

CHAPTER 10

WHETHER THE RIGHTS OF ANY PERSON OR PERSONS WERE VIOLATED IN ANY OF THE AFFECTED OR RELATED COMMUNITIES BY EITHER LAW ENFORCEMENT OFFICERS OR BY ANYONE ELSE AND, IF SO, WHOSE RIGHTS WERE VIOLATED, AND THE MANNER AND EXTENT OF SUCH VIOLATIONS, AND BY WHOM SUCH VIOLATIONS WERE PERPETRATED

ToR (J)

INTRODUCTION

10.1 Similar issues arise in this Chapter and Chapter 14 (dealing with the conduct of the security forces during May 2010). These issues are both of law and fact. We have therefore decided to discuss some of the issues of law in Part I of this Chapter in some detail to avoid repetition later. The issues of law involve consideration of the Constitution and the Emergency Powers Regulations (No.1) 2010 promulgated by the Governor-General under section 3 of the Emergency Powers Act.

10.2. Part 2 of this Chapter reviews the evidence of alleged violations of the Constitutional rights of the civilian witnesses who appeared before us. However, to the extent that we have previously given extensive treatment to the evidence of those witnesses in Chapters 8 and 9, our review of the evidence will be condensed substantially and limited to such facts as are material to an understanding and appreciation of the immediate issue.

PART 1

(A) *The Constitution*

10.3. In May 2010, Chapter III of the Constitution was in force. It made provision for the fundamental rights and freedoms of the individual. Chapter III has subsequently been repealed and replaced by the Charter of Rights.

10.4. Section 13 of Chapter III listed the fundamental rights and freedoms to which every person in Jamaica was entitled "whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest". The rights so listed were:

- "(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
- (b) freedom of conscience, of expression and of peaceful assembly and association; and
- (c) respect for his private and family life."

10.5. Section 13 stated thereafter that –

"the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

10.6. The rights listed in section 13 are not absolute. They are subject to limitations contained in the succeeding sections of the Chapter "being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest" (*supra*). Moreover, there may be derogation from the rights guaranteed in Chapter III by the operation of another law.

10.7. In this Chapter, we discuss the right to life and the right to liberty, including protection from arbitrary arrest or detention.

Section 14

Section 14 protected the right to life and enacted as follows:

“14-(1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case –

- i. for the defence of any person from violence or for the defence of property;
- ii. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- iii. for the purpose of suppressing a riot, insurrection or mutiny; or
- iv. in order lawfully to prevent the commission by that person of a criminal offence, or if he dies as a result of a lawful act of war.”

10.8 The right to life is breached only in cases where a person has been “intentionally” deprived of his life. Thus, in the context of the internal security operation, an accidental killing or a fatality occurring during cross-fire between gunmen and the security forces would not contravene the right to life. “Extra-judicial killings” are, however, at a different level. They are murders – intentional deprivation of life.

Section 15

10.9. Section 15 affords the individual protection from arbitrary arrest or detention. It provides in subsection (1) –

“15-(1) No person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law.”

10.10. Eleven situations (a) to (k) are then set out. Para.(f) states:

“upon reasonable suspicion of his having committed or of being about to commit a criminal offence...”

Specific provision is made at section 15(5) for a period of public emergency as follows:

“(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the taking during a period of public emergency of measure that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency.”

10.11. A “period of public emergency” is given a restricted definition by virtue of section 26(4). It means “any period during which –

- (a) Jamaica is engaged in any war; or
- (b) there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or
- (c) there is in force a resolution of each House supported by the votes of a majority of all the members of that House declaring that democratic institutions in Jamaica are threatened by subversion.”

Section 16

10.12. Section 16 protected freedom of movement. It provided –

“(1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Jamaica,

the right to reside in any part of Jamaica, the right to enter Jamaica and immunity from expulsion from Jamaica.

(2) Any restriction on a person's freedom of movement which is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

- (a) which is reasonably required in the interests of defence, public safety, public order, public morality or public health..."

Section 17

10.13. Section 17 afforded protection from inhuman treatment in these terms:

"17-(1) No person shall be subjected to torture or to inhuman or degrading punishment or treatment."

Section 19

10.14. Finally, section 19 protects the privacy of home and other property. The right is expressed thus at section 19(1):

"19-(1) Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises."

10.15. The derogation provision in section 19(2) states:

"(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required –

- (a) in the interests of defence, public safety, public order, public morality, public health, public revenue, town and country planning or the development

and utilisation of any property in such a manner as to promote the public benefit.....”

(B) The Emergency Powers Act

10.16. Section (3) of this Act makes it lawful for the Governor-General, during a period of public emergency, to make Regulations for securing the essentials of life to the community and to confer on persons in Her Majesty’s service, powers and duties, *inter alia*, for the preservation of the peace and for any other purposes essential to public safety and the life of the community.

10.17. A consequence of the Governor-General’s Proclamation of the State of Emergency (the period of public emergency) and the promulgation of the Public Emergency Regulations (No.1) on 23 May 2010 was that, from that date, some of the fundamental rights and freedoms guaranteed under Chapter III were curtailed or suspended for the duration of the State of Emergency.

(C) Emergency Powers Regulations (No.1) 2010

10.18. A copy of the Regulations is appended to this Report at Appendix 16. The Regulations gave extensive powers to the security forces to carry out a variety of activities which, but for the Regulations, might be inconsistent with or in contravention of Chapter III rights.

10.19. Broadly, the security forces were empowered to block roads, set up cordons, remove vehicles, require information if they considered it “necessary or expedient”. They had the power to prohibit assemblies if they suspected that persons had acted or were about to act in a manner “prejudicial to the public safety”. Curfews could be imposed where the security forces were “satisfied that it was reasonably required in the interest of defence, public safety, public order or public health”. The right to protection from search of the person or property was curtailed where the Regulations authorised the security forces “to search

vehicles, land or premises suspected of harbouring or containing persons suspected of having committed or about to commit an offence”; or where they suspected “that the vehicle was being used in a way prejudicial to public safety”. Further, the security forces were given specific power to arrest and detain a person without warrant on reasonable suspicion that the person was acting prejudicial to public safety or had committed or was about to commit an offence under the Regulations; and “to stop and search persons and seize anything found if [the security forces] had reason to suspect that it was being used or intended to be used for purposes prejudicial to public safety and order”.

10.20. The Regulations sought to afford protection to the security forces from litigation in respect of acts done in good faith by them during the State of Emergency.

10.21. Thus, Regulation 45(1) provided as follows:

“Subject to paragraph (2) no action, suit or prosecution or other proceeding shall be brought or instituted against any member of the security forces in respect of any act done in good faith during the emergency period in the exercise or purported exercise of his functions or for the public safety or restoration of order or preservation of the peace in any place or places within the island or otherwise in the public interest.”

Use of Force Policy – The JCF

10.22. In order to ensure that its members respected the human rights of individuals and used only that amount of force that was strictly necessary in a particular situation, the JCF published Force Orders on 27 September 2007 (Serial No.3147). The Orders are titled: “*Jamaica Constabulary Force Human Rights and Police Use of Force and Firearms Policy*”. Hereinafter referred to as “UFFP”, this document is at Appendix 17 of this Report.

10.23. Essentially, the UFFP requires members of the JCF to “use only that amount of force that is strictly necessary”, having regard to the particular circumstance, and to ensure that use of force is proportionate to the threat of harm. And, whenever members of the JCF use lawful force, they must –

- minimise any interference with human rights;
- exercise restraint in the use of force and act in proportion to the seriousness of the offence and the lawful objective to be achieved;
- minimise damage and injury;
- ensure that medical aid is secured for any person requiring it at the earliest opportunity.”

The UFFP seems to reflect some of the guidance provided in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

Chief of Defence Staff Instructions for Opening Fire – The JDF

10.24. These instructions, reproduced at Appendix 18, call for no more than necessary minimum force. A soldier is required to fire aimed shots at a person “committing or about to commit an act likely to endanger human life and there is no other way to prevent the danger” and “against a person attacking or destroying property or stealing firearms or explosives only if his action is likely to endanger human life”. A soldier should always try to employ alternatives to opening fire.

PART 2

10.25. In Chapter 9, we discussed and reported on certain civilians injuries and deaths. We turn now to a discussion of the constitutional issues which arise in respect of those persons and others whose rights may have been breached during the internal security operation. We have found the approach to these issues by the team of attorneys-at-law for the OPD in their written submissions

particularly helpful. We gratefully and respectfully adopt their general approach, omitting, however, a repetition of the evidence reviewed in Chapter 9.

Violations of the Right to Life – Evidence re Dead Bodies

10.26. In contextualising the violation of rights, it is convenient to proceed sector by sector and analyse the evidence on a daily basis. Thus, in sector 1, Maj. Cheverria twice assured us that by 3.25 p.m. on 24 May, he had secured that sector for which he and DSP Tabannah had command responsibility. His soldiers in Charlie Company were in control of the roofs of high-rise buildings and had begun the house clearing exercise. During the process of entering and securing the sector, Maj. Cheverria saw only two bodies “somewhere on Chang Avenue” and these bodies had lacerations to the throat and abdomen.

Lt. Col. Andrew Sewell

10.27. Lt. Col. Sewell, the Commander of 2JR, gave important evidence of his movements after entering Tivoli Gardens. He said that about 1.30 p.m. “we would have been able to manoeuvre our way around the community”. And by 2.30 p.m. he was “moving around the community”.

10.28. He said that by 4.00 p.m., his troops had completed the following tasks:

- physically secured the perimeter of Tivoli Gardens;
- dismantled all major barricades;
- dominated the sectors by occupying the roofs of high-rise buildings;
- established observation posts;
- searched buildings and open areas;
- established vehicular and personnel check points;
- established an operational headquarters for 2JR first at the Community Centre and, later, at a playing field.

10.29. His evidence was clear that "by 6.00 p.m. there was not a lot of hostility directed at the security forces". More to the point, Lt. Col. Sewell said that he visited all three sectors between 4.00 p.m. and 5.00 p.m. on 24 May and he saw no dead bodies. He was so satisfied with the pacification of the community within Tivoli Gardens that he was willing to have independent observers come into the area.

Maj. Marlon Kennedy

10.30. Alpha Company, led by Maj. Kennedy, was responsible for securing sector 2. He reached Tivoli Gardens High School around 2.00 p.m. and then moved into the community. About 4.35 p.m. all areas of sector 2 were secured. He saw no dead bodies on 24 May and, after 4.35 p.m., there was no more hostile fire on 24 and 25 May.

Capt. Garth Anderson

10.31. Capt. Anderson commanded Bravo Company of 2JR which was responsible for securing sector 3. He said that by 5.00 p.m. he was in control of the entire sector 3 but his troops were still faced with intermittent gunfire. He communicated with DSP Thomas (JCF) but the JCF did not enter until daybreak on 25 May. Capt. Anderson's men did house clearing exercises; he saw no dead bodies on 24 May and received no reports of dead bodies.

Maj. Kevron Henry

10.32. Bravo Company of 1JR under the command of Maj. Henry, was able to establish observation posts by 6.30 p.m. at various locations, having secured the two important and strategic high-rise buildings, Foxy's Plaza and PassaPassa Plaza at 4.40 p.m. and 4.43 p.m. respectively.

10.33. As reported elsewhere, Maj. Henry himself fired at an assumed gunman earlier in the day on 24 May while advancing through the area of

Coronation Market. He was unsure if he killed this person. However, by 25 May, there were 16 dead bodies within his area of operation. He was able to give this count from reports he received from his area (from Denham Town School to Oxford Mall). Included in the number of 16 were 2 bodies found in Coronation Market.

DSP Everton Tabannah

10.34. DSP Tabannah had 54 JCF officers under his command on 24 May. They were tasked to operate with Maj. Cheverria's troops in sector 1. The arrangement was that the soldiers would lead the operation, enter Tivoli Gardens, secure it and then call in DSP Tabannah's officers to do searches.

10.35. Serious discrepancies in the evidence of Maj. Cheverria and DSP Tabannah, required us to recall Maj. Cheverria on 19 February 2016 in an effort to clarify the discrepancies.

10.36. Below are some of the discrepancies between Maj. Cheverria and DSP Tabannah:

- (i) Whereas Maj. Cheverria said that he left for the area of operation at 12.25 p.m., DSP Tabannah's evidence is that Maj. Cheverria left about 2.15 p.m.
- (ii) Maj. Cheverria said that "immediately after securing the sector about 3.25 p.m.", he called DSP Tabannah on his mobile telephone about 4.00 p.m., told him the sector was safe and "the JCF began their searches". He went further and said in answer to a question from Mr. McBean:

"I called Tabannah and about 30 minutes later, he reported to me with other members of his team."

DSP Tabannah, on his part, said "we entered about 5:45 p.m."

- (iii) Whereas Maj. Cheverria saw two dead bodies in the sector, somewhere on Chang Avenue, DSP Tabannah testified that his men indicated to him that they saw two dead bodies as they entered Tivoli Gardens. "We did not get close to the bodies at that time because of the heavy gunfire."
- (iv) DSP Tabannah said that he did not think that the JDF was in control of the sector because of the heavy gunfire and "on what I saw they had not established a cordon". This evidence is in conflict with Maj. Cheverria's and, indeed, Lt. Col. Sewell's (*supra*).
- (v) In para.18 of his witness statement, Maj. Cheverria stated:

"At the end of the initial phase, members of the JCF then organised themselves into search teams and began conducting house-to-house searches of the area of operation."

10.37. DSP. Tabannah, in his evidence on 2 November 2015, described para.18 of Maj. Cheverria's witness statement as untrue. Maj. Cheverria insisted that his statement was true and explained that "the initial phase" ended about 3.30 p.m. and the JCF began searching about 4.00 p.m. He was confident of the timelines because it was "standard procedure before going on an operation" to have watches synchronised. Maj. Dixon told the Enquiry that he had synchronised the watches of all the commanders on the morning of 24 May.

DSP Warren Turner

10.38. DSP Turner was the JCF counterpart of Maj. Kennedy. There were material discrepancies in the evidence of these two witnesses. – see (i) to (iii) *infra*.

(i) Maj. Kennedy testified on 23 October 2015:

“We secured the sector about 4.35 p.m. I called the JCF to enter the sector and they came.”

10.39. On the other hand, DSP Turner testified that it was –

“about 8.05 p.m. that Kennedy called me on my cell phone and told me I can move my men into Tivoli Gardens now. I got no call from him until 8.05 p.m. I made a note in my notebook. I arrived inside Tivoli Gardens at 8.20 p.m. and I had no resistance moving in.”

10.40 A page from DSP Turner’s notebook (Ex WT2), was produced in evidence and we observed a notation of “8.20 p.m., a date of “23-5-10” and no notation of “8.05 p.m.”.

