

CHAPTER 11

THE CHAIN OF COMMAND IN RELATION TO THE DECISIONS CONCERNING THE OPERATIONS BY THE SECURITY FORCES IN TIVOLI GARDENS AND RELATED AREAS DURING MAY 2010, AND THE RESPECTIVE RESPONSIBILITIES OF EACH PERSON IN THAT CHAIN OF COMMAND

ToR (K)

AND

WHETHER ANY DERELICTION OF DUTY OR UNLAWFUL CONDUCT IS ATTRIBUTABLE TO ANY PERSON OR PERSONS IN THAT CHAIN OF COMMAND IN CONNECTION WITH THE DECISIONS CONCERNING OR THE EXECUTION OF THE OPERATIONS BY THE SECURITY FORCES IN TIVOLI GARDENS AND RELATED AREAS DURING MAY 2010 AND, IF SO, TO WHICH PERSON OR PERSONS, AND THE NATURE AND EXTENT OF SUCH DERELICTIONS OF DUTY OR UNLAWFUL CONDUCT

ToR (L)

INTRODUCTION

11.1. The JDF and the JCF are Forces with tall hierarchical structures. There are clear levels of command. In the case of the JCF there was a situational chain of command that was established for the purposes of the internal security operation. Even though the JDF largely maintained its standard organisational configuration, there were a situational chain and a line of command during the operation. For example, the Mortar Group reported directly to the Command Centre and Headquarters and not to the Ground Commander.

11.2. In this Chapter, at Part A, we describe the chains of command, identify the units in the area of operation and discuss their respective tasks and responsibilities. In Part B of the Chapter, we discuss the effectiveness of

command and maintenance of discipline. In Part C, we review certain critical decisions. Part D is devoted to the issue of dereliction of duty.

11.3. At the centre of the several issues discussed in this Chapter is the effectiveness of systems of accountability within the JCF and JDF. We map the chains of command in order to locate the sites of key decisions and to examine their functioning including the fulfillment of critical tasks and duties, for example, the duty to respect and protect the fundamental rights of individuals.

11.4. We try to minimise repetition of ground covered in previous and subsequent Chapters but it was inevitable that we should allude to some of the decisions already assessed elsewhere in this Report.

PART A

DESCRIPTION OF THE CHAINS OF COMMAND

11.5. Operation "Garden Parish" was described by the JDF commanders as an internal security operation in which the JDF acted in support of the JCF. However, the security forces did not execute the operation under a single or integrated chain of command. Rather, they seemed to have coordinated their activities.

The Joint Command

11.6. Execution of the operation on 24 May required collaboration between the two Forces. A coordinating mechanism and a set of procedures were established. CoP Ellington testified variously of "joint command", "a joint planning cell" and "a joint operation centre". CDS Saunders confirmed that there was a joint command structure that "evolved out of joint operations" and there was much evidence before us of a measure of joint planning and coordination.

11.7. Even though there was some coordination, we were left with the impression that there was an element of separateness in the operational planning and execution of the operation. This separateness was exemplified in the nomenclature of the operation. For the JDF it was "Operation Garden Parish"; for the JCF it was titled "Operation Keywest". Additionally, the two plans appear not to have had the same objectives. At p.3 of Operation Keywest, the objectives of the JCF were (a) "to apprehend the suspect and repel any resistance"; (b) "to restore security and confidence to the community", or as it was also expressed, "to shape the environment in Western Kingston, and particularly Tivoli Gardens, for the delivery of community policing". On the other hand, CDS Saunders, in his oral evidence, stated the objective of the JDF as an "operation for the capture of Coke".

11.8. The evidence received by us makes it reasonably clear that whereas the respective plans were not necessarily shared, planning guidelines were jointly developed.

11.9. The Joint Command had its first meeting in December 2009 at which the general principles that would guide the operation were developed. According to Lt. Col. Ogilvie at para.10 of his witness statement –

"Among the issues discussed and the guidance given, was the need to ensure that Mr. Coke's rights were not violated, that in any operation the rights of citizens were respected and protected, that it should consist of 3 phases – planning and preparation, search and capture and return to normalcy, the importance of examining past operations in Western Kingston, the need for disciplined but overwhelming force to be used, and the importance of the security forces having a positive impact on the community."

11.10. The planning guidelines of the JCF took the form of an Operational Order dated 11 January 2010. CoP Ellington explained the content and purport of the Order during his evidence on 13 April 2015:

"The Order was scripted as a guide to the officers, men and women of both Forces who would take part in the operation. It included some background information on the situation that we were dealing with, threats and risk assessment, the planning guidelines to be issued by the High Commands of both forces, the intent of the operation, what it is that we intended to achieve, the method that we were hoping to use to execute the plan and issues such as administration, record keeping, dealing with the injured, dealing with casualties, if we had any, our communication and systems and structures which would be put in place to ensure accountability for the conduct of the operation."

11.11. While there was a measure of joint planning, the "need to know" principle also applied to delimit the extent of information sharing. CoP Ellington said -

"The Forces do not need to disclose their capabilities at all times and there are certain questions that I do not ask about JDF capabilities and there are certain questions that they do not ask about JCF capabilities."

11.12. In that regard, as we have mentioned in Chapter 10, CoP Ellington said that the use of mortars was not disclosed to him.

11.13. The security forces did not have a unified command structure. Thus, the JCF did not take orders from the JDF and vice versa. The Forces were not governed by a single chain of command.

Division of Responsibility

11.14. As Lt. Col. Ogilvie stated, the operation was divided into phases. The reality on 24 May was, however, not straightforward if only because members of the JCF were deployed with JDF troops. CoP Ellington said –

"There were joint deployments especially in the early phase of the move-in. I would rather if the commanders who were in charge of those units were here to describe exactly how they were physically composed. But I know that there were

joint elements earmarked for and deployed into the operational zones.”

11.15. In so far as coordination was required at the lower level of command, measures were necessary to ensure accountability. Part of CoP Ellington’s role was “to ensure that, as much as possible, there could be accountability for the actions of the forces”.

Transition of Command

11.16. The plan called for transition of leadership from the JDF to the JCF after Tivoli Gardens was pacified. On 14 April 2015, CoP Ellington explained that –

“A command transition is a very simple exercise. The commanders simply agree that the threat level has subsided significantly and we can now pass command back to you. What we usually do – I don’t know if it was done because given what was happening in the area, I don’t know if they were able to complete what we call a decision log – but they could simply get on the radio and report to Control that command had been transitioned back to the JCF. Or somebody would make a note of it and it could be logged somewhere; or there could be transition of command and nothing is said about it. But the officers who were there and did it can come and explain what happened and when they did it.”

11.17. Difficulties associated with transition of command arose in the afternoon of 24 May after the combat phase of the operation. At this time, the JCF had entered the area of operation and, in those circumstances, they shared operational space with the JDF. We make findings in respect of this matter later.

The JDF’s Chain of Command

11.18. The JDF’s situational chain of command was similar to their usual chain of command. At the apex was the Chief of Defence Staff and the Headquarters Command Centre staffed by senior officers including the Deputy Chief of Defence Staff. The Ground Commanders were the commanders of 1JR,

2JR and the Engineers, holding the rank of Lieutenant Colonel, and the CSB which was commanded by a Major. They reported upwards to the Command Centre. The responsible unit on the ground or within the area of operation was the Battalion. So that, within the area of operation, the highest ranking decision-makers were the Battalion Commanders. During the operation, the three combat battalions were 1JR, 2JR and CSB. Some units of 3JR were attached to 1JR. Each had separate tasks and spheres of responsibility.

11.19. Capt. Anderson, speaking with reference to 2JR, gave a description as follows:

“Within the Battalion, there are four companies. Headquarters Company is more of an administrative company. Then there are three infantry companies or rifle companies as they are referred to. Those are Alpha, Bravo and Charlie Companies. Each company has anywhere between 100 to 120 soldiers.”

11.20. This Battalion was responsible for entering and pacifying Tivoli Gardens. It had a clearly defined operational space that was coterminous with the boundaries of Tivoli Gardens. Each of the rifle companies was responsible for clearly defined geographic zones, viz. sectors 1, 2, and 3 as mentioned elsewhere. The main effort was undertaken by Alpha Company. Its role was pacification of sector 1 including Java where Coke was believed to be ensconced. Lt. Col. Sewell commanded the Battalion charged with this responsibility.

