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Witness Name: David Frend

Statement No.: 1

Exhibits: DF 1-7

Dated: 1 December 2014

**In the matter of an investigation into the death of
Mr Nadheem Abdullah**

**WITNESS STATEMENT OF
DAVID FREND**

I, David Frend, will say as follows: -

Introduction

1. I make this statement at the request of Sir George Newman, who is conducting an inquiry into a fatal incident in Iraq that occurred on 11 May 2003. I seek here to provide as much information as I can to assist to the best of my ability and recollection. I have also been shown and have read a copy of my previous statements dated 5 July 2006 and 14 July 2009, which relate to my time as an Army Legal Services officer in Iraq in 2003. I have recently retired from the Army Legal Services and I commenced my new employment, as a Specialist Prosecutor with the Crown Prosecution Service, on 13 October 2014.
2. From my arrival in Kuwait on 7 February 2003 until 11 April 2003 I was part of the legal branch within Headquarters of the First (United Kingdom) Armoured Division (HQ 1 (UK) Armd Div Main) where my primary role was to provide legal advice to the chain of command on the training and preparation for, and conduct of, war-fighting operations. On 11 April 2003 I deployed forward to HQ 16 Air Assault Brigade (16 Air Asslt Bde) as its legal adviser. After the departure of 16 Air Asslt Bde from Iraq, on 31 May 2003, I became the legal adviser to the Maysan Province Battle Group, which was essentially 1st Battalion The Parachute

Regiment (1 PARA) together with various support elements. I left Iraq on 15 June 2003.

3. I joined the Army in 1997 as a qualified barrister. Following initial training with the Adjutant General's Corps (Army Legal Services), the Royal Military Police (RMP) and a commissioning course at Sandhurst, I was posted to Northern Ireland as a legal advisor. I then undertook further postings as a legal advisor in the UK and Sierra Leone, before joining the Army Prosecuting Authority in December 2001.
4. My statement covers the following areas:
 - i) Rank and day-to-day role during Operation Telic 1
 - ii) Training
 - iii) The divisional structure
 - iv) The legal chain of command
 - v) Dissemination of orders
 - vi) Pre-war role – 7 February 2003 to 26 March 2003
 - vii) Initial war role – 26 March 2003 to 11 April 2003
 - viii) War through to occupation role to 11 April 2003
 - ix) Occupation role – 31 May 2003 to 15 June 2003
 - x) Detention Policy
 - xi) Briefing troops
 - xii) 16 Air Asslt Bde
 - xiii) 3 PARA in Maysan Province
 - xiv) Al-Uzayr
 - xv) Rules of Engagement and the Law of Armed Conflict (LoAC)

- xvi) Dealing with hostile individuals in Maysan Province
- xvii) Training
- xviii) The relationship between an officer and his men

Rank and day-to-day role during Operation Telic 1 (Op Telic 1)

5. I joined the Headquarters of the First (United Kingdom) Armoured Division (HQ 1 (UK) Armd Div) in January 2003 as an augmentee, having volunteered from my previous post at the Army Prosecuting Authority. At that stage I was a Major and I joined HQ 1 (UK) Armd Div as Staff Officer Grade 2 Legal (SO2 Legal). In January 2003, HQ 1 (UK) Armd Div was still in Germany, prior to deployment.
6. My role in Op Telic 1 was as a legal advisor, receiving instructions and giving advice. During Op Telic 1 this role fell into four distinct phases, which are discussed in more detail below. In summary these were:
 - i) 7 February to 26 March - legal advisor to HQ 1 (UK) Armd Div in Kuwait and Iraq, providing general legal advice prior to and in preparation for the invasion of Iraq and during the conduct of the initial ground offensive.
 - ii) 26 March to 11 April - legal advisor to HQ 1 (UK) Armd Div in Iraq, including providing advice to an Intelligence Corps major in relation to the Joint Force Interrogation Team (JFIT) and sitting on boards to assess individual's Prisoner of War (PW) status.
 - iii) 11 April to 31 May - legal advisor to 16 Air Asslt Bde, who were deploying forward to 'replenish in place' (RIP) US forces in Maysan Province – in other words, to take over that area of responsibility.
 - iv) 31 May to 15 June - legal advisor to the Maysan Province Battle Group based in Al Amarah.

Training

7. As a qualified barrister joining the Adjutant General's Corps (Army Legal Services) (ALS) my initial training consisted of a week long introduction to the ALS, followed by a week with the RMP, then a 4 week commissioning course and a 4-5 week "special to arm" course. The commissioning course at Sandhurst was specifically designed to give some basic military training to professionally qualified officers such as lawyers, doctors, vets and padres. The special to arm training was run by the ALS and consisted of specialist training in the kind of areas we would be expected to advise on, including army discipline and the Laws of Armed Conflict (LoAC). This was an overview on a fairly basic level, rather than an academic study of the legal background to these subjects but it provided an introduction to the source materials enabling further research as and when required.
8. In July 1999 I attended a course entitled '*Introduction to the LoAC*', which was run by Professor Hilaire McCoubrey and Dr (now Professor) Nigel White at Nottingham University. This was an intensive week long course at a relatively high legal level. Whilst there were references to treating prisoners humanely and to providing them with the same care as you would give your own troops, in terms of providing the necessities of life, it assumed a knowledge of what humane treatment was and so did not go into the practical details of 'you can do this, you cannot do that'.
9. As a military lawyer, much of my work involved carrying out my own research and building upon my core legal knowledge whilst undertaking a particular task. In 2001, for example, I acted as legal advisor to the Commander of UK Forces in Sierra Leone. A large part of this role was teaching the Sierra Leone forces how to operate lawfully, with particular focus on LoAC. Issues often arose and had to be researched as we were operating, largely by accessing the usual legal research tools over the internet. The International Committee of the Red Cross (ICRC), who assisted with the training, also provided a good source of research materials.
10. As with all members of the army, I am required to carry out Individual Training Directives (ITDs), now known as Military Annual Training Tests (MATTs).

