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Tuesday, 20 July 2010

(10.00 am)

Opening remarks

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

The interpreters wonder if we could all speak a little slower. It is very difficult, I know. I no doubt speak far too fast. But if you could try to speak slower.

MR DINGEMANS: I will try to do that. I have also provided a note of what I say to the interpreters, which I hope might assist in that respect.

THE CHAIRMAN: I know they will find that very helpful.

Yes, now, Mr Dingemans.

Submissions by MR DINGEMANS

MR DINGEMANS: I have been told that I have two hours but that I need not fill it

THE CHAIRMAN: No, you don't need to. There is no compulsion.

MR DINGEMANS: I will try not to disappoint. I don't intend to repeat any part of my written submissions, either opening or closing, but may I just make this point: in our opening submissions we did address some propositions of law relating to the law of armed conflict and I know that you had those well in mind as the matters had progressed and we do respectfully commend them to you.

1 THE CHAIRMAN: Yes.

2 MR DINGEMANS: Can I deal first of all with an issue of the
3 scope of the Inquiry? My learned friend Mr Singh and my
4 learned friend Mr Friedman yesterday addressed you
5 on sections 2(1) and 2(2) of the Inquiries Act 2005 and
6 raised a number of points in relation to that.

7 Can I make two points? First, we respectfully
8 submit that it is impermissible to set out all of
9 elements of a criminal offence, making findings of fact
10 in relation to each of them, and then to say, "I have
11 made findings of fact, but not made findings of criminal
12 liability".

13 THE CHAIRMAN: Yes.

14 MR DINGEMANS: Further, it is the function of a public
15 inquiry to do three things: to identify what went wrong
16 and why it went wrong; secondly, to address the concerns
17 of the public; and thirdly, in those circumstances, to
18 bring the beginnings of justice to the bereaved.

19 It is no part of a public inquiry to play around on
20 the edges of criminal law and it is not the function of
21 the procedures that have been given to you by
22 Parliament.

23 THE CHAIRMAN: Yes.

24 MR DINGEMANS: Indeed, we would respectfully submit that
25 the, for example, jurisprudence in relation to joint

1 enterprise in circumstances such as this needs only to
2 be stated to be realised that it is wholly inapposite to
3 the role that you are constitutionally obliged to
4 perform.

5 THE CHAIRMAN: It is pretty complicated enough without
6 inserting that into it.

7 MR DINGEMANS: Can I, when dealing with general issues in
8 relation to the Inquiry, make this submission: the
9 Inquiries Act and Rules are produced in an attempt to
10 ensure fairness and we respectfully submit that you and
11 your team have been assiduous in attempting to discharge
12 those duties. For that reason criticisms are notified
13 and addressed, but there is this risk in these
14 procedures, that the proper attention paid to those
15 safeguards can divert an inquiry from its proper
16 functions of finding out what happened and why into
17 becoming what we respectfully submit can be called
18 "criticism-centric" --

19 THE CHAIRMAN: Yes.

20 MR DINGEMANS: -- so that unnecessary disputes of fact are
21 determined and mini-trials are conducted. A public
22 inquiry must take place in public, it must address the
23 concerns of the public, but it is not, we respectfully
24 submit, to become criticism-centric. Of course fairness
25 requires that criticisms are dealt with and addressed,

1 but the rules shouldn't be allowed to hijack the
2 process.

3 THE CHAIRMAN: Yes.

4 MR DINGEMANS: On a general proposition, my learned friend
5 Mr Singh would have you believe that many of these
6 failings were systemic and my learned friend Mr Garnham
7 would have you believe that there were no systemic
8 failings. We respectfully submit that, like many
9 things, the truth lies in the middle and that there were
10 systemic failings that had proper relevance to the
11 causes of what occurred. Nothing that I say is intended
12 to excuse the behaviour that occurred.

13 Training. The army did provide law of armed
14 conflict training, but there were a number of problems.
15 The underlying message or guiding beacon, as my learned
16 friend Mr Elias put it in a number of questions, was
17 humane treatment, and it is perfectly apparent that the
18 vast majority, if not the overwhelming majority, of
19 soldiers had picked up that message, but we do
20 respectfully submit it wasn't a sufficient message.

21 As long ago as 1972 Lord Parker Chief Justice and
22 Lord Gardiner Lord Chancellor, respectively in former
23 roles, disagreed about whether all forms of conditioning
24 in Northern Ireland would be inhumane. If we, as boring
25 lawyers, know who was right, it illustrates the need to

1 provide clear guidance to those on the ground and that
2 is particularly so when you see the range of views
3 expressed on hooding.

4 Can I just refer to paragraph 73(g) of our closing
5 submissions, SUB000632, where we set out what S009 said,
6 which was:

7 "There was a very practical reason for hooding --
8 with large numbers of people moving around -- it would
9 have been immoral to put soldiers at risk and to risk
10 detainees injuring themselves."

11 THE CHAIRMAN: Could you just give me a moment while I get
12 it out?

13 SUB000632?

14 MR DINGEMANS: Page 33 of --

15 THE CHAIRMAN: Internal numbering. Yes, I have it.

16 MR DINGEMANS: (a) to (h) I think are quotes of similar
17 nature, but that, given the time available, I simply
18 highlight.

19 I am not for a moment suggesting he is right, but
20 what I do respectfully submit is he was a reasonable
21 person having formed a reasonable view that was
22 sufficiently blunt to mean that "inhumane" or "humanity"
23 is not enough by way of direction, especially on
24 something like hooding.

25 Can I also deal with another point in this respect;

1 for example, whether persons should be made to sit on
2 the ground with their hands behind their heads. I show
3 you a photograph of Corporal Redfearn at Hotel Anzio,
4 which is LCY000040.

5 This was, as you may recollect, the, as it were,
6 battalion or regimental newsletter put round after the
7 tour, on, no doubt, perfectly properly, army funds, but
8 it does suggest that if that sort of treatment was
9 considered acceptable to publish in that kind of
10 newsletter, then teaching something as "humane" or
11 "inhumane" is too blunt an instrument. One can only
12 infer that the editor assumed that that was perfectly
13 permissible.

14 THE CHAIRMAN: Just give me the reference again of that.

15 MR DINGEMANS: LCY000040.

16 THE CHAIRMAN: Thank you.

17 MR DINGEMANS: The second major problem, we respectfully
18 submit, with the training that was given to these
19 soldiers was that it didn't engage with treating
20 prisoners at all and certainly didn't engage with
21 treating civilian prisoners.

22 You asked, Sir, rhetorically yesterday whether
23 a soldier might understand what he has to do if he was
24 to look after prisoners for six to 14 hours and perhaps
25 you don't need much training for that, but we

1 respectfully submit that you do need assistance and
2 proper assistance on the following questions: first of
3 all, where do you keep them? Are they to sit on the
4 ground in the open? Are they to sit in shade? Are they
5 to sit in cubicles? Can they see the interpreters?

6 There was evidence and unhappily reality shows that
7 interpreters were targeted. I am not for a moment
8 suggesting in relation to these detainees that there was
9 reliable evidence of that, but certainly in relation to
10 interpreters generally in Iraq there had been evidence
11 that they had been targeted. Can they be handcuffed?
12 Should they be fed?

13 THE CHAIRMAN: Well, the latter, as I think I said earlier,
14 must be pretty obvious, mustn't it, to the meanest
15 intelligence?

16 MR DINGEMANS: Except this: if you are guarding and have
17 only ever been trained to guard in a tactical situation,
18 are you in a tactical situation at the TDF? I mean, the
19 reality is, as we know, you should realise that you are
20 not if you are there for the six- to 14-hour period.
21 But then, of course, you have the corruption of the
22 training by reference to the proposition that you are
23 undergoing conditioning. We will go back to that later.

24 Are they allowed to sleep? Do they have to sit in
25 a row or are they allowed to make themselves

1 comfortable? Can they smoke? In this respect, soldiers
2 do not guard prisoners in battalions at home. That is
3 the exclusive remit of the provost regimental staff.

4 THE CHAIRMAN: Don't they go to a guard room from time to
5 time to assist?

6 MR DINGEMANS: No, there are two aspects. They go to
7 a guard room to provide guard to a base, and that
8 certainly --

9 THE CHAIRMAN: No, I didn't mean that. I meant the guard
10 room where they --

11 MR DINGEMANS: Not as far as my understanding of the
12 evidence is shown, nor indeed, for what it is worth,
13 subjective understandings.

14 THE CHAIRMAN: Yes. Well, you could be right about that.

15 MR DINGEMANS: That is the regimental provost staff. The
16 great feature of a public inquiry is that one can chase
17 down these things in the evidence after the event, but
18 in our submission, even if that is the case -- and my
19 submission is that is not reflective of the evidence --
20 there is no evidence that, for example, the particular
21 soldiers involved in G10A --

22 THE CHAIRMAN: No, that is quite right.

23 MR DINGEMANS: It is the exclusive preserve of the
24 regimental provost staff or the MPS specialists at
25 Colchester, whom you heard evidence about.

1 THE CHAIRMAN: Yes.

2 MR DINGEMANS: The other difficulty in the facts and
3 circumstances of this particular case is that it was not
4 for a six- to 14-hour period.

5 THE CHAIRMAN: That I understand.

6 MR DINGEMANS: It was Major Peebles that sanctioned the
7 continuing retention for a very substantial period.

8 The third, we respectfully submit, fundamental
9 criticism of training is that it permitted confusion to
10 arise in relation to hooding and conditioning. Even
11 that outdated video on the law of armed conflict showing
12 effectively Russian soldiers being paraded through
13 West German villages emphasised the importance of
14 maintaining of shock of capture, albeit, it is fair to
15 acknowledge, through firm but fair handling.

16 But how do you maintain that? Positions of control
17 or stress positions? What is a sensible distinction
18 between the two in the past? I will come on to current
19 definitions later.

20 Many of the positions reported as stress positions,
21 for example people sitting down with their hands in
22 their laps, might well fall under my learned friend
23 Mr Barr's positions of control in the sense they are not
24 designed to cause discomfort. Of course it is
25 a necessary by-product that if you sit for a long time,

1 your ankles will go to sleep.

2 In this respect, can I deal with my learned friend
3 Mr Garnham's point about mission command? We
4 respectfully submit that "mission command" has never
5 been interpreted to mean that you do not train people
6 properly.

7 THE CHAIRMAN: Yes, well I can understand that.

8 MR DINGEMANS: That brings me down to some other features.

9 First of all, the complete absence of preparation for
10 the aftermath of Telic 1. Secondly, so far as these
11 particular individual soldiers were concerned, rushing
12 them from being firemen one minute to operations the
13 next with what was acknowledged to be inadequate time
14 for training must have a background cause when you are
15 looking at all the circumstances leading up to the
16 failures on those particular circumstances.

17 THE CHAIRMAN: Yes. I see forensically that point from an
18 advocate's point of view, but on the other hand, if you
19 get to the central core of what happened in the TDF, it
20 didn't really play a part in that, absent your training
21 point, which I --

22 MR DINGEMANS: Well, it is the training point, with
23 inadequate time for training, because that was -- the
24 vice of going from Fresco straight out to Iraq,
25 effectively with the very foreshortened training, was

1 that there was no mission-specific civilian prisoner of
2 war handling training. And to be fair to those further
3 up the line who devised the training, they simply had no
4 concept that that was likely to be required in some
5 respects.

6 THE CHAIRMAN: In some respects I rather think they were
7 expecting to have very many more prisoners, but
8 prisoners of war --

9 MR DINGEMANS: Yes.

10 THE CHAIRMAN: -- but that didn't happen.

11 MR DINGEMANS: No. In this respect there was no one in the
12 army before Op Telic 2 who had any experience of
13 civilian prisoner handling. The nearest it had come, as
14 a matter of history, was Northern Ireland, but all the
15 evidence showed and the reality was that civilian
16 prisoners were handed straight over to the Royal Ulster
17 Constabulary after arrest.

18 When you come to make the important judgments, as
19 you will, on the individuals who are before you, we
20 respectfully submit that those are important gaps when
21 judging what people were meant to understand their
22 duties were. If one is to do as my learned friend
23 Mr Singh did yesterday and refer to other inquiries --
24 he referred to the Lawrence Inquiry -- one can sensibly
25 refer to Charles Haddon-Cave's Nimrod Inquiry about the

1 Military Cabinet, which includes proper preparation and
2 assistance for the individuals on the ground, and those
3 are passages which no doubt you will be well aware of.

4 THE CHAIRMAN: Well, I know how to become well aware of
5 them.

6 MR DINGEMANS: Sorry then. If that is too cryptic, I can
7 always provide assistance.

8 THE CHAIRMAN: No, I think you can rest assured that that is
9 one thing we can get.

10 MR DINGEMANS: So where did the idea that conditioning and
11 hooding was appropriate come from? Can I deal with
12 that?

13 THE CHAIRMAN: Yes, I would be grateful if you would.

14 MR DINGEMANS: The proposition that it was home-grown from
15 1 QLR we respectfully submit is not realistic. First,
16 the submission itself contemplates that Gallacher from
17 1 Black Watch influenced it, but what it doesn't do is
18 then say, "Where did it come from for Gallacher?", which
19 was Chicksands, because that is it where Gallacher had
20 been.

21 In that respect my learned friend Mr Garnham's
22 submissions yesterday did not acknowledge the important
23 difference between Gallacher producing this regime and
24 Royce dealing with it because Royce had never had that
25 training at Chicksands. He was an infantry soldier and

1 had no subject matter expertise, as all those in the
2 military had put it.

3 The evidence that there was a linkage between
4 Gallacher and what happened at the TDF subsequently is
5 very remote. The closest it comes is Gallacher's
6 suggestion that Corporal Payne and Sergeant Smith were
7 around and he may have discussed high value prisoners
8 with them.

9 Secondly, my learned friend Mr Garnham's proposition
10 did not withstand questioning from you when you said,
11 "There must be the possibility that training had seeped
12 through", I think is how you put on the transcript, "to
13 infect the process", and my learned friend effectively
14 agreed. We respectfully submit that must be right.

15 Thirdly, the attack on Major Royce's credibility is
16 unfair and unjustified. Major Royce could have walked
17 away from the whole process of the court martial.

18 THE CHAIRMAN: Well, could he? In the end he was called as
19 the judge's witness.

20 MR DINGEMANS: Absolutely, but in terms of "not available",
21 "can't remembers", all those aspects of it, unless you
22 are a truthful and credible person, to put yourself on
23 the line in circumstances where your evidence, you are
24 no doubt to have been told, is going to have an
25 important effect on the court martial -- why you have

1 been called otherwise, and the judge's witness -- is
2 hardly likely to enhance a career prospect. Some of the
3 suggestions against Major Royce, that he is a career
4 man, support Colonel Mendonca -- Colonel Mendonca who
5 was already on trial at the court martial -- to come out
6 and say the truth as he understood it to be, not likely
7 to enhance his career prospects, hasn't enhanced his
8 career prospects, but in my submission was a sign of
9 a man willing to go the extra mile to tell the truth as
10 he perceived it.

11 The attacks from different angles to suit different
12 cases and perspectives we respectfully submit are wholly
13 unfair and unwarranted. In this respect we do
14 respectfully ask that Royce is not judged on what
15 Major Peebles allowed because it would be completely
16 wrong to conflate what happened in the period of 14 to
17 16 September with the control process that Royce
18 described.

19 THE CHAIRMAN: Royce, as I recollect, said that he went to
20 the TDF at least once every half-hour to see what was
21 going on.

22 MR DINGEMANS: He did. He said he had an absolute limit of
23 six hours. He also said he finished it by 10 in the
24 morning and we would respectfully commend to you
25 paragraph 94 of his witness statement.