(ii) Whereas Maj. Kennedy said that “the police came and established check points in and around the sector about 5.00 p.m., DSP Turner’s evidence on the same matter is that “on 24 May, my men did not put vehicle check points around the sector in the evening”.

(iii) Maj. Kennedy did not recall telling DSP Turner that there were two dead bodies in the sector: one on the bottom floor of Building #26 and the other on the top floor of Building #27. He was explicit:

“I did not speak with anyone about bodies in buildings. I can’t recall telling Turner that one man was neutralised. If I were aware, I would have reported it.”

10.41. DSP Turner’s evidence is that, between 7.00 a.m. and 8.00 a.m. on 25 May, he contacted Maj. Kennedy who told him that –

“there were two dead bodies, one on the top floor of Building #27, McKenzie Drive and the other on the ground

floor of Building #26 McKenzie Drive. The area is known as "Belgium". Maj. Kennedy said there was a confrontation between soldiers and gunmen and one man was neutralised. He said that members of the JCF had neutralised the person in Building #26. When my men went, they did not see the bodies. I saw a male body lying down at the intersection of Chang Avenue and Wilton Hill Drive. I told SSP Graham what I saw."

DSP Turner subsequently corrected his evidence to indicate that the intersection was "Wilton Hill Drive and Bustamante Highway" not Chang Avenue.

10.42. No evidence was adduced to explain why the JCF officers assigned to sector 3 did not enter Tivoli Gardens until early on the morning of 25 May. The Commission was informed that DSP Thomas had "long retired" and could not be contacted to give evidence.

Collection of Bodies

10.43. Evidence relating to the collection of bodies is of some assistance in the determination of the number of fatalities suffered during or as a result of the internal security operation.

DSP Tabannah

10.44. DSP Tabannah said that, about 10 to 15 minutes after being told of the two bodies near the clinic, he called Sgt. Steve Waugh and instructed him to collect the bodies. Some of DSP Tabannah's officers brought the bodies to a truck driven by Sgt. Waugh. DSP Tabannah looked at the bodies and saw what appeared to be gunshot wounds. He said that Supt. Winchroy Budhoo had also been in communication with him and had told him of reports of the bodies being seen. Sgt. Waugh was instructed to take the bodies to KPH and he left with members of the search team for KPH.

10.45. DSP Tabannah testified that, about 25 minutes later, Sgt. Waugh called him to say that he had taken the bodies to KPH, they were pronounced dead by doctors and he was on his way to Madden's Funeral Home (Madden's) with them but he met gunfire on North Street from the direction of Hannah Town and was obliged to divert from going to Madden's. DSP Tabannah told him to return to the High School with the bodies. He did so and the bodies remained in the truck during the night of 24 May.

Sgt. Steve Waugh

24 May

10.46. This witness said that he was called by Supt. Budhoo and instructed to go into the community of Tivoli Gardens "to retrieve some bodies". He told DSP Tabannah who advised him to "wait until it was safe". He eventually received a call from DSP Tabannah about 6.30 p.m. about the bodies near the clinic. Cons. Maxwell was in the truck with him. They took the two bodies to KPH on 24 May and "doctors pronounced them dead". Maxwell made a record.

10.47. Sgt. Waugh continued his evidence-in-chief:

"We were to take them to Madden's Funeral Home. At North Street, I heard gunshots from Hannah Town side. I told Maxwell to call DSP Tabannah and he said to come back to base. I went to Tivoli High School."

25 May

10.48. With respect to his activities on 25 May, Sgt. Waugh's evidence is that, about 5.30 a.m., he was told to take the bodies to Madden's accompanied by an armoured vehicle. He took the bodies to Madden's and returned to the High School.

10.49. SSP Donovan Graham called and reported that a number of bodies were seen in Tivoli Gardens. He told Sgt. Waugh: "Go and see what you can do". DSP Tabannah then instructed Sgt. Waugh "to carry out the instructions". About five members of the search team accompanied him. Cons. Maxwell was NOT with him. Sgt. Waugh said he was not told where to look for bodies. He could not recall where he went but he recovered bodies "by barricades and sandbags and on roadways". It was about 8.00 a.m. that he started retrieving bodies. He started "in the Java area". On Bustamante Highway, he collected about 5 bodies by the barricades and sandbags.

10.50. On 25 May, Sgt. Waugh "picked up 12 bodies", took them to KPH where they were pronounced dead by doctors and then he "took all to Madden's". While picking up bodies in Tivoli Gardens, Sgt. Waugh saw no members of the JCF under fire. He made one trip to KPH.

10.51. Sgt. Waugh said that there was no one with him making notes of the locations of bodies. He only knew the name of one road in Tivoli Gardens – Bustamante Highway. He said – "I made mental notes of the locations". He and Sgt. Mario Pratt, who also collected bodies, did not coordinate their activities and they never "crossed each other".

Sgt. Mario Pratt

24 May

10.52. Sgt. Pratt testified that, while he was at the waterfront on 24 May, about 5.00 p.m. he got instructions from DSP Tabannah to begin to go towards Tivoli Gardens. On reaching the train line near Industrial Terrace, the team of JCF officers came under heavy gunfire from the bushes near Seprod and had to take defensive action. The gunfire lasted about 5 minutes after which they went to the Tivoli Gardens High School instead of the community itself. In the vicinity of the clinic, he saw two bodies on the road. They could not be retrieved

because of shooting. The JCF officers took cover and were “pinned down for about 4 minutes”. He subsequently saw the two bodies put on Waugh’s truck. He also saw some of his team clearing a pathway but not engaged in detailed searches before 7.30 p.m.

25 May

10.53. On 25 May, about 7.30 a.m. he drove a truck into the community on the instructions of SSP Graham and DSP Tabannah. Cons. Maxwell went in the truck with him along with about 6 other policemen. He said that he was instructed by Supt. Budhoo “to roam through the community” and he did so. He also went to Denham Town. He said of his collections:

“We found some bodies on the roads and on pathways. Maxwell recorded the locations. I do not know the names of locations. I picked up 13 bodies. At KPH the doctors pronounced all dead. Maxwell made a record. I took the bodies to Madden’s.”

10.54. Sgt. Pratt confirmed that he and Sgt. Waugh did not coordinate their movements. He said that Cons. Maxwell was writing and trying to ascertain the identities of bodies from civilians, mostly women. He (Pratt) retrieved bodies from sidewalks or pathways.

Records of KPH

24 May

10.55. The records of KPH, produced by Dr. Natalie Whyllie, made no mention of two bodies being brought by anyone, far less Sgt. Waugh, and pronounced dead by doctors on 24 May. DSP Tabannah, in answer to Miss Martin, explained that it was necessary to have a pronouncement from a doctor before taking a body to a funeral home. He said “doctors don’t keep them (bodies) there” (KPH). “The doctors will tell them to take them (bodies) to Madden’s”.

25 May

10.56. The records for 25 May reveal that, at 8.44 a.m., 26 males were brought by Insp. K. Brown and Sgt. M. Pratt, said to have been from Tivoli Gardens. They were brought in two trucks. At 11.00 a.m. one body, a male from Tivoli Gardens, was brought by the police. At 2.35 p.m., a police truck escorted by officers from Mobile Reserve – DSP Tabannah – brought 12 bodies. At 3.20 p.m. one body was brought in from Orange Street. At 4.40 p.m. Sgt. Smith of Mobile Reserve brought a male from Tivoli Gardens with multiple gunshot wounds. At 7.30 p.m. there is a record of 11 male bodies picked up in the Coronation Market and Oxford Street areas.

26 May

10.57. On 26 May, there is a record of 6 bodies brought to KPH between 11.20 a.m. and 1.30 p.m. Four of these, we were told, were outside the area of operation.

FINDINGS

10.58. We have given our reasons in Chapter 9 for concluding that a number of persons were probably killed by members of the security forces. However, we wish to state in this Chapter, that we were not persuaded or impressed by the evidence of DSP Tabannah, DSP Turner or Sgt. Waugh and Sgt. Pratt.

DSP Tabannah

10.59. In the case of DSP Tabannah, we prefer the timelines given by Maj. Cheverria who testified that his watch was synchronised in accordance with standard military procedure prior to embarking on the operation. We believe that DSP Tabannah did report to Maj. Cheverria when the latter called him about 4.00 p.m. to come into the sector

which had been secured at 3.25 p.m. We find it passing strange that Maj. Kennedy walked through sector 2 and saw no dead bodies yet DSP Tabannah claimed to have seen two bodies.

10.60. DSP Tabannah's evidence did not inspire confidence in us when juxtaposed with the records of KPH. He never told us that he delivered 12 bodies to KPH on 25 May, yet the records of the hospital show that he did go there with 12 bodies on that day. Further, both DSP Tabannah and Sgt. Waugh are contradicted by the records of KPH to the extent that they both testified of two bodies being taken to the hospital in the evening of 24 May and being pronounced dead by doctors. There is no record at the hospital supporting that evidence. In fact, we doubt that two bodies were in fact taken to KPH on 24 May. We disbelieve DSP Tabannah that the JDF was not in control of sector 1 because of heavy gunfire. Maj. Cheverria's testimony is that the sector was safe and there was no hostile gunfire. We also disbelieve DSP Tabannah's evidence that he was "pinned down for 2 hours" near the train line/intersection of Industrial Terrace and Marcus Garvey Drive. That evidence is in conflict with the evidence of Sgt. Pratt who said the team was "pinned down" for 4 minutes and that of Sgt. Waugh who put the length of time as 10 to 15 minutes. Finally, whereas the evidence of Sgts. Pratt and Waugh is that they collected 25 bodies, DSP Tabannah's evidence under cross-examination by Mr. Panton, is that they collected 27 bodies. Quite simply, there are too many important and unexplained discrepancies in DSP Tabannah's evidence to render it credible.

DSP Turner

10.61. We also find that material discrepancies between the evidence of DSP Turner and that of Maj. Kennedy render Supt. Turner's

evidence untrustworthy. We accept Maj. Kennedy's evidence that he secured the sector about 4.35 p.m., "called the JCF (i.e. DSP Turner) and they came". We do not believe that Supt. Turner went into the sector almost 4 hours later at 8.20 p.m. after being called by Maj. Kennedy at 8.05 p.m. All the sectors had been pacified by 6.00 p.m. at the latest. What was DSP Turner doing for another 2½ hours? He never communicated with Maj. Kennedy that he was in any difficulty such as would have prevented him from entering the sector.

10.62. Moreover, we find that checkpoints were established in and around the sector about 5.00 p.m. It does not accord with commonsense or the exercise of power given to the police under the Emergency Powers Regulations that check points should not have been established as soon as the sector was under control. DSP Turner tried to make us believe that, for the whole of the evening of 24 May, he took no steps to establish check points in sector 2. The production of a page from DSP Turner's notebook only served to cast further doubt on his credibility. The date of the entry "8.20 p.m." is shown as 23 May 2010. The date of the operation was 24 May 2010. We also find it hard to accept the evidence of DSP Turner referred to at para.10.41. We are forced to ask the question: Why would Maj. Kennedy report seeing two dead bodies in buildings on McKenzie Drive when, according to DSP Turner, his men went to the locations and saw no bodies?

Sgt. Waugh

10.63. The manner in which dead bodies were collected and transported to KPH does not reflect well on Sgt. Waugh and Sgt. Pratt. According to them, they drove around randomly on 25 May. Neither knew where the other was. Both claimed ignorance of the roads in

Tivoli Gardens. Both attributed the task of record keeping to Cons. Maxwell who died in October 2010 as a result of a vehicular accident. And DSP Tabannah made no effort to retrieve Maxwell's alleged notes immediately after the operation or at all.

10.64. Sgt. Waugh's evidence that he went twice to KPH with bodies which were pronounced dead by doctors at the hospital is not supported by the records of that institution. The records of KPH, produced by Dr. Natalie Whyllie, show that no two bodies were brought to the hospital on 24 May and there is no record of Sgt. Waugh's name on the documentation of KPH.

10.65. Moreover, Sgt. Waugh's evidence that most of the bodies were found near barricades and sandbags does not sit comfortably with other evidence. If any of the civilians had been killed near barricades or sandbags on 24 May, surely the military commanders of the relevant sectors should have seen those bodies. But except for Maj. Cheverria who saw two bodies, none of the other commanders saw any bodies in Tivoli Gardens on 24 May. And these observations were made after the JDF took control of the sectors and houses had been cleared.

10.66. It is beyond belief that those military commanders would have invited the Supts. to move their officers into "a hot zone".

10.67. In preferring and accepting the evidence of Maj. Cheverria and Maj. Kennedy, we are mindful of the undisputed evidence that their troops' tasks were to enter Tivoli Gardens first, secure the sectors and then invite the JCF to enter and conduct searches and other tasks appropriate for the civil power. The safety and security of a sector were matters for the judgment of the JDF sector commanders who

entered a sector first. When they determined that a sector was safe and secure, it was up to them to invite the JCF in. We therefore believe Maj. Cheverria and Kennedy that they invited DSPs Tabannah and Turner to enter the sectors at the times stated by the Major when the sectors were dominated by the JDF and made safe.

10.68. In the result, we have concluded that it would be dangerous to rely on the evidence of DSP Tabannah, DSP Turner, Sgt. Waugh and Sgt. Pratt.

Adverse Comments re: DSP Everton Tabannah

10.69. On 21 March 2016 and on 13 April 2016, the Commission referred drafts of paras.10.58 to 10.68 and 10.115, 11.117 (formerly 10.73 and 11.103) and 14.139 below respectively to DSP Everton Tabannah as “proposed adverse comments” for his response thereto in accordance with the provisions of the 2013 amendments to the Commissions of Enquiry Act. We received DSP Tabannah’s written responses on 5 April 2016 and 27 April 2016. They appear at Appendix AC5A and AC5B to this Report.

Summary of Response by DSP Tabannah

10.70. The following is a summary of DSP Tabannah’s responses and our comments and findings.

Re: Para.10.59 – Summary of Response by DSP Tabannah

- (i) The sector could not have been secure since persons were still firing at civilians and security forces personnel within the sector. Gunfire continued until 6.00 a.m. on 25 May.
- (ii) DSP Tabannah saw 2 dead bodies in sector 1 and Maj. Cheverria was not in his presence.

- (iii) The Commission disregarded video tape evidence showing heavy gunfire about 6.00 p.m. on 24 May at Foxy's Plaza and coming from the direction of Tivoli Gardens.
- (iv) Insp. Linroy Edwards said that he did not see DSP Tabannah or any police officers around 4.00 p.m. Maj. Mahatma Williams also gave similar evidence.

