

## IN THE BAHA MOUSA PUBLIC INQUIRY

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### FURTHER SUBMISSION ON BEHALF OF NICHOLAS MERCER

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1. These further submissions on behalf of Lt Col Mercer should be read with the closing submissions made on his behalf contained in that document<sup>1</sup>.
2. FRAGO 163<sup>2</sup> was drafted and issued on 30<sup>th</sup> May having some input from Mercer<sup>3</sup>. The non-revised document<sup>4</sup> is significantly different in lack of detail.
3. A comparison of the two documents shows that not only was Mercer involved in including detail but others were also (for example a comparison of the deliberate lift operation paragraph, para 5c, from its content must have had G3 input). The inclusion of the sentence "*under no circumstances may a suspect be interrogated until he has been processed by the TIF*"<sup>5</sup> means just that and needs to be placed in the context of the fact that the rest of the FRAGO requires processing by the RMP within 1-2 hours of arrest by the BG and then return to them for transportation to the TIF within 6 hours of arrest save for silent hours when the TIF was shut, information which must have

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<sup>1</sup> SUB000081-SUB000194, in particular paras 188 SUB000104 – 189 SUB000105

<sup>2</sup> MOD0017179

<sup>3</sup> BMI 68/88/12 and BMI 68/88/183

<sup>4</sup> MOD011506

<sup>5</sup> MOD017181

come from the TIF and through G2/J2 as it is detail not placed in the draft document<sup>6</sup>.

4. It is submitted that at no stage was there supposed to be anything more than a filter by the RMP suggested by this FRAGO. At all times it can be seen that Mercer was trying to “*design out abuse*”<sup>7</sup> and “*lessening time for assault*”<sup>8</sup>. Mercer did not consider that any questioning other than the filter would take place outwith the TIF<sup>9</sup>. A detailed view needs to be taken of the definitions and usage **at the time, not in hindsight**, of interrogation and tactical questioning. He considered<sup>10</sup> that there was “*no particular difference*” between interrogation and “*questioning*” and that tactical questioning fell under the umbrella of “interrogation”<sup>11</sup>, not least because FRAGO 163 had to be read in the light of FRAGO 152<sup>12</sup>.
5. FRAGO 163, in its published form, envisaged that the Iraqi civilian legal organisations would be responsible for the detention of criminals and that Coalition forces would continue to be responsible for internment of those that present a threat to security of coalition forces. Furthermore it stated that Coalition Forces would retain a responsibility for law and order. It ordered

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<sup>6</sup> MOD011506

<sup>7</sup> BMI 68/85/8

<sup>8</sup> BMI 68/85/12

<sup>9</sup> BMI 68/86/11

<sup>10</sup> BMI 68/93

<sup>11</sup> BMI 68/94/1

<sup>12</sup> BMI 68/94/5

that those temporarily detained by the UK **had** to be handed to the RMP within one to two hours and that any later delivery would be only in exceptional circumstances. The RMP would then be responsible for the initial processing before releasing back to the arresting BG for onward movement to the TIF and that all internees were to be delivered to the TIF within 6 hours of arrest when practicable. At night when the TIF was shut<sup>13</sup>, between 2100 – 0800D, the suspect was to be returned to the BG care and “*the BG RP staff is responsible for the care of suspects when in BG custody*”.

6. As such the initial processing by police officers was to be achieved within 1 hour of arrest and then within 6 hours of arrest the detainee was to be at the TIF in the care of the Intelligence community. Any person for whom the soldier could not decide the category was to be detained and sent to the RMP and legal advice sought. To ensure that sufficient resources were available to a BG a minimum of 4 hours notice of deliberate lift operations was required and a reminder of the serious nature of interning civilian under International Law was given.

7. Mercer<sup>14</sup> gives his view of the situation “*detain, hand to the police, delivery to TIF, questioning at the TIF.*” This was to include “*generic questioning*” which covered everything including tactical questioning as the trained tactical questioners were at the TIF<sup>15</sup>. An undated document entitled “*Internees*”<sup>16</sup>

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<sup>13</sup> MOD017180 para 5b

<sup>14</sup> BMI 68/86/21

<sup>15</sup> BMI 68/87/2 – BMI 68/87/15

<sup>16</sup> MOD011514

was also produced by Mercer and it can be assumed he says, because of the detail contained therein, that this was a discussion document within the Divisional Headquarters.