1 THE CHAIRMAN: You just have to remind me for a moment what
2 he said in paragraph 94.

3 MR DINGEMANS: Effectively that. The visits, the close
4 control, the stopping by 10 in the morning, the absolute
5 limit of six hours. It is around 94 and on where he
6 says that he was perfectly happy to tell brigade that he
7 wasn't prepared to continue the process any longer if
8 they couldn't send TQers down.

9 THE CHAIRMAN: If I were to accept that that is correct and
10 that's what he said, what does that say about it? Does
11 that mean that his training and previous experience in
12 the army taught him that hooding and stress positions on
13 any view couldn't be continued for any length of time?

14 MR DINGEMANS: No, what he said in relation to the six hours
15 was -- first of all, you may remember yesterday the
16 question you put to my learned friend Mr Garnham about
17 stress positions and if Major Royce had been taught
18 about that. His evidence was that he had never been
19 taught about stress positions before. He had obviously
20 had them inflicted in the way --

21 THE CHAIRMAN: I thought he said also that in the
22 pre-deployment training he had been told that you
23 couldn't put people in stress positions.

24 MR DINGEMANS: No, he was told unequivocally you couldn't
25 hood people.

1 THE CHAIRMAN: Yes. Yes.

2 MR DINGEMANS: That is all I was saying.

3 THE CHAIRMAN: Yes.

4 MR DINGEMANS: Your point to my learned friend was
5 absolutely right. He, of course, batted it back
6 accurately, saying "Major Royce didn't say that". He
7 didn't. But he said "hood positions". So the point is
8 as valid, but the fact that my learned friend didn't
9 engage with the point shows that there is no answer
10 to it. Why would Major Royce, having been told "no hood
11 positions", put it down in his witness statement, "I was
12 told no hood positions" -- some late corroboratory
13 evidence that he was probably taught that -- and then
14 say, "Yes, in fact hooding was permitted because I went
15 and checked".

16 His evidence as to how he checked hooding was that
17 he observed it when he came with 1-Black Watch, he saw
18 it, he realised it was something to check, he saw it
19 continuing and he checked it and reported it. It was
20 then that stress positions came later on, the first
21 operation, when the delay in arrival of TQers was
22 confronted.

23 THE CHAIRMAN: Yes. His evidence was a little confused
24 about the two occasions that he went to check or to get
25 the sanction, as it has been termed, although I don't

1 think that is necessarily an accurate word. On the
2 first occasion, as I understand it, he spoke to
3 Robinson. That's what he said.

4 MR DINGEMANS: But his recollection was that that was
5 specific to hooding --

6 THE CHAIRMAN: Yes.

7 MR DINGEMANS: -- because at that stage he had no idea about
8 stress positions.

9 MR DINGEMANS: Yes, but subsequently he went on a second
10 occasion and spoke to both Robinson and Clifton.

11 MR DINGEMANS: Yes, his recollection is that the issue of
12 conditioning arose in relation to the question of the
13 operation that was to be conducted at that time, the
14 delay -- I mean Royce put it in terms of "hot planning"
15 for the operation -- the delay that was going to happen
16 before the TQers and him being told to maintain the
17 shock of capture and the process of conditioning.

18 If you put, in our submission, all the evidence
19 together and accept this as a basic proposition that
20 most witnesses, most of the time, are trying to tell the
21 truth -- which we respectfully submit is probably
22 a reasonable proposition until you can be shown
23 otherwise -- then you can easily see what happens.

24 The initial conversation about hooding, Robinson
25 accepts -- no recollection of it, but Robinson accepts

1 that hooding was something that wouldn't have caused him
2 a particular problem. Stress positions certainly would
3 have done.

4 Then you have the operation being disclosed and then
5 you have the fact that Royce becomes aware that TQers
6 aren't coming for a while, some conversation with the
7 field HUMINT officers about maintaining the shock of
8 capture and conditioning, and then authorisation --
9 Royce believes both from Robinson and Clifton, but it
10 may well have been one of those hurried conversations,
11 and he says and accepts that both Robinson and Clifton
12 were busy -- in which Major Clifton accepts that
13 conditioning, as he understood or misunderstood it to
14 be, could continue.

15 Indeed, if what Major Royce had understood as to be
16 acceptable conditioning for a short period of time, you
17 get very close to the position in Northern Ireland about
18 which Lord Parker and Lord Gardiner held diverging
19 views. Of course criticise Royce for not understanding
20 the law accurately, but we respectfully submit that
21 wouldn't be fair. But in terms of whether he was to
22 know it was humane or inhumane, reasonable lawyers,
23 albeit 20 years/30 years before, had themselves
24 disagreed.

25 THE CHAIRMAN: Yes, but you can't exclude the circumstances,

1 can you? I think again -- and you would no doubt point
2 to the fact that his position was entirely different to
3 that of Peebles on this occasion, where it went on for
4 a very long time -- but the thought of people being
5 hooded in 40 to 50 degrees centigrade at any time
6 strikes one as odd

7 MR DINGEMANS: Before you make that criticism of Royce --

8 THE CHAIRMAN: I am not saying --

9 MR DINGEMANS: No, absolutely. I am very grateful that you
10 test the propositions with me. We do respectfully ask
11 you to read what Royce said about his own practice
12 because it was completely different from the 40- to
13 50-degree heat. That was the point about the 10 o'clock
14 cut-off because then you had morning. You never had the
15 situation of effectively permitting those in the TDF to
16 be hooded all day under Royce's watch.

17 THE CHAIRMAN: Yes.

18 MR DINGEMANS: The other distinction between Royce and
19 Peebles, when we talk about stress positions,
20 inevitably, being human, our own perception is
21 immediately rooted back to that dreadful video, which is
22 stress positions on the most extreme side, and Royce
23 talked about stress positions in terms of standing
24 against a wall with their hands apart.

25 THE CHAIRMAN: Standing against a wall with their hands on

1 it apart.

2 MR DINGEMANS: Yes, in fact, trying to work out the position
3 from his description is slightly difficult, but he
4 talked about wall-standing.

5 I entirely accept, after the jurisprudence from the
6 Northern Ireland case, that that is plainly a stress
7 position, but it is of a completely different character
8 from the ski position, if I can call it that by way of
9 informal shorthand, that we see on the video.

10 THE CHAIRMAN: Yes.

11 MR DINGEMANS: In relation to what Royce did or didn't get
12 permission to do, we respectfully submit that the
13 banking argument on this proposition and disputed fact
14 is the fact that he told others before the death of
15 Baha Mousa that he had got permission. You have that
16 evidence from witnesses, a variety of sources set out in
17 our closing submissions.

18 I entirely accept that they gave their witness
19 statements after the death of Baha Mousa, but it related
20 to the period of time before, and there is no reason to
21 suggest they had made it up to help Major Royce who
22 might then help Mendonca. That would be a bizarre
23 conspiracy. If he did say that before any circumstances
24 of death, before anyone knew we were going to be here
25 eight years later, then we respectfully submit that is

1 the strongest possible evidence that he did, at least at
2 the time, immediately -- even before issues arose --
3 assume he had that permission.

4 THE CHAIRMAN: It is not really part of your brief to deal
5 with this, but I would like to see what you have to say.
6 Suppose you are right that he only did his stress
7 positions that he oversaw, presumably they were carried
8 out in part at any rate or supervised in part by Payne.

9 MR DINGEMANS: No.

10 THE CHAIRMAN: Not Payne?

11 MR DINGEMANS: No, and that was another point of distinction
12 about Royce's evidence. He would only allow Smith to
13 carry out the supervision.

14 THE CHAIRMAN: Now you say it, I recollect that.

15 MR DINGEMANS: And that was absolutely critical. Royce was
16 nobody's fool. Everyone can see that Corporal Payne may
17 have some qualities, but being a reasonable person
18 perhaps is not high amongst them and Royce might have
19 spotted that.

20 THE CHAIRMAN: Yes.

21 MR DINGEMANS: That will come back to be a proposition
22 I pick up because how did it happen -- a wrong process
23 I entirely accept when one looks at the law and the
24 rulings that we know happened in Strasbourg, but not the
25 process of 14 to 16 September. In that respect,

1 allowing a person such as Payne to become the central
2 character we respectfully submit is an important part of
3 the explanation.

4 But Royce did not. He said -- and he said this in
5 his witness statement, if you care to look at it just on
6 this particular point:

7 "Sergeant Smith had a reputation of a skiver.
8 I thought that was slightly undeserved because he always
9 did what I would ask him to do and I put him in charge
10 of the process of conditioning ..."

11 THE CHAIRMAN: Now you mention it, I remember that.

12 MR DINGEMANS: Then in this respect -- and it is a point
13 I have part-made as we have been going through -- we do
14 know that Major Robinson thought hooding was acceptable
15 in certain circumstances and that Clifton had understood
16 conditioning, as he understood it to be, was not
17 something that would cause him problems if TQers were
18 around and then it is a tremendous coincidence that it
19 happens to be those two out of brigade that are plucked
20 by Major Royce as the persons with whom he had this
21 conversation.

22 THE CHAIRMAN: Yes.

23 MR DINGEMANS: It is entirely right -- and I have to
24 confront the fact -- that Royce's first witness
25 statements dealt principally with the issue of hooding.

1 But that was, as you can see from the court martial
2 which went down various different avenues and whether
3 anyone might have dealt with the case in the way it was
4 dealt with is a completely different issue -- you can
5 see effectively that Royce was asked about that. Then,
6 when he was come back to in relation to issues such as
7 conditioning, then it is disclosed later on. We dealt
8 with that in our submissions in reply under the heading
9 of "Royce".

10 THE CHAIRMAN: Yes.

11 MR DINGEMANS: Can I then just deal with one further point
12 in relation to this, which is the process developing
13 that my learned friend Mr Garnham referred you to. That
14 comes from paragraph 78 of Royce's witness statement.
15 But what was developing was the process of how to
16 condition. It wasn't the permission.

17 In paragraph 77 he outlined immediately the fact
18 that he claims to have had the permission from Clifton
19 and Robinson which he then returns to in detail from
20 paragraph 110. So it is really plucking one part of the
21 witness statement out of context and using it for
22 a purpose for which it can't support unless you read
23 paragraph 77 and ignore it.

24 Can I finally just deal with Topping and Andrew
25 because they are important witnesses in this respect.

1 THE CHAIRMAN: Yes.

2 MR DINGEMANS: They do show that conditioning was going on
3 in other parts of the brigade. My learned friend
4 Mr Garnham claims that he represented Mr Andrew, but in
5 fact I have that privilege, but it is right that he does
6 represent Sergeant Topping. But their evidence was of
7 a piece and to the effect that they had been told that
8 there was effectively a process of conditioning going
9 on.

10 THE CHAIRMAN: Yes, well I refreshed my memory about it when
11 I was reading through the --

12 MR DINGEMANS: In relation to that, perhaps I can take you
13 just to another part of the S009's evidence, which is
14 SUB000637 -- it is paragraph 74(h) of our closing
15 submissions, the first round of written closing
16 submissions -- when S009 was told by the captain at JFIT
17 that these methods, hooding and kneeling in the sun,
18 were being used to isolate the prisoners.

19 THE CHAIRMAN: I thought we were able to refer to his name.

20 MR DINGEMANS: I am sorry if we are.

21 THE CHAIRMAN: It is S009, yes.

22 MR DINGEMANS: S009, sorry. I am sorry, we hadn't kept up
23 with that change. But S009's evidence to that effect.

24 If one looks at what happened at the TIF, originally
25 in relation to those aspects -- and all the other

1 training you had about hooding and stress positions and
2 all the later documents, including the latest document
3 about air crew that the Ministry of Defence very kindly
4 provided, all that shows is that there was this
5 misunderstanding that the shock of capture enabled one
6 to condition people. It is in that limited respect that
7 materials produced after the event do shed light on what
8 people misunderstood to be legal at the time.

9 Can I then turn to some of the vices of the shock of
10 capture and conditioning?

11 THE CHAIRMAN: Yes.

12 MR DINGEMANS: We respectfully submit that the principle
13 vice of teaching anyone to maintain the shock of capture
14 is that it completely corrupts the role of the guard.

15 THE CHAIRMAN: Could we just pause one moment? I am invited
16 to say -- and I do that -- although that we can refer to
17 S009, on the transcript it still has to be ciphered.

18 MR DINGEMANS: Right.

19 THE CHAIRMAN: So "S009" will do.

20 MR DINGEMANS: "S009", if that is all right.

21 I was attempting to make submissions about vices of
22 the shock of capture.

23 THE CHAIRMAN: Yes, you were.

24 MR DINGEMANS: It is this: it completely corrupts the role
25 of the guard. The guard, as in a soldier guard, should

1 be there to prevent escape, as politicians put it, full
2 stop, end of story, but, no, not with the shock of
3 capture, because now they have to condition them, which
4 is pushing their hands back, encouraging physical
5 contact, which, of course, should be an absolute no-no
6 unless required. It encourages rough handling, whatever
7 that is meant to mean, and if Sergeant Smith was there
8 and only permitted to do it, that would be bad enough.
9 But you may have formed your own view about
10 Sergeant Smith's independence of mind -- whether or not
11 he was a fully engaged worker is a different matter and
12 perhaps not necessary to decide -- but a person of
13 independence of mind. But to permit a person such as
14 Payne and young guards to do it is wrong and would
15 plainly lead to all the problems that occurred.

16 This corruption of the proper process of a guard and
17 the proper function of a guard was exacerbated by
18 propositions such as "subject matter experts", "dark
19 arts" and "unknown arts", which of course enabled
20 perfectly reasonable men to assume that it wasn't
21 a matter for them, "TQ'ing is for specialists. I'd
22 assumed they knew what the purpose was", showing
23 a deference which was unfortunate, and, in fact,
24 completely wrong because the TQers had understood they
25 were assuming control for the purposes of questioning

1 only.

2 You heard that consistent evidence from the TQers,
3 "We were only in charge of them when we were there".
4 But because no one had bothered to train the people who
5 were guarding or responsible for this process, how were
6 they meant to know where command began and ended in that
7 limited respect?

8 Can I deal with an issue of perceptions and
9 reporting of conditions? First, it is perfectly
10 apparent that the conditions which were endured by both
11 the civilian population and the military forces in Iraq
12 in 2003 were unpleasant because effectively the local
13 infrastructure had broken down, both under coalition
14 forces attack and as a result of looting by persons who,
15 it seems, were attempting to hold body and soul
16 together.

17 So far as the military forces were concerned, they
18 were living on top of unexploded ordinance, which might
19 give you some slightly warped perspective of what is
20 reality, and the TDF was situated next to the smelly
21 portalooos, emptied by the honey-sucker, which one is
22 also likely to understand was hardly an accurate
23 description of its smell, and an open sewer in the main
24 road.

25 THE CHAIRMAN: Yes.

1 MR DINGEMANS: The other point about perceptions which you,
2 Sir, will hardly need telling about is that inevitably
3 witnesses will be looking for and expecting different
4 things and focusing on different things.

5 If your interest is curtains, you may go into a room
6 and see a change; if your interest is a set of papers
7 sitting on your desk, you may not notice the change of
8 curtains for three months. It is that type of issue as
9 a broad perspective and then you apply it to an
10 individual situation.

11 If your interest is your men, so, for example -- and
12 I choose not one of my clients for these purposes, for
13 example the padre -- and not the prisoners, then you
14 will have a completely different focus from someone such
15 as Captain Seeds, going in after the dreadful events of
16 Baha Mousa's death to look at the condition of the
17 prisoners. Whether that's a full explanation is
18 obviously a matter for you, but in our submission it is
19 an important aspect to bear in mind when one comes to
20 deal with individual responsibilities.