Commission's Comments and Findings

10.71. The Commission acknowledges that there were two errors in the penultimate line of the draft of para.10.59, viz. "Cheverria" and "sector 1". Accordingly, having re-considered the draft and, having regard to the evidence of Maj. Kennedy reviewed at para.10.30, we have deleted the words "Cheverria" and "sector 1" and substituted therefor the words "Kennedy" and "sector 2".

10.72. With respect to gunfire from Tivoli Gardens towards Foxy's Plaza about 6.00 p.m., we took into account the video evidence shown to the Commission. More especially, we took into account the oral evidence of Maj. Henry that about 4.40 p.m. (not 6.00 p.m.) he and his team had secured Foxy's Plaza - see Chapter 4.86. To the extent that Maj. Henry's evidence of the time of securing Foxy's Plaza was not challenged by any Counsel and, accepting that his watch was synchronised with Maj. Dixon's, we accept the time of 4.40 p.m. In any event, the video tape evidence did not suggest that gunfire was emanating from within DSP Tabannah's sector.

10.73. Insp. Edwards' and Maj. Williams' evidence, to the effect that they did not see DSP Tabannah or any police officers when they entered Java, does not lead to a necessary conclusion that DSP Tabannah and police officers were not in sector 1 at the time. It could

easily have been that they were in different parts of the sector at the time. Indeed Insp. Edwards' evidence is also to the effect that, when he disembarked the APC, he went towards Coke's premises, leaving police officers behind for whose movements he could not account. It is also worthy of comment that Insp. Linroy Edwards' evidence in his witness statement is that, about 3.00 p.m. Maj. Williams was already inside Tivoli Gardens and called him to say that he (Edwards) should go to a house on Chang Avenue. He disembarked from the APC and went in search of Coke. He did not find him and he returned to the APC, spoke to CoP Ellington and remained until about 4.00 p.m. before leaving that area. In our judgment, that evidence suggests strongly that the community of Tivoli Gardens was reasonably safe by 4.00 p.m. and it supports the testimony of Lt. Col. Sewell and Maj. Cheverria as to the pacification of the community about that time. Insp. Edwards' timelines contrast sharply with those given by DSP Tabannah.

Re: Para.10.60 – Summary of Response by DSP Tabannah

- 10.74.
- (i) At no time did he personally go to KPH and deliver any bodies.
 - (ii) Sgt. Waugh told him that two bodies were transported to KPH in the evening of 24 May and he had no reason to disbelieve Sgt. Waugh.
 - (iii) The fact that records of KPH do not reflect that two bodies were carried there on 24 May cannot determine the truthfulness of Sgt. Waugh and himself.
 - (iv) The Commission misunderstood his evidence and that of Sgts. Waugh and Pratt concerning the length of time that he was pinned down by hostile fire near the intersection.
 - (v) It is clear from Sgt. Waugh's evidence that he collected 2 bodies from Tivoli Gardens on 24 May and a further 25

bodies were collected on 25 May. Therefore Sgts. Waugh and Pratt collected a total of 27 bodies.

Commission's Comments and Findings

10.75. In the course of his evidence to the Enquiry, ACP Granville Gause said that whenever a vehicle enters KPH and University Hospital with injured or deceased persons, a record is made "of the number of the vehicle, sometimes the person who drives the vehicle. There are records at KPH as to who would have been bringing in bodies." It is our view, as the tribunal determining the facts, that where documentary evidence conflicts with oral evidence on the same point, it is preferable to rely on the evidence in the document.

10.76. It is remarkable that the records of KPH do not show that Sgt. Waugh brought 2 dead bodies to KPH on 24 May. The records show two different instances where one body was brought to KPH on 24 May. At 4.08 a.m. one body was brought to the hospital and at 3.40 p.m. another was brought. At these times Sgt. Waugh had not even started to collect any bodies. The records for succeeding days contain evidence of the number of bodies and the person or persons bringing the bodies to that hospital. We do not accept that, KPH, well-knowing what was happening in West Kingston on 24 May, omitted to record crucial evidence of dead bodies brought to the hospital and by whom.

10.77. But that is not the end of the matter. Twice during his evidence on 4 June 2015, SSP Donovan Graham said that, on the evening of 24 May, DSP Tabannah reported to Supt. Budhoo that there were 3 bodies "and he was instructed to have them removed". Then SSP Graham said this:

“They were removed but they did not reach the hospital because they came under gunfire at North Street and had to retreat to Tivoli Gardens High School and overnight before they were taken to the hospital on the 25th.”

10.78. He had earlier said in reference to Sgt. Waugh and his team:

“And on the first day when they were heading to KPH, they came under severe and intense gunfire; they had to retreat.”

10.79. Plainly, SSP Graham’s evidence is that Sgt. Waugh did not reach KPH with the bodies to have them pronounced dead. Thus, there could be no record at KPH. SSP Graham’s evidence, taken together with the records of KPH, enables us to find that Sgt. Waugh took no bodies to KPH on 24 May and his evidence to the contrary and reported to DSP Tabannah is false. Similarly, we disbelieve DSP Tabannah that he did not take 12 bodies to KPH on 25 May as shown on the records of the hospital. Further confusion appears in the evidence of the JCF officers since SSP Graham referred to 3 dead bodies twice whereas DSP Tabannah and Sgt. Waugh spoke of two.

10.80. There is no arithmetical error on our part when scepticism is accorded to the figure of 27 bodies. Quite simply, we have discounted the two bodies referred to by DSP Tabannah and Sgt. Waugh in respect of 24 May. We accept that Sgt. Waugh and Sgt. Pratt collected bodies on 25 May but we have a lurking doubt about the actual number of bodies collected. Sgts. Waugh and Pratt testified that they collected 25 bodies but the records of KPH reveal that 26 bodies (not 25) were brought in police trucks on 25 May.

Re: Para.10.63 – Summary of Response by DSP Tabannah

- 10.81. (i) The records were handed over to police personnel at the Command Post by Cons. Maxwell.
- (ii) When DSP Tabannah testified, he made it clear that the records relating to the collection of bodies were never in his possession.
- (iii) He was under no duty to retrieve or obtain records collated by Cons. Maxwell.
- (iv) The Commission should have summoned the records and it is strange that the JDF was not asked to produce records concerning the handling of bodies.

Commission's Comments and Findings

10.82. If it is true that Cons. Maxwell's notes were handed over to personnel at the Command Post, it is indeed strange that they were not located during the Enquiry or at any time before. ACP Gause testified that he gave instructions to locate documentary evidence of where bodies were found. But he told the Commission –

"For the 5 months, between May and October 2010, I did not have any documentary evidence showing where bodies were found, on what date or whether anything illegal was found near the bodies."

10.83. And, as reported elsewhere in this Report, ACP Gause gave evidence that the duty to insist that Cons. Maxwell's notes be made available to BSI as soon as possible after 24 May, "could very well be the responsibility of Maxwell's commanding officer, more so the SO i/c." In light of ACP Gause's reference to "Commanding Officer", it seems to us that it was DCP Tabannah's responsibility to recover Cons. Maxwell's notes.

10.84. Finally, we wish to emphasise that, during the Enquiry, no issue was raised that the JDF did not produce records of the locations of bodies. Counsel for the JCF did not put in issue to the witnesses of the JDF that they made no record of locations of bodies. As we understood the evidence, Lt. Col. Ogilvie testified as to the recovery of bodies and their transportation to KPH and later to the funeral home. On 22 October 2015, Lt. Col. Ogilvie testified that he was clear that dead bodies “were to be notified to the JCF”.

10.85. In para.53 of his witness statement, Lt. Col. Ogilvie stated that by 26 May, “after the shooting had subsided, all the bodies that were in the area of operation had been removed to the funeral parlour”. Under cross-examination by Mr. McBean, Lt. Col. Ogilvie said:

“By the end of 25 May, I had reports of 16 bodies within 1JR’s area of operation. They were removed on 26 May, I was pressing for them to be removed on 25th. But on that day there was still gunfire in Hannah Town and Denham Town. The bodies were removed by the funeral parlour. I was not satisfied with the pace of removal. At the area of Regent Street and North Street, I saw a dog going to smell a body and I instructed that a truck be gotten to drive around, collect bodies and take them to Madden’s. By mid-afternoon, no bodies were in the area. Madden’s were working with the JCF. Where the bodies were found, were not marked or delineated as crime scenes.”

10.86. Ms. Martin’s brief cross-examination of Lt. Col. Ogilvie did not explore the evidence elicited by Mr. McBean to raise any issue as to the propriety of the JDF’s conduct in this matter. However, it seems to us that there was a lack of proper coordination between the two branches of the security forces in respect of the recording of information about dead bodies and the demarcation of possible crime

scenes. We ascribe no adverse comment to Lt. Col. Ogilvie who, we think, did his best in the circumstances.

10.87. In the circumstances, the Commission sees no reason to alter its findings and comments about DSP Tabannah, save for the typographical errors referred to above. Accordingly, for all the reasons stated originally at paras.10.59, 10.60 and 10.63 as well as in this section of the Report, the Commission stands by its adverse findings and comments.

Adverse Comments re: Sgt. Steve Waugh

10.88. On 22 March 2016, the Commission referred drafts of paras.10.58 to 10.68 as “proposed adverse comments” to Sgt. Steve Waugh for his response thereto in accordance with the provision of the 2013 amendments to the Commissions of Enquiry Act. We received his response dated 5 April 2016. It appears at Appendix AC6 to this Report.

Summary of Response by Sgt. Steve Waugh

- (i) The Commission does not appreciate that the function of driving was separate from that of note-taking.
- (ii) We placed undue emphasis on his lack of knowledge of the names of roads. He had never gone to Tivoli Gardens before and was not familiar with the names of roads.
- (iii) He stands by his testimony that “he brought bodies to KPH that were pronounced dead by doctors”.
- (iv) He accuses us of seeking to “malign his character” and “distort the evidence to achieve a desired result”.
- (v) We have shown deference to the JDF. Lt. Col. Ogilvie was not “vilified” in the same way as JCF officers who removed the bodies.

- (vi) He refers to the errors in para.10.59 in respect of the words "Cheverria" and "sector 1" and the video tape evidence referred to by DSP Tabannah.

Commission's Comments and Findings

10.89. We are bound to say that we find Sgt. Waugh's response to be insulting, rude and unworthy of a police officer participating in a judicial or quasi-judicial Enquiry. We do not take kindly to accusations of bias, partiality and vitriolic effusions.

10.90. It is explicit in para.10.63 that we appreciated that Sgt. Waugh drove the truck and Cons. Maxwell made notes. Although we accept that Sgt. Waugh may have been unfamiliar with the names of roads in Tivoli Gardens, since 24 May was the first day that he visited that area, we find it to be bordering on the incredulous that he could effectively make "mental notes" of the several places where he drove and where bodies were located.

10.91. We do not dispute his carefully worded response that he "brought bodies to KPH that were pronounced dead by doctors". The issue that goes to the heart of Sgt. Waugh's credibility is 'when' did he take bodies. His evidence was that he took 2 bodies on 24 May and they were pronounced dead by doctors at KPH. This evidence is contradicted by the documentary records of the hospital. It is also contradicted by SSP Graham who testified that Sgt. Waugh never reached KPH. How then could doctors pronounce dead, 2 persons whom they did not see? We need not reiterate the evidence of ACP Gause (cited at para.10.75) of the procedures used by KPH in relation to injured or deceased persons being brought to the hospital.

10.92. With respect, in the face of the evidence of ACP Gause and SSP Graham, Sgt. Waugh's evidence was discredited. That is a finding which we, as the tribunal of fact, are entitled to make upon an evaluation of the totality of the evidence. And we so make that finding. It requires no distortion of the evidence to assert the falsity of Sgt. Waugh's testimony. The evidence speaks for itself.

10.93. So far as Sgt. Waugh's response alludes to our refusal to "vilify" Lt. Col. Ogilvie, we have set out Lt. Col. Ogilvie's evidence in relation to the collection and disposal of bodies by the JDF. We pointed out that Lt. Col. Ogilvie's evidence was not disputed or criticised by Counsel for the JCF. His evidence raised no issue as to his credibility. The responsibility for securing information concerning dead bodies recovered by the JDF rested squarely on the JCF who, as the civil power, was under a duty to investigate those deaths.

10.94. We expect, as happened, that those against whom adverse findings were proposed, would insist that they spoke the truth during the Enquiry. Notwithstanding such insistence, however, it is entirely a matter for us, as Commissioners, to determine whether they in fact spoke the truth.

Adverse Comments re: DSP Warren Turner

10.95. On 21 March 2016 and 13 April 2016, the Commission referred drafts of paras.10.58 to 10.68 and 10.115 (formerly 10.73) and 11.107 (formerly 11.103) as "proposed adverse comments" to DSP Warren Turner for his response thereto in accordance with the provisions of the 2013 amendments to the Commissions of Enquiry Act. We received DSP Turner's written responses dated 5 April 2016 and 27 April 2016. They appear as Appendix AC7A and AC7B to this Report.

Summary of Response by DSP Turner

10.96. The following is a summary of DSP Turner's response:

- (i) There is a strong imputation of bad faith ascribed to the JDF namely, that the officers of that Force tailored their statements after seeing the witness statements of the JCF officers.
- (ii) The Commissioners are accused of "maligning" JCF officers and DSP Turner "whenever desirable".
- (iii) The Commissioners unfairly target the JCF officers for unfavourable comment.
- (iv) There are references to statements of persons not called as witnesses.
- (v) The Commissioners do not understand the state of affairs that existed in West Kingston at the time of the State of Emergency.
- (vi) "The JCF were not the bad guys".

Commission's Comments and Findings

10.97. Much of DSP Turner's response was premised on an assumption that the references to "Cheverria" and "sector 1" in para.10.59 were correct. As we have pointed out above, those references were erroneous and have been corrected in the final draft of this Report.

10.98. To the suggestion that JDF officers may have tailored their witness statements after sight of those of JCF members, we can only respond by stressing that at no time was it suggested to witnesses of the JDF by Counsel for the JCF that such "doctoring" of evidence

occurred. In the circumstances, the suggestion and imputation are baseless and, indeed unfortunate and unbecoming of DSP Turner.

10.99. There is no merit whatsoever in the allegation that the tone of the Notice was "speculative" in that it sought "to malign" JCF officers. The contents of the Notice faithfully followed the requirements of the 2013 amendments to the Act. We append as Appendix AC7C, a copy of the Notice sent to DSP Turner.

10.100. We deprecate the reference to and identification of other officers of the JCF who were not called as witnesses. Those persons were available to be called by the JCF if it was considered that they were in possession of important evidence. It was never represented to the Commission that these persons be called as witnesses, even after DSP Turner gave evidence and certain issues became live as a result thereof.