11.21. As indicated previously, Alpha Company under Maj. Cherverria was assigned sector 1. Charlie Company and Maj. Kennedy were assigned sector 2, while Capt. Anderson and Bravo Company were to take charge of sector 3.

11.22. According to Lt. Col. Ogilvie, the JDF's system is so structured that no one is left unsupervised. When he gave evidence on 21 October 2015, Lt. Col. Ogilvie said –

“Even though we had been empowered under the State of Emergency to act in a particular way, independent of the Police, I make it very clear that we were always going to be in support of the Police. Because we were not acting with the Police all the time, it did not mean that soldiers were to use this as an excuse to abuse citizens, and violate their rights. They were very clear about the chain of command and the level of supervision. In particular, I charged my junior commanders, platoon commanders, the Cpls. And L/Cpls., the Sgts. to exercise proper command and control. Fortunately, the structure of the military means that nobody is unsupervised at any point. Down to the youngest Private soldier, there is at least a L/Cpl. There to supervise him and a Cpl. to supervise the L/Cpl., a Sgt. to supervise the Cpl. and so on. At the various levels of command and control, those are the persons that I charged and entrusted to ensure that the soldiers behaved professionally and in accordance with their training...”

Responsibility of 1JR

11.23. 1JR was responsible for pacifying the neighbouring areas North of Tivoli Gardens, including Denham Town and Hannah Town. It was to create a buffer zone between Tivoli Gardens and communities North of it. In so doing, it would prevent gangs from entering Tivoli Gardens to give armed support to Coke and his loyalists. And, of course, it would prevent these loyalists from exiting Tivoli Gardens to the North.

11.24. The structure of 1JR was similar to that of 2JR (see para.11.19). Maj. Dave Walker commanded Alpha Company and Maj. Rohan Hibbert commanded Charlie Company of 1JR. Maj. Henry commanded Bravo Company which was the lead unit and had responsibility for creating the buffer zone. It was involved in most of the fighting outside the boundaries of Tivoli Gardens. Alpha established vehicle check points and secured critical installations while blocking possible escapes to the West via May Pen Cemetery. Detachments from Charlie Company occupied the Blood Bank and KPH.

Combat Support Battalion (CSB)

11.25. The CSB commanded by Maj. Mahatma Williams, was tasked to capture Coke and provide flank support for 2JR. Unlike 1JR and 2JR, it had no fixed territory. It was free to move to wherever Coke was believed to be. Thus, during the operation on 24 May, it shared operational space with 2JR and, after 3.00 p.m., with 1JR.

The Mortar Group

11.26. Combat support was also provided by a Mortar Group. We have considered the activities of the Mortar Group in Chapter 10 and merely remark here that it was commanded by Maj. Dixon and reported directly to the JDF Operations Centre – JDF HQ.

The Engineer Battalion

11.27. Likewise, we have discussed the role of the Engineers previously. Accordingly, we only reiterate that the Engineers cleared barricades, embattlements and other obstacles to create entry points into Tivoli Gardens and reduce the risk of death of and injury to JDF soldiers. The Engineers were under the command of Lt. Col. Cummings.

Airwing and Coast Guard

11.28. The airwing of the JDF provided some surveillance during the operation and the Coast Guard provided sea transport for the Mortar Group in the early hours of 24 May.

The JCF's Chain of Command

11.29. CoP Ellington described the situational chain of command for the operation in this way –

“You have an operation which is guided by an Operational Order and it is a pre-planned operation, meaning that you have time to assess risks, plan, allocate responsibilities, resource them and set up structures to monitor the execution, but this one had the Commissioner and the Deputy and their staff at gold. It had Silver Commanders who were responsible for things like cordons.”

11.30. For the operation, the JCF established three levels of command, viz. Gold, Silver and Bronze. CoP Ellington and DCP Hinds were the Gold Commanders along with CDS Saunders of the JDF. CoP Ellington’s oral evidence on 14 April 2015 is instructive as to the levels of command below himself and DCP Hinds. He said –

“We had two Silver commanders. One in charge of cordon and support, and the other one who is in charge of arrests, searches and evidence gathering. Naturally, the officer in charge of cordon and support would be deployed first because that is to secure the target and the officer in charge of arrests, searches and evidence gathering would stage their deployment as it is possible thereafter. Below Silver, you have what we call Bronze commanders. These are usually lower ranking Gazetted Officers and may even be Inspectors who are assigned to perform some specific roles within the operation such as establishing [cordons]. And then you may have officers who are responsible for inner cordons which are where you go closer to the target. Then you may have our arrest team and you may have an extraction team there for injured or high value targets.....each headed by a Bronze commander.”

11.31. The situational structure and related responsibilities were informed by what CoP Ellington and ACP Blake described as the IRIMAC model. Broadly, IRIMAC is an acronym that highlights the critical elements of good operational planning and the assignment of responsibilities. It therefore provides for:

- INFORMATION/INTELLIGENCE
- RISK assessment e.g. safety of officers and the public
- INTENTION e.g. effecting the arrest of Coke
- METHOD e.g. the manner of achieving the objective

- ADMINISTRATION e.g. feeding the officers
- COMMUNICATION e.g. using a dedicated circuit

The Levels of Command

11.32. Here we examine the duties and responsibilities of the three types of commander. – see (1), (2), (3) *supra*.

(1) Gold Command

11.33. The Gold Command's duties and responsibilities were:

- To provide strategic guidance for the operation;
- To lead planning and resourcing;
- To ensure execution of tasks in a manner consistent with the law and the policies of the JCF;
- To ensure thorough briefing of the Silver and Bronze Commanders;
- To ensure the highest levels of professionalism during the operation;
- To monitor execution of the operation and issues of safety, welfare and conduct;
- To determine the feasibility of establishing curfews.

11.34. On 24 May CoP Ellington spent most of his time moving around "dealing with other matters including conversations with the Prime Minister". He said -

"In fact, most of the afternoon into the night I was at Jamaica House or Vale Royal. The officers who were in charge and were at the Command Centre will come and give evidence."

11.35. CoP Ellington did not give any evidence of his direct contact with sector commanders of the JCF. DCP Hinds was in charge of the operation from the standpoint of the JCF. However, Insp. Linroy Edwards of Mobile Reserve in 2010, was part of a special unit to apprehend Coke. Insp. Edwards reported

directly to CoP Ellington, the Gold Commander. On 24 May he was in an APC following behind the main assault team led by Maj. Williams.

11.36. Insp. Edwards testified under cross-examination by Mrs. Mayhew that he called CoP Ellington to inform him that they had not found Coke. He said that CoP Ellington gave him no instructions.

(2) Silver Command

11.37. The Silver command consisted of two commanders with different responsibilities. One commander dealt with the investigative process; the other had responsibility for cordon support. SSP Donovan Graham performed the latter role. *Inter alia*, SSP Graham was responsible for deploying personnel and managing –

- vehicular check points;
- use of APCs;
- coordination with the JDF's airwing and the coordination of marine support;
- house to house searches.

11.38. The other Silver Commander with responsibility for arrests, searches, evidence gathering and the processing of detainees was ACP Leslie Green. However, ACP Green was overseas when the operation began and returned to Jamaica about 2.00 p.m. on 24 May. In his evidence, ACP Green told us that he was not involved in any of those duties until 26 May.

11.39. As events turned out, detainees were held and initially processed at Seprod where SSP. Graham had established a command post. From Seprod, the detainees were sent to Mobile Reserve and the National Arena. At these facilities, ACP Leon Rose assumed responsibility for the detainees. The BSI, then led by ACP Granville Gause, had responsibility for evidence gathering and investigations.

(3) Bronze Command

11.40. There were many Bronze Commanders whose responsibilities, according to CoP Ellington, included -

“things such as outer cordons, vehicle check points, search teams, arrest teams, extraction teams, evidence gather teams. They would move into the operation in phases.”

11.41. For the sake of completeness, we mention DSP Tabannah who led the JCF units in sector 1 and DSP. Turner who was assigned to sector 2. We received no significant evidence about DSP Thomas who was assigned to sector 3.