21 THE CHAIRMAN: I accept it is something to bear in mind, but
22 it doesn't explain the whole of what was available to be
23 seen by anybody who spent any length of time -- and by
24 "any length of time" I mean seconds or minutes -- about
25 what must have been available to be seen at any time in

1 the TDF.

2 MR DINGEMANS: Well, I will deal with that in relation to
3 our witnesses, but perhaps in that respect one does have
4 the other vice of issues such as the shock of
5 conditioning [sic] and this proposition that everyone
6 knows it's going on. Everyone did know that hooding was
7 going on, everyone did know that conditioning was going
8 on and no one had any understanding or misunderstanding
9 about what were the permissible boundaries in that
10 respect, other than just the moral compass for this
11 reason: because if you are told that this is what the
12 subject matter experts expect, then your reactions might
13 vary, but -- and it is unfortunate -- people will then
14 tend to assume, entirely wrongly, that it is a permitted
15 process.

16 THE CHAIRMAN: Well, the higher up you go in the structure
17 of command, the less the force of that argument; lower
18 down at soldier level, possibly. But when you go up,
19 you can't escape the consequences of realising that
20 what's happening there, not on other occasions but in
21 the TDF between the 14th and 16th, couldn't be right,
22 surely.

23 MR DINGEMANS: Well, those are matters that you will have to
24 assess in the light of all those aspects. I will come
25 back to those that I represent that were higher up.

1 THE CHAIRMAN: Yes.

2 MR DINGEMANS: But this was an introductory comment on
3 perspectives --

4 THE CHAIRMAN: Yes, I am sorry. I shouldn't have --

5 MR DINGEMANS: No, no, no, I am very happy to deal with the
6 specifics. But in our submission the general
7 proposition is established. The real question, as you
8 rightly identify, is how far it takes one in particular
9 circumstances.

10 THE CHAIRMAN: Yes.

11 MR DINGEMANS: There is this further proposition -- and this
12 is something we do respectfully ask you to bear in
13 mind -- that some people are better at seeing the
14 reality than others. You have, we would respectfully
15 submit, witnesses that don't see matters: Stirland said
16 "not obviously beaten up" and Captain Seeds who said it
17 was immediately obvious to him that the matter was
18 wrong. And there were some witnesses on the Monday,
19 independent witnesses, who came past the TDF talking
20 about "the choir", et cetera, but not otherwise noticing
21 much beyond that and that is because perceptions do
22 differ.

23 If one is looking, as it were, in terms of what is
24 immediately apparent to people, sometimes the witnesses
25 on the Monday -- important to show who was there, what

1 was happening, who was doing the choir, et cetera,
2 et cetera, what assaults, if any, were being carried
3 out, but also important to see what their own
4 perceptions were of conditions.

5 I have already dealt with Payne's central role.
6 Can I just deal with some other matters before turning
7 to some specifics?

8 THE CHAIRMAN: Yes.

9 MR DINGEMANS: Racism. We do respectfully maintain the
10 submission that the use of the term "Ali Baba" is not
11 a term that is in any proper sense racist. I mean, the
12 literary origins of the phrase are neither here nor
13 there, but the fact that it was in use by Iraqis as well
14 as British soldiers shows that, whether it is an
15 attractive term or not, it was used as a term to
16 identify thieves.

17 Further, the evidence showed that racist behaviour
18 in the usual sense of the term was simply not tolerated.
19 You have Colonel Mendonca's evidence. You also have
20 evidence from soldiers, "No, that wouldn't have happened
21 around officers".

22 As to the invitation to make a finding of
23 institutional racism, we respectfully submit that it
24 would not be a finding that is in any sense reasonable
25 or helpful. First of all the term is defined in a way

1 which is so completely misunderstood by any reasonable
2 person -- my learned friend Mr Singh showed you the
3 accurate definition of it yesterday, but that is not how
4 any reasonable person understands the term -- that it
5 is, in our submission, positively unhelpful.

6 The other difficulty about introducing elements such
7 as racism into a military structure is this: if you
8 target soldiers of country A on the basis of their
9 nationality and work with and support soldiers of
10 country B on the basis of their nationality, you are, in
11 terms, under the Race Relations Acts and the Equality
12 Acts, providing less favourable treatment to soldiers of
13 country A and more favourable treatment to soldiers of
14 country B on the basis of nationality, which is direct
15 discrimination and incapable of justification. One
16 needs only to state the proposition to realise that
17 introducing terms such as this is an absolute recipe, we
18 respectfully submit, for disaster and not the central
19 function in any sense of the proper purposes of this
20 Inquiry.

21 Can I then turn to the events of 14 to
22 16 September --

23 THE CHAIRMAN: Please do.

24 MR DINGEMANS: -- by reference to the radio logs and just
25 pick up two particular parts. The aim of using the

1 radio logs was simply this: to try and assist and give
2 actual dates and times for so many of the movements that
3 were not clear.

4 THE CHAIRMAN: Yes, I have read those and you won't be
5 surprised to know that we will obviously check them to
6 make sure they are accurate. I am sure they are, but we
7 will --

8 MR DINGEMANS: Can I just deal with one particular point
9 that has been informally identified just to deal with
10 this --

11 THE CHAIRMAN: Yes.

12 MR DINGEMANS: -- which is the Monday morning.

13 Can I also just deal with one point on the
14 chronology of the disclosure of the radio logs? First
15 of all I am very grateful that my learned friend
16 Mr Elias was able to get them and my learned friend
17 Mr Barr was able to supply them, but in terms of the
18 chronology and the production, you may recall that they
19 appeared partway through Module 2, by which time many of
20 the soldiers had already given evidence --

21 THE CHAIRMAN: Yes.

22 MR DINGEMANS: -- and therefore, for perfectly
23 understandable reasons, were not able to be asked
24 specifically about their appearance, et cetera.

25 THE CHAIRMAN: No.

1 MR DINGEMANS: In relation just to the issue of
2 Operation Centurion, it is plain that G10A was deployed
3 on Operation Centurion 2 on the Monday afternoon.
4 Can I make that proposition good by showing you
5 MOD016544?
6 THE CHAIRMAN: Yes.
7 MR DINGEMANS: If you look at serial 72, 14.02, call signs
8 G10A and others, "Action: Operation Centurion phase 2".
9 Now we do know that there were some guards still at
10 BG Main.
11 THE CHAIRMAN: Well, the answer to that is yes, we do know
12 that. Indeed, as I have always understood it, apart
13 from Brzezinski nobody suggests that anybody other than
14 the Rodgers multiple did the guarding in this period.
15 MR DINGEMANS: No, I think that's right.
16 THE CHAIRMAN: Yes.
17 MR DINGEMANS: But it is who and what -- because when you
18 are coming to look at individual instances of blame,
19 I represent some, but not all --
20 THE CHAIRMAN: I appreciate that.
21 MR DINGEMANS: -- of the Rodgers multiple.
22 THE CHAIRMAN: Yes.
23 MR DINGEMANS: In relation to those who might be blamed, who
24 might be around, et cetera, and also in relation to
25 issues when you are assessing whether people can be

1 expected to remember their bit of guard duty before they
2 go off on another operation, before they do this, before
3 they then go to Umm Qasr, before they come back,
4 et cetera, it is also partly putting that in the context
5 of the operations that they were actually dealing with.

6 THE CHAIRMAN: Yes, but I think in your submissions
7 somewhere -- I may have got it wrong -- there is some
8 suggestion that Rodgers wasn't there in the morning.

9 MR DINGEMANS: Well, I am dealing with the afternoon
10 first --

11 THE CHAIRMAN: I appreciate that.

12 MR DINGEMANS: -- which is common ground and then I am
13 coming to deal with the morning.

14 THE CHAIRMAN: You are coming back to the morning, yes.

15 MR DINGEMANS: So that is the first reference. G10A must
16 have been there in the afternoon.

17 THE CHAIRMAN: Must have been on ...?

18 MR DINGEMANS: On Operation Centurion.

19 THE CHAIRMAN: Centurion, yes.

20 MR DINGEMANS: In relation to the morning, the references
21 are less clear and I will just show you those that are
22 available. First of all MOD016536. This refers to --

23 THE CHAIRMAN: These are all the battalion logs, are they?

24 MR DINGEMANS: These ones are battalion logs, but they are
25 also --

1 THE CHAIRMAN: The first one was or was not ...?

2 MR DINGEMANS: That was a battalion log and this one is
3 a battalion log. I am going to show you an A Company
4 log in a minute, but this is another battlegroup log.

5 THE CHAIRMAN: Yes.

6 MR DINGEMANS: If you look at 5.26 in the morning --

7 THE CHAIRMAN: "... heading ... for guard task".

8 MR DINGEMANS: "G10A heading here for ... task".

9 THE CHAIRMAN: That ties in with the evidence that we have
10 heard and Counsel to the Inquiry have put forward that
11 the guard changed at about 6 o'clock -- different people
12 from the multiple came on at 6 o'clock.

13 MR DINGEMANS: Yes. I mean, some thought that they went
14 back -- and that was part of the reason -- changed and,
15 as it were, went back. It is perfectly apparent because
16 the importance of Operation Centurion 2 is not that it
17 lasts all morning, and I have never suggested that, but
18 Operation Centurion 2 lasted then until about 10.30 in
19 the morning, after which, if G10A were engaged in it --
20 if -- they then went back to BG Main before then leaving
21 at about 1.30 to deploy on the afternoon session.

22 THE CHAIRMAN: I am sorry, now I am confused. I thought
23 that the first one, the afternoon one that you showed me
24 at 14.02, that is them going on the Operation Centurion.

25 MR DINGEMANS: Yes, they were certainly on

1 Operation Centurion in the afternoon.

2 THE CHAIRMAN: Yes, starting at 14.02.

3 MR DINGEMANS: Yes. Sorry, perhaps I assumed too much.

4 Operation Centurion 2 was held in two parts over the

5 day. There was an early morning deployment from about

6 6.30 to about 10 or 10.30 and then there was another

7 deployment in the afternoon.

8 THE CHAIRMAN: I follow.

9 MR DINGEMANS: It is perfectly apparent from the first

10 reference that I showed you that they were on the

11 afternoon. There is simply no doubt about that.

12 THE CHAIRMAN: Yes.

13 MR DINGEMANS: But in relation to the morning, you have G10A

14 here for guard task. If you drop down to 015 serial,

15 you see that "10B on first knock, 20A ...", et cetera --

16 THE CHAIRMAN: 015?

17 MR DINGEMANS: Yes. You can see some references to 10B and

18 others on Operation Centurion 2 as it is being reported.

19 THE CHAIRMAN: Yes.

20 MR DINGEMANS: But if you look at the A Company log -- and

21 this is MOD016581. If those two references that

22 I identified earlier could be highlighted -- if you look

23 at 10.03 and the cursor is just dropping down, you can

24 see 10.03 -- sorry, I think I said "10.30" that

25 Operation Centurion 2 lasted. It didn't. If you look

1 at 10.03, it says "20" from the A Company command post
2 effectively, "all call signs back at my location".

3 Then if you drop down again -- sorry, if we can zoom
4 out -- it then says, at 10.31, "My call signs back at my
5 location". Then you have, at 10.32, "G20A back at
6 location".

7 If we go over the page, that leaves "10A on task at
8 your location". Whether that is because 10A had come
9 out in the morning and then gone back is the inference
10 that we respectfully invited you to draw simply from
11 these purposes that they had been involved in
12 Operation Centurion in the afternoon, most likely to be
13 involved in the morning as well, because the evidence
14 suggests that after the changeover of the guard, some of
15 the guard returned. That was their recollection. And
16 that would leave -- you also heard that effectively the
17 whole battlegroup was short-staffed and one was not
18 likely to require the whole of the multiple to carry out
19 the guarding force and certainly you didn't require the
20 whole of the multiple in the afternoon.

21 Now it doesn't mean that Rodgers wasn't there in the
22 morning because he was plainly there at the 5.30 and he
23 was plainly there after 10.30-odd in the morning. That
24 also accords with the recollections of some witnesses
25 who have some recollection of sleeping in the Saxon at

1 around lunchtime because they then would be back at
2 Battlegroup Main. But what it does show, if that
3 inference is justified, is that G10A was deployed
4 certainly in the afternoon and, we respectfully submit,
5 probably in the morning as well, although the references
6 are more cryptic, I entirely accept.

7 MR DINGEMANS: If it had been in the morning as well, would
8 there not have been an earlier one of G10A going out --

9 MR DINGEMANS: Well --

10 THE CHAIRMAN: Just so I can complete it -- and does not the
11 one that you have just shown me at the top of the page,
12 that leaves 10A on task, could that not be on task at
13 BG Main?

14 MR DINGEMANS: No, because --

15 THE CHAIRMAN: "At your location".

16 MR DINGEMANS: -- this is A Company talking to BG Main, so
17 it is "at your location", so it is saying at BG Main.

18 THE CHAIRMAN: Yes. I don't see why that shows that they
19 were on Operation Centurion. I would have thought it
20 shows rather the reverse.

21 MR DINGEMANS: You have the reference "All call signs now
22 back at my location". Then you have the other reference
23 to "G20A is back ,G10A is now back at yours" or "now at
24 your location".

25 THE CHAIRMAN: You can read what you want into it in

1 a sense. That leaves 10A on task at your --

2 MR DINGEMANS: Absolutely.

3 THE CHAIRMAN: It could well be that is where it has always

4 been. The fact is that we know that members of the

5 multiple were actually guarding throughout that day.

6 MR DINGEMANS: That's not disputed.

7 THE CHAIRMAN: This is in reference to --

8 MR DINGEMANS: This is in reference to those that weren't

9 guarding, who I represent some, and those who might be

10 considered more senior as to what they were doing

11 because there was the proposition, when they were first

12 questioned, "What were you doing with your time?", and

13 that is why the radio logs assumed a critical

14 importance. There are limitations to the radio logs.

15 We were expressly told by the signalers that they didn't

16 log everything --

17 THE CHAIRMAN: Yes.

18 MR DINGEMANS: -- so your first proposition to me, which is,

19 "Well, you would expect to see that", is entirely

20 accepted, but it doesn't disprove the proposition. It

21 obviously just goes to whether it is likely or not.

22 THE CHAIRMAN: I follow. In the end it will come down to

23 how I view the evidence of those who say they were there

24 and those who say they were not there.

25 MR DINGEMANS: Yes, and indeed what they were doing. But

1 what is important about the radio logs is that, for
2 perfectly understandable reasons, they were not gone
3 through in detail with the witnesses at the time. We do
4 respectfully submit that what they also show -- and this
5 is a point that I know, Sir, you have well in mind on
6 behalf of some of the very junior persons that
7 I represent -- is that they were on an unrelenting tempo
8 of operations. They were the first multiple out and
9 last back in relation to Hotel Haitham, they were there
10 on Sunday night, they were off before dawn in relation
11 to dropping guards off and, if they were on
12 Operation Centurion in the morning in relation to that,
13 they were certainly on Operation Centurion in the
14 afternoon.

15 THE CHAIRMAN: Well, you don't need to impress upon me that
16 it was a very onerous tour.

17 MR DINGEMANS: Can I then turn to the issue of the toilet
18 flushing incident in that respect?

19 THE CHAIRMAN: Yes.

20 MR DINGEMANS: We have set out a lot of evidence in relation
21 to that. There were just some questions raised,
22 effectively, in relation to the analysis. Can I just
23 deal with that and this proposition, the fact that it
24 was mentioned in some of the earlier witness statements
25 taken by the SIB and I hope in our forensic analysis we

1 have fairly acknowledged that. The only person we have
2 not referred to was Kifah Mutairi because obviously he
3 did not come along to give evidence and his description
4 of it was sitting on the floor and the excrement running
5 across, rather than being flushed on to him.