Included amongst these was ITD(A)6 which dealt with LoAC. This was a basic session, and aimed to ensure that everyone in the army had a solid understanding of the LoAC. However, it should not be looked at in isolation. A soldier's core role is to take part in armed conflict and therefore all aspects of army training and exercises apply and reinforce the LoAC principles as part of that training or exercise.

The divisional structure

11. An army division usually consists of three brigades and brigades are usually comprised of three regiments, together with other supporting units such as logistics, medical and artillery. 1 (UK) Armd Div was, and remains, the UK's premiere division for heavy armour; including, for example, armoured infantry, in that they are transported in armoured Warrior Fighting vehicles, and cavalry, who are deployed in Challenger II main battle tanks. However, because of the type of operation that Operation Telic 1 (Op Telic 1) was anticipated to be, a bespoke division was put together. By this I mean that it was anticipated that there would be a requirement for not only heavy armour and armoured infantry, but also that there would be a requirement for light and highly mobile armed forces that could advance and secure ground rapidly. HQ 1 (UK) Armd Div acted as the divisional headquarters with 7 Armoured Brigade (7 Armd Bde) as the armoured manoeuvre brigade. 7 Armd Bde was already part of 1 (UK) Armd Div and was therefore used to operating under its command. However, the division also included 3 Commando Brigade (3 Cdo Bde) and 16 Air Assault Brigade (16 Air Asslt Bde) - light, rapid, mobile brigades - who normally sit outside of the divisional construct but were task organised to come together for this operation. Therefore, arguably, HQ 1 (UK) Armd Div was slightly out of its comfort zone in commanding a composite division of three brigades, rather than its own organic brigades with whom it would have exercised and operated more frequently.
12. In February 2003, 16 Air Asslt Bde consisted of: 1st Battalion The Parachute Regiment (1 PARA); 3rd Battalion The Parachute Regiment (3 PARA); 1st Battalion The Royal Irish Regiment (1 R IRISH); and an army air corps regiment.

The brigade also included a logistical battalion, a medical regiment, and a signals squadron; these are known as "enablers" in that they enable the other elements of the brigade to function as a coherent and cohesive whole.

13. It is my understanding and recollection that 1 (UK) Armd Div (and the brigades that had been task organised for this particular operation) were intended to lead the UK's contribution to the coalition's ground forces for the initial entry into, and occupation of, Iraq. Once the Iraq armed forces had been defeated, and the coalition was in occupation and transiting towards a new Iraqi administration, 1 (UK) Armd Div (and the task organised brigades) would re-deploy to their peacetime locations in order that they could be ready to react to other contingencies that may arise. To this end, the staff of HQ 1 (UK) Armd Div were aware, before the commencement of hostilities, that 3rd (United Kingdom) Division (3 (UK) Div) would be replacing 1 (UK) Armd Div in due course. In the event, 3 (UK) Div took over command of the UK's military contribution to the coalition land forces in or around July 2003.

The legal chain of command

14. The basic structure of the army lawyers on Op Telic 1 was as follows. Lieutenant Colonel Nicholas Mercer was Commander Legal (Staff Officer Grade 1 Legal (SO1 Legal)) and acted as legal advisor to the General Officer Commanding (GOC) 1 (UK) Armd Div, Major General Brims. Beneath him were three SO2 legal advisors; myself, Major Callum Coax and Major David Christie. Major Coax and I were advisors for 1 (UK) Armd Div Main HQ, I worked days and Major Coax worked nights. Major Christie was the legal advisor to the Prisoner of War Handling Organisation ("PWHO"). Beneath Major Christie were two SO3 legal advisors; Captain Chris Heron and Captain Helen Bowman who were advisors to the Divisional Support Group Headquarters.
15. In addition there were two legal advisors based at the National Contingent Command Headquarters (NCHQ) in Qatar, Commander Neil Brown, Royal Navy (SO1 Legal) and Major Gavin Davies (SO2 Legal). There were also two legal

advisors at the Permanent Joint Headquarters (PJHQ) in Northwood, Lieutenant Colonel Nick Clapham (SO1 Legal) and Rachel Quick, a Ministry of Defence civilian legal advisor.

16. Although military lawyers are within the normal military "chain of command", we do not give orders in the usual manner; we give legal advice when it is sought. Other than giving some general advice prior to the ground offensive starting (see below) I did not have much involvement in advising directly on detention or prisoner handling issues. Major Christie, as legal advisor to the PWHO would have been the most logical point of contact for legal advice if it was required in relation to prisoners or detainees.
17. Ultimately, GOC 1 (UK) Armd Div, as the senior military officer, was responsible for all prisoner handling issues. However, he delegated day-to-day responsibility for the oversight of the planning for prisoner issues to the Deputy Chief of Staff, Colonel Cowling, and his staff, who operated from the Divisional Support Group Headquarters.

Dissemination of orders

18. Orders were usually disseminated in written form as fragmentation orders (FRAGOs). All FRAGOs will say who they are from and to either at the top of their first page or on a distribution list at the end of the last page before any attached annexes. Divisional FRAGOs are drafted by Divisional staff and distributed to whoever is named in the distribution list. The person receiving a FRAGO will usually log it in. If a FRAGO comes from Division to Brigade, Brigade will often draft their own FRAGO and issue that to the Battle Groups beneath them. The Brigade FRAGO may either duplicate or attach the content of the Divisional FRAGO, or may expand or contract the content depending upon the relevance to the Battle Group.
19. Divisional FRAGOs were generally the responsibility of the Chief of Staff, Colonel Patrick Marriott, or (probably more commonly) Major Justin Maciejewski (SO2 G3 Operations). They would either draft the FRAGOs or authorise them if

drafted by a specialist. Brigade FRAGOs would be the responsibility of the Brigade Commander and were usually disseminated by the Brigade's Chief of Staff or Deputy Chief of Staff.