10.101. We also deprecate the accusations that we had any ulterior motive in the text of the proposed adverse comments or at all. It is a very tenuous response to level accusations of bias or improper motive against the Commissioners.

10.102. We make no comment on the specific observation addressed to the Chairman that "the JCF were not the bad guys". It is a matter of regret that DSP Turner did not identify "the bad guys" when he testified. It would have been of inestimable assistance to the Commission.

10.103. In all the circumstances, we stand by our original findings in respect of DSP Turner.

Adverse Comments re: Sgt. Mario Pratt

10.104. On 21 March 2016, the Commission referred drafts of paras.10.58 to 10.68 as “proposed adverse comments” to Sgt. Mario Pratt for his response thereto in accordance with the provisions of the 2013 amendments to the Commissions of Enquiry Act. Sgt. Pratt responded on 5 April 2016. His response appears at Appendix AC8 of this Report.

Summary of Response by Sgt. Pratt

- 10.105. (i) It is unreasonable to take issue with his credibility while finding witnesses for the JDF credible.
- (ii) He had not gone to Tivoli Gardens before 24 May and was unfamiliar with the area.
- (iii) He saw Cons. Maxwell making notes on 25 May. 27 bodies were collected.
- (iv) Based on the operational plan, more could have been done by persons responsible for investigations.
- (v) The fact that the records of KPH do not show that 2 bodies were taken there on 24 May, cannot determine the credibility of DSP Tabannah and Sgt. Waugh. He (Sgt. Pratt) was not served with a copy of the KPH records.
- (vi) We have disregarded his testimony because we failed to assess the evidence properly.
- (vii) The team of which he was a part came under sustained gunfire for 2 hours.

Commission’s Comments and Findings

10.106. There is nothing in Sgt. Pratt’s response that persuades us to change our findings. Sgt. Pratt persists in the belief that Sgt. Waugh’s oral evidence of taking 2 bodies to KPH on 24 May and

having them pronounced dead by doctors is preferable to the documentary evidence of the hospital itself. We reiterate that the oral evidence of ACP Gause as to the practice of the hospital, the oral evidence of SSP Graham that Sgt. Waugh did not reach the hospital and the documentary evidence of KPH all weigh heavily in favour of a finding that Sgt. Waugh did not go to KPH on 24 May. To the extent that Sgt. Pratt impliedly supports Sgt. Waugh's evidence, we find that the evidence of those two officers was untrue.

10.107. Turning next to the manner in which Sgt. Pratt carried out instructions to collect dead bodies on 25 May, it was his evidence that he was told by SSP Budhoo to "roam the community". He says that he was unfamiliar with Tivoli Gardens. It was his first visit to that community. Yet, he did not seek to coordinate his task with Sgt. Waugh. It seems to us that his approach to these duties was loose, uncoordinated, haphazard and unprofessional. The collection of dead bodies was an important and serious duty. Since Sgt. Pratt was not familiar with the area, it was incumbent upon him to exercise care and diligence in the execution of his tasks.

10.108. We are perplexed by Sgt. Pratt's response that he and the members of his team came under sustained gunfire for 2 hours, that is to say, covering "the moment of entry into Tivoli Gardens to the point when 2 bodies were retrieved on 24 May 2010" (per his response). We cannot find anywhere in a review of Sgt. Pratt's evidence that he gave such evidence. He clearly said that the team was "pinned down for 5 minutes" near the train line by the intersection of Industrial Terrace and Marcus Garvey Drive. Later in his evidence-in-chief, he gave evidence to the effect that when some of his team attempted to retrieve 2 bodies, they were prevented from doing so by shooting. He

thought that they were being shot at but he could not identify the shooters. Then he said –

**“We took cover by a building and did not return fire.
We were pinned there for about 4 minutes.”**

10.109. In answer to Mr. Terrence Williams, Sgt. Pratt spoke of making two entries into Tivoli Gardens. He said that his team’s first entry was for 6 or 7 minutes. His team’s second entry was “from about 5.30 p.m. to 7.30 p.m.”. He confirmed that it was during his first entry that they were pinned down for about 4 minutes. As to the second entry, Sgt. Pratt testified that “the second time that we entered, *we did not come under fire*”. It is therefore clear from his evidence that the team was NOT pinned down during the two hour period, viz. 5.30 p.m. to 7.30 p.m.

10.110. Discrepancies such as those among DSP Tabannah, Sgt. Waugh and Sgt. Pratt infect their evidence with a taint of unreliability and provoke adverse findings against them.

Individuals whose Rights to Life may have been Violated

10.111. Having regard to our review of the evidence and findings in relation to civilian fatalities in the preceding Chapter, we are content here merely to identify those persons, and the dates on which and the sectors within which, their right to life may have been intentionally violated.

NAME OF PERSON	DATE KILLED	SECTOR
1. LUNDIE MURPHY	24 MAY	1
2. KIRK ALLISON	24 MAY	1
3. DASHARD PAGE	24 MAY	1
4. RADCLIFFE FREEMAN	24 MAY	1
5. DWAYNE EDWARDS	24 MAY	2
6. ANDRE SMITH	24 MAY	2
7. DECOREY WRIGHT	24 MAY	2
8. FABIAN GRANT	25 MAY	1
9. FERNANDO GRANT	25 MAY	1
10. JERMAINE GRANT	25 MAY	1
11. ORLANDO BROWN	25 MAY	1
12. O'CONNOR BROWN	25 MAY	1
13. NICHOLAS WILSON	25 MAY	1
14. OSHANE WALKER	23-25 MAY	1
15. MARTIN LINDSAY	23-25 MAY	1

10.112. Five other males were very likely murdered in the sight of Soldiers #1 and #3 in sector 1 on 24 May. However, having regard to the evidence presented, we cannot identify these persons, nor can we be sure that they are not included in the list of 15 above. It is possible that the 5 persons referred to by Soldiers #1 and #3 may have been among the following 7 persons who were probable victim of extra-judicial killings, namely, Kirk Allison, Dashard Page, Radcliffe Freeman, O'Connor and Orlando Brown, and the Grant brothers.

Two Persons probably killed by Mortars

10.113. For the reasons already stated in para.9.80, Carl Henry and Bojan Rochester were, in our opinion, probably the victims of fatal injuries from an exploding mortar round.

Damion Lindsay (Lion King)

10.114. We received evidence that Damion Lindsay was also killed during the internal security operation. However, the evidence of the witnesses testifying to his death was not of a quality to permit a finding as to the circumstances of his death as we have explained in the previous Chapter.

10.115. The significance of the discrepancies in the evidence of DSPs Tabannah and Turner in relation to their times of entry into Tivoli Gardens is this. They both testified of a large gap in time between the entry of the JDF in the sector and their invitation to enter and search. In our opinion, the gap in the times provided by these officers could have enabled members of the JCF to purport to distance themselves from possible links with extra-judicial killings, which were alleged to have occurred nearer to the times given by the JDF commanders. The majority of civilian witnesses who testified about killings located the events in the afternoon, that is to say, at times when the JCF had entered sectors.

Adverse Comment: DSP Tabannah and DSP Turner

There is nothing in the responses from DSP Turner and DSP Tabannah that has persuaded us to change our comments in this paragraph.

10.116. Mr. Linton Gordon submitted in his concluding oral submissions that it was of significance that 22 of the bodies at Madden's were dressed in white Tee shirts and 11 wore jeans. Whereas witnesses for the security forces testified that the said forces were seised of information/Intelligence that gunmen fighting on behalf of Coke were attired in white Tee shirts and jeans, such attire was no basis for extra-judicial killings. We find that the dress of men

on 24 and 25 May, without more, did not afford and could not have afforded a justifiable reason for the loss of life.

10.117. If it is the argument of the security forces that these bodies represented gunmen who embarked on a vicious and violent offensive against the security forces, there is one pre-eminent deficit in the argument. Where were the guns that these deceased persons were firing? The security forces adduced not a shred of evidence of any guns found near to bodies at any time, and certainly not after 4:00 p.m. when they were in control of sectors 1 & 2. Further, no evidence was placed before us that swabbing of hands of the deceased, who were allegedly murdered, revealed any residue of gun powder.

The Right to Life and the Use of Mortars

10.118. The firing of 37 mortar rounds provoked a vibrant debate during the Enquiry. It was and still is a very important issue. May 24, 2010 was the first time that mortars were used by the security forces in any operation in Jamaica. In our discussion of the issue, we shall treat to the issue under various sub-headings, to seek to ascertain how, why, when and where these weapons were deployed.

Decision and Reasons for the Decision

10.119. CDS Saunders took responsibility for the JDF's use of mortars on 24 May. He said –

“The decision to use mortars was entirely mine.”

10.120. As to the reasons and purpose for deployment, he said –

“There was a need to keep women and children behind doors. Experience had shown that, previously, they had been used as human shields. I needed the troops to have as much access as possible and to create a different sound

in the area of operation...The mortars had the desired effect. They created some disorientation and we did not suffer many injuries. They caused persons to remain inside. There was no record of women and children killed in the operation."

Major Warrenton Dixon

10.121. During May 2010 Maj. Dixon held the appointment of Mortar Officer and it was his responsibility to provide support to 2JR as directed by HQ JDF. At para.2 of his witness statement, Maj. Dixon said –

"My stated task was to use the mortars to create a diversion by firing into open areas that had been previously plotted."

Early in his examination-in-chief, Maj. Dixon amplified his witness statement to say –

"I was instructed by HQ to create a sound effect that would distract and disorient criminals and keep women and children indoors with a view to saving lives."

10.122. And at para.8 he stated –

"For the target area, I was guided by the intent of the HQ which was to support the second battalion by creating a diversion and distract the gunmen. The specific directive was that we would fire into open areas where there was little or no likelihood of causing injury or fatalities to civilians or even the gunmen themselves."

10.123. In oral evidence on 2 December 2015, Maj. Dixon echoed CDS Saunders in these words –

"An objective of using the mortars was to deter women and children from being used as human shields. That was grounded in experience. To my knowledge, no women or children were killed in the operation."

Training and Preparations for Use

10.124. Maj. Dixon had been given specific and relevant training overseas to enable him to qualify as a Mortar Fire Controller (MFC) and he completed his various courses with distinction. He prepared for the operation on 24 May by studying maps of West Kingston, photographs and doing covert visits to the general area. As a result of this reconnaissance, he identified 3 locations which he considered to be suitable target areas for landing the mortars.

Targets

10.125. The three locations targeted for detonation were:

- (i) A grass field due West of the Bus Park on Darling Street, often used as a football field.
- (ii) A grass area South West of the football field and South of the Edward Seaga Oval in the vicinity of the old train line.
- (iii) The football field in Tivoli Gardens itself and North of the Community Centre and bounded by a gully on the West and a 6 feet concrete wall. On the Southern side is a wall of the Community Centre and in the East, West and North are high-rise buildings. Maj. Dixon's measurements of this field are: East to West – 120 metres; North to South – 150 metres.

Who had knowledge of the Use of Mortars?

10.126. CoP Ellington testified on 13 April 2015 that he was not aware that mortars had been used during the operation. He said –

“I don't know what they are. I do not recall being with the Chief of Defence Staff when the Prime Minister said that he had complaints from residents that what sounded like mortars had exploded in Tivoli Gardens. I did not hear the CDS give the Prime Minister any explanation. I do not ask

the JDF about their capabilities and they don't ask me about the JCF."

Mr. Golding

10.127. Before concluding his evidence-in-chief, Mr. Golding said that he had received reports of the use of mortars "from residents". He raised the matter with CDS Saunders –

"And his response to me was that those were not incendiary devices and had more bark than bite and were used for psychological effect. They would not do mortar damage but would sound like mortars."

10.128. Under cross-examination by Mr. Gordon, the Prime Minister said this –

"Much long after, in response to concerns raised in the media, the JDF admitted that mortars were used (a) to dismantle obstacles and (b) were fired into open areas where no one was. I was surprised because when I asked the CDS if mortars were used, he advised me that what were used were devices to create an impression."

Lt. Col. Sewell

10.129. On 24 June 2015, in answer to Mr. McBean Q.C., Lt. Col. Sewell said –

"I was aware of mortars being used by the JDF during the operation. I heard exceedingly loud explosions. They appeared to have come from several areas including Tivoli Gardens. At the time of the mortar explosions, none of 2JR was in Tivoli Gardens. I was not aware where they landed. After we had secured the community, I was aware that mortars had been used. The feedback from residents suggested that there were loud explosions. I saw areas pointed out by citizens where they said things had fallen from the sky in Java – varying degrees of houses with holes... In the area of the Community Centre, I saw no signs of damage by mortars. I was not aware who was

responsible for the mortars. It was under the purview of the CDS.”

10.130. Later, he said the he did not agree with Counsel that he should have had prior knowledge of the use of mortars which could have put his troops at risk. To Mr. Michael Williams, Lt. Col. Sewell said –

“A plan that could have embraced the use of mortars was made available to my troops. I knew that it was planned to create big bangs.”

Captain Garth Anderson

10.131. Capt. Anderson testified that use of mortars “was part of the overall plan”.

“There was a general time for firing the mortars. It would have been prior to the entry of my troops into the sector. The target area was South of my sector where there was a football field. I heard when they were fired.”

10.132. Capt. Anderson said that he knew that mortars were to be used –

“to encourage innocent civilians to remain indoors so as to reduce harm to them and also to disorientate gunmen.....On my approach to my objective, mortars were being fired so I was in Tivoli Gardens but not in the danger zone.”

Lt. Col. Ogilvie

10.133. Lt. Col. Ogilvie was aware that mortars would be used “before the operation”. While he was at Up Park Camp, he heard explosions from mortars between 11.00 a.m. and 11.30 a.m. and “about midday”. He said in response to Mr. Michael Williams –

“I was present when the use of mortars was discussed. The CDS, looking at the forces amassed in West Kingston and the methodologies that could be used to psychologically impact the criminals, determined that mortars were to be used in a limited way. They were to be fired at the beginning of the operation in open fields... Maj. Dixon was

not at that discussion to the best of my knowledge... I only knew that 37 rounds were fired after the CDS testified."

10.134. Towards the end of his evidence, Lt. Col. Ogilvie explained that he participated in a meeting when CDS Saunders indicated that mortars would be used "if necessary". He said the risks were assessed and the CDS made the decision to use them "in a specific way".

"There was a procedure for approving the firing of the mortars and the CDS set out the parameters for use."

Major Kennedy

10.135. Maj. Kennedy said that he was aware that mortars would be fired "in the football field North of the Community Centre" in his sector.

