.

24 THE CHAIRMAN: Yes.

25 MR SINGH: But we don't accept that this undertaking which

1 it is accepted is unprecedented is required to fulfil
2 that correct balance.

3 Sir, the second main point that Mr Dingemans has
4 made is in relation to international law and in relation
5 to torture in particular and the submission he made was
6 that some or all of these people may not themselves have
7 been engaged in wrongful acts at all.

8 So be it. This Inquiry at this stage of its
9 proceedings does not know what happened, does not know
10 who was responsible, and it may well be that witnesses
11 who are themselves not directly implicated in wrongful
12 acts nevertheless have useful things that the Inquiry
13 needs to know about in relation to the acts of others.

14 As I understand it, the extension which is sought,
15 the unprecedented extension sought would mean that if
16 such a witness gave evidence about the wrongful acts of
17 another person, that it could not be used in relation to
18 the other person.

19 THE CHAIRMAN: That is as I understand the article.

20 MR SINGH: We submit that is an extension too far. It would
21 be an important fulfilment of international obligations
22 that if appropriate and if necessary, that is how
23 the evidence emerges, that there were wrongful acts, for
24 example of torture committed by someone, that subject to
25 the safeguards that there are in the Criminal Justice

1 Act 2003 as to the admissibility of hearsay evidence at
2 all, that subject to those safeguards, that evidence
3 ought to be available if that is appropriate in a future
4 criminal trial.

5 So, sir, those are the points I wish to make.

6 THE CHAIRMAN: Thank you, Mr Singh.

7 Now, I think, Mr Barr, I have again read your
8 representations. Is there anything you want to add to
9 those?

10 MR BARR: Very little, sir. I can say as far as
11 the proposed extended undertaking from the Attorney
12 General, helpfully set out in the note circulated by
13 counsel to the Inquiry, the Ministry does not oppose
14 that. And I have nothing to add in relation to what
15 we have said in writing about the DPP or the hearsay
16 point.

17 THE CHAIRMAN: Very well. Thank you very much.

18 I think that completes all the representations from
19 people other than the counsel to the Inquiry. Is there
20 anything you want to respond to on that, Mr Elias?

21 MR ELIAS: No, sir, only to say, as you will be aware, sir,
22 there are, as Mr Singh has just mentioned, significant
23 safeguards in relation to the admission of hearsay
24 evidence in our courts in any event.

25 THE CHAIRMAN: Yes, in sections 116, 117 and 114. Yes.

1 Anything else?

2 MR ELIAS: No, sir.

3 THE CHAIRMAN: Well, I will consider all your submissions
4 and representations and in due course, let you know my
5 answer to it. I think I perhaps ought to stress
6 the fact that in relation at any rate to the first
7 extension that is submitted, everybody here either
8 agrees or does not dissent from it. It does not
9 necessarily mean that I must accept it. It is my
10 responsibility. This is not an adversarial proceedings,
11 it is inquisitorial and I shall look at it in that
12 light.

13 Thank you all for that. Can we now get on to
14 the next one, which is what I am going to call
15 the administrative undertaking.

16 MR ELIAS: Item 2.2 (ii). May I briefly say this.

17 Mr Dingemans submits that the Inquiry should seek an
18 undertaking from the Secretary of State I think, as he
19 puts it, of the Ministry for an undertaking that no
20 material provided by a witness to the Inquiry would be
21 used in any administrative proceedings against him or
22 her or otherwise to his detriment in the future. He
23 submits that those witnesses still in the Army may be
24 dissuaded from giving full and frank evidence without
25 such an undertaking in the way that their careers may be

1 blighted.

2 Mr Garnham invites the Inquiry to seek an
3 undertaking which precludes the evidence of one witness
4 being used in this context against any other witness.

5 Others in their submissions support the application
6 for such undertakings and point to the loss of, for
7 example, pension rights as being some possible
8 disincentive to disclose.

9 Lord Thomas for Major Peebles supports
10 the undertaking, suggesting that in particular, his
11 client is in a unique position because of his acquittal
12 by the panel of the court martial and describes it as
13 "seriously unfair" that Major Peebles should face any
14 possible administrative action affecting his future
15 whilst trying to assist the Inquiry. Warrant Officer
16 Davies' lawyers make similar submissions.

17 Mr Singh for the detainees argues against any such
18 undertaking, principally upon the basis that to grant it
19 would be to allow the serious risk of Crown servants
20 having virtual impunity, as he puts it, to place what he
21 describes as a brake on the Inquiry's accountability
22 role.

23 Mr Barr for the Ministry submits that such an
24 undertaking is inappropriate. Sir Geoffrey Nice and
25 Mr Barr argue in their submission on this point that the

1 Inquiry should allow the Ministry to take action where
2 necessary to improve future performance of an employee
3 or in relation to gross misconduct, to allow for that
4 employee's dismissal.

5 It seems then to be common ground that the fact that
6 administrative action may be taken against a soldier or
7 former soldier does not trigger the right to silence.

8 The arguments therefore appear to rest on
9 a considering of the balance between the suggested need
10 to break down any wall of silence with the perceived
11 need to ensure that those held to account by the Inquiry
12 are not given total immunity from any consequences.

13 Again, sir, in the interests of providing a template
14 for discussion, we have drafted two possible alternative
15 undertakings which were sent out with the agenda, which
16 are designed to seek to address in different ways
17 this balance, as I have put it, but we stress of course
18 that in sending it out, we were not indicating whether
19 such an undertaking were appropriate or not. We have
20 drafted it on the basis that if it were thought to be
21 appropriate, this might meet what we might call
22 the halfway house position.

23 Sir, there is a further related matter that I should
24 deal with at this stage. Mr Dingemans refers in his
25 submission to other detriment, something it seems

1 different to administrative action and prays in aid
2 particularly the victimisation provisions in
3 the employment regulations.

4 It is not immediately clear, we have to say, what
5 other detriment is being referred to or how it may be
6 adequately catered for, or that indeed the analogy which
7 he draws with the employment regulations is entirely
8 apposite, for the reasons that Mr Singh expounds in his
9 submissions. Sir Geoffrey Nice and Mr Barr in
10 the submissions for the Ministry oppose such an
11 undertaking on the specific basis that anybody who feels
12 that he or she has been in any way wronged in relation
13 to his or her service for having cooperated with
14 the Inquiry can invoke the Service Complaints Procedure
15 under the Armed Forces Act of 2006. They also point to
16 the fact that no other similar undertaking has been
17 unearthed in any other Inquiries.

18 It seems to us in relation to this matter the scope
19 of and the need for such an undertaking in this regard
20 requires greater justification before they can be given
21 serious consideration and it must be borne in mind,
22 we would submit, even then that liability to further
23 detriment of course affords no right not to answer
24 questions.

25 It may be, sir, that we should leave Mr Dingemans to

1 explore these matters further if he chooses.

2 THE CHAIRMAN: Thank you. Yes.

3 Now, Mr Dingemans, before we go any further, first
4 of all I expect you have seen, have you, Mr Elias' two
5 template undertakings?

6 MR DINGEMANS: I have, sir, yes.

7 THE CHAIRMAN: Secondly, I do not think I have seen in
8 precise terms the undertaking that you are seeking or
9 you are going to ask me to seek on your behalf and it
10 does not seem to me to be quite the same as the one that
11 Mr Garnham is asking for.

