

THE QUEEN

on the application of  
(1) CHONG NYOK KEYU

(in his own right, and as the personal representative of THAM YONG  
deceased)

(2) LOH AH CHOI

(3) LIM KOK

(4) WOUI KUM THAI

Claimants

-and-

(1) SECRETARY OF STATE FOR FOREIGN  
& COMMONWEALTH AFFAIRS

(2) SECRETARY OF STATE FOR DEFENCE

Defendants

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**CLAIMANTS' SKELETON ARGUMENT**  
**For hearing: Tuesday 8 May 2012 (2 days)**

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TIME ESTIMATE:

1. Hearing: 2 days
2. Pre-reading: 1-2 days

BUNDLES:

- Trial Bundle Vol.1 (V1): tabs A (V1/A) to F (V1/F)
- Trial Bundle Vol.2 (V2): tabs G (V2/G) to U (V2/U)
- Authorities Bundles (A1, A2)

SUGGESTED PRE- READING/VIEWING:

1. The skeletons
2. Amended Grounds for Judicial Review (V1/A/76-99)
3. Amended Grounds of Resistance (V1/A/101-118)
4. WS for Claimants (V1/C/23-52) and Defendants (1/C/78-81)
5. DVD of BBC '*In Cold Blood*' (in envelope at V2/N)
6. *Slaughter & Deception at Batang Kali ("SD")* (book served separately)
7. LBC 3.9.10 [V1/E/304-349]
8. Submission to Ministers #1 22.11.10 (V1/B/1-11)
9. Decision letter #1 29.11.10 (V1/B/12-29)
10. Submission to Ministers #2 24.10.11 (V1/B/30-31)
11. Decision letter #2 4.11.11 (V1/B/37-39)

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ANNEX 1: Chronology

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## 1. INTRODUCTION

- 1.1. This case concerns the killing of 24 unarmed civilians by British soldiers from the Scots Guards at Batang Kali in Malaya on 11 and 12 December 1948. The Claimants are both survivors and the close relatives of the victims of the event. They are supported by the Action Group Condemning the Batang Kali Massacre, a campaign in Malaysia that encompasses no fewer than 568 separate civil society organisations. As that involvement indicates, the events in Batang Kali stand as a hugely significant and unresolved instance of human rights abuse in Malaysian history. By reason of the circumstances, the stigmatizing official position which was maintained and the investigations undertaken and frustrated, it stands as a blot on British colonisation and decolonisation. Attempts to ensure accountability, and that the matter receives the degree of scrutiny, by judicial or other independent bodies, that a mass killing of unarmed persons on this scale demands, have been obstructed by the British, when sought, over the last 63 years.
- 1.2. This is notwithstanding that soldiers, when they came to be formally and properly interviewed, reported that the killings were in the nature of an intentional extra-judicial execution. The majority interviewed under caution by the police, admitted that the killings amounted to murder. They have properly been called a slaughter, or massacre. On any view (even the official position), grossly unreasonable force was used: a crime at common law and a war crime.
- 1.3. The official account of the massacre was that the victims were arrested as 'bandits'. They were shot because to do so was necessary to prevent their escape. This account was formalised and published, and has been steadfastly maintained over the decades, and relied upon during the course of this litigation, notwithstanding the admissions to murder in 1970 and the investigations in England in 1970 and in Malaysia in 1993-1996 being aborted (without any formal interview of the officers commanding the patrol), in circumstances indicative of political interference.
- 1.4. The central question for the Court is whether the Defendants have acted lawfully in refusing, in the circumstances of this case to order an independent inquiry or investigation into the killings.
- 1.5. This case is about truth and reconciliation. It concerns a continuing injustice of deeply troubling proportions. It is not a case about establishing 'civil liability', nor about criminal prosecutions, for the killings. It is a case which engages standards of public law and human rights law, applied by the domestic public law Court.
- 1.6. What is sought is simply that the evidence relating to the Batang Kali incident be examined by an independent authority. The claimants seek recognition and an acknowledgement that the killings were unjustified. They seek the stigma and dishonour attached to the victims by reason of the official account and its maintenance to be removed. They want the question of an apology and reparations to be addressed against a proper starting-point; one which has acknowledged the

truth of what happened and the untruth of the official investigations and explanations which has served for so long to cover it up.

- 1.7. The Courts will normally deprecate unwieldy 'skeleton arguments', and practitioners do well to try hard to avoid them. But there are cases where the context and content of the materials requires careful navigation, and where industry in the drafting of a written argument can be a virtue rather than a vice. Especially where the time-frame for oral argument is necessarily limited. The Claimants' representatives have invested in producing for the Court what will be a very detailed written argument. That is, if nothing else, well-intentioned given the nature of this case and this hearing.
- 1.8. In order to further assist there is annexed to these submissions: Annex 1 (a Chronology); and Annex 2 (a list of *dramatis personae*).

## 2. THE FACTUAL CONTEXT <sup>1</sup>

### Overview

- 2.1. Context is everything.
- 2.2. In examining with care the factual context, the evidence will be addressed in sections dealing with:
  - (a) *The period prior to 1948*: This deals with the origins of British rule prior to 1948 leading to the establishment of the protectorate status of Malaya by virtue of the Treaty of Selangor. This is relevant to the Defendants' suggestion that legal responsibility for the Batang Kali killings did not fall upon the UK Government but upon the Sultan of Selangor.
  - (b) *1948-1949*: This deals with the establishment of the state of emergency in Malaya in July 1948; the killings on 11 and 12 December 1948; the 'investigation' and release of information concerning the event on 13 December 1948, 1 January 1949 and 3 January 1949; the subsequent change in the Emergency Regulations; and the official account to Parliament on 26 January 1949 (repeatedly affirmed and never since retracted, even now). This shows the deeply troubling incident and the way it was covered up.
  - (c) *1970*: This deals with the information published by *The People* newspaper in February 1970; the subsequent Metropolitan Police investigation; the decision to end the investigation; and the aftermath of that decision. This section demonstrates that 6 out of the known 11 members of the patrol told a story of murders having occurred, that the 1948 'investigation' and official account was known to be unsustainable, and that the British authorities were aware of material Malaysian witnesses who further undermined the escape narrative. It also deals with the investigation's curtailment in circumstances indicative of political interference.
  - (d) *1992*: This deals with the investigation of the BBC programme *Inside Story* in the documentary *In Cold Blood*, aired in September 1992, and the official response to it in this country and Malaysia. The programme produced fresh evidence and recorded that although the soldiers who gave statements detailing murder refused to appear, they confirmed their accounts to *Inside Story*. This explains the context in which a petition was first made to the Queen by the Batang Kali survivors and relatives in 1993 and the reason why further consideration was given to the massacre in the United Kingdom and Malaysia.
  - (e) *1993-1996*: This deals with the actions in this country of the Crown Prosecution Service and in Malaysia by the Royal Malaysian Police, indicating the

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<sup>1</sup> This section is based on the available materials, including the book by Ian Ward and Norma Miraflor, *Slaughter and Deception at Batang Kali* (2008) ("**SD**") (which provides clearer versions of some original documents which are difficult to read). Much of the material was reviewed by Counsel instructed by the Defendants, Brendan McGurk (V1/E/108 and 200-223).

extent to which the matter was reflected upon afresh and the Malaysian inquiry produced significant new evidence. At the same time, the British High Commission and the Foreign Office engaged in a protracted and deliberate strategy of procrastination and inertia. The petition to the Queen was never answered and the request by the Malaysian police for Interpol assistance was not properly addressed. The Malaysian investigation effectively ground to a halt and was officially concluded in 2004. The relevance of this section is that it demonstrates that the killings again escaped judicial or other appropriately independent scrutiny in circumstances indicative of political interference.

(f) *2008 to Present*: This deals with the immediate context for these proceedings; the second petition to the Queen submitted in March 2008; its short one paragraph refusal in January 2009; the first letter before action served by the Claimants' solicitors in April 2009; the Defendants' decision the same month to fully reconsider matters; the provisional refusal letter in August 2009; the second letter before action in September 2010; the November 2010 decision not to hold an inquiry into or otherwise investigate the incident; and the November 2011 decision not to hold an inquiry into subsequent investigations. Herein lies the nub: the question whether the Defendants, having taken the step of considering whether to announce an independent inquiry, took an approach that was unjustified and unlawful.

## **A. Prior to 1948**

### **The village of Batang Kali**

2.3. Batang Kali is south of the main town of Kuala Kubu Bahru in the district of Ulu Selangor, approximately 45 miles north-west of Kuala Lumpur,<sup>2</sup> all within the historic Malay Kingdom of Selangor, which by 1948 had become a British protectorate as part of the Federation of Malaya. Today it is part of Malaysia. As to the village and nearby towns, see further §§2.20 below.

### **Origin of British rule**

2.4. From the 18<sup>th</sup> century onwards the eleven separate territories on the Malaysian Peninsular in Southeast Asia, of which Selangor is one, came under the control of the British Empire. The first British territories were known as the Straits Settlements, whose establishment was followed by the remaining nine Malay kingdoms becoming British protectorates by the mid-20<sup>th</sup> century. In the case of some, including Selangor, the arrangement prior to the start of the Second World War involved an exchange of letters whereby the Sultan in 1875 agreed to receive a British resident whose advice on all matters he would follow.<sup>3</sup> Between 1942 and 1945 the

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<sup>2</sup> For historic maps of the area, see SD p.6.

<sup>3</sup> The Defendants asserted in their letter of 29 November 2010 [V1/B/15] that Selangor became a Protected State in 1874. This is not correct. It is recorded in *A Collection of Treaties and Other Documents Affecting the States of Malaysia 1761-1932* at p. 445 that the Governor at that time, Sir Andrew Clarke, concluded a treaty with certain Perak chiefs in 1874 (the 'Pangkor Treaty'). In relation to Selangor: '[he] refrained from drawing up a new treaty defining the British position in Selangor' (Ibid, p. 447). What did happen in 1875 was that the Sultan of Selangor,

areas under British control were occupied by Japan, during which time communist-led Malayan Peoples' Anti-Japanese Army fought in conjunction with British forces to liberate the territory. British military administration was established by September 1945. It was not until the Treaty of McMichael, signed on 24 October 1945 that Selangor became a Protectorate for the first time.<sup>4</sup> The territories, including Selangor, were first unified as the Malayan Union in 1946. Malaya was restructured as the Federation of Malaya in 1948.

- 2.5. The Selangor Treaty of 21 January 1948 between the British Government and the Sultan of Selangor was one of several almost identical treaties that were executed with the nine Malay States on the same day as the Federation of Malaya Agreement was concluded. In accordance with the Treaty, the Crown enjoyed exclusive jurisdiction over external affairs and defence. Article 3(1) provides:

*“His Majesty shall have complete control of the defence and of all the external affairs of the State of Selangor and His Majesty undertakes to protect the Government and State of Selangor and all its dependencies from external hostile attacks and for this and other similar purposes His Majesty’s Forces and persons authorized by or on behalf of His Majesty’s Government shall at all times be allowed free access to the State of Selangor and to employ all necessary means of opposing such attacks”.*

- 2.6. The Sultan of Selangor also remained bound to accept the advice of a British Adviser ‘on all matters connected with the government of the State other than matters relating to the Muslim Religion and the Custom of the Malays’.<sup>5</sup>
- 2.7. The Federation of Malaya Agreement entered into force of 1 February 1948 (the Federation Agreement). The Federation Agreement established the office of a High Commissioner to be appointed by His Majesty.<sup>6</sup> The High Commissioner was charged with “the prevention of any grave menace to the peace” in the Federation or within any of the Malay States.<sup>7</sup> Selangor was listed as a Protected State in the British Protectorates, Protected States and Protected Persons Order in Council 1949 (No. 140).

## **B. 1948-1949**

### **The Malayan Emergency**

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by an exchange of letters, agreed to receive a British Resident who would assist him in running the government. The effect of this arrangement has been described in the following terms: “British residents assumed office in these states with the immediate result that these states were since then actually administered by them. The rulers, who before wielded unlimited power, could act only through the residents, who in turn acted under instructions from the British government” (G. Glos, ‘The Administrative Structure and Legal System of Malaya’ (1965) *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 100, 113)

<sup>4</sup> It was recorded in the preamble: ‘whereas it is expedient to provide for the constitutional development of the Malay States under the protection of His Majesty and for the future government of the State of Selangor’. The first article gave the Untied Kingdom plenary powers in respect of Selangor: ‘His Highness the Sultan agrees that His Majesty shall have full power and jurisdiction within the State of Selangor’.

<sup>5</sup> Selangor Treaty 1948, Art. 4

<sup>6</sup> Federation Agreement, Art. 7

<sup>7</sup> Federation Agreement, Art. 19(1)



### *Proclamation and legal framework*

- 2.8. In 1948 British troops, including battalions of the Scots Guards, were deployed to Malaya to assist the civilian authorities in maintaining public order during a communist uprising known as the 'Malayan Emergency'. An Emergency Regulations Ordinance was promulgated by the Legislative Council of the Federation of Malaya on 7 July 1948. It enabled the High Commissioner to proclaim that a state of emergency existed (section 3) and to issue regulations (section 4). An emergency was proclaimed on 12 July 1948 and published in the Official Gazette on the following day. The Emergency Regulations in force at the time of the Batang Kali killings were published on 15 July 1948.
- 2.9. In addition to the Emergency Regulations (for the purposes of which they were deputized as police officers), the actions of British troops were subject to the rule of law. Relevant legal standards emanated from the common law, including customary international law, UK statutes such as the Offences Against the Person Act 1861 and other legal instruments such as the Kings Regulations. Relevant standards were also found in manuals such as the Manual of Military Law 1939; Notes on Imperial Policing; and Duties in Aid of the Civil Power. Although deputised as police officers, there is no mistaking under whose control and responsibility the soldiers came. The King's Regulations for the Army 1940 (Section 1, § 28) confirm that when His Majesty's forces are serving in a colony, protectorate or mandated territory, they do not serve under the command of the governor as the supreme authority representing His Majesty in the respective colony, protectorate or mandated territory:

*"The Governor of a colony, protectorate or mandated territory is the single and supreme authority responsible to, and representative of, His Majesty. He is, by virtue of his Commission and Letters Patent, entitled to the obedience and assistance of all military and civil officers, but, although bearing the title of Captain-General or Commander-in-Chief, and although he may be a military officer, senior in rank to the O.C. commanding the forces, he is not, except on special appointment from His Majesty, invested with the command of His Majesty's forces in the colony, protectorate or mandated territory. He is not, therefore, entitled to take the immediate direction of any military operations or, except in cases of urgent necessity, to communicate officially with subordinate military officers, without the concurrence of the O.C. the forces, to whom any such exceptional communication must be immediately notified."*

- 2.10. Regulation 36 of the Emergency Regulations suspended the obligation to hold an inquest where the deceased: *"had been killed as a result of operations for suppressing disturbances by the police or His Majesty's Naval, Military or Air Forces"*. That provision deliberately sought to avoid judicial scrutiny which would otherwise take place, and left the question of investigation into military killings squarely in the hands of the military and police themselves.

### *The military and political context in late 1948*

- 2.11. Though some were professional soldiers, many of the Scots Guards deployed were young men on National Service. Their backgrounds and training are discussed in detail in Dr Christi Siver's article *The Other Forgotten War*.<sup>8</sup> The early stages of the Emergency prior to events at Batang Kali have also been documented by Anthony Short, who wrote the official history of the Malayan Campaign, in his article *The Malayan Emergency and the Batang Kali Incident* [2010] XLI 3 Asian Affairs 337.<sup>9</sup>
- 2.12. From such commentaries as these, it can be seen that:
- (a) Although some British troops had extensive experience in jungle warfare, most recently in Burma, many of those soldiers left the army before units deployed to Malaya. Their experience had not been translated into operating procedure, and conscript troops in the early days of the Malayan Emergency underwent limited jungle training before being thrust into operations.<sup>10</sup>
  - (b) The plan of action for dealing with insurgents (so-called "bandits"), especially in the early part of the emergency was (to put it mildly) optimistic, based on wars gone by and awaited the development of a counter-insurgency model, as developed by Riddel Hart and others that would come later in the campaign. General Boucher, the newly appointed General Officer Commanding (GOC), announced that enemy formations would be broken up by air attacks and their units would be rooted out from the jungle by British troops.<sup>11</sup>
  - (c) The Scots Guards had few leaders (80 officers in 30 positions between 1948 and 1951). Thus it was that the Batang Kali patrol was led by two non-commissioned officers, while the Platoon commander (Captain Ramsay) remained elsewhere despite the fact that the patrol held its prisoners, including women and children, in the village over night.<sup>12</sup>
  - (d) In the early period of the Emergency, there were documented concerns as to incidents of unjustifiable shooting of civilians and the mass destruction of property. The Chief Police Officer in Johore wrote a memo querying the legal justification under the normal laws or the Emergency for shooting people unless the incident occurred in a 'protected place' (see below) or during curfew hours. He was particularly concerned about "the possibility that suspects were being shot while attempting to escape", that there were cases where "a small number of rounds of ammunition were planted on the bodies afterwards to justify the shootings", and that "some major scandal might result".<sup>13</sup>

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<sup>8</sup> V2/U/1-55

<sup>9</sup> V2/U/56-73. Other references in this section come from Christopher Bayly and Tim Harper, *Forgotten Wars, The End of Britain's Empire in Asia*, (2007), Ch. 10, pp 407-456

<sup>10</sup> Siver V2/U/5 and 16-17

<sup>11</sup> Short V2/U/57-58.

<sup>12</sup> Siver V2/U/32-35

<sup>13</sup> Short V2/U/61.

(e) In Kerchau in Selangor on 2 November 1948, 61 houses were burned and 400 people were made homeless;<sup>14</sup> there was a cycle of terror and counter-terror.

(f) One recently arrived army colonel, according to a surviving police report from Perak, said that “he had been seven days in Malaya and is fully prepared to deal with the present situation which he considers can only be met with fire and slaughter”, a phrase which did not come to reflect general operating procedure but which has strong resonance for Batang Kali.<sup>15</sup>

(g) Enquiries made with regiments by the Metropolitan police in 1970 confirmed that this was the military mindset: “that it was accepted as a military necessity to burn down villages of bandit sympathisers and to remove the inhabitants to other areas where control could be more easily exercised”.<sup>16</sup>

(h) Despite reported clashes of all British battalions with insurgents, including destruction of property and sometimes civilian casualties, Batang Kali stands out. Both the casualty figures in Batang Kali and the accusations of massacre were never repeated during the rest of the armed conflict; either in the pro-Government press, the Chinese press, official regimental histories, soldiers’ oral histories, propaganda distributed by pro-Communist publishers, or the secondary literature.<sup>17</sup> During the 1993 Malaysian police investigation, a senior Malaysian police officer, Lim Cheng Leng, would confirm the same.<sup>18</sup> Batang Kali was seriously striking. It was the scandal predicted by the Johore Chief Police Officer. But for the fact, that is, that the truth never saw the light of day.

2.13. There were other important features of the context. First, given Malaya’s contribution to Britain’s post-war economy, the geo-political concerns that underpinned the emergency must have been extraordinary.<sup>19</sup> To that end, during this very difficult first period of the conflict the tendency – deliberate or otherwise - to avoid embarrassing this part of colonial rule and counter-insurgency must have been high. That can be seen below in the manner in which the High Commission, in the aftermath of the killings, robustly warned the Colonial Office that British forces could not be subjected to undue ‘rule of law’ considerations. Thereafter, scrutiny from London was minimal.

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<sup>14</sup> Short V2/U/59-62 and Bayly and Harper, *Forgotten Wars*, p 449

<sup>15</sup> Short V2/U/62.

<sup>16</sup> V2/M/14 § 59

<sup>17</sup> Siver V2/U/5-6 and 12-14 and 20; and Short V2/U/63. As the official historian of the era, Short notes that “with few exceptions, army contacts rarely produced more than a handful of dead, wounded or prisoners”. It is for that reason that he regards the incident at Batang Kali “as so extraordinary”.

<sup>18</sup> V2/Q/21

<sup>19</sup> In 1938, Malaya had accounted for 2.57% of Britain’s world trade; by 1951 this would rise to 9.9%. Malaya remained the world’s top rubber producer, which brought \$120 million into the sterling area; the nearest commodity in value was cocoa at £50 million. In 1948 the sterling area suffered an overall dollar deficit of \$1800 million, but Malaya’s surplus was \$170 million. Its nearest competitors were Gold Coast, with a surplus of \$47.5 million, Gambia (\$24.5 million) and Ceylon (\$23 million). But at the end of the year Ceylon’s contribution was lost. By 1952-3 Malaya was providing 35.26% of Britain’s net balance of payments with the dollar area (Bayly and Harper, *Forgotten Wars*, p. 409)

- 2.14. The belligerency between the parties was in the nature of an armed conflict.<sup>20</sup> Boucher's comments, as GOC, indicating that air bombardment and jungle warfare would be the plan of action, reveal the true character of the hostilities. The number of troops deployed from the UK is another clear indicator.<sup>21</sup> In August 1948, three Regiments of the Guards Brigades arrived: the Coldstream Guards, the Grenadier Guards, and the Scots Guards. The British military deployed additional units in 1949-50, including the Green Howards and the Suffolk Regiment.<sup>22</sup> A Memorandum by the Colonial Office on the Security Situation in Malaya as of April 1949, provides statistics that since the armed attacks of the Malayan Communist Party began in June 1948, the number of fatalities included 386 civilians and 197 members of the "security forces",<sup>23</sup> noting that in September 1948 it was estimated that "bandit strength in Malaya was between 3,000 and 5,000", that security forces had "killed or captured 800 of the enemy" and "more than 10,000 persons had been arrested, detained or deported".<sup>24</sup> An undated memo of the High Commission refers to the detention of 10,000 people, of which 4,000 were earmarked for removal to China.<sup>25</sup> Overall 500 British soldiers, 1300 police and 3000 civilians lost their lives during a conflict, in which parts of the territory moved from being under communist control and administration and then back to British control.<sup>26</sup> So, what were engaged were the legal standards of what was imminently entrenched through Common Article 3 of the Geneva Conventions (and had already formed the basis for Nuremberg and Tokyo war crimes prosecutions).<sup>27</sup>
- 2.15. Thirdly, this was a context of increasing violence. Non-accidental casualty figures reported by the War Office to Ministers for the period 1 May 1948 to 30 November 1948 indicate 5 officers and 8 non-officers dead, and 5 officers and 23 officers wounded (albeit excluding Gurkha fatalities, which put the figure at 24 dead).<sup>28</sup> Ward and Miraflor emphasise that these figures were not released to the public;

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<sup>20</sup> The naming of the insurrection as an 'emergency' and description of the insurgents as 'bandits' was deliberately vague; not simply for propaganda reasons, but because the London based insurance cover for the estates and mines protected against 'riot and civil commotion', but not 'rebellion and insurrection': Bayly and Harper, *Forgotten Wars*, p 436, and *The Scotsman*, 14 December 2003 (V2/T/14)

<sup>21</sup> Short V2/U/62: They were the Seaforth Highlanders and the Kings Own Yorkshire Light Infantry (KOYLI) moved from Singapore to join the 4<sup>th</sup> Queens Own Hussars and the Cameron Highlanders (Siver V2/U/4)

<sup>22</sup> Siver V2/U/ 4-5.

<sup>23</sup> V2/H/27

<sup>24</sup> V2/H/28. On 4 January 1949 the Times published figures in the wake of the Batang Kali official press statements that from 16 June 1948 until the end of the year 409 'bandits' have been killed and 268 captured. Police service and [military] casualties were 482 killed and 404 wounded. Civilian casualties, of which more than two-thirds were Chinese, were 330 and 194 injured. Twenty-Four Europeans were killed and 14 wounded (V/H/2).

<sup>25</sup> V2/H/42

<sup>26</sup> Short V2/U/69. As to the acceptance that parts of the territory were under communist administration, see the Memorandum by the Colonial Office, dated April 1949 (V2/H/27)

<sup>27</sup> Siver V2/U/7

<sup>28</sup> V2/H/12. There is a separate figure for Gurkhas: 1 officer and 18 non-officers dead.

rather the local press was given a statement on 10 December reassuring that the Scots Guards and other recently introduced units had been effective.<sup>29</sup>

- 2.16. A Far-Eastern Land Forces British Army (FARELF) Report dated 17 December 1948 summarises a number of incidents (Sitreps) in the days before Batang Kali. It is divided into regions. The section for Selangor confirms that on 10 December 1948 “bandits destroyed a railway station at Ulu Yam Kala”; “attempts to burn down a police station frustrated”; and “bandits fired on a police party in K Kuba Bahru wounding one”.<sup>30</sup> On 11 December two special constables were wounded after being ambushed in the area of Ulu Yam kala. Later a police jeep was attacked on the Kajang Seninyeh Road: “three police killed two specials wounded”. As recognized in a FARELF report to the MOD on 2 February 1970, these events were the background for the Scots Guards patrol to Batang Kali on the afternoon of 11 December.<sup>31</sup>
- 2.17. Further details in relation to the above events were provided by a retired local police captain, Harnum Singh, in an interview with the Royal Malaysian police in 1993. He confirmed that on an unknown date in the period before Batang Kali there had been a communist attack that led to the deaths of a number of British soldiers that do not appear to be reported in the press at the time.<sup>32</sup> He also recalled the attack on the railway station in Ulu Yam Kala on 10 December 1948.<sup>33</sup> Most significantly he was the police officer who was wounded on the same day in Kuala Kubu Bahru.<sup>34</sup> An additional FARELF report to the MOD on 2 February 1970 (after the interest in the Batang Kali incident had been renewed) expressly refers to “the attack in which Inspector Harnum Singh was wounded”.<sup>35</sup>
- 2.18. The situation facing the Scots Guards at this particular moment was recalled by their Commanding Officer, Lt Colonel Fletcher, in 1970 (he himself had been a company commander in 1948):

*“It seems that there were some theoretical operational restrictions on troops during their first few weeks ‘up country’. However, it is also clear that this was the height of the emergency and troops, whatever their state of training, could not ignore the calls for help from the police and the planters in Selangor who at the time were being ambushed and killed by the communist bandits. The requirement of this emergency over-rode the unpreparedness of the national service soldiers on the ground, and resulted in officers and men finding themselves on patrol and on active service the day they arrived.”<sup>36</sup>*

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<sup>29</sup> SD pp19-20.

<sup>30</sup> V2/H/3

<sup>31</sup> V2/L/6-7

<sup>32</sup> V2/P/15-16

<sup>33</sup> V2/P/16

<sup>34</sup> V2/P/17

<sup>35</sup> V2/L/7

<sup>36</sup> V2/L/129

- 2.19. An indication of the tension in Selangor at the time is an event that occurred on 11 December, at roughly the same time as the patrol of 2 Scots Guards were first entering Batang Kali. Fifty members of the Eighth Regiment of the Communist Party of Malaya entered Rawang town in defiance of the curfew. They fired 2000 rounds, mainly at the police station and the railway station, but also randomly into coffee shops and private houses, killing one man and wounding another.<sup>37</sup> It would not be reported in the Singapore based *The Straits Times* until 13 December, by which time Batang Kali was also reported,<sup>38</sup> but the event must have been taken as an indication that communist forces felt entirely unperturbed by the local military presence. No Sitrep was given for the incident in the FARELF report of 17 December.

## **The Batang Kali killings**

### *The village and nearby towns*

- 2.20. In 1948, Batang Kali was a residential area of raised, shared houses, known as Kongsis, on the Sungei Remok Estate. The estate was a rubber plantation. The kongsis accommodated the Chinese workers who were the permanent workers on the Estate, and their families.<sup>39</sup> The clearing in the plantation where the kongsis were situated was boarded by jungle on its eastern side.<sup>40</sup>
- 2.21. The main local town to the north was Kuala Kubu Bahru (KKB). This was where the Harnum Singh had been shot on 10 December. The Scots Guards were based in this town.<sup>41</sup> It was here that the police station was located, and it was to here that detained suspects would be brought for questioning.
- 2.22. A nearer town to the south was Ulu Yam Bahru (UYB). This is where many of the Batang Kali residents came from, from where the villagers daily rations would be brought by lorry by arrangement with the Estate owner, together with the 'day-workers' (tappers). It was to UYB that the women and children would be taken, when the village was burned to the ground. It was in UYB that the dead would be buried in due course.
- 2.23. On 11 December 1948 a 14-man army patrol from the 7<sup>th</sup> Platoon, G Company of the 2 Scots Guards Battalion set out for the village. They were led by two Lance Sergeants, Charles Douglas and Thomas Hughes. Douglas was nominally the officer commanding, though Hughes the second in command was more experienced.<sup>42</sup> The patrol operated in conjunction with the local police. It was guided by a Malay Special

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<sup>37</sup> V/I/9. For a further account of the incident, see SD pp 20-22

<sup>38</sup> It is apparent that the report was cabled from Kuala Lumpur on Sunday (which was 12 December 1948) to the Singapore publishers. It refers to the raid at dusk on the previous night (i.e. 11 December).

<sup>39</sup> For diagrams and photographs of the area prepared by the Malaysian police, see SD, *Slaughter and Deception at Batang Kali*, pp 159 and 163

<sup>40</sup> Statement of retired police Captain Harnum Singh, taken by the Malaysian police in 24 July 1993, V2/P/15

<sup>41</sup> Ibid, p 17 and SD, p. 24 and 31

<sup>42</sup> V2/L/153.

Constable, Jaffar bin Taib. It was accompanied by a Detective Sergeant, C P Gopal (Call Sign No. 51), and another Chinese Detective, Chia Kam Woh (Call Sign No. 182).<sup>43</sup> Woh, as the Cantonese detective, would be able to act as the interpreter once in the village. Chia Kam Woh is an important figure in the overall evidence.

- 2.24. The identities of the British members of the patrol can be seen from lists created by the FCO, the MOD and the MPS during the 1970 police investigation, which have either been obtained from the National Archives,<sup>44</sup> or viewed as a result of the Claimants' solicitors having been given access to the MPS file. 14 names are listed on MOD documents, and the Claimants have the identities and details of 11 people.<sup>45</sup> Aside from the two Lance Sergeants, they are William Cootes, Alan Tuppen, Robert Brownrigg, George Kydd, Victor Remedios, Keith Wood, Roy Gorton, George Porter and James Fern.<sup>46</sup> The names and addresses of those known to be alive at the date when these proceedings were commenced, including Charles Douglas, Thomas Hughes and the second in command of G Company 2 Scots Guards, Captain (later Colonel) George Ramsay, were set out in the schedule of interested parties at the back of the Claim form.<sup>47</sup>
- 2.25. Of the patrol that went to Batang Kali, Lt Colonel Fletcher would recall in a confidential staff memo in 1970 when their members were under renewed suspicion, that for some it could have been their first operation after arriving in Malaya. He said:

*"This was indeed the rump. Not only of G Company, but of the detachment at KKB (Kuala Kubu Bahru). It included the drivers, drummers and even sick men. The Garrison of KKB was reduced to the CSM of G Company and 4/5 sick men while the patrols (Douglas's and Captain Ramsay's) were out..."*

*It appears that not only was there no officer with Douglas's party, but...[at the time] Douglas was himself moved from one platoon to another..."*

*It was most unusual for a LSgt to be in command of a patrol during these early days of the emergency: When the information came in, Captain Ramsay asked the Commanding Officer, 40 miles away at Batu Arang for another officer. There was no officer available, and it is said that the Commanding Officer ordered either Captain Ramsay or the CSM to remain behind at KKB, in order to defend the camp".<sup>48</sup>*

- 2.26. Having entered the village during the late afternoon of 11 December, the patrol found around 50 unarmed adults, together with some children. The men were separated from the women and children. The two groups were kept in separate

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<sup>43</sup> In statements given by Gopal and Woh in 1948, they refer to two Malay guides being present [V2/G/1 and V2/G/7]. A second guide has evidently never been identified, but would presumably have been easy enough to find in 1948 when those statements were given.

<sup>44</sup> V2/L/83-84 and 139/140

<sup>45</sup> One of the original 14, a man called Albert Butt, has stated through his solicitor that he did not travel to Batang Kali with the patrol: Halford, V1/C/3 § 9.

<sup>46</sup> See the summary on enquiries provided by DCS Frank Williams (V2/M/12 § 54)

<sup>47</sup> V1/A/8

<sup>48</sup> V2/L/130

locked kongsis. All were searched and interrogated. At no time did the villagers initiate or threaten any violence towards the soldiers. Regulation 24(3) provided for detained suspects would be brought to the police station (in this case the one in KKB: Kuala Kubu Bahru), but the villagers were detained and kept at the village.

- 2.27. On the evening of 11 December, one of the male villagers, Loh Kit Lin (the uncle of the Second Claimant), was shot and killed. He was one of the first to be questioned. His body was left to lie on the roadside. His death was used as a warning to the other villagers.
- 2.28. During the night of interrogations, shots were repeatedly fired into the air behind prisoners' backs as a form of mock execution in order to frighten them into providing information about the whereabouts of the communists. One of the young male villagers (Cheung Hung, also known as Chong Fong) was relied on as a source of information about the lorry delivery. He is said to have stayed outside the kongsis and slept elsewhere. What is clear is that, when the other male villagers came to be shot dead, he was not.
- 2.29. Early on the morning of the following day, 12 December, the lorry containing food rations and day-workers arrived. The women and children were rounded up and put on the lorry to return to the town of UYB (Ulu Yam Bahru), together with the 'day-workers' and one of the older male villagers who had collapsed under interrogation the night before: Choi Loi. The kepola (Lam Tin Shui) had arrived with the food rations and was questioned. He was detained and put with the other 22 male villagers, making 23 of them. It was then that the 23 male villagers were released from their locked kongsi. The soldiers shot and killed all 23 of them. The village was burned down.

#### *Initial accounts*

- 2.30. The first document which describes the killings is a confidential telegram from the High Commissioner, Sir Henry Gurney, to the Colonial Office sent on 13 December.<sup>49</sup> It is in the nature of providing the "Police Report". It states "26 bandits have been shot and killed by police and military in the Kuala Kubu area of Selangor". One of these, as will be seen, was from a separate incident.
- 2.31. The telegram report recorded the fact of one "bandit" – that is a possible reference to Cheung Hung – as having been "wounded and captured".
- 2.32. The telegram report drew a clear distinction between "bandit" and "civilian" casualties. That was an important distinction. "Bandits" was the phrase connoting the enemy, combatants. Deaths of "bandits" and "civilians" were recorded separately: see the heading "CASUALTIES". As will be seen, what made the Batang Kali incident such a "success" paraded by the British military, was that they were

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<sup>49</sup> V2/H/1



able to record and announce that they had killed such a large number of “bandits”. To the victims and their families, that is a conspicuously stigmatizing description. It has never been withdrawn. Even now.

- 2.33. In the FARELF report dated 17 December 1948 (see §2.16 above), there was a Sitrep for the Batang Kali incident in the following terms<sup>50</sup>:

*“11 dec K Kubu Bahru area 2 SG patrol killed one bandit. Another 2 SG patrol captured twenty six male bandits near K KUBU BAHRU (.) detained for night in Khongsi huts (.) early following morning on information from one of the captured bandits ambush laid for lorry arriving with food (.) lorry captured (.) bandits attempted mass escape (.) twenty-five killed. One recaptured.”*

- 2.34. The first sentence explains that one bandit was killed by the other Scottish Guards patrol. The Batang Kali patrol captured “twenty six male bandits”. Reference is made to ambushing the morning food lorry, after receiving information “from one of the captured bandits”. Reference is being made to an “attempted mass escape”, and to one “bandit” being “recaptured”; the other “twenty-five killed”. There is no reference to one killing having been on the evening before.
- 2.35. An official report came to be made by the War Office on 22 December 1948. The distribution list included the Private Secretaries of the Prime Minister, the Secretary of State for Foreign Affairs, the Secretary of State for the Colonies, the Minister of Defence and the relevant Armed Services ministers.<sup>51</sup> This Report annexed the SITREP<sup>52</sup>. The main body of the Report describes the patrol as “a very successful action”, involving “the capture of 26 Bandits”. It describes the killings as taking place when “they made a mass escape attempt”, after the villagers had been “detained for the night in a Jungle hut” and “in the morning ... were being moved out of it”.
- 2.36. Another official document, also from the National Archives, is entitled Review of Chinese Affairs.<sup>53</sup> This document, from which the extract has been drawn, is noted as being dated “December 1948”. It refers to (a) the incident (b) the aggrieved families (c) the press interest (d) the interest of the Kuala Lumpur Kwongsai Association (KLKA) (e) the concerns raised by the Chinese Consul-General (General Li Chin) (f) the results of the Attorney-General’s enquiry and (g) the position adopted by the MPABA. Several points are to be noted.

(a) As to the incident, the document refers to the fact that the incident is being described as a “first mass killing”. What is said about what happened is that: “twenty-four Chinese prisoners were shot dead by carefully concealed troops when they

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<sup>50</sup> V2/H/3

<sup>51</sup> V2/H/9 repeated in similar terms in the Annex at V2/H/13

<sup>52</sup> V2/H/13.

<sup>53</sup> V2/H/4-8

*succeeded in escaping from the few sentries who were guarding them pending removal for screening*".<sup>54</sup>

(b) As to the aggrieved families, the document refers<sup>55</sup> to the families having appealed to the KLKA and to the Consul-General. As it has been described<sup>56</sup>, four women who had been back to the dead bodies at Batang Kali, scrounged the resources for a taxi to Kuala Lumpur on 19 December where a government official refused to see them, so they called on the Consul-General. The Review Document describes the Consul-General has not having been immediately available, something which the press reported but then retracted. It is apparent that he did agree to help them, because he took up their case with the High Commission.<sup>57</sup>

(c) As to the press interest, the Review document recorded that the "China Press" had reported the families' visit to Kuala Lumpur, "*when the President of the Kwongsai Association passed on the information*". The Malaya Tribune had made an "appeal" to the "conscience" of the public, and it and "the Chinese newspapers" had contained "charges" against the Army. The China Press was said to have given a "circumstantial report" of the "massacre", including "quoting witnesses".

(d) As to the KLKA, the Review records that the families had appealed to this organization, and its President had passed on information to the press.

(e) As to the Consul-General, the Review records that he had informed the Chinese public that he had asked the Government to conduct an enquiry, and that he had stated publicly that, notwithstanding the Attorney-General's enquiry which "*exonerated the Army*", the Consul-General had stated that: "*I still hold the Government responsible for the killing of the twenty four Chinese*".

(f) As to the Attorney-General's enquiry, the Review records that "*an official enquiry was ordered*" and that: "*the results of the Attorney-General's enquiry into the circumstances of the shooting of twenty four escaping prisoners ... exonerated the Army from the charges*".

(g) As to the MPABA, the Review records that the 8<sup>th</sup> Company of the MPABA had written to the editor of the "China Press", urging it to publish a "*manifesto to our brethren of all races to expose the British Imperialists' mass massacre of the Ulu Yam inhabitants*". It described the incident as the killing of "*24 employees and rubber tappers on an European estate at Sungei Remok, Ulu Yam*", they being machine-gunned at a river under a trumped-up charge. It called on brethren of all races to "*join our Army*".

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<sup>54</sup> V2/H/4

<sup>55</sup> V2/H/4

<sup>56</sup> SD pp 50-51

<sup>57</sup> According to Ward and Miraflor (SD p 51), he spent some time speaking to the women, made notes and assured them that he would take up their grievances with the local authorities.

