

Commission of Enquiry

Into the events which occurred in Western Kingston and related areas in May
2010

RESPONSE TO NOTICE OF ADVERSE FINDINGS COMMENTS

Re: (a) Major General Stewart Saunders

and

(b) Major Warrenton Dixon

- a. The above captioned Officers have been served with Notices of Proposed Adverse Comments dated the 13th of April 2016 advising them of proposed findings by the West Kingston Commission of Enquiry before which they attended as Witnesses.
- b. General Saunders and Major Dixon have been served Notices Under Section 7a (2) of the Commissions of Enquiry (Amendment) Act 2013.
- c. The Commission has invited the Officers to make written Statements or written Submissions that is relevant to the proposed adverse comments within fourteen (14) days.
- d. The Officers have reviewed the proposed Adverse Findings as set out in the Notices served on each and have found the contents of each Notice to be **pari materia** (similar to each other).
- e. General Saunders and Major Dixon set out herein below their joint written submissions to the proposed adverse findings as follows:

1. PROPOSED ADVERSE FINDING PARAGRAPH 9.8

- a. We submit that Romaine Walker ought not to be found to be a witness of truth as he gave evidence that was in total conflict with the expert witness who gave evidence. Walker gave evidence of seeing objects falling from the sky.

- b. The evidence of Major Cobb-Smith and of Major Dixon is that it is highly unlikely that one would be able to see a mortar round falling from the sky. Walker's evidence therefore of observing objects falling from the sky and exploding around him ought not to be taken as a means of identifying mortar rounds. The Commission must bear in mind that Improvised Explosive Devices (IEDS) were planted throughout the Tivoli Gardens community by persons resisting the security forces and that the component parts of the IEDS consisted of among other things, pieces of pipes and other metal objects.

- c. The Commission should therefore never discount the possibility, indeed the probability of exploding IEDs injuring citizens. It would be grossly unfair to ascribe all injuries from shrapnel to weapons of the Jamaica Defence Force merely on the assertion of citizens. Save and except for one citizen who gave evidence about seeing gunmen and bodies in the community prior to the arrival of the security forces in the Tivoli Gardens

community, no other civilian witnesses called gave evidence of seeing gunmen, IEDs present, or seeing anyone erecting barricades.

- d. Reverend Herro Blair who visited the community walked through a guard of some fifty (50) men armed with firearms of various calibre. In stark contrast, save and except for one civilian witness, all the rest testified of not making any observation of this sort. Indeed, Mr. Walker himself gave evidence that he knew nothing about Dudus, the Don, and that he never saw anyone attacking the security forces.
- e. The Commission must appreciate that the citizens of Tivoli Gardens are under a code of silence and there is obviously a grand conspiracy to blame the security forces for every single injury, death and damage to property. This came out in the evidence of Ms. Minette Lindsay who said the statement she submitted was composed on her verandah with the assistance of a number of citizens who supplied her with some of the contents of her statement; contents of which she did not have personal knowledge.

The Post Mortem Report of Sidney Clarke stated as follows:

“Summary of opinion as to Cause of Death”

From the abovementioned information and appearance I am of the opinion that: Cause of death is due to:

- 1) Haemorrhage and Shock**

2) Multiple gunshot wounds to Chest

Clearly Mr. Clarke died from gunshot wounds and not from shrapnel. In fact Clarke had seven (7) gunshot injuries.

- f. The only other injuries referred to are the irregular abrasions seen on his right upper thigh, right lower knee and right lower leg. These injuries were described as reddish in colour. The Commission needs to look carefully at these injuries and see if they are consistent with someone who might have been crawling or kneeling and sustained his injuries while so doing.

The Post Mortem of Bojan Rochester list cause of death as follows:

- a) Laceration Femoral Artery, Liver and Lung**
- b) Multiple gunshot wounds to chest and thigh**

A Summary of the injuries sustained by twenty One (21) year old Bojan Rochester is stated as follows:

“The deceased sustained nine (9) gunshot wounds with added laceration wounds over the extremities. The gunshot wound over the left thigh, both from of chest where the fatal shots. The chest wounds perforated the lungs and vessel and the left thigh wound lacerated the

femoral artery which lead to extensive loss of blood and pneumothorax and causing death of the individual”.