12 What I would like to have before me is the precise
13 form of the undertaking that you are asking me to try to
14 obtain on your behalf.

15 MR DINGEMANS: In terms of the administrative undertaking,
16 then, sir, the second one proposed that has been drafted
17 by my learned friend Mr Elias. It seems to us to mirror
18 those that have been -- tailored for these
19 circumstances, but those offered in relation to Bloody
20 Sunday and the Hutton Inquiry.

21 THE CHAIRMAN: Is that therefore one that you would contend
22 for?

23 MR DINGEMANS: Indeed, my Lord. May I just address
24 the wording of the first proposed undertaking.

25 THE CHAIRMAN: Yes, do.

1 MR DINGEMANS: And just identify some potential problems
2 with that. If one looks at the caveat 1, which is an
3 important caveat, but "was involved in or supervised
4 inhuman or degrading treatment or the unlawful death of
5 another" as you will have seen or may have seen from
6 the transcript of the court martial proceedings,
7 the question of supervision and line of control has
8 created all sorts of difficulties.

9 Those will be matters that you will no doubt have to
10 address in the modules. In the context of neglect of
11 duty, that was the charge formulated against some of the
12 Court Martial 7. And in those circumstances, we would
13 contend for the second undertaking.

14 THE CHAIRMAN: If you had to have the first, what would you
15 leave out of it then?

16 MR DINGEMANS: The "supervised" element.

17 THE CHAIRMAN: Otherwise you would accept that, would you?

18 By saying that, I am simply not indicating that it is
19 something that I am going --

20 MR DINGEMANS: No. I entirely accept that. But we would
21 still contend that 2 is obviously in wider terms than 1,
22 because there are exemptions.

23 1 has the question or the difficulty of what is
24 "supervise" and that is especially in circumstances
25 where those instructing me will be representing

1 the soldiers who were there but not necessarily involved
2 in the matters and where the aim of the Inquiry is to
3 ensure that there is the fullest possible engagement
4 with the Inquiry process.

5 Can I just then turn to deal with some points that
6 my learned friend Mr Singh has made and some other
7 points?

8 THE CHAIRMAN: Yes, please do. Before you go on to that,
9 who actually are you asking to give the undertaking?
10 Are you asking the permanent undersecretary or
11 the Secretary of State or the CGS, as has been suggested
12 somewhere along the line?

13 MR DINGEMANS: In some respects, the combination of all
14 three is probably best from the Secretary of State
15 because he combines the political as well as
16 the administrative and the court martials procedures.

17 THE CHAIRMAN: So are you saying both the Secretary of State
18 and the permanent undersecretary?

19 MR DINGEMANS: Those are probably the better targets. I am
20 perfectly happy to listen to any submissions that my
21 learned friend Mr Barr has in respect of that.

22 THE CHAIRMAN: All right.

23 MR DINGEMANS: Certainly in the past they have been.

24 THE CHAIRMAN: I take it you want to get on to the second
25 part of your submissions to answer Mr Singh?

1 MR DINGEMANS: And indeed others. The question is, as my
2 learned friend Mr Elias rightly identifies, the question
3 of balance. We do respectfully submit that if one is to
4 ensure, rather than just hope, that there will be full
5 engagement with the process, it is vital that
6 the soldiers -- and for example for the reasons given by
7 Major Peebles in his short submissions -- are free from
8 the risk of further detriment.

9 My learned friend Mr Singh has said, well, what you
10 can't have is the State, as it were, rewarding in any
11 sense those who have acted wrongly, but particularly for
12 example, the Court Martial 7, they have been tried and
13 save to the limited extends of Corporal Payne's plea of
14 guilty, all acquitted and but for the Inquiry,
15 the process really won't be taken any further forward.

16 Therefore, if one is looking at balance, for all
17 the reasons that were advanced in the Hutton Inquiry and
18 the Bloody Sunday Inquiry we do submit that the balance
19 must lie in giving some further comfort and
20 encouragement to ensure that the truth will out.

21 Can I deal with a specific point that my learned
22 friend Mr Singh has addressed?

23 THE CHAIRMAN: In your original submission, you didn't have
24 in it any undertaking that was precisely the same as in
25 the other Inquiries, which excluded any conduct which

1 would warrant consideration for dismissal or discharge?
2 But you don't ask for that to be excluded; is that
3 right?

4 MR DINGEMANS: No. We are asking for all that the Inquiry
5 will consider appropriate.

6 You had, sir, specifically invited questions on the
7 administrative --

8 THE CHAIRMAN: I did indeed.

9 MR DINGEMANS: And we are asking and making submissions for
10 you to consider in the light of all our submissions,
11 those aspects.

12 It is right that all the other administrative
13 undertakings have had those limitations on them and in
14 relation to those aspects of it, can I just, as I say,
15 deal with a point my learned friend Mr Singh had made,
16 which is that, in the other administrative undertakings,
17 there had been no question of State involvement. Well,
18 we respectfully submit that that is simply not right.

19 When the Hutton Inquiry started, no one had any idea
20 how Dr Kelly had died and the evidence came out in
21 the course of the Inquiry and State involvement was
22 speculated upon by some parties.

23 In relation to the Bloody Sunday Inquiry, then
24 plainly there was State involvement in the shootings and
25 in both of those, it had been thought right to offer

1 administrative undertakings. So we submit that it does
2 not shift the balance away from an administrative
3 undertaking.

4 The question then of the employment regulations was
5 not, as it were, to seek a separate and a different one,
6 but by way of further support for the proposition --

7 THE CHAIRMAN: If I may be permitted to say so, I did not
8 think that that was your best point.

9 MR DINGEMANS: No, but what we do submit, my learned friend
10 Mr Singh has said that the roots of it lay in ensuring
11 that there would not be, as it were, any comeback to
12 those who make complaints. I entirely agree that that
13 is where the roots were, but if you look at regulation
14 4, it goes beyond that. It applies to anyone who comes
15 to give evidence, and it also applies to persons who
16 have given evidence which is false, albeit given in good
17 faith and all of that supports the need and it is really
18 only relied on in this support, for administrative
19 undertakings when you are on a search for the truth.
20 And if one looks at the judgments that have led to
21 the setting up of your Inquiry, that is plainly, sir,
22 what you will be engaged with.

23 THE CHAIRMAN: Thank you very much, Mr Dingemans.

24 Now, Mr Garnham?

25 MR GARNHAM: Sir, thank you.

1 THE CHAIRMAN: You go rather further?

2 MR GARNHAM: Sir, we do. We have set out in our written
3 submissions what we invite the Inquiry to seek. I do
4 not propose to expand on what we have said there, beyond
5 saying this, sir.

6 Fundamental to the work of this Inquiry is
7 the ascertaining of the truth.

8 THE CHAIRMAN: Yes, of course.

9 MR GARNHAM: The question of accountability and sanction and
10 anything of that sort must as a matter of logic follow,
11 but it can only get to first base, once you have
12 discovered the truth. And we submit therefore it is
13 critical to the proper exercise of this Inquiry's
14 function that you devise procedures, as I know is your
15 intention, to achieve that primary objective.