- 2.37. Meanwhile the killings had been repeatedly described by the British military authorities to the Malayan and UK press as the “*biggest success achieved in one operation anywhere in Malaya since the emergency began*”.<sup>58</sup>
- 2.38. The article in *The Straits Times* on 13 December 1948 is particularly notable because it indicates a more detailed account than documented by either FARELF or the War Office. It refers to “*the first report [that] was flashed by radio from the jungle and not until it was completed could the scene be pinpointed*”. The source for that statement was Mr HG Beverly, the Chief Police Officer of Selangor.<sup>59</sup> The front page (copied at V2/I/6 but quoted in full at SD pp 30-32) gives the following details derived from a source from the previous day:<sup>60</sup>

*“The biggest success occurred in the Batang Kali area where a patrol of police and Scots Guards numbering 14 shot dead 25 Chinese who they surprised yesterday morning and rounded up and who then attempted to escape early this morning.*

*Moving through the jungle yesterday afternoon the patrol spied two armed Chinese in uniform, but lost them.*

*[Under the sub-heading Food Lorry]*

*Soon afterwards they found a kongsi inhabited by men and women. Before any alarm could be raised the patrol had surrounded a large hut. The men surrendered. There were 26 of them with a number of women and children.*

*A police officer said tonight: The kongsi was searched and under a mattress was found a large quantity of ammunition.*

*One Chinese attempted to escape and was shot dead.*

*The patrol learned that food was expected at the kongsi early the following morning. They decided to wait. A guard was placed during the night, but there was little sleep.*

*At 5.30 this morning the sound of a motor was heard and very soon a lorry came into view. It was halted, surrounded and discovered to be carrying a large quantity of food.*

*As the lorry was brought towards the kongsi guards were once again put out at strategic points.*

*Most of the guards were hidden from view of the men in the kongsi.*

*They could see only three sentries.*

*Suddenly the 25 men made a break running in all directions.*

*A police officer said: “The Guards had been well placed and the running men just ran into their guns. Every man was killed”<sup>61</sup>*

- 2.39. Several things are to be noted: (1) the patrol was said to have encountered “*two Chinese in uniform*” and had given chase; (2) a “*large quantity of ammunition*” was said

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<sup>58</sup> V2/I/1 and 3. A similar report appeared in the Daily Telegraph on 13 December 1948: See, generally SD at pp 29-35

<sup>59</sup> V2/I/1

<sup>60</sup> It is apparent that the report was cabled from Kuala Lumpur on Sunday (which was 12 December 1948) to the Singapore publishers. It describes the killings as if they happened that morning (i.e 12 December) and events the previous day (i.e. 11 December)

<sup>61</sup> A similar explanation was reported in the Times on the same day (V2/R/7)

to have been found *“under a mattress”*; (3) the lorry was found to have *“a large quantity of food”*; (4) the *“running men ... just ran into their guns”*; and (5) *“Every man was killed”*.

2.40. Of the accuracy of this article, its author the journalist Harry Miller was interviewed by the Metropolitan police in 1970. He told them that on 13 December he drove to the 2SG base at Kuala Kubu Bahru and interviewed Sgt Douglas who confirmed the story. He then attended a press conference on 17 December given by the Commissioner of Police and General Officer Commanding in the course of which the latter said that the above account given by *The Straits Times* was *“extremely accurate”*.<sup>62</sup>

2.41. This can be put alongside a statement (recorded as given at 1230 hours on 14 December 1948) of the accompanying police officer DS Gopal.<sup>63</sup> This, and the other such statements, are described in more detail below (§§2.55-2.64). For now:

(a) Several things are immediately striking about the Gopal statement. For example: (1) the reference to the pursuit of the two uniformed men (*“Sgt Douglas ... told me that one of the soldiers had seen two men dressed in uniform ... The men escaped”*); (2) the fatal evening gunshot after an interrogation (*“I heard a gunshot ... later I heard from Sgt Douglas that one man attempted to escape and they shot him”*); (3) the use of locked huts (*“it would be better to put people into the rooms and lock them under guard”*); (4) the information which he had obtained overnight from questioning Cheung Hung: that the village was occasionally visited at night by armed bandits to obtain food; and that the villagers were not themselves bandits (*“bandits visiting the Estate on four or five occasions ... dressed in khaki uniform. They carry small weapons ... They come in order to get foodstuffs ... the bandits ... were not people of that village ... the labourers of the Estate ... knew about it but they were afraid to tell”*); (5) the statement that this information was passed on to the two Sergeants in the morning (*“the following morning I told the two Sergeants all this information”*); (6) the modest amount of food on the lorry (*“In the lorry was about half a bag of rice which I gather from the kepola was for the labourers”*); (7) the absence of any suspected bandits among the day-workers who came with the lorry (*“I told DPC 182 to identify any bad hats or suspected bandits among the people who came in the lorry. He was unable to identify anybody”*); (8) the insistence of having been out of the soldiers’ way (in the store) and seeing absolutely nothing during the shooting in which 23 men were shot dead (*“I did not see the shooting because I was inside the store”*); (9) the absence of any shouting preceding the shots (*“I did not hear anyone shout”*); (10) the escape-attempt story (*“one of the Sgts ... told me that the men had tried to escape and they had shot them”*); (11) reference to ammunition (*“Sgt Hughes told me that he had found some ammunition ... in the house where Wong Yan was living with his family ... it was under the bed and wrapped in paper ... about 15 rounds ... he was going to keep the ammunition to show to his Captain”*); and (12) the soldiers’

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<sup>62</sup> Miller’s statement is summarised by Brendan McGurk (V1/E/143)

<sup>63</sup> V2/G/1

determination to burn down the village (*"Sgt Hughes ... told me that he was going to set fire to the whole kongsi ... I advised not to burn, but they did not take my advice"*).

(b) As to the similar statement from the other police officer, the Cantonese Detective DS Woh<sup>64</sup> (see §2.58 below), these points can be noted: (1) there is a description of entry and search of the buildings by soldiers on the evening; (2) the information about armed bandits "from the hills behind the Estate" visiting to obtain food; (3) the information about the villagers (*"I asked if they were Communists or had connections with them. He replied that they did not ... He said that all the people in the kongsi were labourers"*); (4) the lorry delivery (*"a sack half full of rice ... they all said the rice was for the coolies living in the kongsi"*); (5) the Sgt's stated intention (*"to burn it down"*); (6) the shooting unseen (*"I was eating"*); (7) the escape-attempt explanation (*"From [DS51] I learnt that these people attempted to run away and were shot down while trying to escape"*); (8) the return to take photographs (*"I did not see a single one of the dead bodies until 13<sup>th</sup> when I went with the Sub-Inspector and a Malay PC to photograph them. The soldiers also came"*).

(c) Then there are two statements of Cheung Hung (§2.59-2.62 below), who was described as the source of the information about bandits, food and the lorry.<sup>65</sup> The statements say he was questioned and then *"taken to the store"* and eventually slept in the same place as the police officers, *"on the verandah"*. The statements describe Cheung Hung's identification of the body of the man killed on the evening; and his own survival during the shooting (*"in the yam patch"*). These statements speak of the shooting being preceded by villagers being *"assembled"* and *"walking"*, with soldiers *"escorting them"*. They also speak of the two police officers as having been *"on the verandah ... where we had slept"*, and from where they would have been able to see if villagers had started to run away. There is also a description of the soldiers as seeming *"very pleased"*.

### *Expressions of concern*

2.42. Despite the championing of the killings as a *"success"*, concerns began to be expressed. As explained in the Review of Chinese Affairs document (§2.36 above) and by Ward and Miraflor,<sup>66</sup> the Chinese Consul-General, Li Chin, did take the matter up with the Chief Secretary of the High Commission, Sir Alec Newbould, requesting comprehensive details of events that had transpired on the plantation. He then held a press conference on 21 December 1948, reported in *The Straits Times* the following day, confirming that representations had been made to him by the families of the dead and that he had formally written to the High Commission asking for an enquiry. He was quoted as saying, *"I feel personally that the killing was out of all of all proportion as the men were not armed. I felt that they should have been shot in the legs and*

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<sup>64</sup> V2/G/7

<sup>65</sup> V2/G/3-6

<sup>66</sup> SD pp 51-52

*lamed instead*". This prompted a Government source to inform *The Straits Times* that "a full enquiry was in hand".

- 2.43. By 22 December 1948 there had been an intervention by the British owner of the Sungei Remok Estate, Thomas Menzies. He was also the Chairman of the Selangor's Estates' Owners Association. Ward and Miraflor recount his public statement.<sup>67</sup> All those killed by the Scots Guards had been employed by the plantation contractor, Lim Chye Chee, with whom Menzies had been associated for 20 years. There was a permanent labour force living on the Estate. It totalled 26 males. Nearly all were Cantonese. It was explained that the labourers had established a long record of good conduct. There had never been a strike nor had there been any problems of any nature. Of the victims, four had been on the estate for 18 years, six for 14 years, ten for ten years and the remainder for at least three and a quarter years. Menzies identified one of the dead as his plantation *kepola* and another as his estate clerk. He emphatically denied that the lorry coming from UYB (Ulu Yam Bahru) was connected to the insurgency. Rather than carrying food for bandits, it was bringing the daily supplies to Batang Kali (60 katties of rice and 10 katties of sugar); all in strict conformity with Emergency rations.
- 2.44. As a result of these interventions, *The Straits Times* on 24 December 1948 increased the pressure in the call for a proper inquiry.<sup>68</sup> It referred to an investigation "that the police began two days after the incident", but called for a more detailed statement from the military authorities given the "exceptional circumstances of the case". Noting that the shooting "was not an ordinary incident" and had "caused serious concern among all communities", including by the Chinese Consul General on behalf of the families, the editorial concluded: "There are two issues; the circumstances in which the men were shot, and the wider question of the instructions under which troops and police operate. An assurance by the military authorities that they are associated with the inquiry, and will act in the light of its findings, is all that is necessary".

### **The purported investigation and public statements**

- 2.45. The next significant event was the so-called "enquiry" under the authority of the Attorney General of the Federation of Malaya at the time, Sir Stafford Foster Sutton. If there was a written record of findings of a report, it was not retained.<sup>69</sup> It is apparent from statements made by the Army to the Metropolitan police in 1970 that

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<sup>67</sup> SD p 52

<sup>68</sup> A copy of the article is reproduced in SD p. 54

<sup>69</sup> For reasons that came to light in 1970, the full Colonial Office and FARELF records for the Malayan campaign have been destroyed. A hand written memo dated 3 February 1970 (V2/L/20-21) from the Library and Records office states that the entire Colonial Office file on the Batang Kali incident had been destroyed under the provisions of Public Record Act 1958, they being considered not to be worthy of preservation at the time of reviews (possibly in 1966) The office was also unable to find any copies of the Attorney-General's Enquiry into the incident and could only conclude that it remained on file as a legacy document. No such document has ever been found.

there was never a formal military inquiry;<sup>70</sup> and no inquests under Malayan law were held.<sup>71</sup>

*Telegrams between the Colonial Office and the High Commission: 31 December 1948 and 1 January 1949*

- 2.46. Surviving telegram correspondence between the Colonial Office and the High Commission between 31 December 1948 and 1 January 1949 deals with the results of an 'investigation' and demonstrates the context in which the official version of events was enshrined in Malaya and Britain during the following weeks.<sup>72</sup>
- 2.47. On 31 December 1948, John Higham, Assistant-Secretary and head of South East Asia Division at the Colonial Office sent a telegram marked "Confidential" to Sir Alec Newbould in the High Commission, regarding "*INCIDENT AT BATANG KALI ON 12<sup>th</sup> DECEMBER IN WHICH 25 CHINESE WERE KILLED*". The telegram indicated "*REPLY REQUIRED URGENTLY*".<sup>73</sup> It informed Sir Alec that the *Daily Mirror* in Britain was about to publish a report from a correspondent in Malaya concerning the killings at Batang Kali, "*stated to be the most reliable detailed account of this incident with reference to the agitation in the press*". The Report was said to maintain that "*the men appear not to have been bandits, but merely suspects detained for questioning and that [an] enquiry is to be held*" and "*that there is public uneasiness about the behaviour of the police and army in security operations generally*". In view that the journalist ("*one of the more responsible press men*") had agreed to hold off publication in order for the Colonial Office to comment, the High Commission was asked to telegraph by tomorrow "*information available on the incident itself and the general line Government are taking with the press with any comments you may have on general*"<sup>74</sup>
- 2.48. Sir Alec replied by telegram to John Higham the following day.<sup>75</sup> The telegram is headed: "*Incident at Batang Kali on 12 December*". Inexplicably, the available copy starts at paragraph 10. Further in the document it refers to paragraphs 1-9,<sup>76</sup> The document will appear particularly strange to the reader because it is not obviously redacted, but what appears to be a doctored edit. The available text from paragraph 10 reads as follows (emphasis added):

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<sup>70</sup> The statements given to the Metropolitan Police in 1970 by Sergeant Major Whyte, Captain Ramsay and Major General Fitzalan-Howard confirm this to be the case (V1/E/109). The CO of the Scots Guards confirmed that there was no military inquiry amounting to an "Army Court of Inquiry" through the adjutant remembered writing a form of summary (V2/L/129-130)

<sup>71</sup> Emergency Regulations, Reg. 36.

<sup>72</sup> V2/H/15

<sup>73</sup> V2/H/19. For a clearer copy of the telegram see also V2/R/35

<sup>74</sup> The telegram ends by noting that the incident has also been the subject of representation by an MP and refers to telegram by the Secretary of State (presumably Sir Arthur Creech-Jones) dated 30 December 1948. The Claimants' solicitor has not been able to find that telegram in the National Archives, neither has it been disclosed.

<sup>75</sup> V2/H/15

<sup>76</sup> V2/H/17. Note the other disclosed copy at V2/R/37 bears the same edit of paragraphs 1-9

*“The above [i.e. the missing paras 1-9] is narrative elicited by an investigation into the incident conducted by a Federal Counsel on the instructions of the Attorney General. Everyone who has visited the spot including the Attorney General is satisfied that the soldiers, who had been posted with the object of protecting the clearing from external attack, did everything that it was possible for them to do to stop the escaping Chinese before resorting to force. Moreover, one Chinese had been shot the previous day during an attempted escape and the others had been warned of the danger to them should they attempt to follow his example.”*

- 2.49. The telegram then deals with general allegations of using unnecessary force, indicating that there was no evidence of this, but urging appreciation “*that prolonged operations in such country as this where every advantage is with the bandits are calculated to fray peoples’ nerves*” (para. 11).
- 2.50. There follows a firm direction from the High Commission as to the line to take with the matters under discussion, reflective of what became the institutional position on what happened at Batang Kali (para. 12):

*“One of the difficulties of this situation is that we have a war of terrorism on our hands and are at the same time endeavouring to maintain the rule of law. I would also point out that it is an easy matter from ones office and home to criticise action taken by security forces in the heat of operations and working under jungle conditions but not so easy to do the job oneself. Rightly or wrongly, we feel here that we must be conservative in our criticism of the men who are undoubtedly carrying out a most arduous and dangerous job and it must be remembered that when persons are picked up by the security forces under such circumstances until they are screened at headquarters it is impossible for the security forces to know whether they may be members of ‘killer squads’ or to what extent they are involved. Furthermore although some of the killed were rubber tappers it is our experience that such persons are frequently rubber tappers part time and bandits the rest of the time and that their arms are normally hidden in the neighbourhood and not found with them. Moreover, we feel that it is most damaging to the morale of the security forces to feel that every action of theirs, after the event, is going to be examined with the most meticulous care.”*

- 2.51. Having recognised that there had been “*considerable agitation in the local press*” about the Batang Kali, Sir Alec refers to a statement that was made to the press on 31 December (para. 13). The document ends by referring to “*today’s*” editorial leaders in *The Straits Times* and the *Malayan Tribune*, which show that the statement has failed to achieve its object and that demands for full details have been reiterated. In the circumstances Sir Alec proposed to make “*a further press release based on paragraphs 1-9 of the preceding telegram for publication in the morning’s papers of 3 January*”. He ends by observing to Higham, “*There would be no objection to you making such use as you wish of information in the telegram*”.

*The public statement: 1 January 1949*

- 2.52. The brief official statement (which did not impress the editor<sup>77</sup>) was published in *The Straits Times* on 1 January 1949:

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<sup>77</sup> Quoted in SD p. 54



*“On instructions of the Attorney General an investigation has been conducted by Federal Counsel into the action taken by the security forces at Batang Kali on 12 December.*

*After careful consideration of the evidence and a personal visit to the place where the incident occurred, the Attorney General is satisfied that the suspects would have made good their escape if the security force had not opened fire.*

*In view of this and information in the possession of the Security Forces regarding the suspects, it is not proposed to take any further action in connection with the incident”<sup>78</sup>*

The supplementary statement: 3 January 1949

2.53. A further document from the High Commission headed “Supplementary Statement” was released to the local press on 3 January 1949, and published the following day in *The Straits Times*,<sup>79</sup> and the *The Times* in London.<sup>80</sup> It declared (emphasis added):

*“Police had reliable information that there were concentrations of communists in the area west of the main road between Rasa and Sungei Tapayan.*

*After discussion with the military it was decided to send a platoon, divided into two sections – one commanded by an officer and, no other officer being available, the other commanded by a sergeant. Each section was accompanied by guides and some police personnel.*

*The object of the patrol was to obtain information, search for arms and ammunition and to detain and bring back to Kuala Kubu Bahru for interrogation any suspicious characters.*

*The general order was that if any detained person tried to escape, he was to be chased and recaptured but under no circumstances to be allowed to escape.*

*The section in question consisted of a sergeant in command and 13 other ranks. It had no vehicles and no wireless or other easy means of communication with headquarters, which was a considerable distance away from the area of operations.*

*The Section patrolled a wide area, including rubber estates and jungle, during which bandits were spotted and fired at.*

*The sergeant feared that these bandits would carry information regarding the section to other concentration of bandits and his section might be trapped.*

*He decided to press on, eventually arriving at the clearing where shooting took place the following day.*

*In the clearing were three kongsi houses and few other huts and shacks. The occupants of the kongsi houses were interrogated and some Sten-gun ammunition discovered hidden in one of the houses.*

*Information from the interrogation was that armed bandits were in the habit of visiting the area and used it for obtaining supplies and that such supplies were brought in every morning by a lorry which was employed to bring in food for the tappers and others who occupied the clearing.*

*If attacked the clearing was a death-trap to the section and the sergeant therefore posted three groups to cover the three entrances to the jungle.*

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<sup>78</sup> V2/I/4

<sup>79</sup> V2/I/5 - Quoted in full in SD pp 56-58

<sup>80</sup> V2/I/2

*These groups were put out of sight of persons in the clearing. This took place on the afternoon of December 11.*

*The Chinese men found in the clearing were placed in a room in one of the kongsi houses for the night, under guard.*

*The following morning they were brought out of the room by two sentries who were on the verandah of the kongsi house in which the room was situated. The only other soldier in sight was the sergeant in command who was standing on the ground a little beyond the kongsi house, ready to receive the Chinese as they came off the verandah.*

*When all the Chinese had reached the ground from the verandah, one of them shouted and they thereupon split up into three groups and made a dash for the three entrances to the jungle.*

*There is no doubt that they were under the impression that the only troops that they had to compete with were the two soldiers on the verandah of the kongsi house and the sergeant.*

*The attempted escape was obviously pre-arranged because there was no hesitation in the formation of the three groups and the shout was no doubt the pre-arranged signal for putting the plan into effect.*

*The sergeant and the two soldiers on the verandah immediately shouted calling upon them to halt. They could not use their arms because to do so would have endangered the lives of their comrades who were posted out of sight but in the line of fire. The men in the three groups covering the entrances heard shouting but did not know what was happening until they saw the Chinese running through the bush and jungle past where they were posted. They thereupon shouted the Malay word for halt to which no attention was paid by the escaping Chinese. The men of the three groups gave chase, continuing calling upon them to halt and, as they failed to do, the soldiers opened fire".*

- 2.54. A number of points are immediately striking about this "Supplementary statement":
- (a) It does nothing to support the idea of the villagers as bandits. Indeed, the reference to bandits is that "*armed bandits were in the habit of visiting the area*". Groups to "cover the three entrances to the jungle" overnight were described as concerned with external visitors. No "arms" were said to be found. The "*bandits*" who had been "*spotted and fired at*" had run away. There is now no reference to "*information ... regarding the suspects*".
  - (b) It describes an objective to "*detain and bring back to Kuala Kubu Bahru for interrogation any suspicious characters*". Regulation 24 (3) authorised arrest for the purposes of bringing suspects to a police station for questioning.
  - (c) It speaks, inexplicably, of unlocking the kongsi and bringing all of the men out on to the verandah ("*brought out of the room by two sentries*"), ready to be received by the sergeant in command ("*to receive the Chinese as they came off the verandah*").
  - (d) It makes no mention (unlike Sir Alec's telegram) of the killing on the first evening; nor of any warning of the danger to the villagers should they attempt to escape.
  - (e) It makes no mention of the women and children who were also detained overnight. There was no account of what had happened to them, including why they

had been separated on to a lorry in the morning and for what purpose the men were kept behind rather than removed to the police station.

(f) Notwithstanding that HG Beverly, the Chief Police Officer of Selangor, had been quoted in *The Straits Times* on 13 December referring to radio contact *from the jungle*, the possibility of such radio contact was here being denied.

(g) Contrary to Harry Miller's account published in *The Straight Times* on 13 December that has been commended by General Boucher as "extremely accurate", a previous description of "*a large quantity of ammunition*" being found was replaced by a reference to the finding of "*some*" stem gun ammunition. The reference to "*a large quantity of food*" had disappeared completely.

(h) Now, rather than it being said that "*the running men just ran into their guns*" as reported on 13 December (which would have caused them all to be shot in the front) it was suggested that the "*running men ran past the guns*" (which would have caused them all to be shot in the back).

(i) Now, moreover, in circumstances where the legality of shooting without prior warning had been ventilated publicly, including in the statements made by the Consul-General<sup>81</sup>, there was heavy reliance on shouted warnings: no fewer than three sets of warning were now being relied on. By the sergeant and the two soldiers on the verandah; by the soldiers near the entrances before giving chase; and by those soldiers again in giving chase and before opening fire.

### *Surviving statements*

2.55. Something which could not be publicly known at the time, was that the 'Supplementary Statement' was also in conflict with the surviving statements of the three witnesses from 1948 (see §2.41 above); those of two police officers (DC Gopal and DC Woh) and the only male villager who remained at the scene but was not killed (Cheung Hung). These statements (which were supplied to the Claimants by the CPS in 2010,<sup>82</sup> but apparently referred to in the 1970 Metropolitan police investigation and 1993 CPS review of the evidence) are in English translation and the surviving copies are unsigned. There are no surviving statements from the British soldiers.<sup>83</sup>

2.56. As has been seen (§2.41 above), Detective Sergeant Gopal (No. 52) says<sup>84</sup> that he entered the Estate with two Malay guides. The purpose of detaining the residents was to interrogate them to obtain information. During the evening this was unsuccessful, including the interrogation by Sergeant Hughes of a "*small boy*", and

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<sup>81</sup> V2/H/5

<sup>82</sup> V2/G/1-8. These statements were not in the Metropolitan Police's files, but were provided to the Claimants' solicitors by the Crown Prosecution Service on 14 June 2010 in answer to a request they first made on 19 January 2010 and repeated a number of times in the intervening months: Halford V1/E § 17

<sup>83</sup> Halford, *ibid*, § 19

<sup>84</sup> V2/G/1-2

ended with one man trying to escape and being shot. Gopal did not see this happen, but was told by Sergeant Douglas after the event. The women and children were then separated from the men and kept under guard inside the kongsi. A young resident, Cheung Hung, was taken by Gopal and Woh into a separate building and then spent the rest of the night with them on the verandah of the kongsi. During the night they had *“a long talk with the youth”*, which ended with him informing them that bandits would visit the village to take food from the communal store, and everybody knew, but they were afraid to tell. The following morning the two sergeants were given the information.

- 2.57. The sequence of events on 12 December is described by Gopal in the following way. As regards the arrival of the lorry, the kepol, who is the father of the Third Claimant in these proceedings, was taken away to be detained with the other men. However, they found only half a bag of rice, which they gathered would be for the tappers. Detective Woh having been tasked by Gopal to look for *“bad hats or suspected bandits”* amongst the men in the lorry found no one. It was decided that these people would therefore be sent away in the lorry with the women and children from the Estate, but before that was to occur Cheung would be brought out to try to identify any insurgents. The police officers then went away with Cheung for 15 minutes to the village store area and when they returned all the men had been shot. He says Sergeant Hughes told him the men had tried to escape and that, also in this 15 minute period, a further search had been made and 15 rounds of sten gun ammunition had been found. This ammunition had not been discovered during the lengthier search conducted the day before. Sergeant Hughes then resolved to burn the village huts to the ground, against Detective Gopal’s advice.
- 2.58. Detective Chia Kam Woh<sup>85</sup> is described as a *“Cantonese detective”*. He also refers to two Malay guides accompanying him and the patrol. He gave a similar account of Cheung Hung being the only person to provide information, but adds that he specifically regarded the Third Claimant’s father as being involved in the supply of food stuffs, but that none of the other people in the village had any connection with the communists. During other interrogations of women and children on the first evening he heard a shot fired but did not know why. Woh also says he did not see any of the shootings take place on the second day. He mentions questioning the Third Claimant’s father about half a bag of rice found in his lorry when he arrived that morning. The women and children were then loaded onto the lorry and driven off without escort. He then went with Gopal and the two Malay guides to the store room apparently to have breakfast. He continues:

*“While I was having my food I heard reports of gun fire. I did not go out to see what it was about. I heard no shooting either before, during or after the gun fire. I was eating. After the firing ceased I came out with others. The DS 51 (Gopal) had some conversation with the soldiers. From him I learnt that these people attempted to run away and were shot down while trying to escape. I did not see a single one of the*

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<sup>85</sup> V2/G/7-8

*dead bodies until 13<sup>th</sup> when I went with the Sub-Inspector to photograph them.<sup>86</sup> The soldiers also came...I did not see any of the dead bodies"*

- 2.59. The third witness who gave statements in 1948 is Cheung Hung. His first statement is marked "22 years old. Rubber Tapper in Sungei Remok Estate".<sup>87</sup> Cheung Hung was also known as Chong Fong, and was the father of the First Claimant. One notable feature is that in 1948 is that the press statements on 13 December referred to 25 dead bandits (effectively counting Cheung Hung/Chan Fong). Fong would tell British and Malaysian journalists in 1970 that he had survived by pretending to be dead. He was apparently the "one recaptured" referred to in the above Sitrep that was included in the FARELF report of 17 December 1948.<sup>88</sup> But he was unharmed; not "wounded" (as suggested in the Telegram of the High Commissioner to the Colonial Office of 13 December 1948<sup>89</sup>). Cheug Hung was also the person described as an "informant" in the above statements of Gopal and Woh, who had provided the information about the lorry supplies under interrogation mentioned in the "Supplementary statement". As a survivor of events care must be taken to distinguish Cheung Hung/Fong from a man called Choi Loi. Loi was an older man who collapsed during the previous night while subject to interrogation and according to villagers and soldiers was allowed to leave on the lorry. These two men, together with the kepola (Lam Tin Shui) make up the "26" men detained by soldiers in the village. If Cheug Hung pretended to be dead, that would explain an original body count of 25 in the Sitrep and the Telegram to the Colonial Office. In any event, this was corrected to 24 quite early on (see §2.38 above).
- 2.60. Cheung Hung's statement contradicts the suggestion that the policemen were in the store room, one of them eating, throughout the mass killing and saw nothing. His account of the shooting of Loh Kit Lin on the evening of 11 December is that Loh was questioned immediately before him and taken out of the store. He heard a shot while he was being interrogated and about two or three seconds afterwards he was taken out to identify the body that lay about 50 yards away. Hung could not say whether Loh was running away, but he could suggest why that would have been, if so (ie. because he was frightened and not because he was a communist). Hung's account was that the lorry came in the morning, but after the kepola was taken away, it was loaded with women and children and allowed to leave. It went some distance and then stopped. Later he heard it start again and drive off.
- 2.61. Cheung Hung's 1948 account of the shooting on 12 December is as follows. From the period before the lorry came, he was told by a soldier (and not the police) to hide in a Yam patch. The Chinese and Indian detective and the Malay guides went first to the verandah, under the kongsi. He explained that a group of villagers was led away by soldiers, *rather than running off themselves*:

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<sup>86</sup> If photographs were taken by Detective Woh and the Sub-inspector on 13<sup>th</sup>, they also no longer exist

<sup>87</sup> V2/G/3-4

<sup>88</sup> V2/H/3

<sup>89</sup> V2/H/1

*“Before the firing I saw some of the assembled people walking from the place where they were assembled in a direction between the store and the smoke house. The soldiers waved them to go in that direction and 3 or 4 soldiers were escorting them. After they had gone some distance the firing started. I saw six of the people from the kongsi pass. I could not see exactly where they came from because my view was obstructed by a fowl house. I had a clear view only in the direction of the store and the corner of the smoke house nearest the store. Between those two points the six people passed. I could not see any of the people from the kongsi when the shooting started. I could not see a single one of them. The firing started from the direction in which the six people from the kongsi had been taken by the soldiers. I saw no soldiers come back by that route...After the shooting the soldiers seemed very pleased, they were talking to each other and smiling. I was about 10 or more of them in several groups. Some of them were smiling but not all”*

- 2.62. The statement directly contradicts the FARELF Sitrep, the press accounts and the official statements. Moreover, he was interviewed again. In a “further statement”,<sup>90</sup> he again provided an account to the effect that he saw a group of six men led away by soldiers before the sound of shooting broke out:

*“I heard one single shot about one minute before the main firing began. It sounded as if it came from the direction of the river. After the first burst of firing came either from the direction of the river, the direction in which I have seen the six men taking (sic), or from the path leading to the “14<sup>th</sup> Division” (Apparently the path to K. Kubu Estate<sup>91</sup>). It came from both directions almost at the same time and I should not like to say for certain which came first. Firing seemed to be mostly from three directions (marked x on plan). I was in the yam patch by the fowl house (FH) at the side of the road.”*

- 2.63. As regards the knowledge of the Detectives and the guides, Hung added that, during the firing, both detectives and the two Malays were all underneath the kongsi, the Indian having walked there after the first shot: “If the labourers had started to run while they were in this area they should have been seen by the police”.
- 2.64. Although no statements taken from the British soldiers in 1948 for the purposes of Sir Stafford’s inquiry survive, there is information about how the matter was approached. The picture which emerged in 1970, when soldiers were asked, was one of (a) collaboration with each other and (b) an official line (the escape-attempt).<sup>92</sup> When he was interviewed by the Metropolitan Police, Colonel Ramsey said the police asked him to take statements from the patrol after the incident and that he had written out statements for the men, which he asked them to sign.<sup>93</sup>

#### *Sir Stafford’s 1970 description*

- 2.65. In 1970 Sir Stafford spoke about his investigation to the BBC’s *World at One* programme. The transcript is available.<sup>94</sup> What he then said is itself very revealing.

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<sup>90</sup> V1/G/5

<sup>91</sup> The text in parenthesis appears in the original translated document

<sup>92</sup> e.g. VB2/J/8, VB2/K/13-14, 31, and 38

<sup>93</sup> MPS File summarised by Brendan McGurk at V1/E/179-180

<sup>94</sup> VB2/K/41-43

He said: *“I cross examined the sergeant and the other men with him and discussed it with the Special Branch men who were with him and I was absolutely satisfied a bona-fide mistake had been made”*. In answer to another question he said: *“There was no formal inquiry at all. Having satisfied myself the statements were true, I made a statement to the press and the matter came to an end. I think we made a statement to the Secretary of State but we made no report to the War Office”*. He suggested that position of the wounds (in the back and sides) supported the story that they were hit when running away. He then repeated: *“I think that anyone who knew anything about it at the time entirely agreed that it was a bona-fide mistake”*.

- 2.66. Sir Stafford in his ‘enquiry’ chose not to speak to any of the surviving villagers, not even the four women who had come to Kuala Lumpur to raise their grievances, nor Cheung Hung who had survived. When interviewed by the Metropolitan Police in 1970, he said *“No enquiries made of inhabitants, none questioned, for a very good reason, because they were most unlikely to talk, and if they did talk to tell the truth.”*<sup>95</sup> This is extraordinary, and layers discrimination upon inadequacy (Brendan McGurk elegantly understates it as *“very unfortunate”*<sup>96</sup>). Sir Stafford must similarly have ignored the contemporaneous statements from Cheung Hung which seriously undermined the official account. He must even have ignored key aspects of the statements of DC Woh and DS Gopal. No further statement was taken from Taib or from anyone else.
- 2.67. Sir Stafford told the police in 1970 that when he went to the site he spoke with *“a Chinese detective who was a special branch man and (he believed) a Malay member of the special branch and the guides and interpreters who had been with the patrol”*.<sup>97</sup> That would mean he knew what Gopal and Woh were saying, that he had spoken to the Malay guide Jaffar Bin Taib, and that he had identified the second Malay guide.

## Retrospective change in the law

### *Public criticism*

- 2.68. Sir Stafford’s position was that, after the public statement to the press in 1949 *“the matter came to an end”*. It did not. For a start, how was it necessary and permissible to kill all 24 people, in order to prevent an escape? The situation was inflamed by a press conference given by Sir Alec Newbould and Major General Boucher at the time the supplementary statement was published.<sup>98</sup> Sir Alec said: *“I have no doubt at all that these men made an attempt to escape from legal custody, and having made that attempt they had to stand the consequences”*. He went on, *“Let us be absolutely fair with the security forces. The point at issue is that, in starting the attempt to escape, the men were warned and continued to make their escape and the patrol opened fire”*. General Boucher supported the

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<sup>95</sup> Quoted in McGurk at V1/E/187

<sup>96</sup> V1/E/112 §10

<sup>97</sup> Ibid

<sup>98</sup> Comments quoted in SD at pp 63-65, but see the original press at V2/I/9 and 11

conclusion drawing the attention to the lethal effect of modern weapons: *"I think the public should know that troops and police are trained never to open fire unless it is necessary, but when they have to fire, the fire is always intended to kill. It cannot be anything else"*.

- 2.69. These official comments sparked a further debate. The *Straits Times* queried how the account (based on official sources) had changed from the men running *into the guns* to the men running *past them*. It asked how (quoting General Boucher) it could be necessary to have opened fire to kill all 24 people in the case.<sup>99</sup> The paper referred to a decision of the High Court of the Federation given by Mr Justice Laville 3 months before the Batang Kali incident: *"The High Court which interprets the law does not agree with the Army, which is charged with preserving it"*.<sup>100</sup>
- 2.70. An article published in the *The Straits Times* on 11 January, entitled *The Criminal Procedure Code*<sup>101</sup> took issue with the 'shoot to kill' dimension of Newbould and Boucher's comment. The author quoted Section 15(iii) of the Criminal Procedure Code: *"Nothing in this section gives the right to cause the death of a person who is not accused of any offence punishable with death or penal servitude"*. He went on to quote section 86(ii) of the same Code relating to action by the military and specifically to dispersal and arrest of unlawful assemblies: *"Every such (military) officer shall obey such requisition in such manner as he thinks fit, but in doing so he shall use as little force and do as little injury to persons... as may be consistent with... arresting and detaining such persons"*. The author concluded: *"How then can the GOC justify the wanton killing of these people. After all the present disturbances are civil disturbances; hence the employment of civil police. I have not heard that these sections of criminal procedure have been abrogated"*.
- 2.71. This criticism was a good one. In December 1948 various emergency powers were in place providing for a right to use lethal force where a person enters 'protected places' or 'special areas' and, within them, refuses to stop when challenged.<sup>102</sup> Batang Kali was not a 'protected place' or 'special area' at the time of the massacre. Thus, by virtue of Regulation 27 the British Armed forces enjoyed the same powers of search, arrest and detention, but they did not enjoy greater or special powers with regard to using lethal force on civilian suspects not engaged in combat. Shoot-to-kill was contrary to law.

### *Regulation 27A*

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<sup>99</sup> V2/I/9

<sup>100</sup> The detail of the decision of Laville J is quoted in a bad copy at V2/I/9, but see the same article dealt with in SD at p. 68. Sitting at the Jahore Assizes, Laville J had acquitted two defendants who faced charges of consorting with an armed terrorist. The terrorist concerned had been convicted and hanged. The two defendants had been seen to run from the hut in which the terrorist had been arrested. The judge ruled that the flight from a house at the approach of the police by 'uneducated people' in Malaya was far from being a conclusive or even probable indication that those running had a guilty 'knowledge or intention'.

<sup>101</sup> V2/I/12 quoted in SD pp 68-69

<sup>102</sup> See Emergency Regulation 10 and 10A



2.72. So it was that on 20 January 1949 an amendment was made by Sir Alec Newbould to the emergency powers pursuant to the Emergency (Amendment No. 6) Regulations 1949. This made provision under a new Regulation 27A for arrests to be effected of any person who was reasonably suspected as having been concerned with the unlawful possession of firearms or ammunition, consorting with a person concerned with unlawful possession of firearms, or consorting with or harbouring a person known to intend to or have acted in a manner prejudicial to public safety or order. Lethal force could be used to effect the arrest of such a person, or to prevent an escape, provided that a loud warning was given first:

*27A. (1) Notwithstanding anything to the contrary contained in any written law, it shall be lawful for any officer in order:*

*(a) to effect the arrest of any person whom he has, in all the circumstances of the case, reasonable grounds for suspecting to have committed an offence against Regulations 4, 5 or 6A; or*

...

*(c) to prevent the escape from arrest or the rescue of any person arrested as aforesaid,*

*to use such force as, in the circumstances of the case, may be reasonably necessary, which force may extend to the use of lethal weapons.*

*(2) Before any lethal weapon may be used to effect the arrest of a person an officer shall call upon him, in a loud voice, to stop and the person so called upon shall be given a reasonable chance to stop and submit to arrest.*

...

*(4) For the purposes of these Regulations "officer" means any police officer or any member of His Majesty's Navel, Military or Air Forces or of any Local Forces established under any written law.*

2.73. Regulation 27A was evidently designed to cover the official account of the Batang Kali killings. Indeed, Regulation 27A(6) provided (emphasis added):

*(6) Any act or thing done before the coming into force of this Regulations which would have been lawfully done if this Regulation had been in force, shall be deemed to have been lawfully done under this Regulation.*

#### *Attitudes of officials*

2.74. Sadly, no disclosure has been given by the Defendants of the circumstances in which these Regulations were proposed, prepared, or agreed. However, it is known that officials were troubled by the idea of the campaign against the insurgents being subjected to legal constraints. The attitude of Sir Alec quoted above in his telegram to the Colonial Office on 1 January 1949 (§2.50 above) was that it was difficult to "fight a war of terrorism" and at the same time "maintain the rule of law". In yet more strident terms, the High Commissioner, Sir Henry Gurney, sent a memo to London on 28 January on "Law and Order in the Federation" in which he suggested: "It is in fact impossible to maintain the rule of law and fight terrorism effectively at the same time". He noted that the police and military forces broke the law "every day" and insisted

that shows of force were necessary to defeat the insurgents. He added: *“it is most important that police and soldiers, who are not saints, should not get the impression that every small mistake is going to be the subject of a public enquiry or that it is better to do nothing than do the wrong thing quickly”*.<sup>103</sup>

- 2.75. The controversy over Batang Kali was also being dealt with in the wake of the killing of seven members of the 4<sup>th</sup> Hussar regiment and the wounding of nine others on 31 January 1949.<sup>104</sup>
- 2.76. The intended consequence of Regulation 27A(6) must have been to seek to immunise official explanation for Batang Kali from any legal accountability for the killing the 24 villagers that had occurred less than 6 weeks earlier.