11.42. These Bronze Commanders had command and control responsibilities for JCF officers who came into direct contact with residents. We were assured by CoP Ellington that the chain of command and assignments were done in a manner that allowed the Bronze Commanders the ability to identify individuals who abused their powers and to hold them to account for misconduct.

11.43. Bronze Commanders and their units were also assigned to the area of operation that included Denham Town and Hannah Town. These units worked with 1JR. The Bronze Commanders were Supt. Baker and DSP Johnson (attached to Bravo Company of 1JR); Supt. Neil and DSP Kerr (Charlie Company of 1JR); and Supt. Bish (Alpha Company of 1JR).

11.44. With respect to the BSI, its responsibilities are discussed in Chapter 14 and need no elaboration here.

FINDINGS

11.45. Accountability is not simply a legal exercise. It is not just the judgment of conduct in relation to legal standards and criteria. It

implies a reckoning and answering for decisions and conduct based on the rules and standards of the Police and the Defence Force and it may include administrative accountability. In this context, administrative accountability embraces the rules of occupational or professional conduct that may be measured against those of peers in other countries. But there are also standards of conduct that are imposed by the law and policies such as a use of force policy. And there are times when accountability rests on basic commonsense.

11.46. Although we fully appreciate that the leadership of the JDF necessarily had to be careful and astute in the handling of information and were obliged to share information on a “need to know” basis, we find that it was imprudent not to have informed CoP Ellington of the potentiality of using mortars. Given the risks to the residents who resided in a section of Tivoli Gardens earmarked for the detonation of mortars, the decision to use such weapons may have benefitted from the perspectives of the leader of the JCF.

11.47. We find that the transition of command required coordination of effort within the area of operation. Particularly during the period of transition, the level of coordination between the JDF and the JCF was inadequate. This inadequacy created spaces for abusive conduct, possible criminality and reduced individual accountability. The transition arrangements were clearly not detailed or sufficiently formal. Therefore opportunities were created for elements within the security forces to avoid individual accountability and command responsibility.

11.48. There were clear difficulties associated with the transition of command in the afternoon of 24 May. There was no spatial division of responsibility between the two Forces. As a consequence, there

were difficulties in trying to determine which Force was accountable for events or incidents that occurred during the period of transition. For example, we were given different accounts of the times of entry of JCF units and the conditions prevailing at those times, including the level of gunfire and armed activity. The JDF and the JCF gave differing times of entry into the area of operation within Tivoli Gardens.

11.49. To further compound the difficulties, there was little evidence of value placed before us as to who did what, when and where. Thus, there was an absence of cogent evidence to determine who, at the command level, was to be held responsible. These types of issues were expressions of a problem of accountability or the avoidance of responsibility that were made easier through a lack of formality in the transition of command.

11.50. Notwithstanding the difficulties, we were able to attribute accountability to certain decisions as events occurred within a location. Hence the decision to use mortars was that of CDS Saunders who admitted that it was his decision. Similarly, to the extent that CoP Ellington was not directly in command of the JCF units that were on the ground in the area of operation, it is clear that the Bronze Commanders must be accountable for the conduct of the officers under their control. However, having regard to the evidence of Insp. Edwards that he was in direct contact with CoP Ellington concerning the fact that Coke was not located in Java, we find that, in that one instance, CoP Ellington was a person at the Gold Command level to whom a junior officer reported directly.

11.51. We find that ACP Leslie Green was not involved in the operation of 24 May.

11.52. In Chapter 10, we make findings specific to DSP Tabannah and DSP Turner. But we have not been able to identify officers under their command who may have misconducted themselves. There was no evidence concerning the identity of JCF officers who were deployed in the three sectors. Indeed, whereas CoP Ellington told us that the Bronze Commanders would know the deployment of personnel and be able to assist our Enquiry, the evidence revealed a contrary reality. For example, even though Insp. Edwards gave evidence that he was in command of an APC with about eleven other persons and identified three of the police personnel, we were not able to identify the other persons in the APC. This was a significant *lacuna* in the evidence since allegations were made of unjustifiable killings by persons who may have been in the APC.

PART B

COMMAND EFFECTIVENESS AND MAINTENANCE OF DISCIPLINE

11.53. The JDF readily acknowledged that there were complaints of misconduct by certain soldiers during the operation. The internal disciplinary mechanisms of the JDF were engaged and offenders were held to account. For example, where a soldier of 1JR abandoned his post, he was charged, found guilty and punished. His supervisor lost his rank.

11.54. Lt. Col. Ogilvie testified that he got a report towards the end of May that a female resident of Denham Town complained of untoward advances to her at her residence late one night by a soldier. This soldier was charged, found guilty and sentenced to 28 days confinement in the military prison. In another case of physical abuse of a man, the offending soldier and his supervisor were disciplined.

11.55. Lt. Col. Sewell said in reference to 2JR –

“I do believe that some residents who made allegations against the JDF may have been speaking the truth.”

11.56. On the part of the JCF, CoP Ellington agreed that citizens “were angry about aspects of the operations”. He said that Mr. Golding drew to his attention that residents were complaining of police misconduct. He said –

“I immediately ordered investigations into the complaints and I got feedback within hours or days. Many of those reports were found not to be true. Some of them involved people who died or were injured. We are yet to establish how, when and by what means. We started investigations immediately and were well advanced when INDECOM demanded that we hand over the investigations to them.....In Tivoli Gardens, we went door to door and asked citizens if the police disrespected them. We logged the complaints and investigated. According to the evidence, there were no concerns of rogue activity.”

11.57. CoP Ellington also said that no dereliction of duty was reported to him.

FINDINGS

11.58. We find that the JDF used its best endeavours to deal with its soldiers who misconducted themselves, although the JDF seemed less responsive to complaints of abuse, verbal and physical, by soldiers. On the other hand, there is no evidence that the JCF dealt similarly with any of its officers. This may have been evidence in itself of weak JCF unit leadership. Some residents testified that certain JCF officers who searched their homes declined or were reluctant to identify themselves. Other residents testified of lower-level police officers being poorly supervised and committing criminal offences against individuals. These instances point to inadequate, internal discipline and weak supervision on the part of the JCF.

11.59. We find that, at the Bronze level itself, there was weak leadership. Orders were given to record the locations of bodies. Supt. Budhoo gave those instructions but he did not hold his subordinates to account for the omission to make a record. In similar vein, there is undisputed evidence from ACP Gause and CoP Ellington himself, that the latter gave clear instructions on 25 May that investigations into the deaths of persons should commence without delay. Yet, the processing of crime scenes did not commence until some ten days later. Once again, this is evidence of weak leadership and a weak system of internal accountability. In addition, there was little after-action written reporting and assessments as a method of accountability and collective or institutional learning.

11.60. Evidence was given that members of the security forces wore masks during the operation. In the case of the JDF, the CDS approved the wearing of masks by the CSB to protect their identities. But there was also evidence of soldiers wearing handkerchiefs as improvised masks, and some JCF personnel wearing masks. None of these persons was authorised to wear masks. We accept the evidence of Mr. Witter that, on 25 May, he saw members of the JCF wearing masks. We find that some members of the security forces wore masks to avoid identification or to avoid individual accountability for their actions.

11.61. Those who were supervising officers wearing masks ought to have put a stop to the practice. We are driven to conclude that there was either weak supervision or a supervisory permissiveness that facilitated or ignored abusive conduct towards residents. This was most evident in the JCF.

11.62. We find that the system of supervision in the JDF allowed detection and punishment of misconduct. This was evidence of a functioning system of internal accountability that held soldiers and their supervisors to the attainment of standards of conduct. We are unable to extend this observation to the JCF. We heard no evidence of any effort to activate the JCF's internal disciplinary machinery or to hold constables to account for any form of misconduct. However, we are satisfied that ACP Gause gave instructions to set up Complaint Desks in Tivoli Gardens and Denham Town to receive complaints from residents.

PART C

SOME CRITICAL DECISIONS

11.63. In this Part, we highlight some of the important decisions taken by the security forces in order to discuss their impact on the effectiveness of the operation taking into account the chains of command and systems of internal accountability.