- g. It went on to say that “the pattern of entrance wounds suggested that the Deceased was shot beyond the range of gunpowder...” deposition. There is therefore no substantive evidence to conclude from the Post Mortem Report that Bojan Rochester died from shrapnel. In any event, the injuries shown on both Bojan Rochester and Sydney Clarke are more consistent with two (2) fighters who were on the front line for the forces in Tivoli Gardens and during hostile firing throughout the community they sustained injuries as well as injuries from explosion of an IEDs.
- h. The third person who it is being alleged was injured by exploding mortar rounds is Marjorie Hinds. The evidence adduced is that a mortar round fell at her feet, exploded and lifted her into the air then throwing her to the ground. The firm and certain evidence of both Majors Dixon and Cobb-Smith is that if a mortar round were to fall at the feet of a person, shrapnel from the mortar round would shred that person to pieces causing instant death. It follows that the evidence in this regard as to how Ms. Hinds was supposedly injured by shrapnel from a mortar round is unreal and therefore ought not to be accepted by the Commission as credible.
- i. Both Majors Dixon and Cobb-Smith gave evidence that the high explosive mortar rounds were not incendiary so they were not likely to ignite or cause a fire. Major General Saunders was not called an expert on

mortars. Consequently, his evidence on this issue must be subject to the expert evidence of Major Warrenton Dixon and to some extent Major Cobb-Smith .

- j. Similarly, Captain Crooks is not an expert on mortars. To place reliance on a letter written by him as an Attorney-at-Law in the legal department over the evidence of persons who are versed in the use and sight of mortar rounds, is, in our respectful view, not a reliable way to arrive at a conclusion.
- k. One should look at the context within which the correspondence passed between the Jamaica Defence Force and the Public Defender and how the term the “incendiary device” was introduced. The term incendiary device was first introduced by the Public Defender himself in his letter of the 23rd day of August, 2012 where he states as follows “...What were the types of incendiary devices, (mortars or others) discharged,...” It is only by looking at the correspondence, that it will be seen, that at its highest, Captain Crooks adopted the term “incendiary device” in his reply. It is in response to this letter, that Captain Crooks at paragraph A3 of his letter of August 28th, 2012 to the Public Defender replied as follows: “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...” Captain Crooks undoubtedly realised his error in using the word incendiary and so by letter of the 21st August, 2012 he wrote the Public Defender and advised him that “...**the rounds that were used by**

the JDF at the time in question were explosive and not incendiary”. It is also important to note that the format of the questions was set by the Public Defender and Captain Crooks responded accordingly.

It is evident based on the time within which the correspondence were exchanged that Captain Crooks realised the error and subsequently sent his letter of the 31st day of August, 2012, correcting the error. We respectfully submit that the Commission should not place any weight on the use of the term incendiary devices by Captain Crooks in light of the fact that two (2) days after its use by him and 2 years before the commencement of Commission, this was clarified by him.

- l. The Commission should instead conclude that Captain Crooks made an innocent error in describing mortars as incendiary devices and this issue, we submit, should not detain the Commissioners.

- m. The evidence of the anonymous witnesses that they saw “white smoke” and the “whole place was white”, cannot by any stretch of the imagination be linked to mortar rounds. Weapons were being fired by gunmen and by members of the security forces. The whole community would therefore have the smell of gunpowder and an atmosphere of smoke. However, even if “the whole place was white,” there is no evidence either from Major Cobb-Smith or anyone else, that the mortar rounds would have caused “the whole place” to be white.

- n. We respectfully submit that the Commission should not accept the evidence of Romaine Walker when he said he saw “a boom fall on Michael Williams’ house”. The evidence of Major Cobb-Smith is that it is highly unlikely that one could see a mortar round as it falls. It is more likely, said Major Cobb-Smith, that you would become aware of the falling mortar round when it hit the ground and explode.

- o. The Post Mortem Report of the Sydney Clarke and Bojan Rochester contained statements by the Pathologists and a Summary of the findings all indicating that these men died of gunshot injuries. There is absolutely no basis and there is no evidence whatsoever to contradict the findings of the Post Mortem reports in respect of Sydney Clarke and Bojan Rochester.

- p. In regards to the Post Mortem Report on Carl Henry there is listed therein a number of injuries he sustained and the Pathologist identified them as shrapnel wounds. The findings of the Pathologist who conducted the Post Mortem are that Karl Henry sustained multiple shrapnel wounds and that death was due to hemorage and shock. The Pathologist listed certain injury sites with various degrees of injury. It is our submission that in view of the fact that the gunmen resisting the security forces had set up IEDs in the community and none came from the community to give evidence about the use and effect of those IEDs, it would be unfair to the Jamaica Defence Force for the Commission to proceed to conclude that

all injuries sustained by shrapnel were caused by exploding mortar rounds.