8. It is submitted that the apparent lack of official clarity in the definitions of interrogation and tactical questioning follow the similar discussion concerning the matter of blindfolding and hooding, which contain a similar lack of clarity; for example in JSP 383<sup>17</sup> and the ICRC document *Fight it Right*<sup>18</sup>, both documents talk of “questioning” only to establish identity and that if “a prisoner of war is willing to provide other information and there is no reason why the capturing power should not ask questions. Since no coercion may be used, this is best done by skilled, well-briefed interrogators who may be able to build a rapport with the prisoner of war.” It goes on to say that “questioning must be done in a language that the prisoner of war understands.”
9. As stated in evidence Mercer, not unsurprisingly, meant for FRAGO 152<sup>19</sup> which had already been issued on 20<sup>th</sup> May 2003 and FRAGO 163 to be read in accordance and in continuation of each other.
10. Despite the obvious difference in opinion concerning prisoner handling in particular between S002, the J2X, and Mercer, from the incident at the TIF in late March/April 2003<sup>20</sup>, the then Maj S Wilson<sup>21</sup> would probably have gone to

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<sup>17</sup> MOD036232

<sup>18</sup> BMI08148

<sup>19</sup> MOD017061

<sup>20</sup> MOD011451

<sup>21</sup> BMI 71/71/1

a legal officer other than Lt Col Mercer for the legal input into FRAGO 29 but whatever the difference of opinion, at all times Mercer attempted to engage the G2 Intelligence Branch, as far as was possible in the Divisional Headquarters with respect to prisoner handling. It must be remembered that G2, J2, Legal and Provost were all involved in prisoner handling and detention. Legal and Provost, by issuing their FRAGOs, were attempting to lessen the time between the point of capture and the removal to the TIF so that the only questioning done at the Battle Group level was a filter, using the analogy of the police officer stopping a potential suspect on the streets with a “*reasonable suspicion*” to ascertain identity and the Article 17 GC requirements of name, rank, number, date of birth.

11. Mercer does not accept the oral evidence of Capt Williamson<sup>22</sup> which gives the impression that at the time, in theatre, there was such a stark distinction between tactical questioning and interrogation and Mercer says that it was his intention to prohibit interrogation prohibited anything more than the RMP filter. This is supported by the timelines and the return to the “*care of the BG*” for transportation to the TIF. The FRAGO does not permit tactical questioning, it allows for handing over to the RMP within 1-2 hours of arrest and return to the BG for transportation only. It specifically prohibits “*interrogation*” which the Inquiry is aware Mercer considers was to include “*generic questioning*”.

12. The answer to the hypothetical questioning of Maj Fraser<sup>23</sup> is, it is submitted, very much in hindsight and that his use of the words “limited tactical

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<sup>22</sup> BMI 62/133/3

<sup>23</sup> BMI 63/72/23

questioning<sup>24</sup> shows no more or no less than the filter envisaged by FRAGO 163 and the RMP then attached to the BG. The “*heavy distinction between tactical questioning and interrogation*”<sup>25</sup> was not so “heavy” in theatre at the time.

13. Mercer did, at the time, consider that a filter by the RMP was required to send an internee to the TIF and that certainly on a “*planned lift operation*”, no more than confirming identity before removing the detained person to the TIF. This was confirmed<sup>24</sup> in part by the then Maj Waters, a general G2 Staff Officer<sup>26</sup>, when he said that “*you need to identify, at the very least, their name, but you know, there are other things that you would wish to know, I suspect.*” He was aware, in oral evidence, of the difference between “*tactical questioning ..... very quickly to work out if they have anything of substance that can be passed on and, if you deem that there may be something more, you would mark them up for interrogation*”<sup>27</sup> and he supposed that there “*might be a risk in relation to this order that those at battlegroup level would understand this to prohibit interrogation before the TIF, but not to prohibit tactical questioning.*”<sup>28</sup> This is all well and good in hindsight but the timelines imposed by FRAGO 163 and the lack of trained tactical questioners at BG level at this stage in Op Telic 1 should have rendered anything other than filtering by the RMP almost impossible at the BG level.

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<sup>24</sup> BMI 63/73/4

<sup>25</sup> BMI 63/73/4

<sup>26</sup> BMI 71/121/17

<sup>27</sup> BMI 71/122/5

<sup>28</sup> BMI 71/122/16

14. The oral evidence of S015, an Intelligence Corps officer<sup>29</sup>, stated that a general staff officer should have been aware of the “staff process required of tactical questioning” but this comment and knowledge goes counter to the evidence of Maj Waters<sup>30</sup> and Maj Eaton<sup>31</sup> both general staff officers. What is pertinent is that S015 was fully aware that although the written FRAGO 163 purported on the face of the document to prohibit “*interrogation*” prior to the TIF<sup>32</sup>, he was fully aware that the author’s intention was to prohibit all kinds of questioning prior to arrival at the TIF<sup>33</sup>. In oral evidence he does go on to state that tactical questioning and interrogation are two separate things<sup>34</sup> however it is submitted that the context and the definition at the time in theatre need to be considered, and not the subsequent clarity of the definitions following their revision after the end of the war fighting operation. Perhaps it can be said that there is a difference in understanding in these terms between intelligence trained and Intelligence Corps officers and non-intelligence trained officers.

