



Office of the Public Defender

**INTERIM REPORT
TO PARLIAMENT**

CONCERNING

**INVESTIGATIONS INTO THE CONDUCT OF THE SECURITY FORCES
DURING THE STATE OF EMERGENCY DECLARED MAY, 2010 –
WEST KINGSTON/TIVOLI GARDENS ‘INCURSION’ –
THE KILLING OF MR. KEITH OXFORD CLARKE
AND
RELATED MATTERS**

BUNDLE OF APPENDICES

April 29, 2013

APOLOGIA

The Public Defender acknowledges the relentless criticism by all who have rightly expressed impatience over the delivery of this **Interim Report** — a “**special**” and **extraordinary** report to Parliament. Their concern that it has contributed to the delay of justice, an injustice in itself, does have merit and is cause for much regret.

In the meantime and for months, frustrated, caustic critics exercising the **freedom of expression**, have fulminated in anger and indignation over the delay. That freedom is **one** of the various fundamental rights of the citizen which the Public Defender is enjoined to **protect** and **enforce**. He must therefore be and, has been especially tolerant of adverse commentary, in this case, by “outraged” would-be opinion-makers who, have launched virulent verbal assaults on him. These attacks relate to the handling of investigations concerning one of the **monumental** events in Jamaica’s torturous history (the State of Emergency declared in May, 2010) as well as the delivery of this review.

The delay has generated a great furore. Utterances, at times vitriolic; rarely balanced, fair and **informed**, were grist to the mill of gleeful media, hungry for and thirsting after something they call “news”. On occasion, the diatribe has stooped to unbecoming and

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highly offensive “anal” ribaldry, spewed by what in times past was respectfully referred to as “the old **lady** of Harbour Street” - the *Daily Gleaner*.

There have even been calls for the incumbent’s resignation; for him to “pack his bags and go !” And if he does not, to hound him out of office.

Quite remarkably, those calling publicly for the resignation, included Mr. Delroy Chuck, Q.C., M.P., **leader of Opposition Business** in the House of Representatives, a **former Speaker** of the House and erstwhile **Chairman** of the Commission established by the Public Defender (Interim) Act, S.11(2), of which he remains a **member**. He spoke out strongly but in egregious disregard of relevant provisions of that statute as well as binding protocols. And Mr. Desmond McKenzie, M. P. for West Kingston, has accused the Public Defender of “**deceiving** the people of Jamaica, **particularly** the **residents of Tivoli Gardens**”, who, are amongst his constituents. (See pp. **198 – 204**, *post*.)

But are the faultfinders **all well-intentioned** ?. Are their **real** motives honourable, or sinister and deplorable ?. Time will tell.

Truth be told, so many of the critics know **too little** about way **too much**. They care to **understand** even **less**. There are ways in which they have done **more harm** than **good**. And yet, others must actually mean well.

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That being so and, with the benefit of these contents, perhaps they will come to realize how often they have missed the mark: that so many of their laudable designs and righteous expectations can or will only be met through a **Commission of Enquiry** long ago *recommended* by the Public Defender; not **directly** by him. For the exigent circumstances of the case impose an **inescapable** procedural obligation on the Government, consistent with the requirements of democratic governance, to cause a **judicial** investigation to be conducted.

The Public Defender is chagrined by ambitious **projections** made but **not met**, of dates by which this **Interim Report** would have been submitted to the Parliament. Persistently, exuberant and energetic copycat news media and commentators have labelled them “self-imposed **deadlines**”, provoking more scathing criticism still.

Having regard to the **scope** of this **Interim Report**, it may also appear that a certain intimation given by the Public Defender to former Prime Minister, the Honourable Bruce Golding, regarding the delivery of reports to Parliament was, **in all the circumstances**, also ambitious. That intimation was given in August, 2010, barely three (3) months after investigations had begun: at a time when formidable challenges occasioned by fast-

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moving events were then only just beginning to manifest themselves.

It is **conceded** however, that earlier “progress” reports might well have been submitted to the Parliament; although the October, 2010, appointment of the **Manatt** commission of enquiry, so called, created fresh exigencies which tended to sideline many decisions.

It should be noted that the Public Defender was not consulted over appointment of the **Manatt** commission. That appointment appears to have been dictated by certain political imperatives or dynamics, from which the Public Defender distances himself. As that commission’s terms of reference show, it was mandated to enquire into matters not sufficiently material to activities of the State Security Forces and **gunmen**, as alleged, **during** the State of Emergency. It is those activities with which the relevant investigations are **mainly** concerned.

But perhaps the Parliament, taking all cogent reasons for the delay under advisement, will allow that the passage of time has at least served to ensure that the Public Defender does not miss the wood for the trees. In fact, perhaps time has afforded a more acute appreciation of matters.

Be all that as it may, the delay is mainly a function of **overload** with which a proactive Public Defender endeavours to cope, even

as he addresses other **matters of moment** or **public interest**, as they arise.

Thus it deserves to be better known as well, that concurrently, the Public Defender at all material times has had to investigate or otherwise deal with varied **unrelated** singular complaints made by more than three thousand (3,000) other anxious citizens. Settlement of those grievances was always no less impatient of delay. For the greater part, those complainants understand that some priority has had to be accorded to the momentous subject matter of this **Report**. Their continuing forbearance is greatly appreciated. Interestingly, many of the remainder consider that that priority should have been accorded to their individual complaints !

The Public Defender seeks the continued patience of the 'Tivoli' complainants whilst striving to address their own grievances. They are assured that if the Public Defender concludes that their claims have **merit**, every effort will be made to secure appropriate redress. As soon as practicable therefore, appropriate *recommendations* will be made to the Government for settlement of all meritorious claims; firstly, those **not related** to alleged extra-judicial killings. Regarding the latter, reparations will have to abide the final determination of any relevant criminal proceedings. However, complainants aggrieved by those killings are assured that the

necessary procedural steps will be taken to ensure that all probable causes of action are preserved.

Frankly, at the outset of the 2010 State of Emergency investigations, it was not imagined that this **Interim Report** would have been as **definitive** a document which some imagine it ought to be. The thinking was that, (as for example in the case of the recent 'Armada' enquiry,) the Public Defender, (**essentially** an investigator,) would, ideally, have made the evidence ferreted available for **judicial** consideration.

Doing so would have entailed no derogation from oath, let alone an investigator's abdication or dereliction of duty. It would have been a pragmatic exercise of discretion. After all, a Commission of Enquiry, by comparison, could be expected to be more **august** and **authoritative**; be better **funded** and **equipped**. Besides, it was at all times self evident that any Government should do the right thing.

That original thinking has now been overtaken by events.

The present Government seems hamstrung by the delay. But **tooling of the Government Forensic Science Laboratory to ensure that it is equipped with the necessary facilities** for completing the crucial ballistic examination of firearms, spent ammunition and bullet casings, is **an absolutely indispensable pre-condition** for completion of the investigations. Thereafter, it

would fall to the Government to determine its acceptance or rejection of the commission of enquiry *recommendation*.

In the meantime also, events have inspired expectancies which would make this Report the *raison d'être* of all things; the fulcrum of so many decisions yet to be made. It needs be therefore, so be it.

The Public Defender sincerely thanks those sober persons genuinely concerned at the delay but who are neither **blinkered** nor **blinded** by excessive zeal. Amid the raging furore, they have kindly elected to hold their peace. They are not at all unmindful of the **rights** alleged to have been abused during the State of Emergency. But they also respect the rights of those **persons** who **have been** or, **may yet be accused** of **related crimes**, or other forms of misconduct. (Like the **freedom of expression** relished by so many critics, these **rights** enjoy the **equal** protection of fundamental law: the Constitution.) Moreover, unlike a lumpen lot, those prepared to “wait and see” appreciate that the Public Defender is embarrassed by various constraints, some of them not unfamiliar; that there is no want of will, wit or industry; that although he **urgently** needs more **investigative** and other diligent, conscientious and tenacious personnel (an aspect which, lamentably, too few care about,) the delay is also a function of the **huge** and ever growing **volume** of grievances dealt with routinely.

Nevertheless, the Public Defender proffers profound apologies to the Speaker of the House of Representatives and to the Parliament. He couples with those sentiments, the Resident Representative of the United Nations Development Programme (UNDP) in Jamaica and the international donor community. The assistance co-ordinated by the UNDP concerning these investigations has been **absolutely** invaluable. **The Public Defender is eternally grateful to them and covets their continued support.** So too should our country.

Finally, the Public Defender thanks the officers and agents and all others who have assisted in these investigations and in the compilation of this **Interim Report**. They include Ms. Florizelle O'Connor, former Co-ordinator of the Jamaica Council for Human Rights, Mr. Boris Ormsby, Information Technology Specialist and two (2) highly proficient proof-readers lately made available by Parliament — Mrs. Pamela Brown, Hansard Editor and her distinguished predecessor, Mr. Dessler Smith. Without being, and hopefully not appearing invidious however, an abiding expression of gratitude goes to the Executive Secretary, Miss Lorna Palmer, whose exceptionally selfless service, patience and fidelity have been exemplary; throughout very taxing times.

[N.B.] In this apologia and elsewhere in this **Interim Report**, the words, phrases and sentences highlighted are, exclusively, **emphases added** by

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the Public Defender. So too are **italics**, except where otherwise indicated. This “**special**” Report pretends to be no more than a brevified treatment of **massive** evidentiary material. The treatment is **eclectic**; not exhaustive. The material demands **judicial** evaluation which is, in all the circumstances, **beyond the capacity** of a **Public Defender**. It would be presumptuous of him to pretend otherwise.

An attempt has been made to deal **contextually** with relevant matters, issues and questions arising from the Emergency activities: some **directly**, some **indirectly** and others which **appertain**. That approach should help to sharpen objective appreciation and perspectives.

Much care has been taken both over what is reported herein and what must remain, for the time being, undisclosed. For there is a time and place for everything.]

(As an aside, the Public Defender makes a humble appeal to Jamaican journalists: in communicating these contents, please do strive for the standards of **accuracy**, sensitivity, proficiency, professionalism, taste and excellence exemplified by a venerable former editor of *The Daily Gleaner*, Mr. Theodore Eustace Sealy, CD — an unsung nation builder who, on the **rarest** of occasions only, awarded himself a byline.)

INTRODUCTION

1. This **Interim Report** concerns continuing investigations undertaken by the Public Defender (aided by a special one-off budgetary allocation,) into events which led to the **greatest loss of life** in a single **State Security Forces** operation in independent Jamaica: **seventy-six (76) civilians** and **one (1) soldier**.

A table listing all **civilian deceased** whose death is attributable to action taken by those Forces, **or by others**, is attached as **Appendix 1**. Of the **seventy-six**, the Public Defender is investigating complaints that **forty-four (44) are** instances of **extra-judicial killings** (unjustifiable homicide.) They are listed in **Appendix 2**.

- 1.1 In addition, investigations have turned up five **(5)** cases of **missing persons**, (pp. **83 - 85** post) four **(4)** of them extant, the corpse of one **(1)** of them now having been positively identified by DNA analysis. Those four may yet be **presumed** dead, according to law. Four (4) male corpses remaining unidentified may be theirs. If not, the **known** civilian body count attributable to relevant activities would rise to **eighty (80)** and the overall death toll to **eighty-one (81)**.

- 1.2 The deaths occurred during a joint Police/Military ‘incursion’, so called, into the poor **inner-city** community of Western Kingston, (principally Tivoli Gardens,) following the declaration of a State of

Emergency in the Corporate Area, effective Sunday, May 23, 2010 and a night-time raid on the residence of Mr. Keith Clarke at far-away Kirkland Close, Red Hills, Saint Andrew – **an upper middle class** neighbourhood.

1.3 Although popularly called an **'incursion'**, the relevant West Kingston operations may be better and more accurately described as a **'siege'** – the most **elaborate** of their kind in Jamaica in almost one-hundred-and-fifty (150) years.

1.4 The Report draws on the **several hundreds** of hand-written statements of **complainants** and **witnesses**, (reduced to typescripts) whose narratives, given separately and independently over more than two years describe what **they** said happened or happened to them at the hands of the State Security Forces; to their relatives, friends, neighbours and households, in those life-changing days. Statements furnished by State Security personnel to the Bureau of Special Investigations (the BSI) have been considered. Authoritative sources and pronouncements emanating from undoubtedly respectable quarters have also been consulted.

Establishment of temporary Public Defender outposts

1.5 The physical accommodation and facilities at the Office of the Public Defender, (78, Harbour Street, Kingston,) were quite inadequate for coping with an anticipated flood of complaints. Arrangements were therefore made to receive complaints at Public

Defender outposts, set up at the Tivoli Gardens community centre and at the City Mission Church-hall, Blount Street, Hannah Town.

1.6 Investigations conducted from those locations were also facilitated by the free broadcast of “public service announcements” on radio and television, kindly provided through the auspices of the Media Association of Jamaica (MAJ). The outposts were kept open from June to October, 2010 and were closed, after two weeks’ notice, broadcast as before. Thereafter (and, up to the present time,) complainants attended at the Office.

1.7 The Public Defender is much obliged to the MAJ and media houses as well as the City Mission Church, for their timely and unhesitating assistance.

1.8 Apart from allegations of extra-judicial killings and the disappearance of citizens, there are **five (5)** other categories of complaint relating to the conduct of who are alleged to have been **rampaging** members of the State Security Forces.

1.9 Investigations into a total of **one thousand two hundred and ninety-five (1,295)** fully documented **complaints** from six hundred and eighty-eight **(688) complainants** have been completed. They await **forensic** assessment of money compensation, or other suitable forms of redress. These claims (excluding personal injury, etc. and detention) are **provisionally** quantified at **one hundred and ten million eight hundred and**

six thousand seven hundred and four dollars + (\$110,806,704.44). This sum does not take account of claims which may yet be made for money compensation regarding the alleged **extra-judicial killings**. A caring, **volunteer** cadre of attorneys-at-law in private practice, will presently begin the assessment.

The categories of complaints are: -

- i. allegations of extra-judicial killings
- ii. missing/disappearance of persons
- iii. personal injury, battery and assault
- iv. detention
- v. malicious damage to real property
- vi. loss/malicious destruction of personal property, and
- vii. looting (larceny)

2.1 Another **two hundred and sixteen (216)** citizens have lodged **dormant** complaints, totalling more than **three hundred** in categories **iii. – vii.** above. Investigations into dormant complaints are incomplete due to lack of evidence establishing *prima facie* proof of injury, loss or damage.

2.2 (The **dormant** investigations include an **itemized** claim for **\$1,315,126.78** regarding allegations of **malicious** destruction of instruments, equipment and paraphernalia; of **looting** of cash and **larceny** of valuable property etc. belonging to the Tivoli Gardens

drum corps and drill team.)

- 2.3** A table showing relevant breakdowns of claims in categories **v. - vii.** is attached hereto as **Appendix 3.**

In the assessment process, all claims will be disaggregated in order to take account of **payouts** made by the Government to complainants and other persons, amounting to **Ninety-Two Million One Hundred Thousand Dollars (\$92,100,000.00)**, according to official figures. This sum was distributed by the Ministry of Labour and Social Security, at the instance of the Social Development Commission, as part of a programme of urgent “**social intervention**” instituted within weeks of the ‘incursion’. The Ministry states that it includes an amount of **Four Million Three Hundred and Twenty-Seven Thousand Dollars (\$4,327,000.00)**, disbursed to help defray the **funeral expenses** of **forty-six (46)** of the deceased. No disbursement **unrelated** to funerary expenses was made on the recommendation of the Public Defender. The disaggregation will guard against duplication of those past money awards.

- 2.4** This **Interim Report** should therefore dispel any doubt of the need for an **independent public enquiry** into matters of the gravest concern as well as immense public importance.

TIVOLI GARDENS AND “DUDUS”

- 3.0** Although expressed to be an initiative aimed at restoring law and order in the **Corporate Area** of **Kingston** and **Saint Andrew**, a **primary objective** of the limited State of Emergency declared in May, 2010 was the capture of the arch-fugitive, **Christopher Michael Coke, “Dudus”**. Hence, a joint police/military swoop on Tivoli Gardens, his reputed hideout and stronghold, was a natural and principal focus of operations. A sketch of the place and pariah should therefore help to put matters in context.
- 3.1** The historic Jamaican inner-city community of Tivoli Gardens rose from the rubble of the slum called **“Back o’ Wall”** which was demolished in the mid-1960s. **Back o’ Wall** was a dehumanizing, dirt poor, labyrinthine squatter settlement of dirt-floor, zinc and board or wattle-and-daub shanties and hovels, criss-crossed by a maze of narrow earthen footpaths; densely populated; bereft of plumbing and electricity; with distinctively poor sanitation.
- 3.2** The locality (now characterised by modest but tidily kept concrete tower block dwellings) derives from a social construct: a **modular concept** of comprehensive **urban transformation** developed by the Most Honourable Edward Seaga, former long serving M.P. for West Kingston and himself a former Prime Minister. [He was Minister of Development and Welfare when **Back o’ Wall** was flattened. At the

time it had been regarded as a People's National Party (PNP) political stronghold.]

3.3 Tivoli Gardens features a community centre which offers training in art, craft, music, and the dance; a maternity centre and infant school; a church, small grocery shops and other business outfits; a few small parks (green areas) and a relatively large playing field - all in the same complex. Thus it is an almost self-sufficient **enclave**.

3.4 Over the years, residents of Tivoli Gardens have excelled in many forms of artistic expression and sport, across all age groups, winning many competitions, awards and trophies; sometimes **international** recognition or acclaim.

3.5 But by May, 2010, Tivoli Gardens had long been at the heart of the governing Jamaica Labour Party (JLP) political establishment in the constituency of West Kingston.

The community has for umpteen years been regarded as a **prime example** of the Jamaican political phenomenon called the "**garrison**". In fact, Rear Admiral Hardley Lewin, a retired Chief of Defence Staff (later Commissioner of Police) once famously described it as "the **mother** of all garrisons." (See pp. **181-5** post.)

Over time also, it came to be thought of as a **citadel** of sorts; the seat of an infamous cross-border crime syndicate named the

“**Shower Posse**”, the reputed head of which was **Christopher Coke, “Dudus”, the “President”**. He grew up there. (“Shower!” is a signature JLP epithet.)

3.6 Coke gained renown as a benefactor of the poor; was both feared and revered; the undisputed ‘Don’. Adults and children alike came to depend upon his largesse. According to his supporters and admirers, it was **he** who kept a territory relatively **crime-free**, almost displacing the Jamaica Constabulary Force (‘JCF’), whose members were **scorned** or **deeply distrusted** by the citizenry; that it was **he** who kept children in school and off the streets at night, enforcing his own peculiar brand of discipline.

3.7 Coke’s detractors counter that his tentacles penetrated the institutions of governance and realms of high society, industry and commerce; that peeling away his veneer of respectability reveals a demon needing to be exorcised.

3.8 “Dudus” has now been extradited to the United States of America. He has pleaded guilty to charges of “racketeering conspiracy” and “conspiracy to commit assault with a dangerous weapon in aid of racketeering” and been sent to prison there. His departure has opened up a space for renascent agents of law enforcement where previously many of them feared to tread. The Tivoli office or shopfront of his set-up called the “**Presidential Click**” now houses a police post. His removal has also created a vacuum in social and

economic life and “governance” affairs, an aftermath which attracted spontaneous State responses, since much diminished, save as regards **law enforcement**.

3.9 Most importantly however, Coke’s reputation of crime overlord and, his standing in the community; the **long reach** of his influence, his patina of benevolent protector of the poor, the **political links** and **patronage** which he may have enjoyed and, how all this may have led (inexorably) to the **cataclysm** of May, 2010, **demands** close **forensic** analysis and authoritative documentation. In the process **he too** should be given the opportunity of a **fair hearing** by commissioners of enquiry. For there is much that an **outcast** may be prepared to tell – to the enduring advantage of the greater good. Overall, Tivoli Gardens is, in **many** respects, a microcosm of post-independence Jamaica: a place and society fit for further and rigorous scientific and forensic study.

The PUBLIC DEFENDER and INDECOM distinguished

- 4.1** It is felt desirable at this early stage, and, for general edification, to outline the status and remit of two State institutions — the Public Defender and the Independent Commission of Investigations (INDECOM). This will not only help to **explain** and **distinguish** the functions of these two **creatures of statute** but should relieve pervasive ignorance which, has been the basis of much misunderstanding.
- 4.2** Each is an independent Commission of Parliament. Both are required to investigate alleged Security Forces misconduct by reason of which the citizen suffers injury or damage; unjustly. But while INDECOM's investigations help to determine probable **criminal liability** or the taking of appropriate disciplinary steps, the Public Defender seeks redress (ranging from money compensation to an apology) for the victim of abuse or, his estate—particularly in the case of **extra-judicial** killings.
- 4.3** The remit of the Public Defender will be dealt with firstly. That of INDECOM will be looked at later (pp. **140 - 7** *post*) in the context of the uncooperative or recalcitrant attitude to relevant investigations displayed by the Jamaica Defence Force (the JDF.)

THE PUBLIC DEFENDER: ROLE AND FUNCTION

5.0.0 In law, the Public Defender is not any one man but an **independent Commission of Parliament**; a hybrid institution (part parliamentary ombudsman and, **quasi** human rights commissioner) established by statute [the Public Defender (Interim) Act, 2000, [“the (Interim) Act”] S.5] for “the purpose of **protecting** and **enforcing** the rights of citizens...”

5.1.1 This Commission is neither an **agency** nor **department** of Government – the executive arm of the State. It is therefore not under the control or **undue** influence of any Minister and reports to none; rather, to a democratically elected bi-cameral Parliament, (the legislative arm) historically constituted by members of two dominant political entities – the PNP and the JLP.

The (Interim) Act repealed and replaced the Ombudsman Act, 1978, which legislated the adoption by Jamaica of ombudsmanry in classical form.

5.1.2 The Commission called Public Defender is largely the brainchild of Mr. Seaga. He conceived an “Advocate-General” as a complement of the Attorney-General, who, historically, was expected to be especially protective of the rights of the citizen but was not regarded as demonstrably so inclined in the post-Independence era. [During the parliamentary debate on the relevant Bill, the Government and Opposition differed over the nomenclature, *inter*

alia. It was Mr. Golding (from the Opposition side) who suggested the compromise of ‘Public Defender’ which was eventually adopted.] Thus it is a response to the perceived need for establishment of a State institution specifically mandated to **protect** and **enforce** the constitutionally defined fundamental rights and freedoms of the citizen. The Government is **guarantor** of those rights and freedoms. But a largely quiescent majority of citizens and the poor were, and remain, **hugely** ignorant of them. This ignorance has fomented endemic apathy and is alleged to have resulted in routine abuse of those rights (the **right to life** in particular) by **renegade** members of the State Security Forces.

5.1.3 The remit of the Commission is defined by Section 13 of the (Interim) Act, which mandates **investigation** of complaints where the Public Defender is of opinion [ss.(1)] —

“(a) that any person or body of persons—

- (i) has sustained **injustice** as a result of any action taken by an **authority** or an **officer** or **member** of such authority, in the exercise of the administrative functions of that authority; or
- (ii) has suffered, is suffering or is likely to suffer an **infringement** of his **constitutional rights** as a result of any **action taken** by an **authority** or an **officer** or **member** of that authority.”

The expression “**authority**” (S.2) refers to Ministries, **agencies and departments** of Government, *inter alia*. It therefore includes the JCF, the Island Special Constabulary Force (‘ISCF’) and, (with limitations) the JDF.

5.1.4 It will be clear therefore that the creature called Public Defender is of a distinctly different make-up than its United States namesake, with whom it is often confused, thereby engendering expectations which the Commission was neither designed nor intended to fulfil.

The **relevant** “constitutional rights” referred to in S.13(1)(a)(ii) of the (Interim) Act are those **formerly** entrenched in the original Cap. III of the Jamaica Constitution, itself also now **repealed** and **replaced** by the Charter of Fundamental Rights and Freedoms (the Charter) enacted by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011. The Charter took effect on **April 8, 2011** but **does not**, of course, apply **retrospectively**.

5.1.5 The *repealed* Cap. III afforded, *inter alia* -

- protection of the **right to life**,
- protection from **arbitrary arrest or detention**,
- protection of the **freedom of movement**,
- protection from **inhuman or degrading** punishment or other **treatment** and,
- protection for **privacy of the home** or other property.

[All of this protection was circumscribed in some way or other and was made **subject** to provisions of the Constitution which authorized suspension or abrogation of these rights (save for protection of the **right to life**) during a “period of **public emergency**” or, if reasonably required “in the interest of defence, public safety (or) public order...” [See — SS.15(5);16(3)(a); 19(2)(a);20(4)(c)(ii);21(6)(a); (22)(2)(a)(i) and 23(2)(i).]

5.1.6 The remit is **delimited**, *inter alia* by **S.13(2)(b)(ii)** of the (Interim) Act by virtue of which the Public Defender is **expressly** precluded from investigating—

“(a) ...

(b) any of the following actions or matters—

(i) ...

(ii) any action done with respect to **orders or directions to the Jamaica Defence Force or members thereof, or any proceedings under the Defence Act...**”

5.1.7 By the Defence Act, S.5, (‘the Defence Act’) the JDF is —

“charged with the defence of and **maintenance of order** in Jamaica and with such **other duties** as may from time to time be defined by the Defence Board (the Board).”

The composition of the Board is regulated by the Defence Act, S.10 which provides that it shall consist of the Minister responsible for defence (usually the Prime Minister) who is Chairman; another Minister appointed by the Prime Minister, the Chief of Defence

Staff and the Permanent Secretary of the Ministry having responsibility for defence.

5.1.8 The JDF consists of a “regular force” and the Jamaica National Reserve (the JNR). Their deployment in policing activities has become quite commonplace, due mainly to an **increase** in violent crimes. But as Dr. Lloyd G. Barnett states —

“this **incipient militarism** has only met with mild public protest. Indeed the party political leaders have appeared to be in general agreement with the **facile resort** to military intervention in the peace-keeping functions of the police.” (*The Constitutional Law of Jamaica, 1965, p. 156.*)

(So far from exciting “public protest” over the “incipient militarism” and, due no doubt to the dramatic increase in gun crimes over the last four decades, there have, intermittently, been fervent calls for the merger of the JCF, the ISCF and the JDF, creating a single law enforcement agency.)

5.1.9 The regular force and the JNR both fall under the Board and the JDF Chief of Defence Staff. However, the Board’s responsibilities do “not extend to the **operational use**” of the JDF, for which **use**, responsibility is “**vested** in the Chief of Defence Staff, **subject** to the overall direction of the **Cabinet**.” (the Defence Act, S.9).

Members of the JDF serve under a system of Military Law, [that part of the body of “service law” described by the Constitution, S.26(1),] which creates special offences related to **military** service and discipline, including dishonesty, e.g. **looting**. But when a

member's action (on or off duty) amounts to a civil offence, e.g. probable murder (extra-judicial killing) manslaughter or looting, he may be required to stand trial in the Civil Courts, where the domestic criminal law is applied.

6.0.0 Part IV. of the (Interim) Act legislates a "Process of Investigation". S.16 thereof lays down the *modus operandi*. By ss.(11) and (12) it is provided that -

"(11) On the **conclusion** of an investigation, the Public Defender may make to the authority concerned such *recommendations* as he *thinks fit* and in particular, but without prejudice to the generality of the foregoing, may *recommend* any or all of the following -

- (a) that the action which was the subject-matter of the complaint be **reviewed**;
- (b) the **alteration** of an **enactment**, rule or regulation which **causes or may cause injustice** or **infringement** of **constitutional** rights;
- (c) that **compensation** be made to the complainant.

(12) If the Public Defender finds, **during** the conduct of his **investigations** or on the **conclusion** thereof, that there is evidence of a **breach** of duty, or **misconduct**, or **criminal offence** on the part of an **officer** or **member** of any **authority**, he shall **refer** the matter to the person or body of persons **competent** to take such disciplinary or **other** proceedings as may be **appropriate** against that officer or member and in all such cases shall lay a **special report** before Parliament."

Thus the Public Defender is an **investigator** and **intermediary** who remedies maladministration and enforces the **constitutional** protection and guarantees: a nascent species of *sentinel on the qui vive*, **not** an **arbiter**. If his *recommendations* for remedying infringement of **constitutional rights** are not accepted by the Government there is recourse to the Judiciary (the Courts) - the third arm of the State. Legal aid may be awarded for those purposes, but for them **only**.

6.1.1. A fact that needs to be or to be more fully appreciated is that as a creature of statute, the Public Defender operates within boundaries delineated by law; as illustrated by the foregoing. Exceeding them renders his actions *ultra vires*, although in an evolving democracy a purposeful Public Defender must be proactive; must constantly press those boundaries.

[N.B.] The Public Defender's

- *modus operandi* of pressing the boundaries of a statutory remit;
- **initiative** in launching the relevant investigations
- conduct of those investigations;
- **cautious** and selective revelation of details concerning those **ongoing** and **incomplete** investigations and,
- care taken over and **discretion** exercised in deciding upon the **contents** of this **Interim Report**,

reflect an appreciation of the **ambit** of the **statutory** mandate.

Further, because of the exigencies of a clearly **extraordinary** situation (worsened by pervasive anxieties) the Public Defender's "*recommendations*" to "the body of persons competent to take proceedings as may be appropriate", i.e. the Government and the Kingston and Saint Andrew Corporation (the KSAC), against "(the) **officer(s)** or **member(s)**" of relevant "**authorities**", i.e. the JCF, the ISCF, the JDF and the KSAC, are included herein, (see pp. *post*) without prior reference. In the result and with some measure of reticence, the Public Defender respectfully draws the attention of the Government and the KSAC to those *recommendations.*]

BACKDROP OF THE ‘INCURSION’ OR ‘SIEGE’

7.0.0 Unfolding of **material events** could be said to have begun on the night of **May 17, 2010**. The then Prime Minister, Mr. Golding, announced in a nationwide television and radio broadcast that the Minister of Justice would, after all, issue an **authority to proceed** under the Extradition Act, 1991, S.13 (1), in relation to a request by the United States of America (the USA) for the extradition of Christopher Coke. The requisition had been received on August 25, 2009. Coke was wanted for trial in the USA on drug trafficking and gun-running charges but was now a fugitive, ignoring entreaties to surrender himself and, evading capture. His whereabouts were known to a **few only**.

7.1.1 The fateful disclosure ended a period of some nine months, during which the Jamaican Government vacillated over its response to the extradition request. It had come under ever mounting pressure from the government of the USA, the local Church, private business sector and “civil society” groupings, to forego any or any further court proceedings in the matter. The issuing of the **authority to proceed** had been kept on hold, pending the outcome of those proceedings. But following upon that announcement, events took on a momentum of their own.

March on downtown Kingston

7.1.2 A large throng of West Kingston women, nearly all of them dressed in white, marched into downtown Kingston. They were protesting the signing of the **authority to proceed** and Coke's imminent arrest. The women displayed fierce loyalty to him. At least one of them considered him "next to Jesus." Others would "dead fi Dudus." (Were these women **dragooned** or **cajoled** ?. Or was theirs a **spontaneous demonstration of support** and **affection** for Dudus ?. Or, indeed, was the turnout dictated by a **combination** of these and other complex socio-economic factors ?.)

Vehicular entrances to Tivoli Gardens were barricaded. There were violent attacks upon police stations at Darling Street and in Hannah Town, West Kingston. Two police officers were killed in Mountain View Avenue, eastern Kingston - by all appearances, an event not **directly** connected to the extradition request.

7.1.3 **Announcement of a State of Emergency;
Mr. Golding's second nationwide broadcast**

7.1.4 On the afternoon of Sunday, May 23, 2010, the Government announced that the Governor General had declared a State of Public Emergency. In another nationwide television and radio broadcast that night, Mr. Golding appealed to all law-abiding citizens to remain calm. He said that threats against the safety of the Jamaican people would be driven back. The State of Emergency had been declared based on "**information**" from the

Security Forces that actions were being carried out which posed significant **threats to law and order in the Corporate Area.**

“Since this morning” he said, “violent, orchestrated attacks have been launched on a number of police stations. Two members of the security forces have been shot and injured.” He described the situation as “**a calculated assault on the authority of the State that cannot be tolerated and will not be allowed to continue.**”

(There was a certain display of earnest resolve in the tone and content of that broadcast.) The State of Emergency would enable the security forces to exercise **extraordinary powers** which included “the power to **restrict** the freedom of movement, **search** premises and **detain** persons suspected of involvement in unlawful activities, **without warrant.**”

7.1.5 By the evening of May 23, hundreds of well armed and camouflaged soldiers in **full battle gear** and drawn from various battalions of the JDF and JNR had descended upon West Kingston. They accompanied **hundreds more** armed policemen (a great many of them **masked**) drawn from various divisions of the JCF and ISCF. Armoured vehicles and bulldozers (to be used in breaching barricades) were deployed.

7.1.6 A command structure provided for splitting up of the territory into “sectors.” Cordons were established. **One in particular, was tightly placed around Tivoli Gardens, the supposed**

encampment of Christopher Coke. Illegal gunmen loyal to Coke and recruited from West Kingston and beyond were said to have taken up position there, prepared to take on the State Security Forces. The battle lines were drawn. Night fell. Electric power supply to Tivoli Gardens was cut off, intentionally or not. The community was thereby plunged into darkness.

Tivoli Gardens residents advised to evacuate

7.1.7 Jamaica Urban Transport Company buses were parked in Marcus Garvey Drive, less than two hundred yards away and in the contiguous Industrial Terrace. All persons remaining in the community (some had fled earlier) who wished to, were advised by public announcements to avail themselves of transport to unspecified “secure locations”, before the projected outbreak of hostilities. A relative handful of residents accepted the offer. Many of those who stayed put, later claimed that this was due to **fear** for their lives and **security** of their property. They were simply not minded to venture out into the dark and risk being shot, they said, by soldiers or policemen. They also claim to have been guided by the experience of previous Security Forces assaults on the community in 1998, 2001 and more recently 2008, in which more than forty (40) citizens were slain.

7.1.8 Beyond Tivoli Gardens, a gripping anticipated **showdown** between **organized** criminal elements loyal to Dudus and the **forces of**

authority brought the capital of a small nation to the edge of its seat. Some transfixed citizens saw it veering to the edge of the abyss; others, to the brink of anarchy.

7.1.9 But above the fray hovered the regnant **Constitution** of Jamaica; the fundamental law: the great **bastion** and **bedrock** of the **rule of law**. In high places and low, there was a call to duty. There was a role for the Public Defender, the Commission of Parliament mandated to protect and enforce the citizen's **fundamental** rights and freedoms. For "amidst the **clash of arms**, the law is not silent...."

JCF announcement of operations

8. On Labour Day, Monday, May, 24, 2010, (a public holiday) the JCF announced that earlier in the day it had launched an operation in Tivoli Gardens and surrounding areas of West Kingston. The joint military/police operation, a news release stated -

"(was) aimed at **executing a warrant** issued by the courts of Jamaica for the arrest of **Christopher Michael Coke** otherwise called '**Dudus**' as well as to restore the area to stability after three consecutive days of **barricading by criminal elements** and wanton **attacks on the police force**. During the operation, **seven** members of the Security Forces were injured. **Six** of the seven were **shot**, one **succumbed** to his injuries. The other was injured in an accident. The operation is still ongoing and the Security Forces are **resolute** in bringing the area to stability so that **law abiding** citizens of West Kingston and its environs can **get on with their lives in peace**. The Security Forces are reminding the residents of

Kingston and St. Andrew that there is a limited State of Emergency in effect and residents are **asked to remain indoors.**”

(It will be noted that the latter request now practically reversed the advice given earlier to residents of Tivoli Gardens.)

