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Tuesday, 16 March 2010

(10.00 am)

Opening remarks

THE CHAIRMAN: Yes. Good morning, ladies and gentlemen.

Just two things I want to say before we start the evidence. First is that it may not have escaped the notice of the more alert of you that the Inquiry has not been able to get email in the last few days. I'm told that there's a problem in the Holborn area. BT are doing their best to resolve it. At the moment they have not resolved it and it's not certain when they will.

However, at around about lunchtime today, I hope that you will be notified of an alternative method of getting emails to the Inquiry through what I'm told is termed a "solicitor's box" by another method. So I hope that will assist. As to when BT manage to get us back on our own email, I have no idea and I don't think, sadly, they have.

The next matter I want to mention is this: today we have a witness, part of his evidence we shall go into camera for. I understand from Mr Elias that it's intended that so far as Counsel to the Inquiry are concerned, that part of his evidence in which we go into camera will be at the very end of Mr Elias' examination of him. I think it would be more convenient and less

1 disruptive if core participants who have questions for
2 him on that part of his evidence did so immediately
3 following that evidence in camera, but I don't want to
4 make any strict rule about that. If you find it
5 difficult, we may have to alter that procedure. It may
6 be that some of you have no questions at all on that
7 part of his evidence.

8 Perhaps when we have our morning break you could let
9 Mr Elias know and, through him, me about what you would
10 prefer to do about that. As I say, my preference at the
11 moment is to have the in camera part of his evidence all
12 in one part, so it would follow on immediately from
13 Mr Elias' examination of him.

14 MR ELIAS: Thank you, Sir.

15 THE CHAIRMAN: Very well.

16 MR ELIAS: Then I will call, if I may, Nicholas Justin
17 Mercer, please. Colonel Mercer, please.

18 THE CHAIRMAN: Colonel, would you be kind enough to stand
19 up, please, whilst I ask that you take the oath?

20 NICHOLAS JUSTIN MERCER (sworn)

21 THE CHAIRMAN: Yes. Colonel, if you could be kind enough to
22 speak into the microphone, then we will all be able to
23 hear you.

24 A. Thank you.

25 THE CHAIRMAN: Thank you.

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Questions by MR ELIAS

MR ELIAS: Would you give the Inquiry your full name,
please?

A. Nicholas Justin Mercer.

Q. Your current rank is lieutenant colonel.

A. Correct.

Q. Colonel Mercer, would you be kind enough, please, to
look at a folder, which I hope is to your right, and to
find in that two statements which I think are copies of
statements you have made to this Inquiry. If you go to
the last page of the first, please, do you find your
signature above the date of 9 September 2009?

A. That's correct.

Q. In relation to the second, is that a statement dated in
February of this year?

A. That's correct.

Q. And have you signed that?

A. That's correct.

Q. And in signing those statements, Colonel Mercer, were
you attesting to the Inquiry that the contents of the
statements were true to the best of your knowledge and
belief?

A. That's correct.

Q. Thank you.

Now we have all read those statements, and indeed

1 the documents to which they refer, and I don't propose
2 by any means to ask you about every aspect that those
3 statements cover, but to take you to certain stepping
4 stones perhaps.

5 A. Yes.

6 Q. I shall endeavour to take matters chronologically when
7 dealing with them. But I want to begin, please, by
8 briefly asking you about your role in Iraq in 2003.

9 A. Well, I was a command legal adviser for the 1st Armoured
10 Division.

11 Q. Command legal adviser -- your voice is a little soft.

12 A. Sorry, I will get closer to the microphone. I was
13 a command legal adviser for the 1st Armoured Division,
14 which meant I gave legal advice to the chain of command
15 within the division on all matters pertaining to
16 military operations.

17 Q. That would include, would it, as you say in your
18 statement, matters pertaining to the laws of war?

19 A. Correct.

20 Q. When dealing with the laws of war, did you liaise with
21 permanent joint HQ?

22 A. Yes, I did, but also the national component command,
23 which was an intervening headquarters, so that was my
24 direct superior.

25 Q. So your direct line was to national component command.

1 I think you say in your statement that would have been
2 directly to Neil Brown, would it?

3 A. Yes, that's correct.

4 Q. Commander Neil Brown.

5 A. That's correct.

6 Q. And with whom did you liaise at PJHQ?

7 A. Well, I would normally liaise with Neil Brown at the
8 national component command until that was collapsed some
9 time in May -- I can't remember the date when it was
10 collapsed -- and then, of course, with that interposed
11 headquarters being taken away, then it would go straight
12 to PJHQ at that point.

13 Q. You say in your statement that at PJHQ you dealt with
14 Rachel Quick and Nick Clapham.

15 A. That's correct.

16 Q. You are a solicitor, having been admitted to the role,
17 you tell us, in 1990.

18 A. That's correct.

19 Q. You joined the army immediately following that, did you?

20 A. That's correct.

21 Q. In 1991?

22 A. 1991, yes.

23 Q. Have you been in Army Legal Service since that time?

24 A. I have. It seems a long time now.

25 Q. You are still in the Army Legal Service working at the

1 HQ directorate in Wiltshire; is that right?

2 A. That's correct, yes.

3 Q. I want to ask you just a little, please, about training,
4 both training that you may have received in relevant
5 areas for this area and also training that you may have
6 given. You have undertaken training in the law of armed
7 conflict yourself, have you?

8 A. Yes, I have.

9 Q. That involved learning about the appropriate treatment
10 of prisoners of war, amongst other things?

11 A. Yes, I mean, we started our law of armed conflict
12 training at Liverpool University, where we got sent for
13 a month. So we were taken through the full panoply of
14 the laws of war, which would include prisoners of war.

15 Q. If there was a single message that emerged from that
16 training in relation to the handling of prisoners of
17 war, what was it?

18 A. Well I use the phrase "humanity and dignity".

19 Q. Did you receive any training at that time about the use
20 of what are sometimes called "the techniques", hooding,
21 stress positions and so on?

22 A. No, none whatsoever.

23 Q. So you weren't given training, for example, or
24 instruction, that these techniques were off limits?

25 A. No.

1 Q. You simply received no training at all about that?

2 A. That's right.

3 Q. Now prior to Op Telic, did you, yourself, give training
4 to soldiers who were --

5 A. Could I come back to your previous question?

6 Q. Please.

7 A. We went -- just to build on that, we go to
8 Liverpool University for a month to do law of armed
9 conflict training. We then go to San Remo for
10 a two-week course, which builds the laws of armed
11 conflict into the staff planning process. Then I did
12 the advanced laws of war course at San Remo, which
13 included some elements of human rights law as well. So
14 it's an accumulative process.

15 Q. I understand. But does that alter the answer you gave
16 me as to whether you received any instructions in the
17 use of the techniques --

18 A. No, that's correct. It doesn't change.

19 Q. May I come, then, please, to training that you may have
20 given in relation to Op Telic 1. You say in the
21 statement to this Inquiry -- I don't think it need be
22 put up, but it's your paragraph 17 -- that all soldiers
23 regardless of rank are supposed to receive annual
24 training in LOAC, the law of armed conflict.

25 A. That's correct.

1 Q. That, as the Inquiry already knows, would have included
2 specific provision with regard to the treatment of
3 prisoners of war. Soldiers' cards, which you refer to
4 in your statement, would have been provided, you say, to
5 all combat troops in theatre.

6 A. That's correct.

7 Q. Do you know whether they were in fact?

8 A. Well, they were -- we briefed 14,000 of the 25,000
9 soldiers in theatre and we had boxes of soldiers' cards
10 which would go out with the trainers. So I use the
11 words "combat troops" deliberately because it's simply
12 impossible to get round 25,000 soldiers. So it was the
13 key combat arms who we trained first and foremost.

14 Q. I follow. We will come back quite a little later on to
15 cards again. But the cards, so far as prisoners of war
16 were concerned, gave an indication that civilians were
17 to be treated humanely and respected at all times; is
18 that right?

19 A. That's correct.

20 Q. In-theatre training -- what in-theatre training did you
21 give?

22 A. Well it would tend -- it would be the law of armed
23 conflict -- those law of armed conflict briefs to the
24 combat troops prior to the war commencing in March 2003.

25 Q. That was training which you and your department, if

1 I can call it that, gave?

2 A. That's right. I wrote the script for that. I sent it
3 up to the NCC for clearance. I handed that -- it was
4 not for them to read out like a homily, but it was there
5 to give them a guidance on the subject to be covered,
6 and I delivered some of them myself.

7 Q. And the subjects to be covered would have included, as
8 I think you say in your statement, the need to treat
9 civilian prisoners with humanity and dignity, as you put
10 it.

11 A. That's right. Those words were included.

12 Q. Was any training given by you or your subordinates in
13 this context, in theatre, in relation to the use of
14 hooding, stress positions, matters of that kind?

15 A. No, none whatsoever. We gave training in relation to
16 prisoner-handling, not prisoner interrogation.

17 Q. So you gave no instruction again either way -- if I can
18 put it that way -- as to whether it was appropriate or
19 not to use hoods, for example?

20 A. No. That's correct.

21 Q. So we are clear about it, you gave no instruction as to
22 deprivation of sight, whether by hoods, blindfolds or
23 anything else?

24 A. No, that's correct.

25 Q. Did you not regard, for example, deprivation of sight as

1 being something that might be necessary in handling
2 prisoners outside the interrogation area?

3 A. I can't recall whether we gave such instruction, but my
4 understanding was that we just used the generic phrase
5 "humanity and dignity" as a sort of catch-all phrase,
6 "treat them with decency". Blindfolding was on --
7 JSP 383, which I have seen subsequently, refers to
8 blindfolding as being part of the interrogation process
9 and I have no recollection at all of giving any
10 instruction on blindfolding. Only plasticuffs were
11 covered.

12 Q. What was said about plasticuffs?

13 A. Well, they could be used in extremis. If there was
14 a violent prisoner, then they could be cuffed using
15 plasticuffs.

16 Q. And do you recall -- please don't guess if you can't
17 remember -- whether any instruction was given as to
18 whether plasticuffs were to be applied in front or
19 behind the body?

20 A. I don't recall that, no.

21 Q. Can we have on the screen, please, paragraph 20 of your
22 statement -- we find it at BMI04063 -- in which you say
23 this:

24 "... given the training provided, I had no concerns
25 about prisoner-handling prior to deployment as

1 I believed it was well understood by all members of the
2 division."

3 By that the Inquiry should understand that you were
4 saying you believed it was well understood that
5 prisoners should be treated with humanity and dignity.

6 A. Yes, I mean, this message is reiterated the whole time.
7 The LOAC video that soldiers watch each year, which is
8 a sort of old cold war relic or it was then, makes it
9 absolutely clear: do not mistreat prisoners. This
10 message is repeated and repeated and repeated.

11 I had read the Op Granby post-operational tour
12 report and there was no mention of any problems on
13 Op Granby and I was pretty confident that we could take
14 them from the battlefield to the prisoner of war camp
15 and this part at least was well understood. Indeed
16 I said that to General Robin Brims in a memo. I said
17 that I'm confident that, you know, from capture to the
18 prisoner of war camp will be conducted successfully and
19 without incident. Indeed, I think it was.

20 Q. Please don't take this question as implying any
21 criticism of you, but just so that we understand the
22 position, you didn't give any -- and by "you" I mean
23 your subordinates also --

24 A. Yes.

25 Q. -- gave no training or instruction as to the use of

1 hooding, for example, or deprivation of sight. Was that
2 because you considered it and decided that it was not
3 necessary --

4 A. To be honest it wasn't even on my radar.

5 Q. So that leads me conveniently, then, to ask you a little
6 more about hooding. At the time of your deployment to
7 Iraq, what was your understanding about the rights and
8 wrongs of the use of hoods on prisoners?

9 A. It is hard to cast your mind back. As I say, I didn't
10 even give it any thought because I just didn't envisage
11 it. As I said, it hadn't happened on Op Granby, so why
12 would I have it in contemplation? I mean, I had done
13 some human rights training, I was aware of the Ireland
14 case, but it just didn't emerge -- you know, it wasn't
15 an issue.

16 Q. So you were aware that hooding had been, can I put it
17 this way in shorthand, ruled as being inhumane?

18 A. Well, in contravention of the Convention on Human
19 Rights, yes.

20 Q. Thank you. You were aware of that. Were you aware,
21 prior to deployment to Iraq, that hooding was being used
22 for any purpose?

23 A. No, none whatsoever.

24 Q. Did you become aware that hooding was used for what has
25 sometimes, in shorthand, been described as "security

1 reasons"?

2 A. No, as I said in my statement, the first time I came
3 across hooding was when I saw it being used in the JFIT.

4 Q. We will come to that in due course.

5 A. Yes.

6 Q. Again, so that the Inquiry understands, that, are you
7 saying, was the first time, as it were, that you had to
8 address the issue?

9 A. That's correct.

10 Q. How long had you been in Iraq by that stage?

11 A. I think my memo was dated 27/28 March, thereabouts, so
12 I had been in Iraq since January 11.

13 Q. And had you seen no prisoners hooded in that time?

14 A. Well, the war broke out on -- I think it was 17 March.
15 We were sitting in Abdaly Farms on the Iraqi border, so
16 you are pretty secluded in your little headquarters in
17 the middle of nowhere. So the war started and I think
18 the first time I got out of the divisional headquarters
19 was seven or eight days later to fly down to the
20 prisoner of war camp. Other than that, we just watched
21 the battle unfold from divisional headquarters.

22 Q. Forgive me, Colonel, what's the answer to my question?
23 Had you seen any prisoners hooded?

24 A. No, I hadn't, no.

25 Q. Before deployment to Iraq, you presumably had heard the

1 term "conditioning", had you?

2 A. Possibly, but it was -- you know, I can't recall for
3 certain.

4 Q. You would have known what it meant?

5 A. In the context of the Ireland case, yes. But, as I say,
6 you know, you go to a lecture on human rights, you are
7 aware broadly of the case law, but you don't dwell on it
8 unless it becomes relevant to you at a particular point
9 in time.

10 Q. So should the Inquiry understand that, at the time of
11 your deployment, you would have been aware that stress
12 positions were not to be used under any circumstances?

13 A. Well, it's quite -- you put me in quite a difficult
14 position because I mean one's aware broadly of the case
15 law. I am dealing largely with the Geneva Conventions.
16 I had raised the Convention on Human Rights with PJHQ,
17 and my -- in the minutes of the meeting of 20 January or
18 thereabouts you can see the question raised endlessly
19 "Will it apply?", and no answer is given on that until
20 later, so one just carries on with Geneva.

21 Q. I understand that. We are going to look at that in
22 a little more detail in a moment or two.

23 A. Yes.

24 Q. Can you help us? Would your view of the use of stress
25 positions have been, at the time of your deployment to

1 Iraq, if you had been asked, "They are off the menu
2 entirely and not to be used under any circumstances"?

3 A. Of course, both under Geneva and under ECHR.

4 Q. Now you refer in your statement -- and I'm trying to
5 take matters, as I have indicated to you,
6 chronologically so far as we can work through these
7 matters -- to what you describe as "pre-deployment
8 concerns". At paragraph 21 -- can we just have that on
9 the screen, please, top of the page -- you say:

10 "Although I had no concerns about prisoner-handling
11 pre-deployment I did have concerns about the provisions
12 for prisoners generally."

13 A. That's correct.

14 Q. I don't necessarily want to go into a lot of detail
15 about this, Colonel Mercer, but are you there indicating
16 that your concerns were about resources being applied to
17 the issue?

18 A. Yes, it wasn't just resources, it was the emphasis being
19 given to prisoners generally because, as I say in my
20 statement, the battalion assigned to prisoner of war
21 duties was struck off the ORBAT almost immediately
22 prior -- flying out to Kuwait.

23 So I had looked at the Op Granby report. They used
24 roughly one battalion to evacuate from the
25 battlefield -- to corral on the battlefield, one

1 battalion to transport and one battalion to deal with
2 the prisoner of war camp. We assigned just one
3 battalion and even that was struck off the ORBAT. So,
4 you know, I was concerned that this was going to fall
5 short of what was required.

6 Q. But in the broad sense, these were resource issues?

7 A. These were resource issues, yes.

8 Q. I am not underplaying them for that reason, but that's
9 really what you are getting at in your statement; is
10 that right?

11 A. There were not enough troops to task, yes.

12 Q. You do say at paragraph 23:

13 "Although the UK maintained that it took its
14 responsibilities under the Geneva Convention in relation
15 to prisoners very seriously, this was not my experience.
16 In my view, the issue of prisoners had very low priority
17 and was treated more as an inconvenience than an
18 obligation under international law."

19 A. Yes, I think that's correct.

20 Q. If I may comment, that's quite a serious allegation to
21 be making.

22 A. It is. If I can just expand on that a bit.

23 Q. Please.

24 A. I mean, first of all, prisoners are a huge issue and
25 a very major part of the Geneva Conventions. Of course

1 it takes up the whole of the Third Geneva Convention.
2 There are very detailed guidelines as to what you need
3 for prisoner of war camps, how they should be built and
4 constructed, how prisoners should be fed and so on and
5 on forth. It is well understood and there are plenty of
6 manuals on that subject. But that came back to the
7 resource issue and did we have enough troops to task.

8 We then had the sort of -- our obligations were then
9 passed, if you like, to the Americans, who were going to
10 rely on seven American MP battalions to deal with our
11 prisoners. So it was sort of ceded across to the United
12 States and prisoner of war camps were planned just south
13 of the Euphrates. But again we were getting another
14 nation to do what we probably should be doing ourselves.

15 Q. You seem to indicate from your statement, if I have
16 understood it correctly, that in one sense at least you
17 were rather relieved that that responsibility was being
18 taken over by the Americans, although there were other
19 problems.

20 A. Yes, but I did warn General Robin Brims that -- for
21 about seven weeks I pushed the resources issue up on the
22 UPREPs to the NCC, saying, "Look, this is flashing
23 amber. I don't think we have done enough". I was also
24 very concerned about the capitulation formula that had
25 been devised.

1 Q. Those are issues that I don't want to go into detail
2 on --

3 A. But broadly speaking I was very concerned about it and
4 I found it -- if I just come back to that point about
5 not taking it seriously enough, I felt I was banging my
6 head against a brick wall on that because I would send
7 it up night after night after night on the UPREPs.

8 Q. What I really wanted to ask you, Colonel, if I may, in
9 relation to paragraph 23 on the screen, is whether, when
10 you say that the issue of prisoners had low priority and
11 was treated more as an inconvenience than an obligation
12 under international law, you mean that resources --
13 perhaps for reasons that we don't need to go into
14 here -- were not being applied as you would have hoped
15 they might be?

16 A. That's correct.

17 Q. You don't mean any more than that?

18 A. No, I mean on the resource side.

19 Q. You don't mean that there was a conscious decision, as
20 it were, by some body or some organisation to treat
21 prisoners as low priority?

22 A. No, it's to do with resources. But if you don't
23 resource it properly, it is a low priority.

24 Q. I understand, but it's in that context --

25 A. It's in that context, yes.

1 Q. I follow. Can we have a look, please, at a minute in
2 relation to a meeting in January of 2003? We find it at
3 MOD053714. You see it's dated 21 January. It's
4 described as a "loose minute". Your name appears second
5 in the list. It's the minutes of PJHQ legal advisers'
6 meeting on prisoner of war issues on 20 January.

7 If we go through, please, to paragraph 16, under the
8 heading "Divisional works":

9 "1 (UK) Armoured Division see their role as handling
10 prisoners of war from capture to the cage. Lieutenant
11 Colonel Mercer stated that they were not equipped for
12 anything further than this and were planning
13 accordingly.

14 "17. Lieutenant Colonel Mercer made it very clear
15 that in order for planning to take place we need to have
16 assurance from the US that they will be accepting the
17 responsibility of the running of prisoner of war camps
18 and that they will be accepting UK captured prisoners of
19 war into those camps. This matter needs to be clarified
20 urgently."

21 That was really, was it, expressing some of the
22 concerns that you have outlined to us today in a little
23 more detail?

24 A. Yes, that's correct, yes.

25 Q. There's an issue at 18 of tracking enemy prisoners of

1 war. I don't think we need to trouble with that.

2 "There will need to be a prisoner of war handling
3 organisation ... established. The role of this
4 organisation needs to be defined and its location within
5 the command chain needs to be agreed. Only then can it
6 be staffed/resourced properly."

7 There's a reference at paragraph 21 to prisoner of
8 war status tribunals. Of course that's a matter that
9 you develop in your statements to this Inquiry and I am
10 not going to go into those aspects because I don't think
11 the Inquiry is directly concerned about that.

12 Paragraph 34 in the document, because this may be of
13 some significance:

14 "Lieutenant Colonel Mercer requested definitions and
15 policy guidance on the following points.

16 "(a) Who is entitled to prisoner of war status;

17 "(b) Child combatants;

18 "(c) Levee en masse ...", mass conscription.

19 "(d) Where are prisoners of war to be held until
20 prisoner of war camps are established."

21 Then at 36:

22 "Will the ECHR apply in the conflict or can we
23 derogate in some way?"

24 Is that a matter you were raising? It's not clear
25 from the quote.

1 A. No, I raised it.

2 Q. You raised that issue, did you?

3 A. Yes.

4 Q. So you were asking for guidance --

5 A. Yes, on what law applied.

6 Q. In relation to those matters.

7 Did you ever receive guidance?

8 A. Well it came -- it did come later. I think it's on one
9 of the emails.

10 Q. But quite a bit later in the --

11 A. I raised it again because the question hadn't been
12 answered -- and put my own thoughts down, expanded a bit
13 on it, and then a reply was received from PJHQ.

14 Q. Could we have a look, please, at paragraph 21 of your
15 second statement? We find that at BMI06901A,
16 paragraph 21. If we just go down three or four lines in
17 the paragraph, you say this:

18 "However hooding was not banned by PJHQ until after
19 Baha Mousa's death and emails in May 2004 show that
20 there was an information gap within the MoD about the
21 practice of hooding. It is now clear from
22 correspondence in 1999 ... that Army Legal Service 2,
23 Lieutenant Colonel Ridge, had given advice to JSIO about
24 the practice of hoods amongst other treatment of
25 prisoners of war and others in interrogation situations

1 other than general war in her advice dated 25th November
2 1999. Despite my requesting guidance from PJHQ on
3 the subject of prisoners of war from as early as
4 20 January ..."

5 That note we just looked at.

6 A. Yes.

7 Q. "... none was forthcoming", you say.

8 A. That's correct?

9 Q. Can we just look at the documents to which you refer in
10 paragraph 21 of your second statement? MOD28352,
11 please. You are referring to a document -- obviously
12 not yours -- of 28 October 1999; correct? If we go
13 through, please, to MOD028354, to a loose minute that's
14 dated 25 November of the same year:

15 "Legal status of interrogation in situations other
16 than general war."

17 Then there's the heading, "Armed conflict". Over
18 the page under "Other operations", halfway down the
19 page, after the reference to Article 3 in paragraph 9:

20 "'Torture' involves suffering of a particular
21 intensity and cruelty. However even though certain
22 action may not amount to torture it can amount to
23 inhumane treatment or degrading treatment. 'Inhumane
24 treatment' includes as a minimum deliberate treatment
25 which causes severe mental and physical suffering as in

1 the case of Ireland ... where detainees suffered
2 substantial bruising, cuts to the head and a broken
3 cheekbone. 'Degrading treatment' consists of treatment
4 which grossly humiliates a person before other or drives
5 him to act against his will. Again in Ireland ... the
6 use of five interrogation techniques, ie keeping
7 detainees' heads covered by a hood, continuous and
8 monotonous noise, sleep deprivation, deprivation of food
9 and water and making the detainees stand [essentially in
10 stress positions] ... amounted to inhuman and degrading
11 treatment."