16 THE CHAIRMAN: I am right, it is your paragraph 9 at the
17 bottom, that is your proposed undertaking --

18 MR GARNHAM: It is, sir.

19 THE CHAIRMAN: -- which provides that any witness statement
20 or any statement by a witness cannot be used in any
21 disciplinary proceedings against any other witness.
22 That is very wide indeed.

23 MR GARNHAM: It is undoubtedly wide, sir. And the logic
24 behind it is the same, we would submit, as the logic
25 behind the submissions you have heard about hearsay in

1 criminal proceedings, it is no better and no worse than
2 that. You have those submissions. I do not propose to
3 repeat them.

4 One other thing, Mr Singh in his written
5 submissions, as has been observed already, suggests that
6 our paragraph 9 contains a staggering and disappointing
7 threat. It does no such thing. It contains submissions
8 on the practicality of achieving the primary objective
9 of ascertaining the truth. There is no threat, implicit
10 or explicit, whether staggering or disappointing or any
11 other description, not only because none is there but
12 also because those instructing me and I and my juniors
13 had not seen or spoken to any of our prospective clients
14 at the time this was drafted.

15 This document was drafted with the intention of
16 indicating what we submitted would be appropriate in
17 order to assist the Inquiry in its primary function.
18 Nothing more than that. There is no threat there.

19 So those were the only submissions I wished to make.

20 THE CHAIRMAN: Thank you very much. Does anybody else for
21 any of the soldiers wish to make any additional
22 submissions?

23 Lord Thomas?

24 LORD THOMAS: May I make three points?

25 THE CHAIRMAN: Of course.

1 LORD THOMAS: First of all, as far as I am aware, this is
2 the first time there has been an Inquiry following
3 criminal proceedings, unlike the Hutton Inquiry or
4 unlike the Bloody Sunday Inquiry. Secondly,
5 Major Peebles faced a charge of neglect of duty which is
6 not an offence in civilian life and he was acquitted of
7 that.

8 Thirdly, it follows from that that if he were to
9 face administrative action, as a result of the finding
10 of this Inquiry, it would be putting him in jeopardy
11 twice over; he would have had the matter dealt with
12 twice.

13 I support what has been said about the word
14 "supervised" in the draft of my learned friend
15 Mr Gerard Elias. If one looks at his draft, what is
16 the disjunctive "or", does that mean that someone can
17 supervise the unlawful death of another, but not be
18 involved in it? It seems to me to be a very wide word
19 and as Mr Dingemans has pointed out, the chain of
20 command is very much in issue in this case.

21 THE CHAIRMAN: Yes, thank you very much.

22 Taking the order I did before, Mr Singh?

23 MR SINGH: Sir, thank you. Subject to any questions from
24 you, sir, there are just two points that I would like to
25 make.

1 THE CHAIRMAN: I appreciate that your submissions are that
2 I should not seek any such undertaking.

3 MR SINGH: Yes.

4 THE CHAIRMAN: But supposing I were to, I would like your
5 comments about the proposed ones.

6 MR SINGH: Very well, sir.

7 THE CHAIRMAN: But other than that, you get on with your two
8 points.

9 MR SINGH: Can I deal with that straightaway?

10 THE CHAIRMAN: Yes please.

11 MR SINGH: In relation to the suggested drafts of what might
12 come, if you were to go down this path then, sir,
13 we would prefer the second formulation, rather than
14 the first.

15 As we read it, it is actually a narrower exception
16 to the norm. There is nothing more I would like to say
17 about that, sir.

18 THE CHAIRMAN: No, thank you very much.

19 MR SINGH: Can I respond to two points made this morning,
20 first by Mr Garnham. He submits rightly that one of the
21 main functions of the Inquiry is to get at the truth but
22 as we have said in more detail in writing, the Inquiry
23 has been given by Parliament a range of powers to
24 achieve just that function, and they include where
25 necessary and appropriate, powers of compulsion. They

1 also include the ability to draw appropriate inferences
2 from silence where that is lawful and appropriate. And
3 so, the truth finding function of the Inquiry need not
4 necessarily be impeded by also trying to fulfil
5 the accountability function.

6 THE CHAIRMAN: Yes.

7 MR SINGH: The second point I would like to respond to is
8 from Lord Thomas, when he mentioned the concept of
9 double jeopardy.

10 One of two possibilities may arise as a matter of
11 law. Either it strictly falls within the legal concept
12 of double jeopardy, in which case the law will protect
13 his client, or it does not. And if it does not, as
14 we would submit it would not, then there is no need for
15 this Inquiry to take a further step beyond what the law
16 of double jeopardy in any event covers.

17 THE CHAIRMAN: Double jeopardy has gone in criminal courts
18 but I do not think it has actually gone for the purposes
19 of court martials.

20 MR SINGH: Sir, that is my understanding, on my feet as it
21 were, yes.

22 THE CHAIRMAN: I think one member of the counsel team did
23 a bit of research on that. And it is thought that
24 the new double jeopardy rules do not include court
25 martials so the old double jeopardy in respect of court

1 martial remains.

2 MR SINGH: Yes. Sir, I do not have any reason to differ
3 from that approach.

4 What I understand Lord Thomas to be referring to
5 however is he uses the phrase as I understand him,
6 double jeopardy, in a slightly wider sense, not to refer
7 to --

8 THE CHAIRMAN: To refer to the administrative proceedings.
9 I do see that.

10 MR SINGH: Yes, sir, so we say the law is there to protect
11 his client as far as is necessary and appropriate and if
12 the law does not protect his client, this Inquiry ought
13 not in principle to go further, precisely because it
14 thereby would frustrate or at least impede the proper
15 holding to account of people if eventually it transpires
16 that they did something wrong.

17 THE CHAIRMAN: Yes.

18 MR SINGH: That is all I wanted to say.

19 THE CHAIRMAN: Mr Barr?

20 MR BARR: Sir, I will not --

21 THE CHAIRMAN: You need not say anything if you don't want
22 to, because I have read your representations.

23 MR BARR: I will not repeat my written representations. May
24 I say a very short word about double jeopardy?

25 THE CHAIRMAN: Please do.

1 MR BARR: My submissions are first of all that this would
2 not be a true case of double jeopardy. It is always
3 open to an employer whose employee has been
4 unsuccessfully prosecuted to bring its own internal
5 administrative proceedings against an employee. Of
6 course, there is a very different standard of proof to
7 be applied and my second observation is of course we are
8 not here simply considering soldiers who have been court
9 martialled and acquitted; there are going to be a very
10 large number of military witnesses to the Inquiry and
11 it is possible that there will be findings against some
12 of them which would justify the taking of administrative
13 action.

14 As to the proposed draft undertakings, I am
15 instructed, sir, that it is thought that in relation to
16 civilian employees of the Ministry of Defence,
17 the appropriate person to give any undertaking would be
18 the permanent undersecretary.

19 THE CHAIRMAN: Thank you.

20 MR BARR: In relation to service personnel, it would be
21 the chief of the defence staff. To the best of
22 the understanding of those present, we will confirm that
23 that is the position --

24 THE CHAIRMAN: Thank you, I would be grateful.

25 MR BARR: -- if, sir, you decide to grant an undertaking,

1 contrary to the Ministry's primary submission.

2 THE CHAIRMAN: Thank you very much. I am grateful to you.

3 I think that completes -- oh.

4 MR GARNHAM: Sir, I apologise for rising again. I omitted
5 in my short submissions to indicate what our position
6 would be if you were against us on the width of the
7 undertaking to be sought as between the two drafts
8 prepared by Mr Elias.