Mr. Golding addresses Parliament

8.1 The following day, Tuesday, May 25, Mr. Golding told a sombre House of Representatives that since Sunday, May 23, several roads in West Kingston had been barricaded, impeding the movement of pedestrian and vehicular traffic as well as normal police law enforcement operations. He continued —

“ **Intelligence** gathered by the security forces indicated that in anticipation of the execution of a warrant for **the arrest** of Christopher Coke, heavily armed men were preparing to attack members of the security forces. **Intelligence** further suggested that **criminal elements** in other communities **intended** to launch attacks on the security forces in order to **divert** attention and resources from the focused operation of what the situation in West Kingston required.”

8.2 On Saturday night, May, 22, a police patrol car had been attacked by gunmen on Mountain View Avenue, East Kingston. Two policemen had been killed and eight others injured, Mr. Golding said. During that night and next morning, “**several** police stations **in and outside of the Corporate Area**” were attacked by armed men using guns and molotov cocktails. These included police stations in West Kingston and Rockfort in East Kingston and, Spanish Town, St. Catherine. The Hannah Town and Darling

Street police stations in West Kingston were **set on fire** and **extensively** damaged.

8.3 The joint police/military operation launched in Tivoli Gardens, he indicated, was meant to bring an end “to this **spate of lawlessness** and to **restore order** and calm to the affected areas.” The security forces encountered “**sustained** and **sporadic** (sic) gunfire” and in the exchange that ensued, he said, “**several**” persons were **confirmed dead**, including a member of the JDF. “Several” others, including **twelve (12)** JDF soldiers, had been injured. (But see **Appendix 12.**) The police had reported that “**twenty-six**” (**26**) persons were **confirmed dead**, but it was likely that the number was higher. It was not then possible to determine the precise circumstances in which those persons were killed, Mr. Golding said. More detailed investigations, including eyewitness statements would be required. The **most thorough** investigations would be carried out, he said.

Public Defender begins investigation

9. The Office of the Public Defender decided to embark upon its own **independent** investigations. The decision was welcomed by the Government and supported by the parliamentary Opposition. The mutual hope and expectation was that the Public Defender’s perceived **independence** and **disinterestedness** would lend **transparency** and enhance confidence in the integrity of the

“detailed investigations” foreshadowed by Mr. Golding’s presentation. This **Interim Report** concerns those independent investigations which, are **continuing**.

**DECLARATION OF STATE OF EMERGENCY
AND THE ‘INCURSION’ OR ‘SIEGE’**

10.0.0 The ‘Tivoli incursion’, so called, had its genesis in a Proclamation made by the Governor-General, (on the advice of the Government,) exercising powers conferred by the Constitution, S.26(4)(b). A State of Emergency was declared in respect of the parishes of Kingston and Saint Andrew. The Proclamation, made also in accordance with the provisions of the Emergency Powers Act, 1938, (as amended) S.2(b), was **published** in the **Jamaica Gazette** dated **Thursday, May 13, 2010**, (**Appendix 4.**) but was actually **issued** under the Broad Seal of Jamaica on **Sunday, May 23, 2010**.

10.1.1 The State of Emergency was expressed to remain in force for **one month**, with effect from that day, but was **extended** by resolution of the House of Representatives for another month, [the Constitution, S.26(6)(b)] **ending July 22, 2010**. The House also extended the area covered by the State of Emergency to the Parish of Saint Catherine.

10.1.2 Thus, the Proclamation eventually embraced the **entire geographic area** designated the **“Kingston Metropolitan Region.”**

10.1.3 The Proclamation propounded His Excellency’s **satisfaction** —“that, consequent on certain decisions of the Government, **action** has **been taken** or is **immediately threatened** by a person or body of persons

therein of such a **nature** and on so **extensive a scale** as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community (the parishes stated above) of supplies or services essential of (sic) life;...”

10.1.4 Those recitals suggested official conformity with the provisions of the Constitution, S.26(5)(b) and the Emergency Powers Act, 1938 (as amended). The latter statute was enacted in the wake of the **labour riots** of that year. That statute is one of two by virtue of which **fundamental rights** may be **abrogated** during periods of **public emergency**. The other is the Emergency (Public Security) Act, 1939 (as amended,) passed during World War II, but which is specifically concerned with the state of or threat of **war**, not domestic upheavals. [The two measures are examples of pre-Independence legislation expressly preserved by the Jamaica (Constitution) Order in Council, 1962, S.4(1)]. As Dr. Barnett explains -

“the **former** law empowers the Governor-General on the **advice** of the **Cabinet** to make Regulations during a period of **public emergency** for the purpose of securing the **essentials** of life to the community. For this purpose, the Regulations may empower Government Departments and public officers to do such things as the **Governor-General** deems **necessary** for the preservation of peace, for securing and regulating the supply and distribution of **food, water, fuel, light** and other **necessities**; for maintaining the means of communications; and for any other purposes **essential** to the life and **safety** of the community. The Regulations may also make such provisions as the Governor-General

thinks necessary for making the exercise of those powers effective.” (*op. cit.* p. 426.)

State of Emergency justified

[N.B.:

10.1.5 For the record, the Public Defender formally accepts that the situation which confronted sovereign Jamaica at the material time showed that:

- a. the country was indeed faced with a state of public emergency;
- b. the circumstances then prevailing **near overwhelmed** the capacity of the JCF and its auxiliaries, (the **primary law enforcement agents** of the State;) those circumstances challenged or threatened the **institutional capacity** of the State itself to subdue **illegally** armed forces apparently operating under the control of **organized crime**;
- c. there does appear to have been **evidence** suggesting that some of these forces had been **assembled** in **West Kingston** to protect the fugitive, Christopher Coke and, to **obstruct** or **prevent** his **arrest** and that therefore,

- d. the circumstances **justified** the Government's resort to the Constitution, S.26(4)(b), (5)(b) and (6)(b) as well as the Emergency Powers Act, 1938, SS.2(b) and 3.]

10.1.6 The Governor-General's "**satisfaction**" regarding the state of affairs then prevailing [S.26(5)(b)] is **significant**. As was **held** by a seven-member Supreme Court of Pakistan in *Farooq Ahmad Khan Leghari & Ors. v Federation of Pakistan & Ors.* [(July 28, 1998) (*Commonwealth Human Rights Law Digest, (2008) p. 119*)], interpreting a provision [Art. 232 (1)] of the Pakistan Constitution **similar** to S.26(5)(b) —

“ (4) The **satisfaction** of the President, provided for in Article 232 (1), is **subjective** and is a **condition precedent** to the exercise of power. If it can be shown that there was no **satisfaction**, or that it was absurd, perverse, *mala fide* (sic) or based on **extraneous** or **irrelevant** grounds, it will **not** amount to **satisfaction** for the purposes of (the Article). Given its far-reaching consequences, a proclamation of emergency must have a **clear nexus** with the **objects** mentioned in (the Article...)” [*Minerva Mills Ltd. & Ors. v. Union of India & Ors. AIR (1980) SC 1789* (India Supreme Court) **applied.**]

Moreover —

“ (6) The validity of a proclamation of emergency is *prima facie* to be examined on the basis of the **statements** made **in it**. Statements made by **Government** or **political leaders** may help to clarify the nature of the emergency or indicate Government intention but they **do not** provide a **sound basis** for imposing an emergency.”

And further —

“ (12) Parliamentary approval of a proclamation of emergency or order **suspending** fundamental rights does not have the effect of validating any inherent **illegality** or **unconstitutionality**.”

Suspension of fundamental rights

10.1.7 Certain **fundamental rights and freedoms** guaranteed by Cap.3 of the Constitution (as it then stood) e.g. protection from arbitrary arrest or detention, the freedom of movement, privacy of the home and certain provisions to secure the protection of law, were **effectually suspended**. The Proclamation also legalized, “... measures that (were) **reasonably justifiable** for the purpose of **dealing with the situation** that (existed) during the period of public emergency.”

Conferment of emergency powers

10.1.8 Simultaneously, His Excellency promulgated the Emergency Powers Regulations, 2010, under the Emergency Powers Act, S.3. The Regulations conferred wide powers upon “**authorized person(s)**” i.e. any **constable, member** of the **JDF**, the Fire Brigade and “any person authorized by (a) competent authority” to take action in relation to –

- any service maintained or operated by any public or private enterprise including the **disposal of the bodies** of deceased persons
- the protection of public property

- the **protection** of public roads
- a power to **block** roads and **set up cordons**
- a power to **require information**
- a prohibition of assemblies
- a **prohibition** against **discharging** firearms
- the power to establish **curfews**
- the power to **restrict access** to any area
- the power to **search premises**
- powers of **questioning** persons
- powers of **arrest** and **detention**
- the **search** of persons
- **confinement** to places of **residence**
- the closing of premises and,
- the **control** of places of **public resort** and entertainment.

10.1.9 In the result, the community of Western Kingston (**Tivoli Gardens in particular**) was placed under **austere lock-down**. There was **robust** enforcement of the regulations, particularly in the first fortnight after the Proclamation.

Review Tribunal

10.2.0 A Tribunal for review of cases of “**detention** of (sic) restriction” was established under the chairmanship of Mrs. Pamela Benka-Coker, Q.C., Chairman of the Disciplinary Committee of the General Legal Council, to deal with applications by detainees for relief. [See the Constitution, Cap.III,S.16(4) [repealed and replaced by the Charter

of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, S.2] and the Emergency Powers Act, 1938, S.3(2)(a)]

- 10.2.1** The right to liberty and freedom of movement [the Constitution, Cap.III (repealed) S.16.—(1)] is a most valuable fundamental right. The citizen may only have been deprived of it in accordance with the provisions of SS.16 and 26 (due process.)] Every **moment** of **detention** is to be treated as unlawful unless it could have been shown to the satisfaction of the Review Tribunal (or the Court) that it was not *ultra vires* or otherwise unlawful: [*Liversidge v. Anderson* (1942) AC 206 (UK HL)] [But see the (Interim) Act, S.13.(2)(b)(i) — p. *ante* and pp. *and post.*]

Jamaica House Meeting

- 10.2.2** On Wednesday, May 26, 2010, the Public Defender accepted Mr. Golding’s invitation to attend a meeting at Jamaica House. Other persons present included then Deputy Prime Minister and Minister of Foreign Affairs, the Honourable Dr. Kenneth Baugh and Minister of National Security, the Honourable Dwight Nelson; the Commissioner of Police, Mr. Owen Ellington, then Chief of Defence Staff, Major General Stuart Saunders, Bishop Herro Blair, Political Ombudsman and Chairman of the Peace Management Initiative and, Dr. Joslin Salmon, then Chairman of the Jamaica Red Cross. The meeting concerned the **joint** JCF/JDF “operations” in Western Kingston, (Tivoli Gardens in particular,) in the purported exercise

of the Emergency powers. At Mr. Golding's invitation, Bishop Blair, Dr. Salmon and the Public Defender agreed to tour Tivoli Gardens under the "**protection**" of the Security Forces.

**Tour of Tivoli Gardens and 'Rasta City';
Tales of rampant aggression**

10.2.3 The ensuing tour lasted all day. A picture of **great desolation** presented itself. There were plaintive litanies of woe from residents and the scene of a community under **tightly restricted** freedom of movement. At least one wounded young man **left unattended** and, two male corpses **lying uncollected**, were seen. It was Bishop Blair who alerted an indifferent JDF sector Commander to the fact that the young man was moving **spasmodically**. But by the time he came to receive attention from the security personnel, he had **apparently died**.

10.2.4 Tivoli Gardens bore **classic features** of a **war zone**. There were burnt-out houses and apartments and unmistakable signs of the explosion of incendiary devices, described by residents as "**bombs**". There were many **blood-spattered interior concrete walls** and floors and aluminium windows shot out or riddled with bullet holes indicating **inward** heavy weapon fire. Exterior walls of buildings also, bore **physical indicia** of **high-powered** weapon fire. Frightened and **traumatized** residents (children, women and aging men but mainly women) cowered in fear. Dwellings had been **thoroughly ransacked**. Furniture, electric and electronic

appliances and equipment had been **dismantled, destroyed** or **damaged**. Members of the Security Forces (closely deployed everywhere) kept guard at the ground floor entrances or lobbies of tower blocks. Residents were **confined** to the **interior** of apartments or houses.

10.2.5 Complaints of indiscriminate **rough handling** and **excessive abuse** by State Security personnel came from all quarters of citizens. They related accounts of a **ferocious organized assault** on the community, marked by unrelenting aggression. They claimed that soldiers and policemen alike told them that they were being punished for **supporting** and **hiding “Dudus”**; otherwise for **attacking** and **setting fire** to the **Hannah Town** and **Darling Street** police stations. In dazed disbelief, they wondered aloud why they had been abandoned and left defenceless by their M.P., Mr. Golding and, what would now become of them.

10.2.6 Some members of the Security Forces wore hideous **hooded masks** in the broad daylight. One police constable in particular menaced the Public Defender during the tour of a building. A police sergeant, who **refused to identify himself**, to whom a protest was directed, evinced **no response**. It was left up to the Public Defender therefore to assert himself and so forestall the constable's boorish and disrespectful behaviour, by demanding that he keep his distance.

'Rasta City'

- 10.2.7** There is a squatter community situated in the shells of concrete buildings formerly occupied by the defunct Public Works Department (PWD) on lands outside the southern perimeter walls of Tivoli Gardens. It is known as **'Rasta City'**. It appears to have been served by illegal connections to the Jamaica Public Service Company Limited power grid. Scores of persons – a few old men, young women and children - were found living there on May 25, 2010. They too complained that **"bombs"** had been **thrown** into some of the buildings or **dropped from the air** and had exploded, **sparking fires**. The entire upper floor of one old PWD building, (a squatter dwelling) was gutted. There were also a few burnt out or partially destroyed board shacks. The surrounding area was bushy with domestic animals, pigs and stray dogs, roaming about.
- 10.2.8** As a result of representations made by the Public Defender to the JDF sector commander, Rasta City dwellers were allowed "air out" time to fetch water and empty slop pails and so relieve the **heavy** stench of accumulated **human body waste, feminine and babies' sanitary disposables**.
- 10.2.9** The touring party thoroughly inspected Rasta City, including the **burnt-out** buildings said to have been **"bombed"**. The party checked out **reports** or rumours that **dead bodies** had also been **burnt** there. But **no evidence** of **burnt bodies** was detected.

Detainees

10.3 In late afternoon, the tour party indicated that they wished to inspect the facilities and conditions under which detainees were being kept, at a former Seprod company warehouse complex in Marcus Garvey Drive. Instead of being conducted to the complex, the tour party were shunted to the Police Area 4 Headquarters whence they had departed for Tivoli Gardens. The explanation for skirting the complex, (bellowed *en route* by the officious constable mentioned earlier) was that there were “**gunmen in the area**”. On the insistence of the Public Defender however, the Police Area Commanding Officer caused the tour party to be escorted back to the complex. There, hundreds of detainees (mainly men of mature years) were found housed in a large old zinc-roofed warehouse. Younger detainees were **tightly bunched up** behind a fence of **razor wire**, many **kneeling in gravel**. They were all being “processed”. There were **no sanitary conveniences**.

10.4 In time, the detainees [peaking at more than **one thousand (1000)**] were transferred to either Harman Barracks or to the National Arena. By midday Saturday, May 29, however, all those held at the National Arena had been released. (According to a member of the Police High Command, only **five (5)** detainees remained in custody thereafter; for further “processing”.) (See also p. *post.*)

Visit to Madden's Funeral Home

11. From the Seprod commercial complex, the tour party repaired to Madden's Funeral Home, North Street, Kingston. At our **insistence**, we were admitted to the morgue and viewed three **large** mounds of tagged corpses, most in varying stages of **decomposition**, many **nude** or **scantily** clad, piled up on the bare concrete floor: a macabre, surreal spectre of mass slaughter. At first, the two insensate and impatient morgue attendants on duty could give no accurate tally of these dead.

By that time it was nearing 6:00 PM.

"Debriefing"

12. After viewing those bodies, Bishop Blair and Dr. Salmon departed to Vale Royal for a "debriefing" with Prime Minister Golding. The Public Defender remained behind to take a tally of the dead then piled up at Madden's, who, were found to number **fifty-six (56)**. In the meantime, radio transmissions which were overheard indicated that there were **sixteen (16)** corpses still lying in thoroughfares in Western Kingston [nine (9) of them in Darling Street], waiting to be picked up. Thus, the Public Defender, upon arrival later, was able to challenge or refute the Commissioner's report to the Prime Minister, that as at the time of the "debriefing", there had been **forty-four (44)** civilian fatalities. (It may well have been the

extremely tense and **volatile** situation **then existing**, which stalled the flow of accurate information **from the ground** on up.)

13. But when the Public Defender remarked upon the “**disparity** between the number of **civilian dead** and the number of **firearms**” said to have been recovered up to that time, (i.e. **72:4**), the sedate Commissioner of Police and Chief of Defence Staff concurred that the ratio was “**not unusual**”. Having regard or, compared to what ?. The gentlemen will want to explain that rejoinder some day. For this seemingly inscrutable response to a matter of such gravity and historical importance suggested that the **heads** of the Security Forces actually regarded the death toll as **a matter of no, or no particularly notable consequence**. [Perhaps this explains the initial failure or delay by the Commissioner to order the prompt start-up of police investigations into strident allegations of wide-scale **extra-judicial killings**. This had been an **urgent recommendation** made by the Public Defender, to the head of the BSI. (See **Appendix 10**. and p. **158 – 60**, *post*.)]

**Letter to Police Commissioner and Chief of Defence Staff
dated May 26, 2010**

- 14.1 There was a follow-up meeting next morning, May 27. Later that day, the Public Defender was moved to address a letter to the Commissioner and the Chief of Defence Staff, jointly, recording “**issues of grave concern**”. The letter which is attached hereto

marked **Appendix 5**. speaks for itself. But particular reference may be made to:

- i. the necessity that they “**bring home** to those under (their) command that the ... State of Emergency (did) not herald any **open season**, permitting unlawful **departure** from the **tenets** and **principles** of the **rule of law**; that the extraordinary power of cordon and search, seizure, arrest and detention without warrant conferred, must be **strictly** adhered to and be applied with **compassion** and **restraint**”;
- ii. the attention drawn to the **ratio** of known **civilian deceased** to **firearms** allegedly **recovered**, (by then standing at **73:5**.) the “evident **disproportionality**” obviously suggesting that there had been “**excessive** use of **deadly** force”;
- iii. the restriction upon the freedom of movement of citizens of Tivoli Gardens, Denham Town and Hannah Town in particular, keeping “women and children **confined round-the-clock** to the **cramped** condition” of their homes which, was considered “unjustified and **unacceptable**.”
- iv. the allegation of “demeaning and highly disrespectful **verbal abuse**” of residents of Tivoli Gardens by

personnel in the lower ranks, who needed greater **supervision** and **control**;

- v. the fact that twenty-three **unidentified, decomposing bodies** had been taken to the May Pen Cemetery and, laid out on the bare ground for **on-the-spot autopsies** and **immediate interment** and,
- vi. the need for **systematic identification** of persons not afforded access to **medical attention** and **medication**.

14.2 In the public interest, the letter, which was copied to the Prime Minister and to Bishop Blair, was **released** to the **news media**. This generated considerable **dismay, public debate** and **adverse commentary**, mostly in relation to the **“evident disproportionality”** referred to at ii. above.

In the following weeks, **scores** of firearms were alleged to have been **“discovered”, “found”** or **“recovered.”** (See pp. **43 – 5**, post).

14.3 It must now be noted that **disproportionality** is also reflected in the **ratio** of **civilian** to **State Security Forces fatality** resulting from **‘incursion’** or **‘siege’** activities – **75:1**, suggesting that there was indeed **excessive** or undue resort to lethal force by those Forces.

Burial plans aborted

15. But prior to that letter (**Appendix 5.**) the Public Defender had alerted the Prime Minister (by telephone) to the matter of the corpses intended for **immediate interment**. With **great alacrity** Mr. Golding directed that they be retrieved: that in fact all corpses should be "**frozen**", pending autopsies. In the event, the bodies were merely **refrigerated**. This cooling of the corpses slightly slowed **accelerating** decomposition. In many instances, if not most, decomposition had been worsened by **extraordinary delay** in collecting them from the streets, dwellings and tenements of West Kingston. But **police** witness statements suggest that the delay was **prolonged** in part due to illegal **sniper fire**. (See p. *post.*)

X-ray of corpses

16. Acting upon independent advice, the Public Defender insisted that all corpses be **x-rayed**, prior to the commencement of autopsies. In the result, x-rays were done **in secrecy**, under **special arrangements** organized with the assistance and cooperation of the Ministry of Health.

After each was x-rayed, (by which time some were **very badly decomposed** or, had become **skeletonized**) thorough autopsies were performed on the corpses of **seventy-five (75)** persons whose

death by **gunshot trauma** or by **explosive devices** are **known** to have occurred during the ‘incursion’. With the aid of x-ray films, **every scrap of foreign body**, (metallic or otherwise,) was extracted from each corpse and delivered to the police for transmission to the Government Forensic Science Laboratory. Forensic examination and evaluation will determine their evidentiary value.

Death toll/body count

17. But to this day, **speculation** fueled by anecdote and hearsay persists, regarding the **precise** civilian **death toll** related to the ‘incursion’. In February, 2011, information was relayed to the Public Defender that “about two hundred (200) dead bodies” were being “stored at a cold storage” in West Street, Kingston. However, a thorough search showed that this report was **unfounded**.

Weapons “finds”/“discoveries” etc.

18. Various JDF accounts about the “discovery” etc. of weapons of varying calibre, given at press conferences called in the weeks of and immediately following May 30, 2010, all came in the wake of the Public Defender publicly expressing grave **disquiet** over the remarkable **ratio** of deceased to weapons **“found”** or **“discovered”**. These claims should therefore be subjected to **severe scrutiny**. Put another way: **the story behind the Who, the Where, the What, the When and Wherefore and the How, of**

each alleged find, should be put to the acid test of **rigorous** forensic examination: for no fewer than six reasons, viz.

- i. **the time** of the supposed finds, and **the timing** of their announcement;
- ii. there is evidence, albeit anecdotal, that **most** of those weapons actually came from the **large stockpile of arms** seized and maintained by the **Security Forces**, prior to and in **operations entirely unrelated** to the ‘incursion’;
- iii. there appear to have been **no arrests** made or **charges laid** in connection with any of the alleged finds;
- iv. announcement of the **“finds”** or **“discoveries”** fit a pattern of the JDF making public pronouncements by way of **damage control (quick-fix or flip-flop** responses to **embarrassing disclosures** about the conduct of army personnel during the ‘incursion’) e.g., the **use of mortar rounds** or, conflicting with earlier statements of their spokesmen e.g., the **presence** of, the **role played** by and **assistance** derived from the USA Department of Homeland

Security surveillance aircraft during those operations (see pp. *post.*);

- v. it has not been suggested or alleged that any of these finds were made **within** the walled perimeter of **Tivoli Gardens**, the supposed **hottest theatre** of confrontation with armed combatants and
- vi. thus, the veracity of those accounts will elucidate and help determine the elusive truth of the circumstances surrounding the **death** of the **greatest number** of citizens in any **one** State Security Forces **operation** in the history of independent Jamaica.

Questions arising from ‘incursion’ activities

- 19.** The Public Defender’s investigations also throw up many broad questions for due consideration. Some examples are:
- 1. What was **the level of resistance** actually encountered by the Security Forces or, such as would have **justified** the **scale** of **carnage** ?.
 - 2. Did the operational plans for the capture of the fugitive Coke or the **execution** thereof include a regime or element of crude **profiling** of citizens who stayed put, despite **warnings**, as **supporters** or **sympathizers** of

“Dudus” or, by virtue of which young males found in Tivoli Gardens were, *ipso facto*, to be considered (potential or actual) **combatants** and thus be **eliminated** ?. Put another way: did the State Security Forces declare **open season** in West Kingston, (Tivoli Gardens in particular) by virtue of which there was flagrant **disregard** for the Jamaica Constabulary Force Human Rights and Police Use of Force and Firearms Policy (the JCF Policy,) (see pp. *post.*) leading to the death of so many civilians ?.

3. Did **execution** of the operational plans illustrate or exemplify a “**one size fits all**” approach to policing or law enforcement ? and,
4. Was there a cynical intention (conveniently but, disingenuously) to explain away the **death** of so many as **unavoidable** “collateral damage,” in the hope that that explanation would satisfy the expectations of an **apprehensive, gullible** or **quiescent** citizenry ? .

**SUPPORT OF INVESTIGATIONS BY THE PARLIAMENT, THE
UNDP, INTERNATIONAL DONOR PARTNERS AND OTHERS**

20. Having only a small cadre of investigators, (a Deputy, a Director and four others) the Public Defender was obviously **not sufficiently equipped** to conduct investigations as momentous, or, of the magnitude of those under consideration: a **necessary** but challenging undertaking which required the engagement of **temporary investigators**. The Police Civilian Oversight Authority (PCOA) also volunteered the **temporary** services of two staff members. They represented the Public Defender as lay observers at the autopsies. Their assistance was halting, though better than perfunctory.

Supplemental funding provided

21. By way of a 2010/11 Supplementary Estimates of Expenditure, Parliament approved special funding of **J\$16,845,000.00** to defray the Public Defender's State of Emergency investigation expenses. That sum was itself augmented by an amount of **J\$9,645,360.34**, *vired* from the annual budget of the Office. The **total** sum of **J\$26,492,360.34** was spent as accounted for in **Appendix** and, in a **Status Report** requested by the Public Administration and Appropriations Committee of the House of Representatives in accordance with Order 73A of the Standing

Orders of the House. (See that Report, dated October 10, 2011, p.19.)

Forensic Sciences

- 22.** The **most important** aspects of the Public Defender's investigation relate to allegations of **extra-judicial killings** (unjustifiable homicide) and involve the forensic sciences of **pathology, ballistics** and **radiography**.

Worldwide search for assistance

- 23.** Fortunately, with the solicitous entreaties of Dr. Pauline Knight, former acting Director of the Planning Institute of Jamaica, and Ambassador Evadne Coye, then Permanent Secretary in the Ministry of Foreign Affairs, support soon came from the UNDP. At the request of the Public Defender, they persuaded the UNDP to conduct a **worldwide search** and survey of **friendly** and **sympathetic** foreign governments **prepared** to help out.

Who killed Who ?.

- 24.** In particular, the Public Defender **urgently** needed the support of respected **forensic pathologists** to act as **independent observers** at autopsies on the bodies of all persons whose death was attributable to activities during the State of Emergency. For it was (and remains) **essential**, that it be determined **which** of the deaths was caused by bullets discharged from **weapons issued** to

members of the **State Security Forces** and fired during the 'incursion' and, the assault on **Mr. Clarke's house**; or by **anyone else**, e.g. **armed combatants** or **illegal gunmen**.

25. Thus, **ballistic examination** was (and remains) a **key process**.

It followed that, as far as possible, **all spent projectiles** or **fragments** lodged in any dead body, should be recovered for the purposes of forensic examination, evaluation and comparison. It was therefore imperative that **all** relevant corpses be **x-rayed**.

Assistance offered by friendly nations

26. The UNDP search and survey turned up assistance from governments of **five (5)** friendly donor countries viz. (in alphabetical order) **Australia, Colombia**, (the Province of) **Ontario, Canada, Portugal**, the **United Kingdom** and, the **United States of America**.

27. As stated earlier, the Public Defender is most grateful to the UNDP and, the governments of the donor countries, for their unstinting support. The **outstanding work** and **assistance** of the eminent forensic experts made available was **first rate**. (An exchange of letters between Mr. Minh Pham, a former Resident Representative and the Public Defender records an appreciation of the work of each other in the matter of these investigations.)

Observer Pathologists

28. The eminent observer pathologists from the countries aforementioned present at the autopsies and representing the Public Defender were (in alphabetical order,) —

Dr. Stephen Cordner, Professor of Forensic Medicine, Monash University, **Australia**

Dr. Elizabeth A. Laposata, MD, FCAP, FASCP, of Boston, Massachusetts, **U.S.A.**

Dr. Maria Dolores Morcillo Mendez, MD, Forensic Doctor, Specialist in Criminal Law and Certified Forensic Expert, of **Colombia**

Dr. Maria Cristina Nunes de Mendonca, MD, PhD, of **Portugal** and,

Dr. Pollanen, MD, FRC(Path.), DMJ(Path.), of **Ontario**, Canada.

29. The observer pathologists each completed a two or three-week tour and furnished **independent** autopsy reports *pro forma*. All of these reports have been **disclosed** to the Government.

Observer oversight

30. The **“PURPOSE”** of the oversight/observation of each **observer** pathologist **designated** by the Public Defender, courtesy of the UNDP, was to provide **independent** commentary on:

“1. the **state** of the body;

2. **identification** of the corpse;
3. **all** the injuries present, including **gunshot** wounds. If gunshot wounds are present, then to comment on –
 - i. the **number** and **locations** on the body of the **entry** and **exit** wounds;
 - ii. the number of **bullets** in the body;
 - iii. the path of the gunshot wounds in the body and,
 - iv. the **range of discharge** of the firearm(s);
4. the **cause** of death;
5. any other medicolegally relevant findings and,
6. the '**completeness**' of the post-mortem examination."

Agreement re autopsy Protocol

31. At a meeting on June, 14, 2010, chaired by the Public Defender, an initial post-mortem Protocol was agreed between Dr. Dinesh Rao DNB, MD, DFM, Government Consultant Forensic Pathologist and former acting Director of the Legal Medicine Unit of the Ministry of National Security and Dr. Michael Pollanen, Public Defender observer pathologist (**Appendix 7.**) That Protocol was **signed** by Dr. Rao and Dr. Pollanen but was **not** faithfully followed initially. For example, after a first post-mortem done on June 15, 2012, the next nine (9) were performed **two (2) at a time** in adjoining rooms. Dr. Pollanen reported that some **dissections** and the **retrieval** of spent bullets or fragments was delegated to

morgue assistants. The assistants searched for these foreign bodies after Dr. Rao generally indicated **where** in the bodies they could be found. Dr. Rao played no part in this process, it was said. These irregular routines aroused the **anxious concern** of Dr. Pollanen, which he communicated to the Public Defender **(Appendix 8.)**

- 32.** At the instance of the Public Defender therefore, the autopsies were **suspended.**

Agreement on revised autopsy Protocol

- 33.** A meeting to discuss the matter was called and chaired by then Minister Nelson. It was attended by senior Government officials including representatives of the Police and the Ministry of Health; the Director of Public Prosecutions, Ms. Paula Llewelyn, Q.C., Dr. Rao, Dr. Pollanen and the Public Defender. A **revised** Protocol was agreed which, the Minister announced, would subsequently **govern** the **conduct** of **all autopsies** in **Jamaica**; certainly those relating to **police/military killings**. (A copy of the revised Protocol is attached as **Appendix 9.**)

Identification of bodies

- 34.** The autopsies were preceded by a **painstaking process** of personal **identification**, agreed between the JCF/BSI and the Public Defender. First, a thick **volume of photographs** of the **West Kingston dead** was compiled. A "**Ground Zero**" number was

assigned to each. Thereafter (over a **four-week** period) relatives and other witnesses made an **initial** photo identification. Each **identification** was **confirmed** by reference to the **physical remains** at the commencement of the **matching** autopsy.

35. The Public Defender acknowledges the assiduous performance of ACP Granville Gauze, (ret'd) Superintendent (now SSP) Ezra Stewart and Deputy Superintendent (now SP) Gladys Brown of the BSI in the identification process. They were especially diligent in **coordinating** the post-mortem arrangements.

Autopsies

36. Eventually, over a **two-month** period, autopsies were performed by Dr. Rao, and his colleague Dr. K.S.N. Prasad, MD, DFM, Government Consultant Forensic Pathologist, on the bodies of all **known persons**, whose death was **attributable** to **action** during the period of Emergency; in **purported** law enforcement or **otherwise**.

(The case of one **markedly decomposed** dead body deserves particular mention. In **some respects** it is **not at all unique**. Despite **refrigeration**, at the time of the autopsy it had become **extensively** infested with **maggots**. Relatives who had earlier identified the deceased now found him visually **unrecognizable**, by reason of discolouration of the

skin, the collapse of soft tissues and scores of **crawling maggots**. A family member called to identify the corpse actually **fainted** at the sight of it. She had to be lifted out.)

Conduct of autopsies in accordance with best practices; Protocols

37. The autopsies were all conducted in accordance with international **best practices** and **United Nations** standards (the '**Minnesota Protocol**') agreed (not without difficulty) between the Ministry of National Security and the Public Defender. (See **Appendix 9.**) It was later amended — (**Appendix 9A.**)

Stipulations in the **original** Protocol included –

- complete musculoskeletal dissection,
- the taking of **samples** of body fluids and the liver, for **toxicological** analysis;
- that **projectiles** recovered and biological **samples** taken should be **recorded** in the report of post-mortem examinations and,
- the taking of **reference samples** to be retained by the Government Forensic Science Laboratory, in **all** cases.

37.1 The **amended** protocol, incorporated the foregoing stipulations, but also established a **prioritized** approach to the conduct of post-mortems, viz.

- a. bodies that had **not yet** been affected by **decomposition**

- b. bodies that were **slightly** decomposed
- c. bodies that were “found” **skeletonized** or in an **advanced** state of **decomposition**, on which **no** post-mortem procedures had been performed and,
- d. bodies similar to those at c. above, on which **partial** post-mortem procedures had been earlier performed (a reference to those **badly decomposed** and which had been **retrieved from the ground at the May Pen cemetery**, after a **strong protest** and, other urgent representations made to Prime Minister Golding, by the Public Defender.) (See p. **42** *ante.*)

37.2 The **amendment** also required the establishment of a **make-shift mortuary** (a **refrigerated** metal shipping container) set up at the Norman Road, Kingston 4 annex of Madden’s Funeral Home. This was to facilitate post-mortems on bodies which were in an **advanced** state of **decomposition** i.e., **markedly decomposed** or **skeletonized**. Further, sternum bone and other samples were taken from all bodies and stored for possible future DNA analysis.

Storage of forensic data

38. Careful linkage between **unidentified bodies** buried by the State following post-mortems and, their **related forensic data**, is to be maintained in case future requests for exhumation are made.

[The requirement to store forensic data has proven astute. Stored forensic data have facilitated the **positive identification** (by DNA) of the corpse of **Andre Smith**, a previously “**unidentified**” deceased. Andre Smith, a young **dual citizen** of **Jamaica** and the **USA**, had also been previously classified as a “**missing person.**” But the wishes of his relatives to have his remains **exhumed** from a **pauper’s grave** and afforded dignified funerary rights, are stymied by **poor record keeping** of the Kingston and St. Andrew Corporation, relating to **interments** at the **May Pen Cemetery**. The precise burial site is **yet to be located.**]

(See also pp. **58** and 230, *post.*)

- 38.1** Further, statistical DNA calculations done to determine **maternity**, have disclosed a **99.893%** probability that a Tivoli Gardens resident “**cannot be excluded**” as the **mother** of **another** previously “unidentified male”, **Dale Anthony Davis**.

The KSAC and May Pen Cemetery burial data

- 39.** By the provisions of the Kingston and Saint Andrew (Cemeteries) Act, 1874, (‘the Act’) S.4, over one hundred and eighteen (118) acres of land are declared vested in the KSAC under a **trust conveyance** “to be held and used as a **cemetery** for the parish of **Kingston.**” It is known as the ‘May Pen Cemetery’. S.13 of the Act

provides for the appointment of a 'keeper', now designated 'Superintendent'. By S.19, the "general management, regulation, and control of the cemetery" is vested in the KSAC. Under **S.22** of the Act -

"**All burials** within the cemetery **shall** be registered in register books to be provided by (the KSAC) by some **officer appointed** to that duty, and such register book **shall distinguish** the part of the cemetery in which the several bodies... are buried..."