### **Enshrinement of the official account**

- 2.77. By now, the British authorities were clearly committed to the official account. And so they remained. On 26 January 1949 the Colonial Secretary Mr Creech Jones gave a written answer to Parliament confirming that *“the Chinese in question were detained for interrogation under powers conferred by the Emergency regulations”* and reporting the Attorney-General’s conclusion (*“after careful consideration of the evidence”*) that: *“had the Security Force not opened fire, the suspect Chinese would have made good an attempt at escape which had been obviously pre-arranged”*. He then referred to the full statement that was issued in Kuala Lumpur on 3 January (see §§2.53-54 above).<sup>105</sup>
- 2.78. As time passed, the entrenched official version of events gained weight. It was endorsed in the official regimental history of the Scots Guards (*Malaya 1948-1951, 2<sup>nd</sup> Battalion Scots Guards*): *“Suffice to say that those killed were active bandit sympathizers”*; then in Scots Guards Historian David Erskine’s book, *The Scots Guards 1919-1955* (as noted at page 124 of *Slaughter and Deception at Batang Kali*) and the regiment’s former Chaplain has also commented: *“The shooting of escaping prisoners was inquired into – and accepted as a nasty, but necessary part of a nasty operation”* (*“Guards ‘killed reds as they fled’”* Express, 3 February 1970). Inquiries in 1970, saw members of the regiment and other senior army figures steadfastly rejecting the possibility that the official account was wrong.<sup>106</sup> This occurred again in 2003 in response to the publication of the biography of Chin Peng, who had been Secretary General of the Communist Party of Malaya.<sup>107</sup> Finally, a report by Counsel instructed by the Defendants<sup>108</sup> to assist the Defendants was prepared to countenance that there may

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<sup>103</sup> Memo from Sir Henry Gurney, 28 January 1949, CO 537/4773 quoted in Siver V2/U/30

<sup>104</sup> V2/I/4. Some of the members of the Scots Guards who admitted to murder in 1970 would wrongly refer to this event as the motive for the shootings

<sup>105</sup> V2/H/35

<sup>106</sup> V2/L/1, V2/L236 and V2/T/13-14

<sup>107</sup> V2/T/13-14

<sup>108</sup> V1/E/113

have been “a spontaneous reflex response”,<sup>109</sup> whatever that may mean. He did not engage with any analysis of the propriety or legality of a “reflex” mass-killing; nor its implications for the truthfulness of the official account which the Defendants have steadfastly maintained and refused to retract.<sup>110</sup>

2.79. In Malaya, the Emergency persisted until 1960.

## **C. 1970**

### ***The People* revelations**

#### *Overview*

2.80. The revelations throughout 1969 concerning the massacre of villagers by American troops in Mai Lai in Vietnam the previous year caused debate about this country’s colonial past and whether similar atrocities had been carried out by British forces. Graphic photographs were published in the international press on 20 November 1969 and the following day George Brown, the deputy leader of the Labour party and a former foreign secretary, appeared on the *World at One*. In an interview with William Hardcastle, he said “People when they are fighting, when they are frightened do terrible things, and are terribly ashamed of them afterwards. I suspect there are an awful lot of spectres in our cupboard too”.<sup>111</sup> On the following day *The People* newspaper wrote a highly critical article, ‘Where’s the evidence George?’, maintaining that it did not believe that in either of the two world wars, or since, any such crime as Pinkville (as Mai Lai was then referred to) had been committed by British soldiers:

*“If any such evidence was produced, we and other newspapers would search out the truth relentlessly. But Mr Brown’s chief offence is not the slur he casts upon honourable brave men, but the excuse he unwittingly provides for those who committed such atrocities. The Nazis must never be allowed to excuse the wiping out of Lidice on the grounds that the soldiers of any other nation might have done the same. The Americans must not be allowed to excuse the shame of Pinkville with the excuse c’est la guerre. And we hope and believe that they will never make that excuse.*

*Some silly people say that since all war is horror, since we bombed Dresden and the American Hiroshima, what’s the difference? But Mr Brown is not rated a silly person. He was Foreign Secretary. His words are heeded.*

*He knows about the Geneva Convention. He knows about the standards of civilised behaviour that decent men try to follow even in war. Withdraw this slur, Mr Brown. LET THERE NOT BE ONE TRACE OF MERCY OR TITTLE OF EXCUSE FOR THOSE WHO RAISED THEIR GUNS AND SHOT DOWN WOMEN AND CHILDREN AT PINKVILLE”.*<sup>112</sup>

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<sup>109</sup> V1/E/ 135 and 137

<sup>110</sup> V1/E/375, 380, 383 and V1/B/2

<sup>111</sup> Quoted in SD, 79 and referred to in *The People* editorial, *Why we are publishing this report*, 1 February 1970 at V2/J/10

<sup>112</sup> SD, pp 79-83

- 2.81. On 2 December 1969,<sup>113</sup> two days after this article in *The People* was published, an ex-Scots Guard, William Cootes, walked into the papers' offices in Manchester to give information about the killings at Batang Kali. In providing the paper with a graphic account of a massacre, he also explored the possibility of payment for his story. In the next two months the paper would make contact with a number of the other members of the patrol who participated in the killings. None of them would request or obtain payment for the accounts they gave.
- 2.82. On 1 February 1970,<sup>114</sup> *The People* published material including extracts from sworn statements made by four members of the patrol which shot the villagers in Batang Kali and the interview of another: They were Willam Cootes,<sup>115</sup> Alan Tuppen,<sup>116</sup> Robert Brownrigg,<sup>117</sup> Victor Remedios,<sup>118</sup> and George Kidd.<sup>119</sup> At the same time *The People* published the denials of the patrol commanders, Charles Douglas<sup>120</sup> and Thomas Hughes,<sup>121</sup> both of which included incriminating statements. In the subsequent days Tuppen repeated his admissions on the television a number of times in the presence of an accompanying solicitor;<sup>122</sup> Remedios also appeared on the radio. In circumstances where wrongdoing was coming to light and being admitted, Sir Stafford Foster Sutton now appeared on the *News at One* to say that he and "everyone who knew anything about it, at the time" regarded the killings as "a bona fide mistake".<sup>123</sup>
- 2.83. These statements could not be reconciled with the official version of events set out in summaries of Sir Stafford Foster Sutton's original investigation and otherwise, nor could any of the accounts given by the members of the patrol who spoke with *The People*. They said in essence that the villagers had not been trying to escape and the patrol had simply been ordered to walk them away from the kongsis in groups and shoot them. The account was much closer to the statement of Cheung Hung in 1948 that referred to groups of prisoners being taken away by the soldiers before the shooting started. Some of those who gave statements indicated that this was a planned response in the nature of a retaliation to the insurgency. It was also said that they had been ordered to shoot the women and children of the village, but had refused to do so. Members of the 1948 patrol repeatedly and emphatically stated that the victims of Batang Kali were shot in cold blood and without any cause.

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<sup>113</sup> For a summary of *The People* investigation, see the report of DCS Williams at V2/M/3-12

<sup>114</sup> The original article in *The People* is at V2/L/1-10

<sup>115</sup> V2/K/16-27

<sup>116</sup> V2/K/32-36

<sup>117</sup> V2/K/3-5

<sup>118</sup> V2/K/37-38

<sup>119</sup> V2/K/6

<sup>120</sup> V2/K/7-8 and V2/L/2-4

<sup>121</sup> V2/K/6-7

<sup>122</sup> V2/K/50-61

<sup>123</sup> V2/K/41-43

- 2.84. The occurrence of revelations like these coming from those directly responsible for a massacre had no precedent in post 1945 British colonial history, and nor have there been any comparable admissions concerning a particular historical event since.

*William Cootes*

- 2.85. William Cootes gave a sworn statement to *The People*.<sup>124</sup> Cootes referred to the relevance of other incidents, though he got the dates of some of them the wrong way round. He described "the Hussars" as having been killed prior to Batang Kali, whereas in fact they were killed on 31 December. He described an anger: "*Men were angry about the Hussars incident and we were unofficially told we were going to wipe out the village*". (Perhaps that "anger" attached to other casualties in the weeks before and the shooting of local policemen the day before.) Once in Batang Kali, on the first night Cootes saw Hughes strike a woman. He also saw Douglas motion a youth to walk down a path and then shoot him in the back in full sight of the villagers. The youth did not die and therefore Hughes shot him in the head. At some point a man in his 40s was brought into a kongsi by Hughes and Cootes was required to shoot his rifle into the roof by way of a mock execution (This may well have been Choi Loi, who would collapse and was allowed to return to Ulu Yam Bahru the following day.) On that first night Douglas and Hughes told them that the intention was to execute the entire village, but the men made it clear that they would not shoot the women and children, who were then locked in a separate kongsi
- 2.86. On the following morning the women and children were loaded onto a truck which left. Fern and Remedios were given the opportunity to guard the road from incoming traffic because they were "squeamish". Hughes commanded the rest of the patrol to shoot the men, or they would be shot themselves. The Chinese were then separated into 4 groups of 7 and the Sergeants indicated which group of the remaining patrol had to take them. Cootes' group that included Alan Tuppen and Ray Gorton took their 7 to the spot near the river. Tuppen took out some matches indicating that the village was going to be burned and motioned them to run. A couple started to walk. An old man stayed still and a youth was too terrified to move. Then (emphasis added):

*"We still hadn't fired and we were still looking at each other. Then we heard shooting from one of the other groups so instinctively almost, we opened fire on them. Once we started firing we seemed to go mad. The old man died immediately from one bullet. The one that was furthest away at the time took about seven bullets before he finally stopped crawling. Apart from this one, the bodies were in touching distance of each other and quite near to the stream. I remember the water turned red with their blood. The incredible thing was that none of them spoke. They didn't shout, or scream, or anything. It was all over in something like half a minute. The man who kept crawling we shot in the head at point blank range. I think it was Gorton who shot. The man's brains spilled on to my boot".*

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<sup>124</sup> V2/K/6-15

- 2.87. Cootes did not think these villagers were terrorists: *"I felt we had shot down innocent men in cold blood"*. They had not found arms in the village or anything to suggest that the villagers were engaging in terrorist activity. About four days later they were told (either by the Sergeants or Captain Ramsay) that they would have to give a statement: *"We were told that we all had get together as a group and decide on the story we were going to tell"*. At one point they were threatened with prison if they did not agree on a story. He recalled that it had been remarked upon as strange that the bodies were found closely together in different groups. He also recalled the interviewer expressing the hope that they would *"get away with it"*.
- 2.88. Cootes was the first witness to go the newspaper, it was revealed in due course that he was paid £1500 for arranging contact with other members of the patrol. It has been said that this could undermine the reliability of his account. But Cootes was corroborating a 1948 statement from Chueng Hung which had never seen the light of day. Moreover, Alan Tuppen gave full statements to *The People*, supporting some, but not all of Cootes' account, and he was prepared to appear on television on 3 February accompanied by a solicitor to give his testimony.

#### *Alan Tuppen*

- 2.89. Alan Tuppen gave a sworn statement to *The People*.<sup>125</sup> He recalled that Captain Ramsay briefed the patrol prior to going to Batang Kali that the objective would be to wipe out the village and everyone in it; because he said that they were either terrorists themselves or were helping terrorists in that area. Unlike Cootes, he did not see anyone killed on the first night, although he did see one man who had been *"terrorised"* by the patrol when they first arrived and was in a state of extreme shock. (This was probably Choi Loi.) Women and children were separated from the men overnight and allowed to leave in the morning in a truck that also took the *"terrorised"* man from the night before.
- 2.90. After the truck left, the patrol was addressed by Sergeant Hughes. Tuppen could remember *"extremely well"* what he said. Hughes told them that the remaining men and boys would be shot and anyone who was too *"squeamish"* could take one place forward and fall out. Tuppen did not do so. He was in a group with Ray Gorton and Cootes. Other groups of Chinese were taken in different directions. He recalled that each group *"strolled"*. What happened next was that they heard shooting from one or some of these groups; that instinctively they started to fire on the villagers in front of them; that one man with bullets in him kept crawling and they fired at him several times, including through his head, before he died. Tuppen described firing on some who went into the stream. He was told about Cootes' recollection that before the killing he had taken out a box of matches to try to get the villagers to run but could not remember that happening, only that it might have. *"The important point"* he wished to make was *"that none of the villagers were shot while trying to escape of their*

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<sup>125</sup> V2/K/32-36

*own free will or either by being forced to run away by any action on our part". After returning to the camp, although he could not remember, he did recall being told to give the story that became the official account. At an interview with a civilian, "I told the story we had agreed to tell knowing that it was not true".*

- 2.91. Tuppen appeared live on the ITV current affairs programme *Day by Day* on 3 February 1970 after the initial revelations had been published.<sup>126</sup> During the course of the interview with Bob Westwood, Tuppen's solicitor, Derek Henson, was also present. Tuppen said that the briefing prior to setting out was informal, but he could remember "*an officer*" being present. He could not recall anyone trying to escape during the first evening. On the second day, Hughes had given them an order to shoot, albeit giving them the option to fall out. When pressed as to whether he was sure about this, he emphasised, "*I'm positive*". He confirmed that a conscious decision was taken that the men of the village were in fact to be shot. He took part of the group of villagers towards the river. When they heard shooting in other parts of the village, they instinctively started to shoot as well. The men were not running away at this point. He agreed that the villagers were shot down "*in cold blood*". The interview ended with the following exchange:

*Westwood: Was it murder?*

*Tuppen: I would prefer not to say anything about that actually. I suppose it was.*

*Henson: I don't yet have a chance to look into the full legal position.....*

*Westwood: Let's not consider the pure legal facts. Do you yourself feel that you did in fact commit what may or may not turn out to be legally indictable murder; but, nevertheless, an act which was really tantamount to murder, in your own heart?*

*Tuppen: Yes."*

- 2.92. Tuppen further appeared on the BBC evening television news on 3 February in a pre-recorded interview with Keith Graves.<sup>127</sup> Although he could not speak for other groups of soldiers, he saw the men in his group shooting, and he was shooting: "*The men were then walking away from us toward the stream and across and the next thing we heard was shouting and firing and we instinctively done the same, because this was the order which we understood*". He confirmed the offer to fall out before the shooting and that he did not. He said that the account he gave to the initial inquiry was that "*the men were running whereas in actual fact they were walking*". The interview ended with the following exchange:<sup>128</sup>

*Graves: What do you think about this incident in your own mind? Do you think there was a mistake, that someone thought they were escaping, or that they were escaping, or in fact they just shot down?*

*Tuppen: I think the latter would be nearer to it.*

*Graves: You think they were just shot down.*

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<sup>126</sup> V2/K/50-61

<sup>127</sup> V2/K/62-67

<sup>128</sup> V2/K/67

*Tuppen: Yes, more or less, yes."*

- 2.93. Tuppen appeared on the *News of Ten* having conducted a pre-recorded interview with Leonard Parkin again in the company of his lawyer.<sup>129</sup> He confirmed again that the NCO lined the patrol up giving them the choice to fall out and that no one fell out: "we knew that they were going to be shot and nobody fell out". They took a group of villagers to the river, who were "walking" not running. When they heard the shooting they started to shoot. In answer to the question, "*Did you and the others fire in cold blood here*"; he replied, "Yes".

*Robert Brownrigg*

- 2.94. Robert Brownrigg gave a sworn statement to *The People*.<sup>130</sup> He did not recall the briefing to the patrol before setting out to the village, but he could "clearly" remember what happened when they reached it. On the first night he described men being taken to a separate hut for interrogation, hearing shots and finding out afterwards that they were the subject of mock executions. It was in this context that he recalled a man being shot while trying to escape (potentially fearing that the executions were not make-believe). He was shot in the back. On the second day he remembered the Sergeant saying that the villagers were to be shot and that no one refused to take part. He considered the killings to be in cold blood; and maintained that he himself fired into the ground or anywhere to avoid hitting the villagers. The soldiers separated the villagers into groups and his group "*walked ahead of us towards the stream*":

*"I don't know whether someone shouted an order but suddenly firing started and all the villagers started running. As I say, I fired to miss them but within a minute or two all the male villagers were dead. Some tried to escape in a stream but were shot."*

Then this:

*"Some time later there was an enquiry in Kuala Lumpur and I gave evidence. I said the villagers were shot while trying to escape. This was not true, but I do remember being told to say that the villagers were shot while trying to escape. Looking back there was no reason to kill these people although somebody might have had a reprisal in mind. There had been a lot of talk about atrocities against British troops."*

*Victor Remedios*

- 2.95. Victor Remedios gave a sworn statement to *The People*.<sup>131</sup> He said that Captain Ramsay gave the patrol a briefing telling them that the villagers were feeding the terrorists and that everyone of them should be killed. He recalled the killing of the boy on the first night by one of the sergeants "for attempting to run away or some such reason". The men and the women were separated with the women being allowed to leave the next morning. At the last minute one of the male villagers was

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<sup>129</sup> V2/L/69-73

<sup>130</sup> V2/K/3-5

<sup>131</sup> V2/K/37-38



put on the truck (A reference to Choi Loi). The sergeant had “terrorised” him the day before and he had lost his senses. This was part of a process of mock executions used to influence those being interrogated.

- 2.96. Remedios recalled Sergeant Hughes telling the patrol on the second day that the men would be shot; but that any one who did not wish to be involved could fall out. He did not fall out as such, but he found out that he need not play a part in the killings if he “went up the road to where the lorry with the women on was parked and acted as a guard”. He and James Fern volunteered to do this with orders to shoot any of the women if they tried to escape. He confirmed that the women and the truck were still in the vicinity: “It sounded like a battlefield. We could hear screams and shouts as our men killed the villagers. All the women started screaming too and tried to get off the truck to get back to stop what was happening”. Afterwards the patrol could “talk of nothing but the killings”. A day or so later they were told they would have to give statements and warned to say that the villagers were trying to escape: “This was quite untrue. We knew that before we went on patrol that the object was to wipe out the village and those who lived in it”. Remedios had discussed the matter with his wife over the years and it had stayed on his conscience.
- 2.97. Remedios appeared on the *World This Weekend* on Radio 4 at lunch time on 1 February 1970 when he was interviewed by Roger Blythe.<sup>132</sup> Remedios reiterated that some time before the operation they were told that the villagers were either feeding the bandits or they were terrorists themselves: “We were told that we were to...we was to wipe out the village”. They were given the opportunity not to be involved in the shooting. Blythe asked him, “So the Sergeant told you that the men had been separated from the women were going to be shot, there and then, and if you did not want to take part you need not?” Remedios replied, “That’s it.” It was suggested to him that stark differences existed between evidence apparently given to the 1948 inquiries in Malaya and claims now being made in *The People*,

***Remedios:*** “We were told by the sergeant after the incident that if anyone said anything we could get 14 or 15 years in prison. We were more or less threatened by the sergeant.

***Blythe:*** So you got together and conspired to fabricate a story?

***Remedios:*** Yes, more or less.

***Blythe:*** All the platoon?

***Remedios:*** More or less, yes.”

*George Kidd*

- 2.98. George Kidd would not provide a sworn statement to *The People* but he undertook to the paper to tell the whole truth under oath if asked to do so by an inquiry.<sup>133</sup> The paper recalls him saying, “It was murder – sheer bloody murder”. In answer to the

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<sup>132</sup> Part of the transcript is at V2/K/39-40 and the rest is summarised verbatim in SD at p. 95

<sup>133</sup> V2/K/6

question, "Were these men running away", he said: "*The truth is what Cootes has told you – that these people were shot down in cold blood. They were not running away. There was no reason to shoot them*".

### *Thomas Hughes*

- 2.99. Thomas Hughes would also not provide a statement *The People*, but in an interview with the paper he made incriminating comments.<sup>134</sup> At first he reiterated that the villagers were trying to escape and he personally gave the order to shoot. When told that there were sworn affidavits to the contrary, he changed his position emphasising that he was only a Lance Sergeant at the time, that he had not in fact given the order to fire; and that Douglas had been in charge. With regard to the killing of the youth the day before, he said he saw the top of the man through the bushes and he seemed to be running. Douglas had shot him, but another guardsman discovered that he was not dead and informed Hughes. Hughes shot the man in the head as "*a humane act*". He could not say if anybody told the man to run: "*I was surprised at the shooting in the circumstances*". Hughes accepted the account given by Cootes, Brownrigg and Remedios that during the night he took villagers behind a hut one at a time and fired a shot in the air each time to pretend that he was executing them. After the treatment one man confessed that everybody in the village was a bandit.
- 2.100. As to the second day, Hughes denied giving the men the opportunity to fall out instead of killing the villagers. As to their deaths he reiterated the official account of 1948. In doing so, he made the following observations. The "shout" that sparked the shooting could have come from Douglas or one of the Chinese interpreters. They had not taken the men back to the police station to interrogate them, because they "*didn't want screaming [from the women and children] while they took them away*" and because the men would go missing from the police station – "*the Malayan police would have got rewards for killing them*". He added that the Malayan police at the scene had looted the dead bodies for money. In contrast to the 1948 account given by Detective Gopal, nothing in this reported interview suggests Hughes had found ammunition immediately after the killings on 12 December, or at all.
- 2.101. Hughes made other, telling comments in his interview, for example, responding to the question "*How can you be sure the men were terrorists*" with "*How can you be sure? But we thought they were. I sensed danger in the village. I can always sense danger. It is better to be safe than sorry.*" He then volunteered this "*If the women and children had made a break for the jungle, I would have given the order to fire. That's natural in war.*"

### *Charles Douglas*

- 2.102. Charles Douglas also would not give a statement to *The People*, but by arrangement with the Military of Defence, he was interviewed. As well as the quoted comments in

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<sup>134</sup> V2/J/6-7

the article of 1 February,<sup>135</sup> the notes of the MOD press officer survive.<sup>136</sup> He told the paper that the object of the operation was to round up all the villagers and if necessary bring them back to the battalion headquarters for questioning. He recalled Captain Ramsay being present at the briefing. He said that he shot the youth, because he ran away and did not stop upon being told to do so in Chinese. When asked whether he failed to kill the youth outright he said, *"I think I did"*. He believed that the village was searched and ammunition was found, but he was not quite sure of that. He denied being told to burn the village and suggested that a fire began by accident either before or after the killings. He stood by the official account.

### *George Ramsay*

2.103. *The People* also approached Captain (now Colonel) George Ramsay, who indicated that he would be appalled if the account of a massacre was true.<sup>137</sup> While he did not accept his own alleged involvement in the briefing, he recalled concern about the number of Chinese killed and being horrified at the suggestion that the men might have acted improperly. He went on to observe *"As a matter of fact we had often been criticised before the incident because of our inability to hit moving targets. Up to that day our bag of terrorists had been very poor indeed"*.

### *Sir Stafford Foster Sutton*

2.104. Sir Stafford Foster Sutton, who by 1970 was President of the Pensions Appeals Tribunal, appeared on the *News at One* on 2 February 1970 to make the admissions about the superficiality of the inquiry and the "bona fide mistake" as detailed at §2.65 above.<sup>138</sup> According to Ward and Miraflor subsequent efforts of other media outlets to interview him later in the day and thereafter were frustrated by a press release issued by the Tribunal indicating that by virtue of his holding judicial office the President was precluded from giving further interviews to press and radio.<sup>139</sup> A note from the Permanent Under-Secretary at the Ministry of Defence, Sir James Dunnett, confirms a discussion he had with Sir Denis Dobson in the Lord Chancellor's office on 2 February. Sir Stafford had informed the Lord Chancellor that he had been invited to appear on television that evening by the BBC and ITV claiming that the media story *"was absolute rubbish"*, but he was told *"to do no such thing"*. Dunnett informed the Minister that he told Dobson that he entirely agreed.<sup>140</sup> There is a handwritten note on the right hand side of the letter addressed to Secretary of State for the Armed Services: *"You should read this before your meetings with US of S (Army) at 1645 today"*.

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<sup>135</sup> V2/J/7-8

<sup>136</sup> V2/K/7-8 and V2/L/2-4

<sup>137</sup> V2/J/8

<sup>138</sup> V2/K/41-43

<sup>139</sup> SD, pp 99-100

<sup>140</sup> V2/L/12

## *Revelations in Malaysia*

- 2.105. As a consequence of the story in *The People*, journalists on *The Straits Times* in Malaysia sought out surviving witnesses and reported its findings on 3 February 1970.<sup>141</sup> Their first discovery was 57 year old Inche Jaffar bin Taib, a former special constable with the Malaysian police, who acted as one of the two guides during the operation. He told *The Straight Times* that when the lorry arrived in the morning of 12 December the Scots Guard soldier told him not to look at the male detainees. “*I turned my back towards them and suddenly there was a terrific burst of gunfire. Women and children screamed. I turned around. There were dead bodies everywhere. The sergeant warned me that if I breathed a word to anyone about the shooting I would land myself in jail. I counted 25 bodies*”.
- 2.106. By 4 February 1970, *The Straits Times* reported visiting Ulu Yam Bahru where journalists were directed to Chong Fong.<sup>142</sup> This was the name Cheung Hung was otherwise known as. At that time no one in Britain or Malaysia realised that he had given the statement to the authorities in 1948 contradicting the escape narrative. Fong said he had survived because he fainted in terror when the shooting began and then feigned death until the soldiers went away, after which he managed to escape and stay in a friend’s house.<sup>143</sup> The paper also located three female survivors: Chong Fong’s wife, Tham Yong (the mother of the First Claimant), Foo Moi and Chai Kew. All the witnesses reiterated that there was no escape attempt. Chong Fong would meet *The People* journalist, William Dorran, in the coming days. He would give the same account as above, but also indicated that the youth killed the night before had been dragged along the road and shot.<sup>144</sup>

## *Immediate response by the Ministry of Defence*

- 2.107. The Ministry of Defence began responding to the story before it was published in *The People* in the knowledge that Douglas (now a Regimental Sergeant Major) had been approached to answer the allegations. A memo dated 28 January 1970 forwarded to the key departmental Secretaries in the Ministry recalled the official version of events from 1948 and that all involved had been exonerated.<sup>145</sup> The decision as to whether to open fire when suspected persons attempted to break through a cordon was noted as a difficult one, and usually one that had to be taken instantly. A (somewhat inapposite) analogy was drawn with an incident involving three Stern gang terrorists in Palestine, who drove through a road block one year before Batang Kali incident and let off a bomb before they could be shot at.

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<sup>141</sup> Miraflor and Ward, pp 105-106

<sup>142</sup> Ibid, p 111

<sup>143</sup> V2/L/31.

<sup>144</sup> V2/M/10-11

<sup>145</sup> V2/L/1

- 2.108. On learning that *The People* had four sworn statements, the MOD Senior Information Officer, J A Gannon expressly asked one of the journalists, William Gardner, to delay publication because it could have serious repercussions in Northern Ireland where British troops were facing increasing tension.<sup>146</sup> The paper did not oblige.
- 2.109. An urgent enquiry in relation to documents was issued by the MOD. On 2 February 1970 FARELF responded to referring back to the official account at the time, but providing the following context for the operation on 11 December 1948.<sup>147</sup> The patrol was “*searching for bandits believed to be responsible for burning Sungei Tempayan and Ulu Yam Lama Railway station and for the attack in which Inspector Harnum Singh was wounded*”.<sup>148</sup> Indicating that they may have been in possession of original files on the subject, the telegram continued: “*one of the 25 volunteered information that they were bandits and that food would be brought to them at dawn the following day*”. As to the cause of the death it concluded: “*The 24 Chinese seeing the smallness of the Guards-police broke away and attempted to escape*”.
- 2.110. An MOD signal message from MOD Army was sent out to FARELF on 30 January 1970 asking for copies of the court of inquiry that was held; and requesting whether there was “*any info*” to be gleaned from “*local sources*”.<sup>149</sup> A reply dated 2 February read: “*(1) Brigadier Martin formerly DAAG PS1 GHQ FARELF remembers papers relating to the incident held ‘never to be destroyed’ in his safe; (2) We are hopeful these are still available*”.<sup>150</sup>
- 2.111. Meanwhile on 3 February, a handwritten note from the “*library and records department*” to Mr P J Sullivan (South West Pacific department: FCO) informed him that the Colonial Office file on the subject appeared to have been destroyed under the provisions of the Public Record Act 1953 (“*possibly in 1966*”) and only certain documents (as detailed in Section B §§2.46-2.51 and 2.55-2.64) above had survived.<sup>151</sup> The information was passed to the MOD in due course.<sup>152</sup>

## **The decision to conduct a UK criminal investigation**

### *Parliament*

- 2.112. The above revelations prompted statements in Parliament. On 4 February 1970 the Secretary of State for Defence, the Rt. Hon Denis Healey, was asked in the House of Commons whether he would institute proceedings against those responsible for the massacre of civilians in Malaya.<sup>153</sup> He replied noting that the House would wish

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<sup>146</sup> V2/M/10 § 45

<sup>147</sup> V2/L/6-7

<sup>148</sup> See the original Sitreps on these events at V2/H/3

<sup>149</sup> V2/L/5

<sup>150</sup> V2/L/42

<sup>151</sup> V2/L/20-21

<sup>152</sup> V2/L/59-60 and 93

<sup>153</sup> V2/L/37

him to do so, that he was “*treating the matter with concern and urgency*”, had called for the “*documents relating to the original investigation*” and undertook to consider whether to refer the matter to the Director of Public Prosecutions.

- 2.113. On 13 February 1970, Mr Healey invited the Director of Public Prosecutions, Sir Norman Skelhorn QC, to consider the matter.<sup>154</sup> In a memo for his consideration dated 12 February from US of S (Army), it was recognised that there was sufficient evidence available to refer the case and there were potential Malaysian witnesses, including Cheung Hung “*the alleged survivor*”, his wife Tham Yong; Jaffar Bin Taib “*who says he was the special constable that guided the patrol*”; and Mrs Wu Moi, Mrs Chin Young and Mrs Chin Kiew, “*who claim to have seen their menfolk killed*”.<sup>155</sup> Parliament was informed of the referral on 16 February.<sup>156</sup>

#### *Initial Review on behalf of the DPP*

- 2.114. A written review of the case was drafted for the DPP by a prosecution lawyer John Wood by 27 February 1970.<sup>157</sup> Having reviewed the available statements from the soldiers to *The People* and the transcripts of television interviews, he recommended further enquiries.<sup>158</sup> In terms of division of labour “*the Metropolitan police should investigate the factual side, perhaps assisted by the SIB to take statements from all material witnesses*” and that “*the Ministry of Defence should investigate the military and political aspect*” (para. 9). Of the police enquiries, he noted that they “*should interview all members of the patrol as far as is practicable*”. Of inquiries in Malaysia, he took it for granted that they would have to occur. Witnesses he had in mind that should be interviewed included “*the police officer who accompanied the patrol Inche Jaffar Bin Taib*”; “*Madame Fu Moi*” who “*supports Chong Fung*” (Cheung Hung). He added (perhaps unwittingly in relation to DC Woh who had been the Cantonese speaker in 1948): “*the Chinese interpreter is unknown, but inquiries should be made to trace him*”. If medical or photographic evidence was available, “*it should be obtained*” (para. 10).
- 2.115. As to the conduct of interviews, he preferred for Ramsay, Douglas and Hughes to be interrogated, possibly under caution, only “*after all the evidence had been obtained, including statements from those who buried the bodies.*” Cootes and Tuppen would have to be cautioned when interviewed: “*After all, both admit they were given the opportunity to drop out, both admit they did not do so, both admit murder and both admit telling lies at*

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<sup>154</sup> V2/L/119

<sup>155</sup> V2/L/116

<sup>156</sup> V2/L/122

<sup>157</sup> V2/L/150-165. The note identified that a potential prosecution would have to take place in the civil courts, because at the time a court martial was precluded if charges were brought more than 3 years after the offence. Wood took the view that a prosecution was possible in accordance under s. 9 of the Offences Against the Person Act 1961 (murder or manslaughter abroad). By virtue of Malaya being a British Protectorate, it was not possible to prosecute for offences contrary to section 31 of the Criminal Justice Act 1948 (offences by a Crown Servant in a foreign country) (V2/L/151-152).

<sup>158</sup> V2/L/162

*the enquiry*". They should be regarded as potential defendants. He regarded the position of Brownrigg and Remedios as *"more difficult"*.<sup>159</sup>

- 2.116. On the back page of the available copy of Wood's note are three separate handwritten entries. The first entry is dated 27 February 1970 and is signed by a presently unknown person. Having commended Wood's *"excellent minute"* it reads:

*"In my view we cannot at this stage say that further inquiry is not justified on the ground that there is no reasonable prospect of obtaining sufficient evidence to prove an offence. Clearly all the ex-members of the patrol in this country must be seen. Whether the Government of Malaysia will agree to British police officers continuing the enquiry in Malaysia should I feel be ascertained by an official approach through the usual diplomatic channels, but before we start anything do you think we should let the AG have a copy of Wood's minute to put him in the picture"*

- 2.117. The second entry on the same page is dated 12 March 1970 and is signed by a different presently unknown person. It reads:

*"I have discussed this with the AG in the light of Wood's very helpful Note which I let him have. I agree that the investigation should proceed along the lines suggested [...] and that the question of whether pursuing these inquiries in Malaysia when it arises, should be taken up with the Malaysia Government through the Foreign and Colonial Office"*

- 2.118. The third entry is dated 13 March 1970 and appears to be signed by the DPP, Nigel Skelhorn. It reads: *"Please proceed accordingly"*.

### **Referral to the Metropolitan Police**

- 2.119. The matter was then referred on to the Metropolitan Police Service for investigation.

#### *Aims of the Inquiry and initial FCO response*

- 2.120. The Scotland Yard investigatory team was established under a well-respected senior officer, Detective Chief Superintendent Frank Williams, and included an ex serviceman from the Scots Guards, Ron Dowling. In a letter to the MoD dated 18 March 1970<sup>160</sup> the DPP explained that their investigations were to be confined to the UK for time being but: *"if it is felt necessary to extend them to include Malaysia and elsewhere I will make the necessary arrangements through the Foreign Office"*.

- 2.121. That was felt necessary. On 28 April 1970 DCS Williams set out his plans which were to start interviewing people (including soldiers on the patrol) living in the UK other than *"the central figures"*. A note made on that date added: *"Then he will report to the DPP and seek authority to pursue his investigations in the Far East... When he has collected*

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<sup>159</sup> V2/L/164

<sup>160</sup> V2/L/170

*all the available evidence in the Far East, he will return and interview the central figures in the investigation.”*<sup>161</sup>

- 2.122. At that stage thought was also given to exhumation and forensic examination of the villagers’ bodies;<sup>162</sup> a matter which logically flowed from the reviewing lawyer’s above suggestion if medical evidence was available, it should be obtained.<sup>163</sup>
- 2.123. By 7 May 1970, DCS Williams had also let it be known to the Provost Marshall that he was “*most anxious*” to ascertain who went with the Scots Guards and therefore prior to his leaving for Malaysia it was “*important to locate (1) the Chinese detective (2) the Indian police sergeant and (3) any Malay guides or interpreters*”.<sup>164</sup>

#### *Foreign Office and other departmental concern*

- 2.124. The reaction of the High Commission in Kuala Lumpur from the start was acutely sensitive. On 3 February 1970 it cabled the Foreign Office indicating that although the reaction of the Malaysian government was silent to date, “*we must recognise*” that it “*may come under pressure to open their own enquiry or press HMG*”.<sup>165</sup> The response to DCS Williams’ proposed visit is noteworthy. In a letter dated 19 May 1970<sup>166</sup> to the FCO it commented:

*“While I realise that it may be thought necessary to take the evidence of eye witnesses you may like to point out to Scotland Yard the problems involved in doing so now. It would be difficult to establish with certainty the bona fides of a villager claiming first hand knowledge of the incident; any hint that claims for compensation might have some chance of success would bring forward first hand accounts by the dozen. It is also extremely doubtful if a villager’s recollections of an incident which happened 22 years ago could ever be accurate, especially as the terrain has since changed beyond recognition.”*

- 2.125. This point, and other supposed difficulties with pursuing the investigation in Malaysia were raised repeatedly by officials of the Foreign Office: it might “*revive local feeling*”,<sup>167</sup> cause “*political difficulties*”,<sup>168</sup> “*be given close and embarrassing attention*”,<sup>169</sup> cause “*adverse publicity’ that might rub off on FARELF in 1970*”.<sup>170</sup> These were allegations that remained “*sensitive in more ways than one*”.<sup>171</sup> A flavour of how the police investigators were dealt with by government agencies is suggested by a letter for Head of C2(AD) to the PS/Us of S (Army), dated 28 April 1970. It is copied

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<sup>161</sup> V2/L/174; see also V2/M/12

<sup>162</sup> V2/L/174

<sup>163</sup> V2/L/161

<sup>164</sup> V2/L/176

<sup>165</sup> V2/L/41

<sup>166</sup> V2/L/182

<sup>167</sup> V2/L/179

<sup>168</sup> V2/L/174

<sup>169</sup> V2/L/182

<sup>170</sup> V2/L/183

<sup>171</sup> V2/L/183



to PUS(A), AUS(A) (AD), CPR and the Head of the AG Secretariat. Williams had been “told, without wishing to interfere in anyway with the course of his enquiries” that the departments “should wish to have advance notice of any moves that would be likely to attract publicity”. In particular, it was emphasised that the FCO would “want to prepare the ground” for any visit the Far East. Williams, the letter concluded, “is obviously well aware of the political difficulties it may cause”.<sup>172</sup>

2.126. On the covering letter that forwarded the views of C2(AD) to the Secretary of State for Defence on 30 April 1970, there is a hand written entry that reads: “The sledgehammer approach is regrettable but unavoidable”.<sup>173</sup>

2.127. Nevertheless, the Malaysian authorities had indicated they were very willing to facilitate the investigation.<sup>174</sup>

#### *Lack of clarity over the standing orders and regulations*

2.128. During this time there remained a pointed lack of clarity about the standing orders for the Scots Guards in 1948 and the legal basis for shooting of unarmed persons. In his confidential staff memo of 17 February 1970, Lt Colonel Fletcher as the CO of the Scots Guards, said that while there were no remaining records, he could be “absolutely confident” in excluding the possibility that Captain Ramsay briefed the patrol to shoot civilians, adding that there would have been a requirement at the time to refrain from shooting on sight in, or near, inhabited areas.<sup>175</sup> On 4 March Lieutenant Colonel Fletcher wrote a follow-up memo indicating that he had spoken to Colonel Fane-Gladwin, who also commanded a Scots Guards Rifle company in 1948.<sup>176</sup> He was “quite clear” that there was a Standing Order “to the effect that any individual who ran away after being challenged by a member of the Security Forces must expect to be shot”. It was thought that “this must have been published in the newspapers and broadcast over the Radio, though not written in any operational Standing Orders for the troops”.

2.129. John Wood outlined the need in his interim report of 25 February 1970 to acquire any standing orders regarding the shooting on sight of suspects.<sup>177</sup> His later suggestion in his final report of 12 June 1970 that there were orders at the time that enabled a person to be shot after being told to halt, strongly suggests that neither he nor anyone else specifically analysed the text, or the background to the promulgation of, Regulation 27A.<sup>178</sup>

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<sup>172</sup> V2/L/174

<sup>173</sup> V2/L/173

<sup>174</sup> V2/L/178

<sup>175</sup> V2/L/130

<sup>176</sup> V2/L/167

<sup>177</sup> V2/ L/165

<sup>178</sup> V2/L/191

## The Metropolitan police interviews

### Overview

- 2.130. Meanwhile, DCS Williams and his team pressed on with a series of interviews in the UK, which were tape recorded and turned into the written statements held by the Metropolitan Police Service (and now held in the files that the Claimants' solicitors have seen and which were also reviewed by Brendan McGurk on behalf of the Defendants). It is a matter of serious concern that these statements have still not been properly disclosed to the claimants' representatives and for the assistance of this Court. It is unsatisfactory for the Defendants to put before the Court documents in which Government-instructed Counsel summarises these important statements, and to refuse to consent to the disclosure of the statements themselves: *Cf. Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 at §4; *R (NAHS) v Department of Health* [2005] EWCA Civ 154 at §§47, 49.
- 2.131. Most of those who had been identified as being members of the patrol were interviewed, as was Sir Stafford. Of those interviewed, the majority contend that the killings were arranged and systematic, rather than a reaction, spontaneous or otherwise, to an escape attempt. Out of the known 11 members of the patrol, 6 supported an account of a massacre: Tuppen, Cootes, Brownrigg, Kidd, Remedios and Wood. Two maintained there had been an escape attempt: Gorton and Porter. Hughes and Douglas were never asked to attend an interview (as noted above, DCS Williams considered they were "central figures" and as such it was appropriate to interview them once enquiries in Malaysia were complete). Fern (who lived in Australia) was not located at the time; but was described as being pale, upset and nervous by the first soldier who met the patrol after the killings.
- 2.132. Other notable features of the interviews are as follows. There were marked differences in recollection as to whether Captain Ramsay ordered an execution in the briefing the night before. Accounts differ as to whether he meant that by wiping out the village, it would be destroyed (which did occur at that time in other places in the theatre of combat) or whether he simply indicated that the patrol was likely to engage in combat with terrorists and that killing would occur. There can be little doubt that Hughes conducted mock executions during the interrogations on the first night. Patrol members either present or privy to discussions back at HQ discussed wounded villagers being "*finished off*" when they lay wounded. These witnesses are Cootes, Gorton, Tuppen, and Houlston (who recalled a conversation with Wood). No interviewee suggests the villagers were armed, or that they dressed or behaved in a way that suggested they were combatants, or that they offered any resistance, let alone violence, to the British troops. The sole person who personally claims to have found ammunition is Sir Stafford, who says that he found some spent shell casings

(but not a substantial quantity of ammunition, or a box of rounds) amongst the ashes of the kongsi huts.<sup>179</sup>

- 2.133. The summary of the interviews and statements that follows are based on notes made by the Claimants' solicitors from the Metropolitan Police file. Six out of the eight witnesses interviewed under caution ended up corroborating an account that the residents of Batang Kali were killed unlawfully. While some of them criticised *The People* newspaper for inaccuracy and failure to advise them that they could be prosecuted, these six witnesses clearly supported a conclusion that the killings amounted to murder. The failure throughout to fully engage with that issue is considered by the Claimants in Part 3 below.