RESPONSE TO PARAGRAPH 10.71

- a. We repeat what is stated in response to Paragraph 9.80 above and reiterate that there is no evidence to support a conclusion or an opinion that either Sydney Clarke or Bojan Rochester died from exploding mortar rounds. The Post Mortem Reports of both of these men, as we have cited above, stated clearly that they died of gunshot injuries and not of shrapnel.

RESPONSE TO PARAGRAPH 10.130

- a. We would urge the Commissioners to visit the principle of **PROPORTIONALITY**.
- b. The Commander (in this case Major General Saunders) has a duty to balance the conflicting security/military objective and the humanitarian interest. It must also be borne in mind that all conflicts involving the use of arms have the possibility to result in the loss of life, injuries to combatants and innocent bystanders, damage to property and destruction of property.

c. The Commander has a duty to use his human resources, technical logistics, intelligence resources, arms and weapons to ensure minimum loss of life, minimum injury to civilians and combatants and minimum damage to property. He may have to restrain and control civilians in the conflict zones until they are properly identified or until it is safe to allow them to proceed along their way. The restraint of innocent citizens occurred recently in Australia, North America and in Europe where all citizens including women and children at the site of an attack were ordered to “come out with their hands over their heads or on their heads.” They were then taken into custody and it was only after they were processed and identified as not being part of the criminal/terrorist group, that they were allowed to go their ways. This is standard operating procedure and it is done to protect the citizens as well as to ensure that members of the security forces are not opening themselves to the risk of being attacked by persons who they interact with. An apparently unarmed citizen for example, could be one who has just hidden a weapon and is awaiting the opportunity to grab that weapon and fire at the members of the security forces who have just walked by him.

d. The Supreme Court in the United Kingdom recently had to deal with the issue of proportionality in the case of *Beghal vs Director Of Public Prosecution [2016] 1 All ER 483* (A copy of the said case is attached hereto for ease of reference). In this case, the Appellant had gone to visit her husband who was in custody in France for terrorist offences. On her return to the United Kingdom she was stopped, questioned and detained

for some time. She refused to answer questions and she was charged under the Terrorism Act of 2000 on a charge of not answering these questions. She challenged the procedure she was put through and the matter came before the Supreme Court. In his Judgment LORD HUGHES at page 501, paragraph 46 adopted the formulation of LORD SUMPTION of proportionality earlier set out in the leading case of *BANK MELLAT vs. HM TREASURY (No.2) [2013] UK SC 39* as follows:

- i. is the objective sufficiently important to justify limitation upon a fundamental right?
 - ii. is the measure rationally connective 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?
- e. It is our submission that when these principles are applied to the circumstances leading up to the May 2010 Operations, it must be concluded that the Commander of the Jamaica Defence Force had a duty to engage the best methods that would rescue the country from being fragmented. The use of mortars must be seen against the background that it was the only weapon the gunmen in Tivoli Gardens never had. It must also be seen that without the introduction of the mortars which had a psychological effect on the gunmen in Tivoli Gardens (in that several of them, not knowing what they were up against fled to the north of Tivoli

Gardens), there would have been a bloody fight with enormous casualties on both sides.

f. We call the Commissioners' attention to the level of resistance the security forces faced going through the market district up to Foxy's Plaza where mortars were not and could not have been used. In that area it took the security forces over four (4) hours to get up to Foxy's Plaza because of the intense resistance put up by gunmen in that area. The resistance was obviously less in Tivoli Gardens because of the use of the mortars.

g. It is our submission, that the answer to the question raised in the paragraph is that the response of the Jamaica Defence Force to the situation was well thought out, properly assessed and the fact that there were no mass casualties or destruction of property by mortars fired, means that the Jamaica Defence Force, given what they were faced with, did a good job with the use of mortars. It is submitted, that the proper view ought to be, that despite the risk and challenges, Major Dixon did a good job with the use of the mortars. It should also be borne in mind that the gunmen in Tivoli Gardens had a range of weapons comparable to those of the army with the exception of the mortars. It is the use of the mortars that edged things in favour of the army which resulted in the rescue of Jamaica from a disastrous fight between the army and heavily armed hostile forces. The Chief of Defence Staff had the responsibility to engage tactics and strategies that would ensure that the weapons he brought to the confrontation gave his troops an advantage in weaponry

over the gunmen. This is standard military tactics as superiority in weaponry can easily overwhelm the opponent, bring the conflict to a speedy conclusion and thereby save lives on both sides of the conflict. This we submit is the proper view to be taken of the use of mortars in the May 2010 operation.