The JDF

11.64. From the perspective of the JDF commanders, the critical decisions related to the efficient and effective implementation of the internal security operation. According to Lt. Col. Ogilvie, those decisions taken at the planning stage included:

- the provision of adequate resources;
- video recording evidence of armed conflict with gunmen;
- determining the span of control;
- ensuring effective supervision of soldiers;
- eliminating duplication of roles and areas of responsibility;
- developing a means of dealing with by-standers;

- “de-confliction of boundaries”, viz. removing ambiguity as to operational boundaries.

11.65. In oral evidence on 20 October 2015, Lt. Col. Ogilvie amplified the foregoing planning decisions and spoke directly to “the span of control”:

“Issues relating to the effective command and control of a body of troops over a specific area is what we mean by ‘the span of control’. But this really refers to making sure that the troops that are deployed, are effectively commanded and controlled with the relevant layers of supervision such that they were not over-stretched and would not at any point not be properly supervised. We also discussed very specific roles for the various units, ensuring that there was no confusion and overlapping of boundaries and areas of responsibility. And, of course, we discussed identification of persons, whether they were friendly, hostile or innocent bystanders. That was a very central part of the planning.”

11.66. We next discuss 7 specific decisions at (i) to (vii) *infra*:

- (i) *The decision to have a clear division of responsibility between the JDF and the JCF.*

Differences in the capabilities of the two Forces informed this decision. It was accepted throughout the course of the Enquiry that the level of threat posed by Coke and his allies was beyond the capabilities of the JCF. The JDF was needed to launch an assault against the barricaded environs of Tivoli Gardens in order to gain entry and capture Coke. The JCF did not possess either the resources, the training or expertise of the JDF to mount a successful challenge against Coke and his allies in the conditions which prevailed on 23 and 24 May.

FINDING

11.67 We find that there was ample justification for this decision. It was an arrangement that should have produced greater accountability. But as noted above, the arrangements for command

transition could have been better implemented. To take one example: there was no count of dead bodies at the time of transition of leadership from the JDF to the JCF in the three sectors.

(ii) *The decision to use overwhelming numerical force.*

This was predicated upon an assumption of large-scale, violent resistance from gunmen. Such resistance did eventuate. We have reported elsewhere the time taken by the Battalions to gain control and dominance of different sectors. It was almost 5.00 p.m. before Maj. Henry controlled Foxy's Plaza and PassaPassa Plaza.

FINDING

11.68 Having regard to the Intelligence available to the security forces of the number of gunmen available to Coke and the *evidence* of the violence launched against the JCF and its assets on 23 May, we find that the decision to use overwhelming numerical force was justified.

(iii) *The decision of the JDF commanders to remain in the area of operation on a 24 hour basis for an extended period.*

FINDING

11.69 In our opinion, the extended presence of senior commanders of the JDF strengthened discipline and internal accountability. It would also have afforded residents an opportunity to have access to senior management of the JDF. Above all, it was a decision which ensured that the Shower Posse did not quickly re-settle within the community and maintain a power base therein.

- (iv) *The decision related to the evacuation of residents in buses on the evening of 23 May.*

FINDING

11.70 This seemed to have been a joint decision of CDS Saunders and CoP Ellington. It was a good decision but was implemented too late to be of any usefulness as we have found in Chapter 7.

- (v) *The decision to fire mortars during the operation.*

FINDING

11.71 This was a bad decision for the reasons given in Chapter 10.

- (vi) *The decision to use other explosive devices.*

Explosives such as shaped charges, were used to breach walls and create a pathway for troops. On behalf of the JDF, it was represented to us that this tactic may have saved the lives of soldiers.

FINDING

11.72 Given the nature and extent of the fortification of Tivoli Gardens, we do not believe that this was an unreasonable decision. We received no credible evidence that these types of explosives caused personal injuries or damage to private property.

(vii) *The decision to carry out mass detentions.*

FINDING

11.73 We have found that for the most part this decision was carried out in such an arbitrary and unreasonable manner as to render its execution unlawful.

Accepting Command Responsibility

11.74. The CDS and CoP had command responsibility for their respective Forces. In operational matters they were independent and the principle of operational independence is enshrined in the statutes relating to the JDF and JCF – see Chapter 7.13.

11.75. CDS Saunders explained the principle of command responsibility as follows:

“Essentially, it speaks to responsibility exercised over the administrative and operational requirements of the men and women of a particular Force, e.g. the JDF.”

11.76. CDS Saunders agreed that command responsibilities implied duties and he would be in dereliction of duty if abuses of rights were drawn to his attention and he did nothing about them.

11.77. CoP Ellington testified that there was no breakdown in command in the case of the JCF. In answer to a question put to him by Mrs. DaCosta, the CoP said –

“There is individual responsibility for action on the ground; responsibility for the planning and execution of an operation to the extent that you set up a structure, you issue guidelines, you start it, you provide resources and you provide a mechanism for accountability. That is the responsibility of the Commissioner.”

11.78. And, more specifically on the issue of command responsibility for the use of force by the JCF, CoP Ellington said –

“If you read the policy on the use of force, you see where it says ‘The discharge of firearms is an individual’s responsibility’.”

11.79. Commanders, he continued, “are responsible for taking action if people operate outside of the law”.

“if they are knowledgeable about misconduct and they fail to exercise their supervisory duties, then they are culpable; but they can’t be held responsible for the direct action of individuals.”

11.80. To the suggestion that he should have known what was happening on the ground since he had been advised by the Prime Minister that residents were reporting killings by the JCF, CoP Ellington replied:

“And we investigated. What else could be done?”

FINDINGS

11.81. We accept that aberrant behaviour and abuses are not necessarily evidence of poor supervision by the JCF. However, where the prevalence of complaints of extra-judicial killings suggest a pattern of abusive and illegal conduct that was unrestrained by supervision, then the pattern may reasonably be considered as a failure of management to adhere to systems and rules. We see it as a failure to maintain internal discipline through the chain of command. When, subsequently, there was no alacrity in systematically investigating complaints of killings or to review incidents as is required by the JCF’s own rules and procedures and international best practice, then, in our view, there is an even greater failure of leadership. In our judgment, CoP Ellington should have been held administratively accountable for weak superintendence of the JCF in May 2010.

11.82. The decision to break with the pattern of previous operations in Tivoli Gardens and, instead, establish a permanent presence in that community was a very important and effective decision. It was a crucial step in the process of “de-garrisonisation” of that community. It was a stratagem aimed at preventing future armed confrontation on the scale of that which occurred in May 2010.

11.83. Whereas the CDS accepted command responsibility, CoP Ellington so frequently deferred giving evidence on issues that he appeared to us to be distancing himself from the tactical decision-making processes on the ground. But, on his own admission, he was remote from the activities of 24 May.

Adverse Comments re: CoP Owen Ellington

11.84. On 13 April 2016, the Commission referred the drafts of paras.11.59 (formerly 11.58), 11.81 and 11.83 to CoP Owen Ellington as “proposed adverse comments” and sought his responses thereto. We received his responses by letter dated 15 April 2016 on 27 April 2016 and append the letter as Appendix AC10 of this Report.

(A) Re: Para.11.59 (formerly 11.58)- Summary of CoP Ellington’s Responses

- 11.85. (i) It would have been reckless and dangerous for Scenes of Crime officers to enter areas which were rigged with IEDs.
- (ii) It is contrary to the evidence for the Commission to comment that there was little after-action written reporting and assessments as a method of accountability and institutional learning. The evidence shows that before and during the internal security operation, systems of record keeping were in place and were effectively used. This is evident from “the Golding Papers”.