Major Cheverria

10.136. Maj. Cheverria said that he knew that mortars were fired. He heard them. He did not know where they were fired. He heard one that was fired prior to entering the area of operation when he was at the waterfront. The next one he heard was when he was at the intersection of Marcus Garvey Drive and Industrial Terrace. To the questions posed by Lord Gifford when and where was he when mortars were fired, Maj. Cheverria said "I don't know".

When were Mortars Fired?

10.137. Maj. Dixon told the Enquiry that mortars were fired at the following times:

- (i) 10.58 a.m.
- (ii) 12.08 p.m.
- (iii) 12.40 p.m., and
- (iv) 7.20 p.m.

(a) 10.58 a.m.

Maj. Dixon said that the first firings were at targets East of Seprod. 12 rounds were fired.

(b) 12.08 p.m.

He said that requests were made for firings at this time "because of the intensity of the opposition". He said that he communicated "with all 4 sector commanders. Prior to 10.58 a.m., I did not speak to the 4 sector commanders who were all on the network. There were occasions when I spoke to them individually". 18 rounds were fired.

(c) 12.40 p.m.

He said that, at this time, Maj. Cheverria "requested mortar fire because of the intensity of the gunfire being fired while trying to enter Rasta City. I was asked to do something to disorientate the gunmen. This mortar was fired North of the football field. One of the rounds did not explode." 2 rounds were fired.

When he was recalled on 18 February 2016, Maj. Cheverria said –

"I did not request a mortar to be fired. I cannot recall making any such request of Maj. Dixon on that day. I recall mortar rounds being fired before I entered Tivoli Gardens. I got into Tivoli Gardens about 12.30 p.m."

In answer to Mr. Terrence Williams, he said that he heard the sounds of exploding mortars when he was either at the waterfront or on his way to Tivoli. And in answer to Lord Gifford, Maj. Cheverria said that at 12.40 p.m. he "would have been along Industrial Terrace".

(d) 7.20 p.m.

The mortar fired at 7.20 p.m. was illuminative and was fired on Maj. Dixon's own initiative. He said –

"We believed we were hearing some sounds in the shrubbery. It was an area with many trees. We heard shuffling in the shrubbery. We saw no one. I assessed on my own that there was a need for the mortar and I made a request to fire it."

10.138. This mortar burnt itself out in the air. It lit up the area. In answer to Lord Gifford, Maj. Dixon testified –

"We were coming under intermittent fire and I heard sounds as if gunmen were coming through the old train yard. I took the decision to light up the area. I saw nothing."

Mortars not Exploding

10.139. According to Maj. Dixon, 4 rounds of the 37, (excluding the illuminative round), did not explode. The next day, 25 May, he found an unexploded mortar at the Northern end of the field near the Community Centre. Whereas Maj. Dixon could not say whether Carl Henry was hit by shrapnel at Chang Avenue, he was definite that Marjorie Hinds could not have been injured as was alleged.

Other Important Aspects of Major Dixon's Evidence

10.140. Maj. Dixon's oral evidence substantially expanded his witness statement. *Inter alia*, he performed the dual role of Mortar Officer (MO) and MFC. About 8.20 a.m. on 24 May, he and his team of 9 persons were in place near the Seprod building. Maj. Dixon took up a position on top of the building, about 500 metres from the field at the Northern end of the Community Centre. From his location he was able to observe two of the targets. The mortars used were 81mm – a medium mortar of low velocity. He said of this type of mortar –

"As soon as it touches a reasonably hard surface, it will explode and it won't cause a crater or sort of excavation of the earth. It makes two loud bangs. It does not make a whistling sound."

10.141. The mortar had a range of about 3 miles, but “we chose to go within 1000 metres of the furthest target and approximately 600 metres from the Seprod perimeter fence and 800 metres from the area just South of the sports complex. The Mortar Firers (Mortar Line) were South of Marcus Garvey Drive near the old Sardine factory”.

Safety Procedures

10.142. Maj. Dixon pointed out to the Commission that “the mortar is not a pinpoint weapon system but it is designed to be fired within plus or minus 1 metre accuracy.” Accordingly, he had to take into account a number of factors including the possibility of human error, the condition of equipment, meteorological conditions, the nature of the ground where the mortar would land and the time of flight of the round.

10.143. When questioned about the distances within which the mortar could be fired safely, Maj. Dixon mentioned the following:

The “predicted safety distance” was 550 metres from the point of burst”; “operational safety distance” was 200 metres; “reduced safety distance” (i.e. the distance beyond which one shrapnel from the round may travel) was 400 metres; “the danger zone” of a round was a radius of 90 metres, that is to say, a radius within which shrapnel may cause injury; “the lethal area” was 40 metres.

He said that allowance had to be made for “bedding-in” when there could be shifts in the baseline after the first round is fired.

10.144. Maj. Dixon stated in oral evidence that he had no practical experience of firing mortars in built-up areas and he agreed that shrapnel could cause lethal injury and some types of mortar (but not the type used on 24 May) could cause phosphorous burns. He did not agree that a human being could be lifted off the ground as a result of an exploding mortar.

10.145. He was rigorously cross-examined by Mr. Terrence Williams and agreed that "at none of the targets did I have a radius of 700 metres safety distance and, at the football field, the radius would have been 60 metres". Moreover, he said –

"I believe I could have fired the mortars safely into the football field by the Community Centre even though it was in a built-up area. The grave risk to human life was not lost on me. The decision to use mortars in Tivoli Gardens put at grave risk the lives of persons who were not a threat. There are risks inherent in using mortars but, in many ways they are safer than rifles provided the operators have the appropriate training experience."

10.146. He did not agree that mortars are intrinsically inaccurate. He described them as "a larger type of grenade" which could cause an IED to explode if the mortar landed on an IED. Maj. Dixon spoke of an Observer who was placed on a building in such a way that "he could reasonably see what he needed to see". The Observer's role and function were –

"to tell me if the field into which I was firing was safe. Part of the role was to tell me if the round landed where it was supposed to land. His function was one of safety to tell me 'Field is clear or not clear'. He reported to me that the second round had landed and I saw the mark."

Letters of Capt. Chester Crooks

10.147. On 23 August 2012, the Public Defender, Mr. Witter, wrote to the JDF seeking information

- "(a) regarding precisely what were the types of incendiary devices (mortars or others) were discharged, as well as the tactical nature, targets and strategic objectives of their discharge; and
- (b) the reason why discharge of these devices was thought to be appropriate."

10.148. By letter dated 23 August 2012, Capt. Chester Crooks answered the two queries thus:

“The types of incendiary devices that were used were mortars. These mortars were used as a diversionary tactic with the aim of confusing the highly armed gunmen who were targeting the troops including the manning of barricades which were erected to prevent the security forces from entering Tivoli Gardens. The use of these mortars was supervised by highly trained and competent JDF personnel who ensured that the mortars were targeted at open areas, thus minimising the possibility of casualties.

The use of those devices was thought to be appropriate based on the information which suggested that there were hundreds of armed gunmen in West Kingston prior to the entry of the security forces. In addition to distracting and creating confusion among these highly armed gunmen, it minimised the potential for loss of life among the civilian and also the security forces who were facing direct gunfire and the very real possibility of being ambushed at rigged barricades.”

10.149. On 31 August 2012, Capt. Crooks wrote another letter “to provide further clarification to prevent any ambiguity”. In this letter he stated:

“It should be noted that the mortars used are capable of firing rounds of varying types as follows:

- (a) Explosives;
- (b) Illuminative;
- (c) White Phosphorous (incendiary).

However, the rounds that were used by the JDF at the time in question were explosive and not incendiary.”

Capt. Crook’s letters are appended hereto as Appendices 19 and 20, respectively.

Ret. Major Christopher Cobb-Smith

10.150. On February 8 and 9, 2016, Maj. Christopher Cobb-Smith, a retired British Army Officer, gave evidence. He was brought by INDECOM as an expert to comment on the evidence of Maj. Dixon and the use of mortars during the

internal security operation. Maj. Cobb-Smith served in the Royal Artillery for 18 years and saw operational service in Northern Ireland, Iraq, Kosovo and Afghanistan. He has never personally fired a mortar but travelled extensively “on training exercises, many of which involved periods of the live firing of artillery and mortars” for which he was responsible. For 11 years he was engaged in the training, instruction or operation of the use of indirect fire weapons such as mortars and currently he is a consultant to many well-known international media organisations. Much of his work is as an escort for media teams in war zones, looking after their safety and advising them on potential threats.

10.151. Both Maj. Dixon and Maj. Cobb-Smith were conversant with the British Ministry of Defence’s “Infantry Tactical Doctrine Vol.2 – The Tactical Employment of Infantry Weapons and Systems, Pamphlet No.2 THE MEDIUM MORTAR – 81MM L16, 2001 and its updates (the Doctrine) and there was a large measure of agreement between these two witnesses on the guidelines provided in the Doctrine. Maj. Cobb-Smith said of Maj. Dixon:

“I do not doubt that Maj. Dixon knows his trade; he is a Mortar Officer; he did the course and he is clearly competent as a Mortar Officer.”

10.152. Maj. Cobb-Smith was provided by INDECOM with copies of Maj. Dixon’s evidence before us and he also visited Tivoli Gardens on 7 February 2016 prior to giving evidence. He explained the working of a mortar system in this way:

“In simple terms, a mortar system is set up normally well behind the forward troops in a relatively benign area and in cover to fire high explosive rounds over the heads of the troops they are supporting to neutralize or destroy targets in front of them so that the supporting troops are better able to do their job... And normally or always there should be a Mortar Fire Controller forward with the supporting troops... He would basically be taking his orders from those supporting troops, he would be planning targets, firing on

opportunity targets when asked to do so and reacting to incidents to provide fire support for those forward troops.”

10.153. Maj. Cobb-Smith disagreed with Maj. Dixon that he plotted and ensured the accuracy of the mortar, plus or minus one metre, using a 1:50,000 map. He was of opinion that plus or minus 10 metres would be more accurate “because it is impossible to read a 1:50,000 map down to ten figures”.

10.154. On the matter of *bedding-in*, he said that, when a mortar is fired, there is a certain amount of recoil and “the first two rounds that are fired will be inaccurate”. In the act of bedding-in, the mortar tube makes “a slight jump”, i.e. “it will elevate slightly as those first two rounds are fired”. Then he testified –

“But for those first two rounds it is very important to allow at least an extra 200 metres drop in range when doing the calculations. So if you have forward troops, you need to add that extra 200 metres to your initial safety distance of 700 metres.”

10.155. According to Maj. Cobb-Smith, one of the variables which may affect the accuracy of a mortar is “the beaten zone”, the area where the mortar will always fall. But accuracy can never be guaranteed “to more than 100 metres by 20 metres because there will always be inherent inaccuracies”. There is a margin of error excluding the adjustment process. Other variables include the mortar failing to exit the tube or landing without detonating.

10.156. The infantry or operational commander usually dictates where he wants the target of the mortar and gives orders to the MFC who sends the grid references back to the team manning the mortars (the mortar line) to do the necessary computations and preparations before firing the remote.

“It would be very unusual for the first round to fall exactly on target.”

10.157. With regard to injury by shrapnel from a mortar round, Maj. Cobb-Smith’s evidence is that “the only distance at which one can say that someone

would definitively not be affected by a fragment is 550 metres from the point where the round lands”.

“You would definitely be killed within 40 metres and injured within 190 metres. But there are instances where people have been much closer and not been injured.”

10.158. Maj. Cobb-Smith agreed with Maj. Dixon that although a log should be kept, in this case it was not reasonable to expect him as MFC in action, under fire, “to be recording things in a notebook”.

10.159. Maj. Cobb-Smith’s opinion is that there should have been 550 metres from the nearest civilian building. Having regard to the built-up nature of Tivoli Gardens, Maj. Cobb-Smith said –

“In my opinion, this is not a correct use of this weapon system. I believe it was irresponsible and reckless to use a high explosive weapon system in a populated urban area especially without going through any form of adjustment procedures. But, of course, adjustment procedures would have been impossible on these targets because they are completely surrounded by dwellings.”

10.160. Maj. Cobb-Smith said it would be unusual to see a mortar round actually landing and it would be very difficult to observe it falling from the sky.

10.161. With regard to the safety limit as represented in the Doctrine, Maj. Cobb-Smith’s evidence is:

“The safety limit doctrine was disregarded to such a huge extent, to such massive proportions. Again, I think that the employment of indirect fire in the form of mortars was disproportional, reckless and completely unreasonable in this context.”

10.162. Maj. Cobb-Smith’s measurements of the playing field near the Community Centre were North to South 101 metres; East to West 90 metres, giving “a radius of, at most, 50 metres away from #10 Chang Avenue”. He took photographs of various properties thought to bear the markings of shrapnel from

exploding mortar rounds but, under cross-examination, Maj. Cobb-Smith conceded that he could not say that the properties were in the same condition in May 2010.

Maj. Cobb-Smith's Conclusion

10.163. Nevertheless, he offered an opinion that based on the markings he had seen on properties, three mortars were fired in the Tivoli Gardens area and properties in Green Path and Chang Avenue may have been affected. He thought that a mortar may have landed "within quite a small courtyard of a building in Green Path...one probably landed on Chang Avenue itself" and a fragmentation pattern on a wall "was consistent with fragmentation caused by the third mortar".

10.164. As to the other two targets, Maj. Cobb-Smith said that they "were extremely close to each other". Dwellings which he saw nearby "would be well inside the recommended safety distance, remembering that adjustment safety distance is 700 metres – I would say 75/80 metres". The Rural Bus Park would definitely have been within the 700 metres distance.

10.165. Alternatives to mortars in Maj. Cobb-Smith's opinion were "stun grenades and, very possibly, CS gas on limited use".

The Mortar Line

10.166. Since the Mortar Line was in the vicinity of some trees near Marcus Garvey Drive, in Maj. Cobb-Smith's opinion, there should have been a radio log and he "was surprised that logs were not maintained in this instance".

10.167. Under cross-examination by Mr. Linton Gordon, Maj. Cobb-Smith accepted that use of mortars was a matter of analysis and assessment for "the Commander" faced with the threat portfolio and to ensure that women and children were not used as human shields. He held to his opinion that "the risk in

firing the mortars was not justified” even if they kept women and children inside and disoriented gunmen. But since he did not know where the mortars actually landed, he was not in a position to determine whether they were a success or not. Acknowledging the challenge faced by the security forces, Maj. Cobb-Smith said –

“I empathise with the Commander’s (CDS) challenges for this operation... I think he was badly advised to take the risk to fire mortars.”

10.168. But he maintained that the alternatives he suggested would still have been practical “as they worked their way, street by street as any other conventional force would in fighting in built-up areas (FIBUA)”. In response to Lord Gifford, Maj. Cobb-Smith testified that a white phosphorous mortar could cause fire and burns and would produce white smoke. In response to the Chairman, Maj. Cobb-Smith said –

“I agree entirely with your observation that whether injury or death was a consequence, does not derogate from the inherent danger of using that weapon in that type of environment.”