Further, those register books "**shall** be so kept and **indexed** as to facilitate searches for **entries** in them, in respect of **bodies interred.**" Copies or extracts of the books "**shall** be received in all courts as **evidence of the burials** entered therein." And copies of transcripts of the books are to be "transmitted to the Registrar-General" who is required to keep and record them "according to law."

39.1 S.6 of the Act contemplates and permits assignments of portions of the cemetery to churches or congregations "...for purposes of interment according to (their) rites..." And by paragraph 12. of the Kingston and Saint Andrew (Cemetery) Rules, 1947 (made under S.27 of the Act) the **plan** of the cemetery has an area shaded green and "set apart for the burial of persons not belonging to, or **not claimed** by any religious community or society."

39.2 None of the unidentified bodies was “claimed.” Presumably therefore, they were buried in an area designated by the KSAC for the interment of paupers. But months of persistent enquiry have failed to afford access to any relevant “register book” or information regarding the “area” of interment of any unidentified corpse.

39.3 It will be noted that the duties imposed by S.22 of the Act are **mandatory**; not discretionary. The KSAC and the “officer appointed”, (the ‘keeper’/‘Superintendent’) are therefore, *prima facie*, in continuing **breach** of statutory duty.

Alleged extra-judicial killings

40. Of the **seventy-six (76) known** and relevant **civilian** deceased, (**Appendix 1) forty-four (44)** (including **Mr. Keith Clarke**) (see **Appendix 2**) are **alleged** to be instances of **extra-judicial** killings (unjustifiable homicide.) The following six (6) cases are broadly illustrative of these **allegations**:

Kevin Gordon

40.1 On Tuesday, May 25, 2010, at about 6:30 a.m., a forty-five year old male witness was at home along with his nephew, the deceased, (aka “Porridge man”,) who sold porridge for a living. Security forces entered the home having kicked off the front door. The witness was confined to the verandah while Mr. Gordon was being interrogated inside the house. After a short period of silence, the witness says he then heard gunshots inside the house. The witness tried to run from the verandah but was bullied to “go down on (his) belly and . . . **must not**

look". He alleges however, that about fifteen minutes later he **saw** three policemen —

“...**draw out** my nephew Kevin in a coloured sheet, **pulled** him on the sidewalk, **removed his clothes** from his body, and throw his clothes in (sic) the sidewalk”.

The witness alleges further that a few minutes later a Police truck drove up and the deceased was thrown into the truck. He too was ordered to board that truck in which there were at least ten **dead bodies**. After being in the truck for about ten minutes and, following **the protest** of **a policeman**, the witness and four other men were allowed to board **another vehicle** which transported them to the Seprod detention post.

40.2 (There are allegations of some deceased being **taken away alive** by State Security personnel but later **turning up dead**. Did the protest of a percipient policeman prove timely ?. Fortuitous and decisive ?. Did it cause the life of this witness and the other four men to be spared ?.)

Bojon Rochester

40.3 Mr. Rochester, a twenty-one year old welder, lived in Tivoli Gardens, along with his mother, and other family members. On Monday, May 24, 2010, Mr. Rochester and neighbours were standing in a pathway, when his mother heard “**a loud noise** making a **booming sound** and **the place went dark** and the **building shook**.” She continued —

“After the **smoke kinda clear**, Bojon was lying down on the ground with other men **some of them dead**.”

Mr. Rochester's mother says that she was unable to go to the assistance of Bojon who, she noticed, was bleeding from his side and crying out for water. "About half an hour to one hour later," she continues, "police and soldiers came up the pathway and **kicked over some of the bodies.**" The deceased was **still alive** and "**crying out**" for **water**. "One of the soldiers **came over to him and just shot him.** It was more than one shot; I heard more than one shot," she alleges.

The soldier and policemen then "**scooped up all the bodies,** including Bojon's and **threw them** on a big **dumper truck.**"

40.4 (These allegations also provide *prima facie* evidence of the discharge and impact of **mortar rounds** or other explosive devices, described by witnesses as "**bombs**".) (See pp. **107 – 10**, post and **Appendix 11.**)

Errol Spence

40.5 On Monday, May 24, 2010, Mr. Errol Spence was at home in Tivoli Gardens along with his mother and other family members. A number of other residents (totalling seventeen persons) were inside their home when members of the Security Forces entered. When asked, the deceased gave his age as twenty-two (22) and his occupation as barber. His mother says that she assured the police that he was her son and that he lived at the said residence. The police requested and were shown photos of him "from baby stage". **His hands were swabbed** after which he was told —

"We si yu a **run up and down** from morning and **man mus' dead fi man live**".

Mr. Spence's sister was asked how many brothers she had and she said two. A policeman is alleged to have replied "**yu a go have one lef**" The deceased was

ordered over to “the kitchen wall to sit down”. A policeman then “**fired four shots in his upper body and head** killing him on the spot”. When family members and neighbours cried out in shock and horror, the policeman is reported to have said -

“Wey uno a mek noise in ya fa . . . stop uno noise or else a kill all a uno in ya”.

The young man’s body was then “**hauled away**” from the house.

40.6 (Swabbing of the hands is a forensic routine by which the presence of **gunpowder primer residue** may be **detected**. If that test proves positive, it indicates either that unwashed hands fired or handled a gun recently or, that they belonged to a person who had been in close proximity to a shooter or someone who had been in physical contact with the shooter, at material times.) (See p. **64**, *post*.)

Orlando Brown, Fabian Grant and Fernando Grant

40.7 A **seventeen-year-old** graduate of Denham Town High School resided in Tivoli Gardens, at the time of the ‘incursion’. He was the **president** of his school’s **Inter-School Christian Fellowship** group.

On Tuesday, May 25, 2010 at about 6:00 a.m., the teenager was at home with his father and six other family members, including his brother **Orlando**, aged thirty-one. Members of the Security Forces stormed into their four-bedroom concrete house by **breaking down the back door**. They wore **dark blue denim** uniforms. **The faces** of soldiers and policemen were **painted in black, green** and **brown camouflage colours**. He heard them “**cursing several bad words**.”

On the instructions of the security forces, all occupants came out of the house which was thereafter searched. He himself was searched. A policeman told him **'mek mi smell you han'**. He **placed my left hand beneath his nose** while squeezing tightly on my right hand. It hurt me badly and it became red and swollen." The witness alleges that all **except** Orlando were then ordered back inside. The youngster went to a window of his father's room from where he could see and hear what was taking place across the street where Orlando was being kept guarded by the police.

Orlando Brown was questioned and searched by the security forces. A policeman made a cell phone call and was heard asking: "**How far the truck that collect the dead bodies deh ?**" Orlando was then instructed by a policeman to "**kneel down and place both hands behind (his) head**". After Orlando did as he was instructed, the witness says that he "heard three or four gunshots and then . . . saw Orlando fall..."

The policeman then turned to the direction of two brothers, Fabian ("Pucksie") and Fernando Grant ("Christopher") and instructed them – "uno two guh ova deh suh, an **duh di same ting**". Both men meekly obeyed the instruction of the officer and knelt facing the building where Orlando was killed. The policeman aimed his "long gun". According to the witness, he then "heard four gunshots and **Fabian fell sideways** into a garden and **Fernando fell face-down**". In a state of shock, the witness moved away from the window and so cannot say how and by whom the bodies of the three were taken up. But later he saw "a lot of blood in the garden and on the walkway" where the brothers had lain.

(Cf. the proven conduct of the **colonial militia** and **maroons** during the Morant Bay Rebellion, pp. **209 – 13**, post.)

Absence of clothing and expert forensic evidence

- 41.** The high incidence of **removal of clothing** from relevant corpses raises reasonable suspicion that there was an **intention** to **conceal, contaminate** or **destroy** vital evidentiary material capable of yielding up important forensic data, e.g., gunshot **primer residue** or gunpowder **burns**. The presence of either is one **basis of expert opinion** regarding **distance** separating victim and firearm at the material time. That distance is therefore **crucial** in determining the material **proximity** of a shooter and the mortally wounded: e.g. whether the shooting was “**close range**” or whether injuries were “**close contact**” or not. Thus, expert opinion ordinarily provides **independent** forensic support for complaints of cold-blooded killings made by witnesses and/or give the lie to allegations of **self-defensive** action.
- 42.** The **nudity of corpses**, (total or partial,) and, corresponding with upper and lower parts of bodies where fatal gunshot injuries were inflicted, is established by **the** Public Defender’s **personal observation** and **by** thirty (30) **independent** autopsy reports. The significance of this will now be self-evident.
- 43.** There may therefore have been a **concerted** endeavour to **conceal** highly **probative** evidence of infliction of “close range” or “close

contact” gunshot injuries allegedly inflicted by State Security personnel, suggesting that indeed there were **unlawful** executions.

Further significance of swabbing or smelling of hands

44. The swabbing or smelling of hands (e.g. in the case of **ERROL SPENCE** and the witness in the case of **ORLANDO BROWN & Ors.**) is *prima facie* or at least some evidence of **profiling**.

In the **execution** of operational ‘incursion’ plans was there or was there **systematic** rogue profiling ?.

45. “**Field tests**” by the State Security servicemen if found “positive” could indicate to the layman tester that a person had **recently** discharged or handled a firearm or been in close proximity to or contact with someone who had. Was this procedure used to identify illegal **gunmen** who were later summarily executed ?. (And see p. **61**, *ante*.)

Unidentified Corpses

- 46.** The **unidentified** corpses recovered are recorded as —
1. **GZ 07**
 2. **GZ 23**
 3. **GZ 29**
 4. **GZ 38** and,
 5. **GZ 41** (see p.)
- 47.** The following is a summary of the **findings** and **expert opinions** regarding the cause of death, rendered by the **Government pathologists** who performed post-mortem examinations (autopsies) on these bodies. Other **noteworthy** findings and observations of **Professor Stephen Cordner**, the **observer pathologist** made available to the Public Defender by the UNDP, and designated by him, follow thereafter. Not much else is known about these deceased. The recorded data regarding their physical characteristics e.g. height, scars, oral features, estimated age and gender, as well as clothing, may yet assist positive identification.

47.1.1. UNIDENTIFIED MALE (GZ 07)

The body of this unidentified male whose age was **estimated** at **twenty-five (25)** years, was “**discovered** between 23rd and 25th May, 2010 at **Kingston Public Hospital**, by the **doctor on duty**”. It was removed to Madden’s Funeral Home for Post-Mortem examination, “on the instruction” of the Police. “Information

obtained” was that “the deceased was shot and injured **during a shoot out** (sic) between members of the security forces and gunmen in Tivoli Gardens.”

47.1.2 The autopsy was done on July 8, 2010. The body was that of a “somewhat heavy built (sic) **six foot** (183cm) male.” There was peeling of the skin “with drying present on the face”. White fungus, was seen around the eyes. Both eyeballs **collapsed** from **decomposition**. There was an “**irregular small scar** seen on **front of left knee** over an area of 4 x 3cm as well as a **linear scar** 7.5cm in length seen on the antero-lateral **lower left thigh immediately above left knee**.” There was **one gunshot wound** to the body. It is described as “an **entrance wound** 0.9cm x 0.7cm on **left temporal region** of the head 6.5cm below top of head, 10cm from anterior midline, 7cm above and lateral to right eye brow **without gunpowder deposition**.” There was an **exit wound** on the “**right parieto-temporal region** of the head 13cm from midline on top of head.” **No** surrounding **sooting** or **blackening** was seen in the temporal tissue.

47.1.3 The pathologist retrieved a severely deformed “**copper jacket bullet**” (sic) from the posterior part of the left temporal fossa.

47.1.4 An x-ray done on the body revealed -

- (a) a large fracture on left side of the skull and
- (b) a **large** fragment in the left mastoid region.

No fragment was found in the chest, abdomen, pelvis, upper or lower thigh, knee or legs. On the **left ankle** of the deceased there was a tag with the label "**Ground Zero #7**, unidentified male" but, on the **right great toe** there was a tag - "**GZ 27**". The **left wrist**, had a tag marked "**Ground Zero #7**, Unidentified male".

47.1.5 The pathologist found the deceased clad in a **white t-shirt** which was heavily blood-stained and in "Blue under-pants (boxer shorts), blue jeans pants Quest Brand" with a "Complex crest design on both back pockets" and a white belt.

47.1.6 The cause of death was –

- (1) **penetrating** injury to **the brain**, and
- (2) gunshot wound to head.

47.2.2. UNIDENTIFIED MALE (GZ 23)

The autopsy was conducted on July 8, 2010. This body also, was "**discovered** (lying on its back) between 23rd and 25th May, 2010 at the **Kingston Public Hospital**, Kingston by **the doctor on duty**". The corpse was subsequently, "removed to Madden's Funeral Home on instruction from the Police for Post-Mortem Examination." The **estimated** age of the deceased is "**between eighteen (18) and twenty (20) years.**"

47.2.3 There were four (4) **gunshot wounds** to the body described as –

1. an entrance wound on left upper posterior arm 45cm

below top of head with downward trajectory but **without** gun powder deposition.

“**2&3**” (sic) an entrance gunshot wound 0.5 x 0.3cm on **right lower posterior chest** 49cm below top of head, **without** gun powder deposition; another entrance wound 0.4 x 0.3cm on **right lower posterior chest** 50cm below top of head and 12.5cm from midline **without** gun powder deposition.” One bullet travelled through the underlying tissue muscles of **posterior chest, fracturing the right scapula**, while another “travelled through the underlying tissues, muscles of posterior chest, thoracic cavity, all three lobes of right lung, continuing between oesophagus and thoraco-cervical spine **at root of neck** and exited on **left mid anterior neck**, 25cm below stop of head.”

4. an entrance gunshot wound 0.4 x 0.3cm on “left **posterior** hand on mastoid behind left ear, 16cm below top of head,” **without** gun powder deposition.

47.2.4 One (1) copper fragment and one (1) “copper jacket” taken from the muscles of the right posterior shoulder, were handed over to Police.

47.2.5 X-ray results revealed multiple fractures to the skull cap. The pathologist observed **three tags** on the body, one of which was on the right ankle and bore the legend “**GZ 23** unidentified male”.

The corpse also bore a “**half length blue jeans pant** (cut at lower legs) with **worn** white-black belt, ‘LEVI’ Brand and a white **t-shirt** with complex pattern; **damage associated** with gunshot wounds and **removal (cut)** seen.”

47.2.6 According to the pathologist, “from information obtained” the deceased was, “**shot** and injured during a **shoot out** (sic) between members of **the security forces** and **gunmen** in **Tivoli Gardens**”. He concluded that the cause of death was

- (1) haemorrhage and shock and
- (2) multiple gunshot wounds.

47.2.7 [**Who** cut out a portion of the t-shirt ? **Why** was that done ? Did the **portion removed** hold evidence of **unburnt** or **burnt** gunpowder; **blackening** or **singeing** of the fabric ?. If so, the **distance** between the **muzzle** of the firearm and the **body of the deceased**, when he was shot, could have been **reliably estimated** by forensic experts. These physical indicia as well as the material distance (range of firearm discharge) are or would be of **crucial importance** in determining the immediate circumstances surrounding his death.]

47.3.1 **UNIDENTIFIED MALE (GZ 29)**

An autopsy was performed on July 9, 2010. The body, (age **estimated** at “above **20** ... **but** below **24** years”), was “**discovered** between 23rd and 25th May, 2010 at **Tivoli Gardens**, Kingston 14

by the Police.” It was “removed to Maddens’ Funeral Home on instruction from the Police.”

47.3.2 The Government pathologist’s report recorded –

“...the body is that of 6’1” (186cm) male about 160lbs. Scalp hair **short** and **black**. Post-mortem loosening and loss of scalp hair seen. Very slight beard seen on chin. Both **eyes collapsed**. Post-mortem peeling and drying of skin present on face, anterior trunk, anterior left lower limb, anterior right upper thigh, left upper limb. **Complete epidermal loss of skin** present on posterior trunk, buttocks and thighs. No visible scar seen on the body. Tatoo of ‘Anchor’ (sic) **with long axis vertically** seen on right arm on deltoid (sic) region.”

47.3.3 There were two (2) **gunshot wounds** to the body, viz. —

1. an **entrance** wound 0.5 x 0.4cm on **left lower buttocks**, 83cm below top of head and 16.5cm from **posterior midline**, without **gun powder** deposition.” The bullet “travelled through the underlying tissues muscles of buttock, ilium entered **abdominal cavity** passing through psoas muscle, disrupting a loop of small intestine and exited on **left lower anterior abdomen** on left iliac fossa...”, the intestines protruding through the wound.

2. an entrance wound 0.4 x 0.7cm on “**right lower anterior neck** 26cm below top of head and 6.6cm from midline without **gunpowder deposition**. Right half of **mandible fragmented** with missing of teeth (sic) except both incisors and canine. **Presumably**, the fragments travelled **upwards, backwards** fracturing mandible, ricocheted downwards and to left passing through the **left chest cavity** and fragmented.” A **large** copper fragment, a conical **small** copper fragment and, three **small** lead fragments were recovered from “the muscles behind left clavicle and muscles between it (sic) and the scapula.”

47.3.4 The results of the **x-ray** were (inter alia) -

Skull lateral view: “multiple fragments **snow-storm** appearance seen in the neck, lower jaw and left shoulder.”

Chest: multiple fragments seen [**snow storm** (sic) appearance] in left upper chest, left shoulder and left neck.

Abdomen and Pelvis: “**Snow storm** (sic) appearance around left sacro iliac joint (multiple fragments).”

47.3.5 The body was tagged on the left ankle — “unidentified male, **GZ 26**”. It was clothed in “**brown-white striped shorts** with black belt **size 32**, a **green-white t-shirt**, **blue-brown-white-green striped boxer shorts** with round defect in left upper buttock.”

According to the pathologist, “**information obtained**” was that the deceased was **reportedly** (sic) killed **during operations** by **the security force**” (sic). The cause of death was -

- (1) haemorrhage and shock and,
- (2) gunshot wound to **neck and chest**.

47.3.6 UNIDENTIFIED MALE (GZ 38)

A post-mortem examination was conducted on this corpse on July 8, 2010. The **estimated** age, “based on x-ray findings and teeth”, was put at “between **16 - 19** years”. This body too “was **discovered** between 23rd and 25th May 2010 **at Kingston Public Hospital** by **doctor on duty**.” It was removed to Maddens’ Funeral Home “on instruction from Police for Post-Mortem examination.”

47.3.7 According to the pathologist’s report, the body was that of a “5’ 11 (180cm) male, of slim built, with very short curly black scalp hair showing ordinary **right angle trim** on fronto-temporal area on **both sides**. **Intermittently shaved** left eyebrow. No beard and no moustaches.” **Three** (3) scars were identified, viz. —

- (a) a **vertical linear scar** 5cm length seen on **left anterior mid arm**,
- (b) a 4cm **linear traverse** (sic) **scar** seen on anterior lateral left mid thigh and
- (c) a 1.5cm **scar** seen on **right mastoid region**.

Post mortem peeling of skin was present “**here and there** on the body.”

47.3.8 There were two (2) **gunshot** wounds —

1. “an **entrance wound** 0.4 x 0.3cm on **right upper anterior abdomen** on epigastrium 54cm below top of head and 2cm from mid line **without** gun powder deposition.” The bullet “travelled through the **abdominal cavity**, left lobe of **liver** at the junction with **right** lobe, diaphragm, apex passing through **left lung** fracturing **left** posterior **6th** rib and fragmented.” A **large** “copper jacket **fragment**” (sic) was recovered from the muscles on left lower scapular region and handed over to police. The **base** of the **heart** was found “**completely shredded** and **pulpified.**” The trajectory of the bullet was “upwards, backwards and to the left.”
2. an entrance wound on “**upper anterior chest** 30.5cm below top of head and 2cm from midline **without** gunpowder deposition.” The bullet “travelled through **thoracic cavity** fracturing right 1st rib passing through upper and lower lobe of right lung.” A “**large gaping wound**” was seen in the **right posterior chest muscles** around 6th rib measuring 6 x 25cm. Two (2)

large lead fragments, one (1) small lead fragment and, two **large** copper fragments recovered from muscles on the right upper posterior chest were “handed over to the police.”

47.3.9 Three (3) tags were observed on the body – one (1) on the **left ankle** with the legend “**Ground Zero 38**, unidentified male” and on the **left wrist**, another, “**GZ 38, 25-5-10**. The **right wrist** bore a tag marked “**Ground Zero 38**, unidentified male”. The body was clothed in “**white merino... blue jeans pants and blue belt – ‘TOM CRUISE’ brand** (with) complex crest pattern seen on back pockets. Size 32. The deceased had blue underwear (boxer shorts) ‘FUBJOLD’ brand.” According to the pathologist, “from **information obtained**” this deceased also was “shot and injured during a **shoot out** (sic) between members of the **security forces** and **gunmen** in Tivoli Gardens.”

The cause of death, in the opinion of the pathologist, was -

- (1) haemorrhage and shock and,
- (2) **gunshot wound to abdomen and chest.**

47.4 UNIDENTIFIED MALE (GZ 41)

This body was reportedly “**discovered** May 2010 (sic) in the **Coronation Market**, Kingston by **the Police**.” It was subsequently “removed to Madden’s Funeral Home”, on their instructions, for a post-mortem examination to be done. The “**severely charred**”

body was 42 inches (107cm) in length. Both **lower limbs** below the lower one-third of the thigh were found **missing**; so too were the **left upper limb** below the mid forearm, the **right upper limb**, from the lower one-third of the arm and, the cranial vault. **Remnants** of a **penis** were present. The lateral halves of **charred clavicles** were present on both sides. The **thoracic** and **abdominal walls** were **burnt anteriorly** and **anterio-laterally**, exposing their abdominal and thoracic contents, which were **severely charred**.

47.4.1 The report states that **five (5) copper fragments, one (1) copper jacket fragment** and **three (3) lead fragments**, from the muscles over scapula, were recovered and handed over to Police. A **large copper fragment** was retrieved from the right upper buttock (the muscles under the fractured iliac crest). The fragments were handed over to police. It was **estimated** that the deceased was aged “**above** twenty-five (25) years.”

47.4.2 The results of an x-ray done on the body were —

(a) “Lower half of skull, neck and upper chest: a **cluster** of fragments seen in left upper chest. Skull upper half **missing**.”

(b) Pelvis and upper thighs: scattered tiny fragments in pelvis.”

47.4.3 The pathologist found a tag on the right upper arm of these remains labelled “**GZ 41**” and on the left upper arm, “**unid male**,

burnt body, Darling Street, D. Gayle, Denham Town Police, 25-5-10". No clothing was seen on the body.

47.4.4 The pathologist recorded -

“Brain coagulated (sic) and contracted. Soft tissues of neck missing attached (sic) with trachea. On opening the paraboled (sic) and contracted trachea **no soot is visible. No visible soot** in both main **bronchi**. Trachea is **filled** with **coagulated blood**. Thoracic contents **exposed** and **charred**. Abdominal contents **exposed** and **charred**.”

The cause of death was given as “**gunshot wound** to chest and pelvis”.

47.5.5 [The **absence of** soot or of “**visible** soot” may indicate that death occurred **prior** to the corpse becoming charred (**partially burnt**).]

Noteworthy Findings/Observations Of Independent Observer Pathologist

47.5.6 **UNIDENTIFIED MALE GZ 7**

Professor Cordner recorded that –

1. he “specifically asked if **fingerprints** had been taken and was assured they had been and had been **checked** against criminal records. **No match** was found.”
2. the apparent age of the deceased was “**not assessable** from external examination” and **the eyes** also were “**not assessable**.”;

3. the deceased had a short **“goatee type”** beard and **moustache “black cane row** planting” (sic), 10cm in length at back of neck” and “no sideburns”;
4. a “3.5cm almost square raised **keloidal legion**, presumably a scar in central R buttock, 9cm to R of midline”;
5. there was a gunshot **entry wound** to the “L **upper** temporal region, 6.5cm from the top of the head and 10cm from the anterior midline with (a) defect in shape and 0.9 x 0.7cm in size and a corresponding **exit** wound located in the R temporo-parietal region 6cm behind and above the R ear, 13cm from the vertex (sic) midline, 15cm from lateral R eyebrow.” The direction of the fatal projectile was “more or less **across the head** from left to right coursing slightly backwards”;
6. a **femoral** bone sample was retained and that
7. the corpse was partly clothed in a “white heavily blood-stained **merino**,” (with damage associated with “**removal by cutting**,”) **as well as** a “white heavily blood-stained **T shirt**.”

47.7 UNIDENTIFIED MALE GZ 23

1. The apparent age was “**not assessable**”; nor were the eyes, because “orbital contents (were) **sunken** and **largely absent**.” There was also “**marked decomposition** with skin slippage and loss over chest, abdomen, thighs and neck.”

2. There was a “**gold coloured**” ear stud in each ear lobe.
3. Signs of **recent injury** included
 - i. “a gunshot **entry** wound to the **head** located in the L mastoid region”;
 - ii. a “**cresecentic** abrasion 0.2 x 0.5cm between 4 and 8 o’clock”;
 - iii. “**complete** disruption of the cranial vault and floor” with haemorrhage not obvious due to **decomposition**;
 - iv. the gunshot **entry wound** was to the “**R lateral back**” with an associated “**cresecentic** abrasion 0.5 x 0.4 cm between 4 and 8 o’clock, the path of the bullet causing extensive transverse fracture just inferior to the spinous (sic) of the scapula”;
 - v. “a projectile (folded copper jacket) and one other copper fragment” were located in subcutaneous tissue over the scapula having travelled “from **R back** more or less directly upwards and superficially”;
 - vi. the projectile, which caused an entry wound to the **R lateral back**, “**nicked** the lower margins of the 8th rib, coursing supero-medially through all lobes of the R lung continuing between the oesophagus and the thoracic/cervical space at the base of the neck and **shredded** the structures of the neck”;

- vii. there was a “**crescentic** abrasion 0.4 x 0.3 cm between 2 and 4 o’clock” relating to a gunshot entry wound to the **back** of the left upper arm;
- viii. a **femoral** bone sample was retained and,
- ix. that **significant** projectile fragments were recovered and retained.

He commented that “**distinctive teeth**” may enable identification and that although the deceased was “**probably no older than 23/4... some care needs to be taken** with this conclusion.” He associated the **damage** to the white T-shirt with **gunshot** wounds and “**removal by cutting**”.

47.8 UNIDENTIFIED MALE GZ 29

Professor Cordner -

- 1. estimates the age as “>20 (**probably greater than 23/24**)”,
- 2. described the tattoo as being in the “outer R deltoid region:
 - (a) **form of the cross** with a circle replacing the top projection of the ‘t’ ” and
- 3. states that a **femoral** bone sample was retained.

47.9 UNIDENTIFIED MALE GZ 38

- 1. Professor Cordner found “**decomposition** established” as well as “patchy epidermal skin loss and **sunken**, largely decomposed **orbital** contents.”

2. He too estimated the age of the deceased at **16 – 19 years** “a conclusion based mainly on **incomplete fusion** of the lower femur.”
3. He noted **unique features** of “**very short** fingernails” which, “appeared **bitten**” and toenails “not cut”.

47.10 UNIDENTIFIED MALE GZ 41

Professor Cordner observed -

1. **three** (3) labels affixed to the body, viz. -
 - i. on the “R upper arm: **‘GZ41’** ”;
 - ii. on the “L upper arm” -
 - a. “unidentified **male** burn body Darling St D Gayle Denham Town Police 25-5-10”;
 - b. “ **‘GZ 41 Unidentified male burnt remains’** ” and
 - c. “**female** (sic) GZ 41 25-5-10.” (sic)
 - iii. that there was “no **obvious soot** visible on the inner surface” of the “contracted parboiled trachea when opened” but that it was “filled with coagulated blood” and that there was **no soot** in the “R main bronchus”;
 - iv. a **femoral** bone sample and “**a vertebral body**” (sic) were retained;

- v. that the “charred body obliterated ability to assess” whether the (**no fewer than two**) gunshot wounds showed evidence of contact, close-range or intermediate-range discharge of firearms;
- vi. that within “**severe limits** of assessment”, no injuries caused by **stabbing or cutting** were apparent;
- vii. that the burns to the corpse were “**probably** post-mortem”;
- viii. that because there were “no signs of unfused epiphyses”, age should be put at “**probably >24/25 years.**”
- ix. that because they were **incinerated**, the following parts of the remains were found absent –
 - **R and L lower limbs** below the lower femurs
 - **below** mid L forearm
 - **below** lower third R humerus
 - front and sides of chest
 - **cranial vault**
 - medial half L and R clavicle
 - anterior abdominal wall and,
 - soft tissues (of the) face and neck
- x. that regarding “dental (oral) characteristics”
 - “• L mandible 3 molar teeth present;

- R maxilla: 2 molar teeth present, broken 1st premolar;
- L maxilla: 2 complete molar, 3rd molar incomplete eruption (and)
- R mandible absent.”

2. These were “**badly charred** incomplete **human** remains” with the “**base of (a) penis** and remnants of **testes** identifiable.”

47.11 In his opinion, in each of the five cases, the post-mortem examination done by the Government pathologist was “**satisfactory**”.

MISSING PERSONS

48. The remaining **four** (4) citizens reported “**missing**” since the ‘incursion’ are **Dale Anthony Davis, Dwayne Edwards, Winston Purrier** and **Vincent Samuels**. All four resided in Tivoli Gardens. All, **when last seen alive**, were in the **custody** or **company** of **State Security personnel** at locations inside that place. They may yet be presumed dead according to law. According to **civilian** witness statements, the circumstances preceding their individual disappearance are as follows -

Dale Anthony Davis

- 48.1 Dale Anthony Davis was born on June 13, 1993 to Ms. Dawn Brown.
- Dale attended Operation Friendship School for **slow learners**. He was a **student** of **National Hero the Right Excellent Marcus Mosiah Garvey, ON** and read at Liberty Hall. Dale lived with his grand-aunt, Ms. Ivy Grant, aged sixty-plus, at Flat B, Building 15, Seaga Boulevard, Tivoli Gardens. Ms. Grant is a diabetic. She also suffers from heart ailments. Dale was her caregiver. Ms. Grant reported to Ms. Brown that on Tuesday, May 25, 2010, Dale was “**taken ... out of her house** while they (the Security Forces) were doing house to house search. The soldiers also told her that they were taking him to **check him out**”. Despite making checks at various places, including the National Arena detention centre, police stations, Madden’s Funeral Home and after viewing the photographs of deceased persons at the Tivoli Gardens community centre, Dale Davis has **not been seen or heard of** since.

[On July 15, 2011, a **buccal swab** was taken from Ms. Dawn Brown, mother of Dale Davis. A **bloodstained swab** taken from the body of an “**unidentified**

male” deceased at “Ground Zero 23” (**GZ 23**) was **compared** with the swab taken from Ms. Brown. **Statistical calculations** by the Government Forensic Science Laboratory to determine **maternity** resulted in a **99.893% probability** that Dawn Brown **cannot be excluded** as being “the **mother** of the source of the blood stain” present on the swab allegedly taken from the body of the “unidentified male” at “Ground Zero 23”. Therefore, according to a DNA report, the missing person, Dale Davis **“cannot be excluded** as being **the source**” of that blood stain.]

Dwayne Edwards

48.2 Mr. Edwards, a twenty-seven year old janitor, resided at Building 22, Seaga Boulevard, Tivoli Gardens, a tower block. On Monday, May 24, 2012 at about 5:30 p.m., Mr. Edwards and his cousin Mr. **Andre Smith**, were seen **in the company of policemen** in the ground floor lobby of Building 22 where they lived. The police were heard telling both Mr. Edwards and Mr. Smith “to come with them upstairs to **help them search**”. Both men then **“walked up the stairs** with the police officers.” Shortly afterwards, **shots were heard**. At about 6:30 p.m. two policemen were seen **carrying a body** which was **covered by a sheet**. This sheet was recognized by a relative of Mr. Edwards as **the sheet** which had **covered** his bed. A **foot** and **trouser leg** protruded from the sheet. The relative recognized **the leg of grey trousers** and a **foot of the “crepe”** which Mr. Edwards had been wearing at the time he went upstairs with the police officers. About twenty minutes later, policemen brought **another body** downstairs. That body also, was wrapped in a sheet. (The **corpse of Mr. Andre Smith**, previously classified as a “missing person” and who was **not seen alive** after ascending the stairs, **has now been positively identified** by DNA.)

Winston Purrier and Vincent Samuels

48.3 On Monday 24th May 2012, Mr. Keith Patterson was at the house of his two grandsons, Winston Purrier, a “farmhand” and Vincent Samuels, a gardener. Their home was situated at McKenzie Drive, Tivoli Gardens. Mr. Patterson, aged seventy-three, is **practically blind**. He can “only ... barely glimpse a little from the left eye”. He **heard** members of the security forces questioning his grandsons (aged eighteen, twenty-three and twenty-five years respectively) at the home and, **accusing** them of supporting “**Dudus**”. He then heard about **four loud explosions** and screaming. Later he was told by a neighbour that “soldiers shot and murdered my two grandsons (Mr. Purrier and Mr. Samuels) and brutally”. **Neither** of the two has been **seen or heard from** since.

48.4 These cases of missing persons may be among the five (5) **unidentified male corpses** buried in **paupers’ graves** dug at the May Pen cemetery.

MORE ON DETAINEES

49. Two members of the Tivoli Gardens **football team** were among the over **one thousand (1000)** detainees. One of them, **(TG 1)** participated in Jamaica's 1998 World Cup football qualifiers. The other, **(TG 2)** is of a later generation. The experiences they relate, are **not** untypical of allegations made by detainees.

49.1 **TG 1** alleges that –

On **May, 24**, at the height of the 'incursion', he was on his way to **retrieve his cellular phone** which was being charged, when a family friend anxiously dragged him into her house for safety. He had been in her house for about two hours when he heard a knock on the door. After the door was opened, a soldier entered and started to carry out a search. Another soldier who was **masked** had a gun in one hand and a **machete** in the other, he said, and demanded that he come outside.

49.2 He alleges further that when he reached the door "to go outside, the soldier (who) came with the machete **pushed the machete** in my face, he **wanted to put it in my throat. I held his hand** to prevent the machete from **going into my throat** and I fell to the ground." **TG 1** says that he shouted to the soldier who was inside to come outside. That soldier "heard" and said to the other "**no man nuh kill him, him a baller.**" He was **slapped four times** in his head with the machete.

49.3 He was taken out into the yard of the premises and made to kneel on the ground. A soldier asked him "**weh yu a do here — ?**" (calling him by surname.) He replied "a mi phone me did a try go fah cause **Mr. Seaga** suppose fi call me." Another soldier interposed: "**him deh yah fi Dudus,**

him should a gone like the res' a baller dem." He alleges further that the masked soldier kicked him and used "the gun nozzle lick me in my ribs". Another said: **"the whole a unno a go dead off"**. Yet another soldier riding on a passing jeep asked his fellows who were in the yard: **"weh unno a do wid so much live bodies ?"** The soldier who had searched the house comforted him: **"Jus' easy man. Mi a stay wid unno. Mi nah mek dem kill yu."**

49.4 Later, with his hands bound, he was herded along with others to the Tivoli Gardens Comprehensive High School campus. Along the way he asked one of the soldiers guarding him "weh unno a do dis fah ?" Came the reply: **"a di orders weh we get. A kill den search so unno must tank God fi de soldier weh come inna di house."**

49.5 Late in the day, he was taken to the old Seprod compound "placed in an open area with gravel on the ground and **bird filth** on the ground." He was **"beaten by the police** who said **we ago dead** same way". About two o'clock next morning he was fed sliced bread and bottled water. With his hands still bound, he told a policeman that he wanted to urinate. He alleges that the reply was: **"a nuh your pants, piss ina it"**. Because he had no choice **"I had to pee same place."** At about 11:00 a.m. later that morning, he was "given a tea that tasted like Milo" and at about mid-day, he was returned to an open area where he had been placed the evening before. Later still, he was photographed and other personal details recorded.