- h. We submit that the use of the mortars are in accordance with the principles of proportionality and that the Jamaica Defence Force was left with no alternative but to bring into use a weapon that would give them an edge however slight, over the gunmen who were confronting them. It cannot be denied that mortars can be used for psychological effect as the Chief of Defence Staff intended. Major Cobb-Smith when confronted in cross examination with his latest manual admitted that the use of mortars to weaken the will of the opponent to fight is acceptable. The manual speaks to the demoralising effect that mortars can have on an opponent.

RESPONSE TO PARAGRAPH 10.131

- a. The Commission should not give any negative interpretation to the fact that the Commissioner of Police, Mr. Owen Ellington gave evidence that he was not informed of the intended use of mortars. The Commission must bear in mind that even though the two (2) forces, the Jamaica Constabulary Force and the Jamaica Defence Force were working together they had separate plans for their respective members. While it

might seem astonishing and discourteous for the Chief of Defence Staff not to have informed the Commissioner of Police of the intended use of the mortars, the harsh reality is that Major General Saunders was under no duty to make the disclosure to the Commissioner of Police. As the Chief of Defence Staff, Major General Saunders was guided by the principle of “*need to know*”. If it was his considered opinion that there was no need for the information regarding the use of mortars to be shared with the Commissioner of Police, then it was within his judgment and he is entitled to decide not to disclose it to Commissioner Ellington.

- b. The decision whether or not to make a disclosure about a sensitive aspect of an operation is not guided by courtesy, friendship or good relations. The Chief of Defence Staff and all members of the Jamaica Defence Force are bound to be guided by the “*need to know*” principle and if there is no need for someone to know about a sensitive decision, it is the duty of the Chief of Defence Staff to be so guided.
- c. We submit therefore that the Commission should not see anything wrong or untoward with the decision of the Chief of Defence Staff not to inform Commissioner Ellington about the use of mortars.
- d. We accept that the Commission ought to find it disquieting that Lieutenant Colonel Sewell, the Commanding Officer of the 2nd Battalion, gave evidence that he knew nothing about the use of mortars. The evidence and indeed the demeanour of Lt. Col. Sewell must be assessed,

analysed, contrasted and compared with the Officers under his command. Lt. Col. Sewell had three (3) Company Commanders under his command, namely Majors. Cheverria and Kennedy and then Captain Anderson. All these Commanding Officers gave evidence that they knew of the use of mortars. It defies logic that Lt. Col. Sewell's three (3) Company Commanders would have known of the use of mortars without Lt. Col. Sewell, who was the person who briefed them in preparation for the operation, without Lt. Col. Sewell being aware of it. It is therefore, we submit, a better approach to rely on the three (3) Company Commanders and to accept that Lt. Col. Sewell must have suffered a serious lack of recollection which is sufficient for the Commission to find his evidence in this regard unreliable.

- e. The Commission should rely on the evidence of Majors Cheverria and Kennedy and then Captain Anderson and not on Lt. Col. Sewell. Indeed we remind the Commission that during the testimony of Lt. Col. Sewell his demeanour and his expression were such that at one stage, the Learned Chairman of the Commission asked Lt. Col Sewell if he was okay.
- f. The evidence of Lt. Col. Sewell should not be accepted and instead preference should be given to the evidence of the three (3) Company Commanders who testified that they were made aware of the intended use of mortar.

RESPONSE TO PARAGRAPH 10.132

- a. The Commission would mislead itself were it to put the determination for using the mortars on the letter written by Captain Crooks. Captain Crooks was not an operational Officer but was an Attorney-At-Law in the Legal Department of the Jamaica Defence Force. He had no training in the use of mortars and it is evident from the letters from the Public Defender and those from Captain Crooks that the Public Defender used the expression incendiary devices and Captain Crooks obviously not aware of the details of the mortars used, repeated the expression used by the Public Defender. We humbly submit that this is how these letters should be interpreted instead of seeing them as Captain Crooks not making disclosures.

- b. It is accepted that Captain Crooks would most likely not be aware of the operational purposes of the mortars. The fact that Captain Crooks did not mention the purpose of the mortars in his letter cannot by extrapolation lead to a conclusion that their use and purpose as stated was not in the thinking of the Jamaica Defence Force.

- c. In regard to what was communicated or not communicated to Prime Minister Golding, the evidence of Mr. Golding should be reviewed in order to appreciate how Major General Saunders dealt with the matter. It is Mr Golding's evidence that it he did not expect the Chief of Defence Staff to give him the details, but instead those details should be given to

the Defence Board. We quote Mr. Golding's evidence at pages 103-4 on the 9th day of February 2015, as follows:

Q: As Minister of Defence, were you aware of plans to use mortars by the Military in Tivoli Gardens?*

A: No I wasn't, and that would not normally be part of the remit of the Defence Board, and I invite the Commission to take note of Section 9(2), I believe the Defence Act which places the operational use of force squarely and exclusively within the responsibility of the Chief of the Defence Staff.*That is in today's Observer by somebody making the same point.*

Q: Did you become aware subsequently of the use of mortars in Tivoli Gardens?*

A: I pause to answer the question because I have to be very clear. I received reports of the use of mortars.*

Q: When did you receive these reports?