Commission's Comments and Findings

11.86. There was no evidence of explosives that were rigged within the community of Tivoli Gardens in such a manner as posed a threat to human life following (a) the destruction of barricades and embattlements on 24 May, and (b) the completion of house clearing and searches during the evening of 24 May. In the course of his oral evidence, CoP Ellington did say that "barricades were rigged with IEDs". We have construed that evidence to mean that the perimeter of Tivoli Gardens where there were barricades were rigged with IEDs. On 25 May, it was not considered reckless or dangerous to permit Mr. Earl Witter Q.C., Bishop Blair and Dr. Salmon to walk through parts of the interior of Tivoli Gardens or for CoP Ellington himself and ACP Gause to go to the area. Nor did ACP Blake consider it reckless and dangerous to give instructions on 26 May for a house where there were dead bodies to be processed. Moreover, since both the JCF and OPD had established "desks" in the community and were receiving complaints from residents daily, it must truly have been a "surprise" to Mr. Witter that processing of potential scenes crime had not begun when he wrote to ACP Gause on 31 May – see Appendix 24. It will be recalled that Mr. Witter complained that the rainfall on the weekend prior to his letter would have "washed away forensic evidence" such as blood or serosanguineous stains. Mr. Witter who was on the scene, and whose evidence we accept, clearly did not consider it reckless or dangerous that the processing of scenes should have commenced even prior to his correspondence.

11.87. As to CoP Ellington's response to our comment in relation to after-action reports, it was his evidence that –

"There was a lack of recorded briefing and de-briefing. These operational concerns came from

officers who commented on the operation and what they observed.”

11.88. The assessments to which we refer are a requirement of the IRIMAC model that was adopted by the JCF. Our concern is with self-assessments and institutional learning that would inform future operations. Summaries of “records of events prior to, during and after the entire conduct of the operation” and which are included in “the Golding Papers” do not constitute assessments and evaluations. It is true that, in his letter of 2 September 2013 to the then Minister of National Security, Hon. Peter Bunting, which is included as Appendix 30, CoP Ellington made an assessment of the operation of 24 May 2010. This letter confirms the value of internal assessments and learning. However, the stated purpose of the letter was to “counter the adverse effects” of Mr. Witter’s Interim Report. It was not represented to us that the terms of the letter were used as a learning tool within the JCF or were otherwise used to stimulate a process of institutional learning. To that extent, we hold that this requirement of the IRIMAC model was not met.

11.89. In the circumstances, the Commission re-affirms its findings and comments at para.11.59.

(B) Re: Para.11.81 – Summary of CoP Ellington’s Response

- 11.90.
- (i) The Commission’s comments are based on hypothetical situations.
 - (ii) All allegations against the Police were investigated. Complaints desks were set up. The JCF gave support to OPD to investigate residents’ complaints.
 - (iii) He instructed BSI to begin investigations on 25 May.

- (iv) The comment on a lack of alacrity in systematically investigating complaints of killings is unfounded.
- (v) There was no failure in leadership. His orders to his subordinates were carried out.
- (vi) The JCF, under his leadership, honestly believed that criminal elements had declared war on the State and the JCF.

Commission's Comments and Findings

11.91. The JCF's UFFP (Appendix 17) provides in para.32:

"Members of the JCF will verbally report any use of force to their immediate supervisors as soon as practicable. Any use of physical force by a member must be documented completely and accurately in an appropriate report, depending on the nature of the incident."

Para.35 is as follows:

"Members of the JCF must fully document the circumstances in which they found themselves, the reasons for their actions and the details of the supervisor to whom they subsequently reported."

We received very little evidence of compliance with the provisions of those paragraphs.

11.92. Our comments and findings at para.11.81 are based on evidence presented at the Enquiry. Many witnesses gave credible testimony of probable extra-judicial killings. That testimony suggested a pattern of conduct and, in our judgment, is sufficient evidence of a failure to maintain discipline through the chain of command.

(C) Re: Para.11.83 – Summary of CoP Ellington’s Response

- 11.93. (i) He faithfully followed the principles which obliged him to keep the functions among the Gold, Silver and Bronze Commanders separate and he did not allow his functions and role as a Gold Commander to conflict with those of other commanders.
- (ii) It is disheartening that the Commission is attempting to tarnish the good image and professional reputation of career police officers whereas we attribute no responsibility to the criminal elements engaged in the attacks on the State and the JCF.

Commission’s Comments and Findings

11.94. CoP Ellington was a Gold Commander. We accept that he could “only give evidence as to the overall strategy and agreed tactical options”. The substance of our comment concerns CoP Ellington’s attitude to COMMAND RESPONSIBILITY. We have cited the supporting evidence for our finding and contrasted his position with that of CDS Saunders. While we agree with the CoP that the military and police are very different organisations, our comparison is limited to the attitudes of the leaders of the two security forces to the matter of command responsibility IN THE SPECIFIC CONTEXT OF THE JOINT OPERATION of 24 May 2010.

11.95. It is of concern to us that, whereas Prime Minister Golding testified on 9 February 2015 that “there is a section that is called JAVA that was totally destroyed”, CoP Ellington’s evidence of destruction of part of the community of Tivoli Gardens is starkly different. He said –

“There would have been absolutely no evidence of an entire section of a community razed.”

11.96. Furthermore, the investigations of MoLSS reveal that approximately 56 dwellings at 1 McKenzie Drive were “totally destroyed”. The Commission also heard evidence that several houses on Chang Avenue were destroyed by fire. Either CoP Ellington did not see the destruction wrought in these areas or the information given to him by Silver or Bronze Commanders was deficient.

11.97. Finally, we have not attempted “to tarnish the good image and professional reputation of career Police Officers”. By virtue of section 7 of the Commissions of Enquiry Act, our duties are “to make a full, faithful and impartial enquiry” into the matters specified in our Terms of Reference and to furnish His Excellency, the Governor-General with “a full statement of the proceedings of the Commission and of the reasons leading to the conclusions arrived at or reported”. Impartiality requires that we treat all witnesses equally and without fear or favour. It requires that, if the evidence of any witness, upon careful evaluation, proves to be unreliable or untrue, we must make an appropriate finding irrespective of the status of that witness.

PART D

DERELICTION OF DUTY

Introduction

11.98. An assessment of probable dereliction of duty ought to begin with identification of conditions that ought to be met. The statutes of the JDF and the JCF do not provide much assistance in identifying these conditions. Secondly, the definition or applicability of the concept of duty has been the

subject of voluminous jurisprudential debate to which we make no attempt to contribute.

11.99. For the purposes of this Report, we treat “duty” as a species of obligation, prescribing a pattern of conduct, namely, prescribing how the security forces ought, or ought not to have behaved towards the residents of West Kingston who had correlative rights or claims. In short, we adopt the basic theses of the jurists Hohfeld and HLA Hart. A breach or dereliction of duty will occur as a result of conduct, whether by commission or omission depending on the source or circumstances giving rise to the duty, e.g. under the terms of the operational plan or by reason of the very nature of the particular circumstances. Thus, we approach the discussion of this Term of Reference by considering (a) whether a duty existed; (b) whether there was or ought to have been an awareness of that duty; and (c) whether the duty was fulfilled or not. Those three considerations are tested in relation to the rights of individuals. For example, the right to life entailed a duty on the part of the security forces to protect and respect that right and not to violate it.

11.100. The requirement of awareness was satisfied to the extent that many senior commanders of both Forces testified that they briefed their subordinate officers on the human rights of Coke and all other persons prior to the commencement of operations. Correspondingly, we were told that they were briefed on the conduct expected of them as members of the security forces, viz. their duties.

Issues of Probable Dereliction of Duty

11.101. We now examine various matters where there might have been evidence of probable dereliction of duty. – see (i) to (viii) *infra*.

(i) Evacuation of Coronation Market

11.102. Coronation Market was the site of sustained and heavy gunfire between gunmen and the security forces, especially when Bravo Company led by Maj. Henry, was advancing towards its position North of Tivoli Gardens. We received evidence that, during the advance through the market, the security forces observed many persons, other than gunmen, within the market. Some were playing dominoes. And it later transpired that persons also resided inside the market. However, no prior effort was made to evacuate these persons. ACP Blake told the Enquiry –

“Coronation Market is a public place; it always has persons inside there ... we factored in Coronation Market as a place of interest that we needed to look out for in terms of civilian existence.”

The evidence suggests that the JDF was not aware of the presence of those persons within the market prior to the operation. Maj. Henry said that he “assumed that there might be limited or no persons in the market”, because it was a public holiday and a State of Emergency had been declared the day before. But once Maj. Henry became aware of these persons, they were encouraged to leave the immediate danger areas. Some refused.