49.6 **TG 1** says that he remained in that open area until about 6:30 p.m. when it started to rain. He identified himself to a policeman who had bawled out his name and who asked him: **"who is the next baller ?"**. Thereupon, he identified **TG 2** and along with him, soon after 7:00 p.m.,

was “taken in an open back police van along with **other civilians** and seven policemen **to Vale Royal** as **instructed** by Mr. Seaga.”

49.7 **TG 2** says that –

He was at home in Tivoli Gardens on May 24 when he “heard a knocking on the door and a voice saying ‘**unno come out of the house in five seconds with unno hand on unno head**’ ”. All the occupants did and were promptly arrested. Later that night, soldiers and policemen “**just start beat the whole of we wid dem gun. Them box me in my face and kick me up saying a dead mi fi dead, ‘bout me a baller.**” Eventually, they were bussed to the Seprod compound where he encountered **TG 1** in an open area, in the company of other detainees. They remained there up until about 2:00 a.m. next morning when they were moved into a zinc-roofed building to sleep. “**It was all covered in pidgin (sic) droppings. The building had a zinc roof. We had to sleep on the bare dirt.**” On Tuesday May, 25, the detainees were fed and their pictures taken. Upon his release in the night, he elected to go to Portmore “due to the fact that (he) was **afraid to go home** in Tivoli because bare police and soldier was over there”. He was transported to a bus stop in Waterford, St. Catherine where he was picked up by his sister. He remained at his sister’s until Sunday, May 30 when, because of information he had received, he returned home to find “**the whole of my clothes thrown down on the ground, my door mash up and the glass them break out.**” He continued: “About 4 weeks later, in June, about 6 o’clock in the morning, the police came beating down the door. I showed them my picture and explain that **Mr. Seaga** had called the first time I was detained and **as a result I was released** without **detention papers**. They said they **did not care ‘bout that**. I was taken to Mobile Reserve. My picture and finger print was taken. I was released in the

night after I explain that **I did not want to miss training**. Richie, a **policeman I know**, took me home and at that time **I was given detention papers**” (which indicated that he had been formally released after “processing”.)

**Complaints re malicious destruction of/damage to property;
assault, looting etc.**

- 50.0.0** The categories of complaint under investigation are listed at p. *ante*. The complaints **suggest** that in the purported exercise of Emergency powers, the State Security Forces —
- i. subjected the civilians they encountered to indiscriminate **rough handling**;
 - ii. conducted a search for weapons, ammunition or other contraband which “**left no stone unturned**”, particularly in **Tivoli Gardens**;
 - iii. were **hardly concerned** or **sensitive** about **destruction** of or **damage** to real or personal property whilst carrying out the searches which, amounted to a **thorough** “shake-down”;
 - iv. required the occupants of houses and apartments to evacuate temporarily, **under guard**, whilst the searches were conducted; that in their **absence** or that of other residents, who for various reasons had fled from their residences (**Tivoli Gardens in particular**), members of those Forces **looted** cash and other valuables, e.g. jewellery and small

electronic items, treating such property as the “**spoils of war**” and further that,

- v. there was a noticeable **lack of supervision**, leaving the troops and rank and file policemen to operate with **carefree abandon**, thereby —

demonstrating the axiomatic truth that “when the **ordinary laws** framed for the suppression of wrong-doing and the protection of the well-doer, are, for a time **suspended**” the circumstances justifying their suspension are “almost sure to ... **excite** both fear and passion; and some **injustice**” and that “some **cruelties** will be **certain** at such times to be **perpetrated.**” (*See pp. post.*)

The following nine (9) complaints, randomly selected, are generally illustrative. (See too the **dormant** complaint made re the Tivoli Gardens marching band and drill team — *p. ante and p. post.*)

50.1.0

Complaint No. 1

A restaurant cashier alleges that on May 18, 2010 she locked up her home in Tivoli Gardens and went to a rural St. Ann district to visit her mother. On May 22, 2010, as tension heightened, her brother joined her there. She returned home on May 29, 2010 and found her front door split into two pieces. The glass at the top of the door was shattered. She entered the house and found it ransacked. Clothing was thrown all over the floor and furniture removed from their original position. She discovered several gunshot holes in the freezer section of her refrigerator and one in the lower section of it. Her washing machine also was punctured by gunshot holes to the back of it. A glass table

was shattered into pieces; so too the mirror of her dresser. Her television set was damaged. There were also gunshot holes in three sets of metal louvre blades. An entire section of the wall at the back of her apartment was riddled with bullet holes.

50.1.2 N.B. *Occupation of Tivoli Gardens by State Security Forces practically began on the night of May 23, 2010. It may be answered or argued that persons other than members of those Forces had the opportunity, during the absence of complainants, to have caused the damage and/or loss complained of. But those grievances have been investigated and considered in light of the multitude of similar complaints of abuse made against members of those Forces and which purport to have been witnessed and are corroborated by others. This category of complaints suggest a pattern of misconduct by the Forces.*

50.1.3**Complaint #58**

The complainant was a General Helper employed to the Kingston and St. Andrew Corporation. On May 24, 2010 she was at home with her son, aged 29, when three police officers came and “tear off (her) front door” and asked her “who and yu in the house?”. Before she could answer, the police grabbed her son and pulled him downstairs. She saw a soldier use a stick to hit her son across the face. Soldiers pulled him into a room. She heard him crying out for “Murder!” One of the policemen returned to her apartment and just started to “fling down”

her things on the floor. She alleges that the police threw her electric fan, blender, wardrobe and chest of drawers down on the floor causing severe damage to them. They also tore down a board partition.

50.1.4

Complaint #158

The complainant is a **disabled** cosmetologist. She lived alone. She walks with the aid of two metal crutches. She alleges that on May 24, 2010 she left her house and went to her neighbour's, because she was afraid. Whilst there, police officers and soldiers entered, confiscated cellular phones and ordered all present to sit on the ground. She could not do so because of her disability. Shortly thereafter, all females were ordered out of the house. Being fearful for her safety, she said, she did not return home but went to stay with a friend who lived on Derrick Path. She alleges that on Thursday, May 27, 2010 when she went back home, her entire house was in disarray. All her hair products were smashed and mixed with cement and grout, on the floor. The dining room and her bedroom were "covered in blood". There was a trail of blood leading from the dining room to the verandah. Her bed and mattress were totally destroyed and covered in blood. There were several bloody spots on her bedroom wall. All the tiles in her bathroom were dug from the wall and littered the floor. Her toilet tank cover was broken. Her houseware, clothing, utensils and other personal belongings were strewn all over. The sum of One Hundred and Fifty-Two Thousand Dollars (\$152,000.00) in savings was missing from a chest of drawers; stolen.

50.1.5

Complaint No. 290A

The Complainant is a twenty-one year-old Rastafarian higgler who resides in Tivoli Gardens. He lives with his partner, their one-year-old son and three step-

daughters, ranging in age from four to eleven years.

50.1.6 On Monday May 24, 2010, he was at home with his family at about midday when he began to hear gun shots.

At approximately 3.00 p.m., he heard a voice shouting from the ground floor of the multi storey building: “Uno come out! Come out and throw down the gun dem!” He peeped through a window and saw soldiers dressed in army green uniforms, and bearing high powered weapons. “Their faces had on war paint and handkerchief around dem mouth, like a cowboy thing”, he says. He opened his door but as he pushed open a metal grill he was fired on by soldiers from downstairs. He cried out “ how uno a call we out and wan kill me? Murder! Murder!!”.

50.1.7 Fearing for his life, the complainant says he rushed back into his house.

50.1.8 Thereafter, several gun shots were fired. The soldiers shouted “If uno don’t come out we ago **bomb uno out!**” The complainant’s partner screamed out: “me a come out! A mi and mi pickney dem! Don’t fire; no shoot!” The complainant came out with hands on head after his partner and children had exited the house. They were all searched and their cellular telephones confiscated. They were placed in an apartment with other residents. Eventually males were separated from females and children.

50.1.9 He was taken to an apartment on the building with approximately twenty other men. Whilst being made to lie on his stomach, face down and shirtless, he got burnt on his right hand and chest “from the spen [sic] shells fired by the soldiers who were **targeting** men downstairs.” During the night, he was verbally abused by a soldier who struck him on the temple with his rifle butt.

- 50.2.0** Next day, the complainant and the other men were removed from the apartment to Justine Plaza and placed under a guard of five policemen, all armed with rifles. One of them “came from behind and kicked my legs and I fell on the ground and injured my left elbow and ribs.” Another policeman fired several shots then shouted “Run! Uno run!” He did not because “I know if I run they would shoot us.”
- 50.2.1.** The complainant and others were ordered to clear road blocks on Spanish Town Road and to pick up dead bodies. He “picked up the first dead body at Mr. Myers business place and took it to Mother White bridge and placed it on a **white truck with pure dead people.**” He had returned to Justine Plaza after clearing road blocks when a soldier came up to him and said “him no like rasta, uno a battyman and everything ungodly. He then took out a **white pill** and say **‘this no make me feel no pain’** and then took out a Rambo knife and proceeded to **cut off my locks.**”
- 50.2.2** The complainant has been a Rastafarian for the past seven years. He states: “After dem trim me I felt very angered, depressed; my knees felt weak and I wanted to cry. For a moment I wanted to **lash out and hit him**, but if I did dem wud a kill me and me have my youth fi live for.”
- 50.2.3** Later he and other men were ordered to board a white Coaster Police bus. While entering, a policeman struck him on his right knee with a baton. “The bus was filled with (other male detainees.) Some were sitting in other man lap. Nobody wanted to stay behind for fear of being killed by the security forces.”
- 50.2.4** They were taken to Seprod and he was made to “walk on (his) knees for about an hour.” He was kicked in his right side and region of the kidneys by a policeman, making him writhe in pain.

50.2.5 It started to rain. He was then taken to “an old run-down, leaking building that had a foul odour.” There he was offered no food; only water. Later he was transferred to another building which did not leak. He slept on the “cold concrete” that night.

50.2.6 The following day he was taken to the National Arena where he was fingerprinted and photographed. He was served a cooked meal and was provided with a bed and bathroom facilities. Two days later, at 4.00 a.m., he was released and given a detention certificate.

50.3.0 **Complaint # 348.**

The complainant is a thirty-nine year-old chef who resided at Building 5, Sangster Crescent, Tivoli Gardens. On May 25, 2010 at about 1:30 p.m., she was at home with her children and other family members, huddling in fear, she says, because “loud explosions sounding like **bombs** and gunshots were heard in the area.” According to her, “the door was opened and I heard soldiers who were seen before dressed in uniform with long guns, shouting **‘Residents of Building No. 5 come downstairs!’**.” She alleges that, “two soldiers came into the house and stand on the chairs and began to **beat my brother and the rest of the men** on their heads with the butt of their guns. The soldiers asked: **“Unoo never hear say fi left Tivoli! ?. We a go kill all of you in yah!”** She said soldiers damaged the windows by hitting them with their gun butts saying, **“mek unoo Prime Minister buy them back.”**

50.3.1 A total of fifteen cellular phones and a number of cameras were confiscated. None of them has been returned.

50.3.2 The occupants were ordered outside to sit on the ground whilst the flat was searched. They were allowed back in after 7.00 p.m. and found the place

thoroughly ransacked. Pieces of furniture were maliciously damaged, for no apparent reason. Loss and damage was estimated at \$320,000.00.

50.4.0 Complaint #484.

The complainant is a twenty-eight year-old plumber and rastafarian who resides at McKenzie Drive, Tivoli Gardens, Kingston 14.

50.4.1 According to him, on Tuesday May 25, 2010, he was taken away from his mother's house by members of the Security Forces. While being taken away, he alleges, **"a police officer slapped me twice with a machete across my back close to my side; my skin was not cut but my skin was wailed."** He was taken inside the quadrangle area of the Tivoli Gardens community centre and put to lie on his belly. Sometime later, he was moved to the Seprod compound. Along the way, a soldier used his helmet to strike him on the head.

50.4.2 The complainant alleges that while at Seprod, he "was made to **sleep on the ground** which got wet by the rains which fell overnight." He continued: **"While at Seprod I was kicked in my mouth and my two front teeth are shaking. I was kicked because the soldiers found out that I had a cell phone after they seized all the other cell phones."** Next day, he was taken to the National Arena where he was detained up until Friday, May 28, 2010. His Nokia camera phone has not been returned to him.

50.4.3 During his detention he ate only bread and drank water. He could not eat the meat provided, due to his religious beliefs.

50.4.4 Upon his release, he went to stay with a cousin at East Road, Waltham Park, Kingston 11, for some five days returning to Tivoli on June 3. He was denied entry to his house. He returned again next day, this time being allowed to enter. Thereupon, he discovered that "the door had been cut out in the region of the

lock.” The ceiling had been ripped out. The speaker boxes of his component set had been cut open. A radio had been pulled apart. A television set was also damaged. A settee and mattress were cut open. A “brand new” pair of Timberland shoes was missing.

50.5.0 Complaint #516

The complainant is a thirty-three year-old hairdresser who operated her business from her home at Building 21, Seaga Boulevard, Tivoli Gardens Kingston 14. She also ran a stall in the Coronation Market.

50.5.1 On May 24, 2010 at about 4.00 p.m., she was sitting on a settee at home with her three-year-old daughter when her door **“fly in and then shattered into pieces.”** About seven soldiers now stood at the entrance door. “They asked me several times who I was home with”, she says. “I responded telling them ‘no one’. Shortly after, a soldier said **‘if me eva cum si nuh man in deh, yu a go si weh mi du wid yuh’** ”. They forcefully ordered her to go to the first floor of the tower block.

50.5.2 According to the complainant, she, the toddler and twelve other residents were detained by soldiers in another flat for three days under heavy guard. On the third day, at her request, she was escorted back to her home by soldiers to fetch her electric fan.

50.5.3 On entry, she found furniture and other items smashed or badly damaged. She described the scene and gave details of loss and damage suffered during her absence:

50.5.4 A three-piece glass dining set lay shattered on the floor. A flat- screen television set had two gunshot holes in it. Another television set connected to a DVD player was also damaged. So too was a chest of drawers, all drawers having

been taken out and broken into pieces, leaving only the frame. All three mirrors of a dresser had been smashed by gunshot.

50.5.5 Hair products used in her hair-dressing business were also shot up. Items used for grooming her baby were destroyed and strewn on the floor. Clothing belonging to her daughter, her “baby father”, two other children and herself were also shot up. A four burner gas stove was also damaged by gunfire.

50.5.6 There were a number of items missing including a Sony digital camera — “a gift from overseas” which had been stored in the dresser. A 17” laptop computer belonging to her fourteen-year-old son was also missing. So too were three cellular phones — a Blackberry, a Samsung and a Motorola brand. Savings of \$88,000.00, in five-hundred and one-thousand dollar denominations was looted from a dresser drawer. A saving pan with coins was also missing.

50.5.7 The metal window of her bedroom and bathroom, the walls of her bedroom, bathroom, kitchen and living room were shot up. A face basin was broken into several pieces apparently by gunshots. The lid and bowl of her toilet were also damaged, apparently by similar means.

50.5.8 There were a number of other items missing. The total cost of replacing lost or damaged items is estimated at \$920,000.00.

50.5.9 The complainant alleges also that she suffered loss estimated at \$220,000.00, as a result of the fire at the Coronation Market. The fire completely destroyed her stock of escallion, onions, garlic, pepper, tomatoes and thyme, she says.

50.6 **Complaint # 559**

The complainant is a small businesswoman who operated a “registered” game shop.

50.6.1 She alleges that along with her children, she left their Tivoli Gardens home securely locked up on May 17, 2010 to stay with an uncle in rural St. Andrew, because she feared for their safety. She returned home on June 2, 2010 and found her front door “kicked” off its hinges. There was evidence of a boot mark on the door. Upon entering, she saw all the family’s clothes littering the floor. Her refrigerator door was twisted and the handle of the freezer section broken off and lying on the floor. As a result, the refrigerator door could not be closed. All food items were now spoiled. Four panes in the “storm window” of her children’s rooms were badly damaged. All her settee cushions had been ripped open, apparently by a sharp instrument.

50.6.3 There were several items of personal property missing, including her component set, liquor, cologne, a digital camera and jewellery.

50.6.4 She had secured all contents of the game shop before leaving on May 17, 2010. However, on her return, she found that that entrance door also had been forced open. The coin boxes for each game had been prised open and the contents stolen. All the games along with their hard-drives were missing, leaving only the cabinets in which they had been stored, she says.

50.7

Complaint #898

The complainant’s wife was admitted to the Kingston Public Hospital in early February 2010. Since that time their home in Tivoli Gardens had remained locked-up. He alleges however, that upon returning home on June 18, 2010 and on opening his door he saw a glass table smashed. So too were his bedroom and kitchen windows and dresser. His 15 cubic ft. refrigerator was shot up. A plywood partition in the house was also destroyed.

BSI'S CRIMINAL INVESTIGATIONS

51.0 Criminal investigations into allegations of atrocities committed during the 'incursion', or 'siege' made against members of the JCF and the JDF, have been conducted by the BSI which was the JCF Division charged with investigation of matters which now properly come under the purview of INDECOM. The BSI functions are now subsumed in the INDECOM remit.

51.1 The BSI collected witness statements from JCF personnel and civilians. The former detail pre-'incursion' meetings to settle matters relating to strategic and tactical plans both for the arrest/capture of Christopher Coke and taking control of Tivoli Gardens, held between the JCF High Command and senior officers of the JDF. There are accounts, mainly from low-ranking policemen (ISCF personnel in particular), relating hostile encounters with illegal snipers and the origin of the fire which severely damaged the Coronation market. The civilians narrated accounts of Coke's reputation as **crime boss** and his prior **criminal activities** in West Kingston. Their accounts also relate Coke's movements on May 24, in the company of **illegally armed men**, although he himself is said to have carried no weapon.

52.0.0 The JDF and its stance on the OPD/BSI investigations

52.1.0 To a considerable degree, the **delimiting** provisions of the (Interim) Act have operated as **a check** on the extent of the Public

Defender's 'Tivoli' investigations. By reason of the provisions of **S.13(2)(b)(ii)**, those investigations have been greatly impacted by an *ipse dixit* of the JDF which may be summarized as follows:

At all material times the Government required that its members be deployed in support of the JCF and its auxiliaries in—

- (a) **apprehending** the fugitive Coke, and
- (b) wresting control of West Kingston (in particular **Tivoli Gardens** and **its environs**), from armed combatants or other unlawful elements;
- (c) that it **got the job done**, sustaining **one** fatality, personal injuries and damage to its materiel but, did **no wrong**;
- (d) that in fact, (very serious allegations to the contrary notwithstanding,) its manoeuvres were **surgical** and **antiseptic**.

52.1.1. In both **West Kingston** and, the assault on the home of Mr. Keith Clarke, operations were **spearheaded** by the JDF. For operational purposes, JCF and ISCF personnel were absorbed or integrated into the JDF ranks. Regarding the former operations, a JDF catalogue of its **lone fatality**, injuries sustained by army personnel and damage to equipment is attached as **Appendix 12**.

[N.B. —

1. The circumstances of the soldier's death, the infringement of his **right to life** and the Government's **obligations** to him call to mind the *obiter dicta* in a decided case — *R. (on the application of Gentle) & Anr. v. The Prime Minister & Ors.* (2008) (UKHL) 20; (2008) 1 AC 1356; (2008) 3 All ER 1 (concerning deployment of British troops in the Iraq war) viz.—

“ Those who **serve** in the **armed forces** do so upon the knowledge that they may be called upon to **risk their lives** in the defence of their country or the country's **legitimate interests** and that the ... State's duty to **protect military personnel** should be viewed in light of the **characteristics of military life**, the nature of the activities that they are required to perform and of the **risks** to which they give rise.” *per* Lord Hope.]

2. The JDF stance is to be **contrasted**, *inter alia*, with
 - (a) its **attitude** regarding **similar investigations** in respect of earlier operations in the said same **Tivoli Gardens (of 1997 and 2001)** and/or
 - (b) with respect to the **Keith Clarke operation**, as it may be called.

In those instances, **“witness”** statements were or have been **collected** by the BSI from **military personnel involved**. In fact, according to the BSI, the JDF had **always** cooperated fully, in relation to its investigation of cases of killings in which the JDF was implicated.]

52.1.2 In the result, the JDF was not at all eagerly forthcoming in relation to endeavours **by the BSI** (to say nothing of the Public Defender) to have its members **answer** questions or provide **accounts** of the execution of its role in **the West Kingston** operations; in particular the proximate circumstances of the killing of **seventy-six (76) civilians**.

52.1.3 It has neglected or refused to comply with requests or entreaties from the BSI to cooperate with its investigations. It was implacable in its insistence that that cooperation be “**evidence-driven**”: that it must **first be informed** of the **crimes** and/or other **unlawful** action of which its members are **accused** or are **suspected**, before any or any due compliance. Initially, it refused or neglected to deliver up weapons as and when required for the purpose of ballistic testing.

52.1.4 That intransigent JDF posture is illustrated by a letter dated January 10, 2011 to the BSI from Lieutenant Colonel Patrick A. Cole (for the Chief of Defence Staff,) a true copy of which is attached hereto as **Appendix 13**. The letter **purported** to express a **readiness** “to put mechanisms in place to ensure that the **sterling cooperation** which ... existed between the BSI and the JDF is **continued**.” Nevertheless, it persisted with requests for “**specifics of any allegation** made against members of the JDF, so that these allegations may be noted and appropriate (sic) the

assistance given to the BSI in regards (sic) to their investigation of any allegation made.” The letter **repeated** an earlier “request for the BSI to state the following:

- a. ...**the allegations** made against members of the JDF;
- b. **the crime** being investigated;
- c. **the place** it is alleged to be committed;
- d. and also the **date** and **time** of the allegation.”

52.1.5 This letter elicited a prompt response to the Chief of Defence Staff from ACP Gauze, then the Officer Commanding the BSI, (attached hereto as **Appendix 14.**) The ACP’s letter laid out the basis of the BSI investigations and the necessity for forensic ballistic examination of relevant JDF weapons. It directly addressed the JDF’s “**evidence-driven**” paradigm thusly:

“... the position taken by **the BSI** is that in execution of (its) mandate, it is **entitled** to have **access** to any and **all firearms alleged** or **suspected to have been used** in the course of any operation, **particularly** where **death results**, for ballistic **examination and comparison** in order to **determine** whether or not **bullets discharged** from any **such firearms caused** or **contributed to the death** of anyone. In these circumstances it is our view that for these purposes our **requisition** for access to relevant JDF weapons is **sufficiently**, ‘evidence-driven’, if, as happens to be the case, **there are allegations**, or **reasonable suspicion** exist (sic) that bullets discharged by JDF personnel may either have proven fatal or otherwise inflicted injury.

Moreover, addressing the content of (**Appendix 13**), we consider it **quite adequate** for the legitimate purpose of our investigation to inform you that the allegations we are investigating against members of the JDF as well as the JCF is (sic) that **bullets discharged** by them on and in the week of May 23, 2010 **in Western Kingston** may have **caused** or **contributed** to the **death** of persons. The ballistic examination and comparison will of course, engaged (sic) bullets or fragments recovered from the corpses of the deceased during the autopsies as wells (sic) as spent shells recovered from various scenes. It is **absolutely essential** therefore that the firearm examiners be **allowed access** to such firearms as may be described by them at the conclusion of phase one (1) of the **agreed** Protocol for the Examination of the Tivoli (**and related**) Events.”

52.1.6 The BSI’s position was reinforced in another letter to the Chief of Defence Staff of **January 14, 2011 (Appendix 15)** which reminded him that –

“The protocol for the examination of the weapons was **already agreed** on by the Ministry of National Security and the concerned parties”

who, certainly included the JDF.

52.1.7 That BSI letter (**Appendix 15**), overtook another from Lieutenant Colonel Cole to ACP Gauze, **hand-dated** January 13, 2011 (**Appendix 16**) and received **after delivery** of **Appendix 15** which, (in all the circumstances) **curiously** suggested that the–

“... **tone** of (the letter of January 11) seems to indicate that you might have **misinterpreted** the **tenor** of the letter dated January 10, 2011 to mean that the JDF **was unwilling to cooperate** in this matter. This is to categorically state that this is **not** the case.”

plainly evidencing, as it did, a shift, softening or wavering in the JDF posture.

52.1.8 That letter (**Appendix 16**), it will be observed, actually **now** suggested a **procedure** for examination of JDF weapons.

52.1.9 Quite notably also, in the letter of January 10 (**Appendix 13**) the JDF had maintained its months-long **hesitation** or **refusal** to furnish the BSI with “**the names of all JDF persons** involved in the (West Kingston) operation” contending that -

“...because of the nature of this operation **the entire Force** was involved in the operation. To fulfil (the BSI’s) request would be to send the **entire** list of **personnel** in the **JDF**. We are accepting the fact that this could not have been your intention so therefore we are requesting that this request be **more specific.**”

52.2.1 But then intriguingly, in his letter of January 13 (**Appendix 16**) suggesting the ballistics examination regime, Lieutenant Colonel Cole stated –

“To achieve this aim (of ballistic testing of JDF weapons) I have affixed to this letter a list of the **soldiers who fired** their weapons and **the serial numbers** of the weapons so used.”

52.2.2 In the circumstances therefore and, because of the vacillation exhibited, it becomes highly desirable that the JDF’s *bona fides*, in relation to the **list eventually handed over**, *inter alia*, should be **rigorously** tested.

52.2.3 Two other **material** issues –

- i. the use by the JDF of **mortar ordnance** and,
- ii. the **tactical assistance** afforded by overflights of United States of America Department of Homeland Security **surveillance aircraft**

have left the JDF **mired in controversy**, due largely to **conflicting** official responses.

52.2.4 **i. The mortar ordnance**

The mortar is an **indirect** fire weapon which fires explosive projectiles (known as “**mortar bombs**”) at low velocities, short ranges and high-arcing ballistic trajectories. It is typically muzzle-loading.

52.2.5 Initially, public pronouncements by the JDF in reply to **insistent allegations** by Tivoli citizens that “**bombs**” were trained on the community, were less than frank or, obfuscatory.

52.2.6 In the face of widely publicized allegations by residents of Tivoli Gardens that the community was “bombed”, no **candid** admissions were made by the JDF. In fact, a high-ranking military spokesman has been reported as having declared publicly that he was “**unaware**” of it.

52.2.7 But following upon publication of news reports that based upon facts coming to light through USA information access facilities, official USA sources had **confirmed** that the JDF had indeed fired mortars, **those admissions** came in early **June, 2012**. In a Press

Release dated June 7, 2012 under the rubric “JDF **CLARIFIES** U.S. CABLE REPORT” (**Appendix 17**) the Military confirmed the use of mortars. The release continued –

“Mortar rounds were **fired into open areas** as part of a **diversion**. At **no time** were **persons** or **buildings** targeted. This **diversionary tactic** created **confusion** and **disorientation** among the **entrenched gunmen**, and allowed the JDF to use bulldozers to **breach** the barricades and enter the community.

The mortar rounds that were fired were **well targeted and directed** and the **JDF** is **satisfied** that the **use of these munitions** was not only **accurate** and **effective**, but **justified** and **necessary** in order to achieve the **operational objectives**.”

According to the JDF, the Press statement was issued –

“...given the **potential for speculation** and **misunderstanding** surrounding this matter ...”

52.2.8 In view of this surprising development, the Public Defender, (following up on earlier telephone conversations) wrote to Brigadier Rocky Meade, Deputy Chief of Defence Staff by letter dated August 23, 2012 (**Appendix 18**) formally requesting that he provide information both in relation to the West Kingston ‘incursion’ and the killing of Mr. Keith Clarke regarding -

a. “... precisely what were **the types** of **incendiary** devices (mortars or **other**) discharged, as well as the tactical nature, targets and strategic objectives of their discharge” (**Appendix 18**, p.2, **sub-para. iii.**) and,

b. “the reason why discharge of these devices was thought to be **appropriate.**” (**Appendix 18**, p.2, **sub-para. iv.**)

52.2.9 A JDF response came through Captain C. A. Crooks (for the Chief of Defence Staff) in a letter dated **August 28, 2012 (Appendix 19.)** Not foregoing its **ubiquitous** reliance on the (Interim) Act, **S.13(2)(b)(ii)** and, after noting, **gratuitously**, that “the questions in your letter have **already been addressed in the public domain**”, the replies to the requests at **a.** and **b.** above were stated as follows –

Re. **a.** :

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

Re. **b.** :

“The use of these devices was **thought** to be **appropriate** based on the **information** which suggested that there were **hundreds** of **armed gunmen** in **West Kingston** prior to the entry of the security forces. In addition to **distracting** and **creating confusion** among these **highly armed gunmen**, it minimized **the potential** for **loss of life** among the **civilians** and **also** the

security forces who were facing **direct gun fire** and the very real possibility of being **ambushed** at rigged barricades.”

52.3.0 Again, it will be observed that **Appendix 19** alleges that the “armed gunmen” were in “**West Kingston**”, **not** the particular **locales** of **Tivoli Gardens** and **Rasta City** where, **only**, the mortar munitions were targeted; undoubtedly.

52.3.1 (Cf. the “**information**” regarding the mass of “**hundreds of armed gunmen** in West Kingston” (**Appendix 19**) and the “**intelligence**” which “indicated that there were significant numbers of heavily armed gunmen massing **inside** the community” of Tivoli Gardens (**Appendix 17**) and, regarding the whereabouts of ‘**Dudus**’, leading to the assault on the **Keith Clarke** household. The former expression is comparatively **banal** whilst the latter is more imposing and implies or suggests a high level of **sophistication**. But how **reliable** was the **substance** of **either** ?.)

52.3.2 As regards the killing of **Mr. Clarke**, the letter stated that the issue of the use of mortar bombs did not “relate to” his death.

52.3.3 But the veracity of the JDF’s assertions that the mortar rounds —

- i. were “fired into **open areas**”;
- ii. were “**well targeted** and **directed**” and,
- iii. that “their use was **accurate** and effective, ... **justified** and **necessary**”

may be challenged on the basis of irrefutable evidence of the seriously deleterious discharge of ordnance described by Tivoli residents as **“bombs”**.

52.3.4 In particular —

- i. at least one related killing is **directly attributable** to the discharge of an explosive device resulting (according to **autopsy findings**) in —
 - a. thirteen **penetrating lacerations**, including one “rectangular shaped penetrating laceration 1.5 cm x 2.5 cm seen on top of (the) fronto-parietal region...”, the projectile **penetrating** “the underlying tissues, **perforating** the skull cap” and lodging on the “dura on left parietal lobe.”
 - b. haemorrhage and shock and,
 - c. a perforating **shrapnel** wound to the abdomen;
(No evidence of gunshot trauma was reported by the pathologists in relation to this killing)
- ii. autopsy reports also disclose injuries which may have been inflicted to the bodies of **three (3)** other related deceased by exploding rounds;
- iii. one survivor **“felt a force lift (her) into the air”** rendering her unconscious;

- iv. a number of dwelling houses (and all contents) was **completely destroyed** by fire **sparked** by **mortar rounds**, (members of the Security Forces allegedly dismissing appeals to summon the Fire Brigade) and, a coop of tame pigeons standing **inside** a **yard**, was completely destroyed, killing birds owned by an occupier who had fled as the 'incursion' drew near;
- v. the "**well targeted** and **directed**" aim of mortar rounds discharged into "**open areas**" included a **narrow** *cul de sac* in which an expensive high-end motor truck reputedly the property of **Christopher Coke** was burnt down to the frame;
- vi. the related killing, burning of the houses, pigeon coop and vehicle, all took place in close proximity, some distance **removed** from the barricaded **entrances** to Tivoli Gardens and,
- vii. a particular area of Levy Path/Chang Avenue, i.e. deep **inside** Tivoli Gardens and in close proximity to a reputed **residence** of **Christopher Coke**, was the area or vicinity at which **mortar bombs** were **targeted, mainly**; that the high-end motor vehicle was burnt to the frame; that the related killing at i. above took place and that four houses and a small grocery shop were burnt to their skeletal concrete walls. (Was that area specifically **targeted** by

reason of “**information**” gleaned ?. Or by some species of “**intelligence**” ?.)

52.3.5 (A catalogue of persons and property impacted by **explosive** or **incendiary** devices during the Tivoli ‘incursion’/siege is attached as **Appendix 11** and a selection of photographs as **Appendix 39**.)

52.3.6 The JDF in an **unsolicited** follow up letter dated **August 31, 2012** (**Appendix 20**) contradicted its own response at **a.** above, **now claiming** that the type of mortar rounds discharged “were **explosive** and **not incendiary**.” Be it noted however, that the fires reported (as regards which there is abundant evidence) were **ignited by mortar bombs**.

The controversy surrounding ordnance use is fuelled further by allegations of “**something**” falling from the sky “followed by a **loud explosion**” and of a device described as a “grenade” being “thrown” on a house igniting a fire which spread to others.

52.4.0 **ii. USA Homeland Security surveillance**

The Public Defender’s letter at **Appendix 18** also sought information from the JDF regarding —

- a.** “the **nature** and **effect** of assistance at material times which the JDF derived from the **surveillance** flights relating to **general imagery communications** or **otherwise** and,

b. “whether or not the **JDF** is in **possession** of **surveillance footage**” (in which case, a viewing of that footage was requested).

52.4.1 The reply at **Appendix 19** stated —

Re. **a.** :

“A United States (US) surveillance aircraft was deployed over the area of operation in West Kingston **with a view** to providing the JDF with **general imagery** assistance and **communications** during the May 2010 operations. This move was designed to **gather information** to assist the **safe movement** of the **troops**” and,

Re. **b.** :

“The JDF is **not in possession** of any **useful footage** from the US surveillance aircraft as due to **technical challenges** no **usable** imagery was obtained that could be **effectively utilized** by the JDF”.

52.4.2 The Public Defender resists all temptation to comment on the assertion relating to “**technical challenges**” but will say that whatever may have been the perceived (or intended) **tactical** advantage or, **justification** for the use of **mortar rounds** and or heavy explosive devices in such a densely populated residential area, its **appropriateness** requires **close** judicial **evaluation**. Forensic scrutiny would also help to determine how the aircraft assisted “**communications**” as well as the “**information**” gathered, (if any) and as regard which, the JDF has volunteered **nothing**. (Perhaps its silence may be due to “**national security**” considerations.)

52.4.3 At all events, having regard to –

- A. the distinction between the **types** of mortars identified by the JDF in **Appendix 20**, i.e. between the **explosive** and **incendiary** variety;
- B. the **conflicting claims** concerning which **type** was discharged during the ‘Tivoli’ operation;
- C. the irrefutable evidence of death, injury and damage caused;
- D. the **omission** or **initial failure** on the part of the JDF to **own up** to the use of mortar rounds, followed, belatedly, by **conflicting** admissions, prompted or provoked by contrary information being made public and,
- E. allegations of the use of munitions **other than** mortar rounds,

there is **reasonable** if not **great doubt** regarding the explosive devices actually **employed** by the JDF during the ‘Tivoli’ operation.

52.4.4 The question may therefore be posed: Putting the best face on their responses as recounted at Re. **b.:** (p. **109**, *ante*) and at Re. **a.:** (p. **109**, *ante*), in the **planning** and moreso the **execution** of its manoeuvres, (particularly those involving the use of mortars,) did the JDF personnel really **balance** concern for the **safety** of its members with the **duty** to prevent injury, damage or loss (“**collateral damage**”) to **innocent** civilians ?. In this respect, the dicta of Lord Hope, a leading appellate Judge, in *R. etc. & Anr. v*

The Prime Minister (op. cit., p. 102, ante) provide a **timely reminder** of the characteristically **risky** nature of **volunteer** military life and **service**.