A: From residents, what they referred to was 'bombs'. I had raised the matter with the Chief of Defence Staff at the time and his response to me was that these were not, I am pausing *Mr. Chairman, I want to be very clear, I think he said these were not incendiary devices, he said they have more barks than bites: that they were used more for psychological effect but that they did not have the effect of mortar artillery. That is what I understood from the Chief of Defence Staff at the time.

Q: *Did you personally...*Mr. Golding, were you told that these were not anti-personnel devices, was that term used?

Q: That these were not anti-personnel devices, were these terms used?

A: Commissioner, the reason why I don't want to be emphatic in terms of yes or no is because I can't remember the exact terminology that was used. What my understanding from the Major General 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 mortar, that is what he told me.*

- d. What we have from this is Mr. Golding giving evidence that the Chief of Defence Staff advised the Prime Minister of the effect the mortars were to have. It is clear from his evidence that the Prime Minister had been given enough information and that any further information would be for the Defence Board.
- e. Mr. Golding in his evidence outlined that the proper procedure to be followed by the Chief of Defence Staff was to give the complete information to the Defence Board and not to him. The Chief of Defence Staff was therefore in full compliance with the Defence Act and the expectation of the Prime Minister when he gave him the information.

RESPONSE TO PARAGRAPH 10.133

- a. We submit respectfully that the evidence adduced regarding the use of mortars has not disclosed any irresponsible and reckless conduct. It is submitted that Major Cobb-Smith did not give evidence of a standard that he should be accepted as an expert.

LPG: Mr. Chairman, I maybe never heard. Did he say he was trained in the use of the 81 millimeter mortar, did he say he was trained to use it? Did he say he was trained to use it? I didn't hear.

A: I was trained to understand all safety aspects.*

LPG: He is an expert in it, trained to use it, be able to use it, trained to use it and

to plan for its use, sir.*

A: I am trained to plan for its use in live firing environments, yes.*

LPG: You have not answered the question.

A: *I am not trained to fire it.*

A: I am trained to oversee a range where the 81 millimeter mortar is being used.

CHAIRMAN: *That doesn't make him less than an expert. I will rule that he is an expert.

- b. In your paragraph 10.34 you noted that Major Cobb-Smith "...had more practical experience of SEEING EMPHASIS ADDED MORTARS IN USE". Major Dixon on the other hand is a trained mortar officer and has been involved in the use of mortars. There is no basis on the evidence before it, for the Commission to give preference to Major Cobb-Smith's evidence over that of Major Dixon's evidence regarding the use of mortars.
- c. The Commission it is respectfully submitted, should be guided by the principles of law as it relates to the acceptance of the testimony of one witness over another grounded in the evidence (See Levy v. Marrabelle and Co. Ltd 1984 ICR 583)
- d. The Commission has found that Major Cobb-Smith has "more practical experience of seeing mortars in use". This is analogous to someone in the

medical theatre observing for years a neurosurgeon doing several brain surgeries. It would be ludicrous for someone such as this to put himself as an expert by virtue of seeing brain surgeries being performed.

e. The Commission should be very cautious about accepting Major Cobb-Smith's predetermined conclusion that the use of mortars by the Jamaica Defence Force was irresponsible and reckless. Irresponsible and reckless are strong words that should only be arrived at on the basis of empirical evidence. That is to say, evidence of what damage, death or injury occurred from the use of mortars.

f. It was Major Cobb-Smith's evidence in answer to Lord Anthony Gifford QC that "mortars are highly inaccurate". However, when confronted with his own manual upon which he sought to rely, he retracted that evidence of "highly inaccurate" and conceded that **mortars are highly accurate.** Indeed, the following is what was put to him from the manual produced by Major Dixon and which he said remains the same in his more current edition.

“ Par 0113. ACCURACY.