12 Your reference to those documents in 1999 was
13 a reference, was it, to the fact that there appears from
14 that correspondence to be an indication that, for
15 example, hooding was not to be employed?

16 A. That's correct. I mean I obviously didn't see these
17 documents until shown to me by my counsel, but it's
18 clear that advice was sought in 1999 and the army made
19 it very clear that these were prohibited. Then we bump
20 into the issue again in 2003.

21 Q. But what you're saying, so that the Chairman is clear
22 about it, is that you did not see this --

23 A. No.

24 Q. -- correspondence at the time --

25 A. No.

1 Q. -- and were not aware of it, you say, until preparing
2 your evidence for this Inquiry.

3 A. That's correct.

4 Q. It's suggested by the witness with the cipher "S002" --
5 and I think you know to whom I refer -- that there were
6 discussions prior to your observing what you saw in the
7 JFIT about the use of hooding for security purposes and
8 that those discussions, I think you probably will be
9 aware, it is suggested, included you.

10 A. Yes, I have no recollection of that. Indeed I went back
11 with my counsel over the meetings and we pulled out
12 a meeting and I wasn't even on the list of the
13 attendees. I have no recollection of any such occasion.

14 Q. What is suggested is that when the discussions took
15 place, as I think you will know, that you raised no
16 objection to the use of hoods for what has been
17 described as "security purposes".

18 A. I would have objected.

19 Q. So your position is that you would have objected, would
20 you, if there had been discussion of that kind?

21 A. As soon as I saw hooding in the JFIT, I wrote
22 immediately to General Robin Brims --

23 Q. We are going to come to that. It's a bit of a different
24 issue.

25 A. The point is, sir, that when I saw it for the first

1 time, I put in an immediate complaint.

2 Q. It may be a bit of a different issue, if you will
3 forgive me saying so, Colonel. If you had been asked
4 the question, if you had been party to the discussions
5 it is suggested you were party to, would you have sought
6 to distinguish between the use of hoods for conditioning
7 a prisoner prior to questioning or the use for what has
8 been described to this Inquiry, if you will forgive the
9 shorthand, as "security reasons"?

10 A. I don't like hooding at all. I'm against it. I think
11 it violates the Conventions.

12 Q. So if I may ask you to be rather more specific to my
13 question, would you have distinguished between the use
14 of hoods for those two purposes --

15 A. No, I wouldn't. I think it's illegal in both
16 situations.

17 Q. That, you tell the Inquiry, would have been your
18 position if you had participated in any discussion at
19 the time?

20 A. That's correct, yes.

21 Q. So S002 is wrong in his recollection of you, as it were,
22 acquiescing, is he?

23 A. I have no recollection of that. The first I saw it was
24 about a week ago.

25 Q. Moving on then in time, please, can we have a look at

1 a document dated 6 March. We find it at MOD019764. If
2 we go over the page, we can see that it's from you. If
3 we go back to the previous page, you see the date at the
4 top. It's a memo from you, isn't it, to the GOC --

5 A. That's correct.

6 Q. --to General Brims. I just want to go through this in
7 a little detail if we may, please. You say this, at
8 paragraph 1:

9 "The information received on Wednesday regarding the
10 reduction in US MPs battalion from 7 to 1 now puts even
11 greater pressure on the UK with regard to the issue of
12 prisoners of war, particularly with regard to manning
13 and resources."

14 I don't think I need to go into the detail of that
15 change, but we can see what it was.

16 "The issue of prisoners of war has been on the
17 divisional 'at risk' register for some time ..."

18 What did you mean by that?

19 A. Well, I touched on it earlier, but every night we would
20 UPREP up to the NCC, which the division could raise its
21 concerns to the next superior headquarters, and
22 continually I put the issue of prisoners of war on the
23 UPREPs.

24 Q. And again this was essentially the resources issue --

25 A. The resources issue, yes.

1 Q. Thank you.

2 "... various requests for manning (minimum of two
3 battalions) have been made continually by this division
4 over the past seven weeks. If the news received on
5 Wednesday is added to the failure to find the additional
6 two battalions then manning shortfall is potentially
7 very serious and getting worse by the day."

8 This is something you had been repeating, you tell
9 us.

10 A. Yes, that's right.

11 Q. At 3:

12 "I appreciate that the manning and resources
13 estimate for prisoners of war is difficult to evaluate
14 but, as your legal adviser, I am professionally obliged
15 to point out any legal risks that you or the division
16 may run in any area of military operations and, in my
17 opinion, the failure to find additional manning and
18 resources with regard to prisoners of war now brings
19 a real risk of potentially violating international law."

20 Did you have, Colonel Mercer, in mind any specific
21 violations of international law?

22 A. Yes, I think I covered them further down in my memo.
23 One was evacuating prisoners of war from the
24 battlefield. They have to be taken out of danger's
25 way --

1 Q. Which you deal with at paragraph 4, don't you?

2 A. That's correct, yes.

3 Can I just scroll down the document just to refresh
4 my memory?

5 Q. Please, please.

6 A. Yes, I deal with the safety during evacuation.

7 Q. Then we move on to paragraph 6, essentially.

8 A. That's right, yes.

9 Q. Can I deal with that in a little more detail perhaps?

10 "Secondly, in addition to the evacuation from the
11 battlefield there is also the passage of time spent by
12 prisoners of war in so-called collection points and
13 holding areas."

14 A. Yes.

15 Q. Pausing there for a moment because I think it's a matter
16 you come back to in a number of documents over the
17 period that we are going to look at, the passage of time
18 spent by prisoners of war in collection points, did you
19 regard that, however, if you like, distasteful it may
20 have been to contemplate it, as itself being a risk to
21 prisoners?

22 A. I did.

23 Q. And did you have in mind, then, that, if you like, the
24 longer prisoners were held at collecting points, the
25 greater the opportunity for mistreatment or

1 ill-treatment of them?

2 A. No, I make -- I think I make it clear in the memo that
3 I'm confident that prisoners will be captured and taken
4 to the prisoner of war camp successfully. However, if
5 they stay in a transit camp, you can't give them the
6 rights and obligations under the Third Geneva
7 Convention, which is why that provision is there, that
8 it should be as brief as possible, because they
9 recognise that in the evacuation process you can't have
10 a transit camp that's going to be the right -- the same
11 standard as that required under GC III.

12 Q. So it was essentially the facility and the protection --

13 A. And also the closeness to combat, which is an added
14 risk.

15 Q. You go on to say in paragraph 6:

16 "The Third Geneva Convention anticipates the need
17 for transit camps and requires that any stay in such
18 a camp shall be 'as brief as possible'. I have no
19 problem with the transit camps. However, although it is
20 accepted that such transit facilities will be
21 a temporary measure, there is still a requirement under
22 the Third Geneva Convention for 'proper rations, water
23 and quartering with every guarantee of hygiene and
24 healthfulness'."

25 Over the page at paragraph 7, where you refer to

1 "Thirdly and most seriously ..." and you refer to
2 Article 13 of the 1949 Geneva Convention:

3 "Prisoners of war must at all times be humanely
4 treated."

5 You say this in the succeeding paragraph:

6 "Although I am optimistic that UK forces will not
7 commit unlawful acts clearly the current circumstances
8 mean that an omission leading to death or seriously
9 endangering the health of a prisoner of war remains
10 a very real possibility."

11 What did you mean by "an omission"?

12 A. Well, that's failing to give them proper food, water,
13 evacuation from the battlefield and so on and on forth.
14 I think I deal with it -- it says "... prisoners of war,
15 public health, inadequate food and water are just some
16 of the circumstances in which UK forces might cause the
17 death or seriously endanger the health of prisoners of
18 war". So I expand on it.

19 Q. Thank you. Then in the last paragraph of the document,
20 paragraph 10, you underline for Major General Brims:

21 "... the situation has now deteriorated further and,
22 in my opinion, to avoid a potential violation of
23 international law remedial action will be required as
24 soon as possible."

25 You say:

1 "I have spoken to the NCC about this matter this
2 morning. They will be speaking to CENTCOM today."

3 Do you know what the GOC's reaction to that report
4 was?

5 A. I did go and discuss it with the GOC and the chief of
6 staff and I'm not sure what came of it. Can you just
7 remind me on the date again?

8 Q. 6 March.

9 A. Yes, by this stage we're about a month into living in
10 the desert. I think we were anticipating the war to
11 begin in three days' or four days' time because the
12 start point kept changing. So there was very little we
13 could do, I think, at this point, to be honest.

14 Q. I think that's what you say in your statement.

15 A. Yes.

16 Q. If we look at it at paragraph 33, BMI04066, please.
17 Paragraph 33, towards the end of it, having sent the
18 memo, you say:

19 "I discussed my concerns personally with the GOC and
20 the chief of staff but, in my view, we were too close to
21 hostilities breaking out to make any discernible
22 difference at this late stage."

23 That encapsulates --

24 A. Yes, that's what I said.

25 Q. -- what you have said.

1 I now want to ask you, moving on a little in time to
2 later in March, please, about visits that you made to
3 the TIF. You kept a diary. Was that a diary intended
4 for your own use, your own consumption, if you like,
5 alone?

6 A. Yes, my grandfather had kept one in 1939, so I rather
7 wanted to repeat what he had done, my forefathers had
8 done, so it was just personal.

9 THE CHAIRMAN: You have always kept a diary, have you?

10 A. No, I've never kept a diary. I don't like them.

11 THE CHAIRMAN: Never.

12 A. But I thought these were historic times, so I would keep
13 a record of what happened.

14 THE CHAIRMAN: So this is a new departure for you?

15 A. A new departure, yes.

16 MR ELIAS: What I really wanted to know, Colonel, was
17 whether you were keeping a diary with a view to it being
18 published to a wider audience.

19 A. No, it was a private record and my wife very kindly
20 typed it up at the end for me.

21 Q. It was never intended to be anything more than that, was
22 it?

23 A. No. Quite frankly some of it is embarrassing.

24 Q. When you say "typed up", out of pure curiosity, does
25 that mean that what we see as your diary in that rather

1 neat writing is a font?

2 A. It's a font, yes. I kept it in various notebooks.

3 THE CHAIRMAN: I was for a moment lost with envy of anyone

4 who is able to write as carefully as that, but ...

5 A. An electronic diary in Iraq would have been lost to some

6 power failure.

7 MR ELIAS: So what we are looking at in the bundle that we

8 have is in fact a typed script?

9 A. It is, yes.

10 Q. I follow.

11 How many visits did you make to the TIF?

12 A. In time I made -- I think I made quite a number of

13 visits to the TIF, but I think my first one was on the

14 day that I saw what was going on in the JFIT.

15 Q. Can you remember -- and, please, I haven't said this to

16 you publicly, Colonel Mercer, but when you are naming

17 names, be careful as some names are ciphered, as I think

18 you know. If you have a doubt, please pause and we will

19 provide you with a list.

20 On your first visit when you describe what you saw

21 there, which I think caused you some concern, if that

22 isn't too neutral a word --

23 A. Yes.

24 Q. -- can you remember who was present on that first

25 occasion?

1 A. Well, the reason that I went down to the prisoner of war
2 camp with the general, General Robin Brims, was because
3 the Article 5 tribunals were underway and my S02 had
4 objected to the way they were being conducted and was
5 told that unless he came into line, he would be asked to
6 leave the prisoner of war camp. So obviously I had
7 a bit of an incident to sort out. So I flew down with
8 General Robin in a helicopter to the prisoner of war
9 camp and this was my first visit since the war had
10 begun.

11 Q. If we look at your diary, please, can we look at
12 28 March at MOD019884. You refer to this, don't you, in
13 the last half a dozen lines of this entry?

14 "I went by helicopter with the GOC to Um Qasr to see
15 the prisoner of war collation area."

16 Is that the occasion that you are now referring to?

17 A. That would be correct, yes.

18 Q. Can we assume, therefore, that the diary is reflecting
19 the date at the top, 28 March, as to when this happened?

20 A. I think that -- yes, that's probably correct.

21 Q. You say again:

22 "... a unique experience where I saw over 3,000
23 prisoners of war all in different compounds separated by
24 large strands of barbed wire. Very few were in uniform,
25 but all had been captured in various battles other the

1 last seven days. Some looked terrified, others
2 defiant."

3 Over the page, please, to Saturday 29 March, where
4 your entry begins:

5 "Another exceptional day. I flew to the PWHO
6 organisation in Um Qasr and intervened, yet again, in
7 the prisoner of war process ... massive row with the CO
8 QDG about Article 5 tribunals."

9 As I have indicated, I am not going to trouble you
10 with that:

11 "You need a very thick skin for this job. Anyhow,
12 my view prevailed and I spent the rest of the day at the
13 PWHO."

14 Does it follow from those entries, Colonel Mercer,
15 that you made two visits, one on the 28th and one on the
16 29th?

17 A. It could do. I do not have a recollection of two
18 visits. I only have a recollection of one visit. It
19 seems to be that I went on two separate occasions.

20 Q. It would seem from the diary as if those two occasions
21 were successive days.

22 A. It does seem like that. My recollection is that I just
23 went on one occasion, but, you know, the passage of time
24 ...

25 Q. On the first occasion, at all events, as you have

1 recorded on 28 March, was the GOC with you?

2 A. Yes -- no -- he is mentioned there.

3 Q. Forgive me --

4 A. The GOC was with me. My diary says that he was there on
5 that occasion.

6 Q. Is there any doubt about it?

7 A. There isn't. Obviously I am coming back to this after
8 some time, but the day that this happened was, I think,
9 the Saturday because I went with the specific intent of
10 sorting out the Article 5 tribunals. I did have a bit
11 of a run-in with the commandant and then doubled back
12 during the day to investigate what I had seen at the
13 JFIT. So I believe it all happened on the Saturday.

14 Q. So you think it all happened on the Saturday, which
15 would be 29 March then. You think it was on the
16 Saturday then, do you, that the GOC would have been with
17 you?

18 A. Yes, he was with me, yes.

19 Q. At that time?

20 A. Yes.

21 Q. On that visit?

22 A. I think so, yes. In fact I know so because we flew down
23 in the helicopter together.

24 Q. As you describe in your diary.

25 A. Yes.

1 THE CHAIRMAN: It's my fault. I have got it confused. Your
2 diary of Friday the 28th says that you did fly down with
3 the GOC.

4 "I went by helicopter with the GOC to Um Qasr."

5 A. It does look as if I have gone down on two separate
6 days. I must admit that I have no recollection of two
7 separate days, but clearly the diary says otherwise.

8 THE CHAIRMAN: What I want to know is if the diary is
9 accurate, then it was the first day that the GOC went
10 with you.

11 A. It looks like that, yes. But I am pretty sure he was
12 there for the second day as well.

13 THE CHAIRMAN: That's possible. It's not mentioned in the
14 diary.

15 A. Yes.

16 THE CHAIRMAN: Yes, I see.

17 MR ELIAS: What, so you think the GOC was present on the day
18 on which the Article 5 tribunals was the issue?

19 A. We did, because I tagged on to the visit to sort out the
20 Article 5 tribunals.

21 Q. All right. Well it may or may not matter. On the
22 visit, the first day of the visit, did you see anything
23 which caused you concern?

24 A. Well, I -- again I'm obviously -- as you can see,
25 I don't know -- it appears that I made two visits.

1 I did see something of concern on the day that I saw the
2 JFIT because I was coming into the camp -- I remember it
3 quite clearly. The GOC was picked up by the -- was met
4 by the commandant --

5 Q. You are just dropping your voice a little.

6 A. Sorry, the GOC was met. I was then -- someone welcomed
7 me and I went into the prisoner of war camp with the --
8 a captain from the Queen's Dragoon Guards, who was
9 assigned to look after me for that particular visit.

10 Q. So can we understand that what you are about to describe
11 occurred on the same day as you had what you describe as
12 the run-in with the commandant?

13 A. I think so.

14 Q. Just before we go on, then, on that occasion who else,
15 apart from yourself and the GOC, was present at the
16 JFIT?

17 A. We weren't going to see the JFIT.

18 Q. No.

19 A. We were going to visit the prisoner of war camp.

20 Q. I understand.

21 A. So the JFIT was situated at the entrance to the prisoner
22 of war camp; in other words, as you walked into the
23 prisoner of war camp, the JFIT, from memory, was to your
24 right and there was a guard on the JFIT gate, who was
25 there obviously guarding, and then there was some sort

1 of passage, from memory, into the JFIT. So the general
2 was met by a huge posse of people and I sort of tagged
3 along at the back.

4 Q. And on this occasion what, if anything, did you see that
5 caused you have concern?

6 A. Well, this was the first time that I'd seen what was
7 going on in the JFIT. As I walked past, I saw two lines
8 of prisoners and I think some prisoners -- from memory,
9 there were two lines of prisoners, all kneeling in the
10 sand, hands cuffed behind their backs, all with hoods on
11 their heads, and from memory there were two lines of
12 prisoners and another group, I think, squatting
13 somewhere in the corner.

14 Q. And the two lines of prisoners comprised roughly how
15 many?

16 A. Well, there was quite a large number of prisoners in
17 there. I think it was -- I mean, two columns of
18 prisoners and some in the corner, either 30 or 40,
19 I would think.

20 Q. All of them hooded?

21 A. From memory, yes.

22 Q. With what?

23 A. Well, I saw sandbags on their heads and I'm pretty sure
24 there were other bags as well, which would be -- I think
25 they were blue bags from memory.

1 Q. You think they were blue bags?

2 A. There were some blue bags, yes.

3 Q. Were the blue bags woven hessian like the sandbags?

4 A. Well, I clearly was not close enough -- the JFIT is to
5 my right. I mean, it's a bit like seeing a picture of
6 Guantanamo Bay for the first time. It is quite a shock.

7 Q. Would you describe the position in which the prisoners
8 were being held -- apart from the hoods on their
9 heads -- would you describe the positions as being
10 stress positions?

11 A. Yes, I mean I wrote -- you have got my memo to the GOC.

12 Q. We are going to come to that.

13 A. But that's my -- the way I described it to him when
14 I wrote my concerns down in that memo.

15 Q. Can you remember who, if anyone else, was in your
16 company to see what you've described to us?

17 A. I just had one sort of bag handler with me, who very
18 kindly sort of came to meet and greet and escort me into
19 the prisoner of war camp itself. If I just go back to
20 the stress positions, the prisoners were cuffed behind
21 their backs, up like this (indicates), so it looked
22 extremely uncomfortable.

23 Q. Did you speak to anyone at the JFIT as to what was going
24 on?

25 A. I did, but first of all I went to deal with the

1 Article 5 tribunals, and so dealt with that. Then, at
2 an appropriate point, when I had dealt with that issue
3 and everything that went with it -- and it was not
4 a particularly pleasant day -- I then doubled back
5 to the JFIT and went to speak to someone in the
6 interrogation tent.

7 Q. Do you know to whom you spoke?

8 A. No, I don't. I think there were two people in there
9 from memory.

10 Q. Do you remember the rank of the person to whom you
11 spoke?

12 A. No, but he certainly -- he wasn't -- he was probably
13 a major or a captain.

14 Q. What, in essence, did you say to him?

15 A. Well, I expressed my concern as to what was happening
16 and my view that it was illegal, and his words were --
17 again I am going back to my memo that I wrote to the
18 GOC -- he said it was part of UK doctrine.

19 Q. Did he tell you or did you ask where the doctrine was to
20 be found?

21 A. No, I didn't get into that.

22 Q. Did you tell him, the major or the captain that you
23 spoke to, that you regarded what you had seen as being
24 unlawful?

25 A. I believe I did.

1 Q. You wrote a memo to the GOC about this, as you have told
2 us.

3 A. Yes, that's correct.

4 Q. Could that be because, in fact, the GOC wasn't present
5 on this occasion?

6 A. I don't think the GOC -- I mean the GOC went, from
7 memory -- and it's difficult and I appreciate my diary
8 doesn't help matters here -- from memory he went ahead
9 of me and was surrounded by -- I mean I was sort of left
10 in his wake as he was surrounded by a whole group of
11 people and I followed on behind him.

12 Q. Again, I don't want you to guess about this: you don't
13 know, do you, whether the GOC saw what you saw or not?

14 A. Well, he never mentioned it later. I mean I obviously
15 gave him the memo and he didn't say "I saw it too" or
16 anything of that nature.

17 Q. It might be suggested, you see, that since you wrote
18 a memo to him, perhaps an inference to be drawn from
19 that is that he wasn't present, otherwise you would have
20 spoken with him there and then about it.

21 A. He went back by separate means.

22 Q. I follow. So you weren't with him at the time you saw
23 it and you don't know whether he saw it; is that right?

24 A. That's correct.

25 Q. And subsequently you sent him a memo.

1 A. That's right.

2 Q. Can we have a look, please, at that memo? We find it at
3 MOD011447. Can we enlarge that somewhat? Thank you
4 very much. It is to the GOC, from you. We see it's
5 dated 29 March. That's Saturday. It does seem, doesn't
6 it, from the first line of that document, that indeed
7 you had made two visits because you're saying here
8 "I attended the PWHO again today ..."

9 A. Yes, that's correct.

10 Q. So you sent this memo. It's under the heading
11 "Article 5 tribunals and questioning of prisoner of
12 war".

13 "I attended the PWHO again today to speak to my S02
14 and to review the process that had been put in place to
15 review the prisoners of war who claim to be civilians."

16 You then refer to sitting on a tribunal. As I have
17 indicated to you, I am not going to take you through
18 that aspect of matters because it's not directly in
19 point for us.

20 Can I come to paragraph 6, please, where you say
21 this:

22 "Finally I visited the JFIT and witnessed a number
23 of prisoners of war who were hooded and in various is
24 stress positions. I am informed that this is in
25 accordance with British Army doctrine on tactical

1 questioning."

2 Was that a reference to what the major or captain
3 had told you?

4 A. I think so.

5 Q. "Whereas it may be in accordance with British Army
6 doctrine [you went on to say], in my opinion, it
7 violates international law. Prisoners of war must at
8 all times be protected against acts of violence or
9 intimidation and must have respect for their persons and
10 their honour [you refer to Articles 13 and 14 of Geneva
11 Convention III]. I accept that tactical questioning may
12 be permitted but this behaviour clearly violates the
13 Convention."

14 When you say, as you do there, "I accept that
15 tactical questioning may be permitted", were you giving
16 any indication of any view that, for example, hooding or
17 stress positions -- those matters about which you were
18 complaining -- may have some part to play in the
19 tactical questioning?

20 A. No, not at all.

21 Q. -- operation?

22 A. No.

23 Q. So why did you refer to tactical questioning in this
24 memo?

25 A. Well, I mean, I've headed it "Questioning of PW's".

1 I mean, when I arrived at the JFIT -- I mean I -- we
2 were aware that tactical questioning took part because
3 it's mentioned. What we had no idea about was the
4 methodology that was being employed. When I first saw
5 the JFIT, my immediate impression was that these
6 prisoners were being intimidated to make interrogation
7 easier.

8 Q. I need to ask you about that.

9 A. Yes. And therefore I was aware that tactical
10 questioning took place -- everyone is -- but not the
11 methodology employed.

12 Q. So when you saw what you saw and you assumed that this
13 was part of the process of tactical questioning, if
14 I can put in shorthand what I think you said, was that
15 merely an assumption on your part or were you told
16 anything to that effect?

