

**Witness Name: NICHOLAS JUSTIN MERCER**

**Statement no: TWO**

**Exhibits: NIL**

**Dated: 23<sup>rd</sup> February 2010**

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**SECOND STATEMENT OF NICHOLAS JUSTIN MERCER**

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I, NICHOLAS JUSTIN MERCER will state that:

1. I have been asked to provide a further statement to the Baha Musa Inquiry for the purposes of Module 3 and have been asked to consider certain questions when so doing by the solicitor to the Inquiry, Sara Carnegie, in letters dated the 14<sup>th</sup> January 2010, 19<sup>th</sup> February and 22<sup>nd</sup> February 2010. The statement should be read in conjunction with my first Rule 9 statement and exhibits dated 9<sup>th</sup> September 2009 (BMI04058).

**Memorandum dated 26<sup>th</sup> May 2003 (MOD053192)**

2. The context of this email needs to be understood. On 11<sup>th</sup> May 2003 Lt Col Forster-Knight and I had received approval from the COS, Col Marriott, for our plans for reconstruction of the courts, police and prisons. We set ourselves a 3 week target to hand over those institutions to the Iraqis and the intent was that all detainees were to be handed over to the Iraqi authorities by the 1<sup>st</sup> June 2003. At the same time, the Americans were releasing UK PWs from the TIF because they owned the facility and had determined that "active hostilities had ceased". We retained a small number of the PWs. I think Faisal Sadoom was one of those, but it may be that he is the redacted name in the document. He was still a PW when I left theatre. I sought guidance on the interrogation

of internees because I was conscious that the Geneva Conventions provided guidance on the questioning of PWs but was silent as to the interrogation of internees. As far as I can recall, no reply was ever received to this question. I comment upon ROEs in the same memorandum because at this stage we were still on warfighting ROEs which had not changed since the beginning of the conflict.

3. The remaining questions of the Inquiry letter relate to matters towards the end of June 2003.

**Draft Memorandum dated July 2003 (MOD049458)**

4. Despite the measures which were taken with FRAGO 152 (MOD017061) (20<sup>th</sup> May 2003) and including FRAGO 163 (MOD011506) (30<sup>th</sup> May 2003), I was still concerned that mistreatment of prisoners by Battle Groups may be continuing, although any allegations could not be substantiated before the SIB had completed their investigation.
5. For information on how that process worked, the normal practice following a serious incident was that the SIB would issue an interim report once they had started their investigation. In due course I would normally receive a copy of this report. Sometime before 20<sup>th</sup> May I got my first report from the SIB where a death in custody was reported and that it was being investigated. On the evening of 20<sup>th</sup> May 2003, the SIB spoke to me and informed me that they thought there were 5 or 6 more deaths which required investigation. As a result of receiving this information, I immediately issued FRAGO 152 (at 22.30) and made reference to a number of "deaths in custody" as I did not have the precise details.
6. I also spoke to Nick Ayling in the Operations Room the same evening and I recall his shock at the numbers being investigated. He then sent an email up his POLAD chain of command as I was drafting FRAGO 152 (MOD017061). We both sat opposite each other at the same desk and were drafting at the same time. I have not seen the emails he sent. I am aware that Nick Ayling says that we had these discussions after BREADBASKET however I have

checked again and BREADBASKET came to light at the end of May 2003. I also recall that when the BREADBASKET case came to light we were able to report immediately that we had already issued revised direction on the detention procedures relating to civilians (FRAGO 152 (MOD017061) and FRAGO 163 (MOD011506)). We had no idea about such abuses in theatre and it will be recalled that the matter came to light in the UK when the photographs were developed and were reproduced in a newspaper. On 30th May 2003 we issued FRAGO 163 on internment and detention procedures.

7. I would have had some input into the drafting of OP O 005/03 dated 8<sup>th</sup> June 2003 (MOD043711) and its annex, Annex M (MOD023083).
8. The draft memorandum (MOD049458) was attached to an email (or covering note) to Lieutenant General Sir Peter Wall expressing my continuing concerns about the treatment of prisoners captured by UK Forces. I am unsure as to when this was sent but I had previously thought it was in June 2003. I still had ongoing concerns about the treatment of internees/detainees. In the draft memorandum, I emphasised the need to make all Commanders aware that they could be held responsible for any mistreatment under the doctrine of Command Responsibility. The draft memorandum was designed to give General Wall a framework for his advice to Commanders. I believed that such a memorandum would help apply additional pressure on UK Forces (through Commanders) to treat prisoners properly. It was my belief that if Commanders understood that they could be held, personally, accountable for the mistreatment of prisoners by their troops this might focus their minds further on this issue. I cannot recall the response of Lieutenant General Sir Peter Wall although my handover notes refer (in paragraph 6 at MOD052579) to direction being provided by him to his Commanders. As far as I am aware he did not send out the draft memorandum but he dealt with it in his own way.
9. With regard to the deaths or serious assaults referred to in paragraphs 1-3 (MOD049458) I have been unable to establish the details of the deaths and serious injuries. I have been through the investigation records compiled by the SIB but I was unable to establish "ground truth". I believe that a statement from the SIB would be the best way to resolve this issue as they have

compiled a list of the relevant cases. At the time, I was simply relying on what I had been told by the SIB, hence FRAGO 152 and 163.