The mortar provides a high degree of accuracy, due to the equipment and the system of fire control used.”

g. Major Cobb-Smith's evidence of three (3) mortars landing beside a wall with pockmarks is, we submit, the lowest standard of evidence any expert could possibly give. Major Cobb-Smith was seeking to have the

Commission believe that he could merely look at holes in a wall, six (6) years after the event and would be able to tell the Commission that not only were these holes caused by shrapnel but was also capable of stating the number of mortars that fell there, that is, three (3). On the basis of the foregoing Major Cobb-Smith is not a reliable and trustworthy witness and certainly not an expert witness in the sense of a witness who is to impartially assist a tribunal as against the person by whom he is instructed or paid.

RESPONSE TO PARAGRAPH 10.134.

- a. We find it most disappointing that the Commission would prefer the evidence of Major Cobb-Smith, whose “expertise” was prefaced on “more practical experience of seeing” mortars in use over the evidence of Major Dixon who is trained in the use of mortar and who has actually been involved in the firing of mortars. In the case of Major Dixon his expertise goes beyond merely seeing. He has practical experience in the actual use and operation of mortars.
- b. There is no evidential basis for the Commission to give preference to Major Cobb-Smith’s evidence over that of Major Dixon. This is especially so when it is borne in mind that Major Cobb-Smith in cross examination revealed that he read Wikipedia and other journals to prepare himself as an expert for this Commission of Enquiry.

- c. Wikipedia's own website publishes a disclaimer indicating that its information is contributed by anyone who wants to post material and the expertise of the posters is not taken into consideration. Users therefore may end up reading information that is outdated or that has been posted by someone who is not an expert in the field or who wishes to provide misinformation.

- d. Major Cobb-Smith did not give any evidence of ever using the mortar system. Not only did he give evidence that he has never used the system but he never took time to familiarize himself with the system prior to giving evidence in Jamaica.

- e. We call the Commission's attention to Murphy on Evidence, 9th edition, 2005 p.346:
"Paper qualifications by themselves may not a guarantee of actual skills relevant to the questions before the court, and expertise gained by substantial relevant experience certainly renders an expert witness competent, and may invest his evidence with considerable weight."

RESPONSE TO PARAGRAPH 10.135

- a. We acknowledge the difference in the statements of Major Dixon as stated by the Commission. However, it should be noted that nearly all the witnesses, members of the security forces and civilians gave more than one statement and their subsequent statements were invariably more extensive than their initial statements.

- b. The initial statement given by Major Dixon was clearly a summarized report to his superiors. The Commission should not attach any significance to the fact that the initial statement of Major Dixon did not contain the details that his subsequent statements had. Indeed, Major Cobb-Smith's evidence was a significant expansion of his original statement. It must always be remembered that a statement of any witness is a mere guide and it is the sworn testimony of the witness that should be used to test the witness' credibility and reliability in the absence of any contradiction between his oral evidence and his written statement.

- c. If there was additional evidence to be adduced from Major Dixon, it was perfectly in order for him to expand. This, without more, should not be used to impugn his credibility.

RESPONSE TO PARAGRAPH 10.136

- a. There is no discrepancy between the evidence of Major Dixon and Major

Cheverria. Major Dixon said he was asked by Major Cheverria to use mortar fire. Major Cheverria who was recalled and questioned about this, gave evidence that he could not recall if he had made this request. His answer that he could not recall is neutral, meaning he could have as well as could have not made this request. His final response is therefore not conclusive.

- b. It should be appreciated that the respective roles of Majors Cheverria and Dixon in the heat of the operation were completely different. Major Dixon had the responsibility of accounting for the mortar rounds and would in all probability, in accordance with operational procedures, be the one to recall communication between the two.
- c. The issue of the difference in the time given by the various Company Commanders regarding when they arrived in Tivoli Gardens should also be viewed against the background of the operation having taken place some six (6) years ago.
- d. The Commission should therefore accept that the variation amongst the Officers in regard to timings, do not by themselves indicate that they were being untruthful. Instead, the Commission should appreciate that in the aftermath of the operation, the recalling of precise timings would not necessarily be the priority and that the difference of some 20 to 40 minutes between Major Cheverria's time and Major Dixon's time should not be given any significance to the extent that an adverse finding is made.

RESPONSE TO PARAGRAPH 10.137

- a. It is accepted that the guidelines as set out in the manual for mortar fire were not followed. However it was not only in the use of mortars that guidelines were not followed. It is a requirement that high velocity weapons ought not to be used in residential areas. However, during the operation the gunmen used high powered weapons such as 50 calibre rifle that tilted the JDF's front end loader. Consequently, undesirable as it was, the JDF had to resort to the use of high powered weapons such as M16 rifles in this residential area based on the circumstances that prevailed at the time. It should also be noted, that the only weapon the Jamaica Defence Force had use of, that the gunmen did not also have was the mortars.