FINDINGS

10.169. We have borne in mind that the security forces were in possession of credible Intelligence and, indeed, evidence that persons loyal to Christopher Coke had determined to prevent his arrest by means of the several forms of defence mechanisms deliberately established in and around Tivoli Gardens in the week immediately preceding 24 May 2010.

10.170. This determination was acted out on 23 May when gunmen made concerted, coordinated, violent attacks against police assets. These attacks provided some corroboration of the Intelligence that

about 300 gunmen were in West Kingston bent on violence against the agents of the State.

10.171. It was therefore a counsel of prudence and basic commonsense that retaliatory action on the part of the security forces should take into consideration the nature and extent of “the threat portfolio”. We ascribe no improper motive to the security forces in planning a response that involved the use of “overwhelming numerical force” to achieve the legitimate objective of putting down the violence being perpetrated to deny Coke’s arrest.

10.172. So far as the issue of the use of mortars is concerned, the key questions as they appear to us, are whether they were an appropriate response or whether their use, particularly in the heavily built-up area of Tivoli Gardens, was proportionate to the threat offered by Coke’s gunmen.

10.173. We accept the evidence of Majs. Dixon and Cobb-Smith that a mortar is a weapon of indirect fire and is not “pinpoint accurate”. We are confident that CDS Saunders who took the decision to use the mortar weapon also recognised these features of the mortar. However, we have concerns about the propriety of the decision. In the first place, we find it astonishing that CoP Ellington was not informed of the intended use of mortars. As the joint Gold Commander of an operation to be jointly executed by both branches of the security forces, simple courtesy demanded that CoP Ellington should have been made privy to the decision. Even though the use of mortars was not, (and could not) be written into the JDF’s Operation Garden Parish, it was a fact that Maj. Dixon’s team was training and preparing for the possible use of mortars from late 2009. So, at Maj. Dixon’s level, it was probably no secret.

10.174. Secondly, the evidence disclosed mixed reasons for using mortars. CDS Saunders, Maj. Dixon and Capt. Anderson all testified that one of the reasons was to keep women and children indoors to reduce their potentiality to be used as human shields, an experience to which the security forces had been exposed previously. Yet, more than two years after 2010, when the Public Defender enquired of Capt. Crooks the reasons for deploying mortars on 23 May 2010, Capt. Crooks made no mention whatsoever of keeping women and children indoors. We are not satisfied that such a reason was prominent in the thinking of the leadership of the JDF in 2010. Moreover, as Prime Minister Golding testified, it took some time before the JDF admitted using mortars at all, and when Mr. Golding himself enquired of CDS Saunders about the use of mortars, he was told that they were “devices to create an impression”.

10.175. Although we accept that two open playing fields were targeted for landing the mortars, we condemn the decision to explode mortars inside Tivoli Gardens itself. The area chosen was a heavily populated built-up area which carried a great risk of injury or death to residents. Our reading of materials provided by INDECOM on the use of mortars in international humanitarian law (IHL), convinces us that the weight of contemporary opinion, policy and law is against the use of mortars in densely populated areas, such as Tivoli Gardens. In the circumstances, we endorse the characterization by Maj. Cobb-Smith of the use of mortars within Tivoli Gardens, as “irresponsible and reckless”.

10.176. Turning to the technical expert evidence adduced at the Enquiry, we are satisfied as to the credentials of both Maj. Dixon and Maj. Cobb-Smith and we note that the latter has had more practical experience of seeing mortars in use. As indicated during our review of

the evidence, there was a large measure of agreement between the two experts on matters of doctrine and the guidelines issued by the British Army.

10.177. However, there were significant differences in their testimony on other matters. We noted that Maj. Dixon's witness statement of 1¼ pages (Appendix 21), made little or no reference to essential considerations. For example, it was bereft of the number of rounds fired, the times when they were fired, whether any failed to detonate, the safety distances, the measurements of the target areas, his location on the day in question. Evidence on these and other key issues was adduced only during his oral evidence on 1 and 2 December 2015. Maj. Cobb-Smith's first witness statement (Appendix 22) was dated 29 November 2015, and his second witness statement of 4 February 2016 (Appendix 23), provided a fuller account and analysis of key considerations.

10.178. There is a material discrepancy between the evidence of Maj. Dixon and Maj. Cheverria for which there has been no explanation. Maj. Dixon testified twice that at 12.40 p.m. he fired mortars into the field North of the Community Centre at the request of Maj. Cheverria because of the intensity of the gunfire Maj. Cheverria was facing while trying to enter Rasta City. When recalled by the Commissioners to give evidence on 18 February 2016, Maj. Cheverria denied making a request of Maj. Dixon to fire a mortar and said, moreover, that about 12.30 p.m. he had actually got into Tivoli Gardens. He recalled mortar rounds being fired before he entered. In so far as Maj. Dixon testified that he synchronised the watches of the ground commanders and Maj. Cheverria believes that he probably did so, we prefer the evidence of Maj. Cheverria and find that he did not request Maj. Dixon to fire a mortar at 12.40 p.m. or at all.

10.179. With regard to the safety distances, we find that the guidelines for safety distances were not followed and some residents and properties in Tivoli Gardens were in danger areas. The target area was less than 550 metres from the nearest civilian buildings. The doctrine or guidelines called for a radial safety distance of 700 metres but this was never achieved. Firing into Tivoli Gardens football field permitted a safety distance of only 50 metres, well inside the danger area.

10.180. Although Maj. Cobb-Smith could not be sure that property damage which appeared to have been caused by shrapnel from mortars was actually caused in 2010, Lt. Col. Sewell's evidence of what residents told him about "things falling from the sky" and what he saw, viz. "varying degrees of houses with holes", impels us to a finding that the holes in properties pointed out by Maj. Cobb-Smith were very probably the result of shrapnel from an exploding mortar.

10.181. In the circumstances, it is our finding that the decision to use mortars on 24 May was a serious error of judgment. Given the geography of the area as stated above, it was reckless and wholly disproportionate to the threats offered by gunmen.

10.182. For the reasons already stated at Chapter 9.80, we find that Carl Henry was probably killed by shrapnel from an exploding mortar; Bojan Rochester was probably also killed by mortar fire although the gunshot wounds found on his body in addition to the lacerated wounds, strongly suggest that he was also shot by a gun.

10.183. We are aware that the United Nations have repeatedly expressed concern about the problems caused to humanity by the use of the mortars in populated areas because of the fact that such

weapons of indirect fire are indiscriminate in their very nature. The International Criminal Tribunal for the former Yugoslavia (ICTY) has received numerous opinions from experts that mortars are indiscriminate, i.e. they “cannot be directed at a military objective as their effects cannot be limited as required by IHL”.

Adverse Comments re: CDS Stewart Saunders and Maj. Warrenton Dixon

Re: Para.10.172 (formerly 10.130) – Summary of Response

- 10.184. (i) The Commission should consider the principle of proportionality.
- (ii) CDS Saunders was under a duty to balance the interests of residents and those inherent in the objectives of the internal security operation. In all armed conflicts, there is the possibility of damage, injury and death.
- (iii) The authority of the UK Supreme Court in ***Bank Mellat v HM Treasury [2013] 4 All ER 533*** formulates the principles of proportionality. These have been applied in the recent case of ***Beghal v. DPP [2016] 1 All ER 483***.
- (iv) The use of mortars must be seen against the background that they were the only weapons not possessed by gunmen in Tivoli Gardens and they had a psychological effect on the gunmen many of whom fled from Tivoli Gardens.
- (v) The heavy resistance put up by gunmen outside Tivoli Gardens is attributable to the fact that no mortars were fired in the areas where Maj. Henry’s forces were operating.
- (vi) The Commission should conclude that the fact that there were no mass casualties as a result of mortar fire “means that the JDF, given what they were faced with did a good

job with the use of mortars". The use of mortars gave the JDF an advantage over the gunmen.

Commission's Comments and Findings

10.185. We have no doubt that CDS Saunders gave careful and deep thought to his decision to use mortars. His decision to have them fired in 2 open fields is evidence of his balancing the interests of the residents and the objectives of the internal security operation. We, however, part company with CDS Saunders in respect of his decision to explode mortars WITHIN THE DENSELY POPULATED AREA OF TIVOLI GARDENS ITSELF. Accordingly, we re-affirm our findings at para.10. 175.

10.186. We make two other points. First, the evidence is clear that when the security forces attempted to break down barricades to gain entry into Tivoli Gardens, they met extremely heavy resistance from gunmen in bushes in the vicinity of Rasta City and from high-rise buildings within Tivoli Gardens. At least one .50 calibre Grizzly Boar was used against the FEL driven by L/Cpl. McLennon and the APC carrying Insp. Edwards and others. The evidence, which we accept, is that the security forces engaged these men and repelled the attack using more acceptable direct fire weapons. The gunmen fled West of Tivoli Gardens. Maj. Mahatma Williams and Insp. Edwards were able to gain entry into the community and carry out their tasks. The second point we make is that, it is widely accepted in contemporary learning on international humanitarian law and military best practice that *weapons of indirect fire should not be used in heavily built-up areas.*

10.187. We adhere to our finding that, notwithstanding the unprecedented and vicious attacks planned and executed by Coke and

his gunmen, it was reckless and irresponsible to fire mortars *within the community of Tivoli Gardens* in circumstances where, on Maj. Dixon's own evidence, the safety distances were not respected. Their use within the community was disproportionate. With respect to the concept of proportionality, we note that the Constitution as it then was in 2010 did not incorporate proportionality as a restriction on fundamental rights and, in particular, the right to life. As such, it is doubtful whether Counsel for the JDF can properly rely on that concept in defence of their use of mortars. In any event, the concept of proportionality formulated by Lord Sumption in *Bank Mellat (supra)* requires consideration of four questions.

- (i) Is the objective sufficiently important to justify limitation upon a fundamental right?
- (ii) Is the measure rationally connected to the objective?
- (iii) Could a less intrusive measure have been adopted?
- (iv) Has a fair balance been struck between individual rights and the interests of the community?

10.188. Out of an abundance of caution and, in deference to Counsel's submissions, we respectfully adopt Lord Sumption's formulation recently followed in *Beghal v DPP [2016] 1 All ER 483* and answer the four questions thus: The fundamental right involved was the residents' right to life. The broad objectives of the internal security operation were:

"The arrest of Coke, repel any resistance with the least impact on the community, the country and the security forces. Also to restore security and confidence to the community.....and for the police to provide normal policing service." (per Operational

**Report on Extradition of Christopher “Dudus” Coke,
page 1).**

10.189. The internal security operation was carried out under a State of Emergency where certain fundamental rights of citizens were curtailed. However, the critical issue, as we conceive it, is whether the objective of using mortars inside Tivoli Gardens was sufficiently important to justify a real threat to human life. In our judgment, that issue must be answered in the negative for the reasons stated above.

10.190. Turning to the second question in Lord Sumption’s formulation, the decision to use mortars inside the community, a heavily built-up area, was not rational because of the potentiality of death or serious injury to residents. In answer to the third question, we are of opinion that a less inherently dangerous measure could and should have been used, namely, more acceptable direct fire weapons in the heavily built-up area as suggested by Maj. Cobb-Smith in his evidence. In any event, it was part of the plan of the security forces and given in evidence, that they intended to confront the opposing “army” of gunmen with “overwhelming numerical force” as indeed happened. In respect of Lord Sumption’s first question, for the reasons stated in this Report, we find that a fair balance was not struck between the rights of residents and the larger interests of seeking the arrest of Coke.

10.191. We also observe that, after the advance party, led by Maj. Williams and Insp. Edwards, had gained entry into the community, the level of resistance within Tivoli Gardens noticeably declined. In the circumstances, we hold that the tests propounded by the UK Supreme Court in the two cases cited were not satisfied.

10.192. The fact that there were no mass casualties as a result of the use of mortars, does not *ipso facto* lead to a conclusion that their use was appropriate or proportional. The overarching issue remains as to whether the firing of mortars *within the community* was a rational and proportionate decision. In our view that decision was not. Maj. Cobb-Smith agreed with the proposition that it was not the consequences of the decision that mattered but rather the actual decision itself, given all the circumstances.

Re: Para.10.173 (formerly 10.131) – Summary of Responses

- 10.193. (i) The Commission should not give a negative interpretation to the fact that CoP Ellington said that he was not informed of the intended use of mortars.
- (ii) CDS Saunders was under no duty to inform CoP Ellington. CDS Saunders was guided by the “need to know” principle. In CDS Saunders’ judgment, CoP Ellington did not need to know about the likely use of mortars.
- (iii) The Commission should reject Lt. Col. Sewell’s evidence on the issue of knowledge of the use of mortars. He may have been suffering a lapse of memory.

Commission’s Comments and Findings

10.194. We understand the submission that CDS Saunders practised the need to know principle and was not, as a matter of courtesy, obliged to take CoP Ellington into his confidence with regard to the use of mortars. We are nevertheless astonished that CoP Ellington was excluded from the persons who needed to know that mortars would be used. Both CDS Saunders and CoP Ellington were Gold Commanders. The operation was a joint exercise by the two

Forces which they commanded. The use of mortars would have been an unusual tactic with potential very serious consequences. Surely there was a case for communication between the leadership of the two Forces on the matter of the use of mortars. The JDF was acting in aid of the JCF.

10.195. There was some confusion in respect of Lt. Col. Sewell's knowledge of the use of mortars. His evidence as to his knowledge of the use of mortars is not straightforward. Having re-considered his evidence carefully in the context of the responses by CDS Saunders and Maj. Dixon, it seems to us that what he intended to convey was that he was not aware of the use of mortars before he actually heard the explosions. We are satisfied that Lt. Col. Sewell knew of a plan to use mortars. Indeed it follows that if his three Company Commanders knew of the plan, he ought to have known of it as their Commander. The confusion in the evidence arose because, having said in answer to Mr. McBean that he was aware of mortars being used, he subsequently gave an answer that he was "not necessarily aware that mortars were being used".

Re: Para.10.174 (formerly 10.132) – Summary of Responses

- 10.196. (i) The Commission should not place undue reliance upon the letters of Capt. Crooks to Mr. Witter. He was an attorney-at-law in the legal department of the JDF and had no training in the use of mortars.
- (ii) The Commission should review Mr. Golding's evidence in order to appreciate how CDS Saunders dealt with the matter. Mr. Golding said that he did not expect CDS Saunders to give him details.