Accountability of Chief of Defence Staff and Police Commissioner

52.5 In relation to both the West Kingston and Keith Clarke operations, the Public Defender submits that the **heads** of the State Security Forces, the Commissioner of Police and the Chief of Defence Staff, (since retired) and other senior personnel concerned, should be **required** to testify about their **oversight** of the operations, before a **thorough-going** judicial enquiry. The respective roles of those **heads** in the **planning** and **execution** of both operations require to be examined in line with the modern trend of official accountability and transparency as well as for **historical purposes**.

Obviously, the same is to be said of the Prime Minister, Minister of Defence and Chairman of the Defence Board of the day, Mr. Golding, as well as the erstwhile Minister of National Security, Mr. Nelson. [As respectfully submitted later in this Report, a duly constituted commission of enquiry is **the only** appropriate forum.]

52.6.0 Recommendation for ‘alteration’/amendment of The (Interim) Act

52.6.1 Having regard to all the foregoing and in accordance with the (Interim) Act, S.16(11)(b), the Public Defender **urgently**

recommends that the provisions of **S.13(2)(b)(ii)** of the (Interim) Act be **“altered”** or amended, expressly to **exclude** investigations related to allegations of infringement of any **constitutionally protected right** or freedom or, any **criminal** action.

52.6.2 For there appears to be no or no rational or logical basis upon which to circumscribe the Public Defender’s remit in relation to those two areas of investigation, as presently obtains. Moreover, the projected **alteration** or **amendment** would —

- i. **re-affirm** the **supremacy** of the **Constitution** as well as the **subordinate** status of “service” or Military law, procedures and practices;
- ii. shore up the **protection** of **fundamental rights** and freedoms, (in particular the pre-eminent **right to life**) as well as **deter** criminal conduct;
- iii. promote **respect** for and **adherence** to the JCF Policy (rules of engagement);
- iv. **strengthen** democratic governance.
- v. **enhance** the viability and **effectiveness** of the Public Defender and,
- vi. further demarcate and distinguish the roles of two complementary commissions of Parliament — INDECOM and the Public Defender.

53.0.0 THE KILLING OF MR. KEITH OXFORD CLARKE

53.1.0 The Public Defender's investigation into the circumstances surrounding the killing of **Mr. Keith Clarke** have at all times been coupled with that being conducted in respect of the West Kingston/Tivoli 'incursion'. The two events are **inextricably** connected by one stated common objective: **arrest** of the fugitive **Christopher Coke**.

53.1.1 Mr. Clarke was killed in the early morning of Thursday, May 27, 2010 at his home situated at 18, Kirkland Close, Red Hills P.O., in an operation led by the JDF. He was aged 63.

53.1.2 The **ostensible** objective of the operation was Coke's capture.

53.1.3 According to military "**intelligence**", 'Dudus' was hiding out in that house, along with no fewer than seven "heavily armed bodyguards". In order to prevent information leaking, the troops involved were briefed at virtually the last minute. **Details** of the mission were given to them later still. As with the West Kingston operations, instructions/briefings appear to have been given and information disseminated on a strict "**need-to-know**" basis.

53.1.4 Mr. Clarke was a highly respected citizen and chartered accountant. He was a partner in a reputable firm of accountants and auditors. His widow is a Regional Director in the Ministry of Education and, a Justice of the Peace. Mr. Clarke was one of three brothers. One, now deceased, was a learned Judge of the Supreme

Court of Judicature. The other is a former Minister of Government, entrepreneur and newspaper commentator. His sister-in-law, Mrs. Mary Clarke was the first Children's Advocate of Jamaica and is the widow of the Judge.

53.1.4 Mr. Clarke was the licenced owner of a .38 calibre pistol.

53.1.5 Kirkland Close is an **upscale** residential community. The Clarkes' house is appointed on a slope and built on several levels, consisting of five bedrooms, lounge areas and a gazebo. It afforded a commanding view of distant hills, the Liguanea plains, West Kingston and beyond. Not surprisingly, it was tastefully furnished and exhibited subdued, not ostentatious luxury. The Clarkes occupied the house with their daughter, then an eighteen-year-old lower sixth form student of a leading high school. By all accounts theirs was a happy home and family.

53.1.6 [The residence presented **stark contrast** with the **humble dwellings** of **inner-city West Kingston**, (the comparatively **tiny apartments** of Tivoli Gardens in particular), occupied in the main by **low income** artisans, and trades-people, higglers, **hundreds** of **unemployed** persons and, their **thousands** of offspring.]

Course of a ferocious military assault

53.1.7. The operation was mounted by two platoons (about sixty men) wearing bullet-proof vests and ballistic helmets. It began at or

about 2:00 a.m. – the dead of night. They rudely awakened the Clarke household as well as others in that tranquil locale, far removed from the turbulence and tensions of inner-city Western Kingston then prevailing.

53.1.8 Mrs. Clarke says that in the course of it all, she made frantic but fruitless calls and **appeals for help** to 119 (the Police emergency telephone number,) to neighbours and to friends. The JDF asserts that (true to the rules of engagement) they had, at the outset, **dutifully** and **loudly** announced themselves; that they were met with “**flashes of light, seen coming from the house**” suggesting, presumably, that they had been fired on.

53.1.9 Mrs. Clarke says further that at the beginning of their ordeal, her daughter and herself, both shuddering fearfully, hunkered down in the bathroom of the **master bedroom**, whilst Mr. Clarke ensconced himself on top of a clothes closet. Soldiers **burst** in on them. Mrs. Clarke alleges that whilst descending backwards from his high perch, he was ruthlessly cut down before their eyes.

53.2.0 His post-mortem report records **twenty-one (21)** gunshot **entry** wounds, **sixteen (16)** of them to **the back**, (mainly left lower) indicating **automatic** rifled weapon fire.

53.2.1 Did anyone give the **order** to fire at him ?. **Or**, did the shooter(s) act on **his/their own judgement** made **on the spot** ?.

(See also pp. **217** and **221**, *post.*)

53.2.2 The Clarke's house was virtually laid waste after entry. Not a single room or area escaped the ravages of high-powered gunfire or other explosive devices. The blackened, pockmarked walls and floors littered with chips or chunks of concrete, shards of glass, splintered wood and other debris, wrecked furniture, tapestry, furnishings and grillwork bore unmistakable evidence of that. It was a scene of systematic destruction rendering the premises almost uninhabitable. Naturally, the **jaw-dropping** experience left Mr. Clarke's widow and daughter shaken and greatly traumatized. In **stunned bewilderment**, they took refuge with neighbours.

53.2.3 Mr. Clarke's firearm was seized after his demise.

53.2.4 The operation went on past daybreak. The manoeuvres appear to have been well planned and coordinated. There was ample logistical support including a helicopter with arc lights. In the process, the house was **heavily** cordoned. If the fugitive Coke or any of his "bodyguards" had in fact been holed up in that house, their **escape** would have been **most unlikely**, if not miraculous.

53.3.0 An investigator's need for caution

53.3.1 In this as well as the 'incursion' matter, the Public Defender is primarily **an investigator**. Because of what is or may be in the offing, he must therefore be mindful of the **constitutional** and **legal** rights and privileges of **persons charged**; or of those whose conduct should be the subject of searching judicial enquiry. Such

persons would all be entitled to a **fair** and **impartial** hearing, uninfected by the vice of **prejudicial** pretrial or, pre-hearing publicity. Indeed the mandate requires the Public Defender to **protect** these other constitutionally guaranteed **rights** and **privileges, *inter alia***.

53.3.2 de Smith, *Judicial Review of Administrative Action*, Ed. 4th, p. 257 puts the position this way:

“The case-law on the point is thin, but on principle it would seem that where a **report** or determination **lacking final effect** may nevertheless have a seriously **prejudicial** effect on the legally protected **interests** of **individuals**, the **person making the report** or preliminary decision **must not** be affected **by interest** or **likelihood of bias**. In short, the same principles as those governing the *audi alteram partem* rule should apply.”

[See *R. v. Kent Police Authority, ex p. Gooden* (1971) 2Q.B. 662; p 254]

53.3.3 The “rule” referred to (literally – ‘**hear** the **other** side’) is a **fundamental** principle of **natural justice**.

Nevertheless, there is no gainsaying that -

- the **handling** of Mrs. Clarke and her daughter by the invading JDF soldiers was **coarse** and **frightening**;

- there was wanton, **indiscriminate** destruction of furniture, fixtures, etc.; the house was near trashed;
- the **military assault** on the house was carried out using **heavy calibre** weaponry;
- the invaders gained **forced entry** to the house and **master bedroom** by using **powered** saws to cut through **sturdy** grill work and **heavy-duty** padlocks and,
- a **judicial** enquiry should **unravel every stitch** of the planning and execution of this operation as well as the supposed "**intelligence**" which led to it.

53.4**Unanswered Questions**

53.4.1 The raid at Kirkland Close and a grieving widow's account of how her husband was killed (if believed) give rise to many unanswered questions. Some examples are -

1. Despite the **ostensible** objective, what was the real purpose of that invasion ?. Was it the **capture** of Coke or his **liquidation** ?. Put another way: was it intended to **silence** him ?.
2. Assuming that Coke had really been holed up in that house, was it beyond the **ingenuity** or **capacity** of the JDF to have devised a plan to wait him out, smoke him out, flush him out, make him surrender, take him out **alive** ?.
3. Is it at all likely that the attitude and mindset, the approach and **conduct** of the invaders was **any different** from that which propelled those who planned or, who **participated**, in the '**incursion**' or '**siege**' ?. Is it **probable** that, by **contrast**, their treatment of the West Kingston dead or aggrieved was **humane**, gentle or **respectful** ?.
4. Making the **connection** between the **two operations**, precisely what were the actual **orders** or **instructions** given to **foot soldiers** of the JDF and **rank and file members** of the JCF, who must have been expected to make their **personal judgements**, on the spot, mindful of the **legal**

duties imposed by **the rules of engagement** ?. (See p. *post.*) Obviously, merely insisting that they “respect human rights” during the operations would have been **entirely inadequate**, particularly in light of the attendant circumstances.

5. Were the **planners** and the **commanders** themselves sufficiently aware, alert or **regardful** of the requirements of the **JCF Policy**, let alone **inculcate** its values ?. In all the **excitement** of the times, did the operatives simply **shove the JCF Policy provisions aside**, in the interest of an overriding objective - to take Coke, **dead or alive** ?.
6. The invaders struck with **awesome suddenness**, again, in the dead of night; as a contented household **slept**. Is it likely that Mr. Clarke was rudely surprised by a **shocking, confusing, mindboggling scenario** ?. In those particular circumstances therefore, of what relevance and application would have been the ancient **common law** right of Mr. Clarke and every man [preserved by the Jamaica (Constitution) Order in Council, 1962, S.4 and the Constitution, S.26(8)] to **defend** his “castle” and its occupants, be it **well-to-do** or humble habitation, against attack which he may **honestly** (moreso reasonably) have **thought** unlawful ?. Indeed, was the assault **lawful** at all ?.

7. On the other hand and **in those circumstances**, how do State law enforcement agents lawfully practice the “**right**” of “**self defence**” contemplated by the Constitution, common law and the JCF Policy ?. (See *Weaver v. Bush* (1798) 8 TR 78 and *Beckford v. The Queen* (1987) 24 JLR 242; (1988) AC 130; (1987) 85 Cr. App. R.378 (PC) (a Privy Council appeal from **Jamaica** pronouncing on a controversial police killing in the parish of Manchester.)
8. **Who is to be believed**: the **JDF** who claim that they had **loudly** announced themselves and their mission ?. That in response they were fired upon ?. Or **Mrs. Clarke**, who says that she made numerous telephone calls in a desperate endeavour to **find out** just what had **overtaken** her **household** and **why** and to **get help** urgently **from the police** ?.

TWO LEGAL ISSUES: SELF DEFENCE AND SUPERIOR ORDERS

54.0 It is convenient at this stage to deal with two issues of law – **self-defence** and **superior orders** — which arise or may do, in relation to the conduct of the State Security Forces, during both the **Keith Clarke** and **West Kingston** operations.

Self-defence

54.1 Interestingly, two appeals from **Jamaica** to Her Majesty in Council provided the Judicial Committee of the Privy Council (the Board) with occasions for classic pronouncements, in the **modern era**, on the **ancient** common law doctrine of **self-defence**, preserved by the Constitution and **entrenched** in the *repealed* Cap.III, viz. *Beckford's case (supra)* and *Palmer v. R* (1971) 12 JLR 311; (1971) AC 814.

54.2 In *Palmer's* case Lord Morris, delivering the judgement of the Board, propounded the principle in these terms —

“It is both good law and good sense that a man who is **attacked** may defend himself. It is both good law and common sense that he may do, but may **only** do, what is **reasonably** necessary. But everything will depend upon the particular facts and circumstances. Of these a (tribunal of fact) can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be **serious** and dangerous. Others may not be. If there is some relatively **minor** attack, it would not be common sense to permit some act of **retaliation** which was wholly **out of proportion** to the **necessities**

of the situation. If an attack is serious so that it puts someone in **immediate peril**, then immediate defensive action may be necessary. If the moment is one of **crisis** for someone in immediate danger, he may have to avert the danger by some **instant** reaction. If the **attack is over** and no sort of peril remains, then the employment of force may be by way of **revenge** or **punishment** or by way of paying of **an old score** or may be pure **aggression**. There may be no longer any link with a necessity of defence. Of all these matters the good sense of the (tribunal of fact) will be the arbiter ... If there has been an attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot **weigh to a nicety** the exact measure of his defensive action. If the (tribunal of fact) thought that in a moment of **unexpected anguish** a person attacked had only done what he **honestly** and instinctively thought necessary, that would be the most **potent** evidence that only reasonable defensive action had been taken..."

54.3 That statement of principle was approved and followed by the English Court of Criminal Appeal in *R v McInnes*, 55 Cr. App. R.551; (1971) 3 AER 295.

54.4 In *Beckford's case*, the Jamaican Court of Appeal certified the following question as of **"exceptional public importance"** requiring determination by Her Majesty in Council:

"Must the test to be applied for self-defence be based on what a person reasonably believed on reasonable grounds to be necessary to resist an attack, or should it be what the accused honestly believed?"

The Board responded as follows:

“An **honest** belief in facts which, **if true**, would **justify** self-defence constitutes a **defence** to a crime of personal violence [in (that) case, murder]. The issue of the **reasonableness** of the belief is relevant **only** to the question whether the accused’s **mistaken** belief was **honestly** held.”

54.5 Prior to that judgment, the **test** had been thought to turn on “**reasonableness**” of the belief, not its **honesty**.

54.6 It should be noted also that —

- i. the old rule of law that a person attacked must show a **disinclination** to fight by **retreating** as far as possible has disappeared;
- ii. there is no rule of law that a man must wait until he is struck **before** striking in self-defence; he is **entitled** to get his blow in first, if it is **reasonably necessary** to do so in self-defence: *R v Deanna*, 2 Cr. App. R. 75 CCA; 25 TLR, 399 and,
- iii. before the issue of self-defence is left to a tribunal of fact, **there must be evidence**, whether from the **Prosecution** or the **Defence**, which, if accepted could raise a *prima facie* case of self-defence; if there is such evidence, the issue must be left to the tribunal of fact, whether it is relied on by the Defence or not: *DPP (Jamaica) v. Bailey*, 1995, 1 Cr. App. R. 257, PC. (another case of police killing);

- iv. if self-defence is raised, the burden of **negating** it rests on the Prosecution: *R v Lobell* (1957) 1 QB 547; 41 Cr. App. R. 100, CCA;
- v. whenever self-defence is put forward as **justification**, e.g. in a case of homicide (extra-judicial killing), it is not any “defence” casting an **onus of proof** upon an **accused**, but a matter to be **disproved** by the **Prosecution** as an **essential** part of its case before a verdict of guilty is justified: *R v. Wheeler*, 52 Cr. App. R. 28; 30;
- vi. the owner (or occupier of land with a superior title) commits no **punishable** battery or assault if he uses such reasonable force as he **honestly** believes to be necessary in defence of his land or house, its occupants or his possessions in resisting an **unlawful** entry: *2 Rolle Abr.* 548, 1. 25; *Weaver v. Bush*, *op. cit.* and
- vii. if the entry to land or house is unlawful and therefore a *trespass*, then the owner or occupier having superior title may oppose the trespasser “force to force”: *Weaver v. Bush*, *op. cit.*

Superior Orders

54.7 The extent to which **obedience** to an **order**, given to a military man by a **superior**, which leads to or causes **criminal** action by the former, is somewhat unsettled. Failure to carry out some classes of **superior orders** is punishable under service law for offences triable by courts martial. But the serviceman is sometimes confronted with the dilemma of **refusing** to obey an apparently **unlawful** command, thereby avoiding criminal liability or, **executing** an apparently **lawful** order which, turns out to be **illegal**. The better view appears to be that he may **not** properly be **required** to execute an **unlawful** order and will be personally liable for any consequential criminal act.

54.8 According to Dr. Barnett —

“it is now generally accepted that the fact that the soldier had acted in accordance with a command which was **not** manifestly illegal **may**, particularly in times of **emergency**, negative the *mens rea* (sic) (guilty intention) required in most criminal charges.” (*op. cit.*, p. 159) [And see *Keighley v. Bell* (1886) F. & F. 763, 790 *per* Willes, J. and *The Queen v. Smith* (1900) 17 CGH Sup. Ct. Repts. 561; **cf.** *Manual of Military Law*, Ed. 11th. (1965) Part 1, p.153.]

54.9 The common law of England, Australia and the United States of America does not recognize a **general** defence of **superior orders** or of Crown or executive *fiat*: *Archbold, Criminal Pleading, Evidence*

and Practice, Ed. 2004, ¶ 17-134. The learned authors cite *Lewis v. Dickson* [1976] RTR 476, DC; *R v. Howe* [1987] A.C. 417, HL, *per* Lord Hailsham, at p. 427; *A. v. Hayden (No. 2)* (1984) 156 CLR 532, High Court of Australia (a seven-member Bench) and, *Yip Chiu-Cheung v. R.* [1995] 1 A.C. 111, PC.

54.10 But in Jamaica, the soldier on active **law-enforcement duty** is now **bound** by the JCF Policy which, —

- i. acknowledges the **supremacy** of the Constitution;
- ii. provides that **lethal** force may only be used as a **last resort**, i.e. after other options have been reasonably eliminated, and
- iii. emphasizes **individual** responsibility as well as that of **supervisors**, for the **criminal** conduct of those who were or ought to have been supervised.

55.0

BALLISTICS

55.1

“The forensic examination of firearm related physical evidence, from a laboratory perspective, typically involves the examination of fired bullets (or fragments thereof), fired cartridge cases and firearms. Each firearm is manufactured using a variety of machining processes. Inherent in the manufacturing process is the introduction of numerous **small microscopic flaws** on all of the **working surfaces** of the firearm. The **combination** of **microscopic flaws** introduced during the manufacture of a **particular firearm** render (sic) that firearm **unique** (at a microscopic level) from **every other** firearm, due to the **randomness** of the **accidentally** introduced microscopic flaws.

55.2

“When a firearm is discharged, the **unique** microscopic flaws from that firearm can be **translated** onto the **ammunition** that is being fired. The **firing pin, breech face, chamber and barrel** (among other components) are all in **direct contact** with the fired cartridge and at the time of the high pressure discharge can **translate** the **microscopic** flaws **from the gun onto the bullet** and cartridge case. In the laboratory, a **trained examiner** can **compare** the **microscopic signature** of **recovered** bullets/fragments **and cartridge cases** from scenes (**unknowns**) to samples generated by test firing submitted firearms (**knowns**).

55.3

“When **sufficient matching** information between a known and unknown is **observed, the examiner** can **document** and report **these findings** as a **positive association** that a **particular firearm** was used to fire the recovered components. **This is the type of work that will be necessary in the laboratory examination of the Tivoli (and related) events**”.

(The words **“and related”** incorporate the associated **Keith Clarke** investigations.)

56.0.0 **Crucial Importance of ballistic examinations**

56.1.0 From the foregoing it will be clear that the **important issue** of **determining** whether **persons allegedly killed** in course of the Tivoli/West Kingston ‘incursion’ met their deaths **at the hands of** members of the **State Security Forces** (JCF, ISCF or JDF) or **any other**, (such as armed combatants/illegal gunmen) can **only be settled** by the **forensic examination of firearms**. There is **no evidence** of **visual identification** of the shooters. Of course, the issue of **criminal liability** (in particular, whether at any material time a member or members of either Force acted in **self-defence** or not) is altogether a different matter.

56.1.2 **Public Defender ballistics expert**

56.1.3 In this regard, the Public Defender was fortunate to have had the assistance of Mr. Matthew Noedel, a forensic scientist, firearms examiner and ballistics expert, made available by the USAID, also through the UNDP. Mr. Noedel holds membership in leading professional associations in the United States of America. He is a graduate of the University of Montana in Microbiology and Medical Technology and California State University, in Forensic Science. He holds **certification** in firearms, tool marks, and gunshot residue examination from the Association of Firearms and Tool Marks Examiners (AFTE). He has over twenty-five (25) years experience in these branches of Forensic Science.

(The exposition on ballistics quoted above is culled from a Preliminary Draft Report presented by him at the end of a “scoping mission” to Jamaica in November, 2010. It accords with statements of principle contained in other **authoritative professional** and **academic works** on the subject.)

56.1.4 Mr. Noedel was **accepted** by the Ministry of National Security as an **expert in the ballistic sciences** and was afforded access to the Government Forensic Science Laboratory at Hope, St. Andrew. He **assisted** in the **training of JCF personnel** awaiting certification as firearms examiners. He also conducted an **evaluation** of the laboratory, covering **essential operational issues**, laboratory capacity, security, the physical space and, most importantly, the **availability of equipment**. In the result, he was able to identify **critical deficiencies**. His evaluation concluded in part —

“**IBIS** – The lab system has a fully functional ‘Integrated Ballistic Imaging System (IBIS)’. This system is comprised of a computer driven digital camera that can take high resolution images of the microscopic marks left on fired **cartridge cases**. The instrument then stores these images and constantly compares the entries to all other entries in the database. This equipment, if utilized for the Tivoli evidence, will be **very useful** in helping **to sort out** and **screen** potential recovered (**unknown**) and test fired (**known**) cartridge cases. Because of the **irregular** shapes of **fired bullets** and **fragments**, the system is **not useful** to sort out **fired bullet** evidence. Any positive association indicated by the IBIS technology must

be confirmed by **direct microscopic examination** of the physical evidence by a **fully trained** firearm examiner”.

56.1.5 In relation to that vital forensic tool, **the comparison microscope**, he stated —

“A comparison microscope is a system of two microscopes that are bridged together to one set of eye pieces. An **essential tool** for any ballistic laboratory, this instrument allows the examiner to place the **unknown** sample on one microscope stage and the **known** sample on the other stage and directly **compare** the two objects through the eye pieces. As stated earlier, the types of marks that translate onto bullets and cartridge cases are microscopic and **cannot** be readily **compared** without this design of microscope. Currently the ballistic lab has **three** comparison microscopes, **two** of which are **incomplete** and **not working at all**, and **the third** while functional, must be **shared** between **the three examiners** (and a fourth independent examiner for Tivoli evidence.”)

56.1.6 Since delivery of Mr. Noedel’s “Draft Report”, the Government Forensic Science Laboratory has acquired **two** new and fully functional comparison microscopes. A third is **partly functional** and may be used for **preliminary** sorting of **spent shells** only.

56.2 **Staffing, tooling of Firearms Laboratory;
chronic output backlog, etc.**

56.3 The recent acquisitions do not adequately address the demand for trained firearms examiners or, a notorious equipment deficit. These deficiencies are the root causes of a chronic backlog of cases, (**presently put at 1,300**) a feature which has bedeviled the

Laboratory's output for many years past. That feature has militated against the timely administration of criminal justice. It contributes significantly to systemic delay of trials. The fact is that increases in staffing and equipment have not complemented the rise in firearm-related offences. It is expected that four (4) trainee examiners will have qualified for certification by year-end, bringing their number to eight (8) — including a retiree re-engaged on contract. But another four (4) fully functional comparison microscopes are urgently needed.

(Particular attention is also drawn to the **summary** compiled by Mr. Noedel in the Preliminary Draft Report on his findings, attached hereto as **Appendix 21**.)

56.4.0 JDF position re ballistic examinations

- 56.4.1** Up to or about early January, 2011, the JDF maintained a stance of non-co-operation with the Bureau of Special Investigations in relation to the Tivoli 'incursion', insisting that ". . . the **testing of weapons**, should be **evidence driven**. In light of this fact it is of paramount importance that the **nature** of the **allegation(s)** against the Jamaica Defence Force is disclosed in order that the **required assistance** can be given to ensure that the process goes ahead in the manner agreed". (See **Appendix 13**.)
- 56.4.2** What was meant to be conveyed by the phrase "**in the manner agreed**" remains partly shrouded in mystery. But this much has

since become clear: the author was purportedly alluding to an “agreement” reached between representatives of the JDF and the JCF at the Ministry of National Security called to discuss or iron out the question of the JDF refusal to cooperate with the BSI ‘Tivoli’ investigations. The Public Defender was neither **party** nor **privy** to the meeting but very much doubts that any “agreement” on the matter was arrived at; more likely a case of the JDF’s representatives convincing themselves that the BSI would acquiesce in their stubborn refusal to cooperate. This conclusion is supported by the fact that the letter at **Appendix 13** prompted the BSI to write to the Chief of Defence Staff by letter dated January 11, 2011, clearly outlining the basis for **requiring** the JDF to submit firearms for ballistic testing. (**Appendix 14.**)

57.0 The Ballistics Road Map

57.1 A “Protocol for the Examination of the Tivoli (**and related**) Events” (“the firearms Protocol”), drafted by Mr. Noedel was proffered by him in a Preliminary Draft Report (**Appendix 21.**) It also governed **examination** of **physical evidence** associated with the killing of **Mr. Keith Clarke**. It was a ballistics **road map** accepted and approved by the BSI and the Ministry of National Security. Lieutenant Colonel Patrick Cole (a former assistant Crown Counsel in the Department of Public Prosecutions) for the JDF, **belatedly** and **reluctantly** but **unequivocally**, agreed to the Protocol in

November, 2010. Moreover, he stated in **Appendix 16** that the JDF “endorse (**Appendix 21**) as the **best framework** for the testing of weapons.”

57.2 Nevertheless, the fact of the agreement was doubted in a letter sent by the former acting Permanent Secretary in the Ministry of National Security, Ms. Diane McIntosh, **dated** April 30, 2012 (**Appendix 22**) replying to an earlier oral request for confirmation of it made by the Public Defender, backed by letters dated May, 1 and 8, 2012 (**Appendices 23** and **24**). The agreement was **eventually affirmed** by the Ministry however, in a letter dated September 3, 2012 (**Appendix 25**). The agreement provided for the ballistics work to proceed in phases.

57.3. Thereafter the **Government** bore the **responsibility** of organizing **the system** and **programme** by which the ballistic work should have been undertaken and, completed, **in collaboration** with an **independent expert or experts** made available to the Public Defender by the UNDP. (A true copy of the firearms Protocol is attached hereto as **Appendix 26.**)

58.0.0 INDECOM: ROLE AND FUNCTION

58.1.0 INDECOM was established by the Independent Commission of Investigations Act, 2010, (the ICI Act) S.3(1). The ICI Act took effect on **April 15, 2010** and a Commissioner was sworn in on **July 29, that year**. Its independence is secured by S.5. The Commissioner has **security of tenure**. The exercise of his powers are subject only to the provisions of the Constitution and thus, to the directions of the Director of Public Prosecutions (DPP) only. He may investigate any complaint in the nature of those made to the Public Defender in the **‘Tivoli’** and **Keith Clarke** matters. He is also empowered to “manage, supervise, direct and control” the BSI ‘incursion’ investigations [S.14(2)]

58.1.2 The following are other **pertinent** Sections of the ICI Act, viz.—

“2. unless the context otherwise requires—

“**relevant Force**” means any one of the Security Forces—

- (a) **involved in an incident**; or
- (b) in relation to which a complaint is made, or **an investigation** is carried out, under this Act;

“**relevant public body**” means the public body—

- (a) **involved in an incident**; or
- (b) in relation to which a **complaint** is made, or an **investigation** is carried out, under this Act;

“responsible head” means the **head** of a relevant Force;

“**responsible officer**” means the **officer in charge** of a

relevant **public body**;

“**Security Forces**” means—

- (a)
- (b) **the Jamaica Defence Force**;
- (c)
- (d)
- (e)

4.—(1) Subject to the provisions of this Act, the functions of the Commission shall be to—

- (a)
- (b)
- (c) take such steps as are necessary to ensure that the **responsible heads** and responsible **officers** submit to the Commission, **reports** of incidents and complaints concerning the **conduct** of **members** of the Security Forces and specified **officials**.

(2) In the exercise of its function under subsection

- (1) the Commission shall be **entitled** to—
 - (a) have **access to all reports, documents** or other **information** regarding **all incidents** and all other evidence relating thereto, including any **weapons**, photographs and **forensic data**;
 - (b) **require** the **Security Forces** and specified **officials** to **furnish information** relating to **any** matter specified in the request;
 - (c)
 - (d)

- (3) For the purpose of the discharge of its functions under this Act, the Commission shall, subject to the provisions of this Act, be **entitled** —
- (a) upon the authority of a warrant issued in that behalf by a Justice of the Peace—
- (i) to have **access** to all **records, documents or other information** relevant to any complaint or other matter **being investigated** under this Act;
- (ii) to have **access** to any **premises** or other location where the Commission has reason to believe that there may be found any **records, documents or other information** referred to in subparagraph (i) or any property which is **relevant** to an **investigation** under this Act; and
- (iii) to **enter** any **premises** occupied by any person in order to **make such enquires** or to **inspect** the **documents, records, information or property** as the Commission considers **relevant** to any matter being **investigated** under this Act;
- (4) For the purposes of subsection (3), the Commission shall have power to **require** any person to **furnish** in the manner and at such times as may be specified by the Commission, **information** which, in the

opinion of the Commission, is **relevant** to any matter being **investigated** under this Act.

5.—(1) **Subject to** the provisions of the **Constitution**, in the exercise of the powers conferred upon it by this Act, the Commission **shall not** be **subject** to the **direction** or **control** of **any** other **person** or **authority**.

10.—(1) A complaint may be made to the Commission by a person who alleges that the conduct of a member of the Security Forces or any specified official—

- (a) **resulted** in the **death** of or **injury** to **any person** or was **intended** or **likely** to result in such death or injury;
- (b)
- (c) involved **assault** (including threats of harm, reprisal or other **intimidatory acts**) or **battery** by the member or official;
- (d) resulted in **damage** to **property** or the **taking** of **money** or of other property;
- (e) although not falling within paragraphs (a) to (d), is, in the opinion of the Commission an **abuse** of the **rights of a citizen**.

11.— (1) The responsible **head** or the responsible **officer**, having been made aware of an incident which involves the relevant public body or the relevant **Force**, **shall** make a report to the Commission of the incident—

- (a) **forthwith**, where the incident **involves**
- (b) **conduct** that **resulted** in the **death** of or **injury** to any person; and

- (c) not later than twenty-four hours, in any other case.
- (2) It shall be the **duty** of the responsible **head** or the responsible **officer**, as the case may require, to **take such steps** as are necessary to **ensure** that measures are implemented so that **reports** of incidents involving **members** of the relevant **Force** or relevant public body are **duly** made to the **Commission**.
- (3) A **member** of the **Security Forces** or a specified official who, in the **course** of his **duties**—
- (a) becomes **aware** of; (or)
- (b) is **involved** in,
- any incident, **shall** take the **steps** as are necessary (including **reporting the facts** thereof to the responsible **head** or the responsible **officer**) to **ensure** that a **report** is made to the **Commission** in accordance with subsection (1).
12. Where the Commission is satisfied that an incident is of such an **exceptional nature**, that it is likely to have a **significant impact** on **public confidence** in the **Security Forces** or a public body, the Commission **shall** require the relevant Force or the relevant public body to **make a report of that incident to the Commission**, in the form and containing such particulars as the Commission may specify.
13. An investigation under this Act may be undertaken by the Commission **on its own initiative**.

- 14.— (1) The Commission shall, for the purpose of deciding the most appropriate method of investigation, make an assessment of—
- (a) the **seriousness** of the case;
 - (b) the **importance** of the investigations;
 - (c) **public interest** considerations;
 - (d) the **particular circumstances** in which the incident occurred.
- (2) The Commission may manage, supervise, **direct** and **control** an **investigation** carried out by the Security Forces or the relevant public body in relation to an incident, where, **in the opinion of the Commission**, it is **necessary** to direct and oversee that investigation.
- 21.— (1) Subject to subsection (5), the Commission may at any time **require** any **member** of the **Security Forces**, a specified **official** or any other person who, in its opinion, is **able** to give assistance **in relation to an investigation** under this Act, to **furnish** a **statement** of such information and **produce any document or thing** in connection with the investigation that may be in the **possession** or **under the control** of that member, **official** or other person.
- (2)
- (3) Subject to subsection (4), the Commission may **summon** before and examine **on oath**—
- (a) any complainant; or
 - (b) any **member** of the **Security Forces**, any specified official or any other person who, in the

opinion of the Commission, is able to **furnish information** relating to the investigation.

- (4) For the purposes of an investigation under this Act, the Commission shall have the **same** powers as a **Judge** of the **Supreme Court** in respect of the **attendance** and **examination** of witnesses and the **production** of documents.
- (5) A person **shall not**, for the purpose of an investigation, be **compelled** to give any evidence or produce any document or thing which he could **not be compelled** to give or produce in proceedings in any **court of law**.
- (6) **Section 4** of the Perjury Act **shall apply** to proceedings under this section in relation to an **investigation** as it applies to **judicial proceedings** under that section.

[S.4 prescribes **criminal sanctions** of **imprisonment** at hard labour of up to seven (7) years or a fine, or both **imprisonment** and **fine**, upon conviction for **perjury** which, is the offence committed by a **witness** who, "...being lawfully **sworn**.... in a judicial proceeding, **wilfully** makes a statement, **material** in that proceeding, which he **knows** to be **false** or **does not** believe to be true,...."]

58.1.3 It will be clear from the foregoing that **in relation to the JDF**, INDECOM has an investigative capacity (buttressed by much **greater** resources and **coercive** powers) which the Public Defender **does not**. In particular, it may **require** the retired **Chief of Defence Staff** and other **army personnel** to deliver detailed reports and accounts of the conduct of the Security Forces during the State of Emergency.

58.1.4 The Independent Commissioner being far better equipped to do so, may therefore yet succeed in securing the necessary JDF cooperation in the ‘Tivoli’ investigations, where neither the BSI nor the Public Defender was able to.

58.2.0 INDECOM and the ‘incursion’/Keith Clarke investigations

58.2.1 It is a matter of public record that at the outset of his tenure, the Independent Commissioner of Investigations declared repeatedly that he did not intend to investigate the **West Kingston** or **Keith Clarke killings**. The investigation of both matters by the BSI (now downgraded to a section within the Inspectorate of the Constabulary) was too advanced, he said; although his remit subsumes and supersedes the BSI’s functions. Since then however, there has been a *volte face* by INDECOM. It has purported to investigate the circumstances of **Mr. Clarke’s killing** but, as far as is known, and apart from informal advice, not **the West Kingston** fatalities.