20. FRAGOs were sent by the quickest means possible, depending on what equipment was available; email being the quickest, then signals (through PTARMIGAN, the army's secure digital communications system), or physical delivery as a final resort.
21. Orders were also given verbally. The GOC would hold daily morning and evening conference calls on the radio with all Brigade Commanders, during which orders could be given instantly to be passed down verbally.

Pre-war role - 7 February 2003 to 26 March 2003

22. I joined HQ 1 (UK) Armd Div as an augmentee, i.e. as an additional lawyer to augment their existing legal staff. As such I had not been involved in any of the pre-deployment training or any of the previous exercises carried out by HQ 1 (UK) Armd Div, such as Exercise Saif Sareea in Oman in 2002.
23. I joined the rest of HQ 1 (UK) Armd Div in Germany in January 2003 and we moved to Kuwait at the beginning of February. At this stage Lieutenant Colonel Mercer drew up a list of outstanding issues we had to consider from a legal point of view. A large part of this related to the exercise that was being conducted in Kuwait, as the decision to invade Iraq had not been made at this stage. However, part of it related to issues which we needed to consider if there were to be an invasion of Iraq. Subjects on the list included, amongst other things, PWs, targeting, inter-operability with coalition partners and the occupation of Iraq post invasion.
24. During this period my main role was advising in relation to targeting. However, in addition I advised in relation to detention policy and took part in pre-deployment briefs on LoAC.

Initial war role - 26 March 2003 - 11 April 2003

25. From soon after the start of the ground offensive to 11 April I remained as a legal advisor to HQ 1 (UK) Armd Div, but during this time I also advised the Intelligence Corps SO2 responsible for human intelligence, who was also in charge of the Joint Force Interrogation Team (JFIT).
26. I was only with HQ 1 (UK) Armd Div in Iraq for two weeks before I became legal advisor to the Headquarters of 16 Air Asslt Bde.

War through to occupation role - 11 April 2003 - 31 May 2003

27. From 11 April 2003 to 31 May 2003 I was legal advisor to the 16 Air Asslt Bde HQ. 16 Air Asslt Bde were deploying forward to replenish in place (RIP) US forces in Maysan Province.
28. The only time I was involved in anything to do with briefing on detention or the interaction with the civilian population during this period was to put together a legal documents pack for the Battle Group Commanders in the Brigade, which is attached as exhibit DF1. This pack was largely based on FRAGO 79, FRAGO 100 and FRAGO 101 which were all received in the first half of April 2003. The Annexes to FRAGO 100 are attached as exhibit DF2 and FRAGO 101 is attached as exhibit DF3. This document mentioned use of force and detention, but nothing in relation to detainee handling. Otherwise I had no involvement in any issues related to detention policy, the handling of detainees or interaction with the civilian population during this period.

31 May 2003 - 15 June 2003

29. From 31 May 2003 to 15 June 2003 I was legal advisor to the Maysan Province Battle Group, which consisted of the 1st Battalion Parachute Regiment (1 PARA) together with various support elements. My day-to-day role was helping to establish an effective civilian legal process in Maysan Province. I do recall giving

advice to 1 PARA on a planned lift operation, in which an arrest was to be made based upon a threat to the security of coalition forces. My advice related to the lawfulness of the arrest, not the process of any subsequent detention or interaction with the civilian population. I had no other involvement in any issues related to detention policy, the handling of detainees or interaction with the civilian population during this period.

Detention policy

30. I was asked to advise on a mechanism for the management of detention in Iraq. We knew that we would have to deal with PWs in the short term, and there was a policy publication in respect to this (Joint Warfare Publication 1-10 (JWP 1-10)). However, there was also likely to be a continuing need for us to have a process for dealing with detainees in the medium to longer term. In particular, there was likely to be a lacuna between the point at which the existing civilian infrastructure stopped working and a new civilian infrastructure restarted. I was asked to advise on what we should do to breach this gap.
31. The British Army had no readily identifiable precedent for this, but a Royal Military Police (RMP) officer provided me with a paper entitled '*Interfet Detainee Management Unit in East Timor*', written by Major Bruce M Oswald of the Australian Army, which is attached as exhibit DF4. This set out the experiences of the International Force in East Timor in dealing with detainees, including both those who were suspected of criminal offences and those who were detained as a security risk.
32. I took this document as a precedent and tried to apply it to the situation that we were likely to face in Iraq. I drafted a policy and an ordinance to be implemented when required, which are attached as exhibits DF5 and DF6, respectively. Whilst it was based upon the East Timor precedent, the idea was to take the principles from the Geneva Conventions and the Hague Convention and provide UK Forces with a way of applying them on the ground. The aim was to set up a simple system to maintain law and order, in conjunction with existing Iraqi law, and allow for temporary arrest and detention until a new Iraqi legal system was established and was effective.

33. The policy and ordinance was very much concerned with providing a legal framework for the continued temporary detention of PWs and detainees, and did not say anything as to how detainees were to be handled. The idea of including anything within this document on prisoner handling, in terms of what can and cannot be done, did not come to mind as advice on this issue would have been provided by the Military Provost Staff, who are the experts in the Armed Forces on matters of custody and detainee handling. I would have started from the position that people would know that they had to treat detainees humanely and would have relied upon the Military Provost Staff to oversee the implementation of this concept in practice.
34. Whilst I drafted these documents, I was not responsible for the way in which they were later implemented. As far as I am aware it was Lieutenant Colonel Mercer and Major Coax who considered the application of my proposals to the situation on the ground and drafted the FRAGOs that were eventually issued.