6 When you actually look at all the evidence in
7 relation to these, you have a room that was either too
8 large or too small, persons that were touched or not
9 touched and no consistency of allegation. We
10 respectfully submit, on a forensic analysis of the
11 allegation, although those detained may well have
12 convinced themselves that it occurred, perhaps just to
13 illustrate by way of graphic example that they were
14 gravely insulted by the whole process -- and I have no
15 problems with that proposition because there is no doubt
16 that the treatment that they suffered at the TDF would
17 have been a grave insult to any person -- but when you
18 analyse who said what and what they said at the end in
19 relation to that matter, we do respectfully submit that
20 there is insufficient evidence on which to conclude that
21 incident did take place.

22 THE CHAIRMAN: When say the toilet flushing, you are
23 referring to the one at the hotel --

24 MR DINGEMANS: Yes, the hotel.

25 THE CHAIRMAN: -- not what might or might not have happened

1 in the TDF?

2 MR DINGEMANS: No, no --

3 THE CHAIRMAN: I find it very difficult, I have to say, to
4 say that because they are inconsistent -- and indeed
5 they are inconsistent, one with each other in their own
6 evidence, that that is the sort of thing that they could
7 have made up -- exaggerated maybe, but made up,
8 particularly when there are members of the multiple and
9 others who say they were in the toilet.

10 MR DINGEMANS: Well, they were guarded there. Fine, if you
11 take that approach to their original statement, then
12 chase it all the way down to what they said at the end,
13 and the person who at the end then said it occurred is
14 not the person who said at the beginning.

15 THE CHAIRMAN: Yes, I do follow all that. I read with care
16 your submissions about that. But if I start from the
17 premise that I think they must have been in the toilet
18 or some of them must have been in the toilet, it is not
19 a very great leap to say that some of them are telling
20 the truth about what actually happened there.

21 MR DINGEMANS: Then at what stage? Which allegation? Is it
22 the first one they make or the last and the variations?
23 Was the toilet sufficient to have them all in, as some
24 of them describe, or not as some of them do not
25 describe?

1 We do respectfully submit that, starting from the
2 obvious common sense proposition that, if someone who
3 has written down a statement at the start, it is likely
4 to be a very good starting point -- and I have no
5 problems with that as a starting point -- what we do
6 respectfully submit, though, that if you test the
7 evidence fairly in the light of all that has been said,
8 you can perfectly reasonably conclude that there was
9 grave insult in the whole process to the detainees, but
10 that in real terms it wouldn't be safe to conclude that
11 that incident occurred.

12 THE CHAIRMAN: Yes.

13 MR DINGEMANS: Just in relation to some of the forensic
14 analysis of the inconsistencies, that wasn't done for
15 a purpose of showing that the detainees are giving
16 untruthful evidence. What it was done for was simply to
17 show that perfectly honest reasonable people can at
18 times --

19 THE CHAIRMAN: Yes, I am well aware of that.

20 MR DINGEMANS: -- misunderstand the position and inevitably,
21 through a process of reconstruction and discussion, lead
22 to innocent contamination of the evidence and it is
23 a well-known purpose. None of that is in any sense an
24 attempt to justify what occurred, but it is important to
25 show what evidence is reliable and what, for perfectly

1 understandable reasons, is not.

2 Can I, in that respect, also just deal with the
3 weapons?

4 THE CHAIRMAN: Do you want to add to what you said in your
5 submissions? I mean, I have read that carefully --

6 MR DINGEMANS: No, no, it was simply to reaffirm that.
7 Again, it is not for any purpose to suggest that they
8 were -- as my learned friend Mr Garnham suggested; some
9 of the evidence suggested yesterday -- from the
10 intelligence implicated in any earlier attacks. All one
11 simply shows from that is that the weapons had certainly
12 been harboured.

13 My learned friend Mr Singh perfectly properly
14 suggested that some of the Treasury Solicitors'
15 submissions were euphemistic in terms of conditioning,
16 but we do respectfully submit that some of the
17 descriptions applied to the weapons might be considered
18 euphemistic in terms of normal for Basran standards and
19 it is not a proposition that goes further than that and
20 again it is not a proposition advanced to justify what
21 occurred.

22 THE CHAIRMAN: No, quite.

23 MR DINGEMANS: Can I then turn to the issue of mass beating
24 on Sunday night?

25 THE CHAIRMAN: Yes.

1 MR DINGEMANS: In our submission the only proper evidence
2 that you have of that is really from Cooper, whose
3 evidence is really on what the detainees --

4 THE CHAIRMAN: That is certainly one of the major portions
5 of the evidence. To a large extent it depends upon what
6 I make of Cooper. Now I have read again your
7 submissions and others, which are very critical of
8 Cooper.

9 MR DINGEMANS: Yes. Those submission are not going to get
10 better with repetition --

11 THE CHAIRMAN: No.

12 MR DINGEMANS: -- nor, in my submission, will they get
13 worse. But can I just turn to deal with --

14 THE CHAIRMAN: Perhaps I should go a little bit further and
15 say -- again I have not made my mind up about this at
16 all -- but to a large extent, with a number of these
17 witnesses, particularly where they are going back on
18 what they have said at the court martial and
19 particularly bearing in mind the Attorney General's
20 undertaking, it puts them in a slightly different light.
21 It must depend upon my assessment of whether they are
22 truthful in the witness-box and, secondly, of course,
23 accurate.

24 MR DINGEMANS: Yes. In that respect, Sir, I am sure you
25 will have well in mind this proposition: if you are

1 a person more likely to blow in the wind than others,
2 you might have thought the wind was blowing all one way
3 at the court martial and blowing all the other way at
4 an inquiry such as this. One therefore has to examine
5 perfectly properly and critically the changes --

6 THE CHAIRMAN: Yes.

7 MR DINGEMANS: -- and perhaps some of the motivations for
8 those changes.

9 THE CHAIRMAN: Yes. Again, it is just one of those many
10 imponderables that I shall have to deal with and think
11 about very carefully.

12 MR DINGEMANS: Can I come to a specific point which has
13 helpfully been suggested in relation to Allibone?

14 THE CHAIRMAN: Yes.

15 MR DINGEMANS: Can I just give you the references to that?
16 Page 124 of his evidence.

17 THE CHAIRMAN: And the day was ...?

18 MR DINGEMANS: Sorry, I didn't know that. Someone will help
19 me. I am being assisted by my learned friend,
20 Mr Halliday. It is Day 24.

21 THE CHAIRMAN: Day 24, page 124.

22 MR DINGEMANS: He was asked in the context of other
23 questioning about what beatings he saw and who was
24 involved. Then he suggested that there were quite a few
25 at the beginning, probably about four to five.

1 But we have also -- and of course I do represent
2 Mr Allibone -- addressed submissions about
3 inconsistencies, internal inconsistencies, in his own
4 evidence. Indeed, if you look at where he ended up at
5 page 152, we do respectfully submit that it is in some
6 respects difficult to draw out of that an unequivocal
7 acceptance that there was a mass beating on a Sunday
8 night.

9 THE CHAIRMAN: The thing about that incident is that it, to
10 an extent, ties in with some of the evidence of the
11 detainees about the number of people around when the
12 guard changed.

13 MR DINGEMANS: Certainly one can have a number of people
14 around when the guard changed. But also in relation to
15 the evidence of the detainees, what beatings occurred
16 when -- I mean, some of them were to the effect, and
17 again perfectly understandably, that they were beaten
18 throughout and there was no change in tempo.

19 THE CHAIRMAN: Yes.

20 MR DINGEMANS: Indeed, if you look at what we respectfully
21 submit is the gist of the evidence from the detainees,
22 it doesn't necessarily support mass beating on the
23 Sunday night when occurred.

24 If you look at effectively the realities of it,
25 is it very likely that a whole multiple would turn up

1 and suddenly start a mass beating in the manner
2 described?

3 THE CHAIRMAN: Well, is it very likely that any of this
4 would have happened? But it did.

5 MR DINGEMANS: In our submission that is a different
6 proposition. When you have the dehumanising effect of
7 keeping these people in that position -- we know how
8 that happened, we know that Peebles considered that that
9 was all right and effectively wasn't there according to
10 his evidence, we know that the guards were there subject
11 to Corporal Payne, and we know -- and you can put in
12 effectively and work out then did it happen, without
13 necessarily making leaps in, we respectfully submit, to
14 findings that are inconsistent with a whole series of
15 other soldiers' evidence.

16 Of course it is very easy to say that "G10A were
17 there, all naughty G10A", but that is ignoring evidence
18 about some of those who were there who, in our
19 submission, on the evidence certainly shouldn't be
20 criticised, people like Hunt, who had gone out of his
21 way to learn an Arabic language, people like Kenny who
22 would not be involved in anything like that.

23 THE CHAIRMAN: Yes.

24 MR DINGEMANS: I will go through some of those -- well, you
25 have had all our written submissions in any event. But

1 it is wrong simply to tar all witnesses --

2 THE CHAIRMAN: I am well aware of that, Mr Dingemans.

3 MR DINGEMANS: Sorry, I am being asked to slow down -- in
4 that respect.

5 In our submission, the evidence which supports it,
6 when set against the evidence which doesn't support it,
7 is plainly outweighed by the evidence which doesn't
8 support it.

9 THE CHAIRMAN: Yes.

10 MR DINGEMANS: Can I then turn to some issues of
11 identification and deal with that?

12 I do not know when might be a convenient time.

13 THE CHAIRMAN: If you were going to go until midday, I would
14 stop in a minute or two.

15 MR DINGEMANS: I am seven-tenths of the way through my
16 submissions.

17 THE CHAIRMAN: If we go on straight on afterwards into
18 Mr Topolski and get him over by lunch, it would probably
19 be better if we broke at, say, 25 past. Would that be
20 all right?

21 MR DINGEMANS: It is just I was getting looks, partly
22 because of the speed. I think I was going at --

23 THE CHAIRMAN: Mr Dingemans, it is up to you. Do you want
24 to break off now?

25 MR DINGEMANS: I am quite happy to carry on until 25 past.

1 THE CHAIRMAN: Let's do another ten minutes. You were going
2 to ...?

3 MR DINGEMANS: Issues of identification.

4 THE CHAIRMAN: Yes, I suppose if one has sat in criminal
5 trials for 15-odd years, identification must come up
6 about sort of 50 or 60 per cent of the time and I am
7 acutely conscious of the dangers of identification
8 evidence and the rules about taking into account the
9 need for some supporting evidence, although we have now
10 got away from quite a lot of what used to be the case.
11 But I am well aware of the dangers of it.

12 MR DINGEMANS: I was not for a moment going to bore you with
13 issues of Turnbull and the like.

14 THE CHAIRMAN: I didn't think you were, but I thought
15 I would just make my position clear.

16 MR DINGEMANS: I was going to deal with some points on the
17 evidence.

18 THE CHAIRMAN: Yes, fine.

19 MR DINGEMANS: First of all, Redfearn's identification by
20 Douglas at the critical time.

21 THE CHAIRMAN: Yes.

22 MR DINGEMANS: Obviously in Douglas' favour is that he is an
23 older witness than many others and might therefore be
24 considered more reliable. He is slightly independent of
25 G10A, but obviously he identified with much of what they

1 were doing and he plainly honestly believed himself to
2 be accurate.

3 THE CHAIRMAN: I thought he was quite an impressive witness,
4 I have to say.

5 MR DINGEMANS: But he did make, in our submission, two
6 important honest mistakes. The first was on the Sunday
7 night -- I think he put everything on the Sunday night
8 rather than the Monday night, but these things happen --
9 but also in his belief that Redfearn was there at the
10 last when in fact all the other evidence shows that it
11 wasn't him, including the people who were there and
12 there was obviously limited space.

13 THE CHAIRMAN: Well, he went back on Redfearn a bit, anyway,
14 didn't he?

15 MR DINGEMANS: He did at the end of it --

16 THE CHAIRMAN: Yes.

17 MR DINGEMANS: -- and in some respects he is perhaps the
18 perfect illustration of the plainly honest but mistaken
19 witness.

20 THE CHAIRMAN: Yes.

21 MR DINGEMANS: In that respect, when you are looking at
22 someone like Douglas and assessing some of the more
23 general allegations that had been thrown at all the
24 members of G10A, look carefully at who he identifies as
25 involved and who not -- in many respects his evidence

1 was general -- and also the proposition that not
2 everyone was involved.

3 You do have some members of G10A who by their own
4 admission were involved, for example to include Cooper
5 and MacKenzie, et cetera.

6 THE CHAIRMAN: Yes. Well, quite a number of them go
7 a modest way to admitting they had done something.

8 MR DINGEMANS: Absolutely, and there were many who accepted
9 effectively the moving of arms, et cetera, the forcing
10 of people down, the forcing of people up and all those
11 other aspects of it, and those who then accepted to
12 tapping with the feet, to kicking and the other aspects
13 of it.

14 In our submission, if you put together those
15 admissions, together with the evidence of someone like
16 Douglas, you then have a more reliable indicator of
17 whether everyone was involved or not, and that is
18 important when you come back and test issues like the
19 Sunday night beating.

20 THE CHAIRMAN: Yes.

21 MR DINGEMANS: In relation to Bentham and identification,
22 plainly there were witness statements at the start,
23 which one might have thought was a better starting point
24 in relation to those matters, but of course, partly as
25 a vice of the passage of time, by the time the evidence

1 actually came to be tested orally, it was not in any fit
2 state to be tested. We do respectfully submit that in
3 circumstances where one is dealing with issues of such
4 importance for individuals, then you should be driven to
5 the proposition that that is not evidence that you can
6 accept on the balance of probabilities.

7 THE CHAIRMAN: Yes.

8 MR DINGEMANS: You, Sir, will have had more experience than
9 most of a prosecution story set out in witness
10 statements which, on the face of it, looks overwhelming
11 but which, when examined, does not come up to that.

12 THE CHAIRMAN: Yes, we have all come across those instances.

13 MR DINGEMANS: Not many, perhaps, but it is just the absence
14 of oral evidence to support it or test it which makes
15 the case so difficult in that respect.

16 Can I then turn to the issue of Rodgers --

17 THE CHAIRMAN: Yes.

18 MR DINGEMANS: -- and deal with some specific points in
19 relation to him?

20 I make this point first of all. It is, we
21 respectfully submit, now established on the evidence
22 that the chain of command was Payne, Smith and Peebles
23 and did not in any sense engage Rodgers.

24 THE CHAIRMAN: Well, is that completely accurate?

25 MR DINGEMANS: Sorry, this is chain of command for events at

1 the TDF. I entirely accept he retained a residual duty
2 in relation to his men.

3 THE CHAIRMAN: Yes.

4 MR DINGEMANS: But chain of command in terms of giving
5 orders, we respectfully submit the evidence is all one
6 way. It might be thought particularly unattractive that
7 suggestions have been made on behalf of others that
8 effectively it was multiple commander rather than BGIRO
9 that was principally engaged in that respect.