#### *Alan Tuppen*

- 2.134. Tuppen was interviewed under caution. He was shown his sworn statement to *The People*, which he described "*as largely true but was out of context in places*". He had signed a further affidavit on 2 February (before appearing on television). He described Cootes arranging to meet him in December 1969, but not telling him that the journalists would come. When he asked the reporters if there would be any consequences for him in the story coming out they told him there was "*a limitation period of 5-7 years*" and that there was no risk of extradition.
- 2.135. Prior to the mission, Tuppen was now "*not certain*" that Captain Ramsay had mentioned anything about wiping out a village, "*but could have done*". "*He said words to the effect that we would be seeing some action*". They were briefed that the village was supplying food and ammunition to bandits. Once in the village, he "*realised*" that this meant that they were supposed to be shot. On the first night, he recalled an old man being questioned and a shot fired above his head to give others the impression that they would be shot if they did not provide information.
- 2.136. He was now uncertain about crossed out words in his second affidavit, "*Some villagers came down the track and started to cross the river*". However, he maintained his account that Hughes said words to the effect that "*the men were going to be shot and we could fall in or out*". He said he was with Cootes and Gorton when the shooting started: "*I heard shots from the village and lots of shouting. Instinctively we opened fire. I fired my 303 rifle at people in the river and on the bank. There were 4/5 and they fell dead*". When asked if the men were shot trying to escape he replied, "*I should hardly think so*". He assumed that an account had been given by all afterwards that the men were trying to escape, but made it clear: "*they weren't actually running, but just walking past and moving away from the village*". He did not see any ammunition at the village, but he heard about it. When they were shot he felt he was doing his duty, because they were suspected bandits and sympathisers.

#### *William Cootes*

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<sup>179</sup> V1/E/187

- 2.137. Cootes was interviewed under caution. He was shown his affidavit given to *The People*. He was now no longer sure that the event took place before the killing of the Hussars. His account of the briefing before the patrol was that they were told that they were going to “see some action”. Ramsay was present, but he did not repeat the allegation that they were told to wipe out the village. He would later say, “we must have been told to wipe out the village because I am wondering how else we could have been told”. On the first night he was posted on verandah and it was for that reason that he was able to see Douglas shoot the youth: “He motioned to the youth to run and then he shot him. I was just above the incident”.
- 2.138. When asked by Williams whether he recalled being paraded on the second day and told by the sergeants that the villagers were going to be shot and that they could drop out if they wanted to, he replied: “No I can’t remember that”. Of the actual shooting he said, “I was with Tuppen and Gorton. We were in charge of about seven. We were all keyed up with this group in front of us. We heard shooting and the reflexes started. We shot at the group in front of us”. He said “the group we shot were making for the stream and they were all shot within 6 yards”. He maintained that what he said about the old man to *The People* was true. “He was shot while looking at us”.
- 2.139. He accepted that he sought money from *The People*. He said he was involved with them for 8 weeks and they paid his expenses and hotel rooms. He said he assumed he was going to get £3500 (he in fact got £1500). “I was desperate for money”. He explained that the money was important “to get my house I needed so badly”.

#### *Robert Brownrigg*

- 2.140. Brownrigg was interviewed under caution. He was shown the statement he gave to *The People*. He too complained that he was told that nothing would happen to him; and also did not realise he was giving a sworn statement. His understanding from the journalists is that “they were after the people higher up at Whitehall who they said were responsible for the orders which were carried out in Malaya during the emergency”. However, he said that the statement was correct to the best that he could remember. He could not remember being paraded and given the opportunity to fall out. What he wanted to emphasise is “that whatever orders were or were not given I didn’t shoot anyone at all”. He maintained that “people were split into groups, there seemed to be some kind of panic and people were killed”. He also recalled that “a wrong story was given at the enquiry” but could not remember exactly what it was about.

#### *George Kydd*

- 2.141. Kydd was interviewed under caution. He remembered the Batang Kali incident. He confirmed that they were all got together and told by Douglas that all the men were bandits and would be shot and that anyone who didn’t want anything to do with it could fall out. When the kongsis were set on fire, he said it sounded like ammunition was exploding. He was asked, “It is right that you were paraded or grouped together before the shooting took place and anyone that felt squeamish about it was given an

*opportunity by one of the Sergeants to drop out". He replied, "I've got to go along with that". He did not remember the soldiers divided into groups. He could only recall being with Porter and Brownrigg. As to the actual shooting, he said, "the bandits were then shot, but I'm sorry I must tell the truth, they were not running away". As to the subsequent investigation he said: "I remember there was an inquiry later on and I've got to go along with this, we were told before going in to tell the same story, that is that the bandits were running away when they were shot, we all more or less told the same story. I don't remember who told us to tell this story but it was a member of the army". As to the approach by *The People*, he said that they had twisted his words in the actual article. However (a police note book entry states his words) "I was a professional soldier. The rest were national servicemen. I don't want to get involved or sign anything. What would be the benefit? We could land in serious trouble. I would tell the truth if I was asked".*

### *Keith Wood*

2.142. Keith Wood came to an interview with a solicitor, but was not apparently cautioned at first; although according to DCS Williams he was at some point cautioned.<sup>180</sup> At the outset of the interview the solicitor said *"he wants to tell you that although this thing happened as they say in the papers, he in fact fired into the ground"*. He went on to say, *"I don't want to get others in trouble, how much do you know"*. Of Cootes statement he said *"that is a lot of lies, I bet he got a lot of money"*. That said, he went on to confirm that there was an order to shoot the suspects on the second day and the offer to fall out if they did not want to do it. He thought at the time *"it was a bluff"*, as he put it *"like the shots that were fired behind the huts to frighten the bandits"* (the previous day). With regard to the shooting, he was asked whether they were trying to escape. He replied, *"No they weren't running"*. For his own part he said *"I shot into the ground. I remember this because Douglas said "what are you trying to shoot me instead of them?"* When the kongis were set on fire they heard noises that sounded like exploding ammunition. In relation to the subsequent investigation the bloke in charge asked if he wanted to head straight back to England. He said, *"Yes"* and was told that he had better say that the bandits were trying to escape. He could not remember if this person was a civilian or a soldier.

### *Donald Houlston*

2.143. Wood's suggestion that he shot into the ground (at least in the first instance) was contradicted by a fellow G Company member who saw him back at the base after the event. Police notes of an interview with Houlston read as follows: *"Remember from Wood telling me how he had shot one of the Chinese who had attempted to run away. It seemed that Wood had panicked when he had failed to kill him outright and [illegible] sergeant Hughes had finished him off"*.

### *Victor Remedios*

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<sup>180</sup> V2/M/14

- 2.144. Remedios attended an interview under in the presence of a solicitor. He refused to answer any questions about his previous sworn statements or other accounts

*Ray Gorton*

- 2.145. Gorton was interviewed under caution. During the night he was at a defensive position with Cootes, Tuppen, and Brownrigg poised to ambush an communists that came into the village. He did not see the youth killed that night, but was told that it was because he was trying to escape. He had no knowledge of a parade on the second morning where people were told that they could drop out. He said he saw 5/6 Chinese running down the path. He ordered them to stop, but they kept running. He ordered them to stop again; and so they opened fire (The implication being that they shot the villagers as they ran towards the guns rather than past them). He said he heard firing nearer the village at the same time. He checked that all the bodies were dead. He recalled that they found excess food and heard ammunition exploding when the kongis were burned.

*George Porter*

- 2.146. Porter was interviewed under caution. As far as he recalled there was no briefing before they went out. Briefings would have been confined to NCOs. (No other witness would suggest this.) However they "*understood that this was a place where bandits came to and were being helped by villagers*". He knew of the shooting on the first night but did not see it. He was emphatic that they were not called together and told that all villagers were going to be shot: this is "*a lot of nonsense and completely against guards training*". As to the shooting he gave account close to the official conclusion of 1948, "*I do remember hearing shots being fired and five or six men running past us about 20 yards away. Running towards the jungle. When they ran away, it seemed it was a pre-arranged escape attempt as they all ran in different directions*". His reaction was to automatically open fire and using a bren gun "*as is my duty*". He recalled Kydd was with him (Note that Kydd was sure that Porter had the Bren gun.) All 4 or 6 were brought down and killed. They were not told to give false information at the subsequent enquiry. (Porter was the only witness interviewed in 1970 to confirm the official account that the villagers ran *past the guns* before they were shot). He also recalled that ammunition was found at the scene and Hughes shouting to him to that effect; but he did not find it himself, and he does not say he saw it.

*Eric Lazenby*

- 2.147. Eric Lazenby was a Guardsmen. He with two others set up a base camp while the platoon went out into the deeper jungle area on 11 December 1948. Although he did not witness the shootings, he heard the firing of guns the next morning and is likely to have been the first soldier outside of the patrol who met them. He remembered the men coming back and "*Fern and Hawkes looked pale and upset*". Remedios told him that there had been "*trouble*". He particularly recalled the nervous state of Fern,

Hawkes<sup>181</sup> and Kydd. The account that was given by the men was much more qualified than the official account: “someone said the guards shouted halt in Malay but the villagers panicked and ran way. No one seemed to know who fired the first shot and no one appears to have given the command”. He was told by someone (possibly Remedios) that Hughes put a burst into a wounded Chinese villager, to put him out of his misery because he was badly wounded. As to further detail, Lazenby indicated that he passed through Batang Kali two weeks later, but he did not see any bodies.

### *Analysis of DCS Williams*

2.148. DCS Williams would later report how he had personally interviewed all of the above members of the patrol. As he put it:

*“Cootes, Tuppen (with solicitor) Brownrigg and Kydd admitted in statements, after caution, that murder had been committed.*

*Woods, in the presence of a solicitor, verbally admitted that murder had been committed, after he had been cautioned.*

*Remedios, in the presence of a solicitor, refused to comment on, or add anything to his original sworn statement.*

*Porter and Gorton made statements denying the allegations”<sup>182</sup>*

2.149. Williams was aware of at least four witnesses in Malaysia: DS Gopal, DC Chin Kam Woh; Inche Jaffar and Cheung Hung. He was also aware of the statements of 3 of the 4 from 1948 (i.e. no statement from Jaffir had been located).<sup>183</sup> After the conclusion of the “first phase” of the inquiry in Britain, he confirmed that it was intended to continue inquiries in Malaysia. Only after that would RSM Douglas and ex-Sergeant Hughes be called for interview.<sup>184</sup>

## **Termination of the investigation**

### *Foreign Office intervention*

2.150. On 2 June 1970, at the point when it was known that the police were about to complete the British stage of the inquiries, Mr P J Sullivan from South West Pacific Department at the Foreign Office wrote to the office of the Director of Prosecutions. Having referred to the likely publicity that the arrival of a British police team in Malaysia would cause, especially if the team wished to take evidence in the area of Batang Kali itself, he added:

*“The High Commission are also concerned over local difficulties which might complicate the normal problems connected with taking eye-witness statements twenty-two years after the event. In making enquiries among Malaysian villagers the*

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<sup>181</sup> Hawkes told the MPS in his interview that he had been injured prior to Batang Kali, did not go on the patrol, and only found out about it after the event (V1/E/177)

<sup>182</sup> V2/M/14 § 61

<sup>183</sup> Ibid, §§ 55-58

<sup>184</sup> § 54

*team may find it difficult to establish with certainty the credentials of witnesses claiming first-hand knowledge. In addition the number of first hand accounts could multiply if there were any suggestion that possible compensation claims might have some chance of success. Furthermore, villagers' powers of recall are rarely accurate. They are likely to become even less so, as it seems that the terrain has changed beyond recognition in the intervening years".*<sup>185</sup>

- 2.151. The letter was also sent to the MOD. The DPP's office replied on 10 June to indicate that the matter was still under consideration.<sup>186</sup> There is no record of how the DPP initially responded to this letter, but in the subsequent notes at the time that he considered John Wood's review of the police evidence, he refers to a Minute of 5/6/70 (see below). In Brendan McGurk's review of the materials on behalf of the Defendants, he was not able to find that document.<sup>187</sup>

*Wood's review of the evidence and recommendation to continue with the inquiry*

- 2.152. According to DCS Williams he attended the offices of the DPP on 10 June 1970. He was informed that a decision would be made by the Attorney General, Mr Elwyn Jones, as to whether the inquiries would continue in Malaysia. Statements and documents so far obtained were called for and it was stressed that no covering report was necessary. He was told that no decision would be made until after the General Election.<sup>188</sup>
- 2.153. On 12 June 1970 John Wood completed a further note that reviewed the evidence gathered so far by DCS Williams:<sup>189</sup>
- (a) He referred to the fact that DCS Williams was "convinced" that Captain Ramsay did not give a briefing to shoot civilians the night before.
  - (b) He suggested that there was "now evidence that Batang Kali was a terrorist base". (In fact, there was no evidence, new or otherwise, to that effect).
  - (c) The state of mind of the patrol had to be judged by the fact that "the average age of the soldiers was 18 years old" "the jungle was alien to them", and "every unusual noise caused tension", "finger seldom strayed from the trigger".
  - (d) There were no standing orders as such.
  - (e) As to the shooting of a "youth" on 11 December, it is noted that he Hughes accepted shooting him to 'finish off' what Douglas had began. He adds "[t]here is little evidence that the youth was not escaping and he may well have been a terrorist as he was not resident in this village." At that stage no one had actually investigated who this man was. Moreover Cheung Hung's 1948 statement expressly doubted whether he was a communist.

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<sup>185</sup> V2/L/185-186

<sup>186</sup> V2/L/188

<sup>187</sup> V1/E/119 footnote 8

<sup>188</sup> V2/M/17 §§ 69-70

<sup>189</sup> V2/L/190-194



(f) The villagers were described as “*the victims of a fairly intense interrogation*” and that “*It does not appear to be in dispute that shots were fired in the air to terrify the villagers into giving information*”.

(g) As to the events of 12 December, it was observed that the accounts given by those interviewed so far were said to “*differ*”, but that Cootes, Brownrigg, Tuppen, Kydd and Wood “*say in effect it was murder*”. Cootes was concluded not to be a reliable witness, but that the others (including all the others who had refuted the escape attempt version of events – Tuppen, Brownrigg, Kydd and Remedios) “*seem to be men of good quality...they have no axe to grind and no financial interest*”.

2.154. Wood then comments: “*I am satisfied that on the evidence we have no prospect of criminal proceedings*”.<sup>190</sup> Aside perhaps from the issues with Cootes, that conclusion seems incongruous and not to follow from what had gone before. Up to that point he had not referred to any potential evidence in Malaysia. However, he continues:

*“But there are at least 5 persons who say this was murder. It seems to me enquiries must be pursued in Malaysia otherwise the enquiry will be only half done. Furthermore there are a number of witnesses out there who claim to have seen what took place, including a survivor, Cheung Hung. The various statements by this man are inconsistent and we want to pin him down. It appears also that a number of persons who say they saw what happened (women on the lorry) could not have been in a position to do so. I feel this should be cleared up.*

*I am of the opinion that if we do not go through to the bitter end we will lay ourselves open to attack by the newspapers and by the anti-military brigade”*

2.155. Under this concluding paragraph the DPP, Sir Nigel Skelhorn, made a handwritten entry (also dated 12 June 1970). It reads:

*“I have nothing to add to my minute of 5/6/70 [This document is not available]. Having embarked on this enquiry must we now go as far as we can? Perhaps, however, the Malaysian Govt will refuse entry to the investigating team, which will save any further expenditure of time and money on this unrealistic enquiry”.*<sup>191</sup>

2.156. Further correspondence followed between the First and Second Defendant about the difficulties DCS Williams could expect to encounter in Malaysia (and had been told to expect) and the “*extreme political sensitivity*” of him making enquiries there.<sup>192</sup>

#### *The decision to terminate*

2.157. A general election took place on 18 June 1970 and the Labour government was replaced by a Conservative administration.

2.158. DCS Williams was informed that the DPP met with the new Attorney General, Sir Peter Rawlinson QC, on 26 June 1970.<sup>193</sup>

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<sup>190</sup> V2/L/194

<sup>191</sup> Ibid

<sup>192</sup> V2/L/195

- 2.159. On 29 June 1970 the then Director of Public Prosecutions wrote to the Ministry of Defence to advise that the investigation was to be aborted.<sup>194</sup> This was because: *“the institution of criminal proceedings would not be justified on the evidence so far obtained. Further in my view the prospects of obtaining sufficient evidence by further police investigation in Malaysia are so remote that this would not be warranted.”*
- 2.160. The letter referred to the *“substantial conflict among the soldiers who were present in the village”* without indicating that 6 out of 8 accounts supported an allegation of murder; and that Hughes and Douglas were yet to be interviewed. It also neglected to analyse the extent to which the original inquiry conclusion had been brought into question. Indeed, it was beyond dispute that the treatment of the villagers on the previous night prior to and after the shooting of youth, had been cruel and inhuman within the meaning of law of armed conflict as it was understood in 1948. Throughout the process there was no discussion of whether the force used against these villagers was lawful, in the sense of being either reasonable within the meaning of the common law or authorised by the Emergency Regulations prior to the enactment of Regulation 27A six weeks after the shooting.
- 2.161. The second element of this conclusion did not accord with Wood’s view; nor did it accord with DCS Williams’ views of what was necessary and appropriate. It was a view expressed in the context of the FCO having approached both the MOD and the DPP’s office to urge upon them that local people would make up allegations or otherwise be too stupid to give credible evidence.
- 2.162. The result was that there was no visit to Malaysia to gather testimony, that known material witnesses including Gopal, Woh, Inche Jaffar, Hung and the surviving women were not interviewed, that forensic evidence by way of disinterment was not pursued, and that the two people who commanded the unit were never interviewed in the UK.
- 2.163. In the course of early July, news of the decision appeared in reports in the British press. This led the Foreign Office to send a telegram for the immediate attention of diplomats in Kuala Lumpur. It instructed them to inform the Malaysian authorities in the following terms:

*“It is not customary for the Director to give detailed reasons for reaching his decisions, but it may be assumed that he decided that the evidence so far obtained showed that there was no reasonable likelihood of further enquiries producing evidence which would warrant proceedings”<sup>195</sup>*

### *Final discussion in Parliament*

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<sup>193</sup> V2/M/17 § 70

<sup>194</sup> V2/L/210-211

<sup>195</sup> V2/L/217

2.164. On 9 July 1970, Sir Peter Rawlinson was asked a question by Marcus Lipton MP in the House as to why a decision had been made not to continue with further investigations. In reply the recently appointed Attorney General said:

*“After considering the result of the police inquiries in this country, the Director of Public Prosecutions is satisfied that there is no reasonable likelihood of obtaining sufficient evidence to warrant criminal proceedings. He therefore decided to not ask police to continue with his inquiry. I agree with this decision”.*<sup>196</sup>

2.165. When asked by Lipton whether it was nevertheless necessary to conduct an investigation in the light of the four sworn statements to *The People* by the ex-guardsmen, the Attorney would not be drawn: *“I do not wish to make a comment on the necessity of the inquiry. All I would like to repeat for the House and to the hon. Gentleman is my agreement with the Director of Public Prosecutions”.*

2.166. An intervention from Mr Richards MP reads in the Hansard report as follows, *“The investigation having been conducted and the Director having come to the conclusion which he reached, I trust that the House and the country will accept that a full investigation has been made”.* The Attorney General replied, *“I understand the point of view expressed by the hon. Gentleman and I am sure that he is correct in the last point that he makes”.*

#### *The previously undisclosed opposition of the police*

2.167. A report written by DCS Williams on 30 July 1970 expressly contradicts the public statement by the Attorney General of the day. During the course of these judicial review proceedings the Claimants’ solicitors sought unsuccessfully to obtain from the Defendants the only surviving copy of this report (it was not in the Metropolitan Police’s own file). They refused to release it, despite repeated requests,<sup>197</sup> on the grounds that it is confidential.<sup>198</sup> The complete Williams report <sup>199</sup> was apparently returned to the Metropolitan Police following the issue of this claim. They then promptly disclosed it to the Claimants.<sup>200</sup>

2.168. DCS Williams expresses the view on the first page the report:

*“At the outset this matter was politically flavoured and it is patently clear that the decision to terminate enquiries in the middle of the investigation was due to a political change of view when the new Conservative Government came into office after the General Election of 1970”.* <sup>201</sup>

2.169. To clarify his meaning, he notes a time line in his conclusion: starting with the conversation with John Wood on 10 June; the position that no report was necessary;

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<sup>196</sup> V2/L/226

<sup>197</sup> e.g. V1/E/297 and 346

<sup>198</sup> e.g. V1/E/303 and 361

<sup>199</sup> V2/M/1-16

<sup>200</sup> Halford V1/C/11 § 43

<sup>201</sup> V2/M/1 § 3

and the postponement of the decision pending the election. Then on 29 June 1970 he writes:

*“I was informed from the Director’s Office that following a conference between the Director of Public Prosecutions and the new Attorney General, Sir Peter Rawlinson, QC, on 26 June 1970, the attorney General had decided it was unlikely that sufficient evidence would be obtained to support a prosecution, therefore the investigation must terminate forthwith”.*

2.170. This view was echoed by Ron Dowling, the no. 2 in the Metropolitan Police investigation, during his interview for the BBC *In Cold Blood* documentary in 1992 (see §2.180 below). He admitted that as a former Guardsman himself he *“had a natural instinct to investigate something which perhaps they didn’t do”*. Of the investigation he made it clear that the Scotland Yard team *“felt it essential to get into Malaysia and try and find out exactly what had happened”*. He confirmed that prior to polling day the team were actually preparing to leave for Malaysia; but that he worried for the future of the investigation once the government changed. As he put it, *“It was quite a rude awakening really. I didn’t think it could happen, because I felt that we might have got somewhere. We could have got to the truth, which is what I wanted to do”*.

### **The focus and aftermath of the criminal investigation**

2.171. Regardless of the outcome of the police investigation and the DPP’s decision, it is clear from the contemporaneous internal correspondence that the MoD had at all times understood that the DCS Williams was looking only at the question whether there was sufficient evidence to warrant prosecution of anyone for any offence and that, if there was not, a further fact finding exercise might be appropriate.

2.172. Thus, in a minute dated 12 February 1970,<sup>202</sup> the Under-Secretary of State for Army wrote:

*“If [the DPP] decides not to prosecute, either after further investigations or without, then we will have to consider whether there is anything further that we should do. There are, of course, a number of possibilities, but at this stage it is somewhat fruitless to consider them in detail.”*

2.173. In a memo from APS/Secretary of State (through PS/US of S (Army)) on or about 4 February 1970 various other options to address public concern in the event there was no prosecution were canvassed.<sup>203</sup> These included a Parliamentary Committee, an Administrative Tribunal, an enquiry by an outside expert or an internal review of official documents and the evidence of officials. The memo concluded:

*“course (iii) [inquiry by an outside expert] might perhaps serve the purpose best. It should be impartial enough to command public confidence and at the same not over-powered. The result of any such fact-finding enquiry could then be the subject of a statement by the Secretary of State in Parliament”.*

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<sup>202</sup> V2/L/116-117

<sup>203</sup> V2/L/52-53

2.174. A similar point was made in an undated "Background Note" contained in MOD files, apparently produced for the Secretary of State:

*"If criminal proceedings are not taken, a fact-finding enquiry might still be considered desirable – either a Board of Inquiry or some other form. A Board of Inquiry would not be particularly appropriate; it might be better to have an outside expert – a QC for example – to assemble all the evidence and report to the Secretary of State. But neither course is particularly desirable in a case which turns on allegations of crime"*<sup>204</sup>

2.175. However, despite the DPP's decision and the knowledge of obviously relevant inquiries in Malaysia, no action was taken to pursue these options further. Instead a minute dated 1 July 1970, after the communication of the DPP's decision to the MOD but prior to the formal announcement in Parliament, contained the following recommendation from DPS (Army):

*"It has throughout been clear that no trial could take place under Military Law. Now that [a] civil trial is ruled out it seems that those concerned are freed from danger of prosecution unless fresh evidence were to come to light: they also forfeit the opportunity to refute these allegations made in The People in February 1970 and to clear their names in court. The fact that insufficient evidence is to hand to prosecute is not, unfortunately, quite the same thing as demolishing the allegations.*

*It would still be possible for the Army to hold some kind of inquiry – either a Board of Inquiry or an investigation on the lines of the Scarman Commission – in an effort to establish the truth of what happened at Batang Kali on 12 December 48. Such an inquiry would not be a criminal investigation and it is unlikely that anything said before it could be used in evidence in any subsequent proceedings. It seems that some witnesses could stick to what was said in Malaya soon after the event and that others would reiterate what they said to The People, that if the CID failed to uncover conclusive evidence an inquiry is unlikely to do better, and that the Board or Commission would have to choose what to believe or else remain open minded. It may be felt that either outcome would be inconclusive and that apart from stimulating press and public interest in this long past event, little of value would be gained. I recommend that no inquiry be held"*<sup>205</sup>

2.176. The Head of C2(AD), Mr Facer, urged the adoption of this analysis. In a Minute to PS/US of S(Army) (though the AG and PUS(A)) dated 3 July 1970, he argued:

*"The purpose of holding such an enquiry would be to establish the facts as far as possible, with a view to upholding the good name of the Army; but in view of the serious conflict of evidence in the case, which the police investigation has failed to resolve, the findings of the Board of Inquiry so long after the event would be inconclusive or, at best, represent an expression of opinion on the part of a Board. In that event, the objective of establishing the facts would be not have been achieved and the enquiry would only have served to resuscitate public interest in the case to no advantage. DPS (Army) has recommended that no inquiry be held and I agree with his view"*<sup>206</sup>

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<sup>204</sup> V2/L/108

<sup>205</sup> V2/L/214

<sup>206</sup> V2/L/220

2.177. The recommendation was accepted by PS/US of S(Army) in a minute to the Under-Secretary of State on 14 July 1970:

*“At the time when the case was taken on by the Director of Public Prosecutions, it seemed likely that if he decided to take no action there would be pressure for us to set up some sort of enquiry ourselves. The purpose would be to establish facts. Interest in this case appears to have evaporated with the lapse of time... In reply to a question by Mr Lipton on 9 July, the Attorney General formally announced that the DPP had suspended enquiries (see Flag B in the attached Hansard). Judging from this it does not seem that there will be pressure in the House to reopen the case in any way.*

*This is just as well because it would be very difficult to get any worthwhile enquiry going. There would be nothing to work on except the memories of a few individuals... I agree with Mr Facer’s conclusion that we should make no move to take any further action”.*<sup>207</sup>

2.178. A minute to AG Secretariat dated 13 August 1970 from the Director of Personal Services (Army) discussed whether public funds, or the resources of the Treasury Solicitor, could be made available to Sergeant Douglas or others to enable them to pursue a libel action against *The People*. (In due course, despite the suggestion by the Commanding officer of the Scots Guards that some action should be brought, no libel or any other proceedings were issued<sup>208</sup>). The minute observed that an article in *The People* of 5 July read like a ‘sign-off’ and continued, “*If no reaction is forthcoming, the matter will probably now remain buried in the public mind ‘in perpetuo’, and quietly forgotten.*”<sup>209</sup>

## **D.    1992**

### **The BBC documentary ‘*In Cold Blood*’**

2.179. In September 1992 the BBC broadcast a documentary about the massacre, entitled *In Cold Blood* [TB2/N]. The programme involved interviews with some of the surviving relatives, Detective Inspector Ron Dowling who was second in command of the 1970 police inquiry and three Guardsmen who had not been on the patrol, but who heard about the incident soon after the event. The programme also had access to some, but not apparently all, of the original Metropolitan Police file.

#### *Survivors*

2.180. The survivors who were interviewed included Chong Fong, the surviving male; his wife Tham Yong; Wong Yen, the sister-in-law of the Loh Kit Lin who was killed on the first night; Wong Mook Sang who had been a 7 year old child detained over night with his parents and Foo Moi, Wong’s mother and a woman widowed at Batang Kali. These witnesses to the events at Batang Kali for the first time gave interviews on camera to a British audience. Several of them emphasised the

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<sup>207</sup> V2/L/227, For the a Minute expressing agreement of this view by the US of S (Army), see V2/L/228; and for similar agreement from the AG secretariat, see V2/L/229

<sup>208</sup> See, for example, the letter from Lt Colonel Fletcher of 16 July 1970 (V2/L/230)

<sup>209</sup> V2/L/233

terrifying experience of the interrogations on the first night. Tham Yong appeared absolutely distraught when recounting how the detectives refused to accept her denial of any knowledge about the communists. Wong Mook Sang spoke of having a gun pointed to his chest while asked about the communists, even though he was a child [Note: He may have been “small boy” that DS Gopal described being brought by Sergeant Hughes for interrogation]. Tham Yong, Wong Yen and Foo Moi all spoke of Loh Kit Lin being taken away and shot when he did not provide information. His body was left out on the road for everyone to see. With regard to the killings, the older women said that they saw the men divided into groups rather than running off. Foo Moi recalled finding a group of bodies in the shallow river the following day.

### *Detective Inspector Ron Dowling*

2.181. Ron Dowling gave the interview as detailed above (at §2.170) describing the “rude awakening” when the planned trip to Malaysia was cancelled. He blamed the election results:

*“In the back of my mind was the question of the election. If the government changed, if politicians changed, will the decision for us to investigate [be] changed? As the results were coming in I was beginning to say myself, “We’ve lost the job if the Tories get in. This is going to be the end of it. In the morning, I saw Frank [Williams]. I said, “Have you seen the results?” He said, “Yes. Doesn’t make any difference to us. We’re going”. But we didn’t.*

*He had a phone call [from the] DPP: “send me a report on what you’ve done”. As far as I was concerned at that stage that was the end of the matter. Case closed. It was quite a rude awakening really. I didn’t think it could happen, because I felt that we might have got somewhere. We could have got to the truth, which is what I wanted to do.”*

### *Guardsmen*

2.182. The Scots guardsmen who had not been on the patrol but who had heard about the incident were taken out to Malaysia to speak with the survivors. They were Harry Fuller, who was the Sergeant in the separate patrol which did not go to Batang Kali, Don Houlston, who took photographs of the corpses in the following day (that have not survived), and Eric Lazenby, who was at the base camp and met the patrol soon after the event.

2.183. Houlston appeared tremendously troubled by what he had seen. While he could not envisage the men lining the villagers up and shooting them, he also appeared to have doubts about the official account. He had visited the village shortly afterwards to take photographs of the bodies as part of his own duties. He described what he saw to the BBC “as an appalling sight” and one that he could never forget until the end of his days. It was Houlston who, in 1970, had reported a conversation to the police in which Keith Wood had described a wounded villager who he had shot needing to be “finished off” by Sergeant Hughes.

2.184. Eric Lazenby also appeared to question the official account. He told the police in 1970 that he only passed through the Batang Kali two weeks later and did not see any bodies. However, in his BBC interview (with a marked degree of emotion) he described going to village with Houlston two days later where he saw the bodies scattered in groups: *"It weren't pretty"*. This different recollection of events must be read with Lazenby's 1970 account that some of the men were pale, upset and in a nervous state and there was definite confusion as to how and why the firing had started. As he put it in 1993 before returning to Malaysia, *"I met them afterwards. They seemed to think they had done a good job. I don't know whether it was a good job or not"*. As the end of the documentary made clear, Lazenby also believed that a massacre had taken place. He spoke of feeling sorry for the soldiers that had done it; that they were trained to follow orders and if the order was given to shoot the villagers, it was a big burden for them to bear for 43 years.

#### *Access to the Police file*

2.185. The BBC had gained sight of some of the police interviews and re-enacted accounts given under caution by Brownrigg, Kydd, Cootes and Tuppen. The narrator confirmed that the *"soldiers themselves had refused to appear, but they have confirmed their version of events to Insider Story"*.

#### *MoD stance*

2.186. The MoD and army were invited but chose not to participate in the documentary. In correspondence which the Claimants' solicitor has seen rejecting the BBC's invitations to do so, they simply repeat the official version of events.<sup>210</sup>

#### **Government response to the programme at the time**

2.187. The knowledge that the programme would be aired, and the subsequently decision as to lines to take in response to it, stimulated considerable discussion at the time between various Government departments and the CPS.

#### *MOD briefing prior to broadcast*

2.188. Prior to the broadcasting of *In Cold Blood*, there appears to have been a meeting between CPO, Army Legal Services and the CPS War Crimes Unit *"in order to meet media enquiries"* that were expected in the connection with the *"BBC's forthcoming 'Malayan Emergency' programme."*<sup>211</sup> A briefing by PL (LS) on *"lines to take"* was produced in September 1992 just before the programme was shown, that referred to previous investigations, neither of which had revealed sufficient evidence to warrant criminal proceedings against the Guardsmen involved in the incident, and stated that any fresh allegations or evidence would be a matter for the police and the

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<sup>210</sup> Halford V1/C/13 § 51

<sup>211</sup> Loose Minute, dated 12 August 1992 (V2/R/1)



prosecuting authorities.<sup>212</sup> The briefing did accept that the DPP's consideration of the incident was "*hampered by the fact that no official documents at the time had survived*".

#### *FCO concern*

2.189. This led FCO officials to comment that the description was "*disturbing*", because it apparently indicated that the decision was determined by "*lost evidence*" rather than "*insufficient evidence*".<sup>213</sup> A subsequent telegram to Kuala Lumpur reiterated the "*lines to take*", that "*any fresh allegations or evidence would be a matter for the police and the prosecuting authorities*", but warned "*for your information only*", that "*there is more to this subject than immediately meets the eye*", because "*according to the MOD no official documents of the time have survived*".<sup>214</sup>

#### *MOD position post broadcast*

2.190. On 15 September 1992, immediately after the programme aired, a briefing to Ministers was supplied by Richard Suckling, Head of PL (LS) Legal. In it he criticises the fact that the film failed to indicate that although some of the soldiers confessed in 1970, others did not: "we understand that there is a substantial conflict of evidence".<sup>215</sup> All that was said in support of the conflict was that those who denied the allegations in 1970 "*were consistent with what all the soldiers had said in the immediate aftermath of the incident*". The brief commented on the fact that there was little media follow up, that the story was old, and that the only real risk was that it would be raised again when a fresh context arose, for instance an allegation of 'war crimes'. Nevertheless Suckling confirmed that the 'lines to take' should be maintained and that no major change was needed in the MOD response. It also referred to express reminder of the CPS that confidentiality had to be maintained on the terms of the DPP's 1970 advice.

2.191. The briefing is the first and only internal government document that the Claimants' representatives have found on the subject that engages with the significant legal problems that attach to the official account of the killings. It is to be borne in mind that Private Lee Clegg had shot an escaping motorist in West Belfast in 1990 and was subsequently charged with murder. At the time of Suckling briefing Ministers, the trial had not taken place, but it would culminate in the decision of the House of Lords in *R v Clegg* [1995] 1 AC 482, confirming that the conduct was murder because the action involved the use of unreasonable force in the circumstances. Suckling observes:

*"[Critics] may seek to contrast the Malaya incident with today's situation in Northern Ireland, where a soldier – such as a member of the 2 Scots Guards – can be charged with murder for allegedly shooting a suspect trying to run away, whereas*

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<sup>212</sup> V2/R/19

<sup>213</sup> V2/R/22

<sup>214</sup> V2/R/23

<sup>215</sup> V2/R/28

*there is no question of prosecuting those who did so in Malaya. (The argument about Malaya relates to any killings of suspects not running away<sup>216</sup>.)"*

2.192. He goes on to refer to the existence of emergency regulations "apparently...in force in Malaya at the time under which soldiers were expected to shoot anyone attempting to run away to avoid questioning". Regulation 27A, of course, is not drawn so widely. Moreover, no account appears to have been given of its attempt in drafting to alter the substantive criminal law retroactively. Of the purported legality of such conduct in Malaya the Suckling observes:

*"In today's circumstances such a rule might not be considered appropriate, notwithstanding the atrocities committed by the other side".*

2.193. The final documents of interest in 1992 are two letters sent by the Army Historical Branch at the MOD to the South East Asian Department of the FCO. In the first letter dated 21 September 1992, the writer expresses the view that "the final decision" in 1970 "was taken by the Attorney-General".<sup>217</sup> The second letter of 6 October 1992 enclosed Suckling's brief to Ministers, but observed that the MOD had "felt" that there was "no real need" to obtain copies of the 1970 police investigations and the witness statements, but that if the FCO regarded it as necessary, they should approach Mr Bibby, Head of the War Crimes Unit, at the CPS.<sup>218</sup> There is a handwritten entry on the top right hand side of this second letter, dated 7 October, and which remains partly redacted. It appears to read "Very fishy all this. But I assume we should leave things as they now stand, reluctantly. Hardly in our interests to do otherwise!" (emphasis in the original) It appears to be signed "J.E".

## **E.     1993**

### **Review by the CPS of the 1970 decision**

#### *Jim England's Note*

2.194. As a result of the *Inside Story* programme the CPS commissioned a review as to whether the contents of the programme affected the validity of the 1970 advice that there was insufficient evidence to prosecute.<sup>219</sup> A draft of that review by Jim England of the War Crimes Unit dated 26 March 1993 is available.<sup>220</sup> The Claimants do not know whether given his initials Mr England is the above "J.E" who regarded the matter in October 1992 as "very fishy", but understood "reluctantly" that things should be left where they stand.

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<sup>216</sup> A handwritten note in the margin reads: "But we don't know if they were running away".