Briefing troops

35. During the build up to the invasion it became clear to senior officers and civilian officials within 1 (UK) Armd Div, NCHQ, PJHQ and the Ministry of Defence that the mindset of many in the army was based upon the experiences gained from operations in Northern Ireland and the Balkans, where the army's role had been, essentially, peacekeeping. The rules of engagement in a peacekeeping role are very much focused on self-defence and the use of minimum force.
36. The position at PJHQ and NCHQ was that there was a need to reinforce the LoAC in the context of an armed conflict. There was concern that a peacekeeping mindset in an armed conflict could be unnecessarily dangerous to troops. NCHQ, on advice from Commander Brown, directed 1 (UK) Armd Div to roll out a brief to as many troops as possible, reminding troops that they were not peacekeeping, and explaining how the LoAC would apply, for example that pre-emptive targeting of positively identified enemy combatants was permissible. In short, one did not have to wait to be fired upon before one engaged a positively identified enemy position.

37. Therefore, during February and March 2003 my legal colleagues and I went out and briefed as many troops as we could on the LoAC. We worked in pairs and travelled around the Kuwaiti desert briefing them as a Battalion or as a Company at a time. I briefed the more senior command elements, i.e. everyone from Lieutenant Colonel down to Sergeant rank, and my colleague would brief the soldiers below Sergeant rank. In all I think we briefed around 12,500 troops.
38. At the time we had a PowerPoint presentation, but we did not have the facilities to show it as we travelled around from unit to unit. Instead I would work through the PowerPoint slides orally, dealing with all of the principles and giving examples. The brief lasted for around 45 minutes and was designed as a refresher. Everyone should have carried out their LoAC ITD and this was designed to be a reminder that these were the principles that were to be applied, not the peacekeeping principles that they may have previously been more familiar with. However, the briefing also reiterated the fact that once the ground offensive was completed, then we would be in de facto occupation of Iraq and that further guidance on the rules of engagement applicable in occupation would be disseminated.
39. We did not cover prisoner handling in this brief, other than to give a general reminder that prisoners and civilians were to be treated humanely at all times. We would have given examples, although I cannot remember what they were now.
40. In addition to the legal LoAC brief, the Military Provost Staff (MPS) gave a parallel brief on prisoner handling, which was often run alongside ours and again lasted for around 45 minutes. In this they made clear that prisoners should be handled humanely, looked after and fed and watered. They also made clear that troops on the ground must ensure that anyone detained should be moved back down the chain as quickly as possible so that they could be taken out of the immediate area of danger and so that they did not become a constraint on the manoeuvrability of the war-fighting units.
41. Also during this period, a new document was produced entitled "Operation Telic Aide Memoire on the Law of Armed Conflict", which is attached as exhibit DF7. The existing Joint Service Publication 381 (JSP 381) had been withdrawn as there was disagreement within the Ministry of Defence as to whether it accurately

reflected the UK's legal obligations because the UK had become a signatory of further international treaties since its original publication and the effect of being a signatory to these treaties was not reflected in the wording of JSP 381. However HQ 1 (UK) Armd Div felt that it was necessary that the troops, who were used to referring to a rules of engagement card (normally Card A which provided the rules of engagement for an individual opening fire in self-defence), had something to refer to. This document was therefore produced, as I understand it through NCHQ, and was distributed in parallel with our oral briefs.

42. I do not know whether these briefs, or something similar, were given in preparation for Op Telic 2.

16 Air Asslt Bde

43. As I mention at paragraph 21, from around the end of February 2003 to the beginning of war-fighting operations on 19 March 2003 HQ 1 (UK) Armd Div legal branch undertook a series of briefings to all the frontline troops on the Rules of Engagement (ROE) for Op Telic 1 together with a brief on the Law of Armed Conflict (LoAC). All the constituent units of 16 Air Asslt Bde, including 3 PARA, received this brief although I cannot now recall whether I personally gave the brief to that unit. As part of the briefing process all frontline troops were provided with an aide-memoire on LoAC, an example of which is exhibit DF7.
44. All UK Armed Forces personnel deployed on Op Telic 1 received, on arrival in Kuwait, a copy of Card A (The White Card) which contained the ROE for individual service personnel for force protection purposes while they were in Kuwait because there was in existence an ongoing asymmetric terrorist threat. This card provides the generic ROE for all service personnel deployed on operations other than war and is guidance on opening fire with personnel weapons in self-defence. It reiterates the requirements that lethal force can only be used where there is an immediate threat to life and that there is no other way of averting the threat without exposing the individual to a greater risk of death. It continues that no more rounds should be fired than are necessary to stop or prevent the threat

to life. When I conducted my ROE and LoAC briefings I started the brief by handing out the LoAC aide-memoire (copies of exhibit DF7) and explaining that when hostilities commenced the soldiers should take their Card A and place it in their berghens because it may be required after the cessation of war-fighting operations.