9 THE CHAIRMAN: I should have asked you that.

10 MR GARNHAM: Sir, it is my error. If you are against us on
11 our primary submission, we would submit that it is the
12 first of the two drafts that should be sought, deleting
13 the words "or supervised" from sub-paragraph 1.

14 With that amendment, that would then mirror pretty
15 precisely the undertaking that has been sought in other
16 Inquiries that in those circumstances, if you were
17 against us on the primary point, that would be
18 the appropriate one.

19 THE CHAIRMAN: Yes. Thank you.

20 Very well, that I think completes that one. Now
21 we go on to the third of the undertakings which is
22 the international foreign proceedings.

23 MR ELIAS: Before you do that, may we say for the sake of
24 clarity, only this, lest there were any
25 misunderstanding: the second of the alternative drafts

1 was in our view a narrower draft --

2 THE CHAIRMAN: Yes.

3 MR ELIAS: -- covering, if you like, a non-disclosure and

4 the giving of false information in the past. We drafted

5 that upon the basis that it was narrower than the first

6 and I simply say that lest anyone is in any--

7 THE CHAIRMAN: Mr Singh at least detected that.

8 MR ELIAS: I am grateful. Agenda item 3, sir.

9 THE CHAIRMAN: Mr Dingemans, hang on a moment. I will let

10 you have another opportunity to say something but let me

11 hear what Mr Elias has to say.

12 MR ELIAS: Lest there were any understanding, that was our

13 submission.

14 MR DINGEMANS: It is the terrible error of letting lawyers

15 loose on commenting on others' drafts, but there had

16 been a reading of the undertaking 2 which was to this

17 effect, that it covered effectively -- because all

18 the witnesses who had seen or apparently have given

19 evidence by way of earlier witness statements and

20 therefore it was read in a wider sense in some respects

21 than undertaking 1.

22 THE CHAIRMAN: If you want to change to 1, I will

23 understand.

24 MR DINGEMANS: No, no. In any event, our submissions are

25 nothing to the thing in that they are they are for you

1 sir, to consider.

2 That was simply why it had been thought, perhaps
3 wrongly, that a construction of 2 was wider than 1.

4 THE CHAIRMAN: I see. What is your final position then?

5 MR DINGEMANS: Well, sir, as you know --

6 THE CHAIRMAN: I know you say a much wider one altogether,
7 but what is your final position on those two?

8 MR DINGEMANS: The widest that you, sir, will provide to us.

9 THE CHAIRMAN: All right. Thank you.

10 MR ELIAS: Thank you, sir, may we move on to item 3,
11 international/foreign proceedings undertaking?

12 THE CHAIRMAN: Yes.

13 Undertakings/actions re international/foreign courts

14 MR ELIAS: If I may briefly outline the position here:

15 Mr Dingemans, supported by others whilst accepting as we
16 understand it that there is no rights to the privilege
17 against self-incrimination in respect of proceedings in
18 foreign jurisdictions, argues that since the Inquiry's
19 investigations may give rise to considerations of war
20 crimes or breaches of UNCAT, United Nations Convention
21 Against Torture, the Inquiry ought to seek undertakings
22 from the appropriate departments of government to cover
23 broadly the following: that no evidence, document or
24 information given to or before this Inquiry and no
25 record of the proceedings of this Inquiry will be

1 formally or informally transmitted to any foreign State
2 or court or to the international court by the UK
3 government.

4 By extension, Mr Dingemans argues that whether or
5 not an undertaking was obtained, you, sir, have
6 a discretion as to whether to require a witness to
7 answer questions or provide information which may render
8 him or her susceptible to such international
9 proceedings.

10 We would simply say at this stage that is plainly
11 not a matter which needs to be or ought to be determined
12 at this stage because, for example, much may depend upon
13 the question asked and the real risk, if any, attached
14 to answering it.

15 In relation to the main submission, Mr Singh in
16 response has drawn attention to the practical problems
17 of inviting a government to give such an undertaking in
18 the light of what he states to be the government's
19 obligations of providing mutual assistance under, for
20 example, the Torture Convention and Mr Singh contends
21 that in any event, if the Inquiry is to seek to ensure
22 accountability of those responsible for any misdeeds,
23 such an undertaking would run counter to the Inquiry's
24 purposes.

25 Mr Barr for the Ministry submits that there is no

1 material prospect in any event of a witness being
2 prosecuted by the International Criminal Court. He says
3 there is a theoretical but not material prospect of
4 a witness being prosecuted in a foreign country and he
5 argues that as the Inquiry's proceedings will be on the
6 website, as will be the report in due course, any
7 undertaking would be meaningless.

8 Further, he argues any such undertaking would put
9 the United Kingdom Government in breach of its
10 international obligations.

11 Sir, on this matter we confine ourselves to
12 underlining the question as to how great is the risk of
13 international prosecution in reality not least having
14 regard to article 17 of the Rome statute, and we express
15 our concerns as to the practicalities of obtaining such
16 an undertaking, particularly in the light of the
17 government's obligations highlighted in the submissions
18 of Mr Singh in particular, even were such an undertaking
19 thought desirable.

20 In a second related matter, Mr Dingemans seeks to
21 persuade the Inquiry to obtain an undertaking that Her
22 Majesty's Government will provide and fund any legal
23 assistance for any Inquiry witness against whom
24 a foreign State or tribunal seeks to use his or her
25 evidence.

1 Mr Barr in this regard on behalf of the Ministry
2 points to the fact that there is in existence a well
3 established system for providing legal representation
4 for service personnel brought before foreign courts for
5 matters arising during the course of their service. He
6 refers to the Queen's Regulations, chapter 6, annex D.

7 Those are the matters that we wish to open with in
8 relation to this matter, sir.

9 THE CHAIRMAN: Thank you very much.

10 Now Mr Dingemans, I want to ask you one or two
11 questions.

12 First of all, the undertaking that you are inviting
13 me to seek on your behalf is the one that is on page 3,
14 (iii) at the bottom, going over to --

15 MR DINGEMANS: Page 4.

16 THE CHAIRMAN: Is that right?

17 MR DINGEMANS: It is, sir.

18 THE CHAIRMAN: Very well.

19 Can I just ask you this, for a moment? You accept
20 that there is in fact no privilege against
21 self-incrimination in respect of crimes committed in
22 foreign jurisdictions, subject to a possible
23 Brannigan-type discretion and also a section 21.4
24 discretion. Is that right, or not?

25 MR DINGEMANS: That appears to be the current state of the

1 law. The only question will be whether Brannigan could
2 be taken further in the light of the fact that torture
3 is a universal crime.

4 If you look at the reasoning which gave --

5 THE CHAIRMAN: I have appreciated that point, from your
6 submissions.

7 MR DINGEMANS: Yes.

8 THE CHAIRMAN: But that gives rise, you say, to the, as it
9 were, common law discretion; is that right?

10 MR DINGEMANS: That is the common law discretion. Short of
11 the House of Lords or Supreme Court, as it would be by
12 the time this point got there again, then that seems to
13 us to be the law. The question then would be whether,
14 in the light of the fact that this is a universal crime
15 and indeed now incorporated into our domestic law, there
16 would not be the reasoning for restricting the privilege
17 to foreign proceedings when you are dealing with the --

18 THE CHAIRMAN: Again, I have understood that. That gives
19 rise, you say, to the common law discretion?

20 MR DINGEMANS: Yes.

21 THE CHAIRMAN: Mr Singh points out that there appears to be
22 a discretion in 21.4 of the Inquiries Act.

23 MR DINGEMANS: Indeed, sir.

24 THE CHAIRMAN: At any rate, his point is that I ought to, if
25 I am going to say that there is a discretion, deal with

1 it under section 21.4.