<sup>217</sup> V2/R/31

<sup>218</sup> V2/R/39

<sup>219</sup> This is the way in which the CPS described the process in a letter to the FCO in February 1994 once the process was complete (V2/R/94)

<sup>220</sup> V2/R/40-45

- 2.195. In the Draft of the review Mr England (albeit in restrained language) criticises the premature ending of the 1970 investigation. John Wood had accepted that any problems with existing evidence had to await further inquiries in Malaysia, not only to interview witnesses, but to establish what the women on the truck could have seen and whether the survivor Chong Fong was the same person (i.e. Cheung Hung) who made the statement in 1948. Both Wood and the police had wanted to pursue these enquiries "...to the bitter end".<sup>221</sup>
- 2.196. However, as England described matters, "following the change of Government in 1970, the Director of Public Prosecutions and the newly appointed Attorney General resolved to conclude this matter". He referred to the Sir Nigel Skelhorn's letter to Sir James Dunnett in June 1970 quoted above and the Director's view that "the prospects of obtaining any sufficient additional evidence by further police investigation in Malaysia are so remote that this would not be warranted (emphasis added)".<sup>222</sup> England observed that "it is difficult to trace the source of this latter view", but he refers to the above quoted letter from P.J. Sullivan of the FCO dated 2 June 1970 casting suspicion on the credibility and accuracy of potential Malaysian witnesses and the likelihood that they would multiply if there was a suggestion that compensation claims might have some chance of success.<sup>223</sup>
- 2.197. Against that background, England accepted that the *Inside Story* documentary (however much "a one sided version of the facts") identified a number of Malaysian eye witnesses. He was sceptical about Chong Fong because he believed that he had given the statement in 1948. (That said he did not consider the extent to which even then Hung described seeing the soldiers walk a group of villagers away from the kongsis.) However, he recognised that Tham Yong, Foo Moi and Wong Ying had new and relevant evidence to give. His view looked back to the deficiency of the 1970 decision, rather than the future:
- "What the documentary does show is that in 1970 there probably were a number of people with relevant information to give if the police had gone to Malaysia. Even if it now seems almost certain that Chong Fong's account is fictional I do not consider that it would be fair to say that all the surviving villagers were inherently unreliable. It seems to me that they were never given an official opportunity to tell their side of the story due to fear of what they would say."*<sup>224</sup>
- 2.198. However, England ultimately comes to the conclusion that: "if anyone was charged they would, in view not only of the long and what must be regarded as consequentially prejudicial delay but also the termination of enquiries in 1970, have an unassailable abuse of process argument so as to avoid conviction. For this reason alone it would be in my view entirely futile to re-open this matter" (emphasis added)

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<sup>221</sup> V2/R/44

<sup>222</sup> Original copy at V/L/210-211

<sup>223</sup> Original copy at V/L/185

<sup>224</sup> V2/R/45

2.199. Plainly Mr England was not saying that re-opening the matter through other means and for purposes other than a criminal investigation (such as a fact finding inquiry) would be futile. He would contact the South East Asia Department in February 1994, enclosing “a summary of the factual information available from the old DPP file of 1970” and as detailed below, would suggest that the British evidence be combined with the product of an ongoing Malaysian police enquiry<sup>225</sup> The copy of the summary disclosed to the Claimants is of interest because it combines features of the memos of Mr England in March 1993 and Mr Wood in February 1970, but does not appear to contain either of their important conclusions that have been quoted above. <sup>226</sup> (The document is also incomplete.) By this time a petition to the Queen had been submitted and Mr England was keen to draw a distinction between the role of the CPS and what might be required in order to determine a Petition. His covering letter makes this clear:

*“As you will appreciate, the role of the CPS is limited to assessing the quality of evidence and making decisions on the question of criminal proceedings. The Petition from the villagers raises other matters of compensation which are not within our remit”*

### **Petition to the Queen**

2.200. By June 1993 FCO officials in the High Commission in Kuala Lumpur were warning that the survivors were likely to submit a petition to Her Majesty the Queen “to re-open the case”.<sup>227</sup> They reported that they had issued the press line forwarded by the MOD, but the families of the victims had approached the Malaysian Chinese Association (MCA). It was noted that the families “main concern” was apparently “official recognition that the victims were innocent, i.e. not communists, rather than compensation”. The telegram commented that the subject was “extremely unlikely to become an issue in the bilateral relationship”. For wider reasons, particularly relating to Malay/Chinese sensitivities it was unlikely that the governing party would become involved.

2.201. A formal petition on behalf of the relatives of those who had died was submitted on 8 July 1993.<sup>228</sup> It asked that “right be done in this matter” and “in the name of justice” to refer it to the government “to establish the truth and to open up the files and take the necessary action to prosecute the person or persons involved” and for “due compensation to be made for the dependants and relatives of the victims for their loss and suffering”.

2.202. As early as 15 July 1993,<sup>229</sup> one week after receiving the petition, an official in the South East Asia Department of the FCO wrote internally to the Army Historical

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<sup>225</sup> V2/R/93

<sup>226</sup> V2/R/95-105

<sup>227</sup> V2/R/46

<sup>228</sup> V2/R/56-57

<sup>229</sup> V2/R/53-54. A handwritten note on the copy disclosed dated 23/vii reads: “Pl. try to ensure that people do not lose sight of this. Pressure is mounting in Malaysia” (signed) M.R

Branch emphasising the diplomatic importance that the “petition is given full consideration and that this is understood by the Malaysians”. It continued :

*“The issue has, of course, already been investigated in the past, and the DPP was satisfied in 1970 that there was, ‘no reasonable likelihood of obtaining sufficient evidence to warrant criminal proceedings’. .... I think you will agree that a petition to the Queen is a different matter: we cannot, I think, merely repeat the 1970 line automatically, particularly since the petition includes a demand for compensation. If, however, after due consideration by the appropriate bodies, it is decided that there is no case for changing that opinion, so be it.”*

2.203. On 29 July 1993,<sup>230</sup> Duncan Slater, the High Commissioner, wrote to the FCO. With regard to the petition, he noted,

*“I told [Chua Jui Meng] that it would probably take some time [to respond to the petition] and he seemed to accept this. But eventually we shall have to produce a reply and anything that suggests that we have not looked at the matter seriously or that we are trying to cover up the facts could be exploited by anyone interested in damaging Anglo/Malaysian relations.”*

2.204. By that time, he was aware that the families had also submitted a formal criminal complaint to the Malaysian police and the establishment of an investigating team:

*“The press have suggested that some members of the team may travel to the UK to pursue their enquiries. If this happens, then we will need to decide how much help to give them. Any suggestion that we are being unco-operative or withholding information will obviously play badly here and could result in the Malaysian Government being dragged in”.*

2.205. Legal advice provided internally to the FCO on 19 August 1993<sup>231</sup> emphasised that any prosecution of British soldiers in Malaysia would require them to seek an extradition from the UK. It was considered not to be possible for the Government of Malaysia to bring an action against the United Kingdom, in the International Court of Justice or otherwise. This was because “those killed in this incident in 1948 were at the time British subjects”. Civil and/or private criminal proceedings in the UK were described as difficult to conceive of. There would also be no legal obligation for HMG or the police or private citizens to cooperate with the Malaysian authorities if they sought to collect evidence in the UK. The advice then fixed upon the apparent “conflicting accounts” in the 1970 inquiry and the conclusion that there was insufficient evidence to prosecute. There is no evidence that the legal adviser looked at this evidence; but he ends by stating that if HMG were asked to make an *ex gratia* payment, “we would presumably require sufficient evidence that the allegations are true”. The implication being that this was not going to happen.

2.206. On 21 October 1993, the High Commissioner again wrote to the FCO.<sup>232</sup> He told them that Malaysian police enquiry was proceeding “slowly if at all” and there had

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<sup>230</sup> V2/R/59-61

<sup>231</sup> V2/R/64-65

<sup>232</sup> V2/R/87-88

certainly been no suggestion of pursuing investigations in the UK. In those circumstances he saw *“no reason for haste in replying to the petition to The Queen, if – as I assume – the reply will be negative.”* In expressing that view, he mentioned Dr Ling Leong Sik, a particular personality in the Malaysian government, who was regarded as *“one of the main players in the air services/defence sales issue”* and who could do damage to British interests if he was given a grievance at the present time. He also referred to the fact that *“Hitherto, Batang Kali had been entirely an MCA crusade”*, but that Dr Muhathir *“is annoyed with us over Bosnia, he might use our refusal to reopen Batang Kali as another stick to beat us with. It would be better not to give him the opportunity”*. In those circumstances the High Commissioner concluded, *“we should put this question on ice for the moment”*.

## **Royal Malaysian Police Investigation**

### *Overview*

- 2.207. Meanwhile, on 14 July 1993, the Royal Malaysian Police began investigating locally in response to a report of the massacre as a crime made that day by Chong Fong,<sup>233</sup> Foo Moi,<sup>234</sup> and Tham Yong.<sup>235</sup>
- 2.208. This investigation, headed by Detective K. Siva Rama Moorthy, began with the preparation of a list of each of those who had been killed, their backgrounds and who their surviving relatives were.<sup>236</sup> There is no equivalent of this list in any of the UK records. DCI Williams had planned to gather evidence of this kind but did not because his plans to travel to Malaysia were aborted. In all other UK records, those who were killed are collectively identified as *“the bandits”*, *“the Chinese”* or *“the villagers”*.
- 2.209. A journalist who wished to protect the source of this information has provided the Claimants’ solicitor with Detective K. Siva Rama Moorthy’s investigation file.<sup>237</sup> The Solicitor has undertaken to respect that, and so sought an undertaking from the Treasury Solicitor that, if released to the Defendants, the file would only be used for the purposes of making a decision on whether there should be an inquiry, other investigations or reparation.<sup>238</sup> The Treasury Solicitor refused.<sup>239</sup> The solicitor therefore had the entire file contents transcribed and provided this version (the key documents from which are in the Court’s bundle at V2 Tabs P and Q) to the Treasury Solicitor. The significance of this material, amongst other things, is that it was not available to Counsel instructed by the defendant to review the UK materials in

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<sup>233</sup> V2/0/1

<sup>234</sup> V2/0/2

<sup>235</sup> V2/0/3

<sup>236</sup> V2/Q/41-42

<sup>237</sup> V1/C/15 § 61

<sup>238</sup> V2/E/275-276

<sup>239</sup> V1/E/282

2009,<sup>240</sup> having been supplied to the Claimants' solicitors only after the provisional decision of 21 August 2009.

- 2.210. Detective K. Siva Rama Moorthy's gathered a number of statements from eyewitnesses in Malaysia over the course of 1993 and subsequently.<sup>241</sup> These included the remaining survivors, especially Chong Fong,<sup>242</sup> Tham Yong,<sup>243</sup> Foo Moi,<sup>244</sup> Wong Kum Sooi,<sup>245</sup> Wong Mook Sang<sup>246</sup> and Chong Koon Ying.<sup>247</sup> However, they also took statements from Malaysian police officers, including Harnum Singh<sup>248</sup> who was shot on 10 December 1948, Superintendent Lim Cheng Leng,<sup>249</sup> a senior police officer during the Emergency; and Chai Kam Woh,<sup>250</sup> the Chinese detective who in his 1948 statement admitted being at the scene. These statements develop the evidential matrix in this case in a number of ways outlined below.
- 2.211. The progress of his investigation was carefully monitored by the British High Commission in Kuala Lumpur.<sup>251</sup> So, for example, a telegram of 20 December 1993 from the High Commissioner to the FCO noted that "new witnesses" had been traced. The means by which this monitoring was accomplished are not clear in the documents.

### *Chong Fong*

- 2.212. Chong Fong gave the first interview to the police in July 1993.<sup>252</sup> The other surviving witnesses would follow. If he was the same Cheung Hung who gave a statement to the police in 1948 he did not say so. Neither did he accept that communists had operated in the area. His account of the first night was short. The men and the women and children having been separated, he added only "*I sat alone the whole night through*". He said nothing about the violence on the first night, even though it was accepted that mock executions had taken place; and one man had actually been shot. The next day the men were separated into groups. He now said he was part of the group that was taken by the soldiers to the river. He heard a gun shot and fainted. Having recovered he saw dead men around him and fled to Ulu Yam Bahru, where he remained hiding for a month and half, scared that the "*white men*" would get him.

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<sup>240</sup> See, for example, McGurk at V1/E/124 and E/138-139 where it is clear that he has not taken it into account

<sup>241</sup> V2/P/1-56

<sup>242</sup> V2/P/1-11

<sup>243</sup> V2/Q/20-21

<sup>244</sup> V2/P/32-36

<sup>245</sup> V2/P/50-52

<sup>246</sup> V2/P/53-56

<sup>247</sup> V2/P/39-43 and Q/23/24

<sup>248</sup> V2/P/12-18

<sup>249</sup> V2/P/19-22

<sup>250</sup> V2/p/45-46 and Q/47

<sup>251</sup> e.g. V2/137, 140-171

<sup>252</sup> V2/P/1-11

### Tham Yong

2.213. Tham Yong had married Chong Fong after the killings. At the time she was engaged to his brother.<sup>253</sup> She recalled that Loh Kit Lin was questioned and found with a slip of paper with figures written on it. For that he was accused of being a food supplier, which he vehemently denied. Two British soldiers and the Chinese detective led him about 250 feet away and shot him. The tappers were warned that they would suffer the same fate if they did not cooperate. As to the treatment of others, Tham Yong said that Wong Yang was questioned at knife point and that her husband, Chong Fong, was taken to the place where Loh's dead body was lying and questioned there. The Chinese detective fired two shots behind him and Chong Fong fainted. Choi Loi heard three shots fired behind him while he was being interrogated. He fainted and was thrown at the corridor of the kongsi, where his wife embraced him.<sup>254</sup> (This was presumably the reason why he was put on to the lorry the following day).

### Foo Moi

2.214. Foo Moi was married to Wong Yang.<sup>255</sup> She also recalled Loh Kit Lin being found in possession of the piece of paper with figures on it and accused of supplying the communists. He was escorted by the Chinese detective down the road and she saw him fire a shot. *"The Chinese detective then came back to us and threatened to kill us if we kept quiet about the presence of the communists"*. The interrogations went on during the night. While waiting to be interrogated they were kept in a room. The children were crying of hunger and thirst. In the morning they were separated, with the women and children being put into the lorry. While on the lorry she maintained as she had done in previous accounts:

*"I saw white men soldiers escorting the men out from the second kongsi house in three groups. Two groups walked towards the river and [the] other walked to the hill behind the kongsi. One of the two groups which walked towards the river passed beside the smoke house. My husband Wong Yang was in that group and was walking from the front. As soon as they reached the river, I saw the three whiteman soldiers started to fire at them and they collapsed. At the same time I also saw gun shot coming from further up the river side and also from behind the kongsi"*

2.215. Foo Moi was one of the women who returned to Batang Kali in the subsequent days. She found her husband's dead body in the river. There were six other dead bodies in the river and one of them, Lam Kow, was headless. She could identify him by his clothing.

2.216. This description of a headless corpse had a particular context in Malayan Emergency. Pictures of a soldier in Malaya carrying decapitated heads whilst on duty were published in the *Daily Worker* in 1951 leading to an admission in Parliament that this

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<sup>253</sup> V2/Q/20-21

<sup>254</sup> Choi Loi is the man who was put on to the truck the following day because he had fainted during the interrogation.

<sup>255</sup> V2/P/32-36



was a recognised practice in order to assist in the identification of suspects, without having to transport dead bodies from the jungle but that instructions would be issued that it should cease and fingerprints and photographs should be taken instead.<sup>256</sup> The fact that Lam Kow's head was missing was not only an example of this inhumane act, but would further suggest that the identification exercise did not produce any firm evidence against him.

### *Wong Kum Sooi*

2.217. Wong Kum Sooi was Foo Moi's son.<sup>257</sup> He was about 11 years old at the time. His brother Wong Mook Sang had appeared on the *In Cold Blood* documentary. He saw his brother interrogated by the soldiers. He also saw Loh Kit Lin taken by the two soldiers and the Chinese officer. He saw him fall to the ground, but he could not see which one of the three men shot him. He too recalled being in the room for the night with the other children and crying for food and drink. In the morning they were put into the lorry. While he did not see the shooting he could hear it while the lorry was still at the village and he could see the kongsis when they were set on fire.

### *Wong Mook Sang*

2.218. Wong Mook Sang, Foo Moi's other son, repeated his account from *Inside Story*.<sup>258</sup> He was in fact 7 years old at the time, and not 10 as he suggested on the documentary. (He appears to be the 'small boy' that DS Gopal described as being brought to interrogation by Sergeant Hughes.) A soldier had interrogated him, pointing a pistol at his chest and telling him to tell the truth. Loh Kit Lin and Cheung Hung were interrogated by the Chinese interpreter. After being interrogated for some time Loh Kit Lin was taken away out of the room by the soldiers. Wong heard shots. The following day the women and children were taken away by lorry. Although he could not see anything, he could hear the shooting before they moved off.

### *Chong Koon Ying*

2.219. Chong Koon Ying was 9 years old at the time of the killing.<sup>259</sup> She gave an account of 30 women and children being kept in a kongsi over night:

*"It was dark and we were there until 6.00 am the following morning. About half an hour after we had been locked up there was a sound of a gun shot. The Chinese man who was with the British soldier opened the kongsi door and put his head inside to announce that one of the younger tappers had been shot dead and warned us not to make noise. The children were crying because they were hungry and wanted to drink milk. One of the relatives of the dead Chinese boy was also crying"*

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<sup>256</sup> HC Deb 7 May 1952 vol 500 col 388

<sup>257</sup> V2/P/50-52

<sup>258</sup> V2/P/53-56

<sup>259</sup> V2/P/39-43

2.220. Chong Koon Ying recalled being in the lorry when the shooting started. There were also gun shots as the lorry started to move. She was unable to see anything as she was small and blocked by others. Of final significance for this witness, is that on 29 September 1993 she attended a photo identification procedure, where she picked out the Chinese detective Chia Kam Woh as the man who was present during the incident.<sup>260</sup> When asked how she could remember a face from 45 years before, she stated that *“the Chinese guy with the Scots Guards was good-looking and his features esp. the eyebrows, nose and face appear to be the same”*. She was not *“100% sure”*, but in the photo Chia Kam Woh appeared similar. She also said that she could not *“forget that face”*.

### *Harnum Singh*

2.221. Harnum Singh was a retired police captain who was shot on 10 December 1948.<sup>261</sup> He provided the inquiry with three important pieces of information. First, as far as he could recall, the Sangei Remok Estate where the kongsis were situated was boarded by jungle only on its eastern side. This was in conflict with 1970 soldier witnesses, such as Lazenby who thought that the area was surrounded by jungle therefore explaining why the groups of dead men reflected the limited routes of ‘escape’ from the kongsis. Second, he provided first hand account of the increasing violence towards Malaysian police and British soldiers in the days and weeks before the killings which is detailed in Section A (§§2.15-2.19) above. Finally, he referred to his own wounding on 10 December. He believed he was still in hospital at the time of the Batang Kali killings, but upon his return to Kuala Kubu Bahru, one or two soldiers on seeing him said, *“These fucking bastards on that estate deserve to die by being shot!”*

### *Lim Cheng Leng*

2.222. Superintendent Lim Cheng Leng was a senior police officer during the Emergency, and one of Harnum Singh’s superiors. <sup>262</sup> He confirmed what other historians have suggested that the number of people killed at Batang Kali was unique in the entire Emergency. With regard to attempted escapes in the jungle environment, he saw the number killed as suspicious. Even when apprehended prisoners made a run for it, some may be wounded and some would have escaped unscathed. He suggested that investigations of the incident by the Emergency Information Service (E.I.S) had been brought to an end for political reasons. The head of the EIS had told him *“that General Boucher and the AG were both powerful men not to be crossed”*. He was critical of the fact that there was no documentation relating to the event (*“no finger printing, post-mortem or Sudden Death Reports”*); especially so given that the dead were supposed to be enemy combatants and it was important to determine who they were for security reasons.

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<sup>260</sup> V2/Q/24

<sup>261</sup> V2/P/12-18

<sup>262</sup> V2/P/19-22

*Chia Kam Woh*

2.223. Chia Kam Woh was interviewed by the police and provided a critical piece of evidence: namely a lie as to his non-presence at the scene at critical junctures on 11 and 12 December.<sup>263</sup> Notwithstanding that he had given a statement in 1948 that he was the Chinese detective who went to Batang Kali and was at all times in the near vicinity of the kongsis, directly involved in the interrogation process, he now denied it.<sup>264</sup> As detailed above, the statement in 1948 was questionable, because in accepting that he and Gopal never left the scene, they both said that they heard the shooting of the man on the first night; and then heard the shootings on the morning of the second day; but neither of them ever saw anything. In his 1993 interview, Woh removed himself from the scene altogether. He told the police he was assigned to do duties with a group of about 40-50 soldiers on a hill top at the Sengei Remok Estate. Meanwhile another group of about the same number of soldiers entered the Estate with DS Gopal.

*“We were at ambush position at about 2.00 to 3.00 am. At about 5.00 to 6.00 am we heard gunfire and subsequently we joined them at the Sg Remok Estate. By the time I reached there I saw a lot of dead bodies. I also witnesses the burning of 3 kongsis. After that we went back to KKB. I do not know what happened subsequently.”*

2.224. The full importance of this being an incriminating false account was not known to the Malaysian police in 1993, because they did not have the 1948 statement. However, by this stage, they had a number of accounts from surviving villagers indicating that the Chinese detective had terrorised them on the first night, with several witnesses implicating the detective directly in Loh Kit Lin’s killing.<sup>265</sup> As noted above, Chong Koon Ying had in fact accurately identified this man from a photograph after 43 years. It would appear that his involvement in the events was truly unforgettable to her.<sup>266</sup>

*Case Investigation Progress report*

2.225. On 22 October 1993, Detective K. Siva Rama Moorthy sent a Case Investigation Progress report to his superior summarising the above evidence.<sup>267</sup> He made it clear that Chia Kam Woh was to be regarded as a key witness who was presently not telling the truth about his presence at the scene. He recommended that further efforts be made to confirm it and that, if necessary, Woh could be made a Crown witness (i.e. suggesting that he should be offered immunity).<sup>268</sup> Further, it was indicated that the investigation team suspected Chong Fong of having been an ‘Agent Provocateur’. That was because he was detained separately from all the other men,

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<sup>263</sup> V2/P/45-46

<sup>264</sup> Cf. V2/G/7-8

<sup>265</sup> Tham Yong (V2/Q/20-21); Wung Kum Sooi (V2/P/51); Foo Moi (V2/P/33) and Chong Koon Ying (V2/P/44)

<sup>266</sup> V2/Q/23-24

<sup>267</sup> V2/Q/39-48

<sup>268</sup> Ibid/Q/47

the night before the incident. That observation would, of course, support the 1948 statements of DS Gopal and DC Woh about the youth, Cheung Hung. Although, without the 1948 statement, the extent to which Cheung Hung /Chong Fong had provided qualified information and only as a result of serious ill-treatment during interrogation was not yet properly appreciated by the Malaysian police. What was also not yet known by the investigation team in 1993 was that that Cheung Hung/Chong Fong had also been able to say in 1948 that the male prisoners were escorted away from the kongsis in groups, after which he heard shooting.<sup>269</sup>

## **F. 1994-1996**

### **Failures to supply the Malaysian police with the British material and to seek the Malaysian material to assist with decision making in the UK**

#### *Suggestion of mutual assistance by the War Crimes Unit*

2.226. Mr England sent the later version of his report on the 1970 Metropolitan Police Force evidence and the *In Cold Blood* documentary to the Foreign Office on 2 February 1994.<sup>270</sup> The covering letter goes on to state that will be “for ministers” to consider whether the CPS should consider the products of the ongoing Malaysian investigation.

#### *Rejection of the CPS suggestion to combine UK and Malaysian evidence*

2.227. Three weeks after receipt, the FCO wrote to the CPS War Crimes Unit in response to the 2 February letter. This letter, dated 15 March 1994,<sup>271</sup> says:

*“I am very sorry that other events have prevented me from acknowledging before now the very helpful paper enclosed with your letter of 2 February. I copied it at the time to our High Commission in Kuala Lumpur. Their recommendation was that, since we were under no particular pressure from the Malaysians to produce an answer, we should not take further action on the Petition while certain sensitive issues in our relations with Malaysia remained unresolved. Events since then tend to reinforce that case, and I therefore propose to leave the papers on the file for the moment. I will reassess in due course. I will let you know before moving again.”*

#### *High Commission advice on deliberate delay*

2.228. There was no action taken and a telegram from the High Commission to the FCO of 7 February 1994<sup>272</sup> observed:

*“... we see no case for pushing ahead with an answer to the petition while air services and Bosnia remain such sensitive issues... Even if we were [put under pressure by the MCA or the Malaysian Government] we would be able to resist it by taking the line*

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<sup>269</sup> Cf. V2/G/4

<sup>270</sup> V2/R/93

<sup>271</sup> V2/R/109

<sup>272</sup> V2/R/107

*that a suitably thorough examination of the relevant papers in the UK was necessarily taking time"*

2.229. A letter from the High Commission to the FCO of 6 April 1994<sup>273</sup> commented:

*"It remains in our interests to play this affair long... I therefore recommend that the MCA's petition be submitted to the Queen as soon as possible... This would buy us a bit more time in which to consider the terms of our reply to the petition (I will telegraph separately with further advice on this)".*

2.230. It appears that the petition and proposed draft reply were submitted to the Queen later in April. That draft reply was *"essentially non-committal, while not closing the door to further action if sufficient new evidence is forthcoming"* as a letter from the FCO to the Army Historical Branch on 25 April 1994 explained.<sup>274</sup> In fact, the reply to the petition does not appear to have ever been sent, despite the MCA sending a chasing letter on 8 December 1994.

*The formal request for assistance from the Malaysian Police and the High Commission's advice on a response*

2.231. At some point between February and November 1994, the Malaysian Inspector General of Police made a formal request for assistance with his officers' investigation to the British High Commission. Neither the request nor the immediate response to it are documented in the Malaysian files or the materials disclosed by the Defendants.

2.232. The fact of the request is clear from a telegram from the High Commission to the FCO of 21 November 1994 which ended up suggesting an integrated approach that would bring both the petition and the Malaysian Police investigation to a conclusion.<sup>275</sup> The telegram begins by referring to *"the lifting of trade restrictions as an opportunity to progress matters"*. However, *"considerable potential sensitivities"* were said to *"clearly remain for both the UK and Malaysia"*. Reference was made to the impending general election in Malaysia and the risk that Batang Kali could become a distorting issue.

2.233. The telegram then outlines how action on the petition might bear a consequential effect on the Royal Malaysian Police investigation and vice versa. The writer continues *"I take it will be in our interests not / not [sic] to volunteer papers"* from the 1970 investigation to the Malaysian police. Although the document remains partly redacted with regard to a named soldier, it appears that consideration is then given as to whether to establish if RSM Douglas is still alive and whether he should be contacted with regard to the wish of the Malaysian police to interview him. If he refused this event might in itself stop further Malaysian enquiries. It was also suggested that the Malaysian Inspector General of Police might be directly approached to consider if further enquiry was now worth pursuing. Such an

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<sup>273</sup> V2/R/113-114

<sup>274</sup> V2/R/118

<sup>275</sup> V2/R/145. Note a copy with less redactions is to be found at V2/S/4-6

approach the High Commission recommended could deal with the “*merits – including a proper consideration of the wider policy ramifications – with any subsequent request for a sight of papers relating to the 1970 investigation*”. It concludes that it would be impolitic for the Queen to respond to the petition until the Royal Malaysian Police investigation was completed.

2.234. The FCO responded on 21 December 1994 commenting that the “*continuing delay in our ability to lay this matter to rest is as tiresome for us as it is politically sensitive for you.*”

<sup>276</sup> As to the attempt to discover the whereabouts of the person whose name is still redacted (but which would logically appear to be retired RSM Douglas), the FCO noted that it had not been successful and was reluctant to approach the Scots Guards who it was believed “*would be reticent*” about revealing the man’s details.

2.235. The petition remained unanswered. As late as 4 May 1995, <sup>277</sup> the FCO wrote to the High Commission: “*Now that the election is out of the way, I wonder whether someone might nudge things along on Batang Kali at the Malaysian end. In two months, it will be the second anniversary of the petition to the Queen, and the spotlight will be turned on us again in no uncertain terms. We cannot hold out indefinitely.*”

## **The termination of the Malaysian Police investigation**

### *Request by the Malaysian police for Interpol assistance*

2.236. On 14 June 1995, the FCO confirmed by letter to the High Commissioner in Kuala Lumpur that the OGC had received a letter from Supt Hoh Hong Sung.<sup>278</sup> This was a request for assistance from Interpol London to identify members of the 7<sup>th</sup> Platoon of G Company, to provide copies of their existing statements or to enable the Royal Malaysian Police to interview them.<sup>279</sup> According to the 14 June letter, OGC confirmed that someone (the name has been redacted) would conduct enquiries in the UK and would submit his report via Interpol in due course. The next paragraph (now unredacted) refers to the fact that the Scots Guards have been approached but do not have up-to-date records, therefore requiring searches to be conducted through the Army Pensions branch and the DSS (“*This will be a time consuming and laborious process*”). The remaining portion refers to the proposed visit by the Malaysian police team to gather evidence here: “*I should be grateful if you would ask the Counsellor (Political) to try to steer the Inspector General off the idea of such a visit.*” The author then comments that the “*political sensitivities of the case*” have been explained to another person whose name is redacted. Whatever was done on this instruction to “steer” Detective K. Siva Rama Moorthy away from the idea of visiting the UK, it worked.

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<sup>276</sup> V2/R/150. Note a copy with less redactions is to be found at V2/S/7

<sup>277</sup> V2/R/154

<sup>278</sup> V2/R/162-163. Note a copy with less redactions is to be found at V2/S/8-9

<sup>279</sup> The Malaysian police file records efforts to identify the soldiers having been made through the Malaysian Ministry of Defence, presumably without success.

### *Recommendations for further investigations by the Malaysian police*

- 2.237. It is clear that the Malaysian police were concerned at what they found. A Special Branch briefing note, 'The Batang Kali Incident – Security Situation in Selangor in 1948', had been prepared at Detective K. Siva Rama Moorthy's request. This concluded *"whatever the state of security then, unless the victims had breached the Emergency Regulations which warranted the military to resort to the use of lethal weapons, there was certainly no justification for their killing"*.<sup>280</sup>
- 2.238. The final available document from Detective K. Siva Rama Moorthy's two year investigation is his own interim report of 30 May 1995 which lists a number of "recommended" steps he has yet to complete including interviewing the surviving patrol members, making Detective Woh a Crown witness and disinterment of the villagers bodies for the purposes of an examination by the Chief Pathologist.<sup>281</sup> He observes, however: *"It is evident from the witnesses that this massacre did take place in cold blood."* However, he pointed out, *"all avenues/resources available have not been exhausted, in order to complete investigations so that a decision could be made by the proper authorities"*.
- 2.239. It at this stage, approximately in June 1995, that Ward and Miraflor report on the fact that arrangements for Malaysian investigators to travel to the UK, in there words, *"immediately ran into snags"*. What follows is un-sourced, but would appear to have derived from an interview with someone who had first hand knowledge of the police investigation. Interpol was apparently approached to confirm flight time frames suitable to Scotland Yard. Flight tickets were apparently booked:

*"Then on the night before two Malaysian police officers were due to depart Kuala Lumpur's International Airport, on the initial stage of the UK investigations, each received a telephone call. They were informed Interpol was reporting Scotland Yard unprepared to host the proposed visit and associated interviews. These would have been postponed to another day"*.<sup>282</sup>

- 2.240. Thus, there was a successful "steer" of Detective K. Siva Rama Moorthy by someone working out of the British High Commission as suggested in the telegram of 14 June (see §2.236 above). It would be too much of a coincidence that apparently without knowledge of the 14 June confidential telegram, Ward and Miraflor have obtained a source in Malaysia accounting for an unexpected cancellation of the trip at the same point in time when the FCO and the High Commission were discussing ways to stop that trip from occurring, at least for the time being.

### *Procrastination with regard to the Interpol request*

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<sup>280</sup> V2/Q/58

<sup>281</sup> V2/Q/63-64

<sup>282</sup> SD, p. 201

- 2.241. The Interpol request from the Malaysian Police was taken up by the Metropolitan police; but it took more than a year to answer. A fax from the FCO to the First Secretary (Political) in the High Commission of 23 August 1995 indicates that the British police had been able to establish that 11 of the Scots Guards who were part of 7<sup>th</sup> Platoon of G Company “and who are still alive” (emphasis added). Four of them had been located.<sup>283</sup> Arrangements were made to give a holding reply.
- 2.242. Nothing then appears to have happened until 11 March 1996, when the High Commission suggested by a fax that there was a need to give a further holding reply.<sup>284</sup> A hand written comment dated 18 March 1996 on that same fax would appear to state that it was not considered possible for the Malaysians to investigate in the UK.
- 2.243. The matter was again dealt with in FCO-High Commission correspondence on 10 May 1996. Some names and addresses had been collected by the police. However, investigations were still ongoing. The Met was stated to be reluctant to give the details directly to the Malaysian police, lest they contact the people directly: “*It would make sense for the Malaysians to ask the British police to investigate further on the Malaysians’ behalf (if they wished to pursue their enquiries further)*”.<sup>285</sup>
- 2.244. It then appears that the British police undertook some enquiries intended to assist their Malaysian counterparts and a list of 11 names was supplied to the FCO on 31 July 1996 with the suggestion that the Malaysians be asked whether any further assistance was required.<sup>286</sup> The unredacted part of the fax shows that not only were no contact addresses supplied, but that after more than a year, the London police were unable to assist in any significant detail:

*“Despite further examination of military archives and extensive enquiries of various agencies of record in the United Kingdom, it is regrettably, after this lengthy period of time not proven possible to ascertain where they all live – or indeed, to discover how many of them are alive. Possible addresses have been identified for six of the men. Of these addresses, only three of which are in the jurisdiction of the British police. Two of the other men would appear to live in Scotland and one in Australia. Of these the three who may reside in England none would appear to live within the Metropolitan police area.”*

- 2.245. However, for reasons that have not been explained, the Metropolitan Police’s draft reply and the information it contained was not supplied directly to the Royal Malaysian Police, or to Interpol, by the Foreign and Commonwealth Office, as it indicated to the British High Commission, Kuala Lumpur in a restricted message of 5 September 1996.<sup>287</sup> It appears from the next, and final document disclosed for this

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<sup>283</sup> V2/S/10

<sup>284</sup> V2/R/170

<sup>285</sup> V2/R/171-172

<sup>286</sup> V2/R/176-177. Note a copy with less redactions is to be found at V2/S/8-9

<sup>287</sup> V2/R/178



period, a letter of the same date,<sup>288</sup> that that the Royal Malaysian Police attempted to make contact directly with the Metropolitan Police. There are no records of this contact on the Royal Malaysian Police file, however.

### *Closure of the case*

2.246. From thereon, the Malaysian investigation appears to have ground to a halt. It was not until 16 September 2004, however, that an article in the *New Straits Times* disclosed that the Attorney General had decided to close the case. No reason was given.<sup>289</sup>

### **Further affirmation of the official account**

2.247. The remaining event of significance in Malaysia was the publication in 2003 of an autobiography by the Communist leader, Chin Peng. In it he made clear that the residents at Batang Kali were not connected to the Communists and that it was indeed a cold blooded massacre as maintained by its survivors. The *Scotland on Sunday* ran a piece about the book on 14 December 2003, General Sir Michael Gow on behalf of the Scots Guards described the allegations “as complete non-sense” and a spokesperson from the Ministry of Defence said: “The events at Batang Kali have been well-documented and investigated, with the conclusion that there is insufficient evidence to warrant criminal proceedings”.<sup>290</sup>

### **G. 2008-Present**

2.248. This final section on the Facts deals with the immediate context for these judicial review proceedings.<sup>291</sup>

### **Second Petition to the Queen**

2.249. On 25 March 2008 Mrs Tham and others in the newly-formed Action Committee Condemning the Batang Kali Massacre submitted another petition to Queen, seeking a redress of their grievances including an apology and compensation for the families of the dead.<sup>292</sup> This mass campaign has been publicly endorsed by 568 organisations in Malaysia.<sup>293</sup> Various further representations were made, including a supplementary petition of 12 December 2008 <sup>294</sup> in which a public inquiry was explicitly requested.

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<sup>288</sup> V2/R/179

<sup>289</sup> Quoted in SD, pp 201-203

<sup>290</sup> V2/T/13-14

<sup>291</sup> Materials in relation to this section can be found in Trial Bundle 1. Further detail as to the correspondence between the parties is detailed in the statement of John Halford at V1/C/19-22 §§ 76-92

<sup>292</sup> V1/E/1-2

<sup>293</sup> V1/C/54-77

<sup>294</sup> V1/E/19-21

## Response to the Petition

2.250. The response to Petition was issued in a letter to the Action Committee from the High Commissioner dated 21 January 2009.<sup>295</sup> This stated that the Defendants had decided:

*"[i]n view of the findings of two previous investigations that there was insufficient evidence to pursue a prosecution in this case, and in the absence of any new evidence, we see no reason to reopen and start a fresh investigation."*

## First Pre-Action Protocol Letter: April 2009

2.251. A detailed pre-action protocol letter challenging that decision was sent on 1 April 2009.<sup>296</sup> Various questions and requests for documents were raised.

## Reconsideration and the subsequent process: 24 April 2009

2.252. On 24 April 2009 the decision refusing the Petition of March 2008 was withdrawn and a reconsideration exercise over *"the next few months"* was proposed.<sup>297</sup> However, the Defendants refused to answer any of the questions and requests.<sup>298</sup>

2.253. There followed a process in which the Defendants asked for and received the product of the Claimants' research to date and a meeting was sought and eventually granted between the Defendants' officials, the Claimants' lawyers and a number of Action Committee lawyers.<sup>299</sup>

## Provisional reconsideration decision: August 2009

### *Decision*

2.254. On 21 August 2009 a provisional decision was made refusing an inquiry or other investigations.<sup>300</sup> The provisional conclusion was that an inquiry would not be held because:

(a) *"...an inquiry would be unlikely to be in a position to reach firm conclusions about what happened in December 1948".*

(b) *"Given that the events which would be the subject of any inquiry occurred over 60 years ago, and given the organisational structure of the UK Armed Forces has changed substantially over that time, it is unlikely that an inquiry would identify that any such failings subsist."*

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<sup>295</sup> V1/E/36

<sup>296</sup> V1/E/42-70

<sup>297</sup> V1/E/79

<sup>298</sup> V1/E/90

<sup>299</sup> V1/E/100-102

<sup>300</sup> V1/E/232-237

(c) *“An inquiry might in principle promote good relations between persons of different racial groups, but its ability to do so would depend on the extent to which it was able to reach firm conclusions on the central allegation.”*

### *The McGurk reports*

2.255. By previous agreement the decision was described as “provisional”, so that representations about it could be made. This decision was said to be based on a series of reports that Dr Brendan McGurk of Counsel had prepared after reviewing some of the available evidence in the UK.<sup>301</sup> These reports analyse most, but not all, of the material outlined above, but for reasons outlined below they do not properly engage with the deficiencies in the previous investigations, nor do they analyse the strength of the evidence that undermines the official account. There are also some significant omissions, for example Don Houlston’s description of being told by Keith Wood of wounded villagers being executed as they lay on the ground is not considered significant. Moreover, Dr McGurk did not have access to the Malaysian Police investigation file, because it was not made available by the Claimants’ solicitors until 2010 (see §2.209 above).

2.256. Of significance to the continuing status of the official account, is that Dr McGurk, like Sir Foster Sutton before him, felt compelled in his main Report to proffer the following suggestion about the killings, based on several of the 1970 interviews that effectively described a “spontaneous or reflex response”<sup>302</sup> In his conclusion he observed:

*“One remains struck by the fact that panic, reflex, and spontaneity are what characterise the shootings when they in fact took place – and that is on the basis of the account of those alleging a massacre. Sir Foster Sutton later referred to this as a bona fide mistake in his interview to World at One on 2 February 1970 – something that tallies with (i) those accounts given to the MPS that the soldiers were extremely ‘jumpy’, unfamiliar as they were with the jungle (see the statement of Lazenby) and (ii) a spontaneous or panicked outburst of shooting”*

2.257. In fact, Sir Stafford Foster-Sutton nowhere ascribed the “bona fide mistake” to “panic, reflex, and spontaneity”; but Dr. McGurk was effectively developing upon his revised position of 1970.

2.258. Further, having made this observation, Dr McGurk noted that there was a lack of clarity as regards extant standing orders in December 1948, but does not then engage with the legal consequences of shooting suspects of this nature in so drastic a fashion, even as a result of jumpiness, spontaneity or panic:

*“A further difficulty is that the legal basis for the ‘oral standing order’ to shoot if the person did not stop is unclear. The army was in Malaysia in aid of the civil authorities but were on de facto active service. Formally, this was an insurgency and the basis upon which the command to shoot if the person did not stop was*

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<sup>301</sup> V1/E/108-223 disclosed on 28 August 2009 (V1/E/242)

<sup>302</sup> V1/E/135 at § 67(iii)(e)

*promulgated or deployed is simply not clear. The Letter of Claim raises this issue in support of the contention that this was an excessive, disproportionate and unjustified killing of unarmed civilians such that the act itself was a breach of CiL"*

2.259. No further comment is made on the issue by Dr McGurk, by the subsequent Ministerial Submissions (see §2.264 below), or in the formal decision letters (see §2.265 below). For reasons developed in Part 3 below, by reference to the common law position described in *R v Clegg, ante*, and the prohibition on killing as recognised by in prevailing customary international law at time, the observation sidesteps the question of whether facts as analysed by McGurk amounted to murder or otherwise unjustifiable use of force; and if they did, what would be the public interest in conducting an independent investigation of this matter.