10 Secondly, it is perfectly apparent on the evidence
11 that for periods of time he was detached from those who
12 were guarding for perfectly proper reasons, either
13 because he was asleep for a very short period of time on
14 the Sunday night/Monday morning or because he was on
15 other operations or because --

16 THE CHAIRMAN: Sorry, you go on.

17 MR DINGEMANS: -- or because he was occasionally visiting
18 the operations office in Battlegroup Main.

19 THE CHAIRMAN: Going back to your first point, just help me
20 about this -- and I don't know whether I am right or
21 wrong -- did he not say he briefed the guards at what
22 I am going to call the "evening changeover" on Sunday or
23 was that --

24 MR DINGEMANS: I think the evidence from some of the
25 guards -- and it even may have been him -- was that he

1 got a brief from Payne that he briefed down, but in my
2 submission that didn't, as it were, make him the chain
3 of command --

4 THE CHAIRMAN: I just want to know what the position is.

5 MR DINGEMANS: I am pretty certain that that was either
6 established on the evidence or -- there was certainly
7 some evidence. I am pretty sure Rodgers accepts that it
8 was perfectly possible that, if he was told by Payne, he
9 would have told his men, and I entirely accept that.
10 But there was no suggestion that he, as it were, was
11 making up -- other than passing on orders from Payne
12 simply because they were his men. I also do accept that
13 plainly he obviously had a continuing duty in relation
14 to his own men.

15 THE CHAIRMAN: Yes, he must have done.

16 MR DINGEMANS: But in terms of the original propositions
17 that were being put perfectly properly about chain of
18 command, the evidence is all one way. In that respect,
19 although Royce is my own witness, I do rely on him for
20 that proposition in the same way that the Treasury
21 Solicitors have relied on him for his unequivocal
22 evidence that he was in control.

23 THE CHAIRMAN: That is certainly his evidence, I agree.

24 MR DINGEMANS: Thirdly, he did accept that he was present at
25 the TDF for periods and visiting his men on occasions.

1 He has never hidden from those propositions.

2 Fourthly, he did accept that by the Monday the
3 conditions were, as he put it, unpleasant. But,
4 fifthly, he does maintain that he didn't see anything in
5 terms of anything to put him on his notice that the
6 widespread misbehaviour that we know had occurred had
7 been happening. In that respect you will need to assess
8 his evidence in the light of those submissions I have
9 already made about perceptions and what you should pick
10 up and what you are looking for.

11 If your interest is your men and if you
12 misunderstand the position to be that hooding and stress
13 positions is well known and permitted, then in many
14 respects the dreadful consequences of people being in
15 that situation are what will inevitably be apparent,
16 which was the smelly and unpleasant conditions.

17 THE CHAIRMAN: Yes.

18 Have you anything more to say about Mr Rodgers?

19 I don't want to stop you, but it is now 25 past.

20 MR DINGEMANS: I have two more paragraphs in relation to
21 him, but it might be more convenient to deal with that
22 afterwards, Sir.

23 THE CHAIRMAN: All right. We will break off now. Ten
24 minutes please.

25 (11.25 am)

1 (A short break)

2 (11.37 am)

3 THE CHAIRMAN: Mr Dingemans.

4 MR DINGEMANS: I was partway through my submissions on
5 Captain Rodgers.

6 THE CHAIRMAN: Yes, you were.

7 MR DINGEMANS: We have made detailed written submissions
8 about some of the allegations that have been made about
9 them and I simply won't go through them if that is all
10 right.

11 THE CHAIRMAN: Yes.

12 MR DINGEMANS: But we do note that some of the allegations
13 have changed and varied and we do respectfully submit
14 that there is no reliability in those allegations,
15 including the last and latest one made against him after
16 he had given evidence by Corporal Payne.

17 In some respects that's an important illustration of
18 the fact that just, because you are the commander of the
19 multiple, you are slightly an easy target for
20 allegations. There are perfectly proper points that he
21 has to confront about whether he should have been aware,
22 whether he should have done more, but we do respectfully
23 submit that the allegations of assault are generalised
24 and not proven.

25 A point has been made about having Payne on Facebook

1 as a friend. Can I just deal with that? I don't know,
2 Sir --

3 THE CHAIRMAN: I don't think think you need to take any real
4 time over that.

5 MR DINGEMANS: Can I then just turn to some other
6 individuals briefly? First of all, Kenny, who I have
7 referred to, albeit briefly, earlier on.

8 In our submission, the allegations against him are
9 not justified. He was, we respectfully submit, a man
10 who presented himself as an immensely damaged individual
11 and he had been shocked, although that had not caused
12 him the problems. It was the later assault in Cyprus
13 that caused the problems.

14 THE CHAIRMAN: When he was on holiday, yes.

15 MR DINGEMANS: He did come to give evidence and he was noted
16 to be very quiet. You are right, Sir, when we addressed
17 issues such as assaults on the detainees, that was for
18 the forensic purpose of trying to work out timings of
19 injuries and, of course, psychiatric injuries suffered
20 by the detainees, we simply have no argument with that
21 proposition. They do not assist obviously in trying to
22 work out timing for their injuries.

23 THE CHAIRMAN: No.

24 MR DINGEMANS: But similarly there were young soldiers in
25 particular who were immensely damaged by their service

1 in Iraq.

2 THE CHAIRMAN: I can well understand that.

3 MR DINGEMANS: Can I just turn to a couple of final and
4 concluding remarks? The first is this: the focus on
5 Baha Mousa. Some suggestions have been made that it
6 might have been because of the theft and Colonel Mousa's
7 perfectly proper report of that theft to the
8 authorities. We do respectfully submit that there was
9 not one single witness, notwithstanding the perfectly
10 proper and fullest ventilation of that issue, who
11 supported that proposition. If it is of any assistance
12 to Colonel Mousa, we do respectfully invite you to make
13 the unequivocal finding that his report was not in any
14 sense causative of the subsequent treatment.

15 A number of other speculative reasons have been
16 addressed, one being that the multiple did badly on that
17 morning. There are two difficulties with that: the
18 first is that the evidence appeared to be that the
19 multiple rightly or wrongly assumed that it was
20 Lieutenant Crosbie who had let C001 escape. Secondly,
21 it doesn't explain why Baha Mousa, as opposed to the
22 others, were targeted.

23 We do respectfully submit that the real reason is
24 that there were attempts that Baha Mousa made to free
25 himself from his cuffs and from custody. That's not in

1 any sense to blame him in circumstances where the
2 conditions --

3 THE CHAIRMAN: No, I would think it -- if he did -- I have
4 not made my mind up about that either -- I would think
5 from the way he was treated that would be unsurprising.

6 MR DINGEMANS: We do respectfully submit that that more
7 probably than not explains the reason why it appears
8 that his treatment, together with one other's, was more
9 violent than others. That is one of the vices of
10 permitting conditioning or the shock of capture ever to
11 be permitted. It is my final vice, as it were, which is
12 that violence is likely to lead to violence.

13 THE CHAIRMAN: Yes.

14 MR DINGEMANS: Can I address the issue of Winstanley and the
15 FMed5 forms --

16 THE CHAIRMAN: Yes.

17 MR DINGEMANS: -- albeit briefly? We have made detailed
18 written submissions on this.

19 THE CHAIRMAN: Pausing for a moment, the Winstanleys --

20 MR DINGEMANS: This is private. I have private.

21 THE CHAIRMAN: They are both Steven, aren't they?

22 MR DINGEMANS: They are.

23 THE CHAIRMAN: Your Winstanley is private and the other is
24 corporal.

25 MR DINGEMANS: Yes, I have private. My learned friend

1 Mr Beer has Corporal Winstanley.

2 THE CHAIRMAN: Yes.

3 MR DINGEMANS: We do respectfully submit that the majority
4 of the evidence plainly establishes that the FMed5 forms
5 were not filled in when the detainees were first
6 assessed unless they had a presenting complaint --

7 THE CHAIRMAN: Yes.

8 MR DINGEMANS: -- but were always filled in on any
9 subsequent visit. Private Winstanley's evidence --
10 albeit he was different from Corporal Winstanley in this
11 respect -- is that he was asked to go back to provide --

12 THE CHAIRMAN: He went back in the evening.

13 MR DINGEMANS: Yes, and did provide that assessment. And in
14 those circumstances the production of the FMed5 form is
15 perfectly understandable and the proposition that it
16 would have been created after his death is, we
17 respectfully submit, hopeless. What good would it have
18 done to produce the FMed5 form? How did it help
19 Private Winstanley or anyone?

20 THE CHAIRMAN: Yes.

21 MR DINGEMANS: Because, of course, there were confusions on
22 names, the name wasn't even right. We do respectfully
23 submit it is an allegation which is simply unsupported
24 by proper evidence.

25 Can I just deal with one other allegation in

1 relation to documents? That is Moutarde in relation to
2 his first report. We do respectfully submit that some
3 of the criticisms made of Moutarde about producing that
4 report are wholly unwarranted. He had reported the
5 matter to the SIB, he knew his duty to report on the
6 first report that he was able to obtain. Of course he
7 didn't say, "I have been told this", but it must have
8 been perfectly apparent that he had been told that and,
9 in any event, the SIB were going to come in and
10 investigate. So to blame him for somehow trying to set
11 a false trail is again, we respectfully submit, wholly
12 unfair.

13 Then that brings me, by way of concluding remarks --

14 THE CHAIRMAN: Before you finish him, what do you say about
15 the possibility that he should have, as adjutant, in
16 a pivotal position, one might think from a discipline
17 point of view -- although I think the adjutant really
18 largely deals with officers, doesn't he, from the
19 discipline point of view and the regiment sergeant major
20 does the non-commissioned officers and the soldiers.

21 MR DINGEMANS: He does in some respects. Also there is this
22 particularly important change in the modern army which
23 Moutarde gave evidence about, partly because of the
24 introduction of the Human Rights Act and the fact that
25 court martials are even now fairer than they were

1 before -- the adjutant is very much process-driven in
2 terms of what he deals with the process. Of course he
3 deals with discipline in the sense of setting out
4 charges, ensuring that there are officers commanding,
5 defending, but it is not discipline in what might have
6 been a more traditional sense of his role, where next to
7 the RSM, who was discipline for lower ranks, the
8 adjutant was then discipline for officer ranks and all
9 other ranks.

10 THE CHAIRMAN: Are there still adjutant's orders in the
11 morning or not?

12 MR DINGEMANS: I am afraid my own experience is probably too
13 far gone to be of much assistance, but my understanding
14 from Ms Edington, who has more relevant experience, from
15 the shake of her head is not.

16 THE CHAIRMAN: I assumed that might be the case.

17 MR DINGEMANS: We do respectfully submit that the evidence
18 plainly establishes what his role was and was not and
19 although one might start off with the proposition that
20 both RSM and adjutant in that respect were the central
21 drivers for discipline in this particular TDF, that's
22 not the evidence.

23 THE CHAIRMAN: The only other thing that I found, I have to
24 say, surprising about his evidence were his comments
25 when shown the Payne video.

1 MR DINGEMANS: In relation to that?

2 THE CHAIRMAN: Yes. He was one of the very few people who
3 did not unreservedly condemn it. That is not to say he
4 said it was all right, but he did not unreservedly
5 condemn it.

6 MR DINGEMANS: What I would respectfully submit in relation
7 to that is this: first of all, it shows the vice of
8 allowing the thinking about conditioning -- hooding and
9 conditioning -- to infect the thinking of reasonable
10 people. Secondly, it shows that when you are dealing
11 with issues such as humane/inhumane, it is far too
12 subjective a concept.

13 Of course in law it has a now more established
14 meaning and is becoming more and more established with
15 more and more cases, but it is far too subjective
16 a concept to be a proper guidance for reasonable people.
17 To conclude with this: we do respectfully submit that
18 Moutarde was a reasonable person who gave his honest
19 reaction to that video. He did not say that it was
20 unequivocally all right, as you fairly summarised, but
21 his reaction wasn't the horror that others might have.
22 That is part of the difficulty of ever allowing people
23 to look after civilians with this corrupting influence
24 of the shock of capture.

25 THE CHAIRMAN: Yes.

1 MR DINGEMANS: Can I then, just by way of final submission,
2 turn to this, one reason why you might conclude that
3 this occurred, which was untrained soldiers --

4 THE CHAIRMAN: Untrained in guarding?

5 MR DINGEMANS: Sorry, untrained in the guarding of civilian
6 prisoners -- sorry, that was too cryptic. Soldiers
7 untrained in the guarding of civilian prisoners --

8 THE CHAIRMAN: Yes.

9 MR DINGEMANS: -- looking after persons who they were told
10 should be hooded and conditioned, where the process of
11 conditioning --

12 THE CHAIRMAN: Just pausing a moment -- I am so sorry to
13 interrupt -- conditioned and as part of the conditioning
14 being in stress positions?

15 MR DINGEMANS: Yes, and where the conditioning -- and this
16 is the second sub-clause that deals with that -- had
17 gone from perhaps the edge of any proper boundaries
18 under Royce to beyond the radar on the video --

19 THE CHAIRMAN: Yes.

20 MR DINGEMANS: -- with a person in a central position, which
21 was Payne, whose qualities did not extend to reasonable
22 behaviour.

23 THE CHAIRMAN: Yes.

24 MR DINGEMANS: Those are my submissions.

25 THE CHAIRMAN: And might you add "without proper

1 supervision"?

2 MR DINGEMANS: Sorry, in fact I did have, and in a process
3 that was effectively wholly unsupervised --

4 THE CHAIRMAN: Yes. Thank you.

5 MR DINGEMANS: -- and, if one is looking at that, where such
6 supervision as did occur appears to have been entirely
7 focused on the soldiers and not the detained persons.

8 THE CHAIRMAN: Thank you very much, Mr Dingemans. I am
9 extremely grateful for your submissions.

10 MR DINGEMANS: I am sorry to finish ten minutes early.

11 THE CHAIRMAN: No, you earn marks for that in this Inquiry.

12 Now, Mr Topolski.

13 THE CHAIRMAN: If you just pause a moment, I will get your
14 submission out and also your response. I now have them
15 both.

16 Yes.

17 Submissions by MR TOPOLSKI

18 MR TOPOLSKI: Sir, it has not been altogether easy to
19 represent Donald Payne at this Inquiry. He began it and
20 indeed will end it a disgraced soldier, reviled and
21 condemned. Colonel Mousa would not accept an apology
22 from him because he did not accept apologies from
23 criminals. Who can blame him for that?

24 Had Donald Payne tried to maintain the accounts he
25 had given to the SIB, at the court martial or even in

1 earlier statements to this Inquiry, he would have been
2 roundly and rightly criticised. He at least has
3 responded to the Inquiry's call for what I shall
4 describe as "more of the truth", but of course
5 unsurprisingly continues to be characterised as
6 a callous thug and indeed as a killer. So the difficult
7 task that confronted his team at the outset in that
8 sense persists now the evidence is in.

9 Sir, we must accept that, given the nature and
10 extent of the lies that he has admitted telling, that
11 before reliance can be placed on his evidence there
12 would need to be either some independent support for it
13 at best or no reliable evidence which significantly
14 undermines or contradicts it at least. And so it is
15 that we have attempted in our written submissions to be
16 realistic.

17 We do suggest that there may yet be evidence he has
18 given worthy of serious consideration -- we know it
19 shall get that -- and indeed acceptance, and I say at
20 the outset that that extends even to the most
21 controversial and fraught area of all, the precise
22 circumstances of the final moments of Baha Mousa's life.

23 THE CHAIRMAN: Yes.

24 MR TOPOLSKI: Sir, it is worth putting at the forefront of
25 our submissions today a reminder in very short order of

1 precisely what it is that Payne has now at least
2 admitted.

3 THE CHAIRMAN: Yes.

4 MR TOPOLSKI: I take all this, of course, from the primary
5 source, his evidence before you.

6 THE CHAIRMAN: Yes.

7 MR TOPOLSKI: He has admitted using much greater force than
8 he previously admitted; he has admitted using gratuitous
9 violence, routinely kicking and punching, kicking and
10 punching each detainee with forceful blows designed to
11 hurt them; he has admitted being the first one to begin
12 assaulting; he has admitted, to that extent at least,
13 setting an example; he has admitted beginning the
14 violence in the presence of Rodgers' multiple, going
15 around kicking and punching; he has witnessed all
16 multiple members, except the drivers, forcefully kicking
17 and punching.