17 A. Well, clearly, they were interrogating prisoners.
18 I mean, the whole thing was set up with the prisoners in
19 these position and hooded in front of an interrogation
20 tent with generators running. I mean this was all
21 designed for the interrogation process. So clearly --
22 yes, of course, you can ask tactical questions, but of
23 course not using these methods.

24 Q. Did you have any discussion with the captain or major
25 about generators and the reason for them running?

1 A. I don't -- I can't recall if I did at the time, but my
2 view was that the picture being painted for the
3 prisoners was that the generators were being used to
4 muffle sound. I mean you try to get into the military
5 mindset, but I think if I was a prisoner there and
6 I could hear the noise, I would wonder what they were
7 trying to muffle, and that was the picture in my view
8 that was being painted.

9 Q. If you had been told that the purpose or one of them of
10 the generator noise was so that what was going on in one
11 tent by way of tactical questioning may not be heard in
12 another, would you then have accepted that as being
13 appropriate for tactical questioning?

14 A. No, I mean, my impression was, when I saw it, that this
15 is being used to roll over prisoners; in other words
16 they were being intimidated by these various means so
17 when it came to interrogation, they would roll over in
18 the interrogation.

19 Q. Did you take that up, Colonel Mercer, in those terms, if
20 you like, with the major or captain to whom you spoke?

21 A. Well, I went to investigate what was happening. I went
22 into the interrogation tent. I didn't know what I'd
23 find and I was relieved I didn't find anything
24 unpleasant in the interrogation tent because that was
25 the picture, in my view, that was being painted to the

1 prisoners. I obviously had a discussion about the
2 legality and then was told it was part of UK doctrine.

3 Q. But did you put -- can I put it quite bluntly to you --
4 to the individual that you spoke to that what you
5 believed you were observing was no more nor less than
6 a softening-up process prior to questioning?

7 A. I mean, obviously I made my concerns known to him.
8 I mean, the conversation took place seven years ago.

9 Q. Were those the concerns that you did raise or --

10 A. I think it was generic. We didn't break it down into
11 constituent parts. I mean, basically, "What on earth's
12 going on here?"

13 Q. I asked those questions because -- if we can have
14 a look, please, at paragraph 39 of your statement to
15 this Inquiry at BMI04067 -- after your return to your
16 headquarters, you say you spoke to intelligence officers
17 in G2, including S002, "... where I was advised that the
18 treatment I had witnessed was in accordance with British
19 Army doctrine on tactical questioning".

20 A. Yes.

21 Q. Was that something that was said to you by the major or
22 captain also?

23 A. I don't think I was referred to any document. All I can
24 say is my memo is the closest thing I've got to
25 a contemporaneous note.

1 Q. If we look at paragraph 43 of your statement, please,
2 where you say this:
3 "My complaint to the GOC ... (about hooding and
4 stress positions) caused considerable disquiet among the
5 G2 branch."
6 How were you made aware of that?
7 A. It was just obvious. It was not popular.
8 Q. Say that again.
9 A. It was just obvious. It was not very popular.
10 Q. You say:
11 "My legal advice was not accepted by the G2 branch
12 and the issue was staffed to the NCC."
13 A. That's correct, yes.
14 Q. By whom was the issue staffed to the NCC, do you know?
15 A. I can't -- I can't recall how it went up, up the chain,
16 but I had numerous phone calls and there was quite a lot
17 of email traffic about it. I mean it went backwards and
18 forwards for days with the NCC.
19 Q. So again, trying to take it relatively shortly anyway,
20 should the Inquiry understand that you had made your
21 position quite clear that hooding and stress positions
22 and the use thereof was unlawful and should not be
23 employed under any circumstances --
24 A. That was correct.
25 Q. -- and, if you like, the advice that was coming back was

1 that, what, hooding could be employed for certain
2 purposes?

3 A. Yes, it was, yes.

4 Q. Were you told for what purposes?

5 A. Well, I can't recall -- the correspondence came back and
6 I remember the SO2 G2 coming up to me and saying, "Look
7 we've just got this letter from the NCC. You've got the
8 law wrong". I said, "Well ..." -- you know, obviously
9 that put me in a difficult position because I had
10 objected, a counter-view had been obtained from a higher
11 headquarters, but then the issue, of course, took on
12 a different complexion because it wasn't just me who had
13 seen it and raised their concerns, but, of course, the
14 P info officer -- I think I can refer to his name.

15 Q. Yes.

16 A. -- Chris Vernon had spotted it.

17 Q. Yes.

18 A. I understand subsequently that the commandant of the
19 prisoner of war camp had also seen it and raised his
20 concerns and, of course, whilst I was being told I was
21 wrong, at this point the Red Cross picked up on it and
22 it was now -- obviously once the Red Cross had got
23 on it, it was a turbo-charged issue.

24 Q. It was more in the forefront?

25 A. Yes. So that, you know, my position was in a sense

1 vindicated by those other concerns being raised from
2 other quarters. I mean, anyone who would see it would
3 just say "What is happening here?" and that came from
4 all sorts of angles.

5 Q. I am going to come to those other concerns and the
6 Red Cross in a moment or two, if I may.

7 A. Yes.

8 Q. But the position, as we understand it then, was that you
9 had said "This isn't on". You had been told that you
10 were wrong about that. What I do want to ask you,
11 Colonel Mercer, is whether you can remember whether
12 there were, as it were, any conditions imposed on how
13 hooding may be used when you were told that it was going
14 to continue -- for any particular purpose.

15 A. No. As I understand it, the hooding was banned on --
16 I think it was 3 April --

17 Q. We are going to come to that.

18 A. Yes.

19 Q. But before that --

20 A. I think the issue was still at large at that point.

21 Q. I follow.

22 I don't think it need be put up, but at the end of
23 paragraph 43 of your statement to this Inquiry, after
24 what you describe as the to-ing and fro-ing and emails
25 and so on, you say:

1 "I was not persuaded by the contrary view of the law
2 and did not change my own advice."

3 A. That's correct?

4 Q. Moving on in time, please -- and again going back to
5 your diary to try to ascertain a date, could we have
6 a look, please, at MOD019890, Thursday 3 April, where
7 you record the temperature above 100 degrees in the
8 tent. I want to go down nine or ten lines. Do you see
9 the line that begins "I do not think the war will last
10 much longer ..." and then you say this:

11 "At the same time, I gained a minor victory as
12 I managed to prevent prisoners of war being hooded by
13 interrogators. I referred the matter to the general on
14 Saturday ..."

15 That would be to Major General Brims, would it?

16 A. That's correct, yes.

17 Q. "... and said it was a breach of the law of
18 international armed conflict. G2 tried to argue that it
19 was approved by the Government but when I checked there
20 was no mention of hooding. Hopefully law brings some
21 humanity to the battlefield."

22 What was that a reference to, Colonel Mercer, the
23 "minor victory"?

24 A. Well, the victory was getting hooding banned in theatre.

25 Q. What did you know about the ban on hooding? Who had

1 issued that?

2 A. Well, as I understand it, the decision had been made by
3 the NCC that -- there was legal debate about the issue,
4 but as we were theatre troops, we could make our own
5 policy on it and that the GOC had then banned hooding
6 and that had been disseminated orally over the
7 radio net.

8 Q. Forgive me being pedantic about it, and if you don't
9 know the answer, please say so, but did you understand
10 the GOC's order to be a ban on hooding or a ban on sight
11 deprivation or what?

12 A. A ban on hooding.

13 Q. You understood that it was an order that was issued
14 orally?

15 A. That's correct, yes.

16 Q. Did you know -- and again please don't guess about it --
17 who had in fact issued the order?

18 A. Yes, it was Colonel Marriott.

19 THE CHAIRMAN: He is the chief of staff, is that right?

20 A. Yes, he was chief of staff and chief G3.

21 MR ELIAS: Did you visit the TIF on subsequent occasions?

22 A. I think I -- yes, on quite a lot of occasions.

23 Q. And on any subsequent occasions after that order had
24 been issued, as you understood it, did you see hoods
25 used?

1 A. No, I never saw hoods used again.

2 Q. Did you see any other form of sight deprivation used on
3 any of your visits?

4 A. I don't recall that I did.

5 Q. And on any of those visits, did you see stress positions
6 or anything equating to them used?

7 A. No, I had addressed it with the chief G2 and
8 a compromise had been reached that if prisoners did need
9 restraining, then they were to be cuffed to the front
10 and not up behind their backs. I had also instructed my
11 legal officers down there to be on the lookout, to give
12 me eyes and ears over the prisoner of war camp for any
13 hint of any mistreatment.

14 Q. And none was reported to you?

15 A. None was reported to me.

16 Q. Thank you.

17 Now you have alluded to the fact that the Red
18 Cross -- the ICRC -- became involved through their
19 visits. Indeed the Inquiry has already heard of certain
20 of the concerns that were raised by the ICRC. Did you
21 attend meetings at which representatives of the ICRC
22 attended?

23 A. Yes, I did.

24 Q. Were those meetings at the JFIT?

25 A. Not at the JFIT, but in the prisoner of war camp.

1 Q. Thank you. You say in your statement that concerns were
2 expressed by the Red Cross representatives about the
3 treatment of prisoners of war, including, for example,
4 hooding, which it was said violated the Geneva
5 Conventions, and that was a matter with which you would
6 have agreed; is that correct?

7 A. That's correct.

8 Q. At those meetings where the ICRC were raising concerns
9 about hooding, was there any attempt to justify the use
10 of hooding for any purpose by any of the British
11 representatives?

12 A. Yes. I am free to talk on it at this moment, am I?

13 Q. Yes.

14 A. Yes, there were attempts to justify it.

15 Q. What was the basis, if you can give it to us in
16 a nutshell, upon which it was being suggested hooding
17 could be justified?

18 A. From memory, I think it was security of the prisoner and
19 security of the interrogators.

20 Q. Bearing in mind the caution that I have given you about
21 names, can you remember --

22 A. Yes.

23 Q. -- from the meeting those who were advancing that
24 proposition that hooding could be justified on security
25 grounds?

1 A. I think S002 was one of those people.

2 Q. Any others that you can remember?

3 A. I am struggling to remember the delegates at the meeting
4 itself. I can't even remember if S02 G2 was there
5 either. I think other people supported that position.

6 Q. Can I just invite you -- and if you need to correct it,
7 please do so -- but would you look at paragraph 49 on
8 the screen of your statement, BMI04070. Under the long
9 redaction in that paragraph, you say:

10 "Some of the participants at the meeting [and you
11 include S002] tried to justify the UK approach to
12 hooding on the grounds of security."

13 But you name two others there.

14 A. Yes, that's correct, S02s.

15 Q. Were they also supportive of that proposition?

16 A. And I think that was -- yes, to a degree.

17 Q. So David Frened and Gavin Davies you say also were
18 justifying the UK approach to hooding on the grounds of
19 security.

20 A. That's correct.

21 Q. What was your attitude to that when it was raised, that
22 security was a reason for hooding?

23 A. Well, I was -- I didn't accept it for a minute.
24 I thought there was no requirement at all and I thought
25 it was not the way that hooding was actually being used

1 when I'd seen it.

2 Q. So it would be fair, would it, to say that you didn't

3 believe that is why it was being used --

4 A. I was hard-over on hooding. I just find the whole thing

5 repulsive.

6 Q. I understand that.

7 A. So I was -- in my view it amounts to violence and

8 intimidation and it degrades the individual. So I don't

9 like it at all under any circumstances.

10 Q. Again, so that the Inquiry understands your position, at

11 the meetings we are here describing and you were

12 describing at paragraph 49, are you telling the Inquiry

13 that you believed that the ground of security that was

14 being put forward was not in fact the truthful ground

15 for which it was being operated?

16 A. I certainly -- it certainly wasn't being operated on

17 those grounds when I saw it and I don't -- yes, I think

18 it's unnecessary for security as well. I think there

19 are numerous ways you can get round the issue: proper

20 design of the interrogation centre, proper control of

21 prisoners, separate facilities. There are numerous ways

22 you can get round it by design and sensible handling of

23 prisoners.

24 Q. Would you accept, Colonel Mercer, that perhaps in the

25 early days, when resources had not caught up with the

1 situation -- if you follow the question -- that there
2 may have been some need, for some purposes, to deprive
3 sight of prisoners for security reasons?

4 A. I don't accept that.

5 Q. Not under any circumstances?

6 A. No.

7 Q. I use the term "deprive sight" not necessarily to
8 include hooding --

9 A. I got that. I'm against hooding. If someone had come
10 up to me and said, "We needed to blindfold one prisoner
11 for that, then so be it", but hooding, absolutely not.

12 Q. I am just a little confused then. Are you saying that
13 blindfolding might have been acceptable as a means of
14 ensuring security if, for example, we didn't have enough
15 tentage, we didn't have enough buildings, they couldn't
16 be separated from each other --

17 A. I can rarely see -- it's so -- I can rarely see the
18 point. I mean, I had this discussion with one of the
19 handlers at the prisoner of war camp, who came from the
20 Military Corrective Training Centre so he had been used
21 to handling prisoners, and there were things being told
22 that they would see the rear echelons when they were
23 being transported or they might see X, Y and Z. And
24 I said, "There were other ways to stop this happening.
25 Put screens around an enclosure, for instance. You

1 don't have to put hoods on their heads. Put up hessian
2 screens. Black out the windows of a bus". You know,
3 there were no rear echelons to see that every man and
4 his dog could see anyway because you just take a coach
5 down the road. So I must admit I was fairly cynical
6 about this.

7 Q. And you made that clear at the meeting, did you?

8 A. I was instructed not to speak at the meeting.

9 Q. I want to ask you about that, of course. You were
10 instructed not to speak about what?

11 A. About anything.

12 Q. And by whom were you so instructed?

13 A. I think it's probably on the list of ciphers.

14 Q. Would you like --

15 A. Is there a list?

16 Q. Would you like to have a list?

17 A. S034.

18 Q. S034 instructed you what?

19 A. Not to say anything at the meeting.

20 Q. Was that simply because it was known that your view
21 would be contrary, if you like, to the line that was
22 being put forward?

23 A. Quite possibly.

24 Q. Did you walk out of any meeting at which the ICRC were
25 present?

1 A. I did walk out at one point of the meeting, yes.

2 Q. Why did you walk out of the meeting?

3 A. Because I was very cross with some of the excuses that
4 were being put forward, what I saw as excuses.

5 Q. What, excuses for hooding?

6 A. Yes.

7 Q. Can you just answer this "yes" or "no" please? Do you
8 recall whether the use of stress positions was discussed
9 at the meetings at which the Red Cross attended?

10 A. No, I don't believe it was.

11 Q. We are now at 25 past 11.

12 MR ELIAS: That would be a convenient moment, Sir.

13 THE CHAIRMAN: All right. We break off now for ten minutes
14 so you can have a bit of a rest. I don't need to tell
15 you not to speak to anybody about your evidence, of
16 course.

17 Right, 25 to please.

18 (11.25 am)

19 (A short break)

20 (11.35 am)

21 THE CHAIRMAN: Once again, I don't need to remind you, but
22 you are still under oath.

23 A. Thank you very much.

24 THE CHAIRMAN: Yes.

25 MR ELIAS: Colonel Mercer, in the course of what I am going

1 to categorise as general discussions about this issue of
2 hooding and whether it was justified in any way, was the
3 shock of capture referred to by anyone as any sort of
4 justification to your recollection?

5 A. What, at this meeting?

6 Q. At this or indeed any other meeting where these matters
7 were discussed.

8 A. I mean, I'm aware of the concept of the shock of
9 capture, but I didn't understand it in the sense that
10 you put a head over someone's head -- I mean, the shock
11 is there because you have been captured.

12 Q. So you don't recall it featuring in any of the
13 discussions about whether hooding was justified or not?

14 A. No.

15 Q. Could we look, please, at paragraph 52 of your statement
16 at BMI04070? You say this:

17 "From my perspective, the issue of hooding was now
18 in the hands of the NCC. I had no doubt that, given the
19 seriousness of the situation, it would be staffed to
20 PJHQ and to ministers as there was going to be an
21 official complaint to the UK Government by the ICRC [the
22 Red Cross]."

23 I just want to ask you this about it: that was your
24 assumption, was it, that the matter would go, as it
25 were, all the way up to ministers?

1 A. I am not sure how much I am allowed to say at this
2 point. Please stop me if I am going somewhere
3 I shouldn't. But, yes, I think if the Red Cross is
4 going to make an official complaint to a government,
5 which is what it does, then there is no way that this
6 thing would have stayed at the level of the NCC. It
7 would have gone all the way up.

8 Q. That's what you assumed would happen?

9 A. I did, yes.

10 Q. I don't want to go into the detail of it, but are you
11 saying, then, that it was because of the Red Cross
12 intervention or because it was an issue of such
13 seriousness that in any event you would have expected it
14 to go up the chain?

15 A. No, I mean, a one star political adviser was flown in to
16 deal with this. It was obviously getting pretty
17 serious.

18 Q. So what is the answer to my question? Leave aside the
19 Red Cross, would you still have expected this to have
20 gone up to Government level?

21 A. What, if they'd --

22 Q. Without the complaint from the Red Cross, you having
23 raised the issue, you having, as it were, been rebuffed,
24 there being the to-ing and fro-ing that you have
25 described --

1 A. I am not sure that I would in those circumstances.
2 I would certainly expect it to go to PJHQ in those
3 circumstances.
4 Q. I follow.
5 THE CHAIRMAN: By "one star", do you mean someone --
6 A. Of the equivalent rank, yes.
7 THE CHAIRMAN: Of major general?
8 A. Of brigadier.
9 THE CHAIRMAN: Brigadier.
10 A. Yes.
11 MR ELIAS: Now all of this was happening, as we have seen,
12 towards the end of March. The order was issued, as you
13 recall from your diary, on or about 3 April. Could
14 I just go back to that for a moment? You told us,
15 I think, that you knew that it was Marriott who had
16 issued the order.
17 A. Yes.
18 Q. How did you know that?
19 A. I have a recollection that he gave it on the radio, but
20 I --
21 Q. What, and you heard it?
22 A. I believe so. I mean, I am trying to cast my mind back
23 to that, but clearly I was aware that it had because
24 I recorded it in my diary.
25 Q. Can we move on, please, to look at FRAGO 79?

1 THE CHAIRMAN: Just pause there. When you say that you
2 recorded it, do you mean the passage in the diary on
3 3 April?

4 A. That's correct, yes.

5 MR ELIAS: You refer in that obliquely, don't you --

6 THE CHAIRMAN: Yes.

7 MR ELIAS: If we go back to that, you refer to that
8 obliquely, I think, in your diary entry, as your "minor
9 victory preventing prisoners of war -- if we look at
10 MOD019890, nine or ten lines down.

11 "I don't think the war will last much longer. At
12 the same time, I gained a minor victory as I managed to
13 prevent prisoners of war being hooded by interrogators."

14 A. That's correct, yes.

15 Q. That's a reference to the order, is it?

16 A. That's a reference to the order, yes. I imagine it
17 would be one and the same day, although I -- yes, it's
18 highly likely that it was the same day.

19 Q. As you told us, your recollection is that that was a ban
20 on hooding.

21 A. Correct.

22 Q. Can we move on then, please, to look at FRAGO 79? Again
23 I am trying to take matters in something like
24 chronological order. We find that at MOD016165, please.
25 Is that dated 3 April 2003? If we go to MOD016169, the

1 last page of the FRAGO itself, this would appear to have
2 been issued by you.

3 A. Yes, that's correct.

4 Q. Going back, please, to the first page of it, under 5 we
5 find, do we, under "Stop/search/temporarily detain":

6 "The powers to stop, search and temporarily detain
7 are the principle powers which will be required by the
8 brigades in the discharge of their responsibilities for
9 'public order and safety'."

10 And under 6:

11 "Under the rules of engagement all soldiers have the
12 power to stop, search and temporarily detain.

13 "680 Bravo (1) permits the temporary detention of
14 persons posing a threat to coalition forces or elements
15 under UK protection or otherwise interfering with or
16 threatening the coalition mission."

17 Over the page of this FRAGO, please, at
18 paragraph 10:

19 "Once a person has been temporarily detained, he
20 should either be released or handed over to the RMP (or
21 equivalent) as soon as practicable and in any event
22 within six hours."

23 What was the reasoning for the handover of prisoners
24 as soon as practicable and in any event within six
25 hours?

1 A. I think it was just a timeframe that seemed to fit in
2 with the geographical distribution around theatre.

3 Q. So that was a realistic timeframe -- is that what you
4 are saying -- as you believed it?

5 A. It is very hard to judge, but I think we believed it to
6 be the case. I should just say, at this stage, that the
7 concept for public order and safety -- in other words
8 law and order -- in occupied territory is obviously
9 going to be evolutionary and we are very much finding
10 our way through this problem. I mean, if you can
11 imagine occupying someone's country, you just don't know
12 what you are going to find or how things will develop on
13 the ground.

14 Q. So -- and again I don't take you to your statement --
15 but I think, as you say in your statement, these were
16 evolutionary matters and you were feeling your way and
17 setting out a position that you thought was tenable.

18 A. Yes, I mean, it's impossible to know whether you'll
19 inherit a country that is with its civil powers in place
20 or whether it will disintegrate. No one can possibly
21 gauge precisely what you'll find. So we've written the
22 law and order schematic in a way that would enable us,
23 as the occupying power, to deal with law and order
24 issues as we found them, and obviously, then, we would
25 adapt as the situation on the ground developed.

1 Q. That was a FRAGO issued on 3 April; indeed, the same
2 day, you believe, as the general had issued his order
3 banning hooding.

4 If we move on, please, to the document we find at
5 MOD019141, now dated 8 May. This is a document headed
6 "Detention procedures". It is emanating, is it, from
7 the provost marshal?

8 A. That's correct, yes.

9 Q. You refer to it, I think, in your statement for the
10 contents of the first paragraph specifically, which says
11 this -- and note the date of 8 May:

12 "A review of custody and detention procedures has
13 been conducted to ensure compliance with references A
14 and B [Declaration of human rights and ECHR]. It has
15 been determined that current procedures are not
16 consistent with UK legislation and accepted 'best
17 practice' in relation to custody and detention. It may
18 also be argued that current procedures are inconsistent
19 with Article 5 of ... [ECHR]. Remedial action is,
20 therefore, required."

21 Do you know, Colonel Mercer, in which way or ways
22 current procedures were not consistent with those
23 benchmarks, as it were?

24 A. I think -- I mean there was a debate about -- I mean, we
25 were, at this point, detaining people in the theatre

1 internment facility and, therefore, the conditions were
2 fairly crude, and whereas we had wanted a separate
3 facility for detainees -- those that were potential
4 criminals -- and a separate facility for internees,
5 potentially, and also voluntarily detainees, we kept
6 having to divide the prisoner of war camp into
7 ever-smaller segments to accommodate the different
8 categories of prisoners we had.

9 Now, these prisoners were sleeping pretty much
10 rough. There was some tentage over their heads; there
11 were lime pits for sanitation. It smelt pretty bad.
12 And also our review procedures of those who were
13 detained were pretty primitive.

14 Q. As I indicated, I don't want to get into that latter
15 matter --

16 A. So I think that's how it was understood --

17 Q. Those were the concerns perhaps referred to in that
18 provost marshal note.

19 Moving on in time to paragraph 81 of your statement
20 at BMI04077, at the foot of page, where you say this:

21 "Although strict instructions had been given in
22 FRAGO 79 [the one we just looked at a moment or two ago]
23 that detainees were to be handed over to the Royal
24 Military Police as soon as practicable, and in any event
25 within six hours, before being transported to the TIC,

1 I began to have concerns that this was not being
2 complied with in theatre and that detainees were being
3 held by battlegroups."