FINDING

11.103. In the circumstances, we find that while there was a duty to protect these civilians from possible harm, the JDF had no prior knowledge of their presence but acted appropriately and commendably when they became aware of them. We commend Lt. Col. Ogilvie and Maj. Henry for their actions.

(ii) Absence of Cordons

11.104. The plans of the security forces included the establishment of cordons within the area of operation. An inner cordon should have embraced the boundaries of Tivoli Gardens; an outer cordon should have spanned the boundaries of the larger area of operation. DCP Hinds spoke to the purposes of these cordons:

“To prevent persons from escaping from the area of operation and to also prevent persons with ill-intent from going to support persons in the inner cordon.”

11.105. On 24 May, these cordons were not established. The escape of Coke and gunmen was rendered less difficult than otherwise might have been the case if the cordons were in place. DCP Hinds was of opinion that the failure to establish cordons might have been a factor that facilitated Coke’s escape. DCP Hinds attributed the delay in setting up cordons to the killing of Pte. Green but this opinion was doubted by Maj. Henry.

11.106. However, the JDF and JCF commanders agreed that, given the extent of hostilities on 24 May, establishing the planned cordons would have exposed the security forces detailed to establish cordons, to unnecessary and serious risks of injury or fatalities.

FINDING

11.107. We respect the reasons given for not establishing cordons and find that there was no dereliction of duty in failing to establish the cordons.

(iii) Use of Mortars

FINDING

11.108. Our findings in respect of the use of mortars are made in Chapter 10 and para.11.71(*supra*). We consider that the use of mortar fire inside the built-up area of Tivoli Gardens was a breach of the duty to protect the lives of residents.

(iv) Treatment of the Injured

11.109. The JDF established a medical post at Seprod and provided ambulances and personnel to assist with the transportation of injured residents. The JCF provided one ambulance. However, on the evidence adduced to us, assistance provided by the security forces to injured persons was minimal. Two men, Nicholas Wilson and Damion Lindsay, were being taken to hospital on handcarts by relatives in the sight of members of the security forces. The evidence is that no steps were taken by the security forces to render assistance to those two men. In the case of Wilson, his mother's niece communicated by telephone from overseas with a person in the JDF. Subsequently, soldiers took his mother (Adina Darby) who was also injured to UHWI.

11.110. Mr. Witter testified that he saw a young man who was injured but still showing signs of life during his tour of Tivoli Gardens on 25 May. He drew Lt. Col. Sewell's attention to the man and requested that assistance be given to the man. Mr. Witter's evidence is that there was no response to his request. Lt. Col. Sewell did not have an opportunity to respond to Mr. Witter's evidence and has since retired from the JDF.

FINDING

11.111. We find that the system employed to offer medical assistance to residents was only accessible in limited ways. Although Lt. Col. Sewell may have been under a duty to try to preserve the man's life by providing assistance, on the state of the evidence we are unable to find that he was in dereliction of that duty. There is no evidence that Lt. Col. Sewell did not take action.

(v) Assaults on Residents

11.112. There was also evidence of assaults and batteries committed against young men within the area of operation prior to being taken to detention centres. It is evident from the complaints of residents in evidence that members of the security forces in sectors 1 and 2 misconducted themselves.

FINDING

11.113. On a balance of probabilities, we find that members of the security forces assaulted some residents without restraint. The injuries which were occasioned to various individuals and more particularly described elsewhere in this Report, lead to the reasonable inference that the perpetrators of these abuses and their senior commanders (if there were aware of the abuses) were in dereliction of their duties to respect the human rights of individuals.

(vi) Reporting Murder up the Chain of Command

11.114. Soldiers #1 and #3 testified that they reported the murders they witnessed to their immediate supervisors, i.e. a L/Cpl. There is no evidence that these reports went higher up the chain of command and Lt. Col. Ogilvie gave evidence that no such reports were received at regular meetings of commanders. But the statements of Soldiers #1 and #3 were filed with the Legal Unit of the

JDF. We are unable to track the movement of these reports through the chain of command or to account for the manner in which they reached the Legal Unit. But it is noteworthy that the statements of Soldiers #1 and #3 ended up with INDECOM and the Commission of Enquiry.

FINDING

11.115. The insufficiency of evidence concerning the route of these statements precludes a finding of dereliction of duty.

(vii) Failure to Record Locations of Bodies

11.116. The evidence and our findings in respect of the failure to record the locations of bodies or at least to provide any documentary evidence of such locations, are extensively discussed in Chapters 10 and 14. Nevertheless, we emphasise here that the notes of Cons. Maxwell were never requested or retrieved prior or subsequent to his death in October 2010, if they ever existed at all. The JCF therefore has no available record of locations and the investigations into the deaths are deprived of critical evidence that might assist in a reconstruction of events. DSP Tabannah does not know what became of Cons. Maxwell's diary. According to ACP Gause, it was DSP Tabannah's responsibility to ensure that Cons. Maxwell handed in his notes.

FINDINGS

11.117. Plainly, DSP Tabannah was in breach of his duties. As the Bronze Commander, he was under a duty, as a matter of proper police procedure, to have made or cause to be made a record of the information and have it handed over to the appropriate authority within the JCF. During the Enquiry the Commission requested both branches of the security forces to disclose to us records of the locations

at which bodies were found. The Commission has never received any such information.

Adverse Comment: DSP Everton Tabannah

There is nothing in the responses from DSP Everton Tabannah that has persuaded us to change our comments about him in this paragraph. However, having regard to the response from DSP Turner at Appendix AC7B, the Commission has not pursued its original comment against him in the draft of para.11.117 above.

11.118. SSP Budhoo was an unconvincing witness. In answer to questions put to him by the Chairman, he said that he did not remember if he spoke to DSP Tabannah to find out whether DSP Tabannah had carried out his duty of enquiring whether Cons. Maxwell had recorded the locations of bodies. SSP Budhoo then agreed that it was crucial to make notations of the locations of bodies and, "that is why I told Tabannah to do that", he said. To the next question: "Why didn't you follow up if it was so crucial?" SSP Budhoo answered: "I was basically assisting the Silver Commander on these matters".

11.119. We find SSP Budhoo in dereliction of his duties to the extent that he took no steps in circumstances where, after giving instructions to DSP Tabannah and Sgt. Waugh concerning the retrieval of bodies and recording the locations thereof, he did not follow up with those officers to ensure that his instructions were carried out.

Adverse Comments re: SSP Winchroy Budhoo

11.120. On 13 April 2016, SSP Winchroy Budhoo was served with a Notice of "proposed adverse comment" in respect of a draft of para.11.119 (formerly

11.105) for his response thereto. His response on 25 April 2016 appears at Appendix AC11 to the Report.

Summary of Response by SSP Budhoo

- 11.121.
- (i) The Commission has misconstrued his evidence.
 - (ii) Having regard to the prevailing conditions on 24 May 2014, akin to a theatre of war he was offering whatever assistance he could in the circumstances.
 - (iii) A finding of dereliction requires the assignment of a person to a particular duty and a failure to perform the duty. In that context, it was not suggested to him that he was in dereliction of a duty or had any duty in respect of the processing of dead bodies.
 - (iv) He was never assigned a task to collect and/or process bodies. Therefore he could not be in dereliction of a duty.

Commission's Comments and Findings

11.122. SSP Budhoo's evidence-in-chief contained much discussion about his role in respect of the collection and removal of dead bodies on 24 May in particular. It revealed that about 5.30 p.m. he received a call "from Control" of bodies being seen in Tivoli Gardens. SSP Budhoo said that he spoke with DSP Tabannah and told him to retrieve the bodies and they discussed how the bodies were to be retrieved. SSP Budhoo said he told DSP Tabannah to ensure that a record was made of the location of bodies and have them taken to KPH. He said that he also spoke with Sgt. Waugh and told him to ensure that there was a record made of the locations of bodies.

11.123. Whereas we accept that the operational plan of the JCF did not assign any duty to SSP Budhoo in respect of the retrieval of bodies,

recording their locations and matters ancillary thereto, we remain satisfied that the *circumstances* on 24 May fixed him with a duty to ensure that his instructions were carried out. Those circumstances were these: (a) he was contacted by Control and told of the presence of bodies in Tivoli Gardens; (b) he called DSP Tabannah and Sgt. Waugh and gave them instructions to have the bodies removed and their locations recorded. Notwithstanding his clear role in this matter, on his own unchallenged evidence, SSP Budhoo did not follow up with DSP Tabannah and Sgt. Waugh subsequently to ascertain whether his instructions were carried out or not. The situation of a "theatre of war" did not prevent him from giving instructions; it should not have prevented him from enquiring whether those instructions were carried out.