18 He accepts that he used violence of the kind he has
19 described whenever he would visit the TDF. He accepts
20 that, without having to tell the changeover guard to
21 punch and kick if the detainees did not hold their
22 stress positions -- he agreed that they would have taken
23 that from having observed what he himself was doing.
24 And he admitted using an appalling racist epithet of the
25 "ape" that one can hear if one listens carefully on the

1 TDF video.

2 Sir, in sum we submit three things: the call that
3 has been made for this Inquiry to find Payne complicit
4 in torture and unlawful killing must be a call that is
5 heard and indeed judged against the provisions of the
6 2005 Act.

7 Secondly, that the gratuitous violence that he used
8 and now admits to using was motivated by a mistaken
9 belief that this group of detainees had killed army
10 personnel.

11 Thirdly, as our key submission, the final struggle
12 was brought about by a genuine belief of his that
13 Baha Mousa was attempting some escape which led to
14 a struggle against restraint which itself triggered
15 a fatal cardiac arrest.

16 Sir, with those introductory remarks, may I turn to
17 deal with one or two matters? First of all, character.
18 A tough uncompromising provost corporal with
19 considerable army experience. Major Royce had serious
20 doubts about him, yet it seems he was permitted to
21 continue with his work at the TDF.

22 Of that work, it would appear no prior complaint nor
23 criticism of substance has emerged with regard to his
24 handling of pre Salerno detainees. My learned friends
25 Mr Singh and his team submit that Payne was a product,

1 as they put it, of this regimental environment,
2 conforming, as they put it, to the culture around him
3 and wasn't just an aberration. We stand by our
4 submission that his behaviour towards these detainees
5 was indeed aberrant.

6 But, Sir, it is plainly the case, as judges so often
7 tell juries and perhaps, Sir, you will have yourself in
8 times gone by, that a witness' evidence does not come in
9 job lots such that all could be accepted or all can be
10 rejected --

11 THE CHAIRMAN: Yes, we constantly tell juries that.

12 MR TOPOLSKI: He was commended by Counsel to the Inquiry for
13 showing some courage in giving the evidence that he gave
14 on 16 September. That, along of course with all else,
15 will be taken into consideration by you in making
16 whatever assessment you think appropriate as to his
17 character insofar as that task assists you. But
18 central, of course, to that assessment will be how you
19 treat the fact that he has admitted telling so many
20 lies.

21 If this, Sir, were a criminal trial and you were
22 presiding, we would now be discussing Lucas directions
23 and the like. But as you have had good cause to remind
24 me in the past, you are not a jury and this is not
25 a criminal trial.

1 The approach that we submit is proper to adopt,
2 given the constraints of the 2005 Act and all that goes
3 with a public inquiry, is the one that we have
4 tentatively suggested in our introductory remarks. So,
5 Sir, can I move on, please, just to make some
6 submissions about training, chain of command and
7 supervision?

8 THE CHAIRMAN: Yes.

9 MR TOPOLSKI: Several of the core participants submit to you
10 that training on the likes of hooding, blindfolding,
11 shock of capture, stress positions, was -- and I will
12 borrow a phrase from my learned friend Mr Dingemans'
13 submissions -- "confused and inconsistent".

14 Lewis Cherry submit that there was a general failure
15 to provide adequate training to those tasked with
16 guarding detainees. The MoD, in what we would
17 respectfully suggest is an impressive and measured set
18 of submissions, suggest that this was an area where
19 clarity was lacking as to the precise responsibilities
20 of those involved, observing importantly that the RMP
21 and the MPS -- the Military Police Service -- training
22 was based entirely on the detention of soldiers and not
23 civilians.

24 We adopt all that and refer to our own submissions
25 on the point and make this additional one, that up to

1 the point of using unlawful violence, Payne did what he
2 was trained and indeed ordered to do by those in
3 a position of authority over him. The words that it is
4 obviously essential to forensically underline are "up to
5 the point of unlawful violence".

6 This on the chain of command -- you have our
7 submissions -- but there is a lack of clarity again, we
8 submit, that emerges from the evidence. Bluntly, Sir,
9 the likes of Donald Payne like it clear, like it simple
10 and like it straightforward, and when one hears from
11 a witness such as Smulski phrases such as "grey areas"
12 and "the chain of command was blurred", they speak,
13 those words, for themselves.

14 This issue of the chain of command is inevitably
15 linked to supervision, again upon which we have made
16 written submissions. May we respectfully commend to
17 you, Sir, Kingsley Napley's analysis of FRAGO 29 as
18 revealing what they describe as a "critical flaw", it
19 being that battlegroups were given a reason to hold on
20 to detainees, leaving them in the hands of untrained
21 soldiers.

22 That precisely mirrors Payne's own evidence, first
23 of all that the guarding multiple would be left
24 responsible for the detainees and also that one of the
25 features that singled out these detainees from all

1 others prior was the length of time that they had to be
2 held.

3 Sir, we make this submission, as it were,
4 compendiously on the topics of training, chain of
5 command and supervision. It is this: an unclear chain
6 of command or lack of proper supervision or even poor
7 training does not excuse nor mitigate unlawful violence,
8 but they represent, as again the MoD submit, important
9 factors in understanding and explaining what occurred.

10 Sir, can I move on from there to deal with prisoner
11 handling?

12 THE CHAIRMAN: Yes, by all means.

13 MR TOPOLSKI: You have our submissions on that.

14 THE CHAIRMAN: Yes.

15 MR TOPOLSKI: Whether home-grown by Messrs Royce, Smith and
16 Payne, as T-Sol submit, inherited from 1 Black Watch's
17 Sergeant Gallacher or not, Payne's position is simply
18 that he was putting into practice the SOP which he
19 understood had been brigade-sanctioned.

20 Whether or not 1 QLR's conditioning methods were
21 idiosyncratic is not to the point at least for our
22 purposes. It is clear, though, we suggest, and
23 important for our purposes that in reality the tactical
24 questioner did have considerable influence upon
25 handling, hence, for example, our submission that the

1 maintaining of conditioning past TQ'ing was not simply
2 a construct of Payne's acting alone and outwith his
3 orders or at the very least his understanding of his
4 orders.

5 Sir, can I turn then, as the next heading, to
6 Payne's conduct towards detainees?

7 The TDF video, truly appalling, truly shameful. On
8 the evidence of Crowcroft and in particular
9 Sergeant Stacey it may -- and I underline the word
10 "may" -- be said that with much -- and I underline the
11 word "much" -- less ferocity, it is not wholly outside
12 what was then understood to be the maintaining of the
13 shock of capture. That is why we respectfully invite
14 you in due course to re-read Sergeant Stacey's evidence
15 in particular.

16 THE CHAIRMAN: I actually read it this morning over again.

17 MR TOPOLSKI: Sir, thank you. I say no more about that.

18 You have the point. It is either a good one or not.

19 But this next point is beyond doubt or argument as
20 far as Payne's conduct towards the detainees is
21 concerned. He was not stopped. He was not even told
22 that it might be a good idea to think about stopping.
23 He admitted that the way in which he applied stress
24 positions and the like was in and of itself inhumane, an
25 important and, we would respectfully submit,

1 creditworthy admission to make.

2 As to motive for his treatment, he offers only
3 revenge. To that the MoD add for consideration
4 thuggery, sadism and a loss of control amongst
5 a significant group of both soldiers and sadly NCOs.

6 Sir, it does not seem open to me now to mount any
7 argument against that compendious assessment of the
8 conduct of all those who assaulted these detainees, and
9 that leads me to say one or two things, if I may, about
10 the conduct of others.

11 There is no doubt that there were a large number of
12 other perpetrators. It is sad to reflect, as I have
13 said, that that number appears to include NCOs as well
14 as private soldiers and indeed, if Payne's evidence is
15 correct, may even include an officer.

16 The admissions made by at least some of those who
17 accept unlawful conduct may be thought, on Payne's
18 evidence, not to go nearly far enough in their own
19 descriptions of what they admit doing. We have sought
20 to very briefly, often by the use of a simple word in
21 our written submissions, summarise the nature of some of
22 the "admissions" that some of these soldiers make,
23 a long way short, it may be thought, of "forceful
24 kicking and punching". Sir, if it is found by you that
25 any of them did forcefully kick and punch and that they

1 have played down their role, then I hope I may be
2 entitled to say that Payne will have earned perhaps
3 a little credit, a modicum at least, in giving the
4 evidence that he did if that assists you in coming to
5 that conclusion.

6 Sir, the final struggle. Payne's submission is and
7 remains that he was entitled to use force to prevent
8 what he perceived then was an escape attempt. The
9 account he gives in evidence, it is suggested, of
10 course, does not describe a genuine escape attempt; that
11 on shouting at Baha Mousa, his evidence is that
12 Baha Mousa turned his back and was just inside the door
13 of probably the small toilet room when he was brought to
14 the floor.

15 The detainees submit that the escape story is either
16 wildly exaggerated or invented, of course, that this
17 wasn't an act of restraint at all, but a beating, an
18 unlawful killing -- they don't use the word "murder",
19 but they come pretty close to all its constituent parts,
20 as I understand it to be -- not to prevent him leaving,
21 but simply to re-cuff him and re-hood him.

22 We submit that Payne has always maintained that his
23 first response to what he saw was that this -- my word
24 not his -- "troublesome" detainee was indeed trying to
25 escape and what followed was a struggle in that context

1 and not a gratuitously frenzied final assault.

2 We have invited consideration, for example, of
3 Cooper's more recent graphic account to be held against
4 Dr James' evidence. I don't go into the detail of that.
5 What we have to say about that is set out in writing.

6 It is plainly obvious that our submission does not
7 deal with the other witnesses who say, for example,
8 Payne kicked and punched -- Douglas, Reader. It doesn't
9 go on to deal with other evidence from, say, Bentham,
10 who interestingly is the witness who actually uses the
11 word "escape" when he says to you in his evidence that
12 he told Payne he thought Baha Mousa was trying to escape

13 It doesn't also deal with Redfearn to the extent
14 that he may be said to support at least parts of Payne's
15 account. It might be thought -- we hope it isn't, but
16 it might be -- that we are ducking an attempt to resolve
17 this evidential conflict by way of submission. It seems
18 to us that no submission we could make would be of very
19 much assistance.

20 We cannot -- and, Sir, you would not expect us to --
21 adopt or adapt our client's account and his reasons
22 given for his actions to better fit accounts of others
23 to try to get round the accounts of others.

24 The submission is made that he is motivated to
25 minimise the extent of his own violence. Well, given

1 that the starting point must be the act, given, as you
2 say in your own ruling on the burden of proof, that the
3 more serious the allegation, the more cogent the
4 evidence to support it must be -- and how much more
5 serious can you get than the allegation of unlawful
6 killing -- given, it seems to us, that no amount of
7 submitting here and now by me will assist in persuading
8 you to prefer Payne's position one way or the other, it
9 is hard to see, though, one observes, what Payne would
10 have to gain now by persisting in a wholly concocted
11 story. Either this was, in his perception, an attempt
12 to restrain a potential escaper or it was yet another
13 gratuitous assault in which he lost, for the first time,
14 all self-control.

15 THE CHAIRMAN: It could be both, couldn't it?

16 MR TOPOLSKI: It could be both.

17 THE CHAIRMAN: It starts as one and continues as another?

18 MR TOPOLSKI: Yes, yes. What I have just submitted was put
19 to him in cross-examination by Mr Friedman and he
20 maintained his position. Sir, it must follow that we do
21 the same.

22 There is, we submit, in this scene a sufficient
23 number of factors that make preferring perhaps one set
24 of accounts over another extremely difficult. One only
25 needs to think about them for a moment: the speed of the

1 event, the space, the heat, the light, the noise, the
2 violence. The evidence is not sufficiently clear, we
3 would submit, to establish to the appropriate standard
4 the allegation made of an unlawful killing.

5 So, Sir, if I may just make one or two final
6 remarks. Payne did not act alone in mistreating these
7 defendants. He was, though, on his own admission, the
8 first to do so and thereby accepts that he set an
9 example, particularly, potentially to the younger less
10 experienced soldier.

11 He seeks no solace in trying to present himself now
12 to you as a put-upon scapegoat. He is not the victim
13 here. That said, his life has been turned around for
14 the worse as a result of 72 abhorrent hours of
15 misconduct, some of it grave, which must be set against
16 a career spanning nearly 20 years. He has paid a price
17 for that that no one else will pay. He accepts his
18 conduct was appalling, unjustified and unjustifiable and
19 he has apologised.

20 As we say in the final paragraph of our written
21 submissions -- and these will be the last words that
22 I utter before this Inquiry -- thank you, Sir, for all
23 your help and courtesy and those of all of the Inquiry
24 staff, who have been of the most enormous assistance and
25 in particular your counsel.

1 Donald Payne would not have been able to do all he
2 did without the participation of many, the knowledge of
3 some and the acquiescence of a few.

4 Sir, unless we can be of any further assistance,
5 those are our submissions.

6 THE CHAIRMAN: No, thank you very much, Mr Topolski. I am
7 grateful to you for your submissions and for your
8 conduct of Mr Payne's case.

9 Now theoretically we do not start until 2, but I see
10 Mr Beer is here. Is there any reason why we should not
11 start now, Mr Beer? It is up to you.

12 MR BEER: None whatsoever. Sir, I have already indicated to
13 Mr Elias that I envisage being about 30 or 40 minutes --

14 THE CHAIRMAN: We might just squeeze it in before lunch.

15 MR BEER: -- subject to a reasonable level of interruption.

16 THE CHAIRMAN: Is that a warning shot you are firing,
17 Mr Beer?

18 MR BEER: Not at all. It is your lunch hour, Sir.

19 Submissions by MR BEER

20 MR BEER: The Hill Dickinson witnesses are a disparate group
21 of individuals. They each have different interests,
22 different perspectives and different narratives to give.
23 There is no single or unifying theme in relation to the
24 evidence that they give, other than that they are the
25 individuals that every other legal team felt unable to

1 represent.

2 You will have seen in our main written submissions,
3 Sir, that we have followed through the approach that we
4 have taken to the Inquiry generally --

5 THE CHAIRMAN: Yes.

6 MR BEER: -- namely to address only those issues which
7 appear to be central to the Inquiry's terms of
8 reference, to address only those issues which directly
9 affect the Hill Dickinson witnesses and therefore not to
10 make thematic or corporate or general comments.

11 THE CHAIRMAN: There have been quite a lot of those, so most
12 of them have been covered, if not all of them.

13 MR BEER: Exactly. It is better left to others who have got
14 a direct interest in that. Instead they are focused on
15 the events of 14 to 16 September, but necessarily
16 contain some narrative within which to fit our clients'
17 involvement.

18 In the reply submissions we address what appear to
19 be new points arising from other core participants'
20 submissions that directly affected us. They were
21 largely defensive in nature, seeking to reply to the
22 points made against the Hill Dickinson witnesses. We
23 did not deliberately leave anything out of those
24 submissions with a view to making it orally. They
25 contained what we wanted to say.

1 THE CHAIRMAN: Yes.

2 MR BEER: It follows that these submissions seek only to add
3 to the submissions already made, where they require to
4 be supplemented in the light of other core participants'
5 replies or oral submissions or to reply to new issues
6 raised.

7 This exercise necessarily focuses on not all of the
8 Hill Dickinson witnesses. Instead it addresses the
9 position of the following five: Major Clifton,
10 Sergeant Smith, Major Radbourne, Colour Sergeant Livesey
11 and Corporal Winstanley.