Commission's Comments and Findings

10.197. We have commented on Capt. Crooks' letters at para.9.83 above.

10.198. Our understanding of Mr. Golding's evidence is that he was not aware of plans to use mortars in Tivoli Gardens. That was not a matter that would normally be part of the remit of the Defence Board. But he did receive reports of the use of mortars from residents who referred to them as "bombs". At the time of the reports, he made inquiries of CDS Saunders. It is instructive to quote the precise words of Mr. Golding:

"I think he (CDS Saunders) said these were not incendiary devices; he said they have more bark than bite; that they were used more for psychological effect but they did not have the effect of mortar artillery. That is what I understood from the CDS at the time."

10.199. Mr. Golding could not recall the exact words of CDS Saunders but he said that his "understanding from CDS Saunders was that this was more a shock and awe effect that the military was seeking to obtain. It was not something that would do mortar damage but it would sound like a mortar. That is what he told me."

10.200. It is our finding, having regard to the evidence, that CDS Saunders did not make it clear to Mr. Golding that mortars were actually fired. He left the Prime Minister with the impression that the weapon used would not have the effect of a mortar properly so called.

Re: Para.10.175 and 10.176 (formerly 10.133 and 10.134) – Summary of Responses

- 10.201.
- (i) The evidence regarding the use of mortars has not disclosed reckless or irresponsible conduct.
 - (ii) Maj. Cobb-Smith should not be considered as an expert. He was not trained to fire a mortar. He was trained to plan for its use in live firing environments.
 - (iii) Maj. Dixon is a trained mortar officer and has been involved in the use of mortars. The Commission should not, on the evidence, prefer Maj. Cobb-Smith's evidence to that of Maj. Dixon regarding the use of mortars.
 - (iv) The finding of reckless and irresponsible use of the weapon should depend upon whether there was evidence of damage, injury or death.
 - (v) The Commission should be wary of Maj. Cobb-Smith's evidence of what he observed at premises six years after the event.

Commission's Comments and Findings

10.202. As we have pointed out above, we do not accept that a finding of reckless and irresponsible conduct must only be linked to consequences. Surely a person can drive a vehicle recklessly without actually causing an accident or death. It is the manner of driving that may be deemed reckless rather than the fact that no one was injured as a result of the driving. Even if no one was injured or killed, firing a mortar within the lethal area is evidence of recklessness.

10.203. We ruled during the Enquiry that Maj. Cobb-Smith would be treated as an expert witness and that is the end of that matter. In an article "Opinion Evidence" (1986) 60 ALJ 597 Gillies wrote at p.602:

"Expertise may be characterised broadly as consisting of a body of knowledge and/or skills based upon experience or training which concerns a subject which is of such a nature that it can be grasped and commented upon in an informed way by a person with training and/or experience extending beyond that possessed by the average person."

10.204. In our judgment, there are two essential preconditions to be fulfilled for a person to qualify as an expert: (a) is the subject-matter of the witness's evidence an area for expert opinion; and (b) is the witness actually skilled through study and/or experience in that area. At para.10.108 we set out Maj. Cobb-Smith's experience and training. Since expert evidence is a question of fact, it is for us to decide which witness's evidence is preferable.

10.205. With respect to Maj. Cobb-Smith's evidence of the condition of premises that he observed in 2016, he admitted that he could not be sure if the marks of damage were caused by shrapnel in 2010. Our comments in para.10.180 were directed at what Lt. Col. Sewell said that he observed in May 2010.

Re: Para.10.177 (formerly 10.135) – Summary of Responses

- 10.206. (i) The differences in the witness statements of the two experts are acknowledged.
- (ii) Maj. Dixon's statement was a summarised report to his superiors and the Commission should not give undue weight to its lack of detail.

Commission's Comments and Findings

10.207. We note, without more, that Maj. Dixon's witness statement was signed on 18 June 2015 – at a time when the Commission of Enquiry was actively embarked upon its mandate.

Re: Para.10.178 (formerly 10.136) – Summary of Responses

- 10.208. (i) There is no discrepancy between the evidence of Maj. Dixon and Maj. Cheverria. Maj. Dixon said he was asked by Maj. Cheverria to use mortar fire. Maj. Cheverria said he could not recall if he had made the request.
- (ii) The differences in times stated by various Company Commanders regarding their times of entry into Tivoli Gardens must be understood against the background of the lapse of time from the events. Differences in times should not be construed as false evidence.

Commission's Comments and Findings

10.209. When Maj. Cheverria was recalled on 18 February 2016, questions were put to him by the Chairman as follows:

“COMMISSIONER: Did you request a mortar to be fired?

A: No, Sir, that was a part of the initial plan. I made no request on the day.

COMMISSIONER: No, No. Did you?

A: No, Sir.

COMMISSIONER: You didn't call Dixon and say, 'time to fire' or words to that effect or ask him to fire anything?

A: No, Sir. I can't recall making any such request.

COMMISSIONER: Can't recall or you did not do it?

A: I can't recall making any request of Maj. Dixon on that day."

10.210. Having seen and heard Maj. Cheverria, we find that he did not request Maj. Dixon to fire a mortar. His first and second answers to the Chairman's questions were definitive. Subsequently, he used the words "can't recall".

10.211. Whereas we have taken into account in this Enquiry that all witnesses have been required to recall events taking place six years ago, and while we make allowances for faulty recall of those events, so far as members of the security forces are concerned, we expected reasonable precision in their evidence as to time. In the case of JDF witnesses, Maj. Dixon's evidence was that he synchronised the watches of the various commanders. Maj. Cheverria testified that "it could have been Maj. Dixon who synchronised the watches of all of us. That is standard procedure before going into an operation."

10.212. We find material discrepancies in the evidence of Maj. Dixon and Maj. Cheverria as set out in para.10.178 and prefer the evidence of Maj. Cheverria on the two issues. He did not request Maj. Dixon to fire mortars.

Re: Para.10.179 (formerly 10.137) – Summary of Responses

10.213. (i) Maj. Dixon accepts that the guidelines as set out in the manual for mortar fire were not followed. It is also a requirement that high velocity weapons ought not to be used in residential areas but in so far as the gunmen were using such types of weapon, the JDF was obliged to respond commensurately.

- (ii) The Commission should have regard to the fact that, along Maj. Henry's route, no mortars were used and his troops were engaged in a firefight for approximately 4 hours using conventional artillery. Sixteen civilians were found dead on Spanish Town Road.
- (iii) Maj. Dixon used the mortars in a skilled, competent and responsible manner.

Commission's Comments and Findings

10.214. There is nothing in the responses that causes us to amend our findings. We compliment Maj. Dixon on his frankness and openness in conceding that the recommended safety distances were not followed. We think that such non-compliance with the doctrine merely strengthens our findings that firing mortar rounds within the community of Tivoli Gardens was reckless and irresponsible.

10.215. We are unable to draw the inferences suggested that, because no mortars were used in Maj. Henry's area of operation, 16 deaths occurred and the firefight was necessarily prolonged by the use of conventional weaponry. The evidence is not clear and compelling that the gunmen inside Tivoli Gardens were deterred by the use of mortars. What the evidence shows is that, as the advance forces led by Maj. Williams approached the train line by the intersection of Industrial Terrace and Marcus Garvey Drive, they were viciously attacked by a group of about 15 gunmen in bushes near Rasta City and from high-rise buildings within Tivoli Gardens. The security forces repelled these attacks and the men fled. Thereafter, the forces were able to enter Tivoli Gardens. Gunfire from gunmen lessened considerably and, by 2.30 p.m. Lt. Col. Sewell was satisfied that the sectors under his command were safe. In fact, in his witness

statement, Lt. Col. Sewell stated that “the community of Tivoli Gardens was eventually cordoned off about 1.30 p.m. on 24 May 2010”.

10.216. Of significance is the fact that neither Lt. Col. Sewell, Maj. Williams, Insp. Edwards, nor Maj. Kennedy made any mention whatsoever in their witness statements of the use or effect of mortars as they sought to enter the community or at all. We should have thought that if the use and effect of mortars on gunmen were so significant, the JDF witnesses on the ground would have opined accordingly during their evidence.

Re: Para.10.181 and 10.182 (formerly 10.139 and 10.140) – Summary of Responses

- 10.217. (i) A finding of recklessness and disproportionality in the use of mortars is inconsistent with the evidence given the nature of the security threat.
- (ii) If mortars had not been used and a conventional approach to fighting in built-up areas had been adopted, there would have been far more casualties.
- (iii) The sound of the mortars had the desired effect of keeping women and children indoors, therefore the use of mortars was not reckless and disproportionate.

Commission’s Comments and Findings

10.218. It is possible that the use of mortars had the effect of keeping women and children indoors but, equally, it is also possible that the sheer scale and intensity of the conflict, including the presence of large numbers of the security forces within the community armed

with high-powered weapons, may have had a similar deterrent effect on women and children.

Right to Liberty and Protection from Arbitrary Arrest or Detention

10.219. Section 15(1) of the Constitution provided that “no person shall be deprived of his personal liberty save as may in any of the following cases be authorised by law”. One of those cases is stated in section 15(1)(f) as follows:

“(f) upon reasonable suspicion of his having committed or being about to commit a criminal offence.”

10.220. By virtue of section 15(2), “any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which he understands, of the reasons for his arrest or detention.”

Special Provisions Applicable during a State of Emergency

10.221. It is important to appreciate that section 15(1) may be derogated from during a period of public emergency (State of Emergency). Thus, section 15(5) enacts:

“(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency.”

10.222. In addition, Reg.31(1) of the Emergency Powers (No.1) Regulations 2010, authorised the security forces to “arrest without a warrant and detain, pending enquiries, any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has –

(a) acted or is acting in a manner prejudicial to the public safety; or

(b) has committed or is about to commit an offence against these Regulations.”

10.223. Paragraphs (2) and (3) of Regulation 31 specify that, a person must not be detained for more than 24 hours except that a Resident Magistrate or a police officer not below the rank of Deputy Superintendent, may authorise detention for a period of up to 5 days – para.(2).

10.224. But where a Resident Magistrate or a police officer not below the rank of Senior Superintendent is satisfied that necessary enquiries cannot be completed within 5 days, he/she may direct that the person be detained for a further period not exceeding 5 days – para.(3). Para.(4) of Regulation 31 deems detention under para.1 as “lawful custody”.

10.225. For the purposes of the discussion, the other relevant Regulation is Regulation 34(1).

“34(1) The Minister, if satisfied that any person has been concerned in acts prejudicial to public safety or public order or in the preparation or instigation of such acts and that for any reason thereof, it is necessary to exercise control over that person, may make an order (hereinafter referred to as a detention order) against that person directing that he be detained.”

10.226. In addition the Minister may authorise a place of detention and the detainee shall be deemed to be in lawful custody – para.(2). At any time after a detention order has been made, the Minister may make a further order revoking or varying the detention order or suspend the duration of the order upon conditions – para.(3). The authorised persons referred to in Regulation 31 are members of the JDF and JCF and the Minister responsible for national security.

Review of the Evidence re Detentions

10.227. Against the background of law, we now discuss the evidence adduced in relation to detentions. That evidence shows that, during the month

of May (to which this discussion is limited), a very large number of male persons were detained by the security forces at various locations, viz. Up Park Camp, Harmon Barracks, Seprod and the National Arena.

Evidence of the JCF

(i) Commissioner Ellington

10.228. During examination-in-chief, CoP Ellington was asked about the rationale for separating persons and detaining them. He said –

“It was a hot zone and there was intense gunfire. We didn’t know who was who. We were primarily concerned about the safety of individuals. We could not give orders to thousands of them and enforce those orders to keep inside, stay out of the way of gunfire. So the safest option for us to do was to remove them from the hot zone and that is why there was mass detention and separation as we battled the criminals on the ground. As soon as it was possible to reunite citizens with their community, that was done. And so the considerations were citizens’ security, their own safety; preventing obstruction of the men and women who were conducting the operation, preserving evidence, ensuring that citizens did not get caught in crossfire between security forces elements and criminals who were embedded in the community.”

On 13 April 2015, CoP Ellington testified that, during the State of Emergency, a total of 4,372 persons were detained from 24 May to 22 July 2010. Four thousand and ninety three (4,093) were released. However, as at 28 May 2010, 1,122 were detained and 627 of those were released. The Operational Update signed by CoP Ellington for 23 June (the day after Coke’s capture/surrender) tabulates the statistics as follows at Table 3 below.

TABLE 3

CATEGORY	KINGSTON AND ST. ANDREW	ST. CATHERINE	TOTAL
DETAINEES	2,118	290	2,408
PERSONS PROCESSED AND RELEASED	2,071	211	2,282
DETENTION ORDERS ISSUED	122		122
ACTIVE INVESTIGATIONS AGAINST PERSONS	122		122
PERSONS DETAINED AND AWAITING PROCESSING			76

10.229. By 19 July 2010 those numbers had changed appreciably as shown in Table 4 below.

TABLE 4

CATEGORY	KINGSTON AND ST. ANDREW	ST. CATHERINE	TOTAL
DETAINEES	2,983	1,389	4,372
PERSONS PROCESSED AND RELEASED	2,710	1,383	4,093
DETENTION ORDERS ISSUED	139		139
RELEASE ORDERS ISSUED			21
ACTIVE INVESTIGATIONS AGAINST PERSONS	138		138
PERSONS DETAINED AND AWAITING PROCESSING			155

(ii) DCP Hinds

10.230. On 27 May 2015, DCP Hinds gave evidence that there were “over 6,000” detainees. But he said that –

“after a few days, 128 remained. 17 were charged with offences and a further 8 were held pending further investigations.”

Speaking of the rationale underlying the mass detentions, DCP Hinds said in evidence-in-chief:

“In the initial phase of the detention were persons who we suspected to have been firing weapons at us. That was the initial phase. There was a State of Emergency. We had a number of open files and a number of persons who we detained were also implicated in some of the crimes who we had open files for. Seventeen (17) persons were actually arrested and charged and eight (8) persons were not charged but were the subject of further investigation at that time.”

10.231. DCP Hinds stated that detainees were originally held at Mobile Reserve headquarters but later they were transferred to the National Arena. Processing also took place at Seprod. In answer to Mrs. DaCosta, he said that, initially, 4,000 detainees were “from Tivoli Gardens, Denham Town and the corporate area and, within 5 to 7 days, the majority were released.” At first on 24 May, the headquarters of Mobile Reserve were used as a detention centre but that soon changed to the National Arena.

(iii) SSP Graham

10.232. Some processing was also carried out at Seprod. SSP Donovan Graham was the second in command at Mobile Reserve and was chosen as a ground commander for the internal security operation. He established a command post at Seprod which was used as a temporary detention area.