11.124. In his response, SSP Budhoo laid great emphasis on his duties relating to the provision of troops to block the southern border of the cordon, providing for the security of detainees, providing patrols at Seprod and sentries at the Command Post. He said that he was "never assigned the task to collect and/or process dead bodies; therefore I could not be cited for dereliction". We are at a loss to understand how such a narrow construction could be placed on the extent of SSP Budhoo's duties. As he asserts, he was never assigned the task of collecting or processing bodies. But, in his evidence he admitted giving instructions in respect of the collection and removal of bodies on 24 May. As regards 25 May, Sgt. Pratt testified that SSP Budhoo gave him instructions to "roam the community" in pursuit of the recovery of bodies.

11.125. Upon an evaluation of the totality of evidence adduced to the Commission on the matters of retrieval of bodies and recording the locations thereof, we are satisfied that these matters were not properly

executed by the officers of the JCF whose responsibility it was to perform those duties. So far as SSP Budhoo is concerned, we have deleted our original finding and substitute the finding at 11.119.

(viii) Delay in Commencing Investigations

11.126. We limit our comments hereunder to the investigations into allegations of unlawful killings and direct further attention to Chapters 10 and 14. It suffices to report that allegations of extra-judicial killings by members of the security forces were documented by OPD and handed over to BSI. On 25 May, CoP Ellington instructed BSI to commence investigations without delay. BSI duly established complaints desks in Tivoli Gardens and Denham Town but there was no record made of the locations of bodies to assist in a determination of the manner of killings nor was there an immediate start made to process possible crime scenes. The JCF had an obligation to record these matters as an inescapable part of the investigative process. ACP Blake testified that, on 26 May, he saw three bodies in a house in Tivoli Gardens. He instructed Supt. Phipps “to get the Scenes of Crime persons to do the photographing because, obviously, three dead men in a house with what appear to be gunshot wounds, it struck me that we need to have the scene properly processed”.

11.127. ACP Gause said that on 26 May he gave a directive to SSP Stewart—
“that henceforth BSI personnel along with a team, BSI personnel, somebody from Scenes of Crime, somebody from the photo section, somebody from Denham Town – about four or five because that will constitute a team – be there until further order to primarily hear complaints, take necessary statements, visit particular areas.”

11.128. That evidence was contradicted by Insp. Harris who led the Scenes of Crime unit to Tivoli Gardens. He testified unequivocally that his unit was not requested to go into Tivoli Gardens until 4 June 2010. We also draw attention to Mr. Witter’s letter of 31 May 2010 to ACP Gause and copied to CoP Ellington

(Appendix 24), as well as Mr. Witter's letter of 2 June 2010 to CoP Ellington and copied to the Minister of National Security (Appendix 25).

FINDINGS

11.129. From the foregoing, we hold that ACP Gause was in dereliction of his duties to move expeditiously to commence investigations into the locations and deaths of civilians. The JCF should have been well aware of the case of *Michael Gayle v. Jamaica, Case 12.418, Report No. 92/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc (2005)*, where Jamaica was criticised internationally for not taking statements until one week after homicides had taken place. We reject the evidence of ACP Gause and Det. Insp. Harris (see Chapter 14) that the environment in Tivoli Gardens was not conducive to processing possible scenes of crime earlier. After all, Messrs. Witter, Blair and Salmon toured Tivoli Gardens on 25 May without the threat of injury and on 26 May ACP Blake was sufficiently confident to instruct that the scene at a house be processed. Respect for the rights to life required a swift and appropriate response from the JCF whose duty it was to investigate the deaths.

Adverse Comments re: ACP Granville Gause

11.130. On 13 April 2016, the Commission referred para.11.129 (formerly 11.109) as a "proposed adverse comment" to ACP Granville Gause for his response thereto in accordance with the provisions of the 2013 amendments to the Commissions of Enquiry Act. We received his undated response on 29 April 2016. It appears as Appendix AC12 to this Report.

Summary of Response by ACP Gause

11.131. The following is a summary of the response of ACP Gause.

- (i) The case of *Michael Gayle v. Jamaica* is not relevant and we ignored the prevailing conditions that warranted the declaration of the State of Emergency and the evidence of the events occurring in Western Kingston after 24 May 2010.
- (ii) Lt. Col. Sewell who was in charge of large numbers of JDF personnel cleaning up the area was not asked to comment on "many of the assumptions being made to ground an adverse finding".
- (iii) The area was unsafe because of booby traps within the community.
- (iv) There is un-contradicted evidence of coordinated efforts between BSI and OPD to create an environment for citizens to make reports.
- (v) The JCF started investigations relating to dead bodies as soon as it was possible to do so and the Commission should pay regard to the extraordinary efforts and strain placed on BSI personnel.
- (vi) Investigation of all homicides was the duty of the Criminal Investigation Branch (CIB) not BSI under the terms of the operational plan.
- (vii) A finding of dereliction of duty can only be made where one is required to carry out a function and fails to do so. BSI was asked to carry out functions "in circumstances outside any norm", and BSI performed.
- (viii) It would have been dangerous for personnel from the Scenes of Crime Unit to enter the area which was rigged with IEDs.
- (ix) It would be unreasonable to hold that there was dereliction because persons did not act expeditiously.
- (x) ACP Les Green should have been questioned about the work carried on at the command post.

Commission's Comments and Findings

11.132. Since receiving ACP Gause's response, we have given further and careful consideration to it. We stand by our findings and comments in para.129 but desire to make these additional comments. We rejected the evidence of ACP Gause and Insp. Harris as it related to TIVOLI GARDENS. ACP Gause chose to respond that events in "WESTERN KINGSTON" in the days after 24 May made that larger area unsafe because of sporadic gunfire. The Commission does not dispute the evidence of Supt. Gladys Brown-Ellis of gunfire OUTSIDE TIVOLI GARDENS at Hanover St. on 25 May and in May Pen Cemetery on 28 May.

11.133. There is not a shred of evidence of gunfire WITHIN TIVOLI GARDENS (where there were allegations of extra-judicial killings and evidence of a number of dead bodies) after 25 May such that rendered that community an unsafe place. Indeed on 26 May, ACP Gause returned to the area of the Community Centre and established a police post complete with Complaints Desks. So, too, did OPD. CoP Ellington issued two Press Releases inviting residents to report missing persons and "to try to identify whoever it is they have lost because the police are there" as ACP said in evidence.

11.134. There is no evidence before us that booby traps or IEDs INSIDE TIVOLI GARDENS prevented the security forces or residents from moving around the community in safety after 25 May. And there was no need to recall Lt. Col. Sewell who testified on 24 June 2015 that he, the JDF Ground Commander within Tivoli Gardens, was able "to move around from as early as 2.30 p.m." on 24 May. Moreover, by 4.00 p.m. the security forces were dominating the community of Tivoli Gardens and had accomplished a large number of tasks which made

the area secure. Lt. Col. Sewell said that throughout the afternoon he went to all the sectors in Tivoli Gardens and spoke with his commanders.

11.135. Seven days after the operation on 24 May, Mr. Witter Q.C., was obliged to write to ACP Gause expressing surprise that “none of the venues of alleged killings at Ground Zero were being treated as, or as potential crime scenes” – See Appendix 30 of Mr. Witter’s Interim Report. Mr. Witter and/or staff of OPD were visiting Tivoli Gardens daily after 25 May and we received no evidence of apprehension on their part in going into and working in Tivoli Gardens in the immediate aftermath of the internal security operation.

11.136. It is true that the State of Emergency continued in existence after 24 May but that fact, in itself, does not lend to a conclusion that Tivoli Gardens was not so pacified as to preclude the use of Scenes of Crime personnel before 4 June 2010. In that regard, we accept that Insp. Harris could only begin his work upon a request to do so. He was only instructed to commence such work on 4 June 2010.