2 MR DINGEMANS: We are not inviting you now, for the reasons
3 my learned friend has already given, to make any rulings
4 in relation to questions, because we simply don't know
5 what those questions will be.

6 It is only in relation to the issues of overseas
7 proceedings which will not necessarily be dependent upon
8 questions. Questions will need to be addressed.
9 We thought it right to flag up, I hope as fairly as
10 possible, the issues of the international nature of
11 torture and the international justiciability of it so
12 that everyone knows, indeed and it will be part of our
13 duties to advise the soldiers of those aspects of it.

14 THE CHAIRMAN: Yes I see.

15 MR DINGEMANS: And part of that, the giving of that advice,
16 will be that we can then communicate to those soldiers
17 what steps had been taken, as it were, to meet
18 the potential problems. And it is in that respect that
19 there is the undertaking set out at page 4, as you, sir,
20 have already pointed out.

21 It is absolutely right that it may not in many
22 respects be a complete answer to any prosecutions, but
23 can I deal with the legal objection to the provision of
24 that undertaking, which is that it is said to conflict
25 with the international obligations of the United

1 Kingdom?

2 We respectfully submit not, because without your
3 Inquiry, nothing further will come about anyway. This
4 is to ensure that the truth will out, as it were and
5 that is to ensure that the United Kingdom complies with
6 its international obligations, for example under the
7 European Convention on Human Rights, articles 2 and 3.

8 So to ensure that the government complies with its
9 obligations, it is required to ensure that the Inquiry
10 is effective and to part ensure that this undertaking is
11 given, we would respectfully submit that that there can
12 then be no question that the government has done all
13 that it is required to do, both under the UNCAT treaty
14 and European Convention.

15 It effectively enables you, sir, to export, as far
16 as you can do, the domestic undertakings internationally
17 and we entire accept the limitations of your powers to
18 do that.

19 THE CHAIRMAN: Yes, indeed.

20 MR DINGEMANS: Can I then turn to the question of legal
21 assistance? Again, if the Ministry of Defence's answer,
22 is, well, this is covered by Queen's Regulations in any
23 event --

24 THE CHAIRMAN: Well, that is what is said, yes.

25 MR DINGEMANS: You will have seen the limitations of

1 Queen's Regulations even this morning, when
2 Corporal Payne was not offered the same undertaking that
3 was extended to other soldiers. We respectfully --
4 THE CHAIRMAN: I do not think you need necessarily think
5 that that is a reason for supporting this part of your
6 argument. I do not know what the situation is as far as
7 Corporal Payne is concerned at the moment, but I do not
8 think that necessarily assists you.
9 MR DINGEMANS: But what it does show is that short of
10 undertakings, when you are dealing with Queen's
11 Regulations and the interpretation of Queen's
12 Regulations, you are inevitably into areas where there
13 are proper limitations in that respect. Again,
14 mirroring the point in relation to our submissions on
15 the Attorney's and Director's undertakings, rather than
16 complicate matters, if matters are so clear and it is
17 effectively common ground that this assistance ought to
18 be provided, why not enable us to say in clear terms
19 that this has been provided so that the soldiers can
20 have that comfort and we can as far as possible assist
21 you, sir, in obtaining the truth.
22 THE CHAIRMAN: Thank you.
23 Now, who is next? Mr Garnham?
24 MR GARNHAM: Sir, I have no submissions on this.
25 THE CHAIRMAN: Does anybody else want to make any

1 submissions in favour of the undertaking? Thank you.

2 Mr Singh?

3 MR SINGH: Sir, subject to any questions from you, there is
4 nothing I would like to add to what we have said in
5 writing.

6 THE CHAIRMAN: No, I am grateful. I have read your
7 submissions and I am extremely grateful.

8 Now, Mr Barr, what is the position about funding?

9 MR BARR: The position about funding is as set out in
10 the submissions, the Ministry's understanding is that if
11 the scenario posited by Mr Dingemans were to eventuate,
12 then the Army Legal Aid provisions would apply.

13 THE CHAIRMAN: You also say that in any event, as far as
14 the international court is concerned, they have a great
15 deal on their plate in any event, put shortly, and this
16 does not come within their remit. Is that right?
17 The letter says that they seem to have had a great deal
18 on their plate in any event and this is not so serious
19 as to merit their attention; that is what the letter
20 seems to say, written however in 2006.

21 MR BARR: Which letter is that? The ICC's letter, yes,
22 the prosecutor's letter, yes. I think the point there
23 is that the ICC applies to principle, one of
24 complementarity and one of gravity and put bluntly on
25 either test, the matters which this Inquiry is concerned

1 with are simply going to come nowhere near satisfying
2 that test.

3 THE CHAIRMAN: The other matter I wanted to ask you about is
4 you also have provided the coalition provision authority
5 order. What is the status of that? Can you tell me?

6 MR BARR: My understanding is that it is an order made
7 during the time when Iraq was being administered by
8 the provisional authority and therefore --

9 THE CHAIRMAN: Made by whom?

10 MR BARR: I do not have instructions as to exactly who was
11 in charge of the CPA at the time that that order was
12 made.

13 THE CHAIRMAN: Well, it is signed by Mr L Paul Bremmer,
14 Coalition Provisional Authority.

15 MR BARR: He was in charge of the CPA at the time. It was
16 his authority.

17 THE CHAIRMAN: Would that cover the current Iraqi government
18 now?

19 MR BARR: We submit that it would.

20 THE CHAIRMAN: Why?

21 MR BARR: Because that was the legal status of Iraq's
22 administration at the time and there is no reason why
23 that should not be binding. I can also point that Iraq
24 is not a signatory to UNCAT.

25 THE CHAIRMAN: Yes. Anything else you want to say?

1 MR BARR: I do not want to add anything to the written
2 submissions, sir.

3 MR ELIAS: There is nothing further, sir, that we want to
4 say on this issue.

5 THE CHAIRMAN: Thank you very much. Well now, that I think
6 leaves us with items 4, 5 and 6, does it not?

7 MR ELIAS: Yes, sir.

8 THE CHAIRMAN: We are making good progress and I have every
9 hope that we will finish before lunch. But we are
10 trying out LiveNote and we need now to change writers --
11 I think that is the appropriate way of putting it -- so
12 we are going to have a short break. Shall we say 25
13 past 11, please? And I do like to stick to time.

14 (11.20 am)

15 (A short break)

16 (11.25 am)

17 THE CHAIRMAN: Now, Mr Moss, you are going to deal with
18 anonymity.

19 Anonymity and other protection measures

20 MR MOSS: Thank you, sir. It may be convenient if I start
21 with the reporting restriction orders that were made
22 during the course of the court martial.

23 THE CHAIRMAN: Yes, please.

24 MR MOSS: As you indicated in your opening statement,
25 the presiding judge at the court martial made an order

1 requiring the media not to publish certain features and
2 information in relation to the court martial defendants.