4 Can you help as to why you began to have concerns?
5 What were the source of your --

6 A. Well, the schematic was fairly straightforward,
7 I thought; in other words, that people who were detained
8 under the ROE were handed to the police and the police
9 then handed them to the -- took them down to the TIC,
10 the theatre internment centre, or TIF or whatever it's
11 called, at this particular moment in time.

12 It's very hard to read a situation from divisional
13 headquarters. You have 25,000 soldiers over a massive
14 geographical area and you begin -- you were conscious
15 that things might happen or might be happening, and one
16 of my concerns was that people weren't being taken down
17 to the TIF, but were being held elsewhere.

18 Q. Where did you learn that?

19 A. I can't remember where that came up. It may have been
20 anecdotal. It may have been from -- I can't remember
21 the source, but to address this issue I put it in
22 a FRAGO that all units were to report --

23 Q. We are going to look at that in just a moment, but
24 I just want to deal with your concerns, if I may, in
25 this paragraph. You say:

1 "I began to have concerns that this was not being
2 complied with ..."

3 That is the handover within the timescale that had
4 been set.

5 A. That's correct.

6 Q. You can't put your finger on where those concerns
7 emanated from or what evidence, if you like, there was?

8 A. I can't specifically. No one came up to me
9 specifically, but I just -- you sort of detect -- you
10 suspect things might be happening that shouldn't be
11 happening, but it is very hard to read from the locus
12 of the divisional headquarters. You are sitting there
13 in your staff headquarters and, of course, you have
14 troops spread all across the ground, so you are blind to
15 a large degree.

16 Q. Your statement goes on at paragraph 81, as we can see --
17 you began to have concerns that it wasn't being complied
18 with in theatre. You go on to say this:

19 "Although I had no direct knowledge of this ..."

20 That is to say that it wasn't being complied with;
21 is that correct?

22 A. Yes.

23 Q. "... I believe that I requested the paragraph in
24 FRAGO 143 dated 14 May ... to try and identify any such
25 locations."

1 By which you mean locations in which detainees were
2 being held by battlegroups.

3 A. Potentially, yes.

4 Q. Can we look, then, please, at FRAGO 143? This is now
5 dated 14 May. We find it please at MOD030974. You see
6 at the top of the page, FRAGO 143.

7 A. Yes.

8 Q. "Daily miscellaneous FRAGO" is its headline. If we go
9 over the page, please, paragraph 3 in the middle of the
10 page, "Treatment of detainees":

11 "Brigades are reminded that detainees should be
12 treated in accordance with the responsibilities as laid
13 out in 'Geneva Convention 4'."

14 Then this:

15 "All details of locations where detainees are held
16 in the div area of responsibility should be confirmed to
17 G3 pro at this HQ by 15 May at 18.30 hours and all are
18 reminded to allow [Red Cross] access to such sites if
19 requested."

20 Is that the paragraph to which you are referring at
21 paragraph 81 of your statement?

22 A. Yes, that's correct.

23 Q. So what you were asking for here, in paragraph 3, is to
24 know the location -- any location -- where detainees
25 were being held?

1 A. Yes. I mean the schematic was simple: detain under the
2 ROE, hand to the police, the police take them down to
3 the TIF. But, of course, as we know, that system had
4 become very overloaded and broken.

5 Q. And so the purpose of having those areas identified was
6 what?

7 A. Well, I mean, obviously the schematic wasn't working.
8 I wanted people in the TIF and nowhere else.

9 Q. I understand that. What was the purpose of having these
10 areas where detainees were going to be held or were
11 being held -- what was the purpose in having those, as
12 it were, confirmed to G3 pro --

13 A. Well, I'm not sure that any were confirmed. I can't
14 recall what results came from this FRAGO.

15 Q. That's another issue. What was the purpose of
16 requesting it, Colonel?

17 A. Well to see if there were -- if this was working as it
18 should or if people were holding them against
19 instructions.

20 Q. But you don't recall what, if any, was the result of
21 that --

22 A. No, I don't recall. I don't recall any being
23 identified, to be honest.

24 Q. You don't recall any being identified?

25 A. No.

1 Q. Again, I have asked you this in relation to an early
2 matter but, in seeking to get that information, was
3 there anything in your mind that if detainees were
4 located at a particular battlegroup location, there was
5 any higher risk of them being mistreated or ill-treated?
6 A. Well, not at this point, I don't think. I mean I like
7 to think it was clearly understood that they should be
8 properly treated.
9 Q. You go on in your statement to say -- moving on now to
10 20 May -- that you were advised by the SIB that there
11 had been a death in custody of someone held by
12 a battlegroup and that that matter was being
13 investigated.
14 A. That's correct.
15 Q. You were also led to believe that there may have been
16 other deaths in British custody.
17 A. I think from memory the way this worked was when the SIB
18 investigate an incident, you get what's call an "interim
19 report", and that interim report would hit my desk as
20 commander legal in the divisional headquarters. So I do
21 recall the first interim report being issued where there
22 had been a death of an individual held by a battlegroup
23 in theatre. But of course you don't know at that stage
24 whether -- what the possible cause of the death is. So
25 you are concerned, but you don't know for certain what

1 caused it until it's properly investigated --

2 Q. It obviously could be natural causes, couldn't it?

3 A. Absolutely. So the first one I had left. I had

4 registered it and I thought "We will wait and see what

5 happens". But when I got number two and I spoke to

6 a member of the SIB, who said they were investigating

7 a number of others, and that was communicated to me

8 orally, I decided to act immediately on that

9 information.

10 Q. Again, please don't speculate or guess if you don't

11 remember, but was there any indication given to you in

12 relation to any or either of the deaths about which you

13 specifically became aware, you tell us, that any

14 breathing difficulties may have been involved in those

15 deaths?

16 A. No, there was none whatsoever.

17 Q. So having been alerted to the two deaths, as

18 I understand you to say it was, what then did you do

19 about it?

20 A. Well, it wasn't just two deaths. There were a number of

21 deaths -- I thought the figure was higher -- and of

22 course I issued FRAGO 152.

23 Q. You say in your statement -- or at least you intimate if

24 you don't say it directly -- that you issued FRAGO 152

25 very shortly after being given this information about

1 the death.

2 A. I think from memory I was given the information --
3 I mean I have given you a chronology in my statement
4 about what was happening at this stage and, to be
5 honest, we were busting a gut to get the courts up and
6 running so that we could get rid of detainees from the
7 TIF and actually start to cope with all that was going
8 on in Iraq. So the day was spent running around trying
9 to find judges, find magistrates, find lawyers, build
10 the courthouses. I got back in the evening, from memory
11 at 6 or 7 at night, a member of the SIB spoke to me and
12 gave me this information.

13 Q. If we look at MOD017061, we find there, do we,
14 FRAGO 152? Again if we just look at the end of it at
15 MOD17063, please. Again issued by you?

16 A. That's correct.

17 Q. If we go back to the first page if we may, we can see
18 the date at the top, can we, of 20 May 2003 as the date
19 of issue? The time at 22.30. So are you telling the
20 Inquiry -- please don't just accept it from me -- that
21 that was issued on the same evening as you were given
22 the information about the deaths?

23 A. That's correct.

24 Q. I follow.

25 Can we see what you set out here? It is headed the

1 "Miscellaneous FRAGO". Under "Legal", in paragraph 3:

2 "... find renewed guidance on the detention of
3 civilians attached at enclosure 1. This is to be passed
4 down to the lowest level."

5 Over the page, under the heading of "Detention of
6 civilians", you record at paragraph 1:

7 "There have recently been a number of deaths in
8 custody where Iraqi civilians have died whilst being
9 held by various units in theatre. A number of these
10 cases are currently being investigated by the SIB but
11 all units in theatre are to ensure that all persons
12 detained by UK forces are treated with humanity and
13 dignity at all times."

14 That is reinforcing the lesson you say had been
15 given --

16 A. Yes, reiterating the words we had used in our briefings.

17 Q. -- many times over.

18 Then at paragraph 4 under the general heading
19 "Minimum force", there's a reiteration, isn't there, of
20 the handing over within six hours of detention.

21 "Delivery to the RMP should occur as soon as
22 possible. The guidance allowing up to six hours is to
23 take account of those units which might be in remote
24 locations. All other units should attempt to deliver
25 the detained person in under a hour."

1 That was what was being aimed at, correct?

2 A. That's correct.

3 Q. At 5:

4 "If a unit has to hold a detained person prior to
5 the arrival of the Royal Military Police or to await
6 transport or for any other unavoidable reason, the
7 detained person should be treated with humanity and
8 dignity [I think highlighted in black] at all times.
9 They should not be assaulted. They should be provided
10 with water in all cases and food if they are detained
11 for longer."

12 Just pausing there, if I may for a moment, "they
13 should not be assaulted", was that put into this FRAGO
14 for any specific reason because you were aware of any
15 allegations that prisoners had been assaulted?

16 A. I was aware that prisoners had died.

17 Q. But you knew no more or less than that, did you?

18 A. Well, I can't remember if it was at this point or
19 others, but there were reports of prisoners -- some
20 prisoners -- being delivered who were quite bruised down
21 to the TIF. Now I cannot recall whether it fell before
22 this or after this. Now that's difficult because was it
23 a result of a lift operation, which it could be, or was
24 it for some other reason? So I put that in. I can't
25 recall at this particular moment in time, but it's

1 likely to have been because of the mention of the
2 deaths.

3 Q. But we should assume, should we -- the Inquiry should
4 assume -- that you put it in, as it were, specifically,
5 not because it formed some part of a stream of words
6 that would have been used in a FRAGO of this kind come
7 what may?

8 A. No. It was aimed specifically.

9 Q. Then reading on:

10 "... water in all cases and food if they are
11 detained for longer. If they need to be restrained,
12 then this should be only be effected where absolutely
13 necessary and using the minimum force required."

14 Then this:

15 "Under no circumstances should their faces be
16 covered as this might impair breathing. Medical
17 assistance should be close at hand at all times. The
18 Royal Military Police are specifically trained in all
19 these matters and timely delivery to the Military Police
20 is the best way to ensure that the correct procedures
21 are adopted at the outset."

22 "Under no circumstances should their faces be
23 covered as this might impair breathing."

24 A. Mm-hm.

25 Q. Why did you put that into this FRAGO, Colonel?

1 A. Well, at this point, of course, I've got two interim
2 reports or two reports from the SIB that people -- two
3 people held by battlegroups had died. I, as the lawyer,
4 am trying envisage what might have happened. I don't
5 know. So I am trying to cover as many bases as I can.
6 I covered the assault in the first paragraph. I cover
7 food, water in the second line. I cover -- hooding had
8 been banned and I was thinking, well, soldiers being
9 soldiers, they might try something else because I know
10 what they're like -- if they say "hooding is banned",
11 then they will do something that, you know, cuts out
12 sight or whatever using other means. So I put it in for
13 those reasons. I am really trying to get at what might
14 be going wrong here.

15 I think, if I may say -- and it's something I picked
16 up in the press -- I did see pictures of prisoners who
17 had black masking tape round their heads and round their
18 noses, so actually my guess from the headquarters
19 I don't think was too wide of the mark.

20 Q. Do you mean that you saw that at the time?

21 A. No, it came up during the course of this Inquiry.

22 THE CHAIRMAN: Yes.

23 A. So I did see that. And I thought, "Well, actually
24 that's precisely the sort of inventiveness unfortunately
25 that you get".

1 MR ELIAS: So the "under no circumstances should their faces
2 be covered as this might impair breathing" was not
3 specifically aimed at no hooding.

4 A. No, hooding had been banned. This is why it was couched
5 in these terms.

6 Q. Let's examine that. As you said, you knew hooding had
7 been banned because you heard the oral order.

8 A. Yes.

9 Q. You had nothing in writing about it, did you?

10 A. Well the situation is I am the command legal adviser.
11 If the general gives an order or instructs his chief of
12 staff to give an order, then the chief of staff will do
13 that order in whatever way he sees fit. It's not for
14 me, as a legal adviser, to do anything in those
15 circumstances.

16 Q. Forgive me. You have perhaps answered a question
17 I haven't not asked you --

18 A. No.

19 Q. -- and I didn't intend to ask you. I do want to ask you
20 this one.

21 A. Yes.

22 Q. Given that you knew that hooding had been banned by way
23 of an oral order from Major General Brims via
24 Marriott -- but you knew it was not in writing, didn't
25 you?

1 A. That's correct.

2 Q. -- did you think that in this FRAGO, where you were
3 making things -- as you put it in your statement,
4 setting them out in unequivocal terms, did you think
5 that in this FRAGO it might be an opportunity to
6 indicate that of course prisoners may not be hooded?

7 A. Well, I took that as a given and this addressed the
8 situation where they were trying to get round that
9 instruction.

10 Q. Taking it as a given, therefore, you didn't consider
11 that you needed to put the ban on hooding unequivocally
12 and in writing in this FRAGO --

13 A. Well, the order had already been given --

14 Q. Yes.

15 A. -- so this supplemented.

16 Q. Okay. By "faces being covered", what did you have in
17 particular in mind?

18 A. Well, I just thought someone could have wrapped
19 something round their eyes, covered their noses.
20 I mean, I was trying to guess how this could have
21 happened.

22 Q. Forgive me for asking it again, but we can be quite
23 clear, can we, that you had not been given any
24 indication by anyone that maybe difficulties with
25 breathing had brought about the death of --

1 A. No, none whatsoever.

2 Q. You say in paragraph 83 -- can we have that on the
3 screen, please -- of your statement to this Inquiry,
4 BMI04078, that:

5 "I used the phrase ... because I was concerned that
6 detainees might possibly be being blindfolded (given the
7 unfinished debate about the legality of hooding) and
8 that the blindfolding ... might also be a potential
9 danger (if it was applied in a way that might impair
10 breathing, over the nose for instance). This was in an
11 abundance of caution and was not a reference to hooding
12 or anything of which I was aware."

13 You then go on to say:

14 "Furthermore, the FRAGO made it clear that
15 interrogation was only to take place at the TIC [or TIF]
16 where I was content that I had sufficient supervision
17 and awareness of the prisoner-handling process."

18 I don't think this FRAGO in fact did go to that
19 issue, did it?

20 A. No, it didn't. It was later. It was 163, I think.

21 Q. Yes.

22 A. Actually -- if I can just come back to that, actually,
23 I think it does because it refers to delivery to the RMP
24 of course, so that would then fit into the schematic.

25 Q. I understand that.

1 A. Yes.

2 Q. Of course you were still maintaining the six-hour
3 maximum period for handover.

4 A. Yes, we were.

5 Q. You are aware now, are you, that it does seem in
6 a variety of areas that after Major General Brims'
7 order, hooding continued to be employed? You are aware
8 of that now, are you?

9 A. I'm not -- at this stage I'm not.

10 Q. Had you been aware of any uncertainty as to whether that
11 order had been received, you would presumably have
12 included it, would you, in the FRAGO we just looked at?

13 A. It would have been reiterated.

14 Q. So FRAGO 152 was 20 May. Can we move on, please, to
15 have a look at a document that isn't precisely dated,
16 but which I suggest may be around end of May?
17 MOD011514, please. Again if we go to MOD011516, we see
18 it is a document under your name, with a heading
19 "Internees" on the first page. You refer at the top of
20 that page, the first paragraph, to guidance being
21 provided recently. To whom were you providing this
22 guidance?

23 A. I think -- I can't find -- this will have been attached
24 to a FRAGO. What I tended to do -- the FRAGO would deal
25 with the subject and then there would be an annex which

1 dealt specifically with the particular issue of the
2 moment. I think -- if I just take you back to the
3 chronology here, on 1 June the courts and prison and
4 police were all brought on-stream. We had restored
5 sufficient capacity to deal -- so the Iraqis could deal
6 with public order and safety or law and order.

7 Roughly on 1 or 2 June, the entire pool of
8 300 detainees were transferred from the theatre
9 internment facility to Al Maqu'al prison in Basra; in
10 other words, we -- prisoners of war bar one or two had
11 all been cleared; detainees, of which there were about
12 300, were all moved to the prison, handed to the Iraqi
13 authorities, paperwork given to an Iraqi judge and
14 therefore the last category remaining in the theatre
15 internment facility was internees. In other words,
16 I then would address this specific issue because that
17 was the only one remaining at this particular moment in
18 time, bar one or two legacies in the prisoner of war
19 camp.

20 Q. Can I then, please, take you just to parts of the
21 document. Under "Introduction" you say:

22 "Guidance was provided recently on detainees (being
23 those persons who have committed a serious criminal
24 offence who are subsequently detained by coalition
25 forces). However there is another category of persons

1 who can be detained called internees."

2 That is the point you just made, I think,
3 essentially. Was the guidance provided recently
4 a reference to FRAGO 152, do you think?

5 A. It could have been. I can't recall?

6 Q. All right:

7 "These are people who simply pose a threat to force
8 security and under the IV Geneva Convention 1949, such
9 persons may be interned where it is 'absolutely
10 necessary' for force security ... At the present time,
11 however, there appears to be some confusion within the
12 brigades as to the procedure for arresting and holding
13 internees and this document is intended to provide
14 guidance to ensure that internees are not held
15 unlawfully."

16 Just to go to the foot of page, please, the last
17 paragraph, there is a reiteration, isn't there, here of
18 the six-hour guide to allow those in remote locations to
19 deliver, so still the six hours is, as it were, being
20 adhered to.

21 A. Yes.

22 Q. Over the page, the ideal --

23 A. Within one hour.

24 Q. -- that they should be delivered within one hour, as you
25 underline in the document.

1 A. Yes.

2 Q. "This should hopefully ensure the safe detention of both
3 interneers and detainees."

4 Again, was that notion of safety, the safe
5 detention -- did you have in mind, in writing it, any
6 query as to whether detainees might otherwise be
7 mistreated or ill-treated?

8 A. I was trying to design out the potential for abuse.

9 Q. And "designing out the potential for abuse" means,
10 putting it in straightforward language, lessening the
11 opportunity for assault?

12 A. That's correct.

13 Q. That was being done by -- may I put it this way -- this
14 constant reiterating of the six-hour maximum and the
15 one-hour ideal?

16 A. Yes, that's correct.

17 Q. You go on to say:

18 "The procedure is identical in both cases."

19 Then if we go to the foot of the page, under the
20 heading "Questioning":

21 "Questioning of interneers will not be carried out by
22 the brigades in brigade holding areas and should only be
23 conducted at the theatre internment facility ..."

24 You go on then to refer to what's going to happen
25 I think some little time in the future.

1 "From July 2003 ... 3 Div will not have a permanent
2 JFIT presence ...", and so on.

3 But just to ask you about that, please, the first
4 line, "Questioning of internees will not be carried out
5 by the brigades in brigade holding areas ...", was that
6 suggesting that tactical questioning would not take
7 place there?

8 A. It covers everything.

9 Q. So questioning of all kinds?

10 A. Well, interrogation of all kinds, yes.

11 Q. Which would include tactical questioning, would it?

12 A. Of course, yes.

13 Q. Over the page, as it were --

14 A. If I can just say on that, the theatre internment
15 facility had a lawyer present at the theatre internment
16 facility; in other words, I had legal supervision at
17 that point and I didn't have it elsewhere.

18 Q. So what you were seeking to bring in, if you like,
19 through this guidance was -- if it had been going on --
20 an end to tactical questioning at brigade level?

21 A. I didn't know it was going on there. The idea was to --
22 it doesn't say so at all. It says: detain, hand to the
23 police, delivery to the TIF, questioning at the TIF.

24 Q. But if, insofar as it had been going on, this was
25 designed to prevent tactical questioning or questioning

1 of any kind --

2 A. Of any kind, "questioning" being generic.

3 Q. -- anywhere other than at the TIF?

4 A. At the TIF because I had legal supervision of that.

5 Q. Looking back on it, Colonel Mercer, do you think that it

6 might have been clearer on that issue to indicate that

7 tactical questioning was also not to be conducted?

8 A. No, "questioning" covers everything.

9 Q. So over the page, please, just to underline perhaps the

10 point --

11 A. And I think can I -- sorry, just to go back to that last

12 paragraph, it says "tactical ..." -- it goes on to say

13 "trained tactical questioners who can question the

14 internee at the TIF", so it does deal with tactical

15 questioning. So I hope it's clear.

16 Q. Over the page, then, please, under "Conclusion":

17 "The procedure for both internees and detainees can

18 be summarised follows:

19 "(a) Temporarily detain (as permitted under the

20 Rules of Engagement)

21 "(b) Convey to the Royal Military Police within

22 1 hour (but six hours ...) [if necessary]

23 "(c) Questioning can only take place at the TIF."

24 A. That's correct.

25 Q. Can we then move on, please, to 30 May and to FRAGO 163?

1 THE CHAIRMAN: One of the rare occasions when I have the
2 document you are struggling to find.

3 MR ELIAS: I am very grateful. My bundle had been removed
4 and I have it.

5 Could we find FRAGO 163, please, at MOD017179. Let
6 us try MOD011506? Thank you very much.

7 Forgive me, Colonel, we can see, can't we, that the
8 date of that is 30 May 2003, isn't it?

9 A. Yes.

10 Q. Did you contribute to this FRAGO in terms of its
11 content?

12 A. I can't recall whether I did or didn't. It could be --
13 it's highly likely that I had some input into it.

14 MR ELIAS: Would you forgive me for a moment, Sir? I do
15 want to go back to the document that I was seeking to
16 put up. It is the FRAGO, but it was issued in two
17 versions at later times. But it is certainly the later
18 version adopted at brigade level about which I want to
19 ask this witness.

20 Can we try MOD016174, please? Let me use that
21 version of it, if I may.

22 So forgive me, Colonel, you think you may have had
23 some input --

24 A. Yes, I did have some input.

25 Q. Thank you. Now 30 May. "Internment and detention

1 procedures", as we can see. "Scope of the order":
2 "This FRAGO specifies the procedure to be
3 implemented when detaining or interning civilians."
4 Then under "General" there is reference to the
5 permission to apprehend and so on those who pose
6 a threat to force security. In the last three lines:
7 "It is essential that all soldiers must understand
8 the procedures to temporarily detain detainees or
9 internees to prevent violations of international law."
10 "Execution" at 3, at the foot of the page, please,
11 "Concept of ops", and under A, "Intent":
12 "To ensure that all ranks are able and have the
13 confidence to initiate internment or detention
14 procedures within a specific process that conforms to
15 legal stipulations."
16 Over the page at B, "Scheme of manoeuvre", and
17 I want to go to those bold highlighted words, please:
18 "Those temporarily held by UK forces must be handed
19 to RMP within one to two hours."
20 So the timeframe, no doubt for the same reasons you
21 have outlined in the earlier FRAGOs, was being
22 maintained; correct?
23 A. That's correct.
24 Q. "Any later delivery can only be in exceptional
25 circumstances. The RMP will then be responsible for

1 initial processing before releasing back to the
2 arresting battlegroup for onward movement to the TIF.
3 All internees are to be delivered to the TIF within
4 6 hours of arrest when practicable."

5 And that then is further highlighted under
6 "Coordinating instructions". I don't think I need take
7 you to the time limits, but they are set out again.

8 Under (b), "Internment procedures", there is
9 a reference to the fact that the TIF is closed been
10 21.00 hours and 8 o'clock in the morning. You were
11 aware of that, were you?