### **Efforts to obtain disclosure and accumulate the relevant available material: 2009-2010**

2.260. The materials that are contained in Volume 2 of the trial bundle, all of which are presently subject to undertakings not to disclose to others beyond the conduct of these proceedings, were disclosed and accumulated during the remainder of 2009 and most of 2010. The work done is detailed in the statement of John Halford.<sup>303</sup> Although the McGurk reports were disclosed to the Claimants' solicitors, it took a number of months to secure access to the underlying documents upon which the reports are based. It was accepted that otherwise any opportunity to make representations would be futile.<sup>304</sup> Eventually most of these materials were obtained. The Claimants' solicitor was also given assistance by the Metropolitan police to view, but not copy or remove, the 1970 investigation file. The solicitor's notes on the issue form the basis of the factual account of the statements taken during that investigation as set out above. The Defendants were then served transcribed copies of the Malaysian police file (see §2.209 above). The Claimants' solicitors conducted their own additional research into the Emergency Regulations and common law legal framework applicable in 1948 (see §§2.8-2.10 and 2.72-2.73).

### **Second letter before claim: September 2010**

2.261. On 3 September 2010, the Claimants sent a second letter before action to the Defendants responding to the provisional decision of 21 August 2009. The Defendants were asked to order either a public inquiry under s. 1 of the Inquiries Act 2005, or "*some other sufficiently independent and robust fact finding mechanism*" to "*to explain fully what happened at Batang Kali, why it happened and why there has been no adequate explanation to date*".<sup>305</sup> The letter sets out in far greater detail than before the view that there was no legal authority for the troops to kill the villagers and raising the question of a common law duty to make reparations, including the conduct of a

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<sup>303</sup> Halford V1/E/21 §§ 84-88

<sup>304</sup> V1/E/243-254 (for the remainder of 2009) and V1/E/261-274 (for the 2010). Separate representations were made to the DPP to get the CPS materials (V1/E/299-302)

<sup>305</sup> V1/E/304

thorough and independent investigation, in order to discharge international law obligations. In making their decision the Defendants were directed to their obligation to have “*due regard*” to eliminate race discrimination and promote good relations between persons of different racial groups under the Race Relations Act.

2.262. As part of the letter the Defendants were invited to indicate in the light of the information now disclosed and exchanged “*that (whatever the factual circumstances may have been) there was no legal basis for the killings at Batang Kali, either at the time or subsequently*”.<sup>306</sup> In addition they were asked to indicate their agreement or otherwise with what were described as nine “*incontestable facts*”.<sup>307</sup> The Defendants have repeatedly refused to engage with these questions in any of its correspondence, even though it was put to them that the *prima facie* legality of the killings and the factual basis upon which the official account had been allowed to rest were regarded as a material consideration as to whether to order an investigation, or make a payment of reparations.<sup>308</sup> The crux of their answer to this repeated request is that such a matter would have been a question to answer at a public inquiry, had an order to hold one been made.

2.263. Enclosed with this letter was a detailed e-mail from one of the UK’s leading forensic archaeologists, Professor Sue Black, who explained that significant conclusions could be drawn from the examination of gunshot wounds to large groups of people, and that the task would not be onerous were the bodies exhumed.<sup>309</sup>

## **The First Decision: November 2010**

### *Ministerial submissions*

2.264. Prior to making the first contested decision in these proceedings, the Ministers were provided with submissions. The documents are dated 22 November 2010<sup>310</sup> (but were not disclosed for another year – see §2.270 below). They made recommendations that HMG should neither pay compensation nor establish a public inquiry. Significant features of the submissions are as follows:

(a) It is noted that it was claimed at the time that the villagers were shot trying to escape, but those calling for a public inquiry contend that the killings were pre-planned extrajudicial killings. Of these positions, the submissions suggest, without further elaboration, that “[t]here is some evidence which supports each of these competing theories”.<sup>311</sup>

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<sup>306</sup> V1/E/306

<sup>307</sup> V1/E/308-309

<sup>308</sup> V1/E/375, 380, 383 and V1/B/2

<sup>309</sup> Quoted at V1/E/336-337

<sup>310</sup> V1/B/ 1-5 and 6-11

<sup>311</sup> V1/B/2

(b) It then states (wrongly) that there were four occasions when the matter was investigated with a view to possible criminal proceedings. It can only be assumed that the figure of four was reached by including the review by Jim England that was carried out in 1993, in effect to review the 1970 investigation and not a free standing fresh investigation. This is when England appears to have made the comment with regard to his audit, that the whole thing looked “*very fishy*”, but that matters should be left where they stand because “*it was hardly in our interest to do otherwise!*” (see §2.192 above). It would also mean that Sir Stafford’s investigation, that overlooked existing statements from Gopal, Woh, and Hung, and which deliberately avoided interviewing any of the surviving villagers, could be classed as a genuine investigation (see §§2.66-2.67 above).

(c) On each of the investigations, the submission draws back from detailing their faults and provides a general observation to the Defendants that “*they should not assume that any of these investigations was a full or sufficient one*”. The written documents suggesting that each of the ‘investigations’ were subject to political interference is not alluded to.

(d) At no point is the legal basis for the shooting, even on the official account, confronted. In fact the contrary position is taken, that law (domestic and international) has moved on since 1948, which therefore diminishes the extent to which the conclusions of an inquiry might serve contemporary operations.

(e) Although the Defendants are told that they have the power to establish an inquiry that was “*less formal than an inquiry under the 2005 [Inquiries] Act*”, there was no consideration of *actual* alternative models of independent investigation, which would have significantly different consequences for resources. Rather the same implications (including cost) were assumed.

(f) Against those matters, the submissions suggest five reasons why an inquiry should not be ordered under the headings: (1) the purposes the inquiries might serve; (2) the extent to which conclusions reached would be relevant today; (3) resources (“*it would almost certainly cost several million pounds*”<sup>312</sup>); (4) the evidence that the inquires would be able to consider; and (5) s. 71 Race Relations Act. These factors were in due course adopted by Ministers in their refusal letter.

### *The Decision*

2.265. On 29 November 2010, the Defendants issued a decision that they “*will not establish a public inquiry under the 2005 Act and that they will not initiate any other inquiry or investigation into the killings at Batang Kali on 11-12 December 1948*”.<sup>313</sup> The reasons given are as follows:

(a) The Defendants accept that “*they should not assume that an inquiry would be unlikely to be in a position to reach firm conclusions about what happened in December*

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<sup>312</sup> V1/B/8 at c.

<sup>313</sup> V1/B/12-29

1948” (emphasis in original). This is the opposite conclusion to that in the preliminary decision letter.

(b) Any conclusions reached would be of limited relevance today. Decisions taken in 1948 are “not likely to assist commanders in the present day, who are subject to radically different legal obligations” and “training methods and command structures have moved on since then”.

(c) Although some racial equality and relations benefits are “possible” they are not “sufficient on [their] own to displace the general considerations”.

(d) The Defendants have considered “the difficulties that may have been faced by female villagers, without legal aid, in bringing a complaint before the courts after 1948” but “public inquiries are not generally intended to provide a means to investigate events that took place long ago... the circumstances of this case do not justify making an exception from this general position”.

(e) No reliance was placed on “the sufficiency of any criminal investigations”.

(f) An inquiry would have “significant running costs” (note, however, the figure of “almost certainly... several millions of pounds” given in the submission to Ministers was not quoted).

(g) “The considerations set out above in relation to the establishment of an inquiry under the 2005 Act also militate against the establishment of any other form of inquiry or investigation”.

(h) There is no obligation to hold an inquiry into the killings at Batang Kali as a matter of customary international law or under the common law. Nor, it is said, are any international obligations relevant when considering whether to hold an inquiry or other investigation or to make any other form of reparation.

## **The Claim for judicial review**

2.266. The Claimants issued a claim for judicial review on 25 February 2011.

2.267. Permission was granted on 31 August 2011 by Mr Justice Silber who indicated in his decision that the case raised “arguable issues of importance”.<sup>314</sup>

## **The Second Decision: November 2011**

### *Ministerial submissions*

2.268. In the light of Detailed Grounds of Claim a second set of submissions was made to Ministers on 24 October 2011 advising them to promulgate a further decision as to whether “the probable inadequacy of earlier investigations in the killing would serve to justify a decision (a) to hold a public inquiry or other inquiry into the killings or (b) to hold a public inquiry into those earlier investigations either alongside an inquiry into the killings or

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<sup>314</sup> V1/D/1

*separately*".<sup>315</sup> The submissions advised that the answer should be in the negative. Significant features of the submissions are as follows:

- (a) The counsel not to rely on the sufficiency of previous investigations was repeated, but Ministers were again asked to make a decision without actually being told what the deficiencies in the previous investigations were, or even might be;
- (b) Again, the questions of whether the factual or legal basis for the official account were sustainable was left out of account;
- (c) The same five factors – as above – were then applied to the question of whether to inquire into the investigations.

### *The Decision*

2.269. On 4 November 2011 the Secretaries of State communicated a further decision intended in particular to address the complaint that there had been a failure on their part to take account of the instigation of previous investigations into the killings and their adequacy.<sup>316</sup> That decision purported to consider *"that matter both as a matter which may militate in favour of an inquiry into the killings themselves and also as a matter that would warrant investigation in its own right"*. The letter referred back to the five key reasons given in the original decision letter as to why the request for an inquiry into the killings was unnecessary. It then concluded that:

*"the instigation, and presumed inadequacy, of the previous investigations did not outweigh the factors against holding a public inquiry into the killings and that a public inquiry into the previous investigations themselves (whether alongside an inquiry into the killings or separately) would have many of the same disadvantages as an inquiry into the killings and would not be justified"*

### **Disclosure of the Ministerial submissions**

2.270. Also on 4 November 2011 the Defendants disclosed the aforementioned Ministerial Submissions that were relied on to make both the original decision of 29 November 2010 and that of 4 November 2011. Those submissions taken together with the content of the decision letters make the following clear:

- (a) The Defendants have never confronted the fact that the official account is neither legally nor factual sustainable;
- (b) In not assuming that any investigations were full or sufficient, the Defendants have never grappled with the implications and consequences if they were not.
- (c) *Actual* alternative models of independent investigation, which would have less drastic consequences for resources than a public inquiry, have never been considered in this case.

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<sup>315</sup> V1/E/30-32 and 33-36

<sup>316</sup> V1/E/37-39



## **Amendment to the Detailed Grounds of Claim and Resistance**

2.271. As a result of the further decision on 4 November 2011 and the service of Ministerial Submission that underpinned both decisions, the parties agreed to amendments to their Detailed Grounds of Claim and Resistance, which were served sequentially during February of 2012.<sup>317</sup>

### **H. Conclusion of this Part**

2.272. It follows from the above presentation of the facts that for the first time in 64 years, the materials are available for a public inquiry or investigation into what happened at Batang Kali and why subsequent investigations into what occurred were so inadequate. Indeed, whatever investigations there have ever been have always occurred as a reaction to scrutiny by others, and never as a result of Government initiative. Whilst newspapers, films and books, have sought to investigate this issue, it has never been the subject of independent judicial or equivalent scrutiny, and most of the material cited above is not yet in the public domain. The matter is poised, ready for an inquiry, but the Defendants are unwilling to find a mechanism to enable it to happen.

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<sup>317</sup> V1/A/76-99 and 101-107

### 3. SUBMISSIONS I: DOMESTIC PUBLIC LAW

#### Overview

##### *Summary of submissions*

- 3.1. The essence of the challenge at domestic common law to the Defendants' decisions not to order an inquiry or any other adequate, independent investigation is encapsulated in §32A of the Amended Grounds for Judicial Review<sup>318</sup>. It is there contended that, in all the circumstances:
- (a) the official account (lawful, unavoidable and necessary shootings) is obviously unsustainable and always has been, and this ought to have been the starting point for the 29 November 2010 and 4 November 2011 decisions;
  - (b) its maintenance, rejecting the claims of deliberate executions and refusing to recognise any basis upon which the events could be criticised, constitutes a cover up which has succeeded (to this day); and
  - (c) an independent inquiry report is readily achievable, need not be based on a model which is prohibitively expensive, would be enormously beneficial (as to truth and accountability and race relations) whereas the status quo is profoundly detrimental to these and the public interests.
- 3.2. There are a number of features of the case which it is helpful to consider in turn. The Claimants submit, and will develop below, these points:
- (a) The official account is unsustainable and yet it has steadfastly been maintained from 1948 to today;
  - (b) Even the official account would involve action contrary to law which illegality has never been acknowledged;
  - (c) The 1948 'investigations' and public announcements served to cover up an incident which was known to be deeply troubling;
  - (d) The 1970 and 1993 investigations were aborted in circumstances indicative of political interference;
  - (e) There has been no independent recognition, appraisal, evaluation or determination as to the truth. There has been no apology and no reparation (or even consideration of reparation with a proper starting-point);
  - (f) The problem will not go away, nor should it, especially given the egregious nature of the original conduct and the degree to which procedural steps to investigate it have been improperly frustrated thereby compounding the original wrong;

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<sup>318</sup> V1/A/95

(g) Looking at the balance of benefits and detriments, the difficulties have manifestly been overstated. There are a number of things the Defendants characterise as problems which are wrong: the material has now been comprehensively collected for the first time; there are acts that can now be undertaken for the first time – such as disinterment – that have been recommended since 1970; there are a range of models available under which an investigation can take place; costs are also overstated and should not be prohibitive; there are lessons to be learned;

(h) The benefits, by contrast, have manifestly been understated. The capacity for restorative justice in giving the matter proper consideration is overwhelming and there is benefit (as well as obligation) in having due regard to race relations in the race context of this case;

(i) The decision not to hold a further inquiry or investigation cannot satisfy the basic standards of reasonableness and justification which include standards which on the facts of this case are identical to proportionality.

### *Legal context*

3.3. The issues in the case directly relate to the right to life, and the substantive and procedural protections which relate to that right. As Lord Bingham explained in *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 at §30, “a profound respect for the sanctity of life underpins the common law”. The respect which arises under the rule of law means that “a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it” including investigatory steps: see §§16 and 30. The fundamental importance of investigation is reflected in the ancient jurisdiction of the coroner. The situation where, by virtue of delegated legislation, state authorities have curtailed the functions of the coroner is, *par excellence*, a situation where the common law will be at its most vigilant to secure the public interest in truth and the avoidance of a cover-up. The more so, the more serious the circumstances of the case.

3.4. The right to life has of course long been accepted in international law, and in domestic human rights law. Given the violation, its nature and scale, the subsequent failure to investigate properly and the positive steps taken to inhibit or frustrate conventional investigations which could have led to independent judicial scrutiny, the Defendants were required to advance the most cogent and compelling reasons to justify their decisions not to hold an inquiry or otherwise investigate further. The test must be one of objective justification: *R v Lord Saville of Newdigate ex parte A* [2000] 1 WLR 1855, §37; *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, §§ 18 and 19; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 § 27D and *R v Secretary of State for the Home Department ex parte McQuillan* [1995] 4 All ER 400, 421. The right to life resonates at common law, through the protection of this ‘anxious scrutiny’, even if the context is one which would engage questions of policy and resources. For a good example, see *R (Rogers) Swindon NHS Primary Care Trust* [2006] 1 WLR 2649 at §56.

**A. The official account is unsustainable and yet it has steadfastly been maintained from 1948 to today**

3.5. The starting point for a reasonable decision must be whether the official account (of lawful, unavoidable and necessary shootings) is sustainable. Yet the Defendants have steadfastly refused to engage with this question. The official position has never been retracted, and its stigmatizing implications remain unabated. The Defendants have refused to face up to the strength of the case for impugning that official account.

3.6. For example:

(a) They tasked Dr McGurk with reviewing “*all extant information*” and summarising “*the considerations [the Defendants] may wish to take into account*”<sup>319</sup>. But those reports contain no assessment of the sustainability of the official account; none was sought and no view has been undertaken.

(b) No view was taken on this issue in the Submissions to Ministers; nor in the decision-letters.

(c) The Defendants’ position involves treating the strength of the case as wholly irrelevant. On the Defendants’ approach it would matter not whether the ‘case to answer’ here is (a) weak and unlikely or (b) overwhelmingly convincing.

(d) The Defendants have been asked throughout these proceedings whether they maintain that the official account is accurate, or whether it will be withdrawn<sup>320</sup>. The response is striking. Through the Treasury Solicitor, they explain that Ministers have not been “*invited to make a decision on the existence or extent of the evidence on either side*”, there was, in the officials’ view, “*some evidence to support both theories*”, and “*[w]hether or not the Written Statement [given to Parliament in 1949] contains a reliable account of the killings is a matter which would be investigated by an inquiry had it been decided to establish one.*”<sup>321</sup>

3.7. The refusal to engage with the strength of the challenge to the official version of events is regrettable. The public interest consideration must surely be informed by features such as these: (a) the seriousness of what is alleged to have happened; (b) the cogency of those claims; (c) the nature and implications of the official position; and (d) the manner in which the claims have been dealt with and the position maintained. After all, a critical consideration for the Defendants in any decision on whether to hold an inquiry into, or otherwise investigate, an incident involving state responsibility for avoidable deaths is the extent of the public interest in proper accountability and the importance of public confidence in the state.

3.8. It is not a question of competing “*theories*” (or even Dr McGurk’s new “*reflex*” suggestion). The official account is a matter of public record. Twenty-four villagers

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<sup>319</sup> V1/E/108

<sup>320</sup> V1/E/380

<sup>321</sup> V1/E/383

were shot and killed as “bandits”, and not “civilians”.<sup>322</sup> The file was closed on this basis, and because of “information in the possession of the Security Services regarding the suspects”. On “careful consideration of the evidence”, the Attorney-General could be “satisfied that the suspects would have made good their escape had the security services not opened fire”. The villagers ignored clear warnings: after the evening shooting they had been “warned of the danger to them should they attempt to follow his example”. They ignored a sequence of three sets of shouted requests to halt: from the sentries and sergeant; from soldiers in the vicinity; and from those soldiers in pursuit. They died as bandits, and through their own folly, because unless shot dead they would have escaped (see §§ 2.38 and 2.52-2.53).

- 3.9. The Defendants’ choice to ignore the sustainability of the official account has enabled them to avoid the obvious implications of this case. Had they accepted that the official account could not be maintained, they would have been forced to confront the true nature of the public interest in truth, an acknowledgement of wrongdoing, and an acknowledgment that the truth has for far too long been covered up.

### **The official account is not sustainable**

#### *“Bandits”*

- 3.10. The killing of a large group of “bandits” was the official story. The description of the villagers as “bandits” was announced and recorded and has never been retracted. The official account referred to information held by the Security Forces, and to ammunition found at the scene. The authorities spoke of ‘tappers part time and bandits the rest of the time’<sup>323</sup>. These killings were added to the record of “bandits” killed by the military forces; and there they have stayed. There was an important contrast between “bandits” and “civilians”, especially in the case of those shot dead by the British military. It was important to the honour and memory of the victims, and remains important to this day to their families and to the organizations in Malaysia who have together joined in this quest for accountability.<sup>324</sup>

- 3.11. As the Court can see:

(a) Cheung Hung was relied on for the information he gave to the two interrogating police officers. He told each of them, in terms, that there were armed bandits from outside the village who had occasionally visited at night to take food from the village. Guards were placed around the perimeter that night. The position was of food brought by the kepola (for the villagers) was being taken by bandits and was sustaining them.

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<sup>322</sup> V2/H/1 and H/3 and H/13

<sup>323</sup> V2/H/15

<sup>324</sup> Cf. *R v Secretary of State for the Home Department ex p. Bentley* [1993] EWHC Admin 2 (CO/2912/92)

(b) Cheung Hung told each of the officers that the villagers were not bandits. The bandits were armed people who came from elsewhere. This information was communicated to the sergeants in command of the patrol. There are contemporaneous written statements which record this.

(c) The soldiers had been in pursuit of bandits. They had engaged two bandits, in uniform, who had run away. Those bandits were not among the villagers. The police were in a position to identify any suspected bandits, and scrutinized the day-workers; but there were none.

(d) The lorry was intercepted by the soldiers, but it did not contain “a large amount of food”. It was observed as containing a modest amount of food, for the villagers and in accordance with their emergency rations. On this basis, the villagers were vulnerable to the theft of their emergency rations, by armed bandits from outside.

(e) Searches in the evening uncovered no weapons or ammunition. No weapons were ever said to be uncovered. A single and small amount of ammunition – but not a large amount – was reported as ‘found’ by the sergeant the following day, under the bed of a named and weaponless individual.

(f) The suggestion of Batang Kali as a terrorist base<sup>325</sup> was without foundation and unsurprisingly refuted by the British owner of the Estate.<sup>326</sup> Save for Foster Sutton, who says he found shells at the scene (where several men had been shot dead) several days later,<sup>327</sup> there is no statement from a soldier in the patrol that personally recounts finding ammunition before or after the killings;<sup>328</sup> no weapons nor insurgents were ever shown to emanate from this particular tapper community; and the statements of the police officers and Cheung Hung himself suggest no more than that the community did not stop their emergency rations being raided by armed bandits. The soldier Harry Fuller was asked about this in the film *In Cold Blood*. Question “What would happen if they didn’t [provide the food]?” Answer from Fuller: “The terrorists would terrorise them”.

(g) There were 26 permanent workers on the Estate, as the British landowner explained, and this was the village where they lived. This was the evening, and they were at home with their families. They were unarmed. Many of them were older men. None of them fought. Those who did fight the British (the MPABA) did not hail these as brother fighters; but as rubber tappers and employees of the Estate.<sup>329</sup>

(h) When the village was wiped out and burned to the ground, the source of any food rations being taken from by bandits was removed. No bandits had been

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<sup>325</sup> See, for instance, the observation of John Wood (V2/L/190), under the heading “Evidence of Banditry”

<sup>326</sup> SD p. 52

<sup>327</sup> V1/E/187

<sup>328</sup> This includes Douglas and Hughes in their interview with *The People* (V2/L/3 and V2/J/6-7). Porter only recalled Hughes showing him shells, but did not say when (V1/E/175)

<sup>329</sup> V2/T/4 and 13-14

identified; none appeared in the night, nor with the lorry in the morning. The villagers, and their bodies, were not identified as bandits or suspected bandits.

(i) The women knew that the British had shot dead a group of men who were labourers on the plantation: husbands, sons, brothers. The British knew it too, but could hail this instead as a great success.

*“Shot Dead to Prevent an Escape Attempt”*

3.12. This was the official story. It was the justification given for the killing the evening before. It was the response given to the two police officers who had ‘seen nothing’ (because they were in a store-room, one of them eating). It was announced, confirmed and maintained. It characterized the shooting as necessary and lawful, and attributable to the villagers’ own actions in running and ignoring shouted warnings.

3.13. As the Court can see:

(a) This was a convenient explanation, and the one feared by the Chief Police Officer in Johore as capable of giving rise to a *“major scandal”* (see §2.12(d) above). Of all stories which could cover-up murder, this would be the best and easiest candidate. Especially if the non-military personnel were ‘looking the other way’, as the Malay guide Jaffar Bin Taib said that he was told to; and as the two police officers were. They did not react to the shooting, not even to seek to ascertain what it was. Nor did they evidently feel under any threat.

(b) It raises the most obvious questions of necessity and proportionality. When Loh Kit Lin was shot on the evening before, supposedly to stop him escaping, he was described as injured and crawling on the ground. The Sergeant in command admitted then shooting him in the head, to *“finish him off”*. The body was left where it lay and the villagers, themselves the subject of simulated executions – again admitted – during the night, were supposed to be *“warned”*. They would have been terrified.

(c) *“Every man was killed”*. Nobody who tried to escape was shot and wounded. The story of a man who was wounded and recaptured did not add up.<sup>330</sup> Choi Loi, the collapsed older man, was on the lorry. Cheung Hung, relied on for information and who had been kept separate from the locked kongsi, was unharmed. But 23 ‘mass-escape’ villagers were shot dead, this being necessary to prevent the escape. Nobody got away. 10 or 11 firing soldiers caught up with 23 running men, after warnings and pursuit, and hit all 23 targets before anyone could get into the cover of the Jungle. Nobody got away. Nobody was incapacitated by a shot which wounded him. Nobody shot to wound. Nobody shot in the air. All 23 of the men were shot until they were dead: ‘finished off’.

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<sup>330</sup> V2/H/1

(d) The story evolved and got perfected. Running into the guns became running away from the guns, in circumstances where it was known that the villagers had been shot in the back rather than in the front. A story involving no shouting – recorded by both police officers – became a story about repeated shouted commands, in circumstances where attention was being drawn to the legal precondition to use of lethal force under the Regulations, where they applied. They didn't, so a retrospective Regulation – premised on the same prior-warning narrative – was speedily introduced.

(e) The story makes no sense. The men ran away – all of them. They kept running, until they were shot down – all of them. They ran, all of them, in spite of a supposed warning the evening before that anyone who tried to escape would be shot dead, like Loh Kit Lin. They all ran, including the older men, like the 70 year old and those in their 50s and 60s. And they supposedly all kept running, notwithstanding a shouted command from the Sgt leader and his two sentries, notwithstanding further shouted commands from soldiers at the periphery, and notwithstanding yet further shouted commands from soldiers in pursuit. Nobody decided against it. Nobody stopped and gave themselves up.

(f) The story makes no sense, for another reason. The Attorney-General who investigated the circumstances and was “quite satisfied” said in 1970 that he realized there had been a “bona fide mistake”, and that everyone realized there had been a “bona fide mistake”. But that cannot be so, if it is the case that the villagers ran despite warnings and the shooting was necessary to prevent their escape. On that version of events, where is the “bona fide mistake”? What did the soldiers do that was in error? The official version, endorsed by the Attorney General, was that the shootings were necessary: he had been satisfied that the suspects would have escaped if the soldiers had not opened fire. If that was right, there was no bona fide mistake taking place. If there was a mistake, the official version was not right. And he knew it; everybody knew it.

(g) The story also makes no sense for this further reason. What were the soldiers doing with the male villagers, if they were not preparing to eliminate them before burning down the village? And what were they doing burning down the village, if the villagers were intended to be released? Certainly, the men were not being released so that they could go to UYB (Ulu Yam Bahru), with the women and children and day-workers. Had they been, they would have been told they could go on the lorry, with their wives and children, and would have been loaded on together. If they were to be “processed” and “interrogated” further, then that would have meant taking them to KKB (Kuala Kubu Bahru). That meant transport, and a transfer of prisoners from a locked kongsi, into a vehicle or vehicles. There is no mention anywhere of any arrangements, and there was no such action. Instead, there is this quite extraordinary suggestion: that these 23 men, who had needed to be kept locked up securely and guarded all night, are now released and brought out of the kongsi, by just two sentries. No other soldiers are visible. They are all concealed in the perimeter, supposedly to protect against marauders (who come at night). And what



is happening to this group of 23 men who are being brought out is that the Sergeant in charge of the patrol is preparing to “receive” these 23 men on the “verandah”.

(h) Finally, there is always the (inconvenient) truth. That Cheung Hung, as soon as he was asked, was describing villagers walking under escort in a group. That Jaffar Bin Taib, when a statement was eventually taken from him, was told to look the other way. That police officers saw nothing, and heard only shooting. And that soldiers, when eventually interviewed under caution in 1970, admitted that these had been executions in cold-blood. That this was murder. Why would they make that up?

3.14. Then there are these points:

(a) By the time the villagers were actually shot it was known by the police and the unit commanders that, at its highest, they were suspected of providing the communists with food, if and when they came to the jungle to ask for it and, more likely, it was simply taken from a communal store.<sup>331</sup>

(b) The previous night, the villagers had been terrorised by the soldiers and police: men, women and very young children were interrogated at gun point; mock executions were conducted; villagers were aware that a youth had been shot and regardless of whether he had tried to escape, they were told that was the reason he was killed; they were also the admitted victims of mock executions, such that they could not be expected to differentiate the motives of their captors.<sup>332</sup>

(c) After this night of terrifying treatment, where they were deliberately kept outside of institutional police station supervision, the women and children were placed on a lorry, and the men were kept back, with no evidence that the interpreters or anyone else informed them as to why they were being kept back and/or what would happen.

(d) Even if it were assumed that the terrified males ran into the jungle, the public pronouncement of 3 January 1949 suggests that there were three sets of soldiers in unseen defensive positions adjacent to three paths into the jungle, who rationally allowed the escapees to run past “the guns” (to quote the pronouncement of 3 January 1948 at §2.53) and then shoot all them fatally from behind.

3.15. To these, we can add the following further factors:

(a) These were young untrained national service conscripts were engaged in an armed conflict taking place in a jungle and were led by non-commissioned officers in circumstances where communist violence towards police and the army in that

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<sup>331</sup> Gopal V2/G/1-2

<sup>332</sup> Hughes V2/J/6, Cootes V2/K/10-11, Brownrigg V2/K/1, Remdios V2/K/37-38, Tuppen [Met Police File], and Wood V1/E/198

particular territory had brutally intensified in recent weeks.<sup>333</sup>The risk of panic firing would be known to be high.<sup>334</sup>

(b) Standing orders were at best unclear, possibly non-existent.<sup>335</sup>

(c) Lazenby, as the first soldier to meet the patrol at the base camp, confirmed that “no one appeared to know who fired the first shot and not one appeared to know who had given the command”.<sup>336</sup>

(d) Experts confirm that in the history of the Malayan Emergency, the 24 fatalities at Batang Kali were unique in quality and unusual in circumstances.<sup>337</sup>

(e) It is against that background that McGurk observed, when instructed to review materials for the Defendants in 2008 that villagers may have been killed as a result of what he called a “spontaneous reflex response”.<sup>338</sup>

### **The further evidence**

#### *6 out of 8 soldiers interviewed in 1970 support an account of murder*

3.16. In relation to the evidence obtained by the 1970 Metropolitan police investigation in 1970, the Defendants’ unwillingness to engage with the following facts is striking:

(a) In the records of the police interviews that have not been provided for inclusion in the Court’s bundles, six of the eight members of the patrol that were involved in the killings - Cootes, Tuppen, Kydd, Brownrigg, Wood and Remedios - describe what occurred in terms DCI Williams correctly identified as murder (see §§2.137-2.144 and 2.148 above). Cootes was treated as separate, but all five of the others were acknowledged to be “men of good quality... and have no axe to grind and no financial interest”,<sup>339</sup> and Tuppen and Remedios spoke candidly and openly, in the public domain, a number of times. It is very difficult to see what is said to counteract their evidence.

(b) The common theme in relation to all of the six accounts of murder was that the male villagers were escorted into the jungle in groups after the women and children were placed onto a lorry and that none of them ran away.

(c) Those admissions are categorically in conflict with the official account and in any event question begging to the most incriminating degree as to why it was that the men should be taken into the jungle at that point in time and the women and children removed from the scene.

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<sup>333</sup> See §§2.15-2.19 above, but also Fletcher V2/L/129

<sup>334</sup> Short V2/U/60 and Lazenby [Met Police File] summarised at Wood V2/L/190-191

<sup>335</sup> Fletcher V2/K/128-131 and Wood V2/K/191

<sup>336</sup> V1/E/183

<sup>337</sup> Lim Cheng Leng V2/P/20, Siver V2/U/ 12-14 and 20 and Short V2/U/63

<sup>338</sup> V1/E/135 and 137

<sup>339</sup> Wood V1/L/193

(d) Some of the witnesses, particularly Cootes, Tuppen and Kydd, accepted that they were personally involved in pre-arranged executions: at the point they made these admissions under caution there could be no question of ulterior motive, or lack of understanding of the import of what they were saying. None has ever been suggested.

(e) Of those interviewed, only Gorton and Porter suggested that the killings were a necessary act to prevent an escape (see §§2.145-2.146 above), and only Porter fully supported the official account in terms of the Chinese running past the guns before they were shot.

(f) In the BBC documentary *In Cold Blood* in 1993, extracts from 4 of the 6 accounts were enacted. Those ex-soldiers declined to appear on the programme, but they did confirm the accuracy of their stories to *Inside Story* (see §2.185 above).

### *Cheung Hung*

3.17. The description by 6 of the 8 ex-soldiers of men being *walked* into the jungle is also a description that was provided in the two statements of Cheung Hung given in 1948.<sup>340</sup> Of the ex-soldiers who gave interviews in 1970 none could have known of Cheung Hung's dormant account. They corroborated it, unseen and unknown.

3.18. Cheung Hung (known also as Chong Fong) provided an account in 1970 and 1993 that suggested that he walked with the other villagers and then hid when the shooting started, rather than remaining in the yam patch/ditch (see §§2.106 and 2.212 above). But this has been relied upon to disregard the importance of his evidence altogether. He had been interrogated, had identified a dead body (Loh Kit Lin), had cooperated and had slept separately from the other men. He had survived. His description of villagers walking under escort did not change. And by 1970 it can come to be strongly corroborated. What changed was where he placed himself in the events, and in surviving them. Moreover, the British had themselves characterized him as a person who was "recaptured".<sup>341</sup> The circumstances in 1948, when he was both a surviving witness and someone who could be described as an informant, did not prevent him making it clear that the villagers were walked into the jungle and did not run. He repeated it in a further 1948 statement. He was simply ignored.

### *Chia Kam Woh*

3.19. The Chinese police officer, Chia Kam Woh, had told a detailed story about the patrol and events at the village in 1948. He flatly denied being at Batang Kali that day at all when interviewed in 1993.<sup>342</sup> This was important. The Malaysian police recognized that Woh's denial was untruthful, judged against the overwhelming other evidence, including his own contemporaneous statement. They were rightly adamant that Chia

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<sup>340</sup> V2/G/4 and 5

<sup>341</sup> V2/H/3 and see also H/13

<sup>342</sup> V2/G/7-8, P/ 45, and Q/23-24

Kam Woh needed to be exploited as a witness (potentially by an offer of immunity) in order to obtain the truth from him.<sup>343</sup>

### *Yet Further Factors*

3.20. To these points can be added:

(a) One of the Malaysian police guides, Special Constable Inche Jaffar, told journalists on 3 February 1970, within two days of the publication of the article in *The People*, that a soldier had told him to turn his back to the shooting while he stood by the lorry and that he was warned thereafter not to say anything.<sup>344</sup> This fits with the two police officers who ‘saw nothing’, and reinforces the idea that what was about to happen was an incident in which the soldiers were taking control of something about to happen.

(b) The explanation that three jungle paths were the only places to run are undermined by the recollection of Captain Harnum Singh in 1993 that the Estate was bordered by jungle only on its eastern side.<sup>345</sup>

(c) Foo Moi, who is the one survivor who said she could see from the lorry, gave evidence that the men were led in groups to be shot.<sup>346</sup> Remedios, to *The People*, had confirmed that the lorry was still close by when the shooting began, with the women and children then screaming. Surviving children recalled hearing the shooting before the lorry began to move<sup>347</sup>. Cheung Hung had described the lorry as moving, then stopping.

(d) Finally, even those who contest that they were involved in a murder have referred to the shooting of wounded villagers on the first night and the second day, in order to “finish them off”.<sup>348</sup> That is not a description of necessary, and proportionate lethal force. Quite the contrary.

### *The official account continues to be maintained*

3.21. The above evidence, taken all together, serves cogently and convincingly to undermine a starting position that these killings could be presented as unavoidable and necessary. However, the official account continues to be maintained. It was expressed by the responsible minister before Parliament,<sup>349</sup> repeated over time,<sup>350</sup> and the Defendants have steadfastly refused to retract it at any stage.<sup>351</sup>

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<sup>343</sup> V2/Q /19 and 64

<sup>344</sup> Miraflor and Ward, pp 105-106

<sup>345</sup> V2/P/15

<sup>346</sup> V2/P/34

<sup>347</sup> E.g. Chong Koon Ying V2/P/42

<sup>348</sup> Hughes on the first V/2/J/6-8 and L/191; and Don Houlston’s account of what he was told by Keith Wood as regards the second day [Met File]

<sup>349</sup> V2/H/35

3.22. The Claimants submit that the sustainability of the entire factual basis for the State's original justification for the killings, maintained literally over several decades despite the accumulation of evidence to the contrary, is obviously relevant. The failure to recognize it fatally undermines the Defendants' decision and decision-making approach.

**B. Even the official account would involve action contrary to law, which illegality has never been acknowledged**

3.23. The official account that it was necessary to shoot 24 people (suspected of providing food to communists) in order to prevent their escape is plainly inconsistent with prevailing common law and international law standards at the time. It has no legitimate legal basis.

### **Common law and Military law in 1948**

#### *Common law*

3.24. The common law position that the use of more force than reasonable to effect an arrest or defend another amounts to unlawful violence (and is to be indicted as murder and not manslaughter) dates back at least to the 19<sup>th</sup> century and the *Royal Commission on Indictable Offences* 1879 (see generally *R v Clegg* [1995] 1 AC 482, 493). The opinion of the Law Officers to the same effect was given by the Attorney General, Sir Rufus Isaacs QC in 1911 that was Annexed to the 1943 reprint of the *Manual of Military Law* (1939), pp 268-269. This was the extant version in 1948. The 1911 guidance of Sir Rufus would continue to appear in edition of the *Manual* after 1948.<sup>352</sup> On this issue, superior orders would be irrelevant to legality – the common law knowing no such defence (*Clegg*, p. 498B-C citing authority dating back to 1816).

#### *Military law*

3.25. By military law, and at that time s. 41 of the *Army Act 1881*, the common law position travelled with the soldier wherever he was in world. This specific limitation on the use of force was nevertheless expressly particularised in binding protocols applicable upon HM Armed Services in overseas operations, for which see: *Notes on Imperial Policing 1934*, Section 12, paragraphs 2 and Section 15 paragraph 4; and *Duties in Aid of the Civil Power 1937*, p 77. A requirement to use minimal/reasonable force was also contained in the 1940 King's Regulations.

### **Customary international law**

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<sup>350</sup> e.g. V2/L/1, V2/L336, V1/E/4 and V2/T/13-14

<sup>351</sup> V1/E/375, 380, 383

<sup>352</sup> See its citation by the Saville Inquiry Report Vol. IX ch. 194 as applying to the Bloody Sunday Shootings in 1972

- 3.26. The position under the common law was in accordance with customary international law, as of 1948.
- 3.27. In the conduct of armed conflict limitations upon the use of violence against persons *hors de combat* dated back to Lieber Code of 1863 that applied to the forces of the Northern States in the American Civil War, the Brussels Declaration of 1874 and the Oxford Manual of 1880. The principal reference for these limitations evolving into customary international law status lie in the IV Hague Convention and Regulations of 1907, especially Articles 4 and 23 of the Annexed regulations. The so-called Martens Clause within the Preamble to the actual convention added that in cases not covered by the Regulations “inhabitants and the belligerents remained under the protection of the law of nations, as they result from the usages established amongst civilized peoples, from the laws of humanity, and the dictates of the public conscience”.
- 3.28. The above sources of law culminated into customary international law by 1945. The Charter of the International Military Tribunal at Nuremberg (the London Charter) provided a non-exhaustive list of war crimes, including “murder... of the civilian population” (Article 6(b)). The judgment of the Nuremberg Tribunal held that the humanitarian rules in the Hague Convention and Regulations 1907 were “recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war” by 1939 and that violations of those provisions constituted crimes for which individuals were punishable.<sup>353</sup>
- 3.29. The above authority relates to the conduct of international armed conflict. For reasons dealt with in Part 2 (at §2.14 above), the insurgency in Malaya can undoubtedly be classed under humanitarian law as an “armed conflict of a non-international character”. Common Article 3 of the Geneva Conventions that were signed by the United Kingdom on 8 December 1949, directly applied to such conflicts and prohibits “*violence to life and person, in particular murder of all kinds*” against “*persons taking no active part in the hostilities*”. The date of the Treaty, arising after the Batang Kali killings, bears no import because the terms of Article 3 accord with the above Martens Clause. They reflect “*elementary considerations of humanity, even more exacting in peace than in war*” which the ICJ recognised in the *Corfu Channel Case* [1949] ICJ Reports, 4, at 22 are among the “*general principles of law recognized by civilized nations*” referred to in Article 38(1) of the 1945 Statute of the International Court of Justice<sup>354</sup>. They accord with Article 3 of the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly on 10 December 1948.