12 THE CHAIRMAN: Yes.

13 MR BEER: I should also deal, if I may, very shortly with
14 Mr Friedman's submission that present at the TDF at the
15 time of the death of Baha Mousa ought to be a sufficient
16 basis for concluding that those present were part of an
17 enterprise that resulted in the death, either by way of
18 joint enterprise or joint venture, because that affects
19 two and possibly three of my clients.

20 May I start then with Major Clifton?

21 THE CHAIRMAN: Yes. I do not know whether you were here.
22 I think yesterday I said that I found the controversy in
23 evidence between Major Clifton, Major Robinson and
24 Major Royce really one of the more difficult, if not the
25 most difficult, of issues to resolve.

1 MR BEER: We can well understand why, Sir, in particular
2 because it might be the case that the polarised
3 positions might not be the answer that you are seeking
4 to find, which are the polarised positions. It might be
5 more nuanced than certainly was pretended at the court
6 martial.

7 THE CHAIRMAN: I think that that is a very good word for it.

8 MR BEER: Can I attempt to help you to resolve that
9 difficulty?

10 THE CHAIRMAN: You certainly can, and I need assistance over
11 it, although I have to say that that is the longest
12 section of your submission and I have read it carefully.

13 MR BEER: Sir, there will hopefully be no repetition.

14 THE CHAIRMAN: Yes.

15 MR BEER: We take briefly four points raised in the
16 submissions of other core participants. They are as
17 follows. I will summarise them first: first it is said
18 that it cannot be a coincidence that Royce says that
19 a lawyer gave legal advice that precisely coincided with
20 the legal views that the lawyer Clifton held about the
21 use of hoods and stress positions. That is the
22 coincidence point.

23 Secondly, whether it would have been risky or worse
24 for Major Royce to have told Lieutenant Colonel Mendonca
25 that the use of hooding and stress positions were

1 legally permissible as aids to interrogation if
2 Major Royce had not been told that very thing by
3 Major Clifton. That is the second point taken against
4 us.

5 Third, that Major Royce's account as to the
6 existence of a brigade sanction is supported by the
7 evidence of other officers within 1 QLR, that
8 Major Royce had told them before the death of Baha Mousa
9 that the brigade had sanctioned the use of hooding and
10 stress positions. It is a point mentioned by
11 Mr Dingemans this morning.

12 Then, fourthly -- and this is essentially the point
13 made by PIL -- that the Inquiry ought to make an
14 intermediate finding somewhere between the position
15 adopted by Major Royce on the one hand and
16 Majors Clifton and Robinson on the other.

17 Can I turn to address then the first point, the
18 coincidence point? It is said by Kingsley Napley that
19 it is highly unlikely to be a coincidence that the
20 lawyer, Major Clifton, who Major Royce identified as
21 having approved both of the techniques, hooding and
22 stress positions, advocated by Major Clifton, was
23 someone who thought that it was permissible to use them
24 for the purpose of maintaining the shock of capture.
25 That is the case we have to meet.

1 There are, we say, three answers to that point.
2 First, Major Royce states that he is sure that
3 Major Clifton approved the use of both hoods and stress
4 positions and that he did so in the same conversation,
5 yet it is clear beyond doubt that Major Clifton knew
6 that hoods were not to be used in any circumstances,
7 that that had been confirmed by an oral and written
8 order, and that that order, that ban, continued. This,
9 as far as he was aware, was a red flag or a red line
10 issue.

11 Even PIL accept that Major Clifton held that view
12 and that he was very unlikely to have expressed
13 a different one. That's because of the plain body of
14 evidence amongst the lawyers of knowledge of the ban.
15 You will recall Major Clifton's evidence in this regard
16 of the animated conversations he had.

17 THE CHAIRMAN: Yes, I am very conscious of that point.

18 MR BEER: Yes. Major Royce claims that Major Clifton spoke
19 to him in a single conversation where both of the issues
20 were said to have been dealt with by the advice of the
21 lawyer. So in this regard, far from there being
22 a coincidence between Major Clifton's view and the
23 advice that he is said to have given in relation to
24 hooding, they are polar opposites.

25 Second, in relation to the legal advice said to have

1 been given in relation to stress positions, again there
2 is no coincidence in the views that Major Clifton held
3 and the legal advice that he is said to have given.
4 Major Clifton said that if he had been asked about the
5 use of stress positions to maintain the shock of capture
6 pending TQ'ing, he would have asked a series of
7 questions about the circumstances in which it was
8 proposed to adopt that tactic because he took the view
9 that stress positions may be permissible in some
10 circumstances and he would need to know what the
11 circumstances were. Major Royce says that none of this
12 occurred. He asked a simple question and got a simple
13 "yes".

14 Third, and relatedly, that this was, for
15 Major Clifton, a hypothetical view in relation to stress
16 positions. That's as expressed in his witness statement
17 of 16 November 2006, the day he was giving evidence at
18 the court martial. You remember he gave the witness
19 statement as he was waiting to be called in.

20 Simply because it was the hypothetical view that he
21 held doesn't mean that it was the view that he expressed
22 and certainly where there is a divergence in the view
23 that he held and the view that is attributed to him.
24 I should say in relation to that last point that,
25 contrary to the written submissions of Kingsley Napley,

1 Major Clifton has made no attempt at any stage of the
2 Inquiry to distance himself from his statement of
3 16 November 2006.

4 It is said that he said that he was pressurised into
5 signing it. He has never said that in any of the
6 evidence he has given, whether written or oral. He has
7 stood by the statement in his Rule 9 statement and in
8 his oral evidence to the Inquiry. He said "Yes", to his
9 credit, "this was my view". Unlike many other witnesses
10 who have sought to distance themselves from their
11 written accounts, he did not do so in relation to that
12 statement.

13 I turn to the second point taken against us, namely
14 that it would have been risky for Royce to have told
15 Mendonca that Clifton had sanctioned hooding and stress
16 positions if that had in fact not occurred. This is
17 a point made by Kingsley Napley and also by Mr Langdale
18 on behalf of Lieutenant Colonel Mendonca.

19 We say there are two answers to the submission.
20 First, contrary to what has been said on his behalf,
21 Lieutenant Colonel Mendonca has not said that
22 Major Royce told him that he had been told by
23 Major Clifton that the use of hooding and stress
24 positions as an aid to TQ'ing was permissible prior to
25 TQ'ing.

1 In relation to Major Royce's account of what he told
2 his CO, you recall the significant change in his
3 accounts or, as Mr Dingemans calls it, the development
4 of his accounts over time which we have highlighted in
5 the written submissions. Close in time he says that he
6 would have raised, in an O Group, the fact that the use
7 of hoods and restraints was approved for G2-led
8 operation, but that he would not have mentioned it
9 afterwards. That's his statement of 31 March 2005.

10 By Christmas of that year, 6 December 2005, by the
11 time it is known that there is to be a court martial in
12 which Lieutenant Colonel Mendonca is involved,
13 Major Royce states that he had discussed these issues
14 one evening in the TDF with his commanding officer.
15 Significantly and perhaps overlooked, he said this:

16 "We discussed the fact that conditioning was being
17 done at the request of TQers and therefore at the behest
18 of brigade headquarters."

19 There are three things to note about that: firstly,
20 the memory recall that he then had, which was contrary
21 to his earlier statement when he said "I raised the
22 matter in an O Group and it was never mentioned again".
23 Secondly, he was now saying that this was to be done at
24 the request of the TQers and that is why it had brigade
25 sanction. That is clear from the context of his

1 statement, "The TQers are asking for it to be done,
2 Lieutenant Colonel Mendonca, and that is why it has
3 brigade sanction".

4 There is no suggestion there that it had been
5 demanded by Robinson or approved by Clifton. And even
6 in this substantial development Major Royce does not say
7 that he told his CO that he had discussed the matter
8 with the chain of command and the functional legal
9 adviser and had approved or got approval for the use of
10 these measures. It is only when Major Royce comes to
11 give evidence at the court martial that he claims that
12 he had told Lieutenant Colonel Mendonca that he had
13 secured a sanction or approval for the use of these two
14 measures from Majors Robinson and Clifton and he wasn't
15 tested in the odd circumstances that the court martial
16 found itself in relation to that evidence.

17 THE CHAIRMAN: Well he has been tested now.

18 MR BEER: Yes. In his evidence now we get the still further
19 claim. In his evidence now he says that
20 Lieutenant Colonel Mendonca had asked him a specific
21 question. So it wasn't him in an O Group, it wasn't him
22 at the TDF, it was Lieutenant Colonel Mendonca asking
23 him a specific question, "Have you cleared the policy of
24 hooding and the use of stress positions with brigade and
25 with the functional legal adviser?", and, "Yes, I told

1 him I had cleared it with the chain of command at
2 brigade and the functional legal adviser".

3 Well, against that background of, as it is, I think,
4 euphemistically put, the development of an account, we
5 say that the Inquiry can't rely on the latter account,
6 in particular when Lieutenant Colonel Mendonca makes no
7 mention of being told by Major Royce of the instruction
8 said to have been given by Majors Clifton and Robinson
9 insofar as it relates to stress positions. We have
10 dealt with that compendiously in our written
11 submissions.

12 Mendonca says, "All I knew about was hooding. None
13 of what Major Royce told me related to stress
14 positions", and he was asked three or four times by
15 Mr Elias about that.

16 Mr Dingemans advances two answers in his reply
17 submissions for the substantial changes in this aspect
18 of Major Royce's account and also for the changes in his
19 account as to his conversations with Majors Clifton and
20 Robinson. I haven't addressed that because it is
21 already set out in the written submissions.

22 The two answers advanced were, firstly, "I didn't
23 have any diary when I made my earlier statements", and
24 secondly, "We don't know how my early statements were
25 taken. I may have been asked questions that were

1 specific and I wasn't asked the specific one which
2 elicited the information which years later I was to
3 give".

4 As to the first of these points, the emergence and
5 significance of the diary, we make three short points in
6 reply. Firstly, the recovered memory is not about the
7 chronology of events, so a diary hardly helps you to
8 recall more.

9 Secondly, Major Royce's recovered memory is
10 unaffected by the chronology. He now purports to give
11 evidence as to what actually happened, not the order of
12 events.

13 Thirdly, the submission fails to draw in any way
14 a causal link between the seven lines in the diary and
15 his newly found memory. The Inquiry has the diary and
16 will see the seven lines. They don't relate to the
17 topic under consideration.

18 As to the second point that's taken on Major Royce's
19 behalf, namely that "I may not have been asked the right
20 questions by the RMP when my statements were taken", you
21 will recall Mr Elias giving some privates, including
22 some whom we represent, an appropriately tough time over
23 whether such an answer will really do, amounting to
24 "I told the truth, but not the whole truth". We say it
25 simply does not wash in relation to a person such as

1 this experienced major.

2 We asked, "Is it really being said that Major Royce,
3 knowing that he was being asked to provide a witness
4 statement in the course of a criminal investigation for
5 very serious offences, including one alleged to have
6 been committed by his commanding officer, where the use
7 of hoods and stress positions was one of the focuses of
8 the investigation, decided not to tell investigators
9 that he had received legal sanction from Major Clifton
10 for the use of hoods and stress positions and then
11 informed his CO about this simply because he was not
12 asked?" This was absolutely critical evidence. As has
13 been observed, it effectively scuppered the prosecution
14 case against Lieutenant Colonel Mendonca.

15 The second general point is that it is equally as
16 unlikely --

17 THE CHAIRMAN: I have quite a number of subsidiary points.
18 I am not sure I have got a first -- yes, I have got
19 a first point. This is the second one, is it, a general
20 point?

21 MR BEER: Yes, it is. It is that it is equally as unlikely
22 or, as Mr Garnham puts it, inherently unlikely that
23 Major Clifton would have given legal advice that he
24 would know would directly contradict the clear and
25 express oral and written orders that he had been given

1 by a previous formation and which he had been told about
2 by Lieutenant Colonel Mercer in an excitable state were
3 to continue.

4 Can I deal with the third point that is taken
5 against us then, namely the evidence of other officers
6 within 1 QLR that Major Royce told them before the death
7 of Baha Mousa that brigade had approved the use of
8 hooding and stress positions. Mr Dingemans rightly
9 identifies that Messrs Davies, Sweeney, Moutarde and
10 Osborne all gave evidence to a lesser or greater
11 extent -- there are differences between them, but that
12 doesn't matter for the present submission -- that
13 Major Royce had mentioned to them, before Baha Mousa's
14 death, that the brigade had approved the use of at least
15 hooding.

16 This may be a relevant consideration to take into
17 account when deciding whether to find that Major Royce
18 honestly believed that he had brigade sanction. But
19 save for one matter, it does not assist in determining
20 whether Major Royce secured such approval from
21 Major Clifton.

22 The one exception is that none of these witnesses,
23 namely Davies, Sweeney, Moutarde and Osborne, suggest
24 that Major Royce told them that he had secured legal
25 approval of the use of the techniques or that he had

1 spoken to a lawyer or that that lawyer was
2 Major Clifton. So whilst it may be of assistance in
3 determining what Major Royce's state of mind was, as has
4 been observed in exchanges between you, Sir, and
5 Mr Dingemans already, it does not assist in identifying
6 that Major Clifton was the author of the advice.

7 To an extent that it does assist, it is significant
8 that none of those four witnesses suggest that Royce
9 said, "I've got the legal okay for it, I've got legal
10 sanction". That picks up on a submission that we
11 mentioned rather a lot in our written submissions: it is
12 odd, to say the least, that certainly after the death,
13 if not before it, someone would have said that all of
14 this was sanctioned by a brigade lawyer and that that
15 brigade lawyer was Russell Clifton.

16 We don't say, in reply to one of Mr Dingemans'
17 submissions, that it would have been Major Clifton
18 singing his views from the rooftop, saying, "I have told
19 Royce this, I have told Royce that". But after the
20 events of 14 to 16 September one would have expected
21 someone to have said "Clifton gave this advice" and one
22 wouldn't have expected to have waited until two-thirds
23 of the way through the court martial for Major Royce's
24 evidence to have developed to such a stage that
25 Lieutenant Colonel Mendonca was now able to rely -- to

1 an extent changing his case -- on the brigade sanction.

2 The fourth submission we make is in relation to the
3 so-called intermediate finding that PIL ask to be made.
4 PIL submit that it is likely that what has been inflated
5 into a formal sanction by the court martial was more
6 a product of informal cooperation between members of the
7 brigade and the battlegroup. This is an uncomfortable
8 position unsupported by evidence so far as it concerns
9 Major Clifton. It appears, of course, to recognise the
10 very grave difficulties with Major Royce's evidence,
11 certainly in relation to --

12 THE CHAIRMAN: That is your submission of --

13 MR BEER: Yes.

14 THE CHAIRMAN: -- very grave difficulties?

15 MR BARR: Yes.

16 THE CHAIRMAN: I am not sure I necessarily go along with
17 that because a great deal of how I approach him is what
18 impression he made on me in the witness-box.

19 MR BEER: Yes, well I was about to conclude this section by
20 saying that, in relation to all of these areas, in
21 relation to the difficult factual issue that you have to
22 determine, we say that the issue falls to be determined
23 by some rather old-fashioned fact-finding, rather than
24 relying --

25 THE CHAIRMAN: I am not sure I recognise the term

1 "old-fashioned fact-finding", Mr Beer.

2 MR BEER: It was not directed at you.

3 THE CHAIRMAN: Whoever it is directed at, I am not sure
4 I recognise that as a judicial exercise.

5 MR BEER: I was comparing it with what Mr Friedman relied
6 on, namely the academics' concept of -- I think it was
7 called "back-room apprenticeship".