12 A. I can't recall being aware of it at this point actually.

13 Q. All right. Then provision for detainees, as it were, to
14 be held -- to be returned by the RMP to the battlegroup
15 RP staff, who will be responsible for the care of the
16 suspects overnight and in such cases battlegroups are to
17 deliver the suspects to the TIF before 08.30 the
18 following morning, half an hour after the opening.

19 A. Yes.

20 Q. So it was here envisaged that the RP staff, the provost
21 staff, would be the guards, if you like.

22 A. Yes, when it was closed, yes.

23 Q. Then over the page, the last line of paragraph 5:

24 "Under no circumstances may a suspect be
25 interrogated until he has been processed by the TIF."

1 Again, underlining what we had seen earlier; is that
2 right?

3 A. That's correct.

4 Q. Can we have on the screen, please, paragraphs 87 and 88
5 of your statement to this Inquiry? At paragraph 88:

6 "At the same time, over the course of the week,
7 specific internment and detention procedures were
8 produced [you say] to 'design out' the possibility of
9 prisoner abuse and on 30th May 2003, FRAGO 163 was
10 issued."

11 In what ways did these provisions, the guidance that
12 we have seen a moment or two ago and then FRAGO 163 --
13 how were they designing out the possibility of prisoner
14 abuse?

15 A. Well, I think it's no questioning except at the TIF and
16 also the time prerogatives for handing over, bringing to
17 the TIF and also the involvement of the Military Police.
18 That's part of the process.

19 Q. So those were the safeguards essentially?

20 A. They were, yes.

21 Q. And they were safeguards, Colonel Mercer, which you were
22 keen to underline, weren't they?

23 A. Yes, they were.

24 Q. So that has now been set in place. We are now at 30 May
25 or thereabouts when FRAGO 163 is issued. Can we have

1 a look together, please, at paragraph 4 of your second
2 statement to this Inquiry, in which you say this:

3 "Despite the measures which were taken with
4 FRAGO 152 and including FRAGO 163 (30th May 2003), I was
5 still concerned that mistreatment of prisoners by
6 battlegroups may be continuing, although any allegations
7 could not be substantiated before the SIB had completed
8 their investigation."

9 What gave rise to those concerns?

10 A. I referred to it earlier and it was the delivery of
11 prisoners to the TIF who had suffered bruising. I am
12 not quite sure at this stage, but I think at roughly
13 this point, because my concerns were -- my antenna were
14 picking this up, I then deployed legal officers to the
15 brigades to give me a better chance of visibility as to
16 what was happening at brigade level because you can
17 become very cocooned in a divisional headquarters. So
18 I think at roughly the same time, from memory,
19 I dispatched some younger officers to the brigades or
20 battlegroups to give me some sort of eyes and ears over
21 the ground.

22 Q. Does it come to this, Colonel, that you were -- after
23 30th May -- is this what you are saying -- you were made
24 aware of the fact that detainees were arriving at the
25 TIF -- putting it neutrally -- to some extent and in

1 some cases the worse for wear physically --

2 A. That's correct.

3 Q. -- for reasons that you didn't know?

4 A. That's correct.

5 Q. And apart from sending, as you say, legal officers from

6 your department effectively to the battlegroups, to the

7 locations, what, you were keen, were you, to ensure that

8 all those provisions that you had set out -- the

9 one-hour delivery, the involvement of the RMP and

10 so on -- were also maintained and upheld?

11 A. I was trying to tie it down wherever I could. I had

12 lawyers in the TIF, lawyers in the brigades and had

13 issued FRAGO 152 and so on and so forth, and also the

14 schematic for delivery was in a way a screwing it down

15 as hard as I could.

16 Q. In that FRAGO 163 that we just looked at, you used the

17 term that no interrogation was to take place before

18 delivery to the TIF.

19 A. Yes.

20 Q. Why "interrogation" on this occasion as opposed to

21 "questioning" which we have seen you used earlier?

22 A. There's no particular reason. I can't see any

23 particular difference between the two.

24 Q. Would tactical questioning fall under the umbrella of

25 "interrogation"?

1 A. Yes, very clearly. Interrogation includes tactical
2 questioning and strategic questioning.

3 Q. Again, with hindsight, do you think that might have been
4 made clearer if that was your intention?

5 A. If you read it in the light of the previous FRAGO, it
6 makes it absolutely crystal clear that this only takes
7 place at the TIF. This is again a reiteration of that
8 earlier FRAGO.

9 Q. It is rather what only takes place at the TIF that I am
10 suggesting might have been made a little clearer, to
11 include TQ'ing, if that's what you intended.

12 A. We looked at that last paragraph in the provisions for
13 interneers and it makes it very clear that questioning is
14 only to take place at the TIF, and it includes tactical
15 questioning in that paragraph and then that's reiterated
16 in the later FRAGO.

17 Q. We then move on to FRAGO 29. You say in your statement
18 that you think you may not have been aware of that until
19 it was disseminated; is that right?

20 A. No, I hadn't -- I hadn't seen FRAGO 29. It was produced
21 independently of me.

22 Q. Do you find that surprising?

23 A. I can see the reasons behind it.

24 Q. For producing it independently of you?

25 A. Well, I think -- reading the FRAGO, I don't think --

1 I can't recall when I saw it. I certainly didn't see it
2 when it was being drafted. I certainly didn't see it
3 for some days later, from memory, and it could have been
4 longer. I can't remember the date of FRAGO 29, but it
5 is certainly late in June, I think. And I think it
6 makes it very clear in the FRAGO that internment is
7 a G2/G3-led operation -- you know, the ground is being
8 seized back.

9 Q. When you did see FRAGO 29, as you say, the ground now
10 having been seized back -- the bringing in of the BGIRO
11 and the brigade responsibility and matters of that
12 kind -- were you horrified at what you saw?

13 A. No. I saw the BGIRO -- there clearly has to be
14 a determination in every case as to whether someone goes
15 right to the police or left to the internment facility.
16 That's what I took it to be.

17 Q. But I'm not focusing upon the BGIRO specifically --

18 A. Yes -- no, I didn't.

19 Q. Here you had been striving, as I think we have seen, no
20 doubt with others --

21 A. Yes.

22 Q. -- to reduce the amount of time so as to lessen the risk
23 during which prisoners of war might be held at
24 particular points with battlegroups and now, to some
25 extent at least, it might be said, FRAGO 29 was

1 reversing that process --

2 A. Yes, I cannot recall when I saw FRAGO 29, but it was
3 some days after it had been issued. It could have been
4 longer. I was not consulted on FRAGO 29 and it makes it
5 is absolutely clear that G2/G3 have taken this back from
6 what they saw was being led by police and lawyers. And
7 of course it makes it clear that interrogation is a G2
8 function; in other words, we had strayed onto their
9 turf.

10 I saw it as a way to bring that back into their
11 domain and to marginalise the police and the lawyers.
12 I should just add on the police bit that the police also
13 were so stretched for resources that they wanted to
14 disengage from the prisoner process altogether. So
15 those are the circumstances in which this arose.

16 Q. They were the circumstances in which it arose --

17 A. Sorry, there were two things. One was the 14-hour
18 delivery and I questioned that with the -- someone in
19 the headquarters and was told that the facility was
20 closed from 6 until 6 and that's what I understood the
21 position to be; in other words, we had been giving an
22 order that people simply could not comply with. So one
23 is as it was not a UK facility -- and I think that
24 raises issues because we don't have control where it's
25 run by another nation -- then obviously one had

1 reluctantly to go along with that.

2 With regard to the BGIRO, I had no other indication
3 that it would be anything more than the determination --
4 initial determination -- is he a criminal? Go to the
5 Iraqi police. Is he an internee? He goes down to the
6 TIF.

7 Q. Colonel, let me just ask the question once more.

8 A. Yes.

9 Q. Given what you had been striving to do through the
10 FRAGOs we have looked at over the last half an hour or
11 more, when FRAGO 29 came out -- my words -- reversing
12 that process --

13 A. Yes.

14 Q. -- in large measure, did you have concerns as to whether
15 prisoners might be mistreated or ill-treated under the
16 new regime?

17 A. Well, I had hoped by this stage that the provisions of
18 FRAGO 152, setting out very clearly -- you know, it
19 couldn't be more in your face what you shouldn't do to
20 prisoners -- was clear. I was hoping that the
21 interrogation provisions with regard to interrogation at
22 the TIF was clear. And, yes, it wasn't ideal, but at
23 the end of the day I am a legal adviser and it's a G2/G3
24 product.

25 Q. I am not sure that answers my question, does it?

1 A. Well, I am trying to.

2 Q. Did you have concerns as a result of the regime that
3 FRAGO 29 was now introducing, given your concerns which
4 you've expressed to us over the last hour or so which
5 resulted in FRAGOs 143, 152, 163 and so on?

6 A. Yes, I think I had ongoing concerns until we left and
7 I think that then -- I mean, this had been taken from
8 our hands, but I didn't think it was -- you know, given
9 that it was a 14-hour, I didn't -- maybe that is
10 regrettable, but I didn't see how we could change that
11 and I had no concerns about the BGIRO, as I understood
12 it.

13 But I should just say that simultaneously with this,
14 of course, I'd written to General Wall and was now
15 trying another route to screw down on mistreatment,
16 which was by -- this route was going to go directly to
17 commanders to remind them, if they didn't already know,
18 of the doctrine of command responsibility; in other
19 words, I was changing tack to a degree and trying
20 another route to screw down on it.

21 Q. If you had concerns about the new regime, as I am
22 calling it, produced under FRAGO 29, did you raise those
23 with anyone?

24 A. Yes, I raised the time limit and checked it and was told
25 that that was a given.

1 Q. Any other aspects about FRAGO 29 that you raised --

2 A. I don't recall raising any other.

3 THE CHAIRMAN: When you say "told that that was a given",
4 you mean there was no way of changing it?

5 A. Well, I checked that it was closed and --

6 THE CHAIRMAN: I see, because of --

7 A. Yes.

8 THE CHAIRMAN: -- the closing of the TIF.

9 A. Yes.

10 MR ELIAS: Putting it straightforwardly then, your concerns
11 about the 14 hours arose for the reasons that you gave
12 a little earlier?

13 A. I mean, ideally I would like the regime I imposed to be
14 in place, but of course sometimes you have to give way
15 to things. I think, if I may say so, if it had been a
16 UK-owned facility and we had done our own -- run our own
17 internment facility, which we should have done, then we
18 would have much more influence over these things. We
19 could have simply issued an order and that would have
20 been it. But here it's an American-run facility, so it
21 makes it very much harder.

22 Q. But of course that was only one aspect of --

23 A. It's one aspect, but I think it sets it in context. You
24 know, if it had been a UK-owned facility, simply it
25 would have been a phone call to the commandant and off

1 it would have happened. Of course with a multinational
2 operation you have the added difficulty that they are
3 under a different command chain.

4 THE CHAIRMAN: You mean you could have issued an order
5 saying "stay open"?

6 A. Yes.

7 MR ELIAS: Did you envisage that even under FRAGO 29 all
8 questioning would nonetheless take place at the TIF, as
9 had been previously ordered?

10 A. Absolutely clear. Questioning only took place at the
11 TIF.

12 Q. So how was the BGIRO to operate in his role?

13 A. Well, it was an immediate determination. What is this
14 person -- in the same way that the police determined it.
15 Is he a criminal detainee? Is he an internee?

16 Q. Without questioning of any kind?

17 A. Well of course you have to -- obviously there is going
18 to be some initial contact, but is a crude filtration.
19 Does he go left? Does he go right? In an internment
20 situation that would seem, you know, appropriate.

21 Q. Forgive me, did you envisage that the BGIRO would be
22 questioning?

23 A. Well, he would have to ask initial questions to see
24 which category he fell into.

25 Q. So there was going to be some questioning before the TIF

1 under FRAGO 29 --

2 A. As there always had been, because the police would have
3 had to ask the same question under the previous
4 schematic, as the battlegroup would.

5 Q. So if that were to be your understanding of how it would
6 proceed, should not written guidance have been given
7 about that?

8 A. Well, I understood that -- that's how I understood it.

9 Q. Should not written guidance have been given about that?
10 On the one hand you were saying in black and white, as
11 I understood your answer just a few minutes ago,
12 unequivocally there was to be no questioning before the
13 TIF. Now you are telling us you would have understood
14 under the new regime --

15 A. No, I think you used the word "interrogation" at the TIF
16 and that includes tactical questioning.

17 Q. Yes.

18 A. And I think that was made clear.

19 Q. What sort of questioning was the BGIRO going to carry
20 out or questioning carried out on his behalf under
21 FRAGO 29?

22 A. Well, you know: what's the circumstances? Is this
23 simply a criminal who has been apprehended or is this
24 a threat to force security?

25 Q. If questioning of that kind was to be permitted, do you

1 think it should have been set out clearly in black and
2 white?

3 A. I didn't anticipate a problem at this point.

4 Q. And the answer to my question?

5 A. It's very difficult to say. I mean --

6 Q. It might have been better if it had been?

7 A. Possibly, but I hoped that the previous FRAGOs had made
8 it clear what our intent was.

9 Q. Moving on, can I take you, please, to BMI04082,
10 paragraph 99 and on of your statement, under the heading
11 "Conclusion", in which you say:

12 "The issue of prisoners (of all categories) was
13 a constant battle for the whole of Op Telic 1."

14 You say:

15 "... there was a general indifference to prisoners
16 which was reflected, initially, in the lack of manpower
17 and resources provided."

18 Again the same questions as I asked you at the very
19 outset if I may, Colonel. Do you mean indifference
20 brought about by a lack of resources or indifference
21 demonstrated in other ways?

22 A. I think by this stage this went wider. I think actually
23 the lack of resources reflected a general lack of
24 consideration for what was going to be a massive issue
25 and indeed it was. And I found that the prisoner issue

1 overall was a constant battle and that every time we
2 tried to put in proper review procedures and so on and
3 so forth, that we found ourselves fighting some sort of
4 legal war.

5 Q. Would it be fair to categorise the arguments being put
6 up against you, "It is not pragmatic or practical to
7 adopt what you say we have to adopt"?

8 A. That was probably the way it was approached. I don't
9 accept that for a minute.

10 Q. No, I am not asking you to --

11 A. Yes.

12 Q. -- but that was the nature of, if you like, the other
13 side of the argument that was being put?

14 A. I don't think it was put in those -- that it wasn't
15 practicable. I think the word was "use a rod for our
16 own backs"; in other words, if we gave them higher legal
17 rights, shock, horror, we might have to do something
18 about it.

19 Q. You reflect that, don't you, in paragraph 100, where you
20 say:

21 "I am still amazed that we had to fight so hard for
22 even basic Geneva Convention rights for prisoners."

23 A. That's correct.

24 Q. You say:

25 "This indifference ... was exacerbated by the total

1 strategic failure to plan for operation and the vacuum
2 it created."

3 A. Yes.

4 Q. Then this at paragraph 101:

5 "In my view, if the issue of prisoners had been
6 properly resourced and we had been allowed to implement
7 a proper reviewing and oversight mechanism (and had this
8 been sustained) then the tragedy which unfolded might
9 never have happened."

10 A. Yes, I agree with that.

11 Q. By the "tragedy", are you referring to the particular
12 matter that this Inquiry is investigating?

13 A. Yes, I am here. I mean, you haven't touched on it, but
14 I think if we had had a proper reviewing process in
15 place, I think if we had had a judge in theatre, as we
16 requested, with a detainee/internee management unit, if
17 we had an independent team for prisoners and I think if
18 there wasn't this constant reluctance to accept high
19 legal standards, then I think we could have avoided this
20 tragedy. I think had we had our way -- and it's, you
21 know, perhaps naive of me to say "Why should you get
22 your way?" but I think if we had had our way, we could
23 have put all of this in place.

24 Q. You go on in the final two lines of your statement to
25 this Inquiry -- your first one -- to say:

1 "Ultimately, however, given the vagaries of all
2 warfare, in my view, it's also about proper education,
3 training and the moral compass."

4 A. Yes.

5 Q. Proper education, training and the moral compass for
6 whom?

7 A. This is the wider point. I mean, all staff officers
8 deal with problems within a military operation, but,
9 let's face it, whenever this is going on, then every
10 time a soldier abuses a prisoner, there is generally
11 a junior NCO present who should know what to do. There
12 is generally a senior NCO present who knows what to do.
13 There is generally a platoon commander. There is
14 generally a company commander overseeing that unit. And
15 that's where it -- you cannot stop this sort of thing
16 simply by staff work. It is impossible. It pops up
17 somewhere else. You didn't say this right -- you know,
18 it keeps resurfacing.

19 Actually it's what happens on the ground and if
20 soldiers are taught to intervene rather than turn
21 a blind eye -- and this is what I refer to as the moral
22 compass, because in so many of these there've been
23 numerous people involved and that's where it should be
24 stopped, because no staff work with the best will in the
25 world can do everything to prevent it. That's the

1 problem.

2 Q. Looking back on the problem, Colonel -- knowing now what
3 you know did happen in relation to these detainees -- is
4 there anything else that you should have done?

5 A. If I can just -- I think we struggled with this issue
6 from 20 January to the day we left. We had even
7 prepared cards for the incoming troops.

8 This was a constant difficulty. You take it as you
9 find it. You win some issues in staff work; you lose
10 some issues. But I think you've got to put it in its
11 wider context which people forget, which is that we
12 arrived in enemy territory having occupied an area of
13 ground that would run from Dover right the way up to
14 Sheffield. That's the sort of territory we were dealing
15 with.

16 This is a massive undertaking and we had not one
17 document as to how to do that. We did it all ourselves
18 and I think that was a phenomenal achievement. And so,
19 yes, we did do our best; there were things that went
20 wrong, but I think it should be set in that context.

21 Q. Setting it in that context, looking back on it now and
22 knowing what did go wrong in this particular case, is
23 there anything that you think you should have done that
24 would have ameliorated that position and/or prevented --

25 A. I did my level best both to anticipate and to deal

1 with it.

2 Q. There's nothing else you can think of that you should
3 have done?

4 A. No.

5 Q. Then if I may I just want to ask you two or three
6 questions but I think the Inquiry should move into
7 camera, Sir, if we may to deal with them.

8 THE CHAIRMAN: Yes. We will do that now. I don't need to
9 rise --

10 MR ELIAS: I think not.

11 THE CHAIRMAN: -- so that we now should have only the legal
12 advisers present. Is that right?

13 MR ELIAS: Core participants and legal advisers --

14 THE CHAIRMAN: Anybody who is not a core participant or
15 legal adviser, I am afraid I ask you please to go.

16 (12.47 pm)

17 PROCEEDINGS IN CAMERA

18 [Redacted]*****

19 *****

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23 *****

24 *****

25 A. *****

1 Q. *****
2 *****
3 A. *****
4 Q. *****
5 *****
6 *****
7 *****
8 A. *****
9 Q. *****
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11 A. *****
12 Q. *****
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21 Q. *****
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24 Q. *****
25 A. *****

1 *****
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4 *****
5 A. *****
6 *****
7 *****
8 *****
9 *****
10 A. *****
11 THE CHAIRMAN: *****
12 A. *****
13 THE CHAIRMAN: *****
14 *****
15 MR ELIAS: *****
16 THE CHAIRMAN: *****
17 *****
18 *****
19 *****
20 MR SINGH: *****
21 THE CHAIRMAN: *****
22 MR GARNHAM: *****
23 THE CHAIRMAN: *****
24 *****
25 *****

1 MS DOBBIN: *****
2 THE CHAIRMAN: *****
3 MS SIMCOCK: *****
4 THE CHAIRMAN: *****
5 MR BOURNE: *****
6 THE CHAIRMAN: *****
7 MS EDINGTON: *****
8 MR ELIAS: *****
9 *****
10 *****
11 THE CHAIRMAN: *****
12 *****
13 *****
14 MR ELIAS: *****
15 *****
16 THE CHAIRMAN: *****
17 *****
18 (1.54 pm)
19 (The short adjournment)
20 (2.00 pm)
21 PROCEEDINGS IN OPEN COURT
22 MR ELIAS: Sir, I have completed my questions. Thank you.
23 THE CHAIRMAN: Yes, very well. Now you are going to be
24 asked questions by other counsel, Colonel.
25 Yes, Mr Singh.

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Questions by MR SINGH

MR SINGH: Yes, thank you, Sir. Thank you, Colonel Mercer.

May I start with some evidence you gave early on this morning about your training and you mentioned, I think, a course that you did at San Remo.

A. That's correct.

Q. I think you mentioned that that included an element of human rights law.

A. The advanced course did.

Q. Was human rights law part of the training on other aspects of your legal training before you did the San Remo course?

A. Yes, we did receive instruction in human rights law because that could feed into other operations that fell short of international armed conflict.

Q. Right. When you say "we", can I take it --

A. As an organisation.

Q. As an organisation. The army?

A. Army Legal Services.

Q. Yes, I see. Does the training that you have done for other soldiers who are not lawyers itself include an element of human rights law?

A. It depends on the circumstances, but it could.

Q. Can you tell us briefly in what circumstances it could?

A. Well, I think in an international armed conflict you

1 would use the lex specialis of the law of armed
2 conflict, but in conflict falling beneath full
3 international armed conflict, then, of course, human
4 rights law could be applicable, so it would depend on
5 the circumstances.

6 Q. You also said, I think, this morning, that you had not
7 done training in relation to interrogation matters.

8 A. That's correct.

9 Q. Can I ask you this? Do you know who was supposed to do
10 training on the legal requirements of interrogation?

11 A. Looking at the paperwork, ALS -- Army Legal Services --
12 gave advice to the Chicksands in 1999 on interrogation.
13 As far as I'm aware, that's the last time we gave advice
14 until I bumped into the issue in 2003. So Chicksands
15 will have got their legal advice from -- I don't know --
16 Ministry of Defence legal advisers -- I am not aware,
17 but that's all that I can envisage.

18 Q. Apart from such advice -- some of which you have seen in
19 the papers, as you know -- in terms of formal training
20 of the kind that you yourself give sometimes to
21 soldiers, are you aware of any such training in relation
22 to interrogation?

23 A. No, I am not. I am not. We didn't have a legal
24 adviser --

25 Q. Yes.

1 A. After this happened, the army put a legal adviser into
2 Chicksands in 2004.

3 Q. I see.

4 A. So they now have a full-time military lawyer at the
5 Chicksands, a head of intelligence.

6 Q. You have referred to the 1999 advice. Can we briefly go
7 back to a document that you were shown, but a passage
8 that I think you were not shown. Can I please have the
9 reference MOD028354, just to see the beginning of this
10 document, Colonel. That's 25 November 1999.

11 THE CHAIRMAN: Will you just give me a moment?

12 MR SINGH: Yes, of course.

13 THE CHAIRMAN: Do you have a tab number, Mr Elias? You go
14 on. I will find it.

15 MR SINGH: I am grateful, Sir. It's Lieutenant
16 Colonel Ridge's three-page letter. You may recall that.

17 THE CHAIRMAN: Yes, advice, yes.

18 MR ELIAS: Tab 53 and 54.

19 THE CHAIRMAN: Thank you very much.

20 MR SINGH: I am grateful to Mr Elias. That's just to see
21 the first page, Colonel, but I want to take you, if I
22 may, to the final page, which is MOD028356. This is
23 paragraph 12 under "Conclusions". It points out that
24 the reference in the query "... had not outlined your
25 methods of interrogation ... my comments have to be

1 rather general. As we discussed at reference B much
2 will depend on the operational circumstances. In an
3 international armed conflict you are very limited as to
4 what you can do other than ask questions."