58.2.2 The very first intimation of this came, rather matter of factly, during a meeting with the Public Defender requested by the Independent Commissioner, in October, 2011. No agenda had been agreed or even suggested. It was to have been something of a “courtesy call.” The Public Defender was somewhat taken aback by this surprising development. It aroused his apprehension for two reasons:

- (a) the Commissioner announced that he “should be in a position to **indict** two or three **soldiers** by early (2012)” and,
- (b) that his **Keith Clarke** investigations would be or were being spearheaded by a former **JDF Intelligence Officer** recruited to his staff. The impartial observer may well conceive the possibility of a **latent** conflict of interest.

58.2.3 Besides, in fact and in law, bias may be **conscious** or **unconscious**. With respect, it seemed to the Public Defender that it was at least desirable that in the particular circumstances of the **Keith Clarke** case, a former JDF **Intelligence Officer** should not be leading the investigations. For it was important to avoid the **appearance** of bias, conscious or unconscious.

58.2.4 It is important to observe here as well that up to the time of the October, 2011 meeting, INDECOM had given no indication to the Public Defender that ballistics work on the **Keith Clarke** case –

- (a) had begun or,
- (b) was underway or
- (c) in relation to the stage reached in the examinations which, it is now apparent, had in fact been started or, was at least being contemplated.

- 58.2.5** The Public Defender therefore comforted himself with the belief that the **ballistics road map** would have been **adhered to**; that that being the case, he need entertain no fear that any attempt would have been made to indict foot soldiers **prior to their superiors' role** in the matter being evaluated **judicially**.
- 58.2.6** More than two years have elapsed since conclusion of Mr. Noedel's Technical Report regarding **Phase 1** of the firearms **Protocol**, as well as on weapons "**recovered** and visually assessed **from the Tivoli event**" but, **not** including "**law enforcement firearms**". There the matter rests, as regards the "**Tivoli**" investigations, as far as the Public Defender is aware.
- 58.3.0** Now the Public Defender's 'Keith Clarke investigations' may also be thought unduly protracted. In the meantime, INDECOM has embarked upon its own investigations, without any, or any proper regard for the binding **ballistics road map**; without the necessary Public Defender **oversight**. In all the circumstances, was or is this sharp **departure** from the **agreed** ballistics **Protocol** excusable ?.
- 58.3.1** Purporting to have completed its investigation, INDECOM submitted a file to the Director of Public Prosecutions (the DPP) for a ruling, in May, 2012. The file was returned for further investigations to be done.

58.3.2 Since that time the DPP has not only ruled but has preferred a **voluntary bill of indictment** charging **murder**, against a **lance corporal** and **two privates** of the JDF. They have appeared before the Home Circuit Court and have been awarded bail.

58.3.3 But, since that time also and, curiously, the Independent Commissioner has informed the DPP and defence counsel that he has directed that **further** ballistic examinations should now be conducted on two spent heavy calibre bullets. How will this development impact **the pending trial** or the integrity of the Prosecution's case ?.

58.3.4 In the **Keith Clarke** case also, **ballistics evidence** is a *sine qua non*: **absolutely essential** for determining the individual **identity** of the soldier or soldiers whose bullets killed him. There is **no evidence** of **visual** identification. In prompting the DPP's ruling, did INDECOM act **precipitately** ? Should it's submission have been preceded by **consultation** or **collaboration** with the Public Defender ?

58.3.5 In whatever event however, it is the considered and respectful opinion of the Public Defender that trial of the three accused should **abide** the **outcome** of a **Commission of Enquiry**.

58.3.6 **Accountability of senior JDF/JCF personnel**

58.3.7 Of course, the idea that **three lowly infantrymen** may be **indicted, tried** and even **convicted** of the **murder of Mr. Clarke**

and thereby **bring closure** to a **military operation** gone **terribly wrong**, is patently **untenable**. For the bizarre invasion of the gentleman's pristine abode is, manifestly, **not the case** of an **audacious** assault **conceived** and **carried out** by a detail of **renegade** foot soldiers. Moreover, whilst Jamaican jurisprudence enshrines a *presumption* of innocence in relation to alleged or suspected criminal conduct, there is **no** "presumption of regularity" concerning the conduct of State Security personnel known to law. **All** officers of the **JDF** and **JCF** involved in the planning and execution of this ill-fated exercise (particularly those in the **highest echelons**) should therefore be **made** and, **held** to account.

**58.4.0 Ballistic examination of "Keith Clarke" weapons etc.
Breach of Ballistics Road Map**

58.4.1 Most significantly however, the ballistic examination of some **sixty-nine (69)** firearms, including the .38 Special Colt model Agent dual action revolver said to have **belonged** to **Mr. Clarke** and, **numerous** spent bullets, fragments and shells connected to the assault on his house, has been conducted by a **retired** Government ballistics expert. This examination was done in **palpable breach** of the firearms Protocol. **The independent observer firearms examiner representing the Public Defender (Mr. Noedel) was neither present nor invited to observe the examination.** No **prior notification** of any sort whatsoever was

given to the Public Defender. The exclusion of the Public Defender from this process **requires explanation**. Either INDECOM **ignored**, or the Ministry of National Security (more particularly, the former acting Permanent Secretary) **failed, neglected** or **elected** not to **apprise** INDECOM of the Protocol. Whatever may have been the case, the *about face* and its consequences also **need to be explained**.

58.4.2 And whilst, of course, the Public Defender may give no “**directions**” to INDECOM, for patently obvious reasons it is **most desirable** that where appropriate, these two parliamentary commissions **collaborate** in their respective but **independent** investigations. In this respect, the Public Defender enjoyed a good working relationship with the BSI and covets a similar and closer relationship with INDECOM. There are propitious and encouraging signs of such a relationship developing.

58.4.3 In contrast to the **Keith Clarke case**, however, no detailed ballistic work is known to have commenced in relation to the **Tivoli/West Kingston** ‘incursion’ or ‘siege’.

58.5.0 Absolute necessity of completing ballistics work

58.5.1 The **Government** (or INDECOM, if it has supplanted the BSI in all the pertinent investigations) should now, **with all deliberate dispatch**, ensure that **outstanding ballistic work** is completed. **A ballistics expert/firearms examiner, representing the Public**

Defender, should have observer status during the completion of this work, in accordance with the **agreed Protocol.**

58.5.2 Any further delay will obviously prolong the agony of grieving dependents and relatives. It would also provoke growing public **skepticism** about the **Government's resolve** in confronting **reasonable suspicion** that the State Security Forces **far exceeded** their lawful authority and acted in **wanton abuse** or **disregard**, of the JCF Policy during the 2010 State of Emergency.

58.5.3 Non-completion of the ballistic work **prevented** the BSI **wrapping up its investigations** and **continues** to **hamper** that of the Public Defender. **Completion** of this work would clear the way for a decision concerning the appointment of a Commission of Enquiry to be made. (See pp. **188 - 93**, post.)

59.0.0

**THE JAMAICA CONSTABULARY FORCE
POLICE USE OF FORCE AND FIREARMS POLICY
(THE JCF POLICY)**

59.1.1 The JCF Policy “incorporate(s) the **fundamental rights** and **obligations**” enshrined in the Jamaica **Constitution** and international **human rights** instruments. In particular, these **rules of engagement** reflect the principles set out in:

- “ i. The United Nations Code of conduct for Law Enforcement Officials, 9G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (no. 46) at 186, U.N. Doc. A/34/46-1979); and
- ii. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, (Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, - Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF. 144/28/Rev, 1 at 112-1990).”

59.1.2 By Article 1. of i. above, the term “Law Enforcement Officials” **includes** members of the **JDF**, (being members of the State Security Forces) and certainly when, as in the instant case, they are **deployed** in **support** of **the JCF** during “law enforcement” operations. **In principle** therefore, JDF personnel engaged in activities **related** to **the State of Emergency** are or would be **as culpable** as JCF members for any **infringement** of the Policy, the Constitution or relevant international human rights instruments.

Faithful **adherence** to **the Policy** or the **lack** of it must therefore be a **central focus** of any investigation or **judicial enquiry**.

59.1.3 Certain key provisions of the Policy are attached hereto as **Appendix 27**.

59.1.4 It will be clear from those provisions that

1. the **primary** responsibility of law enforcement is the **protection** of **life** and the **right** to it **guaranteed** by the Constitution;
2. the use of **lethal** or **deadly force** must be **proportionate** in all the circumstances;
3. **lethal force** may only be employed in **self defence**;
4. the use of **deadly force** must be **strictly** necessary and only **after** other options have been **reasonably discounted**; it must be a matter of **last resort**;
5. accountability and **responsibility** rest with **the individual** member of the Security Forces whose action is called into question as well as with his **supervisor**;
6. officers in **supervisory** positions have **especial responsibility** to ensure **adherence** to the Policy;
7. **medical assistance** and treatment for the **injured** must be provided **promptly** and,
8. **unlawful orders** must **not** be obeyed.

The **judicial enquiry** contemplated by the Public Defender's *recommendation* should **gauge** the degree of **adherence** to or, the scale of **disregard** for, the **rules of engagement**, as the case may be. In this context the JDF use of **mortar rounds** or other **explosive/incendiary** devices in the **civilian theatre** of Tivoli Gardens at the onset of the 'incursion' or during the 'siege' should be very **closely** examined.

59.1.5 The JCF Policy and the incidence of "Shootouts"

59.1.6 For decades, Jamaica has been plagued by the rampant **scourge** of murder committed by **illegal gunmen**. Despairing citizens are often tempted to turn the blind eye at, or even tolerate, instances of **extra-judicial** killings, (unjustifiable homicide) actual or reasonably suspected. They rationalize this indifference: the country is a **safer** place without illegal gunmen. But it is often **reasonably suspected** or is frequently suggested that this quiescent attitude has emboldened frontline JCF personnel to kill then proffer an opiate of **false** accounts about "**shootouts**".

59.1.7 A Table showing official data of '**Persons Allegedly Murdered**' (the overwhelming majority by the use of firearms,) '**Fatal Shootings by (the) Police**' and '**Police Personnel allegedly Murdered**' (all by gunshot) during the years 2000 – 2010, is attached as **Appendix 28**.

59.1.8 Now, consciously or sub-consciously, did the **commanders** and **tacticians** responsible for drawing up **or**, the **State Security personnel** engaged in **executing** operational and strategic plans for the West Kingston/Tivoli ‘incursion’, contemplate or bank on a probable perception of the **fiercest** of all “**shootouts**” with gunmen having taken place ? Did they hope or were they satisfied that a **credulous** people would trust their *bona fides* ?

59.2.0 **Questions/Issues to be answered/resolved judicially**

59.2.1 The following questions and issues also arise for due judicial consideration:

- i. Despite their orders which may have counseled, even emphasized **strict** regard for the rules of engagement and, the necessity of avoiding the death of innocents (collateral damage;) did the State Security personnel engaged **run amok** ?
- ii. Were there any and if so what proportion of them, **excited** by the chance of killing a band of “gunmen” encamped in Tivoli Gardens/West Kingston ?
- iii. So **excited** and sadly **misguided** that they perceived a kind of “**open season**” on “gunmen” ? or,
- iv. Were they all among the **bravest** of the brave, gallantly **risking** their own lives in taking on **armed** combatants in

Appendix 10 did not provoke the speedy response desired and anticipated, the Public Defender dispatched the letter to the Commissioner of Police at **Appendix 31**, expressing astonishment and indicating that his surprise was —

“...aggravated by allegations made by residents of (Tivoli Gardens), that they (had) been told by members of the security forces that they should **clean their houses:** activities that would irretrievably **destroy probative evidence...**”

59.4.2 The “probative evidence” referred to particularly related to blood and sero-sanguineous stains and other trace evidence deposited by the deceased in alleged extra-judicial killings – crucial circumstantial evidence. Public Defender personnel were therefore directed to countermand the Security Forces instructions in order to preserve that evidence.

59.4.3 But up to mid-day June 3, JCF/BSI investigations had still not been started. This generated deeper disquiet. Independent forensic experts/scene of crime analysts from Caribbean Genetics (CARIGEN) had also been engaged to assist in the Public Defender’s investigations. They were standing by, determined not to inspect or take blood samples, etc. from any alleged crime scenes, for fear that they may have been accused of interfering with or contaminating those scenes. The Public Defender therefore

released copies of **Appendices 5** and **31** to the news media in a Press Release issued later that day. What effect all this may have had is left to be determined. But next morning, June 4, JCF Scene of Crime personnel entered Tivoli Gardens for the first time since the start of the 'incursion', followed by an inspection of the home of Mr. Clarke and, BSI investigations got underway.

59.4.4 As soon as the JCF Scene of Crime unit had completed their activities, the CARIGEN experts and analysts were deployed.

59.5.0 **The JCF Policy, illegal gunmen and “due process”**

59.5.1 Despite the foregoing however, let no one doubt that for **too many years past**, the police have had to **confront** fearless but fearsome **gunmen** in the line of duty. Many of them are said to be members of marauding **criminal gangs**, themselves part of larger criminal **networks** - the lot being elements of **“organized crime”**. (See the Epilogue.)

59.5.2 It is the **sworn** duty of the State’s law enforcement agents to —

- arrest and charge those **reasonably suspected** of criminal conduct;
- administer the **statutory caution**;
- take them before an **“impartial** court appointed by **law”** by virtue of which they are **guaranteed** a **“fair trial”**, based upon a **presumption of innocence**;
- the Prosecutor (a ‘minister of justice’) bears the heavy burden of **proving** them guilty, **“beyond reasonable doubt”**, in which case, they may be sentenced to undergo
- **condign** punishment including imprisonment of varying length or, **legal** execution and,
- if incarcerated and thereby committed to the **humane** care of “correctional officers”, the latter should **conscientiously** demonstrate their **awareness** that

59.6.2 **The Cadaveric Spasm**

59.6.3 Those stories often strain belief, not least by reason of their **monotony**. For the **cadaveric spasm**, a phenomenon regarded in the scientific world as a relatively **rare** occurrence has, according to the CCN, long been a quite **commonplace** feature of police killings in Jamaica.

59.6.4 On the other hand and **almost invariably**, the citizens' versions of those killings allege cold-blooded murder.

59.6.5 Professor J. K. Mason, CBE, MD, FRCPath, DMJ, Regius Professor of Forensic Medicine, University of Edinburgh, explains that -

“(The **cadaveric spasm**)..... is a contraction of the muscles which is probably **mediated** by the central nervous system when death occurs in conditions of high emotional tension; it is instantaneous and **permanent** until **putrefaction occurs**. The most common manifestation is seen in the **hands** which may be found **grasping** some object, particularly one that gives some **hope of support**. Cadaveric spasm may **occasionally** involve the hand which has held a firearm used **suicidally**. The medico-legal importance of this is that, while the absence of spasm is of no significance, **cadaveric spasm** cannot be **simulated** after death in an attempt to disguise a homicide. It should be **stressed** that this phenomenon is **uncommon**.” (Forensic Medicine for Lawyers, Ed.2nd, 1983, p.50)

59.6.6 Most significantly however, no instance of the **spasm** occurring **during** the ‘**incursion**’ has been reported. And quite noticeably, in **recent** months CCN accounts make **fewer**

“clutching” allegations: more and more the suggestion is that firearms were **“recovered”** at the scene of “shootouts” or confrontation with gunmen.

59.6.7 Over the years, also, persistent **allegations** of police excess and abuse have led to the establishment of a number of units and institutions, including special units and departments of the JCF, a Police Public Complaints Authority, the BSI, the PCOA and latterly, INDECOM - all mandated to tackle the intractable problem of killings by State Security Forces (the police in particular) and other misconduct.

59.7.0 Public Defender’s 2010 – 12 ‘Strategic Plan’

59.7.1 The year 2012 was the last of a three-year **strategic plan** of the Office of the Public Defender. One of the central objects of the plan is to monitor the enforcement by the Police Commissioner of the JCF Policy.

59.7.2 In March, 2012, following a spike in police killings, the Commissioner announced that he had been moved to consider amendments to and refinements of the JCF Policy, intended to promote adherence to it. He was driven to seek **“support”** from the Officer corps of the Constabulary as well as the Jamaica Police Federation, representing the rank and file members. He said that the Officer corps would thenceforward be **held to account** for the

conduct of deviant personnel: an important term of the Policy long more honoured in the **breach** than in the **observance**.

59.7.3 The Public Defender has welcomed the Commissioner's announcement and offers his fullest support for ongoing efforts (despite resource constraints) to -

- reform the Constabulary;
- expel those found not fit to "**serve**" the citizenry;
- recruit only the "**finest**" from amongst the thousands of volunteers;
- drill them all daily in the tenets of self-discipline and **respect** for all and,
- communicate **candidly** with the Jamaican people who, the constable **swears** to "Serve, Protect and Reassure."

59.7.4 Members of the JCF are sometimes required to serve under appalling physical conditions which are themselves dehumanizing. Policing in Jamaica is fraught with challenges and **stress**, particularly for those on the frontline, where, personal danger frequently lurks. The Public Defender acknowledges and takes the opportunity formally to thank all conscientious personnel for their patriotic service. So should all citizens (the ones policed) who, bear a civic duty to support them but **only** in the **lawful** execution of their duties. For the law cannot be enforced **unlawfully**.

60.0.0 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The ICCPR is a multilateral treaty. It was adopted by the United Nations General Assembly on December 16, 1966 and has been in force since March 23, 1976. The treaty commits State Parties to respect of individual civil and political rights including the **right to life**, the right to **due process** and **fair trials**. As of March 2012, the ICCPR had seventy-four (74) signatories and one hundred and sixty-seven (167) Parties.

60.1.0 The ICCPR is a constituent part of the International Bill of Human Rights, the others being the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR). The ICCPR is monitored by a *Human Rights Committee (HRC)* (a body separate from the UN Human Rights Council), which reviews regular reports of States Parties on how the rights are being implemented.

60.1.1 **Jamaica's signature** was **affixed** to the Covenant on **December 19, 1966**. The date of deposit of the instrument of **ratification or accession** was **October 3, 1975** (the year before Proclamation of a State of Emergency last before that of May, 2010 and the second since the attainment of political independence in 1962.)

60.1.2 The following Declaration was made to the HRC on June 1, 2010:

“in accordance with Article 4 (3) of (the Covenant) (**Jamaica**) has the honour to inform that on 23rd May 2010, the Governor-General

of Jamaica issued a proclamation declaring a State of Public Emergency in the island.

The State of Public Emergency has been imposed in the parishes of Kingston and St. Andrew as a result of a threat to public safety and shall exist for a period of one month unless extended by the House of Representatives or terminated at an earlier time.

The Proclamation issued by the Governor-General is in strict compliance with the provisions of the International Covenant on Civil and Political Rights and with the Constitution of Jamaica. There may be derogation from the rights guaranteed by Articles **12, 19 and 21** of the Covenant.....

The Government of Jamaica hereby requests that the Secretary-General in his capacity as depository of (the Covenant) inform all Parties ... on the provision (sic) from which it may derogate and the reason for possible derogation.”

(Articles **12, 19 and 21** of the Covenant cover the freedoms of movement, expression and the right of peaceful assembly, respectively.)

60.1.3 Article 4 of the Covenant provides:

1. In time of *public* emergency which *threatens the life of the nation* and the existence of which is *officially proclaimed* , the States Parties may take measures *derogating* from their obligations under (the) Covenant to the extent *strictly* required by the exigencies of the situation, provided that such measures are *not*

inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or *social origin*.

2. No **derogation** from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall *immediately* inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of *the provisions* from which it has *derogated* and of the *reasons* by which it was actuated. A further communication shall be made, through the same intermediary, on *the date* on which it *terminates* such derogation.

60.1.4 The protection stipulated for under Article 4. may only be limited “*in time of public emergency which threatens the life of the nation.*” Even then, **no derogation** from the **right to life, freedom from torture** and the **right to personhood** (*inter alia*) is permissible [Article 4(2)].

60.1.5 Article 6 provides :

1. *Every human being has the inherent right to life.* This right shall be protected by law. No one shall be **arbitrarily deprived** of his life.

60.1.6 The allegations of extra-judicial killings by members of the security forces raise **presumptive evidence** of derogation from Article 6.

60.1.7 Article 7 provides (in part) :

No one shall be subjected to torture or to *cruel, inhuman* or *degrading* treatment or punishment.

There is *prima facie* evidence of unlawful derogation from this Article. There are allegations of persons being subjected to what may be considered “*inhuman or degrading treatment*”. Persons who were detained claim to have had no access to toilet facilities, food, and water or been made to kneel in gravel, while in detention.

60.1.8 Article 8:

Proscribes slavery, the slave-trade and **servitude**. It provides, by paragraph **3** that —

(a) — No one shall be required to perform **forced** or **compulsory** labour.

By the provisions of sub-para. (b), the performance of “**hard labour**” (in the countries of State Parties in which it may be imposed) “in pursuance of a **sentence** to such **punishment** by a competent **court**” is **not** precluded by Article 8.

But by sub-para. —

(d) For the purpose of this paragraph, the term “**forced** or **compulsory** labour” shall **not** include

(i) Any work or service not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a **lawful order** of a **court, ...**

(ii) ...

(iii) Any service **exacted** in cases of **emergency** or **calamity** threatening the **life or well-being** of the community

(iv) ...

There were several complaints by detainees that they were **forced** by State Security personnel to pick up dead bodies and load them onto Government-owned vehicles, obviously **not** by virtue of any, or any “lawful order of a court.” This exercise made them most **uncomfortable**. They were fearful of the consequences for their well-being if they had refused to perform this unpleasant chore which, they greatly resented. Presumably however, and on account of the supposed exigencies then prevailing, the Government could seek to justify the relevant orders given by members of the Security Forces, by reliance on paragraphs **3(d)(iii)** of this Article, in answer to complaints that detainees were subjected to “**servitude**”, “**forced**” or “**compulsory**” labour”.

60.1.9 Article 9 provides :

1. Everyone has the right to *liberty* and *security* of the person. No one shall be subjected to *arbitrary* arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are *established by law*.
2. Anyone who is arrested shall be informed **at the time of arrest**, of the reasons for his arrest and shall be **promptly informed** of any charges against him.

60.2.0 Hundreds of male residents of West Kingston and elsewhere were taken from their homes and detained during the ‘incursion’, without explanation or apology and without being informed of the reason for their detention; nor were any charges laid against them.

There is therefore *prima facie* evidence of unwarranted derogation from Article 9 which, (sub – para.3) confers an “*enforceable*” right to compensation.

60.2.1 Article 10 provides :

1. All persons deprived of their liberty shall be treated with *humanity* and with respect for the *inherent dignity* of the human person.

Again, there is *prima facie* evidence of infringement of this protection.

60.2.2 (Articles 11, 15, 16 and 18 —

variously **proscribe** imprisonment “merely on the ground of inability to fulfill a contractual obligation” as well as the pronouncement of guilt by reason of retrospective criminalization of any act and **confer** the “right to recognition everywhere as a person before the law” and, the “right to freedom of thought, conscience and religion”.)

60.2.3 In his address to Parliament of May 25, 2010, then Prime Minister Golding announced that the “most thorough investigation” would have been carried out into the joint police/military operation in West Kingston. The Government provided special funding to the Public Defender, an independent Commission of Parliament, (not a Government agency) to facilitate investigations which that Commission proposed to undertake. It is submitted that that funding would be no more than a partial discharge of the

Government's obligations under the ICCPR, in particular Article 7. It needed to secure the most diligent probe by its law enforcement arm, the JCF, which, it will be recalled, hardly responded with dispatch and in any event, did not enjoy the unstinting cooperation of the JDF.

60.2.4 The Government's treaty obligations now **require** that at the very least, outstanding ballistic examinations be completed, consistent with the Road Map and, that a **public judicial enquiry** be commissioned.

60.2.5 The alleged misconduct of military personnel during the 'incursion' or 'siege' identifies the need for the incorporation of human rights standards in Jamaican military doctrine, policy and Standing Orders, as well as the proper training of soldiers to inculcate respect for human rights. A judicial enquiry may yet determine whether army personnel should stand trial for civil offences or proceedings taken by way of courts martial.

70.0 **COST; ECONOMIC AND SOCIAL IMPACT OF STATE OF EMERGENCY**

70.1 The macro socio-economic impact of events related to the State of Emergency was the subject of a special study undertaken by the PIOJ which published reports in October, 2010 and April, 2011. The following is an extract from the **executive summary** of a report prepared by the United Nations Economic Commission for Latin America and the Caribbean, (ECLAC) at the request of the Government of Jamaica (PIOJ):

“The **total cost** of the fall-out from the civil unrest was determined by, among other factors, the **severity and duration of losses** to affected sectors and activities, the **cost of physical assets damaged** and the extent of **contingency spending** occasioned by its impact. Influenced by these factors, the **total effect** of the unrest **on the economy** of Jamaica was **estimated** at **J\$22,515.8 billion, equivalent to US\$258.8 million**. The **total impact** represented some **2.1% of 2009 current GDP** and **50.0% of tourism GDP**.

The primary affected population was found in the parishes of Kingston and St. Andrew, in an area collectively defined as the **Western Kingston Area** comprising **Denham Town**, Central Downtown, **Tivoli Gardens**, Fletchers Land, **Hanna Town and** West Downtown. Together these communities possessed a population of some 39,332 persons. **Some 41% of that population** could have been found in the community of **Tivoli Gardens**, which was the home of Christopher ‘Dudus’ Coke. The report identifies the magnitude of the primary affected population which accounts for only 2% of the total population of Jamaica. **The secondary population** was defined as those who formed part of the employed labour

force who worked in the parishes of Kingston and St. Andrew and who **accounted for 11%** of the population. The **report concludes**, therefore, that **349,674** or **some 13%** of the **Jamaica population** may have been **directly affected** by the events.

It is important to note that while Western Kingston was the locus of the event, **several** other communities were **severely** affected in terms of **livelihoods lost** and **dried up liquidity** due to their **sybiotic relationship** with Western Kingston.

Other segments of the population were affected as well, such as **farmers** in **rural** communities whose sale of goods through Coronation Market were (sic) disrupted. **Students** at the **secondary** and **primary levels** of education were another group. Because of the **timing** of the event a **significant number** of students undertaking **Caribbean Advanced Proficiency Examination** and **Caribbean Secondary Education Certificate** had their education **disrupted** and a number of significant **national standardized tests** across the country also had to be **postponed**. Approximately **2,500 children** from ages **one** to **four years** old in the communities of **Tivoli Gardens, Denham Town, Fletchers Land and Hannah Town** would have **witnessed** the events in Western Kingston and may have been **exposed** to **some degree** of **psycho social trauma** and required appropriate counseling.

Another group affected by the event was **the tourist** (sic) who **stayed away** from the country and **cancelled reservations** for fear regarding their safety. On 24 May 2010 Air Jamaica announced the cancellations of three flights (two out of Kingston to Fort Lauderdale and New York and one from Fort Lauderdale to Kingston). The **civil unrest** and the **intermittent blockage** of **access roads** to the Norman Manley Airport were cited as reasons for cancellation.

Travel advisories/alerts were **issued** for the island from the foreign affairs departments of the **Canadian, United States, United Kingdom** and **Australian Governments**. Many of these advisories were still in place at the time of the assessment, albeit under revised terms. These advisories were revised between 23 June and 10 August. Potential revenue from tourism was also lost due to the **moving** from **Jamaica** to **Trinidad** of the **West Indies' fifth one-day** and **first test** against **South Africa** because of the security situation in Kingston.

The sectoral composition of the impact indicate that the **productive sectors** suffered the bulk of the impact (**93%**), with **tourism** suffering **most** of the **losses** due largely to **loss of business** and the **outlay** on **marketing** and **advertising** to **encourage** visitors **to return**. The **distribution** sector suffered 3.5% of impact, nevertheless, **the social fall-out** in the sector would have been **considerable**, as a number of independent vendors were badly affected. The **infrastructure** sector suffered 4.8% of the total impact, with the bulk of the fall-out in **transportation**, reflecting in part the **disruption** of operators on the route **from Kingston** to a number of areas. **Productivity** losses represented 0.9% of the total and stemmed from morbidity and loss of life, social distancing resulting in lost labour productivity. Costs to the **health** sector were also contained (US\$1 million), while the **fall-out** in **communication** services amounted to **US\$2.5 million**. The **initial estimate** for the cost of **security operations** was **US\$2.7 million**, made up of US\$1.5 million for the Jamaica Constabulary Force and over US\$1 million for the Jamaica Defence Force and **US\$0.16 million** for Office of the **Public Defender**.”

The report concludes that the events that unfolded in West Kingston are not new to Jamaican society. However, arriving at the “**overall** effect of such events, in terms of its **impact** on growth and development,” is **novel**. The report suggests that knowledge about the **socio-economic** cost of **violence** and **unrest** should influence **development policy** and shape the **reconstruction** efforts for West Kingston.

70.2 In this regard the report proffers conclusions and recommendations.

70.3 The **main conclusion** is that there is the need for a **medium** to **long-term rehabilitation** and **revitalization** programme for the affected communities to functionally **integrate** them into the **Jamaican society**; that the **central focus** of any programme of renewal should be to create the **institutions** and **incentives** for persons in the communities to **generate wealth** from **productive** activity.

70.4 The report, therefore, recommends that:

- a. A **benchmarking analysis** should be undertaken of the **assets** and **resources** in the communities and any major development deficits to inform the programme of action.
- b. Given the specific competitive advance of the area, **an integrated cluster** could be developed around **food** and dry goods vending, **music** and **sport**.

- c. **Special** social welfare programmes for supporting livelihood development **may be necessary**.
- d. Micro-credit facility for **Female Headed Households** should be introduced
- e. A campaign for the **reduction** of **stigma/discrimination**, which had resulted in **social exclusion**, should be implemented and,
- f. A **regeneration** plan for the **Western Kingston** area which utilizes the **creativity** of the people to generate **cultural heritage** products that can be offered as additional **tourism products**, utilizing **the creativity** of the population in **dance, theatre, food** and the **music history** of the communities should be the **outcome** of the process of **revitalization**.

70.5 The Public Defender unequivocally endorses these recommendations and commends them to the Government again. Their efficacy depends **in part** upon the **availability** of fiscal resources but moreso, upon **political will** and the resolve of a **responsive** and **responsible** Government.

70.6 The Public Defender is **especially** attracted to the recommendation at **letter f.** above. Because of the ground-breaking work of social transformation pioneered by the Agency for Inner-City Renewal (the AIR) and the Institute for Social Entrepreneurship & Equity (I-SEE), headed by the thoughtful Dr. Henley Morgan, Ed.D., he was therefore invited by the Public Defender to submit a brief paper to be incorporated into this **Interim Report**. The note which follows anticipates the rigours of a pending Agreement with the

International Monetary Fund for the grant of an Extended Fund Facility. (The co-authors are Professor Emeritus Neville C. Duncan, Ph.D and Dr. Michael Rosberg, Ph.D.)

The Note

“ **ACHIEVING RENEWAL OF THE HUMAN SPIRIT IN TIVOLI THROUGH ECONOMIC REVITALIZATION: A SOCIAL ENTREPRENEURSHIP MODEL**

In Jamaica, there is little or nothing in the IMF package to stimulate sustainable growth among the **bottom 40%** of the population. Therefore, there is a need to look **within** Jamaica for lessons on how to assist this body of persons in increasingly trying economic times.

Jamaica owes **Tivoli** a **special** effort of **reincorporation** in the wider Jamaican **mainstream**, building socio-economic competence. This is not the first time that **Tivoli Gardens** has been the butt of the exercise of state power. Models need to be built that create a deep sense of social esteem based on **individual** entrepreneurial development (i.e. **non-patronage** based).

We haven't got far to look for a potential **alternative model** that can be **custom-tailored** to the **Tivoli** situation. It would be a model starting with an I-SEE **investigation** of the social and economic competencies now **existing** in the community and an identification of **people's preferences** for economic activity. Based on that kind of analysis, there is already an activity of the USAID/I-SEE model that expedites a **comprehensive** way of bringing the people back to a **productive** life (wherever they are in Jamaica).

People in Trench Town are now very positively engaged in **bottom-up** economic activities such as **food production** through **greenhouses**, **recording studios**, and **ceramic production**. With I-SEE's deployment

of MBA students in Trench Town shops, a Grace Kennedy Business Expansion Grant (\$500,000), and First Heritage Co-operative Credit Union loans for new, shopkeeper members' purchases of Grace Kennedy products, the potential for better productivity and higher income becomes possible [i.e. a self-replicable (sic) model with other counterparts, e.g. Berger Paints and house painters from targeted communities]. This is only one example of the kinds of activities that can be supported by the I-SEE model of social entrepreneurship with **social equity**, and can be extended to all major corporations in Jamaica wanting to '*do well by doing good*' (sic).

The I-SEE MBA students, currently at University College of the Caribbean, are being trained to direct small business development centers, soon to be established across Jamaica. Ones promoted by I-SEE (now working with Jamaica Co-operative Credit Union League and the National Union of Co-operative Societies of the co-operative sector) will operate on an expandable and **self-financing** basis. The model also extends benefits to workers likely to be laid off in the public and private sectors with severance benefits who may elect to join a programme like this for their own **self-development**. One great advantage of these **self-funded**, entrepreneurial activities among the **lowest 40%** is that it is a **low cost, dynamic approach** to increase **occupational** growth, and tax benefits to Government **without** excessive additional expense. The model can be adopted by other systems (e.g. Banks, Churches, NGOs)."

70.7 The Public Defender therefore gratefully adopts and endorses those ideas. The paper offers something of a template for sustainable social and economic development of Tivoli Gardens and West Kingston. It aims to promote self-reliance by tapping into the

energy, muscle, creativity and ingenuity of the people. Application of the AIR/I-SEE model would be comparatively cost-effective, requiring minimal State financial outlay. Its success would greatly weaken the pervasive influence of political 'Dons', rendering them increasingly redundant.

70.8 The Public Defender therefore *recommends* to the Government that as a **beginning**, I-SEE be asked to investigate the “social and economic competencies now **existing in the community**” with a view to identifying the “people’s preferences for economic activity.” Purposeful Government support of what will likely be practical recommendations for a **“custom-tailored”** model of self-sustainable social and economic development of Tivoli Gardens and West Kingston i.e., which is not **patronage-based**, would quite probably help to reverse chronic stagnation.

71.0 BEHIND JAMAICA'S POLITICAL "GARRISONS"

71.1 The following excerpts of the July 1997 Report of the *National Committee on Political Tribalism*, chaired by the first Political Ombudsman and, a former Chief Parliamentary Ombudsman, the Honourable Mr. Justice James Kerr, O.J., (ret'd) and now deceased, are pointedly *apposite*.

“ **Garrison** communities are created by:

- (i) the development of large-scale **housing schemes** by the State and the location of the houses therein to **supporters** of the party in power;
- (ii) **homogenization** by the **dominant** party activists pushing out **the minority** from within and **guarding** against **invasion** from **outside**; and
- (iii) the expelled setting up a **squatter community**.

The **hard core** garrison communities exhibit an element of **autonomy**, in that they are **states** within a **state**. The Jamaican State has **no authority** or **power** except in as far as its forces are able to **invade** in the form of **police** and **military raids**. In the **core** garrison, **disputes** have **been settled**, matters **tried**, offenders **sentenced** and **punished**, all **without reference** to the institutions of the **Jamaican State**.

The following extract from Mr. Mark Figueroa's important contribution on the topic speaks eloquently for itself and merits quotation **in full**:

‘Encompassed in this process are all those activities that are associated with the **establishment**, the strengthening, and the **extension** of the **influence** of garrisons and their associated psychology. In using the notion of a **garrison process**, I am

linking the presence of the **large scale** garrisons such as Jungle, Payne Land, Rema, **Tivoli** and other less known strongholds, to a **political culture**. This political culture extends **well beyond the boundaries** of the communities which have come under the tight control of **politicians**, their **thugs**, and/or **local enforcers**.