- b. A comparison should also be made between the type, intensity and duration of the firefight Major Henry and his company were engaged in, in their efforts to move from Pechon Street to Foxy's Plaza, a distance of some 300 metres. The evidence, which has not been challenged, was that it took them over **four (4) hours** and after this firefight some **sixteen (16) bodies** were found on Spanish Town Road. The market was set alight by the gunmen and there was widespread destruction of property. **This is the area in which mortars were not used** and for obvious reasons could not have been used. We submit that the Commission should draw the inference that along this corridor the gunmen put up this type of resistance

and deadly firing at the security forces because they were not intimidated or deterred by mortar use as their cohorts were in Tivoli Gardens. The inference to be drawn from this, is that the use of the mortars in Tivoli Gardens lessened the extent, nature and continuity of confrontation between the gunmen and the army. Paradoxically, the absence of confrontation saved the lives not only of the soldiers but of the gunmen who fled the community in fright of the mortars.

- c. We submit that the Commission should accept that Major Dixon used the mortars in a competent, skilful and responsible way. There was minimum or no casualty to civilians and no significant, if any, damage to buildings. Major Dixon's evidence was that he had a forward observer placed in close to the Tivoli Gardens playfield who reported to him when it was safe to fire the rounds. He gave evidence that two (2) rounds were fired at the playfield one of which never exploded. There is no evidence that gives any basis for not believing Major Dixon.

- d. It is submitted that the test to be applied in the use of the mortars within the guidelines for safety distances, is how carefully they were used, the attention to the safety of civilians and ultimately the **empirical evidence** of the result following of the usage of the mortars.

RESPONSE TO PARAGRAPH 10.138

- a. Major Cobb-Smith's evidence that he cannot be sure that the damage he saw was caused by shrapnel from the mortars, the Commission cannot go on to rely on Lt. Colonel Sewell's evidence for reasons stated herein.
- b. Lt. Col. Sewell sought to give the Commission the impression that by about midday on the day of the operation, everything was calm and quiet in Tivoli Gardens and adjoining areas to the extent that he could go for a leisurely walk. It was during this leisurely walk, he said that the residents reported that things were falling from the sky.
- c. It cannot be factual that by around midday things were so safe and quiet in Tivoli Gardens for Lt. Col. Sewell to go on this leisurely walk. Again we maintain that Lt. Col. Sewell appeared to have suffered a severe bout of lack of recollection or was wilfully refusing to be open and frank to the Commission.
- d. The evidence of all his Company Commanders do not support Lt. Col. Sewell's description of the community as quiet and calm. In addition to that, the evidence of Major Henry was supported in some instances by video recording. The recordings showed that even up to nightfall there was intense firing in the area. It should be noted that the Coronation Market located just across from Darling Street in Tivoli Gardens is less than the length of a cricket field away.

- e. Foxy's Plaza is on Spanish Town Road across the road from the Tivoli Gardens community. The MPM Building is also on Darling Street across the road from the Tivoli Gardens community. All these areas in which there was intense gunfire from around midday until late night are very close to the Tivoli Gardens community. There is no way that Lt. Col. Sewell would not have heard gunfire.

RESPONSE TO PARAGRAPH 10.139

- a. To make a finding of recklessness and disproportionate use of mortars, is, we submit, inconsistent with the evidence and cannot be found to be disproportionate given the nature of the security threat that the country was faced with.
- b. We submit that the evidence does not support an act of recklessness in so far as Major Dixon's use of the mortars was well thought out, well planned and well executed by an Officer trained and experienced in the use of mortars. We also submit that the use of mortars was not disproportionate to the threat as the army had no other weapon that would give them an advantage over the gunmen who had weapons similar to those the army had.
- c. The Commission should recall the evidence of Bishop Herro Blair who had to traverse a road to speak to Mr. Christopher "Dudus" Coke and

along which road he saw over fifty (50) men armed with high powered weapons. This was a private army confronting the state of Jamaica. The sharp irony of this is that the civilian witnesses living in the community and who testified before the Commission of Enquiry (save and except one) gave no evidence of any gunmen being in the community at any time. The intelligence available was that over 300 armed men from outside of the community were in Tivoli Gardens to bolster the existing Tivoli gang in their resistance against the state and its authority.

d. If the then Chief of Defence Staff had not authorised the used of the mortars but instead embarked on a house to house fighting operation, there most likely would have been enormous casualties amongst law abiding civilians, gunmen and the army. The use of the mortars was a new and unknown element to the gunmen and it had the psychological effect of causing them to believe they were facing weapons beyond their own capabilities or weapons superior to what they had in their arsenal.

e. The loud and unusual sound coming from the mortars also had the desired effect of causing women and children to remain indoors and all but the most die hard criminal elements to flee. We submit that in view of this, it cannot be said that the use mortars was reckless and wholly disproportionate.