10. In my email dated 1st June 2003 (MOD031258-MOD031261), I referred to eight alleged murder/manslaughter cases involving UK Forces where post mortem facilities were required. Again, this was based on information received from the SIB.
11. The soldiers' cards mentioned at paragraph 7 (MOD049507) "Soldiers' card – guidance on detaining a suspect" were produced, I believe, by G3 in the Divisional Headquarters. I am unsure who would have been tasked with the authorship and production role but I would expect that Col Marriott or Maj Maciejewski would be better placed to say who was given this task as they had ownership of this issue as Chief G3. In paragraph 92 of my original statement I referred to the ownership of this issue as now belonging to G2/G3 ("processing of internees is now a G2 led G3 Ops responsibility"). I cannot recall the exact circumstances surrounding the production of the card although it is clear that concern about the mistreatment of prisoners was continuing right up until the end of OP TELIC 1 and we worked on this issue up until the very end. I had some input into the wording of the card, although the document produced by the Inquiry at the above reference is not mine as I would not know how to use formatting and track changes on a computer! I remember the cards were produced but I cannot remember how or whether they were issued. (I have since been advised that Lt Col Barnett decided not to distribute the cards to the incoming 3 Div troops). However, I remember the debate about plasticuffing people to vehicles and the bold capital comments at the end of the document sound like my words. The document however reiterates 1 Div's position on the treatment of prisoners which had been consistent throughout OP TELIC 1. My handover notes at paragraph 6 (MOD052579) show my understanding of the status of the cards at the time of handover to Lt Col Barnett – they had been produced and they were available and that I had hoped they would be issued to all soldiers. I was unable to recall this situation until I was shown the disclosure of Lt Col Barnett's disk. In the summer of 2009 Lt Col Barnett informed me that the disk had been found again; it had previously been handed over to the service police in 2006 and

had been deemed corrupted and unreadable by the SIB during the investigation into the death of Baha Mousa. My memory is prompted by the disclosure of the material and as such my current recollection of the soldiers' card is prompted by the re-reading of my handover notes.

12. The Coalition partner referred to in the memorandum was the Danish contingent who had been requested by 7 Armd Bde Battle Group to transfer prisoners to the BG rather than deliver them to the TIF. I do not know why the Battle Group was making this request as they had been ordered to transfer prisoners to the TIF within six hours (FRAGO 163) (MOD011506). The Danish contingent had been instructed to transfer all their prisoners directly to the TIF by the Danish Ministry of Defence and they therefore refused the request from the UK Battle Group. This was communicated to me by Maj S042 e Danish Legal Officer, she was based in the Danish AOR at AI ( 2581), see also MOD049459 at para 2.

#### **Handover notes (MOD052575)**

13. The Handover notes are the notes referred to in paragraph 95 of my first inquiry statement. I have mentioned the deaths in custody above in this supplemental statement. The reference to "FRAGOs which have already been issued" would be referring to FRAGO 152 (MOD017061), FRAGO 163 (MOD011506) and probably FRAGO 129 (MOD017089). I cannot recall the direction by Gen Wall to Commanders but would probably be able to comment further if his Commanders guidance were available and any FRAGO issued thereafter was produced.

#### **Soldiers' card (MOD049507)**

14. I have mentioned the Soldiers card above. It appears that the card was produced as a result of ongoing concerns about the treatment of prisoners in June 2003 and SIB investigations not only into the death of prisoners but also mistreatment. The card does however represent the HQ 1st (UK) Armoured

Division understanding about the treatment of prisoners. Above all, the soldiers' card reiterates, again, that prisoners are not to be hooded, assaulted, placed in stress positions or mistreated in any fashion whatsoever. It was a message we constantly put out right up until the end of our tour in Iraq (11th July 2003). This was the continual theme from March 2003 through to July 2003 and never ceased throughout Op Telic 1. It is a source of continual regret to me that prisoner abuse appears not only to have continued on this tour but also apparently on subsequent Operational Tours.