5 Pausing there, do you agree with that?

6 A. I am not following which paragraph you are referring to.

7 Q. Paragraph 12 in the second and third lines.

8 A. Yes, I've got it.

9 Q. You have that. I am just asking you, first of all, do
10 you agree with that sentence that in an international
11 armed conflict you are very limited as to what you can
12 do other than ask questions?

13 A. Yes.

14 Q. "You intimated to me that the value of interrogation may
15 be such that from a political viewpoint it outweighs the
16 legal considerations. However you should be aware that
17 it is Government policy to comply with its obligations
18 under international law and organisations such as ICRC
19 and Amnesty International will keep a careful watch on
20 proceedings. In a GC III scenario the political fallout
21 from not complying with legal obligations may be
22 considerable. As regards the provision of human rights
23 this is an expanding area with much potential for
24 litigation."

25 Is it right, Colonel, that you yourself were not

1 aware of any of the interrogation techniques that were
2 being used in Iraq at the time you were there?

3 A. I wasn't aware that this was going on until I saw it.

4 Q. Saw ...?

5 A. When I saw the JFIT, which is when I intervened.

6 Q. Yes, I see. Is that a reference to what you told
7 Mr Elias earlier today?

8 A. Yes, that's right, this morning.

9 Q. Forgive me. I am grateful for that clarification so
10 I won't go over that again.

11 You didn't come across, at the time, concepts like
12 "harshing"?

13 A. No, I don't know what that means.

14 Q. All right. Can I move to a different topic, please? At
15 your meeting that you told us about with the ICRC, when
16 you gave evidence that S034 told you not to speak at the
17 meeting -- do you remember that?

18 A. Yes, I do.

19 Q. Can you just remind us what position was held by S034?

20 A. S034 was the POLAD at the NCC.

21 Q. What does "POLAD" stand for?

22 A. Political adviser.

23 THE CHAIRMAN: One of the very few acronyms I can remember.

24 MR SINGH: Did you have a view whether this was a political
25 decision?

1 A. I thought it was strange.

2 THE CHAIRMAN: You mean the decision about not speaking?

3 A. Yes.

4 THE CHAIRMAN: Yes.

5 A. I thought it was strange.

6 MR SINGH: Strange why?

7 A. Because I was the commander legal. There were other
8 people at the meeting of whom I was on a par with or who
9 were subordinate to me and I was stopped -- prevented
10 from speaking. It's -- I thought it was a highly
11 unusual course of conduct.

12 Q. I want to move on to a different topic now, please. You
13 gave some evidence and you were asked questions about
14 FRAGO 29. Correct me if I'm wrong, Colonel, but I think
15 the way you described it was that what happened with
16 FRAGO 29 coming in was that the interrogation and
17 prisoner-handling issue was taken back by G2 and G3 from
18 the police and the lawyers. Is that a fair way of
19 putting it?

20 A. That's how I understand it, yes.

21 Q. Can you be more specific to help the Inquiry with who it
22 was in G2 and G3 who was seizing it back?

23 A. Well, I -- I would probably need the list again.

24 Q. By all means have the list --

25 THE CHAIRMAN: You had better have the list in front of you.

1 Do you not have it anymore?

2 A. No, I haven't.

3 THE CHAIRMAN: Can we see that the list is handed to him?

4 MR SINGH: It may be helpful if you can keep it, if that's

5 permissible to the Inquiry.

6 THE CHAIRMAN: I think in terms of his evidence, that's

7 fine.

8 MR SINGH: Sir, I am grateful.

9 So using ciphers where necessary --

10 A. Yes, I think S002 would certainly be involved.

11 Q. Anyone else?

12 A. I can't remember who signed the document at the end.

13 I do not know if it's possible to bring it up.

14 Q. You also mentioned that there was some concern --

15 correct me if I am wrong -- in the RMP about their

16 resources.

17 A. Well, I mean, the RMP were very, very overstretched --

18 Q. Yes.

19 A. -- and I think we both got involved in a process -- if

20 you look at the soldiers' card, it sets out who's

21 responsible for what as far as prisoners are concerned,

22 and this is -- it's very clear, it's a G2/G3 issue, but,

23 of course, lawyers and police have moved on to this

24 patch. Now the police were very overstretched. They

25 wanted to deploy manpower elsewhere.

1 Q. When you say "they", again use the ciphers if necessary,
2 but who were "they" at the RMP?

3 A. Colonel Eddie Forster-Knight was one, for instance, and
4 I worked with him on a daily basis.

5 Q. Yes.

6 A. And I know he wanted to disengage from the process so he
7 could use his police resources elsewhere. I think the
8 other thing to mention on that -- if you look at the
9 numbers -- you know, we had gone down from 3,000
10 prisoners of war, who had all, but one or two, been
11 released; we had got rid of 300 criminal detainees, who
12 are now in the Iraqi law and order system, and we were
13 down to 18 internees at this point. So this was a point
14 to disengage as far as the police were concerned.

15 Q. Okay. I am going to move on to a different topic now.
16 It's to do with the Geneva Conventions, but in
17 particular the protocol that the UK ratified in 1997.
18 The reference, if I can have it please, is MOD022597.
19 You may just want to remind yourself of that text. It's
20 Article 82 of the protocol. It is the requirement to
21 have "... legal advisers, when necessary, to advise
22 military commanders at the appropriate level ..."

23 Looking back on your time in Iraq, Colonel, do you
24 feel that the UK did comply with that?

25 A. Yes, I do.

1 Q. Did you have any reason to think that not all of your
2 legal colleagues were prepared to stand up to G2 or
3 others that were not lawyers in the army?

4 A. Well, I think this is a classic dilemma in the army, in
5 that you're within a command structure and there's
6 always pressure to do one thing when legally you may
7 believe something else. But it's an imperative that at
8 all times you do what is correct in law. But that's
9 always a danger.

10 Q. Do you feel that -- not talking about yourself, but
11 others may sometimes not always have resisted that
12 danger?

13 A. Yes, I -- perhaps.

14 Q. I want to move on to a different topic. It's about
15 a colleague of yours called "Commander Brown". Not in
16 terms of rank, but was he, in command structure,
17 superior to you?

18 A. Yes, he was.

19 Q. Just remind us -- I know the answer -- where he was
20 based compared to you.

21 A. He was the commander legal at the NCC.

22 Q. Thank you. We can go to them if we need to, but the
23 Inquiry has documents before it which consist of some
24 emails concerning Commander Brown in May 2004, after you
25 had left Iraq, in which there is the suggestion, for

1 example, that the banning of hoods by the Heath
2 Government related to the UK and Northern Ireland in
3 particular. Do you want to look at that?

4 A. Yes, please.

5 Q. Can we look at that? That's MOD020204. Colonel, it's
6 the first line that you need to read for the purpose of
7 my question. Do you see the reference there --

8 A. Yes, I've got it.

9 Q. Yes. Was Commander Brown saying things of that sort to
10 you when you were deployed in Iraq -- I mean in
11 March/April/May 2003.

12 A. We didn't get on to the European Convention on Human
13 Rights. I mean, it automatically impacted on the Geneva
14 Conventions. We didn't have -- we didn't go any further
15 down.

16 Q. Forgive me Colonel, that line there isn't in terms, at
17 least, talking about the ECHR, is it? It's talking
18 about the banning of hoods by the Heath Government.

19 A. I know, but that follows Ireland v UK, as I understand
20 it, so the human rights case. I considered hooding
21 purely under the Geneva Conventions, Articles 13, 14
22 and 17.

23 Q. And stress positions as well?

24 A. Yes, because in my view it amounted to violence,
25 intimidation, degrading treatment and so on and so

1 forth. It hit all of them.

2 Q. Can I show you one other document? We won't need to
3 look at this at length, although it is a long email.
4 It's MOD020218. This is May 2004. It's a long email
5 from Commander Brown.

6 In the middle of that page there's a paragraph which
7 begins "This resulted ..." I just want to read to you
8 the salient passage, where it says that:

9 "... ECHR did not apply (and UK case law in this
10 area was as I understood it ECHR-related) and GC3 was
11 the *lex specialis*."

12 Again, the question I want to ask you is not about
13 the content of that email; do you understand, Colonel?

14 A. Yes.

15 Q. I am more interested for now in asking you whether, when
16 you were deployed in Iraq and he was one of your
17 colleagues, Commander Brown was saying things of similar
18 effect then.

19 A. I don't recall the ECHR being discussed at all.

20 Q. I see.

21 A. I think the discussion went -- I would say this is
22 humanitarian law, it's got that generic title, but I
23 don't recall us going into the ECHR because, as I think
24 we agreed, in war fighting it was *lex specialis* and
25 therefore the ECHR, if it kicked in at all, would be in

1 occupation.

2 Q. I see. Turning to a slightly different topic if I may.
3 Just to introduce it, may I show you, please,
4 paragraph 44 of your first statement to this Inquiry,
5 which is BMI04069. Do you recall saying there?

6 "This was followed by a long exchange of emails ..."

7 Just to be fair to you, Colonel, my understanding is
8 that here you are talking about late March/early April
9 2004.

10 A. Yes, this is after I raised my email -- it raised my
11 memo with General Robin Brims.

12 Q. Indeed.

13 A. So it then gets staffed to the NCC --

14 THE CHAIRMAN: You raised your email, from recollection, at
15 the very end of March; is that right?

16 A. Yes, something like 29 March.

17 THE CHAIRMAN: It is in your diary.

18 A. Yes. I think if you look at that memo, you will see
19 there's certainly one exhibit that's annotated "We will
20 refer this to the NCC".

21 MR SINGH: Yes, I may come back to look at the diary in a
22 moment, if I may. Just on paragraph 44 of your
23 statement, can I ask you this? In the exchange of
24 emails over the next few days, you say:

25 "I recall reminding NCC that we were dealing with

1 humanitarian law and should not forget the humanitarian
2 dimension of LOAC."

3 Are you able to recall how long that exchange of
4 emails took? Was it one or two days? Was it a week --

5 A. Probably one or two days or two or three days.

6 Q. I will be corrected if I am wrong, but I don't think all
7 of the emails are now available from that period. Can
8 you give the Inquiry a flavour of what was being said by
9 those who disagreed?

10 A. I think the exchange -- basically I was hard over on
11 hooding and that it breached the Geneva Conventions, and
12 then there were all sorts of, "Well, it might be lawful
13 in these circumstances" and so on and so forth. And
14 I said, "Well, this is humanitarian law. This is about
15 decency to people on the battlefield".

16 Q. I want to move in your witness statement to a different
17 topic which begins at paragraph 67 at page BMI04074.
18 There and over the next few paragraphs, Colonel, you will
19 recall that you tell the Inquiry about a concept called
20 "DIMU", which stands, I think, for "detainee and
21 internee management unit"; is that right?

22 A. Yes, that's correct.

23 Q. Have I understood your views correctly, Colonel --
24 if I put it this way: you talked earlier to the Inquiry
25 about how you had sought to design out the possibility

1 of abuse; is that fair?

2 A. That's correct.

3 Q. Did you see the DIMU idea and, in particular, having an
4 independent reviewing authority as one method of
5 designing out that possibility of abuse?

6 A. I thought it was the perfect solution, to be honest. It
7 was brought to my attention by one of my subordinates
8 who showed me the -- what had happened in East Timor
9 with the Australian army. At the end of the East Timor
10 operation, the United Nations had described their
11 treatment of prisoners as "exemplary" and of course
12 that's precisely what we wanted. And I -- and the other
13 thing is that it would have had -- it was independent of
14 the chain of command. It would have had a judge heading
15 it up. They would have been able, as a separate team,
16 just to focus on that, rather than everything else that
17 went on, and I am pretty sure that, had we implemented
18 that, we too could have been exemplary.

19 Q. DIMU was never implemented, was it?

20 A. No, because we never got to a reviewing authority and --

21 THE CHAIRMAN: Mr Singh, I don't want to interrupt you and
22 I am not going to stop you from asking these questions,
23 but I regard this issue, for the purposes of my terms of
24 reference, on the very edge of the Inquiry.

25 MR SINGH: Sir, I have nearly reached the end anyway --

1 THE CHAIRMAN: Then I will not stop you from reaching the
2 end.

3 MR SINGH: Can I conclude this topic, then, in this way,
4 Colonel? Can we move on in your statement to BMI04076,
5 paragraph 75. We have all read this before, of course,
6 but you may just want to remind yourself of what you
7 said there. You are saying there:

8 "I believe we would not have encountered the tragedy
9 with prisoners that unfolded (such as the incident which
10 is the subject of this Inquiry), nor breaches of the
11 [ECHR] ... as there would have been suitable independent
12 oversight, accountability and legal clarity."

13 Do you stand by that?

14 A. Yes, of course.

15 MR SINGH: I am very grateful to you, Sir. Sir, that's the
16 end of my questioning.

17 THE CHAIRMAN: Thank you. Mr Garnham?

18 Questions by MR GARNHAM

19 MR GARNHAM: Colonel, you said that some army lawyers did
20 not always resist the pressure to comply with the
21 command structure in the army and that they did not
22 always put their legal responsibilities first.

23 A. I didn't say that. I said there was always pressure to
24 do that.

25 Q. Did you not say that some gave way to that pressure?

1 "Yes, I -- perhaps", you said.

2 A. "Perhaps". I used the word "perhaps".

3 Q. You would not apply those observations, would you, to
4 either of your subordinates at Um Qasr?

5 A. Possibly.

6 Q. Possibly you would. You described Major Frend, in the
7 report that you prepared for him after this tour, as
8 "resourceful, intelligent, with boundless energy", and
9 there is not a word of criticism of this sort or
10 anything else in that report, is there?

11 A. No, there isn't --

12 Q. Thank you.

13 A. -- but the world of reports is a generic overview of
14 a large period of time.

15 Q. You mean you don't stand by it?

16 A. Yes, I do stand by it. It's absolutely right. Those
17 words are spot on.

18 Q. You recommended Major Christie for an award, did you
19 not?

20 A. Correct.

21 Q. Such was your view of the contribution, he had made?

22 A. Yes.

23 Q. Is it not the case that there was room on the question
24 of hooding, as with so many legal issues, to two points
25 of view?

1 A. There were different legal opinions, yes.

2 Q. Legal opinions genuinely and honestly held --

3 A. I think so.

4 Q. -- amongst your own team as well as elsewhere in Army
5 Legal Service?

6 A. And the Ministry of Defence.

7 Q. You don't suggest, do you, that those alternative
8 opinions are other than proper legal opinions that
9 happen to differ from your own?

10 A. As a lawyer, I don't.

11 Q. Your view was that hooding per se was in all
12 circumstances unlawful?

13 A. Correct.

14 Q. Would that apply even if the subject of the hooding
15 consented to it?

16 A. Yes.

17 Q. Would it be the case in an extreme example where, for
18 example, a person became violent when being transported
19 in a helicopter?

20 A. Yes.

21 Q. And it's also presumably your view that it's unlawful
22 even if for a short period in temperate conditions for
23 the safety of British troops?

24 A. Well, we don't hood anyone in the UK, do we?

25 Q. That's not my question. In any circumstances, your view

1 would be that it was unlawful --

2 A. I am against hooding, full stop.

3 THE CHAIRMAN: Colonel, if you would be kind enough to wait

4 for the question.

5 MR GARNHAM: Your view is that in any circumstances hooding

6 is unlawful per se?

7 A. I thought it amounted to violence and intimidation and

8 affected the dignity of the individual.

9 Q. In your view, that conclusion is unaffected by, for

10 example, the length of time for which the hood was

11 worn --

12 A. Yes, it's per se.

13 Q. -- or the temperature in which the hood was worn?

14 A. Yes.

15 Q. Thank you. You told Mr Elias earlier that you had no

16 recollection of SO2 discussing with you and others

17 hooding for security purposes --

18 A. That's correct.

19 Q. -- in February 2003. You are confident about that?

20 A. Yes, I am, yes.

21 Q. You did not at any stage then say to him that you would

22 have approved that limited use of hooding --

23 A. I didn't.

24 Q. -- or that you would have approved of blindfolding in

25 such circumstances?

1 A. I don't think we ever had that discussion.

2 Q. Did you have any similar discussion about hooding or
3 blindfolding for security purposes with the GOC?

4 A. Not to my recollection.

5 Q. You never said to him, then, that either hooding or
6 blindfolding might be lawful if they were serving
7 a security purpose?

8 A. No.

9 Q. It would be dangerous, would it not, to authorise
10 blindfolding in the field of battle, given your views,
11 because a soldier might resort to hooding if he didn't
12 have a blindfold to hand? Would it be dangerous to
13 authorise blindfolding because of the risk that
14 a soldier so authorised might resort to hooding?

15 A. As I understand it, blindfolding is only authorised in
16 the situation of interrogation.

17 Q. You mean during interrogation or delivering a man for
18 interrogation?

19 A. I think they are -- the two could be part and parcel of
20 the same thing.

21 Q. Your understanding was that blindfolding would be lawful
22 in -- during interrogation --

23 A. In --

24 THE CHAIRMAN: Again, please, it's very --

25 A. Sorry, I am trying to be as clear as I can.

1 THE CHAIRMAN: It is very easy to jump in before the
2 question is finished, but it doesn't really help because
3 we then have two people asking questions and I don't
4 hear the answer. So I would be grateful if you would
5 pause until the question has been asked. If you would
6 ask it again, Mr Garnham.

7 MR GARNHAM: Your view is that blindfolding during the
8 process of interrogation itself might be lawful?

9 A. I think it says -- I think the words are "justly" --
10 I can't remember the precise words of JSP 383, but it
11 says where -- in effect -- absolutely necessary.

12 Q. JSP 383, was that published by March 2003? Was that
13 extant?

14 A. It's an ongoing document, as far as I'm aware.

15 Q. And you say that there was an extant version of that
16 document in March 2003?

17 A. In all probability.

18 Q. I wonder if we could have on the screen, please,
19 MOD052196. If we highlight, please, the bottom quarter
20 of that. Thank you. This is part of the document which
21 I think you said you had no part in the preparation of.

22 A. That's correct, yes.

23 Q. Was it instead prepared by Major Christie?

24 A. I don't know who. It might well have been.

25 Q. The text reads:

1 "An alternative was suggested, namely the use of
2 blacked out sunglasses in order not to restrict the
3 senses of the prisoner any more than was strictly
4 necessary. Direction from GOC, however, was that no
5 form of blindfolding was justified ... If the ICRC view
6 is to be accepted that blindfolding is not acceptable
7 per se then a revision of UK policy and JSP 383 is
8 required."

9 Does that fit with your recollection?

10 A. I thought hooding -- the GOC banned hooding and that the
11 solution from the ICRC was blacked-out goggles where it
12 was needed.

13 Q. Thank you. You say that you regarded what you saw at
14 the JFIT on that occasion in late March 2003 as -- and
15 I paraphrase -- utterly unacceptable.

16 A. Yes, I was shocked.

17 Q. And what was unacceptable about it was firstly that
18 people were hooded; yes?

19 A. Well, it was the overall picture. It was the hooding,
20 the arms cuffed up behind the backs and also the overall
21 intent, in my view, which was to intimidate prisoners
22 awaiting interrogation.

23 Q. And you regarded that situation as intolerable?

24 A. I was shocked when I saw it.

25 Q. Why did you go and attend to your business in relation

1 to the Article 5 tribunal matter, rather than sorting
2 that out straightaway?

3 A. Well, I had no option. I had to go -- my appointment
4 that day was for the Article 5 tribunals. I saw the
5 JFIT on my way in, but of course we were in motion, we
6 walked past it. I went to the Article 5 tribunals, went
7 to see what was happening -- because that was my job for
8 the day -- stopped the Article 5 tribunals, which
9 culminated in a massive row with --

10 Q. S09?

11 A. -- S09, and then, when I had an opportunity later in the
12 day, came back to JFIT to look at that issue.

13 Q. So what you saw didn't prompt you immediately to act?
14 You didn't see it and think, "My goodness, that's
15 outrageous, I am going to deal with that now"?

16 A. The circumstances did not lend themselves to that, but
17 I certainly doubled back when the opportunity arose to
18 go and deal with it.

19 Q. Why didn't they lend themselves to that? What was to
20 stop you from going and doing that?

21 A. Because I was going to see the Article 5 tribunal --
22 that's what I had come for -- and I was in a train
23 behind the general.

24 Q. When you wrote your memorandum to the GOC that day --

25 A. Mm-hm.

1 Q. -- your concern about what you'd seen features as
2 paragraph 6 --

3 A. Yes.

4 Q. -- at the end of a memo dealing with Article 5.

5 A. Yes.

6 Q. Again, it wasn't something that you regarded as so
7 important as to require immediate attention on its own?

8 A. Well, I dealt with both issues together. I mean, it had
9 been quite a bruising day, to be honest.

10 Q. Is it right, Colonel, that you brought this to the
11 attention of the GOC, rather than him seeing a prisoner
12 hooded when he visited?

13 A. I have no recollection of him seeing a prisoner hooded.

14 Q. Were you aware of others reporting the fact that
15 prisoners were being held hooded and kneeling down in
16 the sun?

17 A. Well, obviously Chris Vernon raised his concerns. I saw
18 him do it.

19 Q. Was it that -- I am sorry.

20 A. I understand that S009 also raised his concerns.

21 Q. Was it the fact that they had raised their concerns that
22 prompted you to make your visit?

23 A. No, not at all. I came across it independently.

24 Q. Why was there no mention in the memorandum that you sent
25 the GOC of your belief that generators were being used

1 to intimidate?

2 A. Well, I -- that was the impression that I got.

3 Q. I understand that.

4 A. When I went there, I raised the two most important
5 issues which were hooding and which were stress
6 positions.

7 Q. Why did you not raise, if it be the case, your concern
8 that generators were being used to intimidate?

9 A. Well, I can't -- I can't account for why I left that
10 off, but I think the point was made that as soon as
11 I saw what I believed to be a violation of the Geneva
12 Conventions, I addressed them.

13 Q. Yes, but you can't offer any explanation as to why you
14 didn't raise the generator matter?

15 A. Well --

16 THE CHAIRMAN: I think we are largely in the area of comment
17 now, Mr Garnham.

18 MR GARNHAM: Sir.

19 You say in your statement that you saw some
20 40 prisoners kneeling or squatting --

21 A. Yes.

22 Q. -- in the sand. Does that mean that some were kneeling
23 and some were squatting?

24 A. From memory, yes.

25 Q. So they weren't all adopting the same position?

1 A. No, but from memory there were two lines of prisoners,
2 parallel lines, and they were all kneeling in the sand
3 with their arms cuffed behind their backs and hoods on
4 their heads. Then, from memory, I think there was
5 a group -- another group -- of prisoners to the right of
6 that who were squatting.

7 Q. And you saw them as you passed?

8 A. I did.

9 Q. Is it right that the JFIT was surrounded by sand
10 berms -- sand walls?

11 THE CHAIRMAN: "Berms" I think is the technical term.

12 A. Yes, I mean I clearly saw it because that caused me to
13 double back and go back in.

14 MR GARNHAM: I am trying to understand from where you saw
15 them --

16 A. I saw them as I was walking past. That's all I can say.

17 Q. Were you aware of the fact that the JFIT was so
18 surrounded?

19 A. There was a guard on the gate, from memory, but I think
20 there was some sort of tunnel into it or passage into
21 it.

22 Q. How long did you have these detainees in view?

23 A. It was very short, but of course I went back in the
24 afternoon.

25 Q. And they were still in the same position?

1 A. They were still there.

2 Q. Still in the same positions?

3 A. Pretty much.

4 Q. Some standing? Some squatting?

5 A. Yes.

6 Q. Could you tell whether they were being allowed to change
7 from the one position to the other or change within
8 those positions?