11.137. Whereas in his written response of 29 April 2016, ACP Gause sought to make a fine distinction between the roles of BSI and CIB, such technicalities of the internal functions of the two Units were not relied on by ACP Gause during his evidence, to justify the conduct of BSI. It also is not evident that ACP Gause raised these narrow distinctions in correspondence or otherwise with Mr. Witter Q.C.

11.138. For all these reasons we re-affirm our finding that ACP Gause was in dereliction of a duty to commence investigations into the locations and deaths expeditiously.

SSP Graham

11.139. SSP Graham was in charge of the command post at Seprod. He said that, on 24 May, CoP Ellington telephoned him and informed him of reports of dead bodies being seen in Tivoli Gardens. He also received a similar report from SSP Budhoo. But it was not until about 2.00 p.m. on 25 May that SSP Graham visited the community. He saw a man who had been shot lying on a handcart. He learnt that the man had died on his way to hospital. There was no evidence that SSP Graham gave any instructions relative to recording the location, establishing a crime scene or having the body removed. SSP Graham said that he also saw about twenty bodies in a truck driven by Sgt. Waugh. He instructed Sgt. Waugh to take the bodies to KPH and, thereafter, to Madden's. There is no evidence that he instructed that the locations of the bodies be marked as potential crime scenes.

FINDINGS

11.140 We find that, as the most senior Ground Commander of the JCF, SSP Graham did not ensure that a record was made of the locations of bodies nor did he take any action to determine whether his instructions were carried out on matters of vital importance to an investigation and concerning losses of life. Accordingly, we find SSP Graham to have been in dereliction of his duties.

11.141. To the extent that SSP Graham described himself as "the senior person leading the men and women under my command", he must be held accountable for the deficiencies in record-keeping in relation to the locations of dead bodies. He admitted that he received reports from SSP Budhoo about dead bodies being seen in the community. And, according to CoP Ellington, he telephoned SSP Graham in connection with the same matter.

Adverse Comments re: SSP Donovan Graham

11.142. On 13 April 2016, the Commission referred drafts of paras.11.140 and 11.141 (formerly 11.111 and 11.112) to SSP Donovan Graham as “proposed adverse comments” in accordance with the provisions of the 2013 amendments to the Commissions of Enquiry Act and sought his responses thereto. We received SSP Graham’s responses on 26 April 2016. They are appended to this Report as Appendix AC13.

Summary of Responses by SSP Graham

- 11.143. (i) It was not established by evidence that he had or was assigned a duty to process dead bodies or conduct investigations concerning loss of life.
- (ii) The Commission is not conversant with JCF policies and proper procedures.
- (iii) He was Ground Commander up to the evening of 25 May.
- (iv) Mobile Reserve is the operational response team of the JCF. At no time did he have any member of the CIB under his command.
- (v) Bronze Commanders of the CIB were responsible for search, arrest and evidence-gathering.
- (vi) Responsibility for ensuring a record was made of the locations of bodies was for the CIB Bronze Commanders.
- (vii) Daily reports of the JCF as shown in “the Golding Papers” confirm that information was passed up the chain of command.
- (viii) The failure to question ACP Les Green on these matters was a dereliction of duty on the part of the Commission.

Commission's Comments and Findings

11.144. On p.6 of Appendix 'A' to the Operational Plan of the JCF is provision for "Injured Persons". It is stated as follows thereunder:

"The ACP Mobile Reserve will deploy the Armoured Ambulance for use in the extraction of any injured person, to include members of the Security Forces during the operation. Increased RTC deployment to coincide with the operation will be deployed at the hospital to deal with security, crowd control and the protection of security personnel who may be hospitalised. The persons injured in the operation will be taken to the Kingston Public Hospital along a specified route."

11.145. The said Appendix 'A' set out the duties of the "Silver Commander – Arrest, Search and Evidence Gathering" as follows:

"An Assistant Commissioner of Police will be the Silver Commander with responsibility for arrest, search, evidence-gathering, processing of the subject and treatment of significant other suspects arrested/detained."

Bronze Commanders "Search, Arrest, Evidence-Gathering" were to be "appointed and briefed by ACP CIB".

11.146. There was no specific provision in Appendix 'A' for dealing with the *collection or treatment of dead bodies*. Indeed there was no mention of such persons in Appendix 'A'. Thus, any duties in connection with the removal of dead bodies could only arise where the circumstances, by their very nature, imposed duties. On 4 June 2015, SSP Graham agreed that the Operational Plan was "tweaked from here to there to respond to the dynamics of the situation". He also said, in answer to Ms. Taylor of INDECOM:

"We had a special team with two units from Mobile Reserve tasked to retrieve bodies... and, all the bodies that came to our notice during the operation, were taken to the hospital. Sgt. Waugh headed the team assigned to remove bodies."

He said that he was not aware if any instructions were given to note the locations of bodies but the persons who retrieved bodies "are around and they can tell us where they picked up bodies from".

11.147. SSP Graham testified that CoP Ellington telephoned him to say that he was very concerned that –

"bodies were thrown all over the place in the area of operation and I gave instructions for Sgt. Waugh and his team to move around to either confirm or deny that information... I received this information from the CoP on two separate occasions. I don't remember the time."

SSP Graham stressed that he did not take responsibility for the actions of his men on the ground.

11.148. As Ground Commander, SSP Graham had under his command, at the Bronze level, Supt. Budhoo, DSP Tabannah, DSP Turner and DSP Thomas. SSP Graham said that, on the afternoon of 24 May, DSP Tabannah reported to Supt. Budhoo that there were 3 bodies in Tivoli Gardens and he (DSP Tabannah) was instructed to have them removed but they did not reach the hospital. He said that he gave instructions "and Sgt. Waugh from Mobile Reserve and a team retrieved those bodies".

11.149. We agree with SSP Graham that he did not have a duty "to process dead bodies" or "to conduct investigations concerning loss of life". We further agree with him that these were tasks for the BSI and the CIB. But our comments and findings are very clear. We state

explicitly that (a) SSP Graham “*did not ensure that a record was made of the locations of bodies*” and (b) he did not “*take any action to determine whether his instructions were carried out...*”. It is not our finding that processing of bodies was the task of Mobile Reserve. On the other hand, its task was the removal of bodies. DSP Tabannah, a Bronze Commander attached to Mobile Reserve, assigned the tasks of removal of bodies to Sgts. Waugh and Pratt.

11.150. SSP Graham admitted that members of Mobile Reserve assisted in picking up bodies but he argues that “a mere communication to the persons in the area to pick up dead bodies does not make you responsible for the task”. We do not characterise communications from CoP Ellington to ascertain the reliability of information about dead bodies being thrown “all over the place” as “a mere communication”. That SSP Graham gave instructions for the information to be verified, suggests to us that this was a matter of significant importance, especially having regard to the status of the author of the communication. In our judgment, the circumstances required SSP Graham to ensure that his instructions were carried out and to be in a position to report his findings to the Commissioner of Police. It was a task to be executed and reported on. As Ground Commander, it was SSP Graham’s duty to make sure that reporting was carried out up the chain of command.

11.151. It is our opinion that the collection of dead bodies also required that their locations be marked. This was not a matter of “processing dead bodies”. It was a matter that was related to the narrow issue of how dead bodies were collected. There ought to have been and made available to the Commission, a record of the locations of bodies as allegedly made by Cons Maxwell. No such record was produced to the Enquiry. As it turned out, the Enquiry received no

credible evidence that the locations of bodies were marked, despite the Commission's ruling on 4 June 2015 that the JDF and the JCF hand over all information concerning the locations of bodies.

11.152. It is accepted that SSP Graham did not have any members of the CIB under his command. But in the context of the dynamics of the situation in Tivoli Gardens in the afternoon of 24 May and the morning of 25 May, on all the evidence before us, it was Mobile Reserve that removed dead bodies. In our judgment, the circumstances required that members of Mobile Reserve should have marked the locations. As the most senior officer of Mobile Reserve in the area of operation, SSP Graham was ultimately accountable for the performance or non-performance of his subordinate officers.

11.153. Having re-considered our findings and comments in the light of SSP Graham's responses, the Commission is not persuaded to alter its comments and findings.