Those who promote the garrison process seem intent on extending its dominance over **larger** and **large** (sic) sections of the country yet to date there are **few** constituencies where the vast majority of the territory has been garrisoned. To focus on constituencies alone is to miss the **significance** of the **garrison phenomenon** as a whole. The presence of a **relatively small garrison within a constituency** or the presence of a garrison in a neighbouring constituency can **fundamentally alter the course of an election** in a constituency that is relatively **garrison free**. The ability of the garrisons to do ‘**outreach work**’ greatly enhances their significance. My central concern is therefore with the concept of a **garrison community** not a garrison constituency.’

Mr. Mark Figueroa therefore emphasized, and **we accept**, that the **creation, development, and maintenance** of garrisons are neither accidents of history nor geography, but part of a process **deliberately** fostered for **political** ends. Equally important is his focus on the concept of the **garrison community**, rather than a garrison constituency, the point being that the existence in a constituency of a **garrison community** can have as significant an **impact** on the **electoral process** as the garrison constituencies themselves, and an **impetus** to transform the garrison **community** into a garrison **constituency**.”

71.2 Later, the Committee observed —

“ Dr. Barry Chevannes described the **common features** in this way:

‘Just as the political tribe of ancient **Greece** and **Rome** was under the leadership of a **demagogue** so in Jamaica the **garrison** towns are **controlled** by the **Dons**. **Entry** and **exit** to and from these communities are controlled by the so-called ‘top ranking’ and **gang leaders** who have **close relationships** with the constituency **Member of Parliament**, get **preferential** access to contracts and jobs and function as **key elements** of the local level community political leadership in **both parties** in these inner city **poor areas**. These constituencies are made up preponderantly of these “**garrison communities**” where **organized political gangs** with **high powered M-16** and **A.K. 47** assault rifles and **sub-machine guns** control clearly **defined political boundaries** and territories where **political protection** insulates them from the reach of **the security forces**.’

We interpret this to mean that on occasions **political influence** has **impeded the Security Forces** in the performance of their duties.”

71.3 Under the rubric ‘**Poverty**’ the Committee stated -

“ The **living conditions** of the people in most of the ‘**tribalised**’ communities (some of which we visited) reek of **abandonment** and **neglect**. Sub-standard housing, **poor sanitation**, and numerous **environmental hazards** are immediately visible. The National Inner City Committee highlighted these conditions in its 1993 Report on **Strategy for the Revitalisation of Blighted Youth**. Similar observations were made by the Centre for Population, Community, and Social Change in its Study on Urban Violence and Poverty in Jamaica (**They Cry Respect**) published in 1996.

Poverty facilitates the development of **political tribalism**. The slum communities around the parish capitals, particularly, **Kingston, St. Andrew, and St. Catherine**, continue to grow as **unemployed** and **under-educated** youths migrate from rural communities in search of a better opportunity.

The fact is that **the Jamaican economy** has **not performed well** over the past 35 years and therefore the country has **not been able to provide** enough jobs to meet the needs of a **growing** population.

The conditions in the communities also reflect the **failure** of the **education process**, where young people, the **regenerative capacity** of the future, are **graduated** from schools **without** the **basic skills** required to perform in the **formal** economy.”

71.4 The Public Defender considers that the report of this high-powered Committee **deserves** to be and, should now be urgently **dusted off** and **revisited**. For it identifies a debilitating and inhibiting **symbiotic** relationship between **crime, politics and poverty**. The Public Defender gratefully adopts and endorses the **insightful** and **felicitous** observations of the Committee. The work of the National Inner City Committee and the seminal study on Urban Violence and Poverty in Jamaica remain quite instructive.

71.5 The Kerr Committee accepted the opinion of a noted social scientist that **Tivoli Gardens** was a **“large scale”** garrison. (Not a relatively “small garrison within a constituency”?) They reflect on the dominant influence of the **‘Don’**; on how **parlous** performance of **the economy** derives from the **inefficacy** of **“the education**

process” leading, ineluctably, to **low job growth** and unemployment and, on the “**close” relationship** between the **gang leader** and **member of Parliament**.

71.6 The crime/politics/poverty symbiosis and the State of Emergency, etc.

71.7 Two questions in particular arise for **judicial** determination, viz. –

- How, and if so to what extent, if at all, was the garrison phenomenon **dramatized**, was a causative factor or **impact** the Government’s **protracted** handling of the Christopher Coke **extradition request** and/or propelled the **events of May, 2010 ?** and,
- Was there a contaminating and characteristic “**close**” relationship between ‘**Dudus**’ and his member of Parliament, former **Prime Minister Golding** and if so, how did it influence matters ?.

71.8 The Public Defender is very **interested** in the answers to these questions, not least because the **symbiosis** and scenario both affect the **matrix** of his **mandate**; complicate and burden it. But beyond that and of even greater moment, the answers will determine **how** the symbiosis **may** have led to or accelerated the **death** of no fewer than **seventy-six (76) citizens**. Conversely, how its **absence** might have prevented the **cataclysm** being investigated.

72.0.0 INQUEST OR COMMISSION OF ENQUIRY ?

72.1.0 In deciding on the way ahead the relative advantage of two alternatives (an **inquest** or **commission of enquiry**) needs to be considered.

72.1.1 The Inquest

72.1.2 The Director of Public Prosecutions has indicted three **low ranking foot soldiers** for murder in connection with the **death of Mr. Clarke**. Ordinarily, the killing of the other **seventy-five (75) deceased** could be made the subject of inquests, by virtue of the provisions of the Coroners Act, 1900. Under a 2009 amendment to that Act, an Office of **Special Coroner** was created [S.5A. -(1)] and—

“5B.-(1).....shall exercise the jurisdiction and functions of the Coroner in respect of **any death occurring at any place** in Jamaica where there is reasonable cause to suspect that the death occurred as a result of the act or omission of an **agent of the State**.”

72.1.3 The expression “**agent of the State**” includes members of the JCF, JDF, the ISCF and the Rural Police (S.3).

Coroner’s juries of “not less than five” **lay persons** (usually seven) are sworn to hear evidence given on oath and “diligently to enquire **touching the death** of the person on whose body the inquest is ... held and a true verdict to give **according to the evidence**.” [S.19.-(1)]

72.1.4 S.19.—(5) of the Act provides —

“ After hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, **who the deceased was, and how, when and where the deceased came by his death**, and, if it appears to the jury that, *prima facie*, (sic) the circumstances of the death indicate that the crime of murder or manslaughter has been committed, **the persons**, if any, whom **the jury charge** with murder or manslaughter.”

72.1.5 If the Coroner’s inquisition charges a person with the offence of **murder** or **manslaughter**, the Coroner issues a warrant for the arrest or detention of that person [S.20. – (1)].

72.1.6 In the event of a Coroner neglecting or refusing to hold an inquest or where “it is necessary or desirable in the interests of justice that another inquest should be held”, a Judge of the Supreme Court may, on the application of an interested party, order that an inquest be held [S.21.– (1)].

72.1.7 The Coroner may order the production of documents and issue summonses or warrants to **compel** the attendance of witnesses who, however, enjoy protection against self-incrimination. [SS.22A.–(6); 22B.–(1)]. Written statements (including firsthand hearsay) are admissible in evidence (SS.23A. ; 23B.)

72.1.8 Thus the **purposes** of an inquest are for a jury **merely** to —

- C.** an **evaluation** (assessment) of the overall **conduct** of the State Security Forces during the **State of Emergency**, examined particularly in light of —
- (a) the ‘marching orders’/instructions/‘briefing’ **actually given**, prior to the launch of operations;
 - (b) the provisions, of the relevant —
 - i. **rules of engagement** - the JCF Policy and,
 - ii. powers conferred by the Emergency **Proclamation**;
 - (c) such evidence as there may be of State Security Forces’ **‘profiling’** of civilians, (particularly males), consciously or unconsciously —
 - i. during the **‘incursion’** or **‘siege’** or, in the assault on the **Keith Clarke** household;
 - ii. as a **causative** factor in relation to the killings and other **alleged atrocities** and/or
 - iii. by virtue of which those Forces may have retaliated against the earlier attacks on members of those Forces or police stations or practiced a **vendetta** on **residents** of Tivoli Gardens, the suspected perpetrators or their cohorts;

(d) the **“intelligence”** which inspired, as well as the circumstances which led to and/or surrounded the **killings of Mr. Keith Clarke**;

D. the **level of resistance** actually encountered by the State Security Forces during the **‘incursion’** or **‘siege’**, (whichever it was) and the assault on the **Keith Clarke** household;

E. the **precise body count/death toll** related to the State of Emergency and the attendant circumstances of **all** related killings;

F. as far as is ascertainable, the **number of known** deceased (see **Appendices 1 and 2**) who were killed by members of the State Security Forces and/or by **others** e.g., illegal **gunmen/armed combatants**;

G. the **role** played by and **assistance derived** from the over-flight of United States Department of Homeland Security surveillance aircraft (with or without the **collaboration** of the **Civil Aviation Authority**;) during the **‘incursion’** or **‘siege’** and/or the assault on the **Keith Clarke** household;

H. as regards the use of **munitions** during the Tivoli Gardens operations –

(a) the **advisability/justifiability** of that use;

(b) the precise **type(s)** deployed, in particular, the variety of mortar rounds – “incendiary” or “explosive”;

- (c) the **number** of mortar rounds discharged/and the **extent** of their use;
 - (d) the **injuries/death** caused by that use (i.e., other than by **gunshot** trauma) and,
 - (e) the **damage** or loss resulting;
- I.** the **role** in the **planning** of and, the demonstrable **oversight** of ‘**incursion**’/‘**siege**’ activities and the “**Keith Clarke operation**,” played or effectuated by the **Commissioner of Police**, the **Chief of Defence Staff (ret’d)** and **senior officers** of the JCF and the JDF;
 - J.** the **role** played by and, the **involvement** of former Prime Minister Golding and former Minister of National Security, Mr. Nelson, in **matters connected** with **I.** above;
 - K.** a **judicial** examination of —
 - (a) **how** the reluctance, failure or refusal of the JDF to **cooperate** in **investigations** by the BSI and the Public Defender, into the **conduct** of its members during the ‘**incursion**’ or ‘**siege**’, **impeded** those investigations and,
 - (b) the legal **justifiability** and/or **reasonableness** of that failure or reluctance;
 - L.** a **granular** examination of the **Who, Where, When** and **How** etc. concerning the alleged “ **discovery**”, “**recovery**” or

“finding” etc. **of illegal weapons**, by the State Security Forces –

- (a) during the ‘incursion’/‘siege’,
- (b) after cessation of hostilities as well as
- (c) the **precise number, make and calibre** of those weapons;

M. as regards the **Keith Clarke** matter in particular -

- i. the
 - (a) source
 - (b) **precise details**
 - (c) purport
 - (d) **authenticity** and
 - (e) **reliability**
 of the **“intelligence”**, so called, which led to the **assault** on his household and his **death**;
- ii. the participation of the **heads** of the State Security Forces in the **planning** and **execution** of that operation: **what** did they know ? and, **when** did they know it ? and,
- iii. **the palpable** breach of the **agreed** Firearms Protocol (the ballistics **road map**) and its consequences and,

N. the system, **oversight** and **quality** of record keeping by the KSAC relating to interments in **paupers’** graves at the May

Pen cemetery, examined in light of **obligations** imposed by the provisions of the Kingston and Saint Andrew (Cemeteries) Act, 1874 and regulations made thereunder.

Unsuitability/Inefficacy of Inquests

- 72.2.1** It follows therefore that the inquest device is **not suited** to the instant case. It is **inadequate** and lacks the necessary efficacy. In any event, it would be **highly impracticable** (and is obviously undesirable) to commit **so many** deaths (**75**) to enquiry by a Coroner already struggling to cope with **a chronic backlog** of well over **three hundred (300)** cases and growing.
- 72.2.2** Moreover it is notorious that, not by reason of inertia, coroners and the Special Coroner preside over an **inquest system** neither equipped nor noted for due expedition. In fact, that system has for many years past itself been **plagued by delay** and institutional malaise due in no small part also to the well-known **unwillingness** of citizens to **serve as jurors**.
- 72.2.3** With the greatest respect, to commit those deaths to the hands of coroners therefore would be to **condemn** and **inhume** the deaths in a veritable **sinkhole**. But worse, the resort to inquests would condemn the Government to reasonable **suspicion** of seeking to **cover up** alleged wide-scale atrocities as well as deny timely enquiry into the matters adumbrated herein.

72.3.0 **The Commission of Enquiry**

- 72.3.1 The **inquest** mechanism or **option** must therefore be contrasted with proceedings under the **Commissions of Enquiry Act, 1873**. By S.2 of that statute, the Governor-General, “whenever he shall **deem it advisable**” may lawfully appoint commissioners “to enquire into the **conduct** of any **public officers**.... or into **any matter** in which an enquiry would in (his) opinion be for **the public welfare.**” His Excellency may direct whether the enquiry shall or shall not be held in public. In relation to the appointment, constitution, and **terms of reference** of commissions of enquiry, the Governor-General acts **not of his own motion**, but upon the **advice** of the **Government**.
- 72.3.2 Commissioners must subscribe an oath or affirmation “**faithfully, fully, impartially** and to the **best of their ability**, (to) discharge the trust” reposed in them (S.5). They “have the powers of a Judge of the Supreme Court to summon witnesses and to call for the production of books, plans and documents and to examine witnesses and parties concerned **on oath**...” - (S.10)
- 72.3.4 The **efficacy** of the commission of enquiry was recently well illustrated in relation to the May, 2009 fire at the Armadale Juvenile Correctional Centre, Alexandria, Saint Ann, in which five **adolescent female wards** of the State perished. Two others died

later at hospital. That was another case in which the Public Defender **initiated** investigations and was therefore able to furnish the sole commissioner, Mr. Justice Paul Harrison (ret'd), (a former President of the Court of Appeal,) with most of the statements taken from witnesses who testified. (In that matter the Government **rightly opted** for **a commission of enquiry in preference** to a Coroner's inquest.) In a masterly report, the learned Judge made telling **findings, far-reaching** and **wide-ranging** recommendations, including **criminal prosecutions** and disciplinary action. (Disappointingly, the State is **yet to compensate** the estate of the deceased, whose death was caused by negligence, breach of statutory duty and/or criminal misconduct.)

72.3.5 Without hesitation, but with what appears to have been a proper grasp of the scope of the debacle of May, 2010, Prime Minister Golding indicated to the Public Defender that **he** would advise the setting up of a commission of enquiry if so *recommended* by the Public Defender. In a covering letter to Mr. Golding dated **May 28, 2010, (Appendix 29)** [which accompanied his copy of another **(Appendix 5)** sent the day before to Commissioner Ellington and Major General Saunders,] the Public Defender **did just that**. He *recommended* that the terms of reference encompass "the circumstances leading up to the declaration of the State of

Emergency as well as the **discharge** by all **relevant authorities** and **security personnel** of their **statutory** or other **legal duties**".

The Public Defender respectfully **repeats** and has strengthened that *recommendation* by the several reasons given herein.

72.4.0 The 'Manatt' Commission

72.4.1 By a Proclamation published in the **Jamaica Gazette** of Tuesday, October 19, 2010, (**Appendix 32**) the Governor-General, issued a Commission under the 1873 Act, with the following terms of reference:

"1. To enquire into and report on the issues relating to the **extradition request** for Christopher Coke by the Government of the United States of America, the **manner** and **procedure** in which the said extradition request was handled by the Government of Jamaica, the circumstances in which the services of the law firm Manatt, Phelps and Phillips were engaged and its role in relation to the said extradition request and the role and conduct of various public officials and private persons and organizations in relation to any or all of the aforesaid matters more particularly set out in the terms of reference hereunder:

- (a) The **issues** relating to the **extradition request** for Christopher Coke by the Government of the United States of America;
- (b) The **manner** and **procedure** in which the said **extradition request** was handled by the Government of Jamaica and the **role** and **conduct** of the various **public officials** who handled the **extradition request**;

- (c) The circumstances in which the services of the law firm Manatt, Phelps and Phillips were engaged in relation to any or all of the matters involved, by whom were they engaged and on whose behalf they were authorized to act;
- (d) Whether there was any **misconduct** on the part of any person in **any** of **these matters** and, if so, to make recommendations as the Commission sees fit for the referral of such persons to the relevant authority or disciplinary body for appropriate action.”

72.4.2 After due consideration, the Chairman of the Commission, Mr. Emil George, Q.C. and the Public Defender, concurred in the opinion that those terms of reference did **not encompass** the conduct of the **State Security Forces during the ‘incursion’, nor** in relation to the circumstances surrounding **the killing of Mr. Clarke**. (True copies of relevant correspondence are attached hereto as **Appendices 33 – 36**) The report, findings, and recommendations of that Commission are matters of public record. They require no further reference or comment.

72.4.3 Quite surprisingly however, Mr. Golding’s successor as Prime Minister, Mr. Andrew Holness, (now leader of the Opposition,) **equivocated** or was **non-committal** when the issue was put to him during a television interview of **December, 2011**. Plainly alluding to the proceedings before the Manatt tribunal, Mr. Holness was skeptical in referring to what he said was the tendency (of Counsel) to “star” at such hearings; for him, too much

time had intervened. (Cf. the **Bloody Sunday** Saville enquiry, pp. - *post.*) He even felt able to suggest that perhaps the work of a commission were best relegated to **investigative journalism**. With respect, that is or would be a **flippant** or **feckless** response to matters of great moment and historical importance.

72.4.4 But in the result, there is a troubling **divide** between two former Prime Ministers regarding the appropriate method of **getting to the bottom** of what actually transpired, during the ‘incursion’ or ‘siege’; **how** and **why**.

72.4.5 A distressing development is the sideshow starring none other than Mr. Golding’s own cynical **successor** as **Member of Parliament** for West Kingston, Mr. Desmond McKenzie. At all material times he was the **Mayor** of Kingston, **Chairman** of the **KSAC** and the duly elected **Councillor** of the Tivoli ‘division’. Like **“Dudus”** he grew up in Tivoli Gardens but has long since moved out. His Waterworks, Manor Park, Saint Andrew residence was one of the many premises raided by the Security Forces (without warrant) during the State of Emergency. [Taking obvious pride in the experience, he has more than once publicly declared that he and others were flogged by Mr. Seaga (their affectionate but stern “Uncle Eddie”) during the late teens of his “formative” years.]

72.4.6 Mr. McKenzie weighed in at **the height** of the furore. (see the Apologia, p.1). On Friday, February 1, 2013 he told the

Gleaner/Power 106 News (later **personally** confirmed by him in a telephone exchange with the Public Defender) that –

- A.** He was “**convinced** from the **onset** that the **(Public Defender’s)** investigation **wouldn’t bear fruit** based on the **manner** in which **information was gathered** by the Public Defender’s office.”

[What is it about that ‘**manner**’ that irks him ?. In the many months since commencement of the Public Defender’s investigations, he did not (even remotely) indicate any dissatisfaction over it. On the contrary, he was instrumental in facilitating arrangements for **identification** of the dead and the **detailed** recording of complaints from aggrieved persons (the overwhelming majority of them his constituents) at the Tivoli Gardens community centre. Mercifully though, he has not, or not yet, joined those demanding the Public Defender’s “resignation”.]

- B.** He “notes that there are still **many** residents who have **not yet** been interviewed by investigators from Witter’s

(sic) office and a **lot of details** that have not yet been **uncovered.**”

(Who are these **“residents”** ?. Why did they not attend at the Tivoli Gardens and City Mission Church Public Defender’s **outposts** in West Kingston, quickly established to facilitate the recording of complaints ?. Not even after two weeks’ notice of closure of the outposts scheduled for October 31, 2010 ?. Or attend at the Public Defender’s office in all the time since ?. Has Mr. McKenzie, as M.P., advised or encouraged **any of them** to give statements ?. **Taken** or **encouraged** the taking of any steps to revive any **dormant** complaint ?. Not even the **itemized** claim made in respect of the Tivoli Gardens marching band and drill team ?. **Why not** ?. But more importantly, just **what** are the **“details” known** to him which “have **not yet** been **uncovered**” ?. He has not even attempted to communicate any such to the Public Defender. He certainly has a **solemn duty** to do so: **the sooner the**

better. For evidently, he **knows** more than he is letting on.

- C.** He “hopes that (this **Interim Report**), when submitted.... will bring **closure** to residents of West Kingston”.

(Whatever he conceives “**closure**” to be, can it come **before**, or **without**, a Commission of Enquiry ?. He has a **duty** to explain how it possibly could.)

- D.** A “commission of enquiry would only **serve** to open **old** wounds and act as **a reminder** of the **sorrow** that residents experienced **almost three years ago.**”

(Really ?. Those “wounds” are comparatively **quite fresh**, not at all “**old.**” They **directly** affected an estimated **thirteen per cent (13%)** of the Jamaican population and in some respects the **entire** body politic. They will for **years on end.** In fact, their infliction should **never be forgotten.** Moreover, the M.P. needs to be made aware that his constituents’ “sorrow” is **enduring.**)

- E.** He is urging the “**relevant bodies**” to move to “**compensate** those who **suffered losses**” during the ‘incursion’.

(Upon what **rational** or **legal** basis could any of the “**relevant bodies**” to which he alludes “**compensate**” any person aggrieved, **at this time** ?. Without the **judgement of a court** of competent jurisdiction ?. Without a **persuasive recommendation** made by the Public Defender ?. Or should compensation be **dished out** as some form of **largesse** ?. And how would the **recipients** be identified ?. On **his** or **whose** nomination ?.)

- F.** Finally, he calls “for the **Public Defender** to be **held accountable** for his **failure** to submit (this) Report and for **deceiving** the public, in particular, the **residents** of **Tivoli Gardens**.”

[The Public Defender **is accountable** for the delay, has apologized for and offered an explanation for it. Thus the “**failure**” has been mitigated. But what of the utterly **wild** and **offensive** allegation of “**deceiving** the public, in **particular**, the **residents** of Tivoli

Gardens”, his **constituents** ?. That suggestion is simply breathtaking. So much so that the Public Defender asked Mr. McKenzie to explain the highly mischievous and inflammatory assertion. Avoiding **the issue** raised in that question **altogether**, he referred to the time last year when he told the Public Defender of some intention to pose certain relevant questions to **“the Minister.”** For the record, the Public Defender then advised him that his Office did not fall under **the portfolio** of any Minister of Government but was a Commission of Parliament – a fact of which he, a legislator, was surprisingly quite oblivious. (His suggestion that the Public Defender **“begged”** him not to put the “questions” to “the Minister” is both **mischievous** and, **mendacious**. But made the wiser, he appears to have resiled from his misconceived intention.) Now comes the M.P.’s artless, mainly ignorant and most unworthy contribution to the discourse. In particular, his attempt to shoot down the idea or *recommendation* of a judicial enquiry

is not at all edifying. Rather it embarrasses the “**residents**” of Tivoli Gardens and **himself** as well.]

72.5.0 All or any naysay notwithstanding, the Public Defender respectfully submits that, neither “**budgetary constraints**”, “**tight fiscal spaces**”, nor **the lapse of time** should prevent or impede **public judicial examination** of the matters adumbrated earlier (pp.), (in particular, the **conduct** of the State Security Forces and the **resistance** from illegal gunmen or criminal elements which they allegedly encountered,) during the events of **May, 2010**.

(**Cf.** the United Kingdom Government’s handling of and the guidance to be derived from the **Bloody Sunday Massacre**, in Northern Ireland, January, 1972, considered later herein (pp. **216 – 24** post.)

72.5.1 The appointment of a commission of enquiry must not be fettered by parsimony. For the issue is not whether the country **can afford** such an enquiry but rather, whether it **can afford not to** have one.

72.5.2 As regards the **procedural** obligation to appoint a commission of enquiry, some assistance may be derived from R (*on the application of Gentle*) & Anr. (op. cit. p. **116, ante**) in which it was **HELD**:

Article 2 of the European Convention on Human Rights provided, in relevant part, that ‘**(e)veryone’s** right to life shall be protected by law’ ; as a result of interpretation given to Art. 2 by the European Court of

Human Rights, the **substantive** obligation not to take life **without justification** was **complemented** by obligations **requiring** the State also to establish a framework of **laws, precautions, procedures** and **means of enforcement** which will, to the **greatest** extent reasonably possible, **protect** life as well as a **procedural** obligation to initiate an *effective public investigation* by an independent official body when it appears that a substantive obligation under Art. 2 may have been violated. (—); the **procedural** obligation under Art. 2 was **parasitic** upon the existence of the **substantive** right...”

72.5.3 In the event therefore, it is the Most Honourable Mrs. Portia Simpson Miller’s call. Having regard to the ambit of the commission of enquiry here *recommended*, doing the right thing may require some courage. But there is wise counsel coming from the Right Excellent Marcus Garvey – “Men who are in **earnest**, are not afraid of **consequences**.” The “right thing” may be the harbinger of “truth and reconciliation”. Proceedings before such a commission therefore may be as close to that inescapable pass as we shall likely get, in this generation. The opportunity or occasion is not to be missed.

72.6.1 Judge Patrick Robinson’s Contribution

The eminent jurist, Mr. Patrick Robinson, is a Jamaican member and sometimes President of the International Criminal Tribunal for the former Yugoslavia. He makes a strong case for **an enquiry** into the killings which occurred during the ‘incursion’ into Tivoli Gardens and elsewhere and the circumstances which preceded it.

[The approach helpfully suggested by the learned Judge throws into relief one hare-brained idea constantly bandied about by a censorious charlatan and meddlesome sea lawyer. He is associated with an irritant anonymous faction calling itself the 'Tivoli Committee'. He suggests that the whole sorry business should long ago have been laid before the International Criminal Court, ('the ICC',) by the Public Defender.

That idea, for which there appears to be some support, may be quickly put to rest. **The ICC has no jurisdiction in the matter.** Jamaica has **not** acceded to the Rome Statute establishing the Court and is **not** a '**State Party**'; nor has it otherwise accepted the jurisdiction of the Court. And even if it were otherwise, the Statute's dominant '**Principle of Complementarity**' would require that the **domestic** legal system first deals with the "situation". (Although plagued by notorious delays, that system is at work, and is capable of handling matters, which, should be accelerated by the **commission of enquiry** process. That process would be triggered by the **completion of investigations**: practically, faithful adherence to the ballistics **road map**.) Lastly, the United Nations Security Council has not referred the 'Tivoli' events to the Prosecutor of the Court and in the

circumstances, appears unlikely to do so.]

72.6.2 In an article published contemporaneously, Judge Robinson argued (in part) that—

“To find deaths **comparable in numbers** to those in Tivoli Gardens, Jamaicans would have to revisit two of the three events which provided **the furnace** in which **our independence** was **forged**. In Sam Sharpe's Christmas Rebellion of 1831 over 500 persons were killed; in **the 1865 Morant Bay Rebellion** some 400 persons were killed. In the most recent of these events, the 1938 Labour Strikes, some 15 persons were reported as killed. These deaths resulted from action taken by the **colonial** government to protect what it considered to be Jamaica's **national interests**, which of course meant **the interests** of **Britain**. After each of these crucially significant events **an inquiry** was conducted. No doubt, those inquiries were prompted more by concern for **British** property and **security interests** than for the loss of **black** Jamaican lives...

...The simple, plain truth is that in no country with a **Constitution** that **entrenches** the **right to life** can 70 people be **killed** in **peacetime** in a single incident, whether by the **security forces** or by **private persons**, and **national life** and **affairs** continue as though **nothing unusual** has taken place.

Independence means nothing if we cannot do **better** than the **British** and **inquire** into not only **the threat** to **national security** to which the security forces responded, but also the **terrible loss** of **human lives**. Fail to inquire and we fail those who died in 1831, 1865 and 1938 to secure the independence we now have, and we also **fail ourselves**.

The three historic events were **critical markers** on our road to independence: the **Tivoli Gardens incident** must be **cathartic** and

catalytic in **galvanizing** us into **strengthening** our **young democracy**.

Two things **must happen** in relation to the security forces' operation in Tivoli Gardens.

Apart from the legal obligation, there is, more importantly, a **moral duty** to investigate the lawfulness of the **death of every single person** that is **known** to the authorities. If the traditional methods of doing this are not adequate – my information is that there is a backlog of cases for Coroner's inquests – **special** systems should be devised...

Secondly, no less pressing is the need to **explain** the operation **as a whole**. This may require an inquiry that would seek to explain the **threat** to **national security** posed by the presence of **criminals** and **thugs** in Tivoli Gardens and the **force** needed to counter it. But the inquiry should go **beyond** that dimension to examine the **socio-economic foundations** of the Tivoli Gardens phenomenon which, though extreme, is not unique in Jamaica. For that purpose the inquiry should hear from witnesses who can address that **social condition** and include in its membership **social scientists**, such as sociologists or criminologists.”

72.6.3 The Public Defender gratefully **adopts** and **endorses** this postulation in its **entirety**.

72.6.4 Handling of the “Morant Bay Rebellion” and “Bloody Sunday Massacre” Compared

72.6.5 A consideration of the British **colonial** response to the 1865 Rebellion is therefore appropriate here. Some guidance may also be derived from the Westminster handling of the **“Bloody Sunday**

comparatively primitive. Accounts of the upheaval left the sovereign Queen Victoria quite shaken. Within weeks she appointed a Royal Commission to enquire into the –

- a) origin
- b) nature and,
- c) circumstances of the “**grievous disturbances**” and to “collect evidence” regarding
 - i) the measures and **means adopted** to **suppress** “the disturbances” as well as
 - ii) the **conduct of those concerned** in “the disturbances” and **their suppression** and,
 - iii) to express any opinions thought fit.

72.7.2 The Commission was comprised of two Recorders (Judges presiding over **superior courts** of England) and, the colonial Governor of the island of Malta.

72.7.3 The outbreak of those “disturbances” had resulted in the Governor of Jamaica, [acting under statutory powers, (a local Act of 9 Vict. Cap. 35)] summoning a thirty-man **Council of War** upon whose advice he declared **martial law**. The declaration covered the entire County of Surrey, excluding Kingston. **Ordinary laws** were **suspended**. Hundreds of trials of accused persons typified by hasty courts martial were held. Many of them were “drumhead” , i.e. before **rough** and **ready** tribunals. The trials took place at disparate locations – Up Park Camp, Kingston; Spanish Town,

Morant Bay, Port Antonio, Manchioneal, Monklands and Falmouth.

72.7.4 In its report (following more than four months of “**diligent enquiry**”,) the Commissioners focused particular attention upon the **loss of life** (by legalized execution or otherwise) occasioned by the martial law measures. They put **the number** executed at **three hundred and fifty-four (354)**, the majority being in the Morant Bay and Plantain Garden River districts. But in relation to the **total number** who **perished**, the Commissioners declared:

“We believe that **the return** given furnishes **as accurate an account** ... as the circumstances of the event admit of, **without** affecting a **precision** which it is **impossible** to command.”

72.7.5 Nevertheless, in reviewing “**the means** used for the suppression of the **insurrection**” the Commissioners determined not to shut their eyes

“... to the fact that among the **sufferers** during the existence of martial law there were many who were **neither directly** or (sic) **indirectly parties** to the **disturbances** which it was the object of those placed in authority to suppress” i.e., **innocent bystanders**.

72.7.6 They continued:

“We fear that this to a certain extent **must ever be the case** when the **ordinary laws** framed for the suppression of wrong-doing and the protection of the well-doer, **are** for a time **suspended**. The circumstances which are supposed to render **necessary** their suspension are **almost sure** to be such as to **excite** both **fear** and **passion**; and

some **injustice**, and we fear some **cruelities** will be **certain** at such times to be **perpetrated**; but we think that much which is now lamented might have been avoided if **clear** and **precise** instructions had been given for the **regulation** of the **conduct** of **those engaged** in the **suppression**, and every officer had been made to understand that he would be held responsible for the **slightest departure** from those instructions. It does not seem reasonable to send officers upon a very difficult, and perfectly novel, service without any instructions, and to **leave** everything to **their judgment**. But as **under any circumstances**, however carefully instructions may be prepared, and however **implicitly** obeyed, **the evils** of **martial law** must be **very great**,..." (Cf. Emergency powers.)

72.7.7 The Commissioners also remarked upon

“the tone of **levity** which is to be found in the ... **language** of some of the officers while **engaged** in **serious** and **responsible duties**.”

72.7.8 Much of what those Commissioners **said** or **found** seems to **have their echo** or was **replicated** in **the events of May, 2010**. The Commissioners’ salutary comments and observations have a **clarion resonance**, providing **helpful criteria** and **bases** for comparatively **more searching** judicial enquiry today.

72.7.9 Even so, the Commissioners glossed over wide-scale wrongdoing, appearing to treat it cursorily; as the **inevitable outcome** of a martial law regime; viewing things through the hazy lens of a long gone political era of empire, since replaced by the anxious aspirations of an independent people, released from the shackles of chattel slavery.

72.8.1 The 1865 Commissioners were invested with powers to enforce the attendance of witnesses and to examine them upon oath. They gave a “patient hearing” to -

“...the **negroes** (who) were for the most part **uneducated peasants**, speaking in accents strange to the ear, often in phraseology of their own...”

72.8.2 They observed -

“If we have erred on the side of a too great facility in **giving audience** to all persons, of **whatever class**....we have yet the satisfaction of feeling that the Inquiry had been both **thorough** in fact, and thorough likewise in the **estimation** of the **persons most concerned** (in pursuit of) the object which throughout we have regarded as paramount, - that of the **fullness, thoroughness** and **impartiality** of the inquiry.”

72.8.3 Despite their endeavours however, the Commissioners were only able to -

“...offer as near **an approximation** to the number of **lives lost** and **houses destroyed** in the course of the suppression, as (they believed) the nature of the case” admitted.

72.8.4 These excerpts of the report disclose an approach to their forensic duties by a nineteenth century colonial Royal Commission upon which, Judge Robinson has opined (and the Public Defender agrees) independent twenty-first century Jamaica **should improve**. In particular -

A. no mere **approximation** of the number of West Kingston

dead can possibly suffice: **the precise body count** must be settled;

- B.** the quite serious complaints of atrocities and abuse made against the State Security Forces should be considered in light of the provisions of
- i. Cap. 3 of the Constitution (since *repealed*),
 - ii. the JCF Human Rights And Police Use Of Force And Firearms Policy (the JCF Policy);
 - iii. the twentieth century United Nations International Convention on Civil and Political Rights (the ICCPR), to which Jamaica has acceded and,
 - iv. the Emergency powers.
- C.** the **Who, When;** the **Where, What** and the **How** concerning allegations of the “**discovery**”, “**finding**” etc. of **firearms**, significantly long **after** the alleged combatants had been **routed** and the **suggested hostilities** had **ceased** or, **in response** to **public disquiet** over **the ratio** of **deceased** to **firearms “recovered”**, should be fully explored under sworn testimony;
- D.** the supposed “**intelligence**” which propelled the planning and execution of the assault on Mr. Keith Clarke’s house should be fully explored and,

E. “the **socio-economic foundations** of the Tivoli Gardens phenomenon” referred to by Judge Robinson and so ably already considered by the *National Committee on Political Tribalism* should be examined **in context**, without replicating the labours of that *Committee*, but digging down into the **origins** of the proliferation of illegal firearm possession in Jamaica and, to determine the connection, if any, between **partisan** politics and those **origins**.

72.8.5 In the meantime however, this much is already clear: there is a striking **coincidence** in the nature of allegations or of fact regarding **the conduct** of the **colonial militia** and maroons, following the declaration of martial law in 1865 on the one hand and, that of **the State Security Forces** during the period of public emergency of **May 2010**, on the other. The conduct of the Security Forces during the latter requires no less diligent inquiry but **more forthright, fearless** and **discriminating evaluation** and treatment of atrocities and abuse, found to have been perpetrated during the State of Emergency.