9 A. No.

10 Q. Did you inquire about that?

11 A. No.

12 Q. The discussions that followed with the ICRC related to
13 hooding, didn't they?

14 A. They did, yes. I think the stress positions I dealt
15 with with S002, and he'd agreed that a less extreme form
16 of cuffing could take place to the front of the body, so
17 that had been dealt with.

18 Q. Your concern in that regard was the fact that they were
19 cuffed to the rear.

20 A. I think it's extremely uncomfortable, yes.

21 Q. But that was the nature of your concern, rather than the
22 position they had adopted?

23 A. No, clearly plasticuffs were entitled to be used in
24 extremis. I am not sure whether this was all extremis.
25 It's highly unlikely that it was needed in all cases,

1 but it was the cuffs to the rear.

2 Q. Can I ask you next about FRAGO 29 and pick up where
3 Mr Elias left off? FRAGO 29 plainly contemplates some
4 questioning --

5 A. Yes.

6 Q. -- because that's necessary if you are going to decide
7 whether somebody's --

8 A. Of course.

9 Q. -- a threat to the force security.

10 A. Yes.

11 Q. How, from your standpoint, was the average commander on
12 the ground to reconcile that with the intent behind
13 FRAGO 152 that there was to be no questioning at brigade
14 level?

15 A. Well, I think it -- you know, you had to determine the
16 status of the prisoner in all the circumstances. Was he
17 detainee, internee or, in this case, was he an internee
18 or was he now a criminal detainee who would go off to
19 the Iraqi authorities? But, yes, clearly there is going
20 to have to be some sort of questioning in both systems,
21 but not interrogation. It's a determination, not an
22 interrogation.

23 Q. So the important distinction we should take from that is
24 between questioning for that purpose --

25 A. Yes.

1 Q. -- and interrogation?

2 A. That's correct. It's a determination of status, not an
3 interrogation.

4 Q. That being so, isn't it likely, from your standpoint,
5 that commanders on the ground would regard themselves as
6 entitled to question but not to interrogate?

7 A. Determine status, yes.

8 Q. By means of questioning?

9 A. And it also says that if you're unsure, then you radio
10 back to the legal branch.

11 Q. By means of questioning?

12 A. Of course, yes.

13 Q. You said in answer, I think, to Mr Singh that the first
14 legal adviser at Chicksands was appointed in 2004.

15 A. That's correct, yes.

16 Q. If I were to suggest to you that it was Major Yates(?),
17 appointed in September 2003, could that be possible?

18 A. Could be. I thought it was 2004, but it certainly was
19 Major Yates.

20 Q. You described the involvement of S034 -- and do look at
21 who she is -- you describe her involvement in the
22 meeting with the ICRC and you described her instruction
23 to you to keep quiet during the meeting as "unusual".
24 Was it not simply a preference on the part of the
25 officer who was leading that meeting to have the UK's

1 position presented by one voice?

2 A. You would have to ask S034 that.

3 Q. But you were offering opinions a little earlier as to
4 what might be her motivation and therefore I am asking
5 you whether that was not the obvious motivation.

6 A. I can't answer as to her motivation for it. I just
7 thought it was unusual.

8 Q. She was the senior person present.

9 A. That's correct.

10 Q. She was effectively representing the United Kingdom
11 Government in a meeting with the ICRC following
12 a complaint.

13 A. Yes, correct.

14 Q. There was nothing unusual, was there, in her --

15 THE CHAIRMAN: I think we are moving into the realm of
16 comment, Mr Garnham.

17 MR GARNHAM: Sir, thank you.

18 The last question, then. May I have on the screen,
19 please, MOD011176? Can I just make sure that we have
20 identified the right document? Would you have a look at
21 that? Perhaps it could be enlarged. Is that the
22 document that you had printed 20,000 times and handed
23 out to troops in Iraq?

24 A. Could you just go through it a bit further?

25 Q. Does it have a table on the next --

1 A. Does it have a table on the next page? Yes, I believe
2 it is.

3 MR GARNHAM: Thank you very much. Thank you, Sir.

4 THE CHAIRMAN: Thank you.

5 Yes, Ms Dobbin?

6 Questions by MS DOBBIN

7 MS DOBBIN: Colonel, you were referred to the undated
8 document of May 2003. That's the one that refers to
9 questioning only taking place at the TIF.

10 A. Yes.

11 Q. In your evidence you seemed to place some emphasis on
12 the importance of a lawyer being present at the TIF.

13 A. Yes.

14 Q. I wondered why, in your view, you considered that to be
15 so significant.

16 A. Well, I think, first of all, it gives me eyes and ears
17 at the TIF, so that when interrogation takes place --
18 I mean, I had alerted my lawyers to be on the lookout
19 for anything that concerned them at the prisoner of war
20 camp. So having a lawyer down there gave me some
21 comfort that they would be there 24 hours a day, seven
22 days a week and sufficiently around the camp to
23 highlight any concerns. The same applied to the TIF,
24 which is why we pushed so hard for a lawyer at JFLogC,
25 in other words the rear echelon, so that, after I had

1 left or whilst we were leaving -- and my lawyer by this
2 stage had gone -- we had another lawyer down there
3 full-time to oversee that part of the prisoner process.

4 Q. Thank you. Can I just ask you, then, about the system
5 that was ushered in by FRAGO 29? I don't seek to
6 criticise you about its content because you had nothing
7 to do with its drafting, but can I just ask you about
8 these matters please? The BGIRO, unlike an RMP officer,
9 of course, had no sort of investigative training at all.
10 You accept that?

11 A. Not in the same way as a policeman, no.

12 Q. Of course. And he had no training, for example, in
13 investigative questioning techniques?

14 A. I don't know how they are trained, so I can't answer
15 that.

16 Q. Thank you. Would it have been your understanding or did
17 you know that in fact there was no training specific to
18 the BGIRO role at all?

19 THE CHAIRMAN: I think he said he had no idea what training
20 they had or hadn't.

21 MS DOBBIN: I can move on. Thank you, Sir.

22 Were you aware, for example, that there may have
23 been a complete absence of secure facilities within
24 which such detainees would have been kept?

25 A. What, within a unit?

1 Q. Yes or a battlegroup.

2 A. Well, then just create one.

3 Q. But you weren't aware that there may have been --

4 A. Well, you can't check every battlegroup.

5 Q. Had you known that there was such an absence, would that

6 have caused you more concern in respect of FRAGO 29?

7 A. I think the message had been pounded for so long about

8 decent treatment -- you know, it's not exactly just a

9 one-off. It's all the time. I just don't know what it

10 is that doesn't get through.

11 Q. Yes, but you had sufficient concerns to want to have

12 a lawyer present --

13 A. Yes.

14 Q. -- at the TIF.

15 A. That's correct, yes.

16 Q. So you had ongoing concerns and you clearly regarded

17 this as a terribly serious issue --

18 A. Yes.

19 Q. -- so I am just trying to understand how you regarded

20 FRAGO 29.

21 A. As I said before, the BGIRO, in my view, was someone who

22 determined status, as opposed to interrogating per se.

23 Q. But the issue is that this was a FRAGO which meant that

24 detainees were going to be kept at battlegroup locations

25 for up to 14 hours --

1 A. Yes.

2 Q. -- so it wasn't the nature of the questioning process
3 necessarily; it was the fact that they were going to be
4 kept at those locations for so long --

5 A. Potentially -- well, potentially -- I mean, it was
6 closed overnight. So if someone was captured at
7 7 o'clock at night, you could not get into the TIF until
8 6 o'clock the next morning. That was the difficulty --
9 and it wasn't a UK facility.

10 Q. I understand that. But what I'm suggesting to you is
11 the fact that detainees were going to be detained for
12 those lengths of time must have been a cause for concern
13 to you, given everything which had preceded this and the
14 efforts that you made to minimise the length of time
15 that detainees were being kept --

16 A. Well, I wish it had been otherwise, but as I said this
17 morning, we had put out FRAGO 152. We had put out the
18 instructions with regard to internees. We had put out
19 the instructions with regard to interrogation only
20 taking place at the TIF. I was trying to get a lawyer
21 into the TIF to give me cover there. So, you know, the
22 delivery time was not ideal, but it was a US facility.
23 You know, something has to be taken on risk potentially.

24 MS DOBBIN: Thank you, Sir.

25 THE CHAIRMAN: Thank you.

1 Ms Simcock, do you want to ask any questions?

2 Questions by MS SIMCOCK

3 MS SIMCOCK: Yes, thank you, Sir.

4 Prior to your deployment to Iraq, is it right that
5 no training you underwent covered the Heath ruling
6 specifically?

7 A. That's correct, yes.

8 Q. And the Heath ruling itself is not mentioned in your
9 statement. Is that because it was never discussed by
10 you with anyone in Iraq --

11 A. No, it wasn't. We just considered Geneva.

12 Q. -- or indeed before Iraq?

13 A. That's correct.

14 Q. Thank you.

15 Moving on, do you remember, after his arrival in
16 theatre on 23 June 2003, having a conversation with
17 Major Clifton?

18 A. I did have a conversation with Major Clifton about
19 courthouses.

20 Q. Do you remember telling him during the course of that
21 conversation that the hooding of prisoners was banned?

22 A. I don't recall that, but I did -- I certainly had
23 a conversation with him.

24 Q. Yes. Do you think, given your views on the subject,
25 that you mentioned or you would have mentioned to him

1 that hooding was banned?

2 A. Well, I would have done my handover largely with
3 Colonel Barnett because he was the incoming SO1. But
4 Major Clifton was -- I spent about two or three hours
5 with him going through each and every courthouse, and
6 I know it sounds a bit mundane, but going through what
7 had been done and completed because the judicial
8 reconstruction was such a major part -- indeed
9 Colonel Barnett had given him that task, for which --
10 you know, I am not surprised he gave it to someone else
11 to deal with because it was, you know, one of those
12 tasks.

13 Q. Did going over what was in place at the time also
14 include previous orders, FRAGO, that had gone out?

15 A. I understand all the FRAGOs were read by the incoming
16 team.

17 Q. Yes. Do you remember mentioning FRAGO 152 to
18 Major Clifton?

19 A. No, I don't. I just remember talking to him about the
20 courthouses.

21 Q. And nothing else?

22 A. Yes.

23 Q. You didn't, in that conversation, talk to him about the
24 permissibility or legality of stress positions?

25 A. No.

1 Q. Is that because it simply would not have been necessary
2 to mention them --

3 A. That issue was nipped in the bud in March.

4 MS SIMCOCK: Yes, I am grateful. Thank you, Sir.

5 THE CHAIRMAN: Mr Bourne?

6 Questions by MR BOURNE

7 MR BOURNE: A point of detail, Colonel. You have mentioned
8 more than once the TIF being closed overnight.

9 A. Yes.

10 Q. Do you know whether that situation changed at any time?

11 A. Well, I mean, remember that FRAGO 29 is -- probably
12 comes to my attention about five/six days before I leave
13 theatre, so I don't know if that changed subsequently.

14 Q. Right. The SO3 from the division that took over from
15 you recalls that in her time the military provost
16 staff -- that's to say the UK military provost staff --
17 could accept detainees at any hour of the day or night.
18 Do you have any knowledge of that becoming --

19 A. No, I checked whether it indeed was closed overnight and
20 found that to be true. I was not aware of any
21 variations on that.

22 Q. During your time?

23 A. Yes.

24 MR BOURNE: Thank you.

25 THE CHAIRMAN: Thank you. Ms Edington?

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Questions by MS EDINGTON

MS EDINGTON: Thank you, Sir.

Colonel Mercer, you were completely aware that your general officer commanding wanted to comply with the Geneva Convention both in spirit and letter?

A. Yes, absolutely.

Q. And in fact he handwrote a little note on a memo that you sent him, didn't he, to that effect on 26 March?

A. Yes, he did.

Q. The memo that you sent him on 29 March, after your visit to the TIF and the JFIT, resulted in a memo back from SO2 to you, didn't it --

A. That's correct.

Q. -- on 30 March; is that right?

A. That's correct.

Q. And he was trying to engage in a discussion with you about --

A. Yes.

Q. -- hooding and stress positions. Basically you nipped that and said you had staffed it to the NCC; is that right?

A. Yes, correct.

Q. In fact that's what he wanted you to do, didn't he?

A. Yes, we agreed to staff it up the chain of command.

Q. And, of course, that was to Commander Brown?

1 A. Yes.

2 Q. Thank you. When were you first aware of the publication
3 of the now existing JSP 383?

4 A. I can't recall. We tended to use JWP 1-10. You will
5 see that at the reference section at the top. So
6 I think we worked off JWP 1-10. When I did see it
7 raised, I went back to the document to double-check it
8 obviously, but that was in the last few weeks, so
9 I can't recall.

10 Q. Would it be fair to say that the published JSP 383 was
11 actually published in 2004 and that the document before
12 that which was -- I know you've said that JSP 383 was an
13 ongoing document, but the actual published document, if
14 you like the base document, was a 1958 publication?

15 A. I think it was just one of those documents that was just
16 constantly work in progress. I looked back on the files
17 and there is a published one in 2004, but there seemed
18 to be 1996 -- you know, it's just constantly being
19 updated and amended. So whether it actually -- it
20 crystallised at any point, I don't know.

21 Q. But was it a document that really came to your front or
22 were you more conscious of GC III and GC IV?

23 A. GC III and GC IV, yes.

24 Q. You have been asked about FRAGO 29 and you have said
25 that it came to your attention after it had been

1 distributed. With FRAGO 29, would it be fair to say
2 that some questioning would actually be the BGIRO of
3 those arresting troops, rather than just of the
4 detainee/internee?

5 A. Yes, absolutely. I mean it could be the circumstances
6 in which they were -- the person had been detained, it
7 could be any documents found on them, it could be any
8 circumstantial -- that would give them an indication as
9 to whether they were a threat to force security.

10 Q. So when you say it was a left or right basically for the
11 BGIRO to make that choice --

12 A. Yes.

13 Q. -- it could be that the detainee/internee was never
14 actually questioned by anyone at this stage?

15 A. Yes, quite possible. If they were caught red-handed, it
16 would speak for itself.

17 MS EDINGTON: Thank you very much, Colonel Mercer. That is
18 all.

19 THE CHAIRMAN: Mr Elias.

20 Further questions by MR ELIAS

21 MR ELIAS: Just to return briefly to three documents then
22 please, Colonel, in the light of the questions you have
23 been asked. Can we look at JSP 383, the 1984 edition,
24 MOD036434, please.

25 Can we just go back a page?

1 THE CHAIRMAN: You did say the date of this. It's when?

2 MR ELIAS: This is, I believe, in May of 2004.

3 THE CHAIRMAN: I see.

4 MR ELIAS: This is one of the editions if you like, Colonel,
5 that you were referring to, an ongoing -- a work in
6 progress, whatever you want to call it.

7 I just wanted to take you, in the light of the
8 answer that you gave, in particular to Mr Garnham, about
9 this document, as we understood it -- you said -- I hope
10 I quote you accurately -- that you understood that
11 blindfolding may be authorised for the purposes of
12 interrogation --

13 A. Looking at 383, yes.

14 Q. -- and you thought that this document may have been some
15 authority for that.

16 A. Yes, that's correct.

17 Q. If we see the heading there, "Interrogation", against
18 paragraph 8.34, and go over the page, please, to 8.34.2
19 under that same heading:

20 "Blindfolding and segregation may be necessary in
21 the interests of security, the physical restraint of
22 prisoners of war or to prevent collaboration prior to
23 interrogation."

24 And this was the word you were looking for in answer
25 to Mr Garnham, was it?

1 "These discomforts must be truly justified and be
2 for as short a period as possible."
3 A. That's correct, yes.
4 Q. So that we're clear about it and don't lose sight
5 perhaps of the point of all this, were you aware of what
6 might be called that "exception" to the use of
7 blindfolding in 2003 when you were in Iraq?
8 A. I don't believe I was, no.
9 Q. Just two other very brief matters. In answer to
10 Mr Singh and in relation to FRAGO 29, when you were
11 being asked, if I can put it this way, about the turf
12 wars and you were asked who in G2, as it were, was
13 advocating the return of this responsibility to G2,
14 I think you said S02.
15 A. Yes.
16 Q. And you said if you could see the document, perhaps
17 you could see the author of FRAGO 29, as I understood
18 it.
19 A. Yes, sure.
20 Q. We can see that. Could we look please at MOD016186?
21 Just first of all to note at the top of the page the
22 actual date of it, 26 June. When, in fact, did you
23 leave theatre? Do you know the date?
24 A. 11 July, I think.
25 Q. 11 July.

1 THE CHAIRMAN: You said that you didn't actually see it
2 until a day or two after it had been promulgated.

3 A. Yes, I didn't see it until the Sunday. I mean, I simply
4 don't recall the date I saw it, but it certainly wasn't
5 when it was promulgated. It came to my attention
6 afterwards.

7 THE CHAIRMAN: Yes.

8 MR ELIAS: If we go to the document, we see the authorship
9 at MOD016189.

10 A. Yes.

11 Q. I certainly don't want to lead you into giving us the
12 name of anybody in answer to Mr Singh's question --

13 A. That makes perfect sense. It would be S02, G2 and chief
14 G3, which is the chief of staff, as it is a G2/G3
15 product. I said that it might be S002. I suspect he
16 had some hand in it because it deals with the world in
17 which he was working.

18 Q. So we understand it, are you saying that the persons
19 named here, Messrs Marriott and Waters, were advocates
20 of the return to G2?

21 A. Yes, I think there was an attempt to reclaim it. If you
22 go back to the front of the document, it makes this
23 pronouncement:

24 "This FRAGO announces the intention for the G2
25 branch to assume overall control of the internment

1 process."

2 Then it says:

3 "Internees are assessed to be a threat to coalition
4 forces and their process is now a G2-led G3 ops
5 responsibility."

6 So that's what leads me to believe that this was,
7 you know, clawed back, so to speak.

8 Q. Finally this, please: if we look at what is our tab 20
9 in the core bundle at MOD011451, you referred -- I think
10 when questioned by Mr Singh -- to an annotated document
11 indicating that a matter had been staffed to NCC.

12 A. Yes, it's in the top right-hand corner.

13 Q. Is that the document to which you are referring?

14 A. Yes, that's right. My annotation is at the top.

15 Q. "I've referred the matter to the NCC"; is that what it
16 says?

17 A. Yes, and it's my signature, yes.

18 Q. Your signature has been blacked out, and then the date,
19 1 April 2003.

20 A. That sounds about right.

21 Q. So, in other words, contemporaneously with raising the
22 issue with the GOC --

23 A. Yes. It seems to fit sequentially.

24 MR ELIAS: Sir, I have no further questions. Thank you.

25 THE CHAIRMAN: Yes, thank you.

1 Questions by THE CHAIRMAN

2 THE CHAIRMAN: Can you help me about this, please, Colonel?

3 Suppose that you have a prisoner who wishes to be hooded
4 because he's frightened of being seen where he is or
5 frightened that some of his fellow prisoners will think
6 something that would cause them to do him harm, suppose
7 that's his motivation for hooding --

8 A. Yes.

9 THE CHAIRMAN: -- would you say hooding then was unlawful?

10 A. I would, yes.

11 THE CHAIRMAN: Why?

12 A. Because I don't think his consent overrides the
13 obligation to treat them with dignity. Secondly, that
14 other ways could be devised to secure the safety of that
15 prisoner. So if someone had come to me with that
16 proposition, I would have said, "Well, devise a system
17 to keep him safe" because we have an obligation to keep
18 people safe generally under the Geneva Conventions.

19 THE CHAIRMAN: I see. I suppose there is one thing that
20 I have gleaned from your evidence and no doubt a large
21 number of things. You don't think hooding is right in
22 any circumstances; is that so?

23 A. Well, there are people -- I know people have other views
24 about hooding --

25 THE CHAIRMAN: I am just asking for your personal --

1 A. I don't like it at all in any circumstances.

2 THE CHAIRMAN: It's not only illegal; you think it's
3 a thoroughly bad practice.

4 A. I do.

5 THE CHAIRMAN: Do you think in any way, in any sense, that
6 may colour your views about what you saw? Do you
7 understand what I mean?

8 A. Yes, I understand what you mean and clearly I have to
9 guard against that, but it doesn't colour what I saw.
10 There were not -- it was not just me, it was the
11 Red Cross, it was the --

12 THE CHAIRMAN: No, I am asking you, please --

13 A. What I'm trying to say is -- I'm trying to say there
14 were a number of people who expressed concern at what
15 they saw and we were all concerned. It was not just me
16 personally because I have offended by it. There was
17 a whole range of people across -- from all sorts of
18 organisations and positions within the headquarters who
19 said "This is wrong".

20 THE CHAIRMAN: I see.

21 A. So it wasn't just me.

22 THE CHAIRMAN: I follow that you say it's not just you.

23 A. Yes.

24 THE CHAIRMAN: But do you think in any sense that on the
25 occasions that you saw it, when the others were not

1 there, your view about hooding has led you to colour the
2 view of what you actually saw then? I know you say
3 other people saw it, but they didn't at the same time.
4 A. But we were almost at the same time. This all
5 happened -- it was extraordinary because I raised it and
6 then, within -- I don't know -- a day or so, in comes
7 chief media ops saying, "What's going on?" I gather
8 something came in from the commandant at the PW camp at
9 the same time and then two days later the Red Cross have
10 also complained, so I think that speaks for itself.

11 THE CHAIRMAN: All right. Yes.

12 Thank you very much. Well, I am extremely grateful
13 to you for coming to the Inquiry to give your evidence.
14 There are no more questions for you now and you are free
15 to go. We have other business to transact, so don't
16 wait for us. Thank you very much indeed.

17 MR ELIAS: Sir, the next witness will be 20 or 30 minutes,
18 so far as Counsel to the Inquiry is concerned. I am
19 just wondering, sir, whether it would be appropriate to
20 take a break at this stage.

21 THE CHAIRMAN: Well, the last thing I want to do is do
22 anybody out of their mid-afternoon break, so we will
23 have it now in case we go beyond that period.

24 Ten minutes.

25 (3.01 pm)

1 (A short break)

2 (3.11 pm)

3 MR HALLIDAY: Sir, the next witness is

4 Mr Medhurst-Cocksworth.

5 CHRISTOPHER ROBERT MEDHURST-COCKSWORTH (sworn)

6 THE CHAIRMAN: Yes, do sit down. If you would be kind

7 enough to speak into the microphone, which since you are

8 a tall person, that is not quite as easy as it may seem.

9 But please do because then we will all be able to hear

10 you.

11 Yes, thank you.

12 Questions by MR HALLIDAY

13 MR HALLIDAY: Please state your full name.

14 A. Christopher Robert Medhurst-Cocksworth.

15 Q. Can you see a red folder to your side?

16 A. I can.

17 Q. Could you open that please? Is your witness statement

18 inside it?

19 A. Yes.

20 Q. Turn to the last page please. Does your signature

21 appear on the final page?

22 A. It does, yes.

23 Q. When you signed this statement, were you attesting that

24 it was true to the best of your knowledge and belief?