3 You indicated, sir, that if anybody had submissions
4 in relation to that order, then they must be made in
5 writing by 14 November of this year.

6 THE CHAIRMAN: Yes.

7 MR MOSS: The material part of Mr Justice McKinnon's order
8 was in these terms.

9 "In view of the profile of this case and the general
10 security risks associated with anyone who might be
11 perceived to have taken part in operations in Iraq, the
12 press and other media may not report or publish
13 the personal addresses or the area of the country in
14 which they reside of any of the defendants, or their
15 next of kin addresses if different. Any description of
16 the defendants which may lead to the identification of
17 any of them in press and other media reports is to be
18 restricted to their names, ranks and military units
19 only. This restriction remains in force until
20 specifically varied by further order. No image of the
21 face or part of the face of any defendant, with
22 the exception of Colonel Mendonca is to be reported in
23 any media, including but not restricted to newspapers,
24 television or internet to protect the lives and safety
25 of the defendants and their family."

1 And I end the quote there.

2 Sir, if I may then briefly summarise the submissions
3 that have been received on this topic.

4 First of all, Mr Barr on behalf of the Ministry of
5 Defence has indicated that fresh threat assessments have
6 been carried out by JTAC in relation to the court
7 martial defendants and that the threat from
8 international terrorism during the course of the Inquiry
9 has been assessed as low, the definition of which is
10 that an attack is unlikely.

11 Secondly, brief submissions from a number of the
12 Court Martial 7 ask that the restrictions imposed in
13 the court martial proceedings ought to continue.
14 Thirdly and finally, for the detainees, the submissions
15 of Mr Singh did not raise any issue as to
16 the continuance of this order.

17 Sir, given that this was an order made by the judge
18 advocate at the court martial, it is perhaps doubtful
19 whether this Inquiry would itself have jurisdiction to
20 vary or revoke this order, even if the Inquiry were
21 being asked to do so by one of the respective core
22 participants. As it is however, no objection to
23 the continuance of this order has been raised.

24 It is also right to say that the nature of the
25 protection that is granted by the order only restricts

1 the reporting of limited and specified matters. As
2 such, this is not an order that any in any way inhibits
3 the substantive work which is facing this Inquiry.

4 Sir, in those circumstances, I do not propose to say
5 anything more about the order, save to remind parties
6 that in your opening statement you had been advised that
7 this order remains in force.

8 I should for completeness add that in a further
9 order dated 7 December 2006, the judge advocate also
10 prohibited the reporting of the evidence in relation to
11 part of a court martial witness's diaries as was
12 referred to at Day 52 of the court martial at pages 78
13 and 79 of the transcript for that day of the evidence,
14 which was 30 November 2006.

15 Sir, I turn to address the other part of the agenda
16 here, which is the procedures more generally for
17 anonymity and other protective measures.

18 On that matter, you indicated in your opening
19 statement that if there were submissions to be made by
20 other personnel, they too should be made in writing by
21 14 November. Two of the respective core participants
22 made responses in respect of that matter.

23 The first was Mr Byatt in respect of his letter of
24 14 November on behalf of the Ministry of Defence.
25 Mr Byatt suggests first that representations of this

1 sort should be made by lawyers acting for the individual
2 military witnesses themselves.

3 He notes, however, that for what is described as
4 likely to be a small category, MoD may have applications
5 to be made for anonymity or for screening. Mr Byatt
6 explains that the general practice of MoD, however, is
7 to confine such applications to soldiers who serve in
8 special units or who are engaged in other sensitive
9 work, such as the gathering or exploitation of
10 intelligence.

11 Next the Treasury Solicitor team made a specific
12 application in respect of four soldiers described as
13 witnesses A to D. Those applications varied
14 significantly in the types of protection sought. In
15 the case of witnesses B and C, the only protection
16 sought was that their current military posts are not
17 reported and in respect of witness B that the same
18 restrictions should apply to his or her future military
19 positions. In respect of witness D, the only
20 information that was supplied was that the Inquiry was
21 invited to direct that his or her name should not be
22 published. In respect of Witness A, the application was
23 for much wider protection including for his or her
24 evidence to be given in camera, a secure means to enter
25 this building and that all identifying features in

1 relation to Witness A should not be publish or reported.

2 Sir, in respect of each of these applications,
3 the Inquiry then sought the relevant threat assessments
4 through the MoD and asked for greater detail of the
5 grounds of the applications from the Treasury
6 Solicitor's team. In relation to witnesses B and C, the
7 Inquiry indicated that it was your provisional view that
8 the Inquiry would not regard a witness's current
9 military post now as being a relevant area to explore in
10 evidence, unless it involves a responsibility of
11 the issues which will be considered in module 4 of the
12 Inquiry's work. There was then a slight delay, sir,
13 before the Treasury Solicitor's team response which was
14 sent on 26 November.

15 That response has been circulated to all of the
16 legal teams who are present today. In brief summary,
17 the Treasury Solicitor's team has suggested that it is
18 premature to determine the full applications at this
19 time. It is requested that a general procedure should
20 be published by the Inquiry and that the Treasury
21 Solicitor team put forward a possible procedure that
22 might be adopted which would start with the publication
23 by the Inquiry of a list of our prospective witnesses.

24 Sir, there were good reasons for the Inquiry not
25 adopting from the outset the approach that is being

1 advocated by the Treasury Solicitor team, but instead
2 insisted on receiving any anonymity applications at an
3 early stage, indeed by 14 November.

4 First and foremost, the Inquiry was concerned that
5 anonymity applications often involved not just
6 the ability to give evidence under a cipher but also
7 that the witness's name be redacted from documents and
8 witness statements in which the name appears.

9 Sir, if it is necessary and appropriate for that to
10 be done in this Inquiry, then the Inquiry would follow
11 that course of action. It is, however, a very
12 time-consuming process and one that has great potential
13 for slowing down the disclosure to all the core
14 participants, including the Treasury Solicitors team
15 itself of the documents that have been received by
16 the Inquiry.

17 Indeed, given the volume of documents that have been
18 received in this Inquiry, such redactions would be
19 likely to delay the Inquiry by a matter of months rather
20 than weeks.

21 The Treasury Solicitors' team submissions of the
22 14 and 26 November were silent on this practical issue
23 of redactions to documents. Subsequently, however,
24 counsel instructed by the Treasury Solicitor team have
25 very helpfully indicated that they do not seek

1 redactions from documents or witness statements before
2 the documents are disclosed to the other core
3 participants.

4 They wish to leave open the possibility of such
5 redactions being sought before the documents are
6 published more widely, either at oral hearings or on the
7 Inquiry's website.

8 On that basis and strictly on that understanding and
9 because any anonymity applications will not be delaying
10 the disclosure of documents, if you are content,
11 the Inquiry will be able to allow a little more time for
12 anonymity applications to be made, although
13 the timescale still needs to be tightly framed.

14 Sir, the procedure that we as counsel to the Inquiry
15 propose would be as follows: firstly, this week
16 the Inquiry will provide to both the MoD and to
17 the Treasury Solicitor team a provisional list of
18 soldiers who have already been identified as potential
19 sources of relevant information. It needs to be very
20 clearly understood however that nobody should take this
21 list to be anything other than a preliminary indication
22 of soldiers whose evidence has been thus far identified
23 as potentially relevant.