**Others documents referred to by the Inquiry**

15. **MOD053714** – minutes of a meeting held 20 Jan 03. This meeting was held at PJHQ in London and was just before I flew to Kuwait on 22nd January 2003 at 2145 hrs (MOD019821). I note my concerns raised at para 16 – 20 concern PWs. At paras 34 and 36, I raised the policy guidance on PWs and the applicability of the ECHR. It can be seen that my concerns were raised at the earliest stage. I cannot remember finality on many of the issues.
16. **MOD053157** is an email chain between myself and various other legal advisers including Neil Brown and Rachel Quick. I have written the original email but I am unaware who wrote the additional underlined track changes within my email, I suspect from the rest of the correspondence, on MOD053157, that it is Ms Quick. I was in Kuwait before we had deployed into the desert and I believe it must be late January 2003. My concerns are within the email and at least 10 concerns are about PWs and occupation.
17. **MOD053150** I have no comments about this document.
18. **MOD054315** I have no comments but the document appears to be the draft minutes of the meeting which are then seen at MOD053714.
19. **MOD052186** Report on PW Handling During Op Telic. I have been referred to this document and I am now aware that David Christie states that I tasked him with drafting the document and that I am responsible for the underline changes. I do not recognise this document and have no recollection of it. It appears to be a document which is “work in progress” and from reading the

document it is clearly not my wording – for example I do not use the terms “iaw” for “in accordance with”. Nor would I put “Cmdr Legal 1 UK Div” as an abbreviation – I would use “Comd Legal 1 UK Div” as Cmdr is a standard service abbreviation for the naval rank of Commander and Comd is the standard service abbreviation for Commander. Nor would I have been so diplomatic in relation to some of the “bugbears” and conflicts which I personally had had with PJHQ over ECHR compatibility etc. These may be deemed to be small points but it is clear that I am not the author. I cannot assist as to who is responsible for the changes and amendments in this document. I am aware that David Christie did report to NCC directly on occasions, this may be one such occasion.

20. **MOD052196** This document appears to be page 11 of the document commencing at MOD052186 discussed above. Again I cannot definitely say who the author is but, as I said previously, I do not remember seeing this document. I do not know whether a final version was produced or whether it was distributed. The account of events at the JFIT does not however accord with mine. I cannot say whether J2X approved hooding but it was certainly not discussed with me nor would I have approved such practice. I do not know how such approval, if given, was communicated either. All I can re-iterate is that I saw it occurring at the JFIT and was extremely angry about it. Not only were the PW hooded and in stress positions but it later came to light (through the ICRC) [REDACTED]. Some had cement bags on their heads. It was also reported [REDACTED] that some had been assaulted. I am sure this will have all have been reported by the NCC to PJHQ and/or Ministers after the meeting. In addition, at no time before the meeting with ICRC was the so called “security” issue raised. There is no mention of it in my complaint to Gen Brims (which is almost a contemporaneous note) and I would have referred to it in my memo if the interrogator had told me that the PWs were hooded and in stress positions “for their own safety”. He didn’t. However, he did tell me it was part of UK Doctrine. Furthermore, the security explanation seems strange given the fact that so many PWs were placed so close together that they could have easily spoken to each other giving away their identity at any time. I was angered by this explanation of “security” at the time because it was barely credible and I was also prevented from expressing my views at the meeting even though they accorded with the ICRC. It was absolutely clear to me that prisoners were being intimidated prior to interrogation. Some say I had entrenched views about the illegality of hooding and I would agree with that assessment. Even if it was the PJHQ view (that hooding could be used for limited purposes) it was rejected by HQ 1<sup>st</sup> (UK) Armoured Division who banned all hooding and stress positions. I consider both to be contrary to GC III.

In addition to the above, SO02, when the matter was discussed at the Divisional Headquarters (and was banned by an oral order), commented to me that hooding was part of British Military Doctrine for interrogation. He showed me the document containing the doctrine after the issue had passed but I regret that I did not take a note of it at the time. I believe he mentions this in his statement to the SIB. When I was questioned at the Payne and others court martial I was unable to recall the name of the document. After the trial I was contacted by Martin Hemmings who tried to suggest that I was confused in my evidence on this point. As a result, I contacted SO02 and asked him if he recalled showing me the document and, if so, where could a copy of the document be obtained. He stated that he had shown me the document and that it was held at Chicksands. However, he could not recall the name of the document. Although some may say that J2X did approve such a practice, I am sure that this an illegal practice and that once cognisant of it, it was banned by an oral order within the 1 Div AO. FRAGO 152 merely confirms this position as I was increasingly apprehensive that people might try to circumvent it.

21. I am not of the opinion that that there was a lack of guidance as to what is acceptable in terms of UK interrogation and International Law under GC III within HQ 1 UK Div. GC III is perfectly clear both in relation to violence and intimidation to PWs and questioning. However hooding was not banned by PJHQ until after Baha Mousa's death, and emails in May 2004 show that there was an information gap within the MOD about the practice of hooding. It is now clear from correspondence in 1999 (MOD028352, MOD028342) that ALS2 (Lt Col Ridge) had given advice to JSIO about the practice of hoods amongst other treatment of PWs and others in interrogation situations other than general war in her advice dated 25<sup>th</sup> November 1999. Despite my requesting guidance from PJHQ on the subject of PWs from as early as 20<sup>th</sup> January 2003 none was forthcoming. I have never seen the HUMINT direction from CJO (Gen Fry) to Comd NCC (Gen Burridge) (MOD049310) until now.

#### STATEMENT OF TRUTH

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

Signed: 

Dated: 24 February 2010