45. During planning for the land offensive in Iraq it was considered that there was a real probability that a large number of civilians would become displaced and that some may be encountered by UK Armed Forces in or around areas where they were operating. A particular concern was the presence of civilians on the Main Supply Routes (MSRs), i.e. the main roads throughout Iraq. Consequently, as part of the ROE and LoAC briefing, the soldiers were given guidance on how to interact with civilians that they encountered. They were informed that civilians were "protected persons" in accordance with International Humanitarian Law (LoAC), that they could not be targeted as military objectives (unless they were taking a direct part in hostilities such as a levee en masse) and that they were to be treated humanely and fairly at all times.
46. The ROE permitted the detention of civilians interfering with the mission and in such circumstances only the minimum force necessary to prevent them interfering with the mission could be used. For example, if civilians were blocking an MSR they were to be encouraged to move from the route by verbal persuasion. If this failed reasonable force (i.e. the minimum necessary) up to and including physically removing the civilians from the route was permissible. However, lethal force was only permitted against civilians where such civilians were posing an immediate threat to the life (or lives) of Coalition forces. Such force was permitted in accordance with the inalienable right to self-defence.
47. The presence of civilians on the battlefield was of real concern because of the belief that there would be widespread displacement and also that it was understood that members of the Iraqi armed forces would be wearing civilian clothing while engaged in hostilities with the Coalition forces. The potential for such ambiguity could lead to problems with distinction between legitimate military objectives and protected persons/objects and therefore the UK Armed

Forces were briefed to be particularly vigilant when encountering anybody in civilian clothing. It was also understood that a large percentage of the Iraqi adult male population were in possession of firearms (such as long barrelled rifles, mainly AK47s, and short barrelled pistols) as this was part of Iraqi male culture. The mere fact that an Iraqi civilian was in possession of a firearm did not mean that they automatically lost their protected status under International Humanitarian Law (LoAC). Caution was urged and the UK Armed Forces were briefed to treat all civilians as "protected persons" unless they had good reason for treating them otherwise.

48. As is now apparent, the high intensity war-fighting lasted only for a number of weeks and by the beginning of April 2003 many locations within HQ 1 (UK) Armd Div's area of operations (AOR) were effectively under occupation and not in a state of war-fighting. It was about this time that HQ 1 (UK) Armd Div disseminated FRAGO 100 which provided direction on the use of force and handling of detainees in the post-conflict stage (see DF2).
49. Although it is clear that the LoAC applies to a situation of belligerent military occupation in accordance with International Humanitarian Law (LoAC), and the UK Armed Forces' ROE remained the same during both war-fighting and the initial stages of occupation (at least until my departure on 15 June 2003), it should be noted that pursuant to the UK Armed Forces doctrinal concept of mission command, authority for the local application of ROE (within the parameters set by the superior HQ) is a matter for the local commander. Therefore, once HQ 16 Air Asslt Bde had received FRAGO 100 it was for the Commander of 16 Air Asslt Bde to deliver to the forces under his command guidance on the use of force within the parameters set by HQ 1 (UK) Armd Div through FRAGO 100.
50. By about 14 April 2004, when FRAGO 100 was received by HQ 16 Air Asslt Bde, the Brigade AOR was Maysan Province, which was the province directly to the north of Basrah Province. The situation on the ground in Maysan was different from the situation in and around Basrah City. Maysan Province had, effectively, liberated itself from the Ba'athist Regime two days before US

elements of the Coalition Forces arrived in Al Amarah (the capital of Maysan Province and some 120 kms from Basrah City). Therefore, the US forces encountered very little, if any armed resistance, and the province was largely a benign environment when 16 Air Asslt Bde took over control of the province from the US forces. 16 Air Asslt Bde's mission was, effectively, to restore law and order, to assist in the re-establishment of the basic utilities and to encourage the development of self-administration and governance. In comparison to Basrah Province, Maysan Province was further advanced along the road to post-conflict reconstruction. However, the main threat to 16 Air Asslt Bde's mission was criminal conduct, for example looting. In addition, there was also a specific problem related to the theft of copper wiring (primarily from electricity lines) and its subsequent smuggling.

51. Consequently, on receiving FRAGO 100 Commander 16 Air Asslt Bde directed that further guidance should be provided to his Battle Group Commanders (for onward dissemination to the forces under their command) on the extant ROE and, in particular, guidance on the level of force that should and could be used when dealing with the civilian population. I therefore reviewed FRAGO 100 and produced my own "Legal Aide-Memioire" for the Brigade HQ and the Battle Group Commanders, which I produced at paragraph 28 as exhibit DF1. It is clear from paragraphs 1 and 2, to Flag 2, to exhibit DF1, that the extant UK Armed Forces ROE were re-stated and that it was re-iterated that the ability to conduct combat operations against positively identified Iraqi military elements (combatants) remained as defined at subparagraphs 2a to 2l. However, what was crucial was the more developed guidance for the use of minimum force in respect of dealings with the civilian population, as detailed at paragraphs 3 to 13. At paragraphs 5 and 6, I sought to assist the Battle Group Commanders by further illustrating the level of force that could be used dependent upon the situations that their soldiers may find themselves in. The graduated level of force depicted at paragraph 6 is sometimes referred to as the "ladder of response" and is consistent with guidance that is given on the use of force in operational theatres such as Northern Ireland and the Balkans and so should have been familiar to all the Battle Group Commanders and their soldiers. It can be seen that the concept of

the minimum force necessary in the circumstances underpins the guidance and is derived from the English and Welsh domestic law principles of self-defence and the section 3 Criminal Law Act 1967 concept that reasonable force may be used in the prevention of crime or the effecting of an arrest.

52. As I have already referred to above, UK Armed Forces were aware, before entering Iraq, that a large percentage of the Iraqi civilian male population had access to, or routinely carried, personal weapons. Throughout the time I was in Maysan Province the possession of personal weapons by the Iraqi civilian population was a sensitive issue. As part of the post-conflict restructuring the UK Armed Forces wished for the number of such weapons to be reduced as this would assist in the maintenance of law and order. However, we were conscious that to simply take the weapons off Iraqi civilians could be inflammatory. Therefore, Battle Group Commanders were directed to exercise discretion and to recover weapons where possible but that they should not recover them where to do so could cause a situation to deteriorate and expose their soldiers to unnecessary risks. Any weapons that were recovered were to be retained with a view to being re-issued to the re-established Iraqi security forces (e.g. the police, local militia and Iraqi Defence Force). This discretion was reflected in the footnote to the list of specified offences at page 5, of Flag 3 to exhibit DF1. I can recall that there was an intention (although I cannot confirm whether it was ever put into effect) to have a policy that Iraqi civilians would be able to have one or two personal weapons per household for self-defence. This was seen as a form of compromise where the Brigade would have an element of control over the number of weapons in circulation and the Iraqi civilians would retain the ability to possess weapons for the defence of their households.