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<sup>353</sup> For the authoritative statements of the status of the provisions protecting civilian life in armed conflict prior to 1939, *Germany v Italy*, Judgment of the ICJ, 3 February 2012, § 52 (regarding the treatment of POWs in 1944 and 1945); and *Kononov v Latvia*, App No. 36376/04, Judgment of 17 May 2010, §§ 206-217 (regarding the shooting of villagers by Russian troops in Latvia in 1944)

<sup>354</sup> United Nations, *Statute of the International Court of Justice*, 18 April 1946.

- 3.30. It follows that the Defendants are wrong to submit that the “*obvious difficulty*” with the Claimants’ reliance of the law of armed conflict as expressed by the London Charter, “*is that the events at Batang Kali did not occur during a war, as contemplated by the Charter*” (Detailed Grounds of Resistance, [20]).

### Local Emergency Regulations

- 3.31. The above common law and customary international law position was unaffected by any of the existing Emergency Regulations as of December 1948, which provided only for a limited right to use lethal force where a person entered ‘protected places’ or ‘special areas’ and, within them, refuses to stop when challenged.<sup>355</sup>
- 3.32. Regulation 27A was promulgated on 20 January 1949, six weeks after the killings. Four features of the provisions are relevant to this case:
- (a) The breadth of the provision extended to permit the use of lethal force after a warning against persons suspected of merely “consorting” with a person who possesses firearms etc in circumstances that raise a reasonable presumption that “*he intends to or is about to act with, or has recently acted with, such other person in a manner prejudicial to public safety or the maintenance of public order*” (see the reference to Reg. 5 in Reg. 27A (1)(a)).
  - (b) The permission to use force continued to be qualified by a requirement to demonstrate that “*in the circumstances of the case... it was reasonably necessary*” (ibid).
  - (c) The express permission to use a lethal weapon was predicated upon the condition that an officer called out “*in a loud voice, to stop and the person so called upon shall be given a reasonable chance to stop and submit to arrest*” (Reg. 27A (2)).
  - (d) Assuming the various conditions above were met, then any act done before the Regulation came into force would be deemed to be lawfully done, *as if*, it was in force (Reg. 27A(6)). The words used are: “*Any act or thing done before the coming into force of this Regulation which would have been lawfully done if this Regulation had been in force, shall be deemed to have been lawfully done under this Regulation*”.
- 3.33. The fact of enacting Regulation 27A some six weeks after the Batang Kali massacre is of itself a piece of evidence of how the local British authorities sought to immunise the killings from legal challenge, knowing them to be susceptible to such at the time. However, as identified to the Defendants in the Letter before Claim,<sup>356</sup> it is highly doubtful that Regulation 27A was capable of achieving that purpose.

#### *The Regulation could not apply to the facts of this case*

- 3.34. As the Court has seen, there are very strong reasons undermining any suggestion that “in the circumstances of the case” the use of lethal force “was reasonably

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<sup>355</sup> See Emergency Regulation 10 and 10A

<sup>356</sup> V1/E/313-314

necessary” as required by Reg. 27A(2). At its highest these were inhabitants of a village that the communists were suspected to come to get food from, who had been seriously abused by the Scots Guards over night. In addition lethal force could never be necessary to effect an arrest of someone who fell to the ground wounded (Hughes, Houlston). Moreover, only two of the soldiers interviewed by the police in 1970 (Gorton and Porter) could recall an order to halt as required by Reg. 27A.

*The Regulation was unlawful either on grounds of ultra vires or irrationality*

- 3.35. For the following reasons, it is not to be supposed that the Regulation was itself lawful. The power to enact regulations was granted to the High Commissioner by s. 4 (1) of the Emergency Regulation Ordinance, but limited to matters “which he considered desirable in the public interest”. His use of that power in this context involved an attempt to justify the use of lethal force against persons outside of a curfew or a protected area, merely because they were suspected of consorting with terrorists. That, of itself, was highly questionable. Certainly so, if “consorting... in a manner prejudicial to public safety or the maintenance of public order” included the communists coming from the jungle to obtain food.
- 3.36. However, in this context the Regulation also applied retroactively. Section 5(1) of the Ordinance contained general words enabling a regulation to “take effect from any date stated in the regulation... whether that date be prior or subsequent to the date of the regulation”. The section did not expressly enable a regulation to deem the substantive law prior to the regulation to be *as if* the regulation was passed. That is the effect of the words of Reg. 27A(6). They do not specify a “date”, even though the concept of a “date” is used twice in the section. Given the fundamental issue at stake, namely the use of lethal force upon persons who were entitled to have notice of the law at the time, especially if its changing would endanger their lives, cannot be assumed to have been intended by the Malayan Legislative Council: see *R v SSHD ex p Simms* [2000] 2 AC 115 at 131-132, albeit said to express a principle of statutory interpretation can be traced back “at least” to *Stradling v Morgan* (1560) 1 Pl 199.<sup>357</sup>
- 3.37. As secondary legislation these regulations were open to legal challenge at the time; and ought not to be given legal recognition by this court in the present proceedings.<sup>358</sup> Under the common law the legislation should have been quashed on the grounds that the combination of extending to “consorters” in the broadest of circumstances coupled with the unlawful retroactive effect, was both *ultra vires* of the general terms of ss. 4 and 5 of the Ordinance (for which see *ex p Simms*, ante) and/or irrational because contrary to “accepted moral standards” (for which see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 G-H; or as Lord Mansfield put it in *Campbell v Hall* (1774) 1 Cowp. 204, 209, “contrary to fundamental

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<sup>357</sup> That is the way in which Lord Hoffmann describes it in *R (Morgan Grenfell & Co) v Special Commissioner of Income Tax and Anor* [2003] 1 AC 563, [8].

<sup>358</sup> For the capacity of public law to engage with historic injustice, see *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] 1 QB 1067, DC



*principles*". In such a challenge it would have been open to the Court to investigate whether the High Commissioner had abused his regulation making power under s. 4 with the specific intention to immunise unlawful conduct at Batang Kali which he had grounds to believe had taken place.

- 3.38. Secondly, under s. 2 of the Colonial Laws Validity Act 1865 the courts were empowered to declare Regulation 27A void and inoperative: It provides:

*"Any colonial law<sup>359</sup> which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."*

- 3.39. Any provision that had the purported effect of retrospectively legitimising 24 killings by British troops deployed in Malaya in aid of the civil authorities would be repugnant to section 9 of the Offences against the Persons Act 1861 (prohibiting murder or manslaughter by British subjects anywhere in the world).

### **Failure to properly consider the issue by the previous investigations**

- 3.40. The very striking feature of the materials that have now been accumulated is how little thought was applied to the legal basis for the shooting at each stage in which the incident was considered, including by the Defendants in their decision making process.

(a) Over the Christmas and New Year of 1948/1949, Sir Alec Newbould and Sir Henry Gurney robustly lobbied the Colonial Office that military conduct against the terrorist threat ought not to be constrained by the rule of law.<sup>360</sup>

(b) Regulation 27A then passed into force without any comment, with no materials apparently surviving as to how it came to be enacted.

(c) By the time matters were considered in 1970, Lt Colonel Fletcher stated that standing orders were "few if any" but he could be "absolutely confident" that they did not include any reference to shooting civilians.<sup>361</sup> He was forced to qualify the point in a subsequent note referring to a colleague who recalled their being a standing order allowing the shooting of any individual who ran when asked to halt,<sup>362</sup> but this was never investigated.

(d) Sir Stafford Foster Sutton, an ex Attorney General (and indeed ex Chief Justice of the Federation of Malaya) was well placed in 1970 to comment on

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<sup>359</sup> By section 1 of the 1865 Act the term "colony" shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a legislature". Hence Reg 27A would seem to qualify as a colonial law (despite the Federation of Malaya having the status of a protectorate etc).

<sup>360</sup> V2/H/15 and V2/U/29-30

<sup>361</sup> V2/K/130

<sup>362</sup> V2/L/ 167

applicable standing orders, policing doctrine and Regulation 27A (a provision which as Attorney he must have been directly involved in advising upon), but he did not do so; and neither was he asked during the course of the police investigation. This was notwithstanding his revised characterisation of the killings as “*a bona fide mistake*”.

(e) The matter was touched upon slightly more by Richard Suckling, Head of PL (LS) Legal, in his briefing to Ministers in September 1992 right after the airing of *In Cold Blood*. Conscious then of soldiers who might be charged with shooting persons who fled arrest in Northern Ireland, he referred to emergency regulations “*apparently... in force in Malaya at the time under which soldiers were expected to shoot anyone attempting to run away to avoid questioning*”. It is apparent that he did not review the actual Emergency Regulations, but suggested, “*In today’s circumstances such a rule might not be considered appropriate, notwithstanding the atrocities committed by the other side*”.<sup>363</sup>

(f) Counsel who reviewed the case for the Defendants in 2008 suggested that the killings may have been based on a “spontaneous reflex response”, but failed to reflect upon the consequence of that analysis under the criminal law, and assessed the matter under the assumption that “*the legal basis of the ‘oral standing order’ to shoot if the person does not stop is unclear*”.<sup>364</sup> As the Claimants’ solicitors were to put it in the Letter before Claim, the omission of Counsel instructed by the Defendants to consider the correct legal position under the Emergency is “an inexcusable as it is unclear”.<sup>365</sup>

### **Failure of the Defendants to properly consider the issue**

3.41. During the course of exchanging letters before claim, the Defendants were asked to accept the premise that “*(whatever the factual circumstances may have been) there was no legal basis for the killings at Batang Kali, either at the time or subsequently*”<sup>366</sup> but refused to do so. In their Detailed Grounds of Resistance, they accuse the Claimants of effectively mounting a time barred civil claim (at paragraph 10(1)(a)). However, a decision on whether to order an inquiry into a wrongful death cannot reasonably exclude consideration of whether it was caused by conduct arguably contrary to law. The issue is again one of overriding importance; but the Defendants purposely excluded the issue from their consideration, in so far as they engaged with it at all.

3.42. The Defendants have erred in confusing the division of roles between the Minister who decides whether to order an inquiry; and the person who thereafter conducts it. While the fact finder at the inquiry will normally not determine matters of criminal or civil liability, the decision as to whether to hold the inquiry must obviously take

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<sup>363</sup> V2/R/28

<sup>364</sup> V1/E/135 and 137

<sup>365</sup> V1/E/311

<sup>366</sup> V1/E/306

these matters into account. Likewise, the inquiry can make factual conclusions from which criminal or civil liability can be inferred, without amounting to a de facto civil proceeding (for which see the structure of s. 2 of the Inquiries Act 2005, but also the common law as expressed in *R(Jordan) v Lord Chancellor* [2007] 2 AC 226, § 39). In any event, many decisions of this kind will be made where criminal and civil liability are no longer relevant and/or applicable for whatever reason (for example, the Baha Mousa Inquiry and the Saville Inquiry). It is such lacunae in the maintenance of the rule of law that the concept of public inquiry or investigation serves to fill.

- 3.43. The Ministerial submissions,<sup>367</sup> the decision letter<sup>368</sup> and the detailed grounds of defence,<sup>369</sup> do not confront this issue at all. Rather they erroneously brush it aside by maintaining that that law (domestic and international) has moved on since 1948, which therefore diminishes the extent to which the conclusions of an inquiry might serve contemporary operations. There is, in fact, no difference between the law in 1948 and the law today on this discrete question of whether the resort to lethal force in these circumstances can be justified in law.

**C. The 1948 ‘investigations’ and public announcements served to cover up an incident which was known to be deeply troubling**

- 3.44. Neither the Defendants, nor those who previously investigated the incident, have properly explored the shortcomings of what happened in the aftermath of the massacre.
- 3.45. Evidence that would suggest that the incident was known at the time to be deeply troubling includes the following:
- (a) First, the original briefing to the media (commended to the journalist who reported it as “extremely accurate”) and as reflected in the press coverage of the ‘success’ on 13 December concerned 25 dead, “a large quantity of ammunition” being found, and the “the running men just ran into their guns”. These matters would soon have been regarded as demonstrably unsubstantiated. Any one investigating the issue ought to have discovered that there was no large quantity of ammunition, that 24 were dead, and that the injuries on the bodies were to the back of corpses and not to their front.
- (b) Second, in the following days two statements were taken from the survivor Cheung Hung (referred to in the Sitrep as part of the mass escape but “recaptured”) that confirmed that the male villagers were walked to the jungle and did not run.
- (c) Third, it must have been known that untoward conduct had taken place on the first night. Suspects had been kept in the kongsis for interrogation, rather than being brought to the police station (*Cf.* Reg. 24(3)). One man had been killed. The

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<sup>367</sup> V1/B/2-3

<sup>368</sup> V1/B/25-26

<sup>369</sup> At § 10(3)

mock-executions contravened a basic requirement of humane treatment.<sup>370</sup> Aside from the illegality of the conduct, it would have caused Chinese villagers – vulnerable in this informal custodial situation – to genuinely fear for their lives. There was a recent High Court precedent in the judgment of Laville J that made that very point (see §2.69 above). The whole first night is excised from the public proclamation of 3 January 1949 because it makes a nonsense of any justification that it was lawful to use lethal force to stop these people from trying to flee (if indeed that were the case).

3.46. It is to be recalled that the pronouncements in Malaya and in Parliament referred to the Attorney General giving the matter “careful consideration” and to an investigation taking place. In 1970, Sir Stafford would accept that it was not an investigation as such, but its gross shortcoming undoubtedly included:

- (a) Ignoring the two statements of Cheung Hung altogether;
- (b) Electing not to speak to any other surviving villagers, because he did not regard them as reliable;<sup>371</sup>
- (c) Electing not to take account of the statements of the Malaysian police witnesses, including the police guides, notwithstanding that he said that he spoke with these witnesses at the time.

3.47. The political motivation to cover the matter up was considerable:

- (a) Aside from media attention, both the Chinese Consul General<sup>372</sup> and the owner of the plantation (who was chairman of the local association)<sup>373</sup> intervened in the case.
- (b) The Colonial Office was obliged to seek lines to take in London.<sup>374</sup>
- (c) Senior High Commission personnel and the General Officer commanding were making statements to both the public and the Colonial Office, with regard the exceptional requirements of the emergency situation<sup>375</sup>
- (d) The event occurred at a critical moment in the insurgency, when the massive increase in the deployment of British armed services had not translated into tangible gain.

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<sup>370</sup> See, for example, Annex to the Hague Convention, Art. 4 (requiring prisoners of war to be “humanely treated” and Art. 44. (forbidding a belligerent “to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent or about its means of defence”). Common Article 3 of the Geneva Conventions would additionally prohibit “cruel treatment” and “outrages upon personal dignity, in particular humiliating and degrading treatment”)

<sup>371</sup> V1/E/187

<sup>372</sup> SD, p. 51

<sup>373</sup> SD, p. 52

<sup>374</sup> V2/H/19

<sup>375</sup> V2/H/15 and V2/U/29

**D. The 1970 and 1993 investigations were aborted in circumstances indicative of political interference**

- 3.48. The device adopted by the Ministerial Submissions is not to assume that previous investigations were sufficient, but to eschew descending to the detail of why that was so.<sup>376</sup> That is not good enough. With the benefit of full disclosure, it can be established that plausible fresh evidence came to light in 1970 and 1993 but that the procedural steps taken to investigate the evidence on both occasions were not only inadequate in their own right, but were actively frustrated for political reasons. On both occasions this led to the reaffirmation of the official account which of itself further exacerbated the position of the relatives of the victims and the failure to investigate Batang Kali in the first place.
- 3.49. The evidence on this issue is dealt with in detail in Part 2 above (especially Section C, §§2.150-2.178, Section E, §§2.194-2.206 and Section F, §§2.226-2.246). The salient feature of that evidence is as follows.

**The termination of the 1970 investigation**

- 3.50. In the wake of the termination of the investigation on 29 June 1970, the investigating police officer, Detective Chief Superintendent Frank Williams, expressly documented his observation about the political aspect of the case and the extent to which the change of Government coincided with the termination of the investigation.<sup>377</sup> Detective Inspector Ron Dowling would express similar views on camera in the BBC film in 1992.
- 3.51. The significant matters suggesting that the termination of the criminal investigation was indeed the result of improper, politically motivated interventions, are as follows:
- (a) In March 1970 and early June 1970,<sup>378</sup> John Wood, the DPP's lawyer accepted that inquiries should go ahead in Malaysia, supporting the position the police took in deciding what was necessary.
- (b) However, the final decision letter of the DPP dated 29 June 1970 expressed the view, after consulting with the new Attorney General, Sir Peter Rawlinson QC after the General Election, that the investigation should not continue due to: (1) insufficiency of evidence "so far obtained"; and (2) the prospect of obtaining sufficient evidence by the police investigating in Malaysia was "so remote that this would not be warranted".<sup>379</sup>
- (c) The submissions made above would suggest that the first of these conclusions was not correct; especially if the admissions of six out the eight soldiers

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<sup>376</sup> V1/B/2-3 and B/30-32

<sup>377</sup> V2/M/1 and 16-17

<sup>378</sup> V2/L/163-164 and 195

<sup>379</sup> V2/L/210-21

were properly analysed in accordance with long standing common law principles on the use of reasonable force.

(d) The second of these conclusions flew in the face of what the reviewing lawyer and the police had advised was appropriate and necessary.

(e) Besides the further enquiries that were planned in Malaysia, DCI Williams had also planned to interview the “central figures” identified for the purposes of in his investigation here in the UK, Hughes and Douglas. Regardless of the quality and availability of evidence in Malaysia, their evidence was known to be available (they had been traced) and yet it was not gathered before the termination decision was made. It is quite impossible to say that their testimony, given under caution, could not in any circumstances have led to a viable prosecution. The DPP’s recorded reasons for the decision do not engage with this in any way.

(f) Worse still the termination appeared to be the product of, or at least decisively influenced by, the FCO’s representations about the ill-advised nature of any trip to Malaysia; and the extent to which the credibility of local witnesses could not be relied upon.<sup>380</sup> None of those matters were disclosed in the reasons given by the DPP. Neither did the DPP suggest that the investigation had to be terminated for public interest reasons in order to protect the bilateral relationship.

(g) Although the letter states that the decision was made by the DPP, the report of the senior investigating police officer states that he was informed on 29 June that it was the Attorney General that had stopped the case; and not the DPP.<sup>381</sup>

(h) In Parliament, the Attorney suggested otherwise, but he allowed the House to take view that the matter had fully and comprehensively been investigated.<sup>382</sup>

3.52. Thereafter, notwithstanding that the MOD’s fleeting contemplation of a separate Board of Inquiry or investigation at the culmination of a criminal investigation,<sup>383</sup> no further decision on how to respond to the allegations was made until 1993. A further inquiry at this stage appears to have been deemed ill-advised because at best it would represent an opinion on the part of the Board, but would unjustifiably stimulate/resuscitate press and public interest.<sup>384</sup>

### **The treatment of the petition and the Malaysian investigation in 1993-1996**

3.53. The airing of *In Cold Blood* in 1992 set in train the submission of the first Petition to the Queen and the initiation of the Malaysian investigation. Both the film and the Malaysian investigation were to produce significant fresh evidence. Prior to the

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<sup>380</sup> V2/L/185, but see also V2/L/178-179, 180-181

<sup>381</sup> V2/M/17

<sup>382</sup> V/L/226

<sup>383</sup> V2/L/116-117 and 52-53

<sup>384</sup> V2/L/214 and 219

airing of the film the first and second defendant, as well as the CPS War Crimes Unit, revived their involvement in this case.

- 3.54. On behalf of the CPS, Jim England reviewed the previous decision not to prosecute in the light of *In Cold Blood*. In doing so it appears that he, or someone with the initials J.E took the view, that the whole thing was “fishy”, but proceeded on the assumption that “we should leave things as they stand (“reluctantly” but also observing it was “hardly in our interests” to take action).<sup>385</sup> In any event, in the Note prepared for the War Crimes Unit, Mr England exposed some, if not all, of the faults in the reasoning of the DPP’s decision in 1970. He also made it clear that he was not concluding that the Malaysian witness accounts were unreliable, but emphasised “that they were never given an official opportunity to tell their side of the story due to fear of what they would say”.<sup>386</sup>
- 3.55. The review by the CPS coincided with the advent of the petition and the Malaysian police investigation. A different version of Mr England’s draft was forwarded to Ministers (apparently excluding reference to the conclusions of either Wood or England), but noting the relevance of the 1970 police investigation to both the petition and the Malaysian police investigation.<sup>387</sup>
- 3.56. The evidence about the role taken by FCO officials in the UK and the High Commission thereafter is clear and compelling. They sought to stall any response to the petition, while simultaneously procrastinating with regard to providing mutual assistance directly and through Interpol to the Malaysian investigation.<sup>388</sup> The motive on both counts was expressly political (mostly trade restrictions and Bosnia). However, there was an undeniable determination not to hand over the evidence from the British investigations. This conduct is likely to have at least some material bearing on the grinding of the Malaysian investigation to a halt, notwithstanding the clear intention of the police to travel to the UK in May 2005. It was in June 2005, that that the FCO asked whether the Counsellor (Political) might not be able to “steer” the police away from their intended course. The extraordinary outcome of this conduct is that neither the petition nor the Interpol requests were ever formally responded to.

### **Relevance of the detail**

- 3.57. On orthodox public law principles the detail of why the 1970 and 1993-1996 investigations were inadequate commands the utmost consideration. However, on advice Ministers excluded the detail of why the inquiries might be insufficient from their consideration; not only in making the first decision in November 2010, but also the second decision in November 2011 that was deemed to relate specifically to whether there should be an inquiry into the deficiencies of the subsequent

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<sup>385</sup> V2/R/39

<sup>386</sup> V2/R/45

<sup>387</sup> V2/R/93

<sup>388</sup> V2/R/109, V2/R/107, V2/R/113-114, V2/S/4-6 and V2/R/162-163

investigations. It is impossible to answer rationally that question without considering the detail. For the reasons developed in Part 4, these discrete matters outlined above are also highly pertinent to whether there is now a duty to conduct an investigation under customary international law. That is because of recognised principle that an undue failure to adequately investigate plausible fresh evidence may create a separate and autonomous duty for states to investigate historical wrongdoing. Again the detail of the failure is of critical importance.

**E. Requirement for independent and thorough scrutiny**

- 3.58. Taking all of the above matters together, the Defendants ought to have come to the conclusion that there has been no independent recognition, appraisal, evaluation or determination as to the truth; and indeed no independent consideration at all of the eye-witness accounts of events given by the survivors. There has been no apology and no reparation or even consideration of reparation (or none which starts from the right place).
- 3.59. It is for that reasons that the requirement for independent and through scrutiny by a judge or senior lawyer becomes so compelling. All hitherto consideration of the question of compensation has also been insufficient because it has been on erroneous and/or incomplete analysis of the facts (see, for example, *Lofti Raissi v SSHD* [2008] EWCA Civ 72).

**F. A continuing wrong**

- 3.60. Moreover, this is an ongoing wrong. There are three factors that connect the current response of the Defendants to the original event in 1948.
- (a) First, there have been procedural steps in relation to the Petitions in 1993 and 2008. In the latter case the Defendants committed themselves to reviewing all available evidence and reaching fully reasoned decisions on the appropriateness of an inquiry, any other further investigation and reparations.
- (b) Second, there has been, right up to the present, a failure properly to take account of fresh evidence (emerging in 1970 and 1993) and the failure to analyse properly the degree to which the relevant documentation has now been accumulated for the first time.
- (c) Third, there has been repeated and continuing affirmation of the official account.

**G. Problems, purposes and benefits**

- 3.61. Judged against the above requirement in a context such as this to justify a denial of the remedy sought, the benefits and problems associated with the holding of an inquiry ought to have been anxiously and rigorously scrutinised. Instead the



approach has been formulaic: with the problems overstated, the purposes of the inquiry oversimplified and the resulting benefits undervalued.

### **Purported problems with the evidence**

3.62. There are a number of things the Defendants wrongly characterise as problems<sup>389</sup> which are not:

(a) They fixate upon what they describe as a factual dispute, having failed to engage with the reality that the official account is unsustainable;

(b) They assume that the age of the witnesses will be insurmountable, notwithstanding that criminal trials in relation to this era are not regarded as *prima facie* unfair: (*R v Sawoniuk* [2000] Cr App R 220 and *Sawoniuk v United Kingdom*, App. No 63716/03, 29 May 2001).

(c) They overlook the degree to which the materials have now been comprehensively collected and organised for the first time in 64 years, enabling witnesses to recall issues and conclusions to be drawn on the papers;

(d) They also ignore the discrete ways in which an effective investigation could now improve upon the current evidence and understanding of the event: e.g. standard of proof different from legal proceedings; rules of evidence do not apply; findings of fact could be made as to unreasonableness of the use of force, without amounting to determinations of liability (*R(Jordan) v Lord Chancellor* [2007] 2 AC 226, [39]); there are several living witnesses who could testify in an open and transparent setting;<sup>390</sup> immunity can be offered to witnesses; and as previously raised by the British police,<sup>391</sup> and the Malaysian police,<sup>392</sup> the Malaysian authorities could be approached to authorise disinterment (a discrete act that expert advice indicates would produce tangible results irrespective of any other uncertainties).<sup>393</sup>

### **Costs**

3.63. Costs are overstated in a number of ways:

(a) First, a cost-benefit analysis is only as meaningful as the data on which it is based; and in particular the starting point from which it begins. Money is more obviously in need of spending, if the starting point for a costs-benefit analysis is that something went terribly wrong at Batang Kali which cannot be legally justified, but has been denied an adequate investigation ever since. Here, the starting point was that there was two competing "*theories*", with some evidence to support both. That approach doubted whether the expense would reap tangible benefit and overlooked

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<sup>389</sup> See the relevant part of the decision letter at V1/B/26-67

<sup>390</sup> V1/A/31-32

<sup>391</sup> V2/L/174

<sup>392</sup> V2/Q/64

<sup>393</sup> V2/L/174 and V2/Q/64

the grave injustice that needs to be corrected. When looked at correctly, costs should not be prohibitive.

(b) Secondly, a spectre of “*significant running costs*”<sup>394</sup> is raised (“*almost certainly... several millions of pounds*” according to the submission to Ministers), and suggesting that the case would be document heavy. They overlook that the Defendants’ own lawyers, the Claimants, their solicitors and civil society groups in Malaysia have already undertaken a massive amount of work to gather the documents needed to establish the factual record.

(c) Thirdly, having suggested that consideration was given to initiate a non-statutory inquiry, they exclude it on the same costs grounds<sup>395</sup> without any reference to the range of models that might be drawn upon to put reasonable constraints on costs.

### **Alternative models of investigation**

3.64. In consequence of these errors, the Defendants have failed properly to apply their minds to a range of cheaper and more flexible expeditious models of investigation that are presently available and well-established. As to less formal types of independent investigation, examples include the now routine inquest procedures carried out in the wake of the House of Lords judgment in *R (Middleton) v HM Coroner for West Somerset* [2004] 2 AC 182; and the near-death inquiries that have been carried as a result of the judgment in *R (L) v Secretary of State for Justice* [2009] 1 AC 588. A more streamlined model for an inquiry was also exemplified by The Deepcut Review: a review of the circumstances surrounding the deaths of four soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002, HC 795, 26 March 2006.

### **Purpose of the inquiry**

3.65. The Defendants conceptualised any inquiry they might order (and by implication any other investigation) in terms of determining which of the competing “theories” was correct. This was an impermissibly narrow starting point. No comparable inquiry or investigation has been set up with such narrow terms of reference. The views of past inquiry chairs, endorsed by Parliamentarians, and the Court, are that inquiries serve multiple, overlapping purposes based on the power to find facts and make recommendations as they see fit within their terms of reference.

3.66. The evidence of this is contained in the Select Committee Report, *Government by Inquiry*:<sup>396</sup>

*“What are inquiries for?”*

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<sup>394</sup> V/2/26

<sup>395</sup> V2/B/28-29

<sup>396</sup> House of Commons Public Administration Select Committee, indicates First Report of Session 2004-05 Volume 1, HC 51-1

10. There can be little doubt that inquiries matter greatly to the public, especially those directly affected by the events under investigation. The fact that people are prepared to resort to legal action in relation to inquiries, successfully such as over the Shipman Inquiry or the Mubarek Inquiry, or unsuccessfully as over Foot and Mouth Disease (FMD), is testament to this. For the Government "the primary purpose of an inquiry is to prevent recurrence". It is also their view that, "the main aim is to learn lessons, not apportion blame". They believe that inquiries have "helped to restore public confidence through a thorough investigation of the facts and timely and effective recommendations to prevent recurrence of the matters causing concern. Many inquiries have helped to bring about valuable and welcomed improvements in public services". Lord Laming, who carried out the Victoria Climbié Inquiry, told us that inquiries: "[... ] provide an assurance that the facts surrounding an alleged failure will be subjected to objective scrutiny. They are expected to reach judgements on why terrible events happened. They often make recommendations on how such events might be prevented in future. They may give relief to some and allow the expression of anger and outrage to others. They are often disturbing and painful events. They should improve our understanding of complex issues. At best they change attitudes, policies and practice. That being so they occupy an important place in our society".

11. For ministers it is more cynically alleged that inquiries may involve kicking an issue into the long grass, blaming predecessors in government, making a gesture, or simply buckling to public pressure to do something. Sir Ian Kennedy QC told the Committee that "it has to be borne in mind that there is a somewhat perverse motive sometimes in setting up a public inquiry". As Lord Heseltine put it to us "... No Government wants inquiries; they are usually in circumstances where the government is in trouble [...] They are not popular things for governments"

12. Sir Ian Kennedy identified six functions for an inquiry: the recognition and identification of different, genuine perceptions of the truth; learning; healing; catharsis; prescribing; and accountability. Lord Howe, who gave evidence to us from his experience of different roles in several public inquiries, identified six similar functions which have been summarised as follows:

Establishing the facts—providing a full and fair account of what happened, especially in circumstances where the facts are disputed, or the course and causation of events is not clear;

Learning from events—and so helping to prevent their recurrence by synthesising or distilling lessons which can be used to change practice;

Catharsis or therapeutic exposure—providing an opportunity for reconciliation and resolution, by bringing protagonists face to face with each other's perspectives and problems;

Reassurance—rebuilding public confidence after a major failure by showing that the government is making sure it is fully investigated and dealt with;

Accountability, blame, and retribution—holding people and organisations to account, and sometimes indirectly contributing to the assignation of blame and to mechanisms for retribution;

Political considerations—serving a wider political agenda for government either in demonstrating that "something is being done" or in providing leverage for change"

## **Material lessons to be learned from Batang Kali**

- 3.67. The dominant reason as to why the Defendants are not interested is that they do not regard the lessons to be learned by this inquiry as relevant to materially avoiding repetition of such an event in modern military operations.<sup>397</sup>
- 3.68. First, the Defendants submit that the legal backdrop is different in terms of criminal law, services law and international law because, “*at least in some places, it was lawful to use lethal force to kill escaping prisoners*”. For reasons developed above, there may have been statutory justification for such acts in “*some places*”;<sup>398</sup> however, it is wrong to submit that such conduct was lawful under customary international law in 1948; and it was not lawful under the applicable law of United Kingdom.
- 3.69. Second, the Defendants submit that training and command structures have moved on considerably since 1948 and place particular reliance upon the fact that “*practices regarding training and the treatment of prisoners generally were primary concerns of the Baha Mousa Inquiry and were addressed in the recent report of that inquiry*”. The Defendants have ignored the extent to which Batang Kali could provide an important historical case study of how things could *still* go wrong. In fact, save that Baha Mousa was killed on a British base and the villagers here were killed having been deliberately not taken to one, the similarities between what happened in Batang Kali in 1948 and what happened at BG Main in Basra in 2003, are striking. They exemplify that the pressures of warfare are continuously bound to undermine the Army covenant in succeeding generations; especially amount young recruits to the infantry deployed into hostile alien environments. To approach the matter otherwise confirms the principle that he who does not learn from history is doomed to repeat it. Material benefits that the evidence of the Baha Mousa Inquiry suggests could be obtained from a Batang Kali inquiry include:
- (a) Identifying and responding to a concrete and enduring example about non-compliance with doctrine based on inexperience, lack of training, environmental pressures and the risk of reprisals against terrorists who do not comply with the law of war. This in effect is a critical feature of the fog of war that both events exemplify notwithstanding their separation by 60 years.<sup>399</sup>

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<sup>397</sup> V1/A/25

<sup>398</sup> Cf. *State v Walters* [2004] 1 LRC 493 and *Tennessee v Garner* 471 US 1 (1985)

<sup>399</sup> The prevailing wisdom of the British army going in to Iraq was that any illegal conduct in its colonial past was behind it and would not be repeated. This position was exemplified at the inquiry by the witness Brigadier Marciejewski, a G3 Brigade staff officer during Operation Telic 1 responsible for operations, organisations and deployment, who when asked about the lesson learned from Britain’s colonial past that he applied to deployment to Iraq said, “the British Army had come a long way since the 1960s and was very proud that the army that I served in Northern Ireland in the 1990s was a very different kind of army in terms of its procedures” (BMI 72/156/3 to 157/14). Assumptions based on late experience in Northern Ireland simply did not translate to a more hostile environment.

The evidence at the Baha Mousa Inquiry further indicated that the general tendency in contemporary British army training was to refer to examples from French and American military history (e.g. battle of Algiers and Mai Lai), rather than to teach examples from the United Kingdom’s colonial past. For instance, Lt Colonel Landon, whose role included teaching UK Army Staff College, made it clear that the case studies prior to Iraq were predominantly foreign (BMI 80/184/3 to 185/4).

(b) Understanding why the previous investigations were ineffective particularly in the context of risks that would continue today, e.g. lack of access of victims to lawyers, political pressure to win 'hearts and minds', a culture of overly defensive lines operating in the Ministry of Defence.<sup>400</sup>

## **H. The benefits in holding an inquiry have been undervalued**

3.70. Equally the benefits have been undervalued by the Defendants. As with the costs issue, the primary problem is that the valuation of benefit by the Defendant began in the wrong place. Once it is accepted that the official account is unsustainable and that various forms of cover up have prevented the matter from ever being properly ventilated, then the capacity for restorative justice in giving the matter proper consideration is overwhelming and there is benefit (as well as obligation) in having due regard to race relations in the race context of this case.

### **Restorative justice**

3.71. The common law recognises the restorative justice capacity of a public, accountable and involving processes (*R (Lin) v Secretary of State for Transport* [2006] EWHC 2575 (Admin) *per* Moses LJ § 51):

*"There is an aspect of participation or involvement which, perhaps, seems to have been paid too little attention in the authorities. It is that aspect probably best exemplified in the process of truth and reconciliation hearings in South Africa or the process of restorative justice in which offenders meet their victims within the criminal process. The bereaved seek an independent full inquiry into the facts which led to the deaths. They may seek lessons to be taught for the future. They seek to find out who was responsible."*

3.72. For further recognition of the same point, see the following:

(a) *R v Secretary of State for Health ex parte Wagstaff* [2001] 1 WLR 292 at 312 (*per* Kennedy LJ and Jackson J) endorsing the comments of Sheen J in his report into the capsizing of the Herald of Free Enterprise: "in every formal investigation it is of great importance that the public should feel confident that a searching investigation has been held that nothing has been swept under the carpet and that no punches have been pulled"

(b) 'Government by Inquiry' House of Commons Public Administration Select Committee First Report of Session 2004-05 Volume 1, HC 51-1, highlighting at pp 8-9 the views of the Government that inquiries have "helped restore public confidence

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<sup>400</sup> As regards the latter concept of how institutional cultures prevent effective inquiries, the final report of the Baha Mousa Inquiry reflects on a number of instances in which Parliament was inadvertently misled as to the conduct of UK forces in Iraq. In examining why this could have happened, Sir William Gage detected in the MOD "a corporate tendency towards an overly defensive line in response to difficult questions" and a failure to face "more squarely and openly mistakes and shortcomings" (Report Summary VIII/1366 para. 530 and Report III/1153 para 15.177). Batang Kali is a case study of the same phenomenon.

through a thorough investigation of the facts and timely and effective recommendations to prevent reoccurrence”.<sup>401</sup>

(c) The capacity of the inquiry to promote restorative justice would in turn promote good relations between different racial groups in a post-colonial world and demonstrate a commitment to ensuring equality before the law absent in the past investigations.

### *Promoting good relations*

3.73. It is against this context, that it appears manifest that the Defendants have not given “due regard” to the capacity of the inquiry to comply with their duties under s. 71 of the Race Relations Act 1976 to “promote...good relations between persons of different racial groups” (which applied to the 29 November 2010 decision) and s. 149 of the Equality Act 2010 to “foster good relations between persons who share a relevant protected characteristic and persons who do not share it” (which applied to the 4 November 2011 decision) (the *Equality issue*).

3.74. They have not had due regard, because that would have involved reaching a conclusion on the extent of the actual benefits of an inquiry or investigation in race relations / equality terms, not proceeding, as the Defendants have, on the basis that there may be benefits – a superficial, speculative approach that is not compatible with discharge of the s. 71 / 149 duties. “Due” necessarily involves a decision maker:

(a) properly identifying any negative (or positive) consequences in equality terms of the courses of action being contemplated (*R (Lunt and another) v Liverpool City Council* [2009] EWHC 2356 (Admin) § 44),

(b) balancing any such consequences against the other benefits of proceeding (*R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA (Civ) 141 § 31, *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) § 81) and

(c) considering whether, and if so how, any identified negative consequences can be mitigated (*R (Kaur & Shah) v London Borough of Ealing* [2008] EWHC Admin 2026 § 43).

3.75. The Defendants have also taken too narrow an approach to the duty, because they have not properly considered the damage to race relations caused by the original event and the continuing failure to adequately investigate it; including as a

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<sup>401</sup> This view was echoed by a number of past inquiry chairs that gave evidence, such as Lord Howe. See also the *Effective Enquiries* Consultation Paper CP12/04 on which the Inquiries Act 2005 was based at §§3 and 9: “In what circumstances should an inquiry be called? ... A common theme tends to be that the subject matter of the inquiry has exposed some possible failing in systems or services, and so has shaken public confidence in these systems or services, either locally or nationally. In today’s society, the public rightly expects that any possible failings or problems should be investigated thoroughly, and that action should be taken to prevent them from happening again.... Ministers will need to consider how much an inquiry is likely to achieve in terms of restoring public confidence and preventing reoccurrence.”

consequence of their own decision. The villagers were targeted for attention because they and the communists being sought were from the same ethnic group. The killings were experienced by the villagers in terms of a racial attack by British, 'white men' as discussed in their 1993 statements. At the same time there was clearly grave discrimination by British officials after the event that bore devastating consequences for investigations. Sir Foster Sutton did not approach any Chinese villager witnesses in 1948 because he did not regard them as reliable.<sup>402</sup> A similar stance that Chinese villager witnesses were by definition unreliable was expressed by a senior foreign official in a letter to the DPP in 1970 that appears to have had a direct consequence upon his decision not to continue the police investigation in Malaysia.<sup>403</sup>

- 3.76. As noted at the end of Part 2, now is the first point in the history of this continuing wrong in which the papers from Malaysia and the United Kingdom have been compiled. It is an opportunity to go forward.

**I. The refusal is unlawful because it is unreasonable and unjustifiable**

- 3.77. For all of the above reasons, the decision not to hold a further inquiry or investigation cannot satisfy the basic standards of reasonableness and justification which here includes standards which are identical to proportionality, whether through the doctrine of 'anxious scrutiny' or the principle of legality or otherwise.