10.233. Testifying about the command post, SSP Graham said –

"At Seprod we had a makeshift holding area. Detainees were placed there. Persons were held in transit to elsewhere. We knew that we would have to detain persons. We kept detainees for no more than 2 hours. We started receiving detainees on the evening of 24 May. We were overwhelmed by the number of persons who were brought in... Detainees were sent to Mobile Reserve or the National Arena."

10.234. When questioned by Mrs. DaCosta, SSP Graham asserted that "some detainees were detained in their own interests. This was made clear to them when they were detained". He denied that male persons were "rounded up in the hope of finding weapons". He said explicitly -

"It is not true that we detained persons without having good grounds."

10.235. When Mr. Witter, Bishop Blair and Dr. Salmon visited Seprod on 25 May, SSP Graham estimated that there were about 200 detainees there.

(iv) ACP Leon Rose

10.236. In the opinion of ACP Rose, Mobile Reserve was capable of holding "about 150 persons for processing and about 60 for actual detention. The National Arena could have accommodated 4,000." ACP Rose had no advance information as to what number of detainees he should expect at Mobile Reserve and he confirmed that he "did not see a lot of women there". Processing involved interviewing the detainees and relieving them of their mobile telephones. ACP Rose's evidence is that -

"if there was no indication that they were wanted for a previous crime and would have posed no threat, they were released... In the initial phase of the operation, there were persons there for 48 hours."

10.237. In respect of Maurice Tomlinson, ACP Rose acknowledged his signature on the Release Form (which he designed) and the date, 27 May 2010. He said -

"I would have been present when Tomlinson signed and I would have checked to see that he had no injuries."

10.238. ACP Rose emphasised that, in briefing the officers of Mobile Reserve before the launch of the operation, we spent "a lot of time briefing them on the rights of the individual". That briefing took into account the detention of persons and the way in which they were to be treated.

(v) *ACP Clifford Blake*

10.239. ACP Blake was questioned about detainees and he explained the basis for detention in this way in answer to Mrs. Mayhew:

"We had an arrest plan including the safe custody of detainees. We knew that a large number of wanted persons from all over Jamaica had descended on Tivoli Gardens. The security forces were to capture wanted men or persons who were there in support of Coke. We have a *wanted persons* database and our officers would have had a list going into Tivoli. If we were not certain of the identities of persons, they were taken in and, if they were clean, they were released."

10.240. When cross-examined by Mrs. DaCosta, ACP Blake re-affirmed his evidence given in answer to Mrs. Mayhew:

"Persons were wanted and we were looking for them. Where we could not establish identity, people were taken into custody.The list of persons and their photographs were shared with our operatives. We had a long list. 'Slicer' was one of those on the list."

10.241. ACP Blake was not sure of the number of detainees but he estimated 4,000 "taken over an extended period of time and from all over Kingston....."

"A number of persons we had on the list were apprehended over the duration of the operation which was probably 6 weeks."

(vi) DSPs. Everton Tabannah and Warren Turner

10.242. DSP Tabannah was the JCF's counterpart to Maj. Cheverria assigned to sector 1. He gave some evidence concerning the matter of detentions. In evidence-in-chief, he said that he saw no caged area in his sector. He explained how persons came to be detained as follows:

"Some men were picked up while we were doing searches and taken to detention. While questioning them, I realised that they were not from the community."

10.243. To Mr. McBean Q.C. in cross-examination, DSP Tabannah said that those persons "were unable to give a proper account as to where they were from and there was reasonable cause to believe that they were involved. We picked up about 15 or 16 who were sent to Hannah Town." And to Mr. Panton, the DSP. said –

"I did not record the detention of 15 or 16 persons. It would have been an oversight."

DSP Turner said that his officers had nothing to do with detentions. He briefed them on the criteria for detention, i.e. "reasonable suspicion of shooting at the police".

Evidence of JDF

(i) Lt. Col. Ogilvie

10.244. Lt. Col. Ogilvie gave interesting evidence. By 12.00 a.m. on 25 May, all of the companies had reported control of Coronation Market, Spanish Town Road and Marcus Garvey Drive. There was, however, some sporadic hit and run gunfire from a few areas East of the Market and in Hannah Town and Denham Town. Lt. Col. Ogilvie said -

"Early next morning a number of young men walked out into Spanish Town Road, Charles St. and Regent St. saying that they had nowhere to go. They had come from outside

Kingston and were dressed in white Tee shirts and jeans. We secured them and handed them over to the police for processing. Some of the men were pushed out by residents of Denham Town. The residents denied knowledge of them.”

10.245. Lt. Col. Ogilvie said in cross-examination that the guidance which he gave his troops in briefings was “to detain persons and then quickly hand them over to the JCF”. With regard to Seprod, Lt. Col. Ogilvie said –

“I was aware that Seprod was to be used as an intermediate processing point for persons detained before moving them to another place... I went to Seprod once. I did not see the conditions. I saw some detainees on a vehicle. The JCF had the responsibility for handling detainees.”

(ii) Major Kennedy

10.246. Maj. Kennedy was asked by the Chairman: “For what purpose did you detain these men?” He answered:

“The information we got prior to going into Tivoli was the fact that there were a large number of suspicious men in the community. A lot of them did not come from the community and we had a list of some of the wanted men but there were others there that we weren’t aware of. So we treated the situation that everyone would have equal opportunity to be interviewed by the police so we take the young men and handed them over to the police.”

10.247. The Chairman’s follow-up question was: “So you did not detain those men on the basis of reasonable suspicion that they were doing anything wrong?” He answered:

“Not that I am aware of. No Sir.”

10.248. Under cross-examination by Mr. McBean Q.C. on 23 October 2015, Maj. Kennedy said –

“We detained persons wherever we found a large group of men and secured persons in the Community Centre. They were handed over to the police. We detained young men on

24 May. The information we got prior to going in to Tivoli was that there were a lot of suspicious men in the area. We had a list. I did not detain these men on the basis that there was reasonable suspicion. Within the first 48 hours, other residents were restricted. They were told not to come out of their houses. I saw no persons who were made to lie on their bellies or kneel... Each commander established his own detention centre."

10.249. Maj. Kennedy also testified about the attire of some of the detainees. He said –

"Many of those detained wore white shirts and jeans and that provided reasonable suspicion and those men were taken into detention."

(iii) *Maj. Cheverria,*

10.250. Maj. Cheverria admitted that his Company (Charlie) "set up temporary holding areas" –

"typically verandahs and other places where we held persons until they were sent to Seprod... Barbed wire could also have been used to create a caged area but I don't recall if we had any."

10.251. In answer to Mr. McBean, the Major reiterated that he could not recall if an area protected with barbed wire had been established but he did not rule it out. "It could have been."

10.252. He was more certain about the detention of persons.

"Where persons could not tell us why they were in the community, they were detained. I can't estimate how many were detained. It is possible that persons from Tivoli Gardens were detained. There were several reports from my platoon commanders of large numbers of men in houses who could give no satisfactory reason for being there. These were all reported to the JCF to be dealt with."

10.253. There was evidence before us that women and children were kept apart from young men after the security forces entered a sector. Maj. Cheverria's evidence was that -

"There was no policy to separate young men from women and children before the operation started. It did not happen during the operation. It was not part of the policy that young men were told to lie on the ground. It did not happen. I saw no persons who were made to lie face down in mud."

(iv) *Capt. Anderson*

10.254. Under cross-examination by Mr. Michael Williams, Capt. Anderson said that he had no recollection of persons being made to kneel on gravel or lay in water. The method used for detentions was -

"to take people from several apartments and put them in one place. Men and women were separated and, mostly men were taken away to be processed by the JCF."

(v) *Lt. Col. Cummings*

10.255. Lt. Col. Cummings testified that a vehicle checkpoint reported several JUTC buses "with lots of men wearing jeans and white Tee shirts". He said -

"I removed them and handed them over to the JCF. They would have been searched before handover. No guns were recovered."

Evidence of Mr. Witter, Bishop Blair, and Dr. Salmon

10.256. The visit to Tivoli Gardens on 25 May enabled Messrs. Witter, Blair and Salmon to see and assess the detention facility at Seprod. Mr. Witter described it as "an old zinc-roofed warehouse". He saw some detainees being processed and others "in an open area cordoned off by razor wire". The team received complaints from detainees and relayed them to the security forces. The

complaints centred around a lack of food and the physical conditions of the facility.

10.257. Dr. Salmon said that there was no clear provision for water and "sanitary conveniences were inadequate". He could not understand how so many persons could have been accommodated there. He saw processing of the detainees such as the confiscation of mobile telephones and attempts at identifying the owners. "The young men were angry."

10.258. Bishop Blair was told that there were 285 persons detained and being processed at Seprod. He saw four persons in need of medical attention. There were "men and children held at the facility". He said -

"We asked SSP Graham to remove the children, approximately 25. He did so and the children were sent to the National Arena. I oversaw the procedure where the children were processed and sent back home on 26 May."

Complaints of Residents – Degrading Treatment

10.259. In earlier Chapters, we reported that some residents who testified alleged that they were roughly treated by the security forces and made to suffer indignities. Maj. Williams acknowledged that "it could have been that my men made persons sit in water". Section 17(1) of the Constitution is engaged on this evidence – see Chapter 10.13.

FINDINGS

10.260. The law is clear that, during the State of Emergency, the security forces were entitled to detain persons only where their behaviour was of such a nature as to give reasonable grounds for suspecting that they were acting or had acted in a manner prejudicial to public safety or were committing or had committed an offence

against the Regulations. None of the testimony of the witnesses of the security forces satisfied that legal test.

10.261 Neither CoP Ellington nor DCP Hinds was on the ground on 24 May and their evidence, at best, could only have been hearsay. Even so, the criterion advanced by CoP Ellington was that the mass detentions and separations which took place were done with a view to remove thousands of civilians from "a hot zone". On the other hand, DCP Hinds' rationale was that, initially, detainees had been suspected of firing weapons at the security forces. We cannot accept that hundreds of persons were initially detained on suspicion of firing at the security forces. There was no evidence that any of the detainees were found with guns or that large numbers of guns were found after searches were conducted in Tivoli Gardens on 24, 25, 26 May. Counsel for the security forces did not suggest to the detainees who gave evidence that they were shooting at the security forces. And, when persons were detained on 24 May, the JDF had entered the sectors and secured them. The evidence reported elsewhere does not suggest that, at the time of the first set of mass detentions, the areas were "hot". As early as 2.30 p.m. Lt. Col. Sewell had walked around the community.

10.262. The evidence of the JDF Commanders who were the first to enter the various sectors, is more persuasive as to the real reasons for detention. They were given lists of wanted men; they heard that many suspicious men were in Tivoli Gardens; and, wherever they came across a group of men, they detained them without more. We believe Maj. Kennedy that, certainly his troops, did not detain men on the basis of suspicion of having committed criminal offences. It appears to us that men were unceremoniously gathered up, confined to caged areas, and then sent off to detention. The detentions were arbitrary and illegal.

10.263. All of the evidence points to the separation of males and females. Very few women and children were detained. The vast majority of detainees were men, adolescents and adults. Even if, as Maj. Cheverria said, there was no policy of separation of men and women “before the operation started”, we are satisfied that such a policy was carried out once the security forces entered and secured the sectors. There is an abundance of evidence from civilian witnesses that such a policy was in fact effected.

10.264. There was little evidence that detainees were told the reasons for their detention. Failure to give reasons for detention is a breach of section 15(2) of the Constitution. SSP Graham testified that it was explained to some of the detainees that they were detained “in their own interests”, thereby implying that the reasons for detention were made known. But, on his own evidence, this was not a universal practice. It applied to only “some” of the detainees. We are not convinced that the thousands of detainees were told why they were detained. Certain of the civilian witnesses were asked by the security forces whether they knew either Christopher Coke or Steve Reid aka “Slicer” or their whereabouts and, if they denied knowledge, they were detained and, in some cases, roughed up. There was no evidence that any of these witnesses was responsible for firing at the security forces.

10.265. Some of the injuries sustained by Maurice Tomlinson were conspicuous and observable, for example, lacerations to his left ear, upper lip and the abrasions to his elbows – see Chapter 9. In addition, witnesses Tomlinson, Vallin Joiles and O’neil Smith testified that they were detained in excess of 24 hours (Tomlinson and Joiles – 3 days; Smith – 4 days). Their release forms, however, state that they were detained and released in 24 hours. We accept the evidence of these witnesses.

10.266. Having regard to the foregoing, we find that the detentions of the witnesses who testified were illegal as being contrary to the Regulations and were also unconstitutional.

10.267. We find that the complaints of residents that they were made to sit in water or kneel on gravel were truthful. Such conduct on the part of the security forces was in breach of section 17(1) of the Constitution and amounted to degrading treatment within the meaning of that section.

Adverse Comments re: Maj. Marlon Kennedy

10.268. On 13 April 2016, the Commission referred a draft of para.10.262 (formerly 10.185) to Maj. Marlon Kennedy as a “proposed adverse finding” and sought his response thereto. He replied on 5 May 2016 through Counsel and his response is appended to this Report at Appendix AC9.

Re: Para.10.262 (formerly 10.185)- Summary of Response

- 10.269. (i) Maj. Kennedy’s decision to take persons into custody must be assessed according to principles of proportionality and the prevailing circumstances.
- (ii) Maj. Kennedy did not act arbitrarily but with reasonable and probable cause.
- (iii) In the circumstances, he had a duty to secure his sector and that entailed restraining and controlling all persons found in the area until their credentials could be established.
- (iv) Lt. Col. Ogilvie testified that he came across several persons who were not from West Kingston and he observed young men in the community unknown to them.

- (v) Maj. Kennedy took these persons into custody and handed them over to the JCF.
- (vi) Reference was made to two legal authorities of the UK Supreme Court.

Commission's Comments and Findings

10.270. The detentions were made at a time when Reg.31(1) of the Emergency Powers (No.1) Regulations was in force – see para.10.222. Even during a State of Emergency, the law required detention only upon reasonable grounds for suspecting that a person was acting or had acted in a manner prejudicial to public safety or that he/she had committed or was about to commit an offence. In other words, if detention was to be undertaken, it ought to have been justified by objectively demonstrated suspicion. Notwithstanding Maj. Kennedy's response, it is our finding that the wide scale detentions were arbitrary. Persons were detained when there were no objective criteria to support their detention on 24 May 2010.

10.271. With regard to the response that Maj. Kennedy took charge of young men detained by Lt. Col. Ogilvie and then handed them over to the JCF, our understanding of the evidence is different from that offered by Counsel for Maj. Kennedy. As is evident upon a reading of para.10.248 Maj. Kennedy detained persons on 24 May. The detentions of which Lt. Col. Ogilvie testified, took place on the morning of 25 May – see para.10.244 (*supra*).

10.272. In the circumstances, we are not persuaded by Maj. Kennedy's response to alter our original findings.