53. Flag 3, to exhibit DF1, provides HQ 16 Air Asslt Bde's detailed guidance and policy in respect of stop, search and detention. In short, it provides that if a person is detained who is suspected of having committed a specified arrestable offence, or is believed to pose a threat to force security, he must be handed over to 156 Provost Company, the Royal Military Police (RMP) attached to 16 Air Asslt Bde. The phrase "is believed to pose a threat to force security" is not further defined

and is therefore very broad and this was purposely so in order to provide the soldiers on the ground with the flexibility necessary to detain where the operational situation necessitated it for force protection reasons. "Specified arrestable offence" is further defined by reference to the list of offences at page 5 of Flag 3 to exhibit DF1. In both situations the detained person must be handed over to the RMP and a paper trail of his detention must be commenced.

3 PARA in Maysan Province

54. As I refer to at paragraphs 26 and 49 above, 16 Air Asslt Bde deployed forward after the initial war-fighting phase and were first tasked with securing the gas and oil separation plants near the Iraqi town of Ramallah before moving north of Basrah to Maysan Province in order to replenish in place (RIP) the American forces who were already there.
55. The provincial capital of Maysan Province was Al-Amarah, which is where 16 Air Asslt Bde established its HQ and where I was based when I arrived in early to mid-April 2003. At that stage, 16 Air Asslt Bde was on notice to re-deploy into Baghdad if required and the HQ was conducting contingency planning for this possibility. It transpired, however, that 16 Air Asslt Bde were ordered to re-deploy to the UK and 3 PARA remained as the Maysan Province Battle Group. This meant that, by the time that the majority of 16 Air Asslt Bde had departed Iraq, around 1600 service personnel were responsible for an area roughly the size of Wales.
56. When 3 PARA took responsibility for this area they were faced with an infrastructural vacuum. By this I mean that, unlike Basrah where there was significant resistance to the Coalition Forces from various elements Iraqi Army and Ba'athist regime militia, the inhabitants of Maysan Province rose up and overturned the Ba'athist regime simultaneously with the American forces' arrival. The province is predominately a Shia area with a significant Marsh Arab population (who themselves had been subject to persecution under the Saddam Hussein regime), and the Ba'athists simply left, leaving the area with no effective

governmental or administrative infrastructure. Not only had the Iraqi military forces left the area, but there was also no judiciary. From a policing perspective in Iraq, the police were reactive and relied on a judge to direct investigations, and so without the judiciary the police were ineffective.

57. When 16 Air Asslt Bde first arrived in Maysan Province in early to mid-April 2003, the situation could be described as a "honeymoon period". By this I mean that the security situation in Al-Amarah was such that I could walk down the street in my beret as opposed to my helmet, albeit whilst wearing body armour. The interaction with the civilian population appeared amicable; in that they were grateful that the Coalition Forces had deposed Saddam Hussein and his regime.

58. At this stage, my task was to go the Maysan Province courthouses, find the court and legal records they had and to try and determine how to establish a basic court system. In order to do this, I used to travel around in a non-armoured two vehicle convoy and the atmosphere was such that I felt relatively comfortable moving around. However, even at that stage, in late April/early May 2003, the situation was becoming complicated by a preponderance of internecine Sunni-Shia killing.

Al-Uzayr

59. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

60. Al-Uzayr, the area where the incident under consideration occurred, is on the border with Iran. The border area was considered to be a very dangerous area [REDACTED]
[REDACTED]. I have no personal experience of being on the ground there, but I am conscious that it was nowhere near as benign as the rest of Maysan Province.

61. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED]. My recollection is that BRITFOR operated under the direction to avoid, as far as safely possible, any confrontation in this area; this is now known as operating "courageous restraint", that is to say, putting oneself at greater risk of death or injury by approaching suspicious activity, rather than treating suspicious activity as an immediate threat against which force could be used.

Rules of Engagement and Law of Armed Conflict

62. Military practitioners and civil service advisors will work out what are the most appropriate Rules of Engagement (ROE) for a particular operation. They will receive advice from the MOD's Central Legal Services and other government legal advisors. The ROE are then authorised by the Secretary of State for Defence and the Attorney General, who will also authorise a targeting directive which sets out those groupings that are considered to be the enemy armed forces; for example, in the case of Iraq in 2003, the targeting directive identified the Iraqi Army, and the Fedayeen Saddam (a Ba'athist militia extremely loyal to Saddam Hussein who operated in civilian clothing), amongst others, as being legitimate targets of military activity pursuant to the Law of Armed Conflict (LoAC). The targeting directive will also include a definition of what "direct participation of hostilities" is considered to be in that particular context; but this is not made public as it is sensitive. In short, the concept of "direct participation in hostilities" is used to describe those civilians who, ordinarily, would be protected from an armed attack under LoAC, but who have lost their protected status for as long as they take a "direct participation in hostilities." It can therefore be seen that the precise definition of what this conduct means is crucial from a military targeting perspective, because without such guidance it is difficult to establish exactly who can, and cannot, be the subject of an armed attack pursuant to LoAC.