RESPONSE TO PARAGRAPH 10.140

- a. For the reasons already stated in our response to paragraph 9.80, we submit that even if Carl Henry died as a result of injuries from shrapnel there is no evidence which showed conclusively that it was caused by shrapnel from an exploding mortar. The Commission should be reminded that there was evidence of IEDs planted throughout the community and persons who sustained injuries from shrapnel could have sustained those injuries from exploding IEDS.
- b. We remind the Commission of the content of the Post Mortem Reports of Bojan Rochester and Sydney Clarke. Neither of these reports stated that they died from shrapnel.
- c. The Pathologist who did the Post Mortem Examinations and Reports thereafter stated categorically that in the case of Bojan Rochester, his death was due to laceration femoral artery, liver and lung, and multiple gunshot wound to chest and thigh. The report specifically stated **“THE GUN SHOT WOUND OVER THE LEFT THIGH, BOTH FRONT OF CHEST WERE THE FATAL SHOTS.”**
- d. It is our humble suggestion, that in view of this finding by the Pathologist as to what caused the fatality, there is absolutely no basis for a conclusion that his death was due to mortar fire.

- e. In relation to Sidney Clarke, the conclusion of the Pathologist who conducted the Post Mortem is that, in his opinion, the cause of death was haemorrhage, shock and multiple gunshot wounds to Chest. It should be noted that Sidney Clarke sustained seven (7) gunshot injuries including injury to his chest. The overwhelming evidence from these reports are that both Sydney Clarke and Bojan Rochester died from gunshot injuries and not from laceration wounds and more particularly not from exploding mortars. We therefore submit that there is absolutely no evidential basis for the Commission to conclude that either of these two (2) men died from mortar fire.

RESPONSE TO PARAGRAPH 10.141

- a. The fact of the matter is that there is no evidence whatsoever before the Commission of widespread deaths and destruction of property by mortar fire. There is no conclusive evidence whatever before the Commission of anyone at all being killed by mortar fire. The highest the evidence reached in this regard is to be found in the Post Mortem of Karl Henry where it is said that he died from haemorrhage, shock and perforated wound (shrapnel wound to the abdomen).
- b. There is therefore no evidence at all to support the averment of reckless use of mortars or that they were fired in populated areas. The mortars were fired in specific areas.

- c. There is no comparison between the use of mortars in the former Yugoslavia and what occurred during the May, 2010 Operation. In Yugoslavia, citizens and at Markale Market place were deliberately targeted and fired on by persons using mortars. There were two attacks on the Markale market on the 5th February, 1994 in which 68 persons were killed and 144 injured and one mortar round was fired. On the 28th August, 1995, 43 persons were killed and 75 were wounded, five mortars were fired. This comparison highlights the precision and care in which Major Dixon deployed and used the weapons system, as in this instance 34 mortar rounds were deployed and there has not been one confirmed casualty as a result. In the West Kingston operation a careful and meticulous procedure was followed to use the mortar in open spaces and not to fire them at civilians. In fact, Major Cobb-Smith had to agree that the various distances referred to were guidelines and not rules or regulations cast in stone.
- d. A better comparison with the Operation of May, 2010, is not the distant reference to Yugoslavia but closer to home and indeed in Tivoli Gardens, the same community in 2001. On that occasion, there was a gun-battle between members of the Jamaica Constabulary Force and gunmen in the Tivoli Gardens community. This gun-battle was over a protracted period of three (3) days. At the end of this, 27 persons were killed which included six (6) women, young children and senior citizens. All of this occurred in a situation where mortars were not used. Sixty persons were injured. Some of these persons were used as human shields. The

comparison to be made is that there is no evidence of women or children being injured or killed in the operation of May, 2010 and what we submit, made the difference between the duration of the confrontation and the severity of the outcome was the use of mortars. It is noteworthy to mention that in the immediate aftermath of May, 2010, the crime statistics in that area trended downwards.

RESPONSE TO PARAGRAPH 11.94

- a. There is no basis to find that the use of mortars in Tivoli Gardens was in breach of the duty to protect the lives of the residents. The use of the mortars was in an effort to protect the lives of women and children and in fact it minimised the number of potential casualties and deaths. We therefore submit, that there is no evidence to support a conclusion that the use of mortars was in breach of the duty to protect the lives of the citizens of Tivoli Gardens.

Dated the 5th day of May 2016


LINTON P. GORDON