24 There will undoubtedly be a significant number of
25 military witnesses still to be identified and likewise,

1 some soldiers who appear on the list this week may very
2 well end up not being called to give oral evidence at
3 all.

4 In relation in particular, sir, to the wider issues
5 to be considered in module 3 of the Inquiry, it is still
6 very early indeed to be determining what witnesses may
7 need to be called.

8 Secondly, within seven days of receiving this
9 preliminary list, we propose that the Treasury Solicitor
10 team should respond to the Inquiry with a list of those
11 soldiers, if any, who do have anonymity concerns, those
12 who have no anonymity concerns and indicating those
13 soldiers they have not within able to contact.

14 Thirdly, seven days after that, that is by
15 18 December, this list will then be updated by the
16 Treasury Solicitor team in respect of further potential
17 witnesses who have by that stage been contacted.

18 Sir, fourthly, after that stage, the Inquiry will
19 then circulate the preliminary list to the other core
20 participants including to the team for the detainees but
21 without obviously prejudicing any anonymity applications
22 that may be made or the position of witnesses who have
23 not yet been contacted. The Inquiry will at that stage
24 commission threat assessments in respect of any
25 anonymity applicants. Sir, those threat assessments

1 will be addressed to the Inquiry to help the Inquiry to
2 assess the risk to potential witnesses.

3 Any applicants for anonymity will be given an
4 opportunity of course to consider their individual
5 threat assessments.

6 Sir, fifthly, we propose that any anonymity
7 applications themselves must then be received by
8 9 January of next year. Those applications must include
9 any application for name of the potential witness not to
10 be used. They should also include any application for
11 the potential witness to be screened.

12 I would add, sir, though, that if there is
13 a particular reason why that issue of screening should
14 be left over until closer to the time of oral evidence,
15 then the application should specify that that is
16 the case and set out the reasons for it.

17 Sir, I make clear as well that the applications need
18 not for the moment include any application for
19 the evidence to be given in camera, because that is
20 a matter that will need to be considered more fully
21 closer to the time of the oral hearings themselves.

22 Sir, the applications, if I can give this guidance,
23 should be in two parts: an open part for circulation to
24 the other legal teams and a closed part for
25 consideration by you, sir, and by the Inquiry team only.

1 The open part must contain as much of the closed
2 part as is possible without undermining the very purpose
3 of the application. The application, sir, should
4 we suggest set out all of the grounds relied upon,
5 including the personal and professional circumstances
6 which are said to justify the protective measures that
7 are being sought and applications should normally
8 address the question of the extent to which the names of
9 the applicant have already entered the public domain,
10 whether at the court martial or otherwise.

11 Sir, if you are content with that timetable, it is
12 a timetable that will allow the Inquiry to receive any
13 individual anonymity applications in time for them to be
14 circulated in advance of the second directions hearing
15 and if oral argument is needed on the applications, they
16 can be considered at that directions hearing.

17 Sir, because the Inquiry's preliminary list of
18 potential witness shall not be comprehensive, we shall
19 from time to time supply a further update of potential
20 witnesses.

21 Having dealt with many potential witnesses and their
22 applications, if any, in the first tranche however, any
23 further anonymity applications will be expected to be
24 made promptly and to a timetable that will be set out in
25 any updating list of potential witnesses.

1 Sir, I should also add that it has been intimated
2 that some of the detainees may also be contemplating
3 anonymity applications. The Inquiry is grateful that
4 that may be the case. The same considerations that
5 I have set out of course apply equally to them, save
6 that formal threat assessments will not immediately be
7 commissioned by the Inquiry. We propose that any
8 anonymity applications on the part of the detainees
9 should be made by the same date, that is 9 January of
10 next year.

11 Sir, if that timetable and procedure is acceptable,
12 I would add only a few brief submissions about anonymity
13 applications that may be under consideration by my
14 learned friends in the coming weeks.

15 The starting point must be that this is a public
16 Inquiry and ordinarily witnesses will be expected to
17 give witness statements in their own names and if called
18 to give oral evidence, to give that evidence openly in
19 their own names and in public.

20 Sir, there is on any view a strong public interest
21 in the Inquiry conducting its proceedings in as open
22 a way as possible, but consistent with the obligation on
23 the Inquiry to act fairly towards all witnesses.

24 Both the Ministry of Defence in respect of public
25 interest applications and the Treasury Solicitor team on

1 behalf of individual soldiers have already indicated
2 that they believe that the numbers involved in anonymity
3 applications will be few in number.

4 Sir, of course it is right that any such
5 applications will need to be considered entirely on
6 their own merits, but there are a number of reasons to
7 suspect that the number of justifiable anonymity
8 applications may indeed be limited.

9 Sir, first it is relevant to note that even in
10 respect of the Court Martial 7 who might be thought to
11 have a high profile in relation to these events,
12 the updated threat assessments indicate that the threat
13 from international terrorism has been assessed as low.

14 So it is right to observe that there have been over
15 the years some changes in the number of threat
16 assessment levels and their definitions, but this
17 assessment would nevertheless appear to be a lower
18 assessment of threat than that which justified
19 the granting of anonymity in some of the
20 Northern Ireland Inquiries.

21 Second, it is a peculiar and particular feature of
22 this Inquiry that the names of very many of the
23 Inquiry's potential military witnesses, and indeed
24 the civilian witnesses, have already entered the public
25 domain to some extent at least during the course of the

1 court martial.

2 Thirdly, the Inquiry is aware that in some other
3 inquisitorial proceedings, such as inquests into deaths
4 in Iraq, soldiers do not routinely seek or obtain
5 anonymity. So the analogy between such cases and such
6 inquests is not an exact one but it does tend to suggest
7 that anonymity may be very much the exception rather
8 than the rule in this Inquiry.

9 So none of that should be taken as discouraging,
10 still less ruling out individual applications for
11 anonymity or rather protective measures where they are
12 justified by individual circumstances. It does,
13 however, point to the need for such applications to be
14 realistic.

15 Sir, those are my submissions in relation to
16 anonymity. You may wish to hear from any of the legal
17 teams present if they object to that course.

18 THE CHAIRMAN: Yes. Mr Moss, I think that the procedure and
19 the timetable, perhaps not in as great detail as you
20 have outlined to me this morning, has been circulated
21 already, has it not?

22 MR MOSS: It has been communicated to those that would be
23 most affected in outline, but it has not been set out in
24 writing.

25 THE CHAIRMAN: It will of course be available in transcript

1 form. It might perhaps be better if we put it in terms
2 of a written letter sent that can act as a protocol to
3 all parties.

4 MR MOSS: That will be done this afternoon.

5 THE CHAIRMAN: I neither discourage or encourage any
6 comments about that. Does anybody want to make any
7 comments about it?

8 MR GARNHAM: Sir, briefly, yes.

9 It was difficult to ensure as Mr Moss addressed you
10 that every sentence of his proposed protocol followed
11 precisely what had been informal discussions between
12 these two sides. I anticipate that it does. If it
13 does, then we see no difficulty in complying with it.

14 I am slightly cautious about saying that we have
15 nothing to say in response to that, given that I was
16 simply listening to it coming out in that form for
17 the first time.