63. Once the ROE have been authorised by the MOD, they are then cascaded down through the military chain of command: from the Permanent Joint Headquarters (PJHQ) to the National Contingent Headquarters (NCHQ), which was in Qatar, onto the headquarters of the land, sea and air components. These component headquarters would then issue their own directions regarding what level in the chain of command permission is to be held viz-a-viz the conduct of certain military activity. For example, the MOD ROE may permit the use of anti-tank munitions; however, the Land component headquarters may not wish for these to be used without its express authorisation, and therefore the Land component headquarters would retain the authorising for that particular ROE at its level in the chain of command. A specific request would therefore have to be made by a subordinate headquarters to use that type of munition.
64. Although the detailed ROE are provided to all headquarters within the chain of command, an individual member of the infantry would not necessarily have access to the full ROE profile. As I have described above, while BRITFOR were in Kuwait waiting for the order to cross the border into Iraq, myself, and the other Army Legal Services lawyers that I had deployed with, briefed around 12,500 soldiers on the fundamental principles of LoAC, namely, the principles of: discrimination (identifying those that can and cannot be attacked); military necessity (that only military objects may be attacked and that by attacking them there must be a concrete military advantage); proportionality (that any inadvertent damage to civilians, or civilian property, must be proportionate to the overall military advantage that is to be gained from the attack); and humanity (in that any military activity must be limited to only that which is essential to achieve the military objectives - this principle, effectively, being a combination of the previous three). Although LoAC is an organic aspect of all service personnel training, it was acknowledged that the British Army had not been directly involved in a state-on-state conflict since the Gulf War of 1993, and the soldiers were culturally very used to having Card A, which dealt with self-defence. This cultural familiarity with Card A was, in my view, borne out of the British Army's most recent experience of its activities in Northern Ireland and the Balkans.

65. Consequently, when we were told to brief the troops for the invasion, we needed something to provide them with, an aide-memoire. Although there was one which was ready for high-intensity war-fighting, there was a disagreement in Whitehall as to whether it accorded with the United Kingdom's international obligations. We therefore created our own aide-memoire, as the soldier on the ground is not necessarily concerned with matters such as the chemical weapons convention; he simply wants to know what his basic LoAC obligations are in combat. We therefore produced thousands of copies of a card which was modified for the purposes of Op Telic 1. We then went around the troops and briefed them, making sure all the soldiers had the aide-memoire and telling them that this card was to replace their Card A when military operations against Iraq commenced.
66. In respect to the briefing that I gave to the soldiers, I had printouts of the slides of a regular standard LoAC presentation that I would give in the United Kingdom. There were no PowerPoint facilities in Kuwait, so I used the printouts of the slides as my speaking notes, and I also had a briefing sheet where I wrote down the four fundamental principles of LoAC that I have described above. There were two types of briefing: one for those ranked Sergeant and above, and one for Corporals and Privates.
67. I made it clear to all the soldiers I briefed that they had to keep their Card A for use after the war-fighting phase. I used clear language to stress to them that they should not destroy the card; they should instead put it with their morphine pen, or in their backpack, so that it would always be on them.
68. I cannot remember whether I gave this briefing to 3 PARA specifically, but one of my team would have done. I recall that I briefed many units from 16 Air Asslt Bde, including a parachute regiment; however, I cannot now recall whether it was 1 PARA or 3 PARA.
69. Towards the end of April 2003 the war-fighting phase was coming to a close and I produced a second aide-memoire at the request of headquarters 16 Air Asslt Bde. The headquarters had received a FRAGO from HQ 1 (UK) Armd Div and I

simply expanded on what had been written; nothing of substance was changed. I was just trying to help soldiers to understand in more detail the legal responsibilities that they had with each decision they made with regards to the use of force and the arrest of members of the local population.

70. Once I had completed my version of the latest legal aide-memoire, I gave briefings to the Battle Group commanders; these were the commanding officers of the regiments under the command of 16 Air Asslt Bde and they would have been of Lieutenant Colonel or Major rank. I gave each commander a copy of the expanded aide-memoire. However, it was then up to the Battle Group commander as to how to cascade this information down through to his troops. I have no knowledge regarding whether any soldiers were walking around with the expanded aide-memoires or whether it was specifically briefed to them. However, if anyone other than a Battle Group commander had asked me to brief his men, I certainly would have done.

Dealing with hostile individuals in Maysan Province

71. From a legal viewpoint, even though LoAC applies in occupation, many hostile individuals in Maysan Province were operating in civilian clothing and looked in every way like a member of the civilian population. The presence of people with a hostile attitude towards the coalition forces, operating in civilian attire, therefore created problems with regards to targeting because it was almost impossible to discriminate between civilians protected by LoAC and those civilians who had lost their protected status because they were taking direct participation in hostilities. As I have referred to above, the precise definition of what conduct amounts to directly participating in hostilities is highly sensitive and is, in my view, a significantly contested issue amongst states, academics and jurists.
72. The advice was therefore given, to the best of my recollection by HQ 1 (UK) Armd Div, that although members of the Iraqi armed forces could be targeted pursuant to LoAC, our soldiers had to be conscious that some apparent members of the civilian population were also taking a direct part in hostilities. Conversely,

they might be members of armed groups taking part in organised crime but with no hostile intent from an armed conflict perspective.