15. It is apparent from the Module 4 evidence and the closing submissions of Module 4 that there is now supposed to be a definite separation of tactical questioning and interrogation; however it is submitted that this was not apparent or obvious or indeed a separation in reality in the case of

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<sup>29</sup> BMI 84/124/16

<sup>30</sup> BMI 71

<sup>31</sup> BMI 98

<sup>32</sup> BMI 84/126/11

<sup>33</sup> BMI 84/126/17

<sup>34</sup> BMI 84/126/22

deployment on Op Telic 1, either on the ground or even in the training of Tactical Questioners and Interrogators. It is also apparent that there is supposed now to be a distinct separation in theory, if not in practice.

16. It is submitted that there are occasions when basic questioning is permitted and as such Article 17 GC (and in the civilian context PACE 84) allow for a filter and initial screening on the street or before the Theatre Internment Facility. This is what Mercer envisaged and he tried to keep the time limit before the TIF to a minimum. There have been massive changes since Op Telic 1 and May 2003, for example para 14<sup>35</sup> at the MOD Module 4 submissions; a lawyer is now in place at Chicksands and legal audits have become the norm there and in operational theatres (para 15 onwards<sup>36</sup>).

Tactical questioning is now considered as first line questioning as defined “*TQ operations are conducted on the ground, whereas I (Interrogation) operations are conducted from the centre (there would not be a controller in the context of “TQ”.)*”<sup>37</sup>

17. It is now obvious to all that tactical questioning is time sensitive and that “*The TQer’s aim is to obtain reliable information from his subject, but this information will be of no use unless it is obtained within a certain time.*”<sup>38</sup>.

18. However there may still be room for lack of clarity, from the document named “*Interrogation Branch – CPERS handling within the TQ Process*”<sup>39</sup> there are

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<sup>35</sup> MIV012648

<sup>36</sup> MIV012648

<sup>37</sup> MIV012260

<sup>38</sup> MIV010126



no comments concerning tactical questioning and in “*Interrogation Branch introductory talk*”<sup>40</sup> and in “*Operational Sequence & Prisoner handling within the TQ Chain*”<sup>41</sup> there is still inclusion of both aspects together. Again, documents<sup>42</sup> “*Interrogation Paperwork (TQ and Interrogation Documentation)*”; the TQ policy<sup>43</sup> along with S069 ‘s statement<sup>44</sup>, the TQ policies dated 4<sup>th</sup> October 2010<sup>45</sup> and the interrogation policy<sup>46</sup> show that the two definitions are still used interchangeably even within the Intelligence community.

19. What has changed is that it now appears that tactical questioning is defined and used as “*Stop, search and detention on operations*”<sup>47</sup> and in addition<sup>48</sup> shows “*identity, recent movements, knowledge of recent significant incidents*” and as such it can be shown that the definition and usage must yet be clarified more clearly, even now (these documents date from 2010).

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<sup>39</sup> MIV016017

<sup>40</sup> MIV010483

<sup>41</sup> MIV010424

<sup>42</sup> MIV010413 and MIV010132

<sup>43</sup> MIV012712

<sup>44</sup> MIV012733

<sup>45</sup> MIV012545

<sup>46</sup> MIV012577

<sup>47</sup> MIV012419 – 34

<sup>48</sup> MIV012423

20. In “KAF SO31 Tactical Questioning and Interrogation”<sup>49</sup> a description is given of tactical questioning as “*the obtaining of information from captured persons, the value of which would deteriorate or be lost altogether if the questioning was delayed until a trained interrogator could be made available*” whereas “*interrogation is the systematic, longer term questioning of a selected individual by a trained and qualified interrogator.*” It is submitted that this was not well known nor indeed defined on Op Telic 1 in 2003.

21. In 2003, the tactical questioning and interrogation training was undertaken together, it having previously been left predominantly to reservists and it is submitted that it was viewed as a “Cinderella” process and seen by many as a “black art”; only as the conflict commenced and recognition of the need increased did it emerge from the shadows and as such FRAGO 163 prohibiting “*interrogation*” until after processing at the TIF should be seen in this light. The RMP timelines and the subsequent return to the BG by the RMP for transportation to the TIF should have and did prohibit anything other than a filter. In addition tactical questioning was not at the time as well defined and as well understood as it appears to be now.

22. Mercer’s total evidence given by means of his Rule 9 statements<sup>50</sup>, his oral evidence at Day 68<sup>51</sup> and in particular the oral evidence concerning FRAGO 152, FRAGO 163 and the document entitled “*Internees*”<sup>52</sup> remain valid and

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<sup>49</sup> MIV012628

<sup>50</sup> BMI04058 & BMI06895

<sup>51</sup> BMI 68

<sup>52</sup> BMI 68/81/2 – BMI 68/94/16

cogent of his knowledge at the time in theatre in both context and detail. At all stages of his interaction with detainees and prisoner handling he was attempting to and demonstrating that he was determined to achieve the highest practicable standards of prisoner handling.

31<sup>st</sup> May 2011

Fiona Edington