18 THE CHAIRMAN: I think you will find that the letter will
19 say if you have any further comments, you must to give
20 them to us in 24 hours which ought to be sufficient.

21 MR GARNHAM: That will indeed be sufficient and for that
22 I am grateful and I should also say I am grateful for
23 the cooperation there has been for the Inquiry team in
24 trying to find a sensible way through this.

25 THE CHAIRMAN: Thank you. Does anyone else want to say

1 anything?

2 Since Mr Garnham mentioned cooperation, in my
3 opening statement, I did say that I hoped that on all
4 issues there would be a large measure of cooperation and
5 I am happy to say that that seems to have been the case
6 so far. May I just repeat my encouragement to everybody
7 to cooperate, whether formally or informally with
8 the Inquiry team. Very well. Then that will be
9 the subject of a letter and it will be sent out either
10 today or tomorrow.

11 MR MOSS: That will be done straightaway.

12 I should add this, sir, certainly on this aspect,
13 a lot of work has been going on behind the scenes
14 informally. That includes Miss Hetherington on behalf
15 of the detainees, Mr Evans in particular on behalf of
16 the Treasury Solicitors team and Mr Barr and the TIU,
17 and the Inquiry team is very grateful for all
18 the efforts and the work that is being done on the
19 anonymity aspects.

20 THE CHAIRMAN: Thank you very much.

21 Now, the next item is number 5, timetabling for
22 I think it is the next directions hearing, is it,
23 Mr Elias?

24 MR ELIAS: Yes, sir. May I indicate why this is on
25 the agenda? In your opening statement, you referred to

1 the Rule 13 procedures, the procedures for the warning
2 letters and also the opening statements of the core
3 participants as being matters that would be dealt with
4 at this directions hearing. We respectfully invite you,
5 sir, to put these matters over to the January hearing
6 upon the basis that, in good time for that hearing,
7 we shall have circulated procedures in relation to
8 warning letters and the issue as to opening statements
9 can perhaps more conveniently be dealt with at that
10 stage too.

11 THE CHAIRMAN: Yes. And we may as well say at once that
12 we are proposing to have the next directions hearing on
13 19 January.

14 MR ELIAS: Yes, sir. May I apologise, that a number of
15 dates have been circulated and it is not the fault of
16 anyone, but it is now proposed that the next hearing be
17 on 19th January, the Monday of that week, with
18 a possible reserve for the Tuesday if necessary.

19 THE CHAIRMAN: Now, if anybody has any other proposal for
20 what might be dealt with at that directions hearing,
21 would they be kind enough to speak to a member of
22 the Inquiry team about it, but at the very least notify
23 within shall we say 14 days before 19 January?

24 MR ELIAS: I think if we knew by the end of term, it would
25 be extremely helpful.

1 THE CHAIRMAN: And for the purposes of describing what is
2 the end of term, I shall specify it as the 19th. It is
3 Friday 19 December. It may not coincide with the legal
4 term but it is going to be the end of our term.

5 All right. Well, then by the 19th of this month.

6 MR ELIAS: I am grateful, sir.

7 THE CHAIRMAN: Does anybody want to say anything?

8 Again, I am not encouraging you now. This is mostly
9 for information. Does anybody want to make a point
10 about it? Very well, thank you very much.

11 The next is the Inquiry timetable, which is
12 a comparatively short item, as was the last one.

13 Mr Elias?

14 Inquiry timetable

15 MR ELIAS: You indicated in your opening statement that you
16 might hope to give some indication of a date for start
17 of hearings proper, as I might call them, and we simply
18 wondered whether you wished to say anything at this
19 stage about that?

20 THE CHAIRMAN: I said on the last occasion that we hoped to
21 start the oral hearings in the late spring of next year.
22 At present, I have seen nothing to suggest that that is
23 an unrealistic time for the start of the oral hearings.
24 For which, I might say, I am grateful for the huge
25 amount of work that has been done by the Inquiry team

1 already, and there is more to come.

2 We have circulated the issues list. It is not set
3 in stone but you invited suggestions within a time
4 limit. No further ones, save for a late one, have
5 arrived, that therefore will be, for the moment at any
6 rate, the issues list.

7 MR ELIAS: Sir, it is the issues list from which we are
8 working. There were some suggestions made at an
9 appropriate and early stage.

10 THE CHAIRMAN: Yes.

11 MR ELIAS: Those were incorporated in the document that was
12 then circulated.

13 THE CHAIRMAN: Very well.

14 MR ELIAS: There is just one other matter that is not
15 agenda'd that I should record through you, if I may.
16 It is proposed, so that the parties know the position,
17 there is of course the LiveNote which will be live for
18 the next hearing. It will be live and on the screens
19 for the next hearing. But the submissions that have
20 been sent to the Inquiry, it is proposed should go on to
21 the Inquiry website so that when there is reference in
22 the LiveNote transcript to paragraph whatever it may be,
23 that can be understood by anyone who wishes to follow
24 the LiveNote transcript.

25 So it is proposed, subject to any representations

1 that may be made, those submissions that have already
2 been submitted and indeed any future submissions will
3 routinely be placed upon the Inquiry's website.

4 THE CHAIRMAN: I cannot really see any reason why anybody
5 would object to that occurring, but if you do, would you
6 please let us know and I am afraid we must have a very
7 short timeframe for this, by 4 o'clock this afternoon.
8 Thank you. Is that complete?

9 MR ELIAS: It does complete it, sir, save that perhaps I may
10 on behalf of the Inquiry counsel team say that we have
11 been assisted by so many parties in contacting us and in
12 dealing with us both informally and formally. I am
13 grateful to them. It has assisted us in making
14 progress.

15 THE CHAIRMAN: Thank you very much, Mr Elias.

16 Mr Barr?

17 MR BARR: May I just raise one issue to avoid any
18 misunderstanding. It is in relation to the question of
19 representation. It has been pointed out to me by those
20 sitting to my left that Mr Patel's letter raises
21 the issue of interim funding of the court martial
22 soldiers by way of section 40.

23 As I have indicated this morning, certainly
24 the long-term intention of the Ministry is to assume
25 responsibility for the funding of the six acquitted

1 court martial soldiers, subject to an appropriate
2 agreement between the Ministry and the soldiers about
3 that, but I would not wish the directions hearing to
4 close today without the position for interim funding of
5 those soldiers being entirely clear.

6 As the letter that Mr Patel wrote at the end of last
7 week does make plain, the suggestion that has been made
8 by those who have been working on the representation
9 issue is that there be section 40 funding in the very
10 short term.

11 THE CHAIRMAN: I noticed that it is a suggestion. I am not
12 going to say any more than that.

13 MR BARR: Thank you, sir.

14 THE CHAIRMAN: Mr Scott?

15 MR SCOTT: Thank you, sir. In light of the submissions
16 I have heard this morning, I think it is incumbent upon
17 me to make the position clear that, as of this
18 afternoon, I will be making an application for an award
19 under section 40.

20 THE CHAIRMAN: Yes. Thank you, Mr Scott.

21 Very well. It only remains for me to thank all of
22 you for coming along, for making your representations,
23 and repeating, if it be necessary but I am sure it is
24 not: please continue with the cooperation that you have
25 all given up to now. Thank you very much.

1 (11.52 am)

2 (The hearing was adjourned until 10.00 am
3 on Monday, 19 January 2008)

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