- 3.78. In Part 4 below, the Claimants submit that the Defendants are under a duty in international law to investigate; but even if they are not, this is a paradigm case in which the decision-maker ought to be under a duty to provide compelling reasons to refuse relief because the issues at stake touch upon the most fundamental of human rights.

- 3.79. As Sedley L.J. observed in *R v Secretary of State for the Home Department ex parte McQuillan* [1995] 4 All ER 400, at 421:

*"Once it is accepted that the standards articulated in the convention are standards which both march with those of the common law and inform the jurisprudence of the European Union, it becomes unreal and potentially unjust to continue to develop English public law without reference to them. Accordingly, and without in any way departing from the ratio decidendi of Brind, the legal standards by which the decisions of public bodies are supervised can and should differentiate between those rights which are recognised as fundamental and those which, though known to the law, do not enjoy such a pre-eminent status. Once this point is reached, the standard of justification of infringements of rights and freedoms by executive decision must vary in proportion to the significance of the right which is at issue"*

- 3.80. Lord Woolf M.R. alluded to the same principle in *R v Lord Saville of Newdigate ex parte A* [2000] 1 WLR 1855, § 37:

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<sup>402</sup> V1/E /187

<sup>403</sup> V2/L/182 and 185

*“[The decision makers options] are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by Sir Thomas Bingham M.R. in R v Ministry of Defence [1996] QB 517 which is not in issue.”*

As the *ABCIFER* case recognised, (*R (Association of British Civilian Internees; Far Eastern Region) v Secretary of State for Defence* [2003] EWCA Civ 473 [2003] QB 1397 at §§34, 37) although there is no general common law duty of proportionality (yet), proportionality is a principle which does apply in a human rights context.

- 3.81. It was on this basis that the Court of Appeal in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 (§§ 18-19) identified “a settled principle of common law” which was “entirely independent of our incorporation of the Convention by the Human Rights Act 1998”. The graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required: see §§18 and 19 *per* Laws L.J. Moreover, in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, Lord Steyn held that there was (1) a considerable overlap between traditional grounds of review and proportionality in circumstances where an interference with fundamental rights was in play and (2) most cases would be decided in the same way which ever approach was adopted (§ 27D). As the *ABCIFER* case recognized, although there is no general common law duty of proportionality (yet<sup>404</sup>), proportionality is a principle which does apply in a human rights context.
- 3.82. There is a link in public law between decisions being reasonable and being properly reasoned. The approach seen above, to investigations into arguably wrongful deaths, finds resonance in cases about decisions to prosecute,<sup>405</sup> coroners resuming inquests,<sup>406</sup> and decisions whether to order a public inquiry.<sup>407</sup> There is, moreover, the truth identified by Lord Bingham and Lord Brown, where the Court is striking the correct balance between judicial supervision and judicial restraint. Lord Bingham’s observation, in *Manning* at §23, was that “the standard of review should not be set too high, since ... if the test were too exacting an effective remedy would be denied”. Lord Brown’s observation, in *International Transport Roth GmbH v Secretary of State for*

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<sup>404</sup> That being an issue which the claimants in any event reserve for an appeal

<sup>405</sup> *R v DPP, ex parte Manning and Melbourne* [2001] QB 330 § 33

<sup>406</sup> *Hurst v North London Coroner* [2007] 2 AC 189. Here, the bereaved parent lost her case with regard to whether the HRA applied to a post-2000 decision to resume an inquest in relation to a pre-2000 death. Lady Hale and Lord Mance (§§ 22 and 77-81) would have allowed the appeal under the common law. Lord Brown (with whom Lord Bingham agreed) would not have done so (§§ 55-59). Lord Rodger declined to rule on the issue because the applicant had not cross-appealed (§ 6), a factor which also influenced Lord Brown (at § 26).

<sup>407</sup> *Black v Lord Advocate and Scottish Ministers* [2008] CSOH 21 §§ 54-58 and 134



*the Home Department* [2003] QB 728 at §54, was that “Constitutional dangers exist no less in too little judicial activism as in too much”).

## **J. The Court and the public interest**

- 3.83. Finally, once it is recognized that the public interest considerations which operate in this area of the law, and of which the Court is the arbiter, call for independently-adjudicative accountability, then the question is not whether – but rather how – such a need is to be met. There have been instances – the case of *Al-Sweady* being an example – where the Government has sought to rely on the judicial review process itself as capable of providing an independent appraisal and discharge any duty to achieve truth and accountability. The Defendants have not suggested that judicial review would operate itself to satisfy the public interest imperative in having an independent appraisal of this case. It is, of course, open to the Court to recognize the public interest function which this judicial review case of itself undoubtedly serves, and to adopt a comprehensive narrative if it considers this to be appropriate and in the interests of justice. Ultimately, the Court will wish to recognize the context of this case and to apply public law and human rights standards to that context, and to decide whether an independent report is needed to discharge those standards. This skeleton has been structured and directed towards that function.

#### 4. SUBMISSIONS II: INTERNATIONAL HUMAN RIGHTS LAW

- 4.1. Although basic domestic public law principles are amply sufficient to dispose of this case in the claimants' favour (Part 3 above), there is an important wider dimension which comes to their assistance if not. The implications of this wider, international human rights law dimension, is that it moves from (a) a question of unjustified exercise of a discretion (domestic public law) to (b) a dereliction of a legally-recognisable duty (international human rights law).
- 4.2. Until immediately prior to this skeleton argument, the Claimants' premise had been – as a matter of law – that they could not rely on any domestically-cognisable treaty obligation. The straightforward reason why not is that the primary, domestically-cognisable instrument is the European Convention on Human Rights (adopted on 4 November 1950)<sup>408</sup>, which post-dated the deaths in this case (on 11 and 12 December 1948). That had appeared to be fatal to any invocation of the ECHR, there being no temporal jurisdictional reach. However, the consequence of the most recent decision of the European Court of Human Rights has demonstrated that no such jurisdictional bar exists.
- 4.3. Like the appellants in the torture-evidence case of *A and Ors (No. 2) v Secretary of State for the Home Department* [2006] 2 AC 221, the claimants have invoked (a) customary international law and its effect on (b) domestic common law. They maintain the soundness of that position, and so will set it out first.
- 4.4. The Claimants' submissions involve the following propositions: (1) there is in customary international law a procedural (investigative) obligation to conduct an effective and independent investigation into the use of lethal force against civilians by State agents; (2) that procedural obligation is a continuing obligation and remains applicable to the investigation or lack thereof so long as the standards required by the obligation are not satisfied; (3) the UK Government breached the procedural obligation by its acts and omissions in failing to conduct an effective and independent investigation into the Batang Kali massacre; (4) since a human rights obligation in customary international law is (absent abrogation in express statutory words) cognisable as a public law duty at common law, the UK Government has acted unlawfully in (i) failing to recognise it and (ii) acting in continuing breach of it.

##### **A. The investigative duty in customary international law**

- 4.5. The procedural obligation to investigate in customary international human rights law, and customary international humanitarian law, is reflected in Article 3(b) of UN General Assembly Res. 60/147 of 16 December 2005 on '*The Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious Violations of Humanitarian Law*', which states:

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<sup>408</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5.

*“The obligation to ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: .... (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law...”<sup>409</sup>*

4.6. This is an important and long-standing obligation. It is sufficient for the purposes of this case that it had evolved by the early 1990s, as is reflected in its inclusion in a multitude of universal and regional treaties entered into by large numbers of members of the international community; its recognition by those international commissions and courts with authority to provide binding interpretations of such instruments; and the practice of states to give effect to the procedural obligation, for example in their military manuals and national laws. Since customary international law obligations depend ultimately on a demonstrable evidenced basis, and because there is a wealth of detailed material, the claimants have sought to assist the Court by supplying a comprehensive annex of relevant illustrative sources (See Annex 3). It will only be necessary to delve into this material if the Respondents are able to raise some plausible basis for denying that which is (overwhelmingly) there demonstrated.

4.7. Customary international law is defined in Article 38 of the Statute of the International Court of Justice as ‘*evidence of a general practice accepted as law*’. As the learned editors of *Oppenheim’s International Law* have noted:

*“[T]he formulation in the Statute serves to emphasise that the substance of this source of international law is to be found in the practice of states. The practice of states in this context embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic despatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere.”<sup>410</sup>*

The requirement that the general practice must be ‘*accepted as law*’ in the formulation in Article 38 is referred to as the ‘*subjective element*’ or ‘*opinio juris*’. According to the editors of *Oppenheim’s International Law*:

*“This subjective element may be deduced from various sources, including the conclusion of bilateral or multilateral treaties, attitudes to resolutions of the United Nations General Assembly and other international meetings, and statements by state representatives.”<sup>411</sup>*

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<sup>409</sup> UN General Assembly Res. 60/147, 16 December 2005. According to the Preamble the principles contained in the Resolution “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms”

<sup>410</sup> Sir Robert Jennings & Sir Arthur Watts (eds), *Oppenheim’s International Law* (9<sup>th</sup> edn, 1996) Vol. 1, p. 26.

<sup>411</sup> *Ibid.*, p. 28.

- 4.8. The evidential burden for establishing the state practice element for a norm of customary international law was considered by the International Court of Justice in the *Military and Paramilitary Activities* case:

*“In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”*<sup>412</sup>

- 4.9. In relation to the subjective element, the editors of *Oppenheim’s International Law* state, with extensive references to authority, that ‘a practice does not have to be either observed or accepted as law, tacitly or expressly, by every state’ because ‘its acceptance as law must... be that of the international community generally’.<sup>413</sup>

## **B. The procedural obligation as a continuing obligation**

- 4.10. The investigative obligation, where triggered, is an obligation of a continuing character and extends over the entire period during which the investigation continues. It is an obligation of conduct. This can be seen in Art. 14(2) of the ILC’s Articles on State Responsibility:

*“The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”*<sup>414</sup>.

- 4.11. The continuing nature of the procedural obligation to conduct an effective and independent investigation was recognised by the Inter-American Court of Human Rights: *Velasquez Rodriguez* (*“The duty to investigate of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains”*)<sup>415</sup>. See too cases such as *Blake v Guatemala*<sup>416</sup>; and *Consuelo v Argentina*<sup>417</sup>.
- 4.12. It is also reflected in the jurisprudence of the European Court of Human Rights: see *Šilih v Slovenia* (2009) (*“while it is normally death in suspicious circumstances that triggers the procedural obligation under art. 2, this obligation binds the state throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the*

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<sup>412</sup> 1986 ICJ Rep 14, p. 90.

<sup>413</sup> Sir Robert Jennings & Sir Arthur Watts (eds), *Oppenheim’s International Law* (9<sup>th</sup> edn, 1996) Vol. 1, p. 29.

<sup>414</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, Adopted by the International Law Commission at its fifty-third session (2001), General Assembly Res. 56/83 of 12 December 2001.

<sup>415</sup> Inter-Am. Ct.H.R. Series C, No. 4.

<sup>416</sup> Inter-Am. Ct. H.R. Series C, No. 36, at 1, §§52-67.

<sup>417</sup> Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 Report No. 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993).

circumstances of death and establish responsibility for it')<sup>418</sup>; *Brecknell v United Kingdom* (2008)<sup>419</sup>; *Hackett v United Kingdom* (2005)<sup>420</sup>.

### **C. Breach of the international law standard**

4.13. Critical steps in the UK Government's response to the Batang Kali massacre were taken from 1992 onwards. They have been examined in detail (at §§2.187 et seq. above):

(a) They failed to discharge the investigative duty. They began with the collective response of the MOD, FCO and the CPS in response to the airing of the BBC documentary *In Cold Blood* in September 1992.

(b) There was then the review conducted by the CPS War Crimes Unit in March 1993 as to whether the 1970 decision not to prosecute on the basis of insufficient evidence should be reopened in light of the new evidence obtained by the BBC.

(c) Next, there was the FCO's consideration to the formal petition lodged on behalf of the relatives of the victims on 8 July 1993, which resulted in the provision of internal legal advice on 19 August 1993.

(d) The petition was still under consideration in correspondence dated 4 May 1995 but no formal response was ever provided thereafter.

(e) There was the step of putting to Ministers the Note from the CPS War Crimes Unit detailing the nature of the procedural steps taken in 1948/49 and 1970 and posing the question whether the materials should be used to inform the response to the petition and/or to provide assistance to the criminal investigation by the Royal Malaysian Military Police. The FCO objected to this; as did the High Commission.

(f) Then, the British High Commission in Kuala Lumpur was apprised of the new evidence gathered by the Royal Malaysian Police during the course of 1993, which included the first formal interviews conducted with witnesses in Malaysia.

(g) Then there was the decision by the UK Government as to whether to cooperate with the Royal Malaysian Police's investigation from 1993 to 1996, with the several requests to exchange information in relation to the Batang Kali massacre and recommendations as to the potential benefit of mutual assistance made by the CPS War Crimes Unit.

(h) As will be recalled, the Malaysian police were left to conduct their investigations without the benefit of the evidence collected by the British in previous inquiries.

(i) Then, in June 1995, agents of the FCO expressly directed staff of the High Commission to "steer" the Malaysian police away from their intention to continue

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<sup>418</sup> 49 E.H.R.R. 37 at §157.

<sup>419</sup> 46 E.H.R.R. 42 at §§66-72.

<sup>420</sup> Application No 34698/04) 10 May 2005.

their enquiries in the UK. Plans were apparently made to travel, but (according to Ward and Miraflor) aborted at the last minute because the UK police were purportedly not ready to host the trip.

(j) Then another petition to the Queen was filed by relatives of the victims on 25 March 2008.

(k) The formal response referred only to the decision not to prosecute in 1970, which was not only inadequate in itself; but served to affirm the legitimacy of decision to terminate that investigation 1970 in circumstances in which it was either known or ought to have been known that the grounds for termination were irrational and/or improper.

(l) Then there was the analysis commissioned from Treasury Counsel, by way of reports assessing the evidence. Finally, there was the decision-making with which this case is concerned.

4.14. The investigation was not effective, transparent, or participatory. The most basic steps, in any attempt to ventilate the truth, were left undone. Matters as obvious as interviewing survivors and witnesses, interviewing those implicated, securing an examination of the human remains, ensuring an open and independent appraisal of the evidence. All could have been done. None were.

4.15. These acts and omissions of the UK Government constitute a violation of the procedural obligation in customary international law to conduct an independent and effective inquiry. That violation was manifestly evident in 1992 and 1993, by which time the procedural obligation had certainly crystallized in customary international law. The violation continues to this day. That is sufficient to establish action incompatible with a duty contained in customary international law. And that it enough, of itself, for this claim to succeed.

#### **D. Unlawful action and misdirection in law**

4.16. Were there a domestic statute which contained the continuing investigative duty, the Respondents would have recognised it and acted in accordance with it. Were there a domestic case which identified this a public law duty – like the duty to act fairly or to take account of relevancies or to give reasons – they would similarly have been unable to ignore it. This case, like *A and Ors (No.2) v SSHD* before it, requires the Court to establish the duty. The fact that, as in that case (see [2006] 2 AC 221, §§30-45), it has the dual foundation of (a) a duty in customary international law and (b) the absence of any abrogation by express statutory words, makes it no less concrete and no less important.

4.17. It was of course one of Lord Bingham’s sub-rules for the rule of law that the executive should be accountable for duties which it owes in international law; and it is one of the Venice Commission’s standards for evaluating the state of the rule of law in a State, to ask whether there are “*internal rules ensuring that the state abides by*

*international law*" (Report on the Rule of Law, 4 April 2011, Annex §1h). Happily, the thorny questions of *Brind* and *Tin Council* and undomesticated treaty obligations can await another case on another day. For it has long been established that customary international law is a source of the common law. It has sometimes been asked: how? The answer: through public law standards that hold the executive accountable to the rule of law.

- 4.18. In *re McKerr*<sup>421</sup> the family of a man killed in 1982 in Northern Ireland sought an Article 2 compatible inquest, having already secured a finding before the European Court that the original investigation into their son's death including the inquest violated the familiar investigatory obligation under Article 2 (as to which, see eg. *Nachova v Bulgaria*<sup>422</sup>). The claim was defeated on the basis that the HRA did not have a retrospective application so as to mandate a present day inquiry in relation to a death that took place before the HRA came into force. The premise for this analysis was that there was a necessary jurisdictional-coincidence between (a) the date of death and (b) the duty of investigation. This premise has been exposed and overturned by the Supreme Court in *McCaughey*.<sup>423</sup> The ability to invoke Article 2 in the case of a pre-ECHR death is the subject of the recent ground-breaking decision in *Janowiec*<sup>424</sup>, to which it will be necessary to return.
- 4.19. The claimants in *McKerr* advanced an alternative argument if the HRA was not applicable then the common law duty to investigate suspicious deaths should be developed in accordance with Article 2. All of their Lordships rejected this argument. They may well have been wrong: after all, the principle of legality allowed Article 10 to be invoked in *Simms*, and it is difficult to see how the HRA should have restricted the rights which could be invoked at common law. But that is for another day, in the Supreme Court itself.
- 4.20. What is left is the argument which was not made in *McKerr*, but which Lord Steyn raised. Of his own motion, Lord Steyn posed the question whether there was an equivalent duty in customary international law, which would for that reason by part of English public law. He said this:

*"At a late stage of the appeal before the House I did wonder whether customary international law may have a direct role to play in the argument about the development of the common law. The idea was suggested to me by a valuable article: Andrew J Cunningham, "The European Convention on Human Rights, Customary International Law and the Constitution" (1994) 43 ICLQ 537. The writer stated the following propositions, at p 538:*

*"First, that treaties may generate rules of customary international law: the accepted view that unenacted treaties 'cannot be a source of rights and obligations' in England is thus effectively sidestepped, since it is not the*

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<sup>421</sup> [2004] 1 WLR 807.

<sup>422</sup> Applications Nos. 43577/98 and 43579/98, 6 July 2005, §§110-113.

<sup>423</sup> [2011] 2 WLR 1279, SC.

<sup>424</sup> Application Nos. 55508/07 and 29520/09, 16 April 2012.

*treaty itself which is the source of rights. Second, that the numerous human rights treaties and other instruments, of which the European Convention is but one, have given or, at least, may give rise to rules of customary international human rights law. Third, that customary international law forms part of the common law of England. If these three be accepted, it follows that, to the extent that the content of any right encompassed in the European Convention is the same as its content in customary international law, the right in question will be recognised in English law as a part thereof.*

*Along these lines there may be an argument that the right to life has long been recognised in customary international law, which in the absence of a contrary statute has been part of English law since before the 1998 Act came into force. One has to remember, however, that the procedural obligation recognised in *McCann v United Kingdom* 21 EHRR 97 only dates from 1995, i.e. 13 years after the deceased was shot and after the inquest in Northern Ireland was closed. It may be unrealistic to suggest that the procedural obligation was already part of customary international law at a time material to these proceedings. The point has not been in issue in the present case. It has not been researched, and it was not the subject of adversarial argument. It may have to be considered in a future case. The impact of evolving customary international law on our domestic legal system is a subject of increasing importance.”<sup>425</sup>*

- 4.21. This is that future case. Once the customary international law duty has been identified, its cognisance in a domestic Court presents no difficulty. The classic statement of the relationship between customary international law and the English common law remains Lord Denning MR’s speech in *Trendtex Trading Corporation v Central Bank of Nigeria*.<sup>426</sup>

*“[T]he rules of international law are incorporated into English law automatically and considered part of English law unless they are in conflict with an Act of Parliament.”<sup>427</sup>*

Thus, a customary international law duty takes its hold as a domestic common law duty, subject to a conflicting statute which requires or permits its abrogation. In *R v Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 1)*,<sup>428</sup> Lord Lloyd referred to ‘the requirements of customary international law, which are observed and enforced by our courts as part of the common law’ and that ‘the common law incorporates rules of customary international law’.<sup>429</sup> In the subsequent *R v Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)*,<sup>430</sup> Lord Millet said that ‘[c]ustomary international law is part of the common law’.<sup>431</sup> In the Court of Appeal, Latham LJ, giving the judgment of the court in *R v Jones (Margaret)*<sup>432</sup>, held that there is ‘[n]o doubt... that a rule of international law is capable of being incorporated into English law if it

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<sup>425</sup> [2004] 1 WLR 807, §51.

<sup>426</sup> [1977] QB 529.

<sup>427</sup> *Ibid*, 557-8.

<sup>428</sup> [2000] 1 AC 61.

<sup>429</sup> *Ibid* 89, 90.

<sup>430</sup> [2000] 1 AC 147.

<sup>431</sup> *Ibid*. 276.

<sup>432</sup> [2004] EWCA Crim 1981; [2005] QB 259.



is an established rule derived from one or more of the recognised sources'.<sup>433</sup> Jones, of course, articulated an understandable exception: that customary international law cannot introduce a new criminal responsibility, without a positive intervention by Parliament.<sup>434</sup>

- 4.22. The duty of the courts to give effect to norms of customary international law was described in the following terms by Sir Hersch Lauterpacht in 1939 and this remains an accurate statement of the position today:

*"Courts treat the relevant rules of international law as incorporated into the domestic rules because they are bound to do so... by virtue of an established rule which bids them to act in that way. It is a rule of law ... that the courts acknowledge the existence and applicability of the relevant rules of international law. The courts themselves have engrafted that mandatory rule upon the common law."*<sup>435</sup>

- 4.23. So, the UK Government has acted in breach of a legal duty. It has also misdirected itself in law, by concluding that it was under no obligation to conduct an investigation into the Batang Kali massacre in its Decision of 29 November 2010.

#### **E. Attributability and the Sultan of Selangor**

- 4.24. There is no merit in the Defendant's position – if sought to be maintained – that the Scots Guards were deployed to Selangor in support of the civil power such that the Sultan of Selangor was responsible for their actions and not HM Government in right of the UK. The Ministerial Submissions, the two Decision letters, and the Grounds of Defence contain no reference to an evidential basis to support this argument.<sup>436</sup> It is wrong in law, and a further error of law which vitiates the decision-making approach.

- 4.25. Article 3(1) of the Selangor Treaty of 1948 between His Majesty and the Ruler of Selangor, which was operative at the time of the killings at Batang Kali, provides:

*"His Majesty shall have complete control of the defence and of all the external affairs of the State of Selangor and His Majesty undertakes to protect the Government and State of Selangor and all its dependencies from external hostile attacks and for this and other similar purposes His Majesty's Forces and persons authorized by or on behalf of His Majesty's Government shall at all times be allowed free access to the State of Selangor and to employ all necessary means of opposing such attacks."*

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<sup>433</sup> Ibid. 272.

<sup>434</sup> Otherwise the position is as per Lord Hoffmann in *R v Lyons* [2003] 1 AC 976: "There is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation. As Lord Goff of Chieveley said in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283: "I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the Convention]" (§ 27) .

<sup>435</sup> H. Lauterpacht, 'Is International Law a Part of the Law of England?' (1939) 25 *Transactions of the Grotius Society* 51, 79.

<sup>436</sup> Summary Grounds (§14 and §19(a) and the Detailed Grounds of Resistance (§§15-18).

- 4.26. The King's Regulations for the Army 1940 (Section 1, paragraph 28) confirm that when His Majesty's forces are serving in a colony, protectorate or mandated territory, they do not serve under the command of the governor as the supreme authority representing His Majesty in the respective colony, protectorate or mandated territory:

*"The Governor of a colony, protectorate or mandated territory is the single and supreme authority responsible to, and representative of, His Majesty. He is, by virtue of his Commission and Letters Patent, entitled to the obedience and assistance of all military and civil officers, but, although bearing the title of Captain-General or Commander-in-Chief, and although he may be a military officer, senior in rank to the O.C. commanding the forces, he is not, except on special appointment from His Majesty, invested with the command of His Majesty's forces in the colony, protectorate or mandated territory. He is not, therefore, entitled to take the immediate direction of any military operations or, except in cases of urgent necessity, to communicate officially with subordinate military officers, without the concurrence of the O.C. the forces, to whom any such exceptional communication must be immediately notified."*

- 4.27. It is thus beyond any doubt that Her Majesty's Government in right of the United Kingdom had command of, and was responsible for, the British forces serving in Selangor (including the Scots Guards) at the relevant time of the killings. Her Majesty's Government alone is liable for their acts. Lord Browne-Wilkinson observed in *Trawnik v Lennox* that it is 'far from clear how liability for the acts of the British Army (as opposed to the forces of any other party of the Commonwealth) can be said not to arise from acts of the Crown in respect of the United Kingdom'.<sup>437</sup> The Defendants are wrong to suggest otherwise and have produced no evidence of any kind to support their claim, despite being asked in terms to do so.<sup>438</sup>

## **F. Justiciability**

- 4.28. The doctrine of non-justiciability has no application in the circumstances on this case because the Claimants' claim for judicial review does not require the Court to adjudicate upon the acts of a foreign state or to trespass into the conduct of the UK's foreign affairs. The victims of the Batang Kali massacre were British Protected Persons and for that reason the FCO gave advice on 19 August 1993 (see §2.205) to the effect that Malaysia would not be entitled to exercise diplomatic protection on behalf of the victims in a claim against the United Kingdom on the international plane after it had attained full sovereignty in international law. This is a case about the acts and omissions of the UK Government in failing to conduct an independent and effective investigation on UK soil in respect of the murder of British Protected Persons by British soldiers in a former British Protectorate. The subject-matter of the

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<sup>437</sup> [1985] 1 WLR 532 at 552E.

<sup>438</sup> Cf. *Mutua v FCO* [2011] EWHC 1913 (QB) (FCO's submission that every communication between the Secretary of State and the Colonial administration was the action of Her Majesty's Government in right of the colony was rejected). See T1/E/386 to which T1/E/387 replies.

case is the conduct of UK authorities, and the claim does not entail a challenge to 'foreign policy'.<sup>439</sup>

### **G. The Free-Standing Investigative Duty**

4.29. As indicated above (§4.10-4.12), since the Strasbourg case of *Šilih v Slovenia* and the decision of the Supreme Court in *McCaughey*, the applicability of the investigative duty under ECHR Article 2 does not require a temporal coincidence between (a) the death and (b) key steps which raise the question of non-compliance. See *Šilih v Slovenia* (2009): '*...the Court concludes that the procedural obligation to carry out an effective investigation under art.2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of art. 2 it can give rise to a finding of a separate and independent "interference" within the meaning of the Blečić judgment. In this sense it can be considered to be a detachable obligation arising out of art.2 capable of binding the state even when the death took place before the critical date.*').<sup>440</sup>

4.30. As Lord Phillips said in *McCaughey*:

*"61 What difference has Šilih made? I believe that the most significant feature of the decision in Šilih is that it makes it quite clear that the art.2 procedural obligation is not an obligation that continues indefinitely. The spectre that the House of Lords confronted in McKerr is shown to be a chimera. Just because there has been an historic failure to comply with the procedural obligation imposed by art.2 it does not follow that there is an obligation to satisfy that obligation now. Insofar as art.2 imposes any obligation, this is a new, free standing obligation that arises by reason of current events. The relevant event in these appeals is the fact that the Coroner is to hold an inquest into Martin McCaughey's and Dessie Grew's deaths. Šilih establishes that this event gives rise to a free standing obligation to ensure that the inquest satisfies the procedural requirements of art.2."*

4.31. The cases had established that the procedural obligation to investigate is 'detached' from the substantive obligation not to use lethal force. It can be activated by factors such as the following: (1) the undertaking of substantial steps in the investigation; (2) the affirmation of aspects of a prior investigation; (3) discovery of important new evidence or information; or (4) or overriding considerations of justice in the most serious of cases (cases of mass killings, war crimes and so on). In the present case, all four of these factors apply.

4.32. As to (1), see eg. *McCaughey* (victims shot and killed by British soldiers in 1990; coroner assigned to the case in 2009; procedural obligation revived even though killing occurred prior to Human Rights Act 1998; '*There is no temporal restriction on the [procedural] obligation other than that the procedural steps take place after the Convention has come into force. Thus if a state decides to carry out those procedural steps long after the date of death, they must have the attributes that art.2 requires.*')<sup>441</sup>; *Šilih v Slovenia* ('a

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<sup>439</sup> See *R (Abassi) v Secretary of State for the FCO* [2003] UKHRR 76, §§68-69; and *R (Binyam Mohammed) v SSFCO* [2009] 1 WLR 2579, DC §§161-183

<sup>440</sup> 49 E.H.R.R. 37 at §159.

<sup>441</sup> [2011] UKSC 20, §50 per Lord Phillips.

*significant proportion of the procedural steps required by [art. 2]... will have been or ought to have been carried out after the critical date’).*

- 4.33. As to (2), see eg. *Sankara v Burkina Faso*<sup>442</sup> (State’s failure to correct death certificate constituted a continuing breach of procedural obligation where death occurred in 1987, death certificate issued in 1988, Optional Protocol entered into force for Burkina Faso in 1999; ‘*A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations by the state party’*); *Simunek v Czech Republic*<sup>443</sup> *Evan Drake and Carla Maria Drake v New Zealand*<sup>444</sup>; *Ivan Somers v Hungary*<sup>445</sup> *Azocar v Chile*.<sup>446</sup>
- 4.34. As to (3), see eg. *Brecknell v UK (2007)*<sup>447</sup> (victim was killed by loyalist gunmen in 1975; investigations concluded in 1981; further evidence discovered in 1999 suggesting possibility of RUC and UDR collusion with loyalist paramilitaries; ‘... *the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures.*’); *Blake v Guatemala*.<sup>448</sup>
- 4.35. As to (4), see *Šilih*.<sup>449</sup> In *McCaughey* it was described as an ultimate justice ‘*catch-all*’ by Lord Kerr<sup>450</sup> which, according to Lord Phillips, applies where there is no longer any proximity between the death and the date of the alleged breach of the procedural obligation but there remains ‘*the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner*’.<sup>451</sup> See too cases like *Moivana Village v Suriname (2005)*<sup>452</sup> (concerning an alleged massacre in 1986 by army forces of forty villagers and the destruction of village buildings causing the subsequent displacement of the surviving villagers; the Court in dismissing the *ratione temporis* objections relied upon the ‘*seriously deficient investigation..., its violent obstruction of justice, and the extended period of time that has transpired without clarification of the facts...*’;<sup>453</sup> earlier in its judgment the Court described the matters as ‘*a continuing and permanent violation*’<sup>454</sup>); *Varnava v Turkey (2009)*<sup>455</sup> (in circumstances

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<sup>442</sup> Comm. 1159/2003, 11 April 2006, HRC §6.3 and §12.2.

<sup>443</sup> Comm. No. 516/1992, HRC, decision of 31.07.95, U.N. Doc. CCPR/C/54/D/516/1992 (1995), §4.5.

<sup>444</sup> Comm. No. 601/1994, HRC, decision on 03.04.97, U.N. Doc. CCPR/C/59/D/601/1994, §8.2.

<sup>445</sup> Comm. No. 566/1993, HRC, decision of 23.07.96, U.N. Doc. CCPR/C/53/D/566/1993, §9.2.

<sup>446</sup> Case 11.863, Report No. 95/98, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 101 (1998).

<sup>447</sup> 46 E.H.R.R. 957, §71.

<sup>448</sup> Preliminary Objections, 2.07.96, §§33-40.

<sup>449</sup> 49 E.H.R.R. 37, §163.

<sup>450</sup> [2011] UKSC 20, §§115-116.

<sup>451</sup> [2011] UKSC 20, §49.

<sup>452</sup> Inter-Am. Ct.H.R., 15 June 2005.

<sup>453</sup> *Ibid*, §163.

<sup>454</sup> *Ibid*, §39.

<sup>455</sup> App. No. 16064/90-16066/90, 18 September 2009.

where the nine victims had been taken into the custody of agents of the State in 1974 and subsequently disappeared during the conduct of military operations that were accompanied by arrests and killings on a large scale, there was a continuing violation of the procedural obligation to conduct an effective investigation of the nine victims that persisted until the present day; the Court had no jurisdiction over the violation of the substantive obligation and Turkey had only recognized the jurisdiction of the Court from 1990);<sup>456</sup> *Cyprus v Turkey* (where detained persons who disappeared might have been the victims of the most serious crimes including war crimes or crimes against humanity).<sup>457</sup>

#### **H. Pre-ECHR Deaths: *Janowiec***

- 4.36. What no Strasbourg case had previously done was to hold the Article 2 investigative duty as capable of applying where the death had preceded the ECHR itself. And of course, the domestic Court will not “march ahead” of Strasbourg on a question relating to jurisdiction. To apply Article 2 (and so the HRA s.6) to such a situation would take a decision from Strasbourg. That decision has just arrived, and no domestic authority stands in the way of this Court now following it.
- 4.37. The very recent case of *Janowiec v Russia* 16 April 2012 has removed the previous legal premise. It is a case involving a legal point which goes to the Court’s jurisdiction to apply the investigative obligation through the mechanism of the Human Rights Act. It has the legal consequence that the following short but compelling argument is now open to the claimants, which previously was not. The argument is one which no longer needs the entry-point of a customary international law obligation under *Trendtex*, as foreshadowed by Lord Steyn. It now carries the legal logic of the statutory protection of the Article 2 procedural obligation, by virtue of the ‘mirror’ application of the Human Rights Act.
- 4.38. The point is short and compelling. The case is so obviously relevant that it would be the duty of all parties to bring it to the attention of this Court. The argument which is now viable is clear and compelling and requires no further citation of authority. If there is a good answer to it, the Respondents will readily be able to identify it. The Court is therefore asked to allow the argument to be put (see Annex 4). It involves these points which would stand (if permitted) as new paragraphs in the grounds for judicial review:
- N1. The procedural duty arising under ECHR Article 2 can apply in a case, such as the present, where deaths preceded the ECHR itself. The principles which are applicable in such a case have also been articulated. See *Janowiec & ors v Russia*<sup>458</sup>, to which attention is invited. *Janowiec* concerned the Katyn massacre

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<sup>456</sup> Ibid. §§128, 133.

<sup>457</sup> (2002) 35 E.H.R.R. 30, §§133-136.

<sup>458</sup> App. Nos. 55508/07 and 29520/09, 16 April 2012.

of Polish nationals by Soviet forces in 1940. The Convention had been adopted only on 4 November 1950, and Russia had ratified it on 5 May 1998. Russia argued that the investigative obligation under Article 2 could not therefore apply (see §113).

- N2. Whether the Article 2 procedural obligation of an effective investigation (see §130) is capable of arising depends on the following (§132): (a) procedural acts and omissions which have occurred after the date of the entry into force of the ECHR with respect to the UK; (b) a genuine connection between the deaths and the entry into force of the ECHR with respect to the UK; and (c) a significant proportion of procedural steps which have been or ought to have been carried out after the entry into force of the ECHR with respect to the UK. The ECHR entered into force with respect to the UK on 3 September 1953. Factors (a) and (c) are each plainly satisfied in the present case. No “significant proportion” of investigative steps preceded, and “major procedural developments” postdated, the applicability of the ECHR in respect of the UK (cf. §138). Moreover, “information ... casting new light on the circumstances” had come into the public domain during the applicability to the UK of the ECHR, which could of itself revive the procedural obligation (§139).
- N3. As to factor (b), the genuine connection between deaths and the later entry into force of the ECHR is amply satisfied where the ECHR and its entry into force with respect to the UK followed, as did the Geneva Conventions, in close temporal proximity to these deaths and were, par excellence, intended to provide practical and effective human rights accountability, especially in the case of atrocities. There was here the “relatively short period of time” which satisfies the requisite “genuine connection” (see §135). There was nothing here approaching an “excessively long” period (§137). Further, the position would be strongly reinforced by the features of this case which call for the guarantees and underlying values of the Convention to be protected in a real and effective manner (§132). This is a case of multiple killings in circumstances indicative of war crimes (§133). It involves an “event ... of a larger dimension than an ordinary criminal offence and constitut[ing] a negation of the very foundations of the Convention” (§139).
- N4. In these circumstances: (a) the date of the killings themselves does not preclude the ongoing applicability of the investigative obligation in ECHR Article 2; (b) the UK authorities are in breach (and ongoing breach) of that ‘detachable’ and continuing Article 2 obligation; and (c) the Respondents have therefore failed to comply with their statutory human rights duty under section 6 of the Human Rights Act 1998. For these further reasons, which are linked to the customary international law and so common law duty on which the claimants rely, the Respondents have acted unlawfully and the Court is invited so to find.

## 5. CONCLUSION

- 5.1. For all the reasons set out in sections 3 and 4 above, the Court is respectfully invited to rule that the Defendants have acted unlawfully and to allow this claim for judicial review. This is a story, bursting to be told and acknowledged, awaiting its independent and public recognition, which has waited long enough.

*In December 1948, a group of unarmed and non-violent villagers, the permanent workers on a rubber plantation and their families, were separated and detained overnight by the British. The interrogation involved simulated executions. A villager was shot dead, and 'finished off' by a Lance Sergeant, his death intended to serve as a warning to the others to cooperate.*

*The women and children, and an older man who had collapsed under the British treatment of the detainees, were loaded onto a lorry to be removed. The village was suspected of being raided from time to time by armed bandits, stealing the villagers' emergency food rations, on information from a villager who was permitted to survive.*

*British soldiers knew that the villagers were not themselves armed bandits. Desiring to wipe out the village by burning it to the ground, and with the accompanying police officers and guides conveniently 'seeing no evil', the 24 male villagers, including the kepola who brought their food from the nearby town, were eliminated. They were the registered permanent workforce. At least 9 of them were in their 50s, at least 2 in their 60s, and one was aged 70. They were let out of the locked hut, under the supervision of the soldiers. And, a little way away from the huts, the British soldiers shot at them, until they were all dead. It was a mass, unjustified killing of innocent men.*

*The British military then paraded the story of a successful action to eliminate this large number of "bandits". Public announcements involving the Attorney-General and a statement to Parliament referred to an "enquiry", known not to be worth the name; said to justify complete satisfaction that the shooting was necessary action by (concealed) soldiers, to prevent an unwise mass escape attempt, when it was well known from the start that something wrong had happened. Soldiers collaborated in confirming the story. It became embellished by multiple references to shouted warnings, necessary to secure the veneer of lawfulness, and then only under a hastily introduced retrospective emergency regulation, appeared. The most basic and obvious investigative steps were ignored. The pleas of the bereaved families were ignored; their statements unheard.*

*When confessions of murder emerged in the 1970s, an investigation set to include witnesses in Malaysia and key witnesses in the UK was aborted through a post-Election liaison between the Attorney-General and the DPP; the suggestion of any broader non-criminal inquiry was ignored. When from the 1990s the victims' families petitioned for truth-seeking and an*

*acknowledgment of this grave injustice dishonouring the name of their loved ones, the issue was left unaddressed, the interest of the Malaysian authorities in cooperative investigation “steered” away, and justice denied.*

*Facing a robust legal challenge, with public interest public funding and the permission of the Administrative Court, the UK Government preferred to hold to the internal route of a Government-instructed barrister’s report on circumscribed questions and incomplete evidence, declined to withdraw the official account of the incident or provide any recognition or apology; and refused any kind of independent report or inquiry, ultimately on grounds that this was ‘water under the bridge’ and independent scrutiny would be ‘too expensive’.*

*The location which was once the village of Batang Kali – where the kongsi stood and the daily emergency food rations were delivered to the rubber plantation workers, where the 24 bullet-riddled bodies lay – there is no memorial. There is nothing, anywhere, which records a British acknowledgment of the military killing of innocent villagers, wrongly said to have been bandits. For there has been none.*

*The British executive arm chose a course of silence and inertia ...*

- 5.2. This case will shock the conscience of the Court. Happily, there is ample, in the context and the principles of public law, to justify the domestic public law Court in ensuring that this is a case in which the rule of law will not stay silent nor permit truth and accountability to remain concealed. And so, the story continues:

*... which the British judicial arm, applying those public law standards of accountability which ensure executive action be justified in the public interest and compatible with human rights standards, will not permit.*

The claim for judicial review must succeed.

MICHAEL FORDHAM QC

DANNY FRIEDMAN

PROFESSOR ZACHARY DOUGLAS

JOHN HALFORD

BINDMANS & PARTNERS

23 April 2012