

RECOMMENDATIONS BY THE PUBLIC DEFENDER

1. In the wake of the evidence before this Commission of Enquiry, and having regard to the terms of reference, the Public Defender submits to the Commission the following, for its active consideration and ultimately as part of the Commission's findings and pronouncements in its final report to the Governor General.
2. These are set in the context of the primacy of the right to life guaranteed by Chapter 3 of the Jamaica Constitution 1962. Section 14 (1) is clear in its statement that a person may be intentionally deprived of his life only as a result of the execution of a sentence of death imposed by a court after a conviction.
3. The other circumstances under which the person may be reasonably justifiably deprived of his life are also clearly stated in Section 14 (2). Those are:
 - “(a) for the defence of any person from violence or the defence of property;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) for the purpose of suppressing a riot, insurrection or mutiny; or
 - (d) in order lawfully to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.”

4. The right to life is sacrosanct. All the international treaties, arrangements, and protocols on human rights, including those ratified by Jamaica, speak to not merely guaranteeing that fundamental right, but puts on the state a positive duty to protect life. In discharging such a duty the use of force is the major issue for consideration.
5. The Jamaica Constabulary Force promulgated a Use of Force Policy that is consistent with constitutional and international law. However, the testimonies of witnesses at this Commission of Enquiry establish that there was obvious departure from the promulgated policy. The OPD specifically refers to the analysis of the evidence made in the written submissions, paragraphs 41 to 97, in relation to the following named deceased:

Carl Henry

Bojan Rochester

O'Connor Brown

Orlando Brown

Kirk Allison

Dashard Page

Radcliffe Freeman

Lundi Murphy

Damion Lindsay

Andre Smith

Dwayne Edwards

Decorey Wright

Sydney Clarke

Fabian Grant

Fernando Grant

Jermaine Gordon

Nicholas Wilson
Oshane Walker
Martin Lindsay

THE PUBLIC DEFENDER RECOMMENDS:

6. That a public apology be made by the Government of Jamaica to the nation and to the people of West Kingston, for the unlawful acts committed against them by the security forces on May 24th-26th 2010, recognizing that although an internal security operation was required, the disproportionate manner of its execution caused death, bereavement, injury, trauma, and loss and damage to property and business. Such an apology would assist in bringing reconciliation and hope to a community which remains bitter and resentful.
7. That a specific finding to the effect that although there was necessity for the May 2010 internal security operation, its planning and execution represented a disproportionate/excessive use of force which resulted in the violation of citizens' rights; (including the right to life); bereavement, injury, trauma, and loss and damage to property and business.

[ToR (j)]
8. That a specific finding be made that the incursion in Tivoli Gardens in May 2010 was a failed operation, in that both Forces --JDF and JCF-- failed to execute the warrant on Christopher Coke. So too was the second objective of the JCF. The second objective of the JCF, *"to mould and shape Tivoli Gardens for community policing"* was misconceived: for that community policing as we know it, cannot be imposed on a community by force.

[ToR (d), (k), and (p)]

9. That the Commission of Enquiry find as a fact, that the JDF used highly lethal mortar munitions in the form of high-explosive rounds and that the Chief of Defence Staff who personally accepted responsibility, should be held criminally liable.

[ToR (d) and (l)]

10. That the Commission recommend that the use of high explosive mortar ammunition should be strictly prohibited, and shall never be used against any community, urban or rural.

[ToR (d) and (l)]

11. That the Commission of Enquiry make specific findings that the right to life of each of the above-named deceased persons at paragraph 5 hereof, was violated.

[ToR (d) and (j)]

12. That awards be made in respect of the estates of these persons who on the evidence were unlawfully deprived of their right to life by members of the security forces.

[ToR (d) and (j)]

13. That the awards be made *ex gratia* and without requiring the representatives of the deceased to issue proceedings, but subject to probate or letters of administration being duly obtained. The Office of

the Public Defender will assist in the procedures for obtaining letters of administration.

[ToR (q)]

14. That the award should be made as compensation for constitutional redress, and that its quantum should reflect the awards made by the courts of Jamaica in **Fuller v Attorney General** (1998) 56 WIR 337 (Court of Appeal, 16th October 1998), where the award was \$1,000,000, and in **Administrator General v Attorney General** [2005] CL 2001/A073 (30th May 2005, Supreme Court), where the award was \$1,800,000. The equivalent of these sums today would be \$4,600,000.

[ToR (q)]

15. That for the purpose of the discharge of the Coroner's function under section 10 of the Coroners Act, the Commission makes a finding with respect to each and every deceased for whom evidence of his/her killing was received, with regard to the following :--

- (a) the place of death;
- (b) date of death;
- (c) full name of deceased;
- (d) usual place of residence of the deceased;
- (e) sex;
- (f) age;
- (g) marital status; and,
- (h) cause of death.

16. That a specific pronouncement be made on the geographic definition of "*Ground Zero*", or "*GZ*", a term which emerged in the post mortem reports and on the evidence of Superintendent Gladys Brown-

Ellis, as the description of the location where bodies were found. Such a finding and pronouncement is necessary in establishing facts required the Coroner under section 10 of the Coroners Act, in making his report to the Registrar, for the fulfilling of the latter's statutory mandate under the Registration (Birth and Deaths) Act; and ultimately for the purpose of the survivors, and the Administrator-General.

17. That in relation to the injured persons mentioned in paragraphs 113 to 124 of our written submissions, compensation should be paid at a level equivalent to that which would be awarded in a court of law. The Office of the Public Defender will assist in formulating the bases of such compensation.

[ToR (q)]

18. That the Commission find that there was no lawful justification for the detention of over four thousand persons, and recommend to the Government of Jamaica that compensation be paid to those detained in a sum equivalent to the damages would be awarded by the Supreme Court in a case of false imprisonment.
19. That in relation to residents in Tivoli Gardens the Commission make a finding, pursuant to Terms of Reference (q), that the compensation paid to those who suffered loss and damage to their property has not been adequate, and recommend a scheme whereby such residents may be speedily afforded a higher level of reparation, without the necessity of bringing court proceedings. The reparation should be a conventional figure based on the assessments made by Mrs. Colette Roberts-Risden on behalf of the Ministry of Labour and Social Security, and should include others contained on the list furnished by the OPD who were not included in the Ministry Scheme who can produce evidence of damage.

[ToR (q)]

20. That in settling claims for the awards for compensation for constitutional redress as mentioned above, no reliance should be placed by the Government of Jamaica on any period of limitation which would otherwise apply.

[ToR (d) and (q)]

21. That the Commission of Enquiry recommend that Parliament amends the Public Defender Interim Act, by removing therefrom, section 13(2)(b)(ii); the provision which deprives the Public Defender of jurisdiction to investigate matters relating the Jamaica Defence Force (JDF).

[ToR (k)]

22. That Parliament considers making it a criminal offence for uniformed police officers to wear ski-mask, full-face balaclava, facial hood, or any other disguise intended to cover or conceal the face or any part thereof, whilst on duty in a public place , except :-

(a) where the wearing of such facial cover is for medical reasons and is so certified in writing by a registered medical practitioner; or

(b) in cases where the Commissioner of Police in writing, so authorises with stated reasons.

[ToR (d) and (k)]

23. That the children who were subjected to the traumatic experience of the May 2010 Tivoli Gardens incursion, be provided or supported with continuous counselling.

[ToR (d) and (g)]