25 A. I was, yes.

1 Q. You joined the army in 1995; is that correct?

2 A. That's correct, yes.

3 Q. And you are still in the army now?

4 A. I am.

5 Q. Your rank now is major?

6 A. Correct.

7 Q. During Op Telic 2 you were posted to the headquarters of
8 7 Armoured Brigade; is that correct?

9 A. No, that's not correct. Op Telic 1.

10 Q. Op Telic 1, I apologise. What was your rank during
11 Op Telic 1?

12 A. Captain.

13 Q. What was your role during that tour?

14 A. I was the SO3 G2 to 7 Armoured Brigade.

15 Q. Generally speaking, what did that role involve?

16 A. I would be the adviser to the brigade commander on all
17 intelligence issues.

18 Q. How would you provide that advice? Where would you get
19 your intelligence from, generally speaking?

20 A. I was -- I would receive information from the
21 battlegroups with my team. We would decipher that
22 information and try and glean intelligence from it and
23 provide advice to the commander. I would also receive
24 intelligence product from division.

25 Q. The intelligence you received from battlegroups, was

1 that ever gathered during tactical questioning?

2 A. During the war-fighting stage, if something of tactical
3 importance was gleaned after enemy soldiers had been
4 captured, then I would receive that if it was deemed
5 important enough, yes.

6 Q. Sticking with the war-fighting phase, information then
7 was gathered via tactical questioning, was it?

8 A. During the war-fighting phase, I am not sure whether
9 tactical questioning took place by the battlegroups at
10 battlegroup level.

11 Q. What about during the occupation?

12 A. I am unaware whether tactical questioning took place by
13 the battlegroups at battlegroup level.

14 Q. But you said you received intelligence from
15 battlegroups.

16 A. I would receive information.

17 Q. Information. You must have known something about the
18 source of that information, mustn't you?

19 A. During the war-fighting phase -- if that's the phase we
20 are still discussing -- then it could be -- I would
21 expect, for example, if a soldier had been captured by
22 a battlegroup and they were receiving information about
23 the tactical situation, then unless it was deemed
24 vitally important for the brigade plan -- if it was, for
25 example, where is the next enemy trench, then I would

1 not receive that information. If it was of greater
2 significance, then I expect it would come to me, but due
3 to the lack of Arabic speakers I would not expect a huge
4 amount of that to be possible.

5 Q. When you received information, did you ask where it came
6 from?

7 A. I can't recall.

8 Q. Would that not have been a natural question for you to
9 ask?

10 A. It would.

11 Q. Can you recall whether you were ever told that
12 information had come from tactical questioning?

13 A. I don't recall.

14 Q. Were you aware that 1 Black Watch used to tactically
15 question detainees at its headquarters camp?

16 A. No.

17 Q. Definitely not aware of that?

18 A. I wasn't aware of it, no.

19 Q. Did you have any role in providing tactical questioners
20 to battlegroups?

21 A. No, because 7 Brigade wasn't -- didn't have those people
22 attached to it intrinsically. They were a divisional
23 asset that specialised in intelligence corps people.

24 Q. Are you familiar with a document called "JWP 1-10"?

25 A. I am not familiar, but if the screen showed it, I might

1 able to recognise it.

2 Q. Certainly. Can we have on screen MOD013428, please?

3 A. No, I am not familiar with that.

4 Q. There is an aide-memoire inside the document which was

5 designed to be handed out to troops. That appears at

6 MOD013466. Were you familiar with this document during

7 your tour in Iraq?

8 A. I recognise the style of what it's talking about, yes.

9 Q. But you're not sure whether you saw this particular

10 document?

11 A. I am not sure. I can't remember if I saw this document

12 itself.

13 Q. If we go to the second page please, in the

14 "Responsibilities" section, under "J2/J3", it says:

15 "Organising tactical questioning and interrogation

16 of PW ..."

17 Did that form part of your role --

18 A. No.

19 Q. -- during Op Telic 1?

20 A. No.

21 Q. Thank you. Was there a particular person at

22 1 Black Watch with whom you liaised?

23 A. Through normal course of duties I would expect to liaise

24 with their intelligence officer.

25 Q. Can you recall his name?

1 A. I believe his name was Captain Williamson.

2 Q. Captain Williamson never mentioned to you, did he, that
3 1 Black Watch was tactically questioning detainees?

4 A. I don't think so, no.

5 Q. Did he ever mention to you that 1 Black Watch was
6 hooding prisoners --

7 A. No.

8 Q. -- with sandbags?

9 A. No.

10 Q. He didn't tell you that prisoners were hooded both for
11 security reasons and to maintain the shock of capture?

12 A. I don't recall, no.

13 Q. Do you recall during the tour ever being informed that
14 there was a ban on the hooding of detainees with
15 sandbags?

16 A. I can't remember specifically, no.

17 Q. Were you aware that 1 (UK) Div used to hold conference
18 calls at which oral orders were passed down to brigade?

19 A. I wouldn't be sat necessarily at all of those, with the
20 brigade commander, but I am aware of the process, yes.

21 Q. So you attended some of those conference calls, but not
22 all, did you?

23 A. It was expected that the principal staff officers within
24 the brigade would be listening, on the radio or
25 whichever means it was being passed, with the brigade

1 commander.

2 Q. And you fulfilled that expectation sometimes but not
3 other times, is that correct?

4 A. Unless I was unavoidably detained or elsewhere, then,
5 yes, it would be expected of me to be there to listen
6 in.

7 Q. Do you recall any discussion during the conference calls
8 that you did attend of hooding of prisoners with
9 sandbags?

10 A. No, I don't.

11 Q. Do you recall any discussion of the deprivation of
12 prisoners' sight by any means during those conference
13 calls?

14 A. I don't recall, no.

15 Q. Can we have MOD031014 on the screen, please?

16 We can see from the top left-hand corner that this
17 is brigade FRAGO 63, dated 21 March 2003. It appears
18 that this is the means by which brigade disseminated
19 a divisional order the previous day, named FRAGO 152.
20 Can you see on the right-hand side of the page there's
21 a list of recipients from whom action is required?

22 A. Yes, sir.

23 Q. If we go over the page, please, we have a further list
24 of recipients from whom action is required. This is the
25 internal list, internal to brigade -- 7 Armoured

1 Brigade -- and G2 is listed there, is it not?

2 A. It is, yes.

3 Q. Would that have meant you?

4 A. Yes, it would, and my team, yes.

5 Q. Can we go back to the first page, please? Paragraph 1
6 reads as follows:

7 "Detention of civilians. A number of civilians have
8 died in coalition forces custody and human rights
9 organisations are actively investigating alleged abuses.
10 At annex A is a comprehensive guide to detention of
11 civilians which is to be briefed to all those likely to
12 be in a position of contact with civilians under
13 detention at any stage in the chain. Battlegroups and
14 sub-units are to adhere to this policy."

15 Can we turn to the annex now, please? Paragraph 1
16 reads as follows:

17 "There have recently been a number of deaths in
18 custody where Iraqi civilians have died whilst being
19 held by various units in theatre. At the same time the
20 ICRC have advised that they have received a number of
21 complaints about the handling of detainees by coalition
22 forces."

23 Then over the page, at paragraph 5, halfway down
24 that paragraph:

25 "If they [that is detainees] need to be restrained

1 then this should only be effected where absolutely
2 necessary and using the minimum force required. Under
3 no circumstances should their faces be covered as this
4 might impair breathing."

5 Do you remember seeing this order whilst you were in
6 theatre?

7 A. I don't recall it now, no.

8 Q. Do you remember being told orally about its contents?

9 A. As it was a G2 department that was in action, I would
10 have read it, I expect, but I don't recall it.

11 Q. Focusing on that phrase I read last, "Under no
12 circumstances should their faces be covered as this
13 might impair breathing", what do you understand that to
14 mean?

15 A. I presume it means hooding.

16 Q. Hooding with sandbags?

17 A. I guess, yes.

18 Q. You don't recall the order. Presumably you don't recall
19 whether you took any steps to check that battlegroups
20 were complying with it.

21 A. Prisoner-handling was not part of the G2 function of
22 7 Brigade, therefore I wouldn't have followed up on
23 this.

24 Q. Was there no one within 7 Brigade who was responsible
25 for prisoner-handling?

1 A. It would have been, I imagine, going through the G3
2 chain and the RMPs and possibly the G1 train. But
3 7 Brigade G2 was a very small team. We didn't have that
4 remit.

5 Q. Can we turn to a different order now, please? It's
6 MOD017101. We can see from the top left corner that
7 this is brigade FRAGO 70, dated 30 May 2003. It appears
8 to be the means by which brigade disseminated
9 a different divisional order of the same date,
10 divisional FRAGO 163.

11 Can we turn over the page, please? Again, there's
12 a list of action recipients on the right-hand side and
13 amongst the internal recipients we see G2, don't we?

14 A. G2 is there, yes.

15 Q. That, again, would be a reference to you, would it?

16 A. It would be to the G2 department. I, at this stage, had
17 either left or was about to leave and was in the process
18 of handing over to my successor, so I'm not sure whether
19 I actually physically read that document.

20 Q. Your successor was Major Robinson; is that correct?

21 A. I believe so, yes.

22 Q. His recollection, according to his Inquiry witness
23 statement at least, was that that handover took place in
24 early June 2003. Is that different from your
25 recollection?

1 A. It was towards the end of May/beginning of June.
2 I can't remember the exact date. I was certainly out of
3 theatre by 1 June -- sorry, the first week of June.
4 Q. By the first week of June?
5 A. Definitely.
6 Q. So you may or may not have been in theatre when this
7 order was actioned?
8 A. I may have been in theatre, but I don't recall reading
9 that document. We would have been in our handover
10 period if I was in theatre.
11 Q. Can we turn back to the first page, please?
12 Paragraph 1, under "General", the final sentence reads
13 as follows:
14 "It is essential that brigade staff and units
15 understand the procedures to temporarily detain suspects
16 to prevent violations of international law."
17 Then, over the page, there's a paragraph which
18 begins "International law". The last sentence of that
19 paragraph reads as follows:
20 "Under no circumstances may a suspect be
21 interrogated until he has been processed by the TIF."
22 Do you recall receiving that particular instruction
23 whilst you were in Iraq?
24 A. I don't recall.
25 Q. You don't know, do you, whether any steps were taken to

1 check that battlegroups were complying with that
2 instruction?

3 A. If it was a legal order, then the chain of command would
4 be expected to follow it. I do not know whether
5 specific checks to reach the battlegroups took place but
6 as I said G2 in 7 Brigade weren't responsible for
7 prisoner-handling.

8 Q. But this concerns interrogation as opposed to
9 prisoner-handling generally, does it not?

10 A. I believe so, yes.

11 Q. Would that not be a G2 responsibility?

12 A. 7 Brigade didn't have, as far as I am aware,
13 interrogators because certainly within my brigade staff
14 we were only a team of about eight people.
15 Interrogators will have come from the intelligence
16 corps, who would have been a divisional asset and
17 reported to G2X.

18 Q. Regardless of whether you actually had interrogators,
19 would it not be the remit of G2 to police whether or not
20 interrogation was taking place at battlegroup level?

21 A. I suspect it would be across all branches, G2/G3, the
22 battlegroup commanding officer, the battlegroup ops
23 officer. So it is everyone's responsibility, as it
24 states there.

25 Q. It might be said that if something is everyone's

1 responsibility, it ends up being no-one's
2 responsibility. Would G2 not have a particular focus on
3 ensuring that this instruction was complied with?

4 A. It was not within our remit normally and so, therefore,
5 I did not -- and my team did not -- take particular
6 action on this, no.

7 Q. There's just one more document I should trouble you
8 with, Major. It's MOD011514. This is a document
9 drafted by the commander legal at 1 (UK) Division,
10 headed "Internees". You have seen this document before?

11 A. I think I saw this document in a bundle I was given
12 a few weeks ago.

13 Q. Do you recall whether or not you saw this document
14 whilst you were in theatre?

15 A. No, I don't and I doubt I would have received a copy.

16 Q. Why do you doubt that?

17 A. Because it looks like it's legal advice that would have
18 gone to the brigade legal officer.

19 Q. If we turn over the page, please, at the bottom of the
20 second page, under the subheading "Questioning", it
21 reads as follows:

22 "Questioning of internees will not be carried out by
23 the brigades in brigade holding areas and should only be
24 conducted at the theatre internment facility (TIF)."

25 You don't recall that particular instruction, do

1 you?

2 A. I don't recall it, no.

3 Q. You don't recall receiving any other instructions to the

4 same effect whilst you were in theatre?

5 A. If that was the guidance given, then I expect that's

6 what would have happened. I can't remember it

7 specifically because I wasn't responsible for moving

8 prisoners from -- or dealing with prisoners in any way.

9 Q. But again, apart from general prisoner-handling duties,

10 would you not have had some particular responsibility

11 for whether or how prisoners were questioned?

12 A. No. Questioning, as far as I was aware, was done by

13 divisional assets. I would received the information or

14 the intelligence from G2X in a daily int sum.

15 I wouldn't necessarily know the source of it either.

16 Q. You have already said that your handover was to

17 Major Robinson, who succeeded you in the post of G2

18 staff officer at brigade level. Is that correct?

19 A. That's correct, yes.

20 Q. What form did your handover to him take?

21 A. As far as I recall, it was approximately a week and he

22 would shadow me and my team, and I think he had a couple

23 of others from his own team there who would shadow their

24 opposite numbers in their daily duties.

25 Q. In your handover with Major Robinson, did you say

1 anything about prisoner-handling or the questioning of
2 prisoners?

3 A. I don't recall, but it wasn't a major feature or any
4 feature of our normal daily business, so I can't
5 remember.

6 Q. In his statement to the Inquiry, Major Robinson says
7 that he was told in his handover about brigade's role in
8 providing TQers to battlegroups. Do you not recall
9 saying that to him?

10 A. I think that's wrong.

11 Q. You don't think you did say that to him?

12 A. No, I don't.

13 Q. Do you think any of your colleagues could have said that
14 to him?

15 A. I think there's a confusion of where the TQers came
16 from.

17 Q. According to you, they didn't come from brigade?

18 A. 7 Brigade did not have TQers or interrogators as part of
19 the brigade set-up. They belonged to divisional assets.

20 Q. Did you hand over any written orders to Major Robinson?

21 A. As far as I recall, there was a number of files that
22 would have contained orders that would have been passed
23 around internally. I would imagine that anything that
24 had been passed as an action or even an informant, then
25 it would be in that file.

1 Q. So you imagined that the two FRAGOs we have looked at in
2 the last half an hour -- FRAGO 63 and FRAGO 70 -- which
3 had G2 on the action list would have been included in
4 that handover file, do you?

5 A. I would expect them to if they had actually physically
6 been handed to the G2 team.

7 Q. But you can't recall specifically whether those two
8 orders were included in the file?

9 A. No, I can't.

10 Q. Whose responsibility was it at brigade level to hand
11 over matters relating to prisoner-handling?

12 A. I would imagine the G3 team, RMP, possibly G1 and the
13 legal people.

14 Q. Whose responsibility in particular would the handover of
15 FRAGO 63 have been, the FRAGO which bans the covering of
16 detainees' faces?

17 A. I -- as far as I recall, every single FRAGO that we
18 received or we sent out would have been kept either
19 electronically or in a paper copy and that would have
20 been handed over to the next brigade.

21 Q. Who would have been responsible for that handover of
22 written orders?

23 A. The ops team, I imagine.

24 MR HALLIDAY: Thank you.

25 THE CHAIRMAN: Yes. You are going to be asked probably one

1 or two questions by other counsel.

2 Mr Friedman.

3 Questions by MR FRIEDMAN

4 MR FRIEDMAN: Thank you, Sir, and thank you, Major.

5 Can I just start with intelligence generally during
6 Telic 1? Would you accept that near enough brigade and
7 division had to create an intelligence system from
8 scratch, the system of the old regime having been
9 dismantled abruptly?

10 A. Do you mean after we occupied Basra?

11 Q. Yes.

12 A. That's correct, yes.

13 Q. And you spent your time with your team effectively
14 coordinating and collating information and intelligence
15 that was coming from a range of different sources and
16 agencies?

17 A. That's correct, and I also received stuff from division
18 as well.

19 Q. Yes. And was there an urgency and a degree of pressure
20 to the way in which you had to go about your work?

21 A. If I understand your question, was I pressurised?

22 Q. Yes.

23 A. I didn't feel pressurised, no.

24 Q. But did you, to put it another way, put pressure on
25 yourself and work with urgency because you were with

1 others at different levels effectively starting from
2 scratch?

3 A. We all had a sense of urgency in order to understand the
4 situation that was before us.

5 Q. Just two matters about the way in which information was
6 passed between the different levels. First of all this:
7 was there a concern expressed at any time that detainees
8 were being sent up to JFIT, the temporary internal
9 facility, being questioned, but any information gleaned
10 from that questioning was not working its way back down
11 to brigade? Was that concern expressed at any time?

12 A. I don't recall any concerns that I wasn't getting every
13 single piece of information, but I wouldn't expect to
14 get every single piece of information.

15 Q. No. So you felt from your own experience that there was
16 a sufficient communication of information down from JFIT
17 as a result of detainees being questioned at the TIF?

18 A. I wouldn't necessarily be privy to where the information
19 that came from division had come from.

20 Q. I may come on to that in a moment. But just looking at
21 it the other way, did you ever, at brigade level, have
22 communication come down to you from JFIT that they
23 weren't getting sufficient information coming up from
24 brigade in order to assist them in questioning people
25 who had been sent up there?

1 A. I don't recall that, no.

2 Q. Just some very general questions about the way in which
3 the intelligence and information came to you. Please
4 don't go into detail.

5 You've touched on it, but can we be clear. If
6 information came from a detainee being questioned,
7 should the fact that it had come from a detainee through
8 questioning have made its way into the written memo of
9 any type that you received?

10 A. I'm not sure where this -- what you mean by the
11 questioning. Who was questioning the detainee?

12 Q. A UK agent is questioning someone in UK custody, in
13 Iraq, and, as a result of that questioning, information
14 comes from them, if we call that "detainee reporting" or
15 "detainee answers to questions". But should the fact
16 that had it come from a detainee have made its way into
17 any intelligence summary that you received as a result
18 of that?

19 A. Not always, no, because quite often sources are kept out
20 of the int sums in order to protect the sources. So if
21 it was coming from G2X, they wouldn't necessarily -- and
22 I wouldn't expect them to necessarily give me a source.
23 I would expect a rating as to how significant that
24 information is -- rated by G2X or division -- they
25 thought it was.

1 Q. Briefly, within the public domain, rating involves how
2 significant and perhaps how reliable, two points.

3 A. That's correct.

4 Q. One can well understand, as it were, different types of
5 informants, but if the person is a prisoner -- never
6 mind whether they are named or not -- the fact that they
7 are in detention being questioned, was that something
8 that should have been kept out, should have been put in
9 or was there no standard practice about that?

10 A. I don't recall seeing any intelligence coming down that
11 specifically said it came from a detainee. Whether
12 that's significant or not, I couldn't tell you.

13 Q. Can we understand this to be the case? In your time on
14 that tour, you don't recall any intelligence coming up
15 from battlegroup saying that detainees had answered
16 questions and given the information in the report that
17 you got?

18 A. No, I don't recall any of that.

19 Q. Just on that document FRAGO 152 that you don't recall
20 but you would have been on tour when it came down, it
21 refers to the deaths in custody. Were you ever given
22 any information that detainees had died whilst in
23 battlegroup custody?

24 A. I was aware, I think, of one case.

25 Q. Just generally about that case, did you know the

1 circumstances of where they were being held and for what
2 purpose?

3 A. I do not recall where they were being held. I know he
4 had died of a heart attack, I think, whilst he was being
5 arrested, but I don't recall the detail.

6 Q. Given the way you have described, in effect, there being
7 no TQ assets available to brigade, was it ever discussed
8 whilst on tour that that was, in effect, hampering
9 brigade and indeed battlegroup capability in terms of
10 gaining intelligence?

11 A. Yes. When 7 Brigade deployed we had very little time to
12 prepare, so these assets were not given to us or there
13 wasn't enough time for people to be trained. There were
14 few and far between assets at division room level,
15 I remember, so I would imagine, yes, that would have
16 hampered our ability to gain intelligence.

17 Q. Perhaps more importantly than the hindsight, was that
18 a discussion that you were having amongst your team and
19 with your chain of command at the time, that you were
20 hampered for those reasons?

21 A. I may have asked for more assets. I can't remember
22 a specific conversation, but I would imagine that
23 everyone asks for more assets anyway. So I may have had
24 that conversation, but I don't recall a specific
25 conversation about it.

1 Q. Well, then, just into handover with Major Robinson, did
2 anything like that come up in your discussions with him,
3 that, "Effectively there's a lacunae of capability at
4 brigade level to conduct tactical questioning and those
5 are the circumstances we have worked under thus far"?

6 A. I don't recall talking to him about that specifically.
7 It may have come up. How 19 Brigade were structured may
8 have been very different to 7 Brigade. They may have
9 had more resources. I don't know.

10 MR FRIEDMAN: Thank you, Sir.

11 THE CHAIRMAN: Thank you.

12 Ms Edington is not here. Is somebody asking
13 questions on her behalf?

14 MR HALLIDAY: Sir, Ms Edington did convey a message that she
15 would not be attending.

16 THE CHAIRMAN: I understand that. I thought that someone
17 was going to raise questions for her.

18 MR HALLIDAY: The questions she wished to raise were raised
19 by me.

20 THE CHAIRMAN: Right. Mr Evans.

21 Questions by MR EVANS

22 MR EVANS: Major, what was your primary focus when you
23 arrived in Iraq in terms of setting up intelligence?

24 A. You mean once we were in Basra itself?

25 Q. Yes. What was your focus of work?

1 A. We were trying to identify key members of the population
2 who we, 7 Brigade, could interact with and run the city
3 with.

4 Q. Did that, putting it shortly, occupy a great deal of
5 your time in those early days?

6 A. That was a significant part of my time.

7 Q. You tell us in your witness statement that you met
8 prisoners only on one occasion in May 2003. It's
9 paragraph 22, if it can be brought up on the screen.
10 You tell us that you visited Um Qasr and you saw the
11 prisoner of war camp there. Did you see prisoners
12 hooded at that stage?

13 A. No, I didn't.

14 Q. Did you see prisoners walking around the facility?

15 A. I did, yes.

16 Q. Was that the only time you ever saw prisoners while you
17 were in Iraq?

18 A. That was the only time, yes.

19 Q. Was prisoner-handling ever an issue, as far as you were
20 concerned, on your radar, if I can put it that way,
21 during the course of your tour?

22 A. No.

23 Q. Can I just take you to FRAGO 63? It's the first page at
24 MOD031014. You were taken to this document. If you
25 look at that, can you see that on the front page of it

1 THE CHAIRMAN: Did you see anybody hooded there?

2 A. None, Sir.

3 THE CHAIRMAN: None at all?

4 A. None at all.

5 THE CHAIRMAN: When was it you went?

6 A. About May-time, sir.

7 THE CHAIRMAN: Any advance on "about May-time"?

8 A. I can't remember. I was going down with someone from

9 another agency to speak to prisoners.

10 THE CHAIRMAN: I see. Thank you very much.

11 Well, that is all the questions you are going to be

12 asked. I am very grateful to you for coming to the

13 Inquiry and giving your evidence and you are now free to

14 go.

15 A. Thank you, Sir.

16 THE CHAIRMAN: So that completes business today. Tomorrow

17 we have --

18 MR HALLIDAY: Tomorrow we will be calling Messrs Vernon,

19 Frennd and Christie in that order, Sir.

20 THE CHAIRMAN: Thank you very much.

21 (3.46 pm)

22 (The Inquiry adjourned until 10.00 am, Wednesday,

23 17 March 2010)

24

25 Opening remarks1

NICHOLAS JUSTIN MERCER (sworn)2

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