73. It was thus possible that a Battle Group could be involved in high intensity war-fighting against a positively identified enemy, and then 2 to 3 hours later be in a different area interacting with a civilian population using peacekeeping tactics. Consequently, in my view, the levels of expectation on the soldiers on the ground to balance these competing tasks was considerable; and the consequences for making an error were extremely serious from both a tactical and operational perspective. That is to say, the inadvertent killing or injuring of a civilian could not only effect the operations of the soldiers on the ground, it would also effect how BRITFOR were perceived more generally by the Iraqi population.
74. The advice we gave was that if you cannot positively identify a person as a member of the Iraqi armed forces, the law of self-defence was to be applied. Soldiers are trained to err on the side of caution and to treat armed civilians as civilians unless they can make a positive identification that the armed men are directly participating in hostilities. As soldiers, it is accepted that they expose themselves to greater risk of death or serious injury in order to avoid engaging inappropriate people.
75. However, the way a soldier reacts must also be informed by any intelligence he receives. A number of Saddam's specialised armed militia, such as the Fedayeen Saddam paramilitary organisation, had adopted civilian clothing. BRITFOR therefore used intelligence and surveillance – both through aerial capabilities or through human resources – to seek to identify situations where it was anticipated that there was likely to be this kind of activity by people who are appeared to be civilians, but were actually part of the enemy's armed forces.
76. Due to the relative lack of intelligence sophistication at the time, a soldier on the ground would start from the position that he must treat the people he encountered as civilians unless he was able to positively identify them as enemy combatants. As to how this identification would be made in practice, I would have expected

something like a checklist for the soldiers on the ground. For example, a positive identification might be made if the suspected combatants were operating in what appeared to be a co-ordinated fashion, such as manoeuvring in a military manner; setting up checkpoints; and displaying a combination of light and heavy weapons. These are all what are called "combat indicators," namely, that the people that one is encountering are not merely ordinary civilians going about lawful activity, but are more likely civilians taking a direct part in hostilities. I would also expect a soldier who was deciding whether to engage someone as an enemy combatant to be in constant radio contact with his superiors, describing the possible combatants and asking advice as to whether or not to engage them with force.

77. If, hypothetically speaking, a soldier was to conclude positively that some individuals approaching him in a vehicle are direct participants in hostilities, he may attack them pursuant to LoAC; that is to say, he may use lethal force against them even though, at the time, they are not an imminent threat. However, the overriding point is that he must use the minimum force necessary to achieve the required military effect.
78. If in this hypothetical scenario the vehicle has stopped and the soldier cannot positively conclude that the individuals in the vehicle are direct participants in hostilities, there are several tactics available to him. From a legal viewpoint, he is entitled as a member of the occupying military force – whilst bearing in mind that there is a projection of force merely by virtue of having a weapon – to go up to the vehicle. But the soldier will approach the vehicle bearing in mind that there is a significant risk to his life in so doing. If someone in the vehicle suddenly bends down, the soldier may perceive that there is an imminent risk to his life (in that the person bending down is picking up a weapon) and he may then be entitled to open fire in lawful self-defence. Clearly, any such decision of the soldier would have to be justified based on his honest understanding of the situation at the time that he used lethal force.

Training

79. Arguably, what a soldier should seek to do in the hypothetical situation described above is to get any occupants to come out of the vehicle. Soldiers have training throughout their careers on how to safely seek to remove someone from a vehicle.
80. Such training is continuous over a soldier's career, but additional training on various anticipated operational scenarios is provided prior to soldiers deploying on military operations. At OPTAG (Operational Training and Advisory Group) training, the training officer will give practical examples to soldiers based on what the legal advisor tells them are their legal obligations. In my view, the training process is more sophisticated now with lawyers present at all levels of command down to Brigade level, but at the time, legal advisors were only based at the Divisional level. At the Divisional level, the lawyer is part of the staff planning process. As the lawyer, I would explain to the trainers that they must incorporate certain legal principles into the training. We would thus have to rely on the officer, to whom we briefed, being a sufficiently competent person who would 'cascade' the legal training down through the chain of command to the soldiers in accordance with the LoAC obligations.

The relationship between an officer and his men

81. Mission command is an important concept which, arguably, must be understood in order to place in context the actions of BRITFOR personnel. A commander will know what he wants to achieve and he will tell his subordinates what his broad goal is, but he will leave it to the subordinates to choose how best to achieve that intent from a tactical perspective. However, this does not mean that the commander is not responsible for the actions of his subordinates; it merely means that he gives the subordinates the tactical freedom to remain flexible in how they implement the senior commander's intent.
82. In my view, command and leadership are not simply words; they really do set the tone. If you have a particular tone set by a commander, it has an effect down to the lowest level. For example, if the commander is overly aggressive, then this attitude will, in my opinion, cascade all the way through the chain of command to the lowest level; and that level will also demonstrate too much aggression.

83. In this context, it is extremely important to make sure that the boundaries are clear, known and enforced. One has to follow direction up with oversight and review. Otherwise, there is a risk that there will be a drift away from what is acceptable and within the terms of the commander's intent.
84. At Platoon level, the responsibility for the Platoon is held by a Lieutenant or Second Lieutenant, under whom is a Platoon Sergeant, who will normally have 10-15 years' experience as a soldier. At this level in the chain of command, the Lieutenant and Platoon Sergeant operate together as the command element.
85. In my view, the British Army is aware that there can sometimes be tension between a young officer in charge of a Platoon (with little or no command experience) and a more experienced but less senior non-commissioned officer, such as a Sergeant or Corporal. A Lieutenant will be relatively young and will have limited experience, having only relatively recently passed out of Sandhurst and having completed his infantry commanders' course. In Iraq in 2003, it would have been unlikely that new Lieutenants would have had any other operational experience. By contrast, a Sergeant or Corporal may have had 10-12 years of service and operational experience in Northern Ireland and/or the Balkans. In circumstances where there is such a discrepancy in experience it is, in my view, incumbent on the next senior officer (usually the officer commanding the company in which the Platoon is placed, who would ordinarily hold the rank of Major) to maintain sufficient oversight to ensure that the new lieutenant was not overawed by his more experienced non-commissioned officers.
86. In my view, life can be difficult for a young, inexperienced officer, who has to establish both a rapport with the more experienced soldiers in the platoon and deal with responsibility of command. It is in getting this balance right that the inexperienced officer's superior chain of command plays a crucial role.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed ... 

Dated ... *1 December 2014*