72.8.6 A commission of enquiry should therefore approach its work mindful of an **over-riding obligation** to help ensure far more conscientious future regard for the rules of engagement, (the JCF Policy) than appears to have been exhibited during the ‘incursion’ or ‘siege’.

72.9.0**The Bloody Sunday Massacre**

72.9.1 On Sunday afternoon, January 30, 1972, British army paratroopers shot **fourteen** (14) peaceful demonstrators in Londonderry, Northern Ireland. Thirteen (13) of them died on the spot. The other succumbed to his gunshot injuries whilst hospitalized. Three days before, **two (2)** members of the Royal Ulster Constabulary had been shot and killed by the rebel Irish Republican Army in Londonderry. They were the first police officers killed in that city during what was known as ‘The Troubles’ and which up to then spanned more than four years. One-third of the city had become a **“no-go” area** for both the Constabulary and the British Army, which had been deployed there on “counter-terrorism” duties from 1969. A British Conservative Government appointed Lord Chief Justice Widgery to investigate the killings, which came to be dubbed the **“Bloody Sunday Massacre”**.

72.9.2 Within three months, Lord Widgery concluded —

- “1. There would have been no deaths in Londonderry on 30 January if those who organized the illegal march had not thereby **created a highly dangerous situation** in which **a clash** between **demonstrators** and the **security forces** was **almost inevitable**.
2. The decision to contain the march within (two districts of the city) had been opposed by the Chief Superintendent of Police in Londonderry but was fully justified by events and was successfully carried out.

3. If the Army had persisted in its “low key” attitude and had not launched a **large scale operation to arrest hooligans** the day might have passed off without serious incident.
4. The **intention** of the **senior Army officers** to use (a certain paratroop unit) as an **arrest** force and not for other **offensive** purposes **was sincere**.
5. An **arrest operation** carried out in battalion strength in circumstances in which the **troops** were **likely** to **come under fire** involved **hazard to civilians** in the area which (a Brigade Commander) may have **under-estimated**.
6. The order to launch the arrest operation was given by (the Brigade Commander.) The tactical details were properly left to (an elite unit commander) who did not **exceed** his orders. In view of the **experience** of the unit in **operations of this kind** it was not necessary for (the unit commander) to give orders in **greater detail** than he did.
7. When the **vehicles** and **soldiers** appeared in Rossville Street they **came under fire**. Arrests were made; but in a very short time the arrest operation took **second place** and **the soldiers** turned to **engage their assailants**. There is no reason to suppose that the soldiers would have opened fire if they had not been **fired upon first**.
8. Soldiers who **identified** armed gunmen **fired upon them in accordance with** the **standing orders** in the Yellow Card (the rules of engagement.) **Each** soldier was **his own judge** of whether he had **identified a gunman**. Their training made them **aggressive** and **quick in decision** and some showed more **restraint** in **opening fire** than others. At **one end of the scale**, some soldiers showed a

high degree of responsibility; at the other firing **bordered on the reckless**. These distinctions reflect **differences** in the **character and temperament** of the soldiers concerned.

9. The standing orders were satisfactory. Any further **restrictions** on opening fire would have inhibited (soldiers) from taking **proper steps for (their) own safety** and that of (their) comrades and **unduly hamper** the **engagement** of **gunmen**.
10. None of the **deceased** or **wounded** was proved to have been **shot whilst handling a firearm or bomb**. Some (were) wholly acquitted of complicity in such action; but there (was) a **strong suspicion that some others had been firing weapons or handling bombs** in the course of the afternoon and that yet **others had been closely supporting them**.
11. There was **no general breakdown** in discipline. For the most part the **soldiers acted as they did** because they **thought** their orders **required** it. **No order and no training** can **ensure** that **a soldier will always act wisely**, as well as bravely and with initiative. The individual soldier **ought not** to have to bear **the burden of deciding** whether to **open fire** in conditions prevailing in Northern Ireland, however, this is often inescapable.”

72.9.3

Complaint of a Widgery whitewash; Appointment of a fresh judicial enquiry

- 72.9.4** The ink was barely dry on the report of the Lord Chief Justice before it came to be denounced as a **whitewash**. His conclusions provoked **agitation** across national borders which **dragged on for years** - through the streets, in the news media, the Westminster Parliament and the Courts, up to 1998. In that year, finally, a

British Labour Party Government appointed a Tribunal to **re-examine** the matter, by way of an **independent judicial enquiry**. In announcing appointment of the Tribunal the British Prime Minister said —

“ The terms and powers of any new inquiry would need to be such as to **inspire widespread public confidence**; that it would have access to all the relevant official material and otherwise **enjoy full official support and cooperation**; that it would operate independently; that it would **investigate thoroughly and comprehensively**, and would genuinely and impartially seek to establish what happened on Bloody Sunday; **why it happened** and those who must bear **the responsibility for it.**”

72.9.5 The Tribunal comprised Lord Saville, (a Law Lord) Chairman; a retired Chief Justice of the Province of Ontario, Canada and a retired Judge of the Court of Appeal of Australia, its highest Court. At the outset of those hearings Lord Saville vowed to fully investigate 'Bloody Sunday' and events leading up to it. That the enquiry was **named** the '**Bloody Sunday Inquiry**' was viewed as being most significant: a symbolic move to **detach** the **new investigation** from the discredited Widgery proceedings. After years spent taking evidence and deliberating, the Tribunal reported in **2005**.

72.9.6 Findings of two enquiries contrasted

72.9.7 Whilst **Lord Widgery's** report **largely exonerated** the British

paratroopers, the **Saville Tribunal condemned the soldiers** and **exonerated** their **victims** who, they found were **not** posing a threat of causing **death** or **serious injury**. The Saville report **diverged significantly** from its forerunner as illustrated by the following:

On the use of the Paratroopers -

Widgery:

“ It was suggested that (the elite unit) had been specifically brought to Londonderry because they were known to be the **roughest** and **toughest** unit in Northern Ireland and it was intended to use them in one of two ways: either to **flush out** any **IRA gunmen** ... and **destroy them** by **superior training** and **firepower**; or to send a punitive force ... to give the residents a **rough handling** and **discourage them** from making or supporting **further attacks on the troops** ... (but) there (was) **not a shred of evidence** to support these suggestions.”

Saville:

“ [Major General Robert Ford, then Commander of Land Forces in Northern Ireland] referred in particular to the ‘Derry Young Hooligans’ as a factor in the continued destruction of the city, and expressed the view that the **army** was ‘**virtually incapable**’ of dealing with

them. He also expressed the view that he was coming to the conclusion that the **minimum** force required to deal with the ‘Derry Young Hooligans’ was, after clear warnings, **to shoot selected ringleaders.**” (C/f the JCF and criminals said to be roaming about the Corporate Area or **gunmen** alleged to have (been) **assembled** in **West Kingston/Tivoli Gardens**, in May, 2010.)

On discipline -

Widgery:

“ In the events which took place on 30 January the soldiers were **entitled** to **regard themselves** as **acting individually** and thus **entitled to fire** under the terms of Rule 13 **without waiting for orders** ... the (soldiers’) **training** certainly **required** (them) to **act individually** in such circumstances and **no breach of discipline** was thereby involved.”

Saville:

“ In this belief soldiers reacted by **losing their self-control** and firing themselves, **forgetting** or **ignoring their instructions** and **training** and **failing** to satisfy themselves that they had identified targets posing a **threat of causing death** or **serious injury** . . . our **overall conclusion** is that

there was a serious and **widespread loss of fire discipline** among the soldiers of Support Company.”

On who shot first -

Widgery:

“ To those who seek to apportion responsibility for the events of 30 January the question “who fired first?” is vital. I am **entirely satisfied** that the **first firing was directed at the soldiers.**”

Saville:

“ Despite the **contrary evidence given by soldiers**, we have concluded that **none of them fired in response to attacks** or threatened attacks by nail or petrol bombers. No one threw or threatened to throw a nail or petrol bomb at the soldiers on **Bloody Sunday.**”

On false accounts -

Widgery:

“ Those accustomed to listening to witnesses could not fail to be **impressed** by the **demeanour** of the soldiers of (the unit.) They gave their evidence with **confidence** and **without hesitation** or **prevarication** and withstood a rigorous cross-examination without contradicting themselves or each other. With one or two exceptions **I accept**

that they were telling the truth as they remembered it.”

Saville:

“ In the course of the report we have considered in detail **the accounts of the soldiers** whose firing caused the casualties, in the light of **much other evidence**. We have concluded, for the reasons we give, that apart from (one paratroop private) **many of these soldiers** have **knowingly** put forward **false accounts** in order to seek to **justify** their firing. ”

On the order to arrest -

Widgery:

“ It is understandable that these circumstances have given rise to **suspicion** that the (unit commander, Colonel Wilford) **exceeded** his orders, but **I do not accept this conclusion** in the face of the **sworn evidence** of the **three officers** concerned.”

Saville:

“ (The unit commander) either **deliberately disobeyed** (the Brigade Commander’s) order or failed for no good reason to appreciate the **clear limits** on what he had been **authorized to do**. He was **disturbed** by the **delays** in responding to his request to mount **an arrest operation** and had concluded that, by reason of the delay, the only way to effect a

significant number of arrests was to deploy
Support Company in vehicles..... ”

72.9.8

Re a judicial enquiry and the “lapse of time”

[Observe: the comparative plenitude of its resources and acumen notwithstanding, it took the Great British establishment all of **thirty-three (33) years** to **get to the bottom** of what **actually transpired** on Bloody Sunday. The Saville enquiry was perhaps the **longest lasting** and **most expensive** of its kind in **British** history. In fact, the tribunal’s report was not released up until 2010 — nearly **thirty-eight (38) years** after the event. No one imagines that Jamaica should mirror such indolence. But that **delay** should inform and sharpen the **misguided perspective** of those who contend or may, that “**too much time has elapsed**” to allow any meaningful enquiry into the events of May, 2010. For as Judge Robinson argues, **Jamaica** must “**do better than the British.**” Besides, the recall of witnesses, when details are still fresh in the mind, greatly minimizes the **danger** of **memory fading** over time. Witnesses only need to **refresh** themselves from narratives **contemporaneously** recorded, (**as in the instant case**) in order to deliver admissible, **credible** and **probative** oral evidence. The law affords quite **ample** means of testing the

credibility of witnesses, the veracity of their accounts and of **coping** with **memory lapse**. The fear of fading memories diminishing the utility of a judicial enquiry therefore, **does not** have much, if **any** merit.]

72.10.0 British Government's acceptance of responsibility; apology

72.10.1 Prior to publication of the Saville enquiry report (in ten volumes) the British Prime Minister told the House of Commons —

“. . . there is no point in trying to soften or equivocate what is in this report. It is clear from the Tribunal's **authoritative** conclusions that the events of Bloody Sunday were **in no way justified**. I know some people wonder whether **nearly forty years** on from an event, a Prime Minister needs to issue an **apology**. For someone of my generation, this is a period we feel we have learned about rather than lived through. But **what happened should never, ever have happened**. The families of those who died should not have had to live with the pain and hurt of that day – and a lifetime of loss. Some members of our Armed Forces acted wrongly. **The Government is ultimately responsible for the conduct of the Armed Forces**. And for that, on behalf of the Government – and indeed our country – I am **deeply** sorry.”

72.10.2 The Prime Minister himself referred to other atrocities declaring—

“ What happened on Bloody Sunday was both **unjustified** and **unjustifiable**. It was **wrong**. Lord Saville concludes that the soldiers of Support Company who went into Bogside ‘did so as a result of an order . . . which should not have been given by their

commander on balance **the first shot** in the vicinity of the march was fired by the British Army. . .'; that **'none of the casualties shot** by soldiers of Support Company **was armed with a firearm'**... that 'there was some firing by republican paramilitaries...but **...none of this firing** provided any **justification** for the shooting of **civilian casualties'** ...and that 'in no case was any warning given before soldiers opened fire.' He also finds that Support Company 'reacted by **losing their self-control**... forgetting or **ignoring** their instructions and training' with 'a serious and **widespread** loss of fire discipline'. What's more – Lord Saville says that some of those killed or injured were clearly **fleeing** or **going to the assistance** of **others** who were dying. The Report refers to one person who was shot 'while **crawling...away** from the soldiers'... another was shot, in all probability, 'when he was **lying mortally wounded** on the ground'... and a father was 'hit and injured by Army gunfire after he had gone to ... **tend his son.**'

For those looking for statements of innocence, Saville says:

The **immediate responsibility** for the **deaths** and injuries on Bloody Sunday **lies with** those **members** of Support Company whose **unjustifiable firing** was **the cause of** those **deaths** and **injuries'**...and – crucially – that **'none** of the casualties **was posing a threat** of causing death or serious injury or indeed was doing anything else that could **on any view justify** their shooting'..."

72.10.3 From as early as 1974 (albeit without formally accepting liability) the British Government **paid over monies** by way of **amends** to

State Security Forces.

72.11.4 Training makes soldiers **aggressive**, the world over. However skeptically the conclusions of Lord Widgery may be viewed, it must be accepted that “(no) order and no training can **ensure** that **a soldier** will **always** act wisely, as well as **bravely** and with **initiative**.” The same is true of **frontline** Jamaican policemen who, have long been conditioned and hardened by the rigours of **confrontation** with callous **gunmen**. The quite **smug** attitude or position of the JDF that its members **did no wrong** during the ‘incursion’ is therefore also **manifestly** untenable.

72.11.5 It therefore needs to be determined and, with relative certitude, **which** of the **seventy-six (76) civilian deceased** or the many wounded, **if any**, were **shot** whilst **handling** a **firearm** or other **weaponry**: so too the **level** of **armed resistance** actually encountered by the Security Forces. What justification was there for **carnage** on such a comparatively massive scale but the belated “**discovery**” of such relatively few firearms

72.11.6 The inquiry must **be fair** and, **be seen to be fair** both to and, in “the estimation of the **persons most concerned**” in the execution of the **emergency powers** which may have caused the death of so many during the State of Emergency (i.e., the State Security Forces) as well as in the opinion of the dispassionate observer. The actual **operational** instructions —

- i. given to JDF foot soldiers and JCF rank and file and,
- ii. their “**departure**”, if any, from those instructions must be considered in light of **available evidence** and the prevailing **rules of engagement**.

72.11.7 Of no less importance is the necessity of ensuring that:

- i. the constitution, “terms and powers of any (judicial) inquiry (are) such as to inspire **widespread public confidence**”;
- ii. that commissioners “have access to all the **relevant official material**”;
- iii. that they enjoy “**full official support and cooperation**” and no less from former Prime Minister Golding, former Minister Nelson and the **heads** of the State Security Forces, **serving** or **retired**;
- iv. that their **independence, fearlessness** and **impartiality** be assured;
- v. that the enquiry be **thorough** and **comprehensive** and, that it
- vi. “establish **what happened** (during the ‘incursion’ and the assault on the Clarke household,) **why** and **how what happened** (did) and, those who must **bear responsibility**,” according to law and the Constitution.

73.0**LIST OF PRINCIPAL RECOMMENDATIONS**

1. That the Government cause the Forensic Science Laboratory to be adequately equipped and staffed to facilitate completion of outstanding ballistics work in accordance with the agreed Protocol.
2. That a thoroughgoing Commission of Enquiry be appointed to conduct a judicial enquiry into the activities of the State Security Forces and illegal gunmen during the State of Emergency, 2010.
3. That the Public Defender (Interim) Act, 2000, S.13(2)(b)(ii) be altered or amended expressly to exclude investigations related to allegations of infringement of any constitutionally protected right or freedom or, any criminal action.
4. That the Kingston and Saint Andrew Corporation takes immediate steps to ensure due and sustained compliance with the provisions of the Kingston and Saint Andrew (Cemeteries) Act, 1874 and Rules promulgated thereunder, concerning interments at the May Pen Cemetery.
5. That the Government initiates such a study as is suggested by the Agency for Inner-City Renewal (AIR) and the Institute for Social Entrepreneurship & Equity (I-SEE) as precursor to designing an entrepreneurship model to drive economic and social development of Tivoli Gardens/West Kingston.

April 29, 2013

EPILOGUE

This **Interim Report** is necessarily short on detail in some regards. Understandably, it may have posed more questions than it has provided answers. Hopefully, however, it will have focused attention on the big picture: not minutiae. If nothing else, it draws attention to the high **duty** of the **Government** in what might be a seminal year in Jamaican history: the Jubilee of political independence. The year 2013 also marks the one-hundred-and-seventy-fifth anniversary of “emancipation” from chattel slavery.

This is therefore an auspicious juncture in national life – a time for both retrospection and forethought. As a troubled nation yearns for social stability, even as it carries on an unequal struggle for economic independence; for social peace and stability, this much is clear: there is need for a bold and **seismic shift** in the mode of tackling the intractable problems of **crime, politics** and **poverty**. It is time to put **Love** to work.

The events of May, 2010 are, of course, no mere **seven-day wonder**, best soon forgotten. On the contrary, they herald an **epoch**. For they bring a tide in Jamaica’s affairs which, “taken at the flood”, may help ensure that we **never** pass that catastrophic way again. “Omitted, all the voyage” of the next fifty years may be “bound in the shallows” of misery. Jamaica should therefore now “take the current as it serves” or **flounder**.

Immediately, that current “serves” up the urgent **necessity** for a thorough-going **judicial** enquiry into the tumultuous events of that month. It also serves the opportunity to initiate an **ethos** of **Love**.

The findings and recommendations of the commission of enquiry here *recommended* (if endowed with **effectual** terms of reference,) may be expected to help define and shape a **framework**; can help **enlighten** a pathway to the future, in which a beleaguered but resourceful people might **flourish**, through the adoption of that ethos.

Unlike the first, the next fifty years of independence must mirror the ideal of **common** regard for **the rule of law**, more particularly, universal **respect** for fundamental rights and freedoms. The period must also witness an unwavering devotion to the pre-eminent responsibility of **Government** to **ensure justice**, not only between **citizen** and **citizen** but above all, **against itself**. This **Interim Report** seeks to assist the Government in its discharge of that pivotal burden.

There is a corollary: the ennobling **civic** duty also to **respect human life** and the rights of **all others**. For the constant demand for “**Equal** rights and justice” and the persistent refrain of “**We want** justice !” almost invariably ignore the reality: that the task of ensuring that “**equality**”, of bringing home the “**justice**”, cannot

be the duty of or be left up to the Government alone. That task **begins** with the individual citizen – with he who makes the demand; with she who constantly chants the refrain.

Years of making demands and singing the refrain have not brought much relief. But without a doubt, our situation would have been much the better, had there been greater **respect** for the **rights** and civic **responsibilities** conferred by the Constitution – the fundamental law.

The **mutuality** of **rights** and **responsibilities** is a guiding but greatly abused principle of a young yet not unstable democracy. It denotes a culture of **civilized** conduct which the fresh Charter itself rightly seeks to establish. For the abuse of human **rights** is caused **only** through the vice of human **wrongs**.

Thus the Charter enacts a simplified and expanded Chapter III of the Constitution. **Section 13.-(1)** recites a preamble which **proclaims** that –

- “(a) the (State) has an **obligation** to **promote** universal **respect** for, and observance of, human **rights** and **freedoms**;
- (b) **all persons** in Jamaica are entitled to **preserve** for themselves and **future generations** the fundamental rights and freedoms to which they are **entitled** by virtue of their inherent **dignity** as persons and as **citizens** of a free and democratic society; and
- (c) **all persons** are under a **responsibility** to respect and **uphold** the **rights** of **others** recognized in (the) Chapter, (and that its) provisions ... shall have effect for the purpose of affording

protection to the **rights** and **freedoms** of persons as set out in those provisions, to the extent that those rights and freedoms **do not prejudice** the rights and freedoms of **others.**”

The “provisions” referred to delineate the various entrenched rights and freedoms **guaranteed** by the Constitution and the Government. Those rights and freedoms, “**shall** have effect..... to the extent that (they) **do not prejudice** the rights and freedoms of **others.**” And (subject to certain safeguards) they may only be abrogated, abridged or infringed in ways or manner “demonstrably **justified** in a free and democratic society” [ss.(2)].

Indeed, respect of human rights by all, enhances the quality of life of all. Jamaicans should therefore begin to see themselves as a nation **family** of **brothers** and **sisters** and be each other’s “**keeper**”. In that scenario, there will and can be **no comfort** for organized crime and **gunmen** who gnaw at the flesh or for State Security personnel who **disregard** the **sanctity** of **human life** or neither serve, protect nor reassure the citizen.

In the process, all become ‘**public defenders.**’ It is respectfully submitted that there is no better way of strengthening or preserving our **democracy.**

The **foremost** duty of Government is the protection of the **life** and **personal security** of the citizen. The Government is **guarantor** of the **right to life** as well as the enjoyment of all aspects of freedom

of the person, unfettered in any way, save as may be necessary for preservation of the **rule of law**.

Government effectuates its **guarantees** or fails to, largely by the action of its servants and agents; in these times, the **State Security Forces** in particular. It is the **conduct** of those Forces that is now in question and which requires **granular** review. For it is that conduct that is alleged to have caused the **death** of **so many**, over so **short a time** and, provoked the lingering grievances of **hundreds** of others.

On the other hand and, for too many years past, **barbaric** criminal acts have been perpetrated by **brutish** citizen against **despairing** citizen. The offenders are mainly rampaging, shiftless young Black males, **poorly** educated, at best **semi-literate**, steeped in **unreason** and **depravity**; unemployed, or “unemployable”, having **no vocation** and abandoning hope. They are **indiscriminating** in their choice of victims, not sparing the very young, the very old, pregnant women or **the disabled**: right across the economic, social and age spectra. The Honourable Omar Davies, M.P., Minister of Transport, Works and Housing once described some of them as **“irredeemable”**. He did **not** say that **all** of them were; nor are they.

Irredeemable or not, they constitute the overwhelming majority of those incarcerated in decaying, hugely over-crowded “correctional”

institutions, sections of which are **veritable dungeons** and all of them **dens of unremitting decadence**. Their degenerate condition is very much a part of the colonial legacy. They are in desperate need of **emancipation** from **mental** slavery. Many of them may be rehabilitated, reclaimed and redeemed: whether they be convicts serving time or, wandering at large, enjoying the constitutionally guaranteed **freedom of movement**, even as they go about wreaking havoc. Together, as that band of armed cowards headed or head for personal ruin, they have **ruined whole families**, brought untold hardships upon the **children** of their fallen victims and, **lasting** pain and suffering upon adult survivors.

But whatever are the disparate reasons they turned out the way they have, the **fundamental** cause of their indiscipline and situation is that they were neither **nurtured** in, nor **nourished** by **Love**; where necessary, **tough** Love. They are the issue of fecund breeding and the product of poor parenting, mainly absentee fathering or no fathering at all. Concomitantly, indolent mothers abandon, delegate or relegate the unexcelled civic **duty** to secure their children's proper upbringing, foisting that responsibility upon severely overburdened educators. That phenomenon is now sought to be addressed by a Children's Advocate, appointed under the provisions of the Child Care and Protection Act, 2004, — a measure which seeks to restore the lost tradition by which the

child is brought up by “the village”; a tradition by which all adult citizens take a responsible “parental” interest in the proper rearing of the nation’s young and impressionable.

The beast which reigns in the mind and breast and heart of the **gunman** whose “avocation” is **murder** and mayhem may be tamed by **Love**. Being a real “enemy of the State”, he must be overpowered. *Mahatma Gandhi* offers one approach – “Whenever you are confronted with (sic) an opponent, **conquer** him with **love**.” For “it is possible that a man may be so **changed** by **love** as hardly to be recognized as the same person.”

Indeed, there is no prospect of lasting social stability and security in Jamaica if its people (particularly **the young**) are not fully grounded in the tenets of **Love**: the foundation of **all justice** – social, economic or, according to law. The jurist may consider the notion something of a stretch but **Love** actually is a sentiment which undergirds a great limb of the law, founded on **fairness** and known as **Equity**. The hortatory words of **Mr. Garvey** are apposite – “Let us in **shaping** our **Destiny**, set before us the qualities of human Justice, **Love**, Charity, Mercy and Equity.”

Love is no mere palliative; rather, the **eternal light**. There is nothing naïve or simplistic about ideas of its efficacy. It is the hallmark of all well regulated families.

Love dwarfs the pillars of religious dogma. It is the **essential** message of the Christian gospel which proclaims that God **is** Love. It is part of the creed of Buddhists, Hindus, Jews, Muslims, Rastafarians and others alike – the embodiment of the believer’s faith. It is something of a **cure-all**; a balm for so many of Jamaica’s present and looming worries. (A collection of inspiring thoughts on the subject appears at **Appendix 37**.)

It may be argued however, that it is preferable to insist on the Security Forces being **restrained by law** from committing extra-judicial killings, malicious assaults or destruction of property; that they should be made to adhere to **rules of engagement** and the command and control of superior officers: not **inculcate** the principles and **culture** of **Love**. For military men and police officers are **not trained** to love, so the argument goes. They are trained to carry out their duties (particularly in times of armed conflict) according to the precepts of domestic and international humanitarian law. In the discharge of their duties therefore, they need only be mindful of the situation of innocent civilians or non-combatants: not be unduly concerned about anything else. Further, that they must obey **operational commands**; be guided by the exigencies of **necessity** and **proportionality** and should prevent or minimize “collateral damage”. In times of imminent **danger** to themselves or innocent civilians, they should not be

guided by religious dogma but by professional **codes of conduct** and the direction of ground commanders.

Put succinctly: military men and police officers engaged in armed combat should strive for the **highest standards** of professionalism and humanitarian conduct and not be **distracted** by the emotion or sentiment of **Love**. This is a powerful argument. It is redolent of practicality and innate common sense.

Nevertheless, the Public Defender insists that the tenets of **Love** supersede everything; that in the **peculiar** Jamaican circumstances, not any time soon will adequate “resources” - human, fiscal or other - ever be able to work the solutions to the nation’s travails which only **Love** can. It is an overarching sentiment. Its **compelling** appeal to the human **conscience**, is capable of ensuring **obedience** to the rules of engagement, where the command of superiors has failed to rein in a **propensity** to kill or **abuse** and infringe fundamental **human rights**. For as was said by *W. R. Alger* - “**Love** makes **obedience** lighter than liberty.” Thus in the **execution** of duty consistent with the **JCF Policy**, there is ample scope or room for **Love**.

An **indigenous** Jamaican thematic take is the mantra of “**One Love**”. The concept is much **commercialized** and too often **trivialized**. Its unimagined potential is waiting to be unleashed and activated. Ironically therefore, the concept desperately needs

to be **indigenized**. In fact, only **Love** can **animate** the lofty National Motto – “Out of Many One People”.

As the Most Honourable Sir Patrick Allen has said repeatedly however, first we must **believe!** Passionately and compassionately **believe** in all ourselves and our boundless possibilities.

This **Interim Report** is tabled in Parliament soon after what of recent times has become a mainly romantic celebration of ‘**Black History Month**’. There is poignancy in the remembrance and the moment.

According to the latest (2011) population *census*, resident Jamaicans are 92.1% **Black**, being of **African** descent. But there are ethnic minorities of **Chinese**, Caucasian (**White** and **Indian**), ‘West Indian’, Middle Eastern, ‘Mixed’ and ‘Other’ origins. Each is a citizen of a country riven by **inequality**; with a ‘People’ who need to be made and become **more equal**.

As **Mr. Garvey** explains – “It is only a question of sheer **accident** that we happen to be **fellow citizens** today with the descendants of those who, through their advocacy, laid the **foundation** for human rights.” (And see **Appendix 38**.) That “**accident**” has also created the **advantages** of ethnic and cultural diversity which inspired the Motto. But it is no **accident** that a National Heroine and three Heroes were Blacks, the others being ‘mixed’. Their sacrifice and contribution to nation building is well documented

but their noble example is honoured more by **lip service** than by replication.

Even now, that living majority of Blacks, (ever the labouring class for the most part) is still in need of an **awakening**. That awakening can only come from **within**. The road to the awakening is well delineated by **Mr. Garvey** in his Philosophies and Opinions. That majority can accomplish what they will by **lawful** means.

[Garveyism will be introduced into a continental curriculum of secondary education for Black Africa this year. In 2012, came the long overdue introduction of the doctrine at the early childhood through secondary level in Jamaica. We should now take the doctrine “to the world” and not wait for its repatriation before it wins universal local acceptance.]

The country’s ethnic minorities largely control the material resources and means of production of the nation. Many of their number are cut from the same cloth as the “**absentee** landlord” of a bygone colonial era. And there are amongst them latent pockets of holdover racism. Those minorities must embrace the **mantra** of “**One Love**”, not just mindlessly sing along or dance to the mesmeric lines and tempo of the namesake “Song of the (20th) Century” popularised by the Right Honourable Robert Nesta Marley, OM.

Those ethnic minorities have it in their gift and ingenuity to adapt those resources and means of production to demonstrably patriotic and profitable purposes. For they are a privileged, **not** a marginalized class, as are other minorities rightly regarded as “vulnerable”. They should heed the counsel of **Confucius** and “fix (the) mind on truth, hold firm to virtue, rely on **loving** kindness ...” For as with all positions of **privilege**, their **status** bears particular **responsibilities**, in this case to help make **life-changing** contributions to the commonweal. As Confucius puts it: “Consideration for others is the **basis** of a good life, a good society.” (The Analects.) HIM Emperor Haile Selassie I is himself persuaded that “there is **nothing** more worthwhile and **rewarding** in life, than to **work** for the benefit of others. One can derive more pleasure from **giving** than from receiving.”

In the meantime, a passionate Public Defender can be expected to protect and enforce their rights as **minorities**, in accordance with the Constitution and the ICCPR.

Jamaica is no nation of “samples” but of great or potentially great achievers. We should seize the opportunities afforded by our diversity and of our size or “smallness” which is, the ability and capacity to become polished **models** of much that becomes mankind.

Love bespeaks **respect** – the great yearning of the hapless horde of **Black** urban poor. It is they who bore the brunt of atrocities said to have been committed during the State of Emergency; they who, in their unrequited yearnings, turned to ‘**Dudus**’ as ‘godfather’. They need purposeful and legitimate help to help themselves; to be empowered to **help others** and thereby help to **secure** the nation’s future.

The alleged perpetrators – rank and file police and foot soldiers – spring from the same **ethnic** and **social** class. They have been recruited from that class for over one hundred years. The deviants amongst those Forces are not, (because they do not **consider** themselves) restrained by the Constitution, the law or rules of engagement. They constitute **another** minority whose elements continually embarrass and shame their conscientious colleagues by their misconduct. They are a minority who need to be **reined in**. They need to be converted to the transformative call of **One Love**. Because they too enjoy a **privileged status**, (that of law enforcement agents,) they must be reminded continually, that **the law** cannot be enforced **unlawfully** — a *modus* which betrays an oath and renounces responsibility.

The *modus vivendi* therefore, also requires **perpetual** and **purposeful** evaluation. The anti-social class of marauding

gunmen and, their kind as well, must be properly factored into all **normative** agendas and processes of transformation.

The foregoing sets down the fundamentals of a **credo** of the Public Defender, a parliamentary Commission uniquely placed to **help** create an environment of relative **peace** in which the **rule of law** can thrive. Wiser men are at liberty to fill in the blanks. But the credo might help us **work** our way out of most, if not all problems. It envisages no Utopia but a **journey** to ‘paradise’ on earth: on a tropical island blessed with what some say is incomparable natural beauty. *The Mahatma* has a few wise words for those who would be leaders of the process – “The day the **power of love** overrules the **love of power**, the world (even Jamaica) will know **peace**.” And according to the Hindu icon, that is because – “**Love** is the **strongest** force the world possesses and yet, it is the **humblest** imaginable.” It is also the most **humbling**.

Indeed, the **civilizing** characteristic which best becomes the living generation of leaders and “elders” (and all those to follow) is **humility**, a heavy dose of which, applied at this time, would signal the dawn of atonement. And there is a great deal for which the living generation needs to atone, e.g., the declining standards of **morality** and rising mountain of public debt which it bequeaths to the **young**. The smart and necessary thing for us to do therefore is

to change course now and head for **Love** - the road not yet travelled; the enlightened pathway to progress.

The **credo** contemplates no **overnight** fix but a **process** of **moral, social, political** and **economic** transformation by which the country can **work** out its way to emancipation of all kind. It envisages an end to “tribal” politics; a severing of the nexus between **crime, politics** and **poverty** and the dawning of economic independence.

The credo also contemplates acceleration of a process by which only we may dramatically **reverse** that other process through which, by dehumanizing **himself**, the Caucasian slave-master and his cohorts, (some of them Blacks,) attempted to dehumanize Black slaves and so whip them into a hard-labouring force of unprecedented teeming millions who came to be regarded as “the wretched of the earth,” toiling over hundreds of years without recompense or reparation.

A diabolical attempt also to dehumanize the slave facilitated the means by which forced labour facilitated exploitation of a so-called “New World”, generating untold wealth for Europe, whilst deliberately under-developing a Black Motherland. The objective always was to perpetuate **privilege**, social and economic **injustice**, more recently engineered by dividing up Earth into a First, Second and Third World, Jamaica being a part of the latter.

The necessary **transformation** will therefore not likely be accomplished by this generation or the next. It is the **work** of **all** coming generations - everlasting **work** that will perpetually return bountiful social and material dividends. For, as has been said, **“love is love’s reward.”** The only way to **deserve** and **earn** it however, is to **work** at **Love**. Thus it is “a thing to be *learned*.” Resort to that *learning* process is also long past due.

Obviously, that transformation will never be achieved unless first a start is made. **Today**. Made by every living Jamaican. So how ?.

First the citizen **aroused** resolves: “I am **Jamaican**. I **love** or will start **learning** to **love** my country”, meaning: each other, as ‘neighbour’. For the country is its people; **all** of the people.

Love of country is **the** motivating passion of the **patriot**. That love will quicken appreciation of President John Kennedy’s dictum - “Ask not what your country can **do** for **you**, but what **you** can **do** for your country.” Doing for one’s country is doing for one’s self. Jamaica now needs a great host of patriots, not a parade of pundits, protestors and naysayers; rather, a citizen army of **doers** determined to **undo** wrongs and make fulgent **models** out of misfits and malcontents, being ever mindful of the poor who we shall have with us always.

Next: “I will **do** unto others as I would have them **do** unto me”.

That is putting **Love** to **work**. Thereafter, the people labour to keep **Love** at **work**.

Those are the first essential steps on the road to moral, social, economic and political transformation. **All** generations, (starting with the present) should therefore train up their young in the way they should go: with **Love**. In time they should likely do the same with theirs. The results of that remodeled '**Brand Jamaica**' would amaze mankind !

In sum, it is well within the capacity of the Jamaican people to **work** their way out of the chronic miasma of social and economic misery and eventually "overcome" in the way **Martin Luther King** meant it – **overcome** all impediments to **civilised** human relations by the expedient principles of **Love**. By the universal practice of those principles we may **disarm** the **gunman**, reduce crime to **manageable** proportions and lessen the likelihood of **replicating** the emergencies of May, 2010. That would hasten fulfillment of the dream of those who we have made a National Heroine and Heroes. At last.

Live by the concept of **One Love** and we might one day hold out ourselves to the world as a **model** of rightly proud, civilized and accomplished people. Fail to and there will likely be no chance of Jamaica ever becoming the "*place of choice to live, work, raise families and do business.*"

So now, let all Jamaicans, aspiring to be “**one** People”, start putting **Love** to **work** and thus initiate a sea change in social relations by which only, Jamaicans may co-exist peaceably — through equity and justice, according to **law** and the **Constitution**.

One Love!