8 We say that the resolution of this issue has got to
9 start and end with fact-finding, looking at the changes
10 in the accounts the witnesses have given over time --

11 THE CHAIRMAN: You mention the changes. You have so far
12 stressed the changes in Major Royce's evidence. Your
13 clients' evidence is not entirely consistent throughout,
14 as has been pointed out by others. But there we are.
15 These are factors I have to wrestle with.

16 MR BEER: Sir, that is right in relation to one aspect and
17 that is in relation to whether he had contemporaneous
18 knowledge of the use of stress positions.

19 THE CHAIRMAN: Well, on you go.

20 MR BEER: We say it ought to take into account, as we have
21 said, changes in the accounts given by witnesses,
22 looking at the motivations that there may have been for
23 those changes in accounts over time, taking into account
24 the character, obviously, and antecedents and the
25 impression that the witness created when giving evidence

1 in the witness-box.

2 Can I move then, sir, to Sergeant Smith?

3 THE CHAIRMAN: Yes, do.

4 MR BEER: Two issues fall to be addressed in relation to
5 Sergeant Smith: first the doubts expressed by PIL that
6 Sergeant Smith in fact ordered a Sunday night respite
7 and, secondly, the suggestion again by PIL that he
8 deliberately stayed away from the TDF.

9 The first of those, the doubts expressed that there
10 was the Sunday night respite, the bold submission made
11 by PIL is that Sergeant Smith did not order the
12 unhooding of the detainees, he did not order them to be
13 allowed to lay down, to sleep or that they should be
14 given water.

15 Bearing in mind the comment that you made to
16 Mr Friedman when he was making this submission, but not
17 pursuing it, we limit our submissions accordingly.

18 THE CHAIRMAN: Yes.

19 MR BEER: We do not disagree with two of the three more
20 nuanced points that Mr Friedman said in reply, namely
21 that the respite was only for a period of up to
22 30 minutes and that it might have occurred later in the
23 evening or night than Sergeant Smith actually remembers.

24 As to Mr Friedman's third point, that Sergeant Smith
25 merely expressed dissatisfaction with the position and

1 did not in fact issue orders to unhood, allow to rest or
2 feed and water the detainees, we make the following
3 short points:

4 Firstly, it ignores the evidence of MacKenzie and
5 Cooper, who explained that that's exactly what occurred.
6 It ignores, secondly, the improbability that Smith would
7 be able to recruit these two privates in this way,
8 consistently to give false evidence and to put their
9 names to a note that described this very process. It
10 ignores, thirdly, the evidence of Messrs Potter and
11 Lamb, who corroborate Smith about the overriding of the
12 unhooding order. It is to be noted in that regard that
13 the detainees rely elsewhere on the truthfulness and
14 reliability of Potter and Lamb and yet completely ignore
15 their evidence in this regard. It ignores, fourthly,
16 the evidence of Colour Sergeant Livesey, who told the
17 Inquiry that he knew that it was Sergeant Smith who had
18 ordered the unhooding, et cetera, of the detainees.

19 So if Sergeant Smith has recruited MacKenzie and
20 Reader (sic) into his conspiracy, he has also done so in
21 relation to Livesey, a man who would have no interest in
22 joining in it because it was he who was responsible for
23 communicating the countermanding of the order by the
24 TQers.

25 The second point in relation to Smith: PIL's

1 suggestion that he deliberately stayed away from the
2 TDF. They submit that he had a desire to maintain
3 a studied distance from an operation that he knew was
4 spiraling out of control.

5 The fact that there was evidence that Sergeant Smith
6 was not there at times of the detainees' detention is,
7 of course, not the same as saying that he deliberately
8 stayed away. The suggestion that Sergeant Smith stayed
9 away deliberately is inconsistent with the following
10 evidence:

11 First, the body of evidence that Sergeant Smith was
12 fed up and felt powerless. In this regard we rely in
13 particular on the evidence of Messrs Potter and Lamb.
14 Additionally the evidence that he made complaints to
15 Major Royce, to the RSM, Mr Briscoe, and to
16 Captain Seaman.

17 Secondly, it ignores the evidence of what he
18 actually did do, namely pressing for the transfer of the
19 detainees on a number of occasions, first on the Sunday
20 night, when he returned from Umm Qasr at about 6 pm, to
21 Major Peebles, when he was told to wait and he would be
22 told when they were ready for transfer, and then on the
23 next morning, before he goes off on the operation,
24 having just returned as watchkeeper -- he did the 3 am
25 to 6 am shift as watchkeeper -- comes off that, before

1 he goes out on his operation, he asked Major Peebles
2 again, "Can we transfer?", and he was told that he would
3 not be required to transfer the detainees that morning
4 as some of them were still required to be TQ'd.

5 It ignores issuing the order that the detainees were
6 to be unhooded, allowed to lie down, rest and be given
7 water. It ignores his constant complaints about being
8 tasked away from BG Main. If he was seeking to stay
9 away from the TDF, he wouldn't have made those constant
10 complaints.

11 There is a considerable body of evidence that he was
12 complaining and complaining vociferously. In
13 particularly he would not have questioned the order that
14 he should participate in an operation away from BG Main
15 on the Monday. You remember he had to act as
16 Captain Seaman's driver on the Monday.

17 THE CHAIRMAN: I think he ought to have made it clear that
18 his job was at the TDF.

19 MR BEER: That's exactly what he said that he did do to
20 Captain Seaman.

21 THE CHAIRMAN: He could quite easily have gone further if he
22 wanted to. I must say that I am, for the moment,
23 surprised about his absence from the TDF for so long for
24 someone who had previously played an active part of it
25 when Major Royce was there.

1 MR BEER: Sir, you have heard the evidence about what he
2 said about that. In this regard he is supported by
3 Major Royce, namely that Royce wanted him there, Royce
4 raised the issue with Peebles and said, "You need Smith
5 to be at the TDF" --

6 THE CHAIRMAN: Yes.

7 MR BEER: -- and Peebles seemed unconcerned about it.

8 THE CHAIRMAN: One would have expected Smith to have done
9 something rather more about it.

10 MR BEER: You recall what he said, that he complained to
11 those that he understood to be his line managers,
12 including Briscoe, and Briscoe, when asked questions by
13 me, said, "No, I would have expected Smith to have
14 followed the orders that he was being given by
15 Captain Seaman. If Captain Seaman wanted to use him on
16 the Monday, he should have followed that order".

17 So that is exactly the difficulty that Smith was in.
18 He was going to the person he understood to be his line
19 manager, but his line manager gave evidence that, no, he
20 was effectively being controlled by Seaman in this
21 regard and Captain Seaman's orders were to be followed.
22 If he said he wanted him to be the driver for the day,
23 he was going to be the driver for the day.

24 The suggestion ignores the evidence of Messrs Potter
25 and Lamb about what Sergeant Smith tried to do in

1 relation to these detainees, namely that -- if you
2 remember, he was sitting in the canteen --

3 THE CHAIRMAN: That is two-way, isn't it, the observations
4 there? It is a two-edged sword for you, I would have
5 thought.

6 MR BEER: Yes, I accept that it is a double-edged sword,
7 but, when taken together with the other evidence about
8 the issues that he raised, the grievances that he
9 raised, this was in the context of issuing an order for
10 the unhooding -- to make the lives of the detainees more
11 comfortable, to relax the harshness of the regime.
12 That's what he was complaining about and that's why he
13 said that when he had tried to intervene on the orders
14 of the CO, as he put, he had been told to wind his neck
15 in and that he was "nothing but a fucking social
16 worker".

17 We say that evidence is powerful evidence as to
18 Sergeant Smith trying his best to involve himself, with
19 his line manager giving him no support and receiving
20 orders from Captain Seaman that he was obliged to
21 follow.

22 Finally in this regard -- and we are at the moment
23 addressing the more stark suggestion that he
24 deliberately stayed away knowing what was going on --
25 none of this was ever explored with him at all. The

1 issues explored with him whether he was away and whether
2 there was a greater call on his time; not that he knew
3 what was going on and had deliberately absented himself.
4 But for all of the earlier reasons we say that is not
5 a finding that the Inquiry should make.

6 In relation to Major Radbourne, just shortly, Sir,
7 there is a short point that arises from a submission
8 made by Mr Singh yesterday. It is in relation to the
9 paragraph in the Radbourne document of 27 September
10 2007, annex A, paragraph 9 of which says that prisoners
11 were not to be allowed to relax and lay down and
12 therefore on one view this might be thought to condone
13 some sort of sleep deprivation.

14 THE CHAIRMAN: Did that come from division or not?

15 MR BEER: Yes.

16 THE CHAIRMAN: The annex did?

17 MR BEER: Yes. Mr Singh said that and then he went on very
18 shortly afterwards to contradict himself and said "but
19 Major Radbourne had input into it".

20 He didn't. That was the document -- annex A,
21 MOD030587 -- that was the simple lift, the cut and
22 paste. It was annex D that was Major Radbourne's own
23 creation.

24 If I can turn fourthly then to
25 Colour Sergeant Livesey? In his reply submissions

1 Mr Ashley, on behalf of Mr Davies, and Mr Dingemans, on
2 behalf of Mr Smulski, suggest that Colour
3 Sergeant Livesey's evidence is inconsistent in relation
4 to the identity of the person who told him to effect
5 a rehooding of the detainees. Smith has ordered them to
6 be unhooded, amongst other things, and it is Livesey
7 that is responsible for communicating the order to
8 re-hood --

9 THE CHAIRMAN: Yes.

10 MR BEER: -- and they say that he is inconsistent as to the
11 identity of the person who passed that order to Livesey.

12 So they say as follows: Mr Ashley says, "When
13 I asked Colour Sergeant Livesey in evidence who gave the
14 order, he said it was Smulski", and Mr Dingemans says,
15 "When I asked Colour Sergeant Livesey who gave the
16 order, he says it was Davies".

17 For the reasons that we give in paragraph 381(a) and
18 (b) of our submissions, we say that both answers are
19 correct. There were two instances of a possible
20 un-hooding and a re-hooding, the first of which involved
21 Smulski, the second of which involved Davies. Both of
22 them ask you to make the finding that it didn't occur
23 and it wasn't their client because, when he was asked
24 two questions by two counsel, he gave different answers.
25 They are both talking about different events.

1 Lastly, Corporal Winstanley.

2 THE CHAIRMAN: Yes.

3 MR BEER: It is necessary to deal shortly if I may with the
4 allegation that he was party to the creation of a false
5 FMed5 in relation to an examination of Baha Mousa. We
6 have set out our submissions quite fully in paragraphs
7 196 to 204 of our main submissions and do not repeat
8 them.

9 Can I deal in summary form with the reasons that PIL
10 give for the suggestion that the form was created
11 falsely and after the death of Baha Mousa? First, it is
12 suggested by PIL that the form reads as if it was an
13 initial medical assessment and not an attendance as
14 a result of a specific ailment or injury having been
15 reported.

16 We agree. But that is strongly supportive of
17 Corporal Winstanley who said that those were exactly the
18 circumstances in which it was created. It was created
19 after an initial medical assessment. That's why it
20 reads like it was created after an initial medical
21 assessment.

22 Second, it is said by PIL that the existence of the
23 form is suspicious of itself because it was not in
24 keeping with the usual practice of not creating a form
25 unless something specific was discovered in the course

1 of an examination.

2 But Corporal Winstanley gave evidence in his SIB
3 statement, his Rule 9 statement, and in the Inquiry,
4 that such nil returns were created following
5 unremarkable medical examinations. In that respect he
6 was supported by Dr Bartels, who gave exactly the same
7 evidence that that was the practice that he adopted. At
8 the very least it was Corporal Winstanley's
9 understanding of the position, and is consistent of
10 course with good medical practice, namely to record
11 a negative.

12 Third, it is said by PIL that the FMed5 does not
13 read as if it was created following a second visit in
14 response to a specific complaint of illness or injury by
15 Baha Mousa. We again agree. That is a corollary of the
16 first point we have already made: it doesn't read as if
17 it was created following a specific examination because
18 it was not.

19 Fourth, it is said that Private Winstanley's
20 evidence that there was a second medical examination is
21 not supported by Corporal Baxter or Corporal Winstanley,
22 who are said by the private to be the people who
23 supervised it. But we agree again; this is because the
24 balance of the evidence is that there was no second
25 medical examination.

1 It might be that the position again lies somewhere
2 in between Private and Corporal Winstanley. We have
3 posited a suggestion that may explain the differences in
4 their recollections in our written submissions; namely,
5 contrary to his expectation, no form was completed after
6 Corporal Winstanley's supervision of Private Winstanley
7 in the initial medical examination. Private Winstanley
8 did, as he said, carry out a second medical examination
9 of Baha Mousa, but that it wasn't supervised by
10 Corporal Winstanley, as he says.

11 Private Winstanley gave Corporal Winstanley the
12 FMed5 to sign, and he signed it believing he was signing
13 it to record the fact of his supervision of the first
14 examination, knowing nothing about the second
15 examination. That is possible on the evidence of both
16 of them. Our primary position is as I have set out
17 above.

18 Finally, therefore, the supplemental point on
19 Mr Friedman's mere presence is enough to constitute
20 a joint venture submission. This affects, in
21 particular, Privates Reader and Douglas, who we
22 represent, and have been identified by PIL in their
23 written submissions as being a party to the joint
24 venture to kill, but also Mr MacKenzie, who saw some
25 points of the moments leading to the death of

1 Baha Mousa, but oddly is not identified by PIL as within
2 Mr Friedman's thesis, either in writing or orally.

3 Can I deal thereafter with Reader and Douglas?

4 THE CHAIRMAN: Yes. Are you going to be long?

5 MR BEER: Two minutes.

6 THE CHAIRMAN: Two minutes you have.

7 MR BEER: In relation to Mr Reader, he absented himself --
8 you will recall -- he walked out, because he didn't like
9 what he was seeing. He didn't agree with it; he didn't
10 want to be a party to it. When he came back in after
11 the actions of Corporal Payne and Private Cooper, he
12 gave resuscitation.

13 It is right to say that he was part of the guard in
14 general terms, but he was not guarding at this time. He
15 was a mere witness to the violence inflicted by Payne
16 and Cooper. Mr Friedman might, with respect, have
17 a point if he was actively guarding by preventing others
18 from gaining access to Baha Mousa or preventing others
19 from intervening to stop the assault, but that isn't the
20 case.

21 In relation to Mr Douglas, the submissions of PIL
22 that he was a facilitator and should somehow be
23 implicated in your factual findings in the death are
24 even more stark. You will recall that the issue for
25 Mr Douglas was whether he was present at all. The

1 questions of the other core participants were to the
2 effect that he was inventing his presence at the TDF --
3 he said, whilst he maintained that he was there,
4 supported in this by gentle questioning from
5 Mr Friedman, only now to find himself being accused of
6 being part of a joint enterprise that resulted in the
7 death of Baha Mousa.

8 He didn't facilitate the death in any way. The only
9 evidence that he was there comes from himself. He
10 describes himself arriving back at the TDF and hearing
11 noises, walking inside to see what they were, seeing
12 Corporal Payne and Redfearn -- although he accepts that
13 it may have been Cooper -- using violence towards
14 Baha Mousa without justification. He did not
15 participate in any way.

16 Sir, those are the submissions that we make, unless
17 I can help you any further.

18 THE CHAIRMAN: No, thank you very much indeed. That is very
19 convenient. We will return at 10 o'clock tomorrow
20 morning.

21 MR ELIAS: I think Mr Bourne kicks off tomorrow morning,
22 Sir.

23 THE CHAIRMAN: Very well. Good. Thank you all very much.

24 (1.03 pm)

25 (The Inquiry adjourned until 10.00 am, Wednesday,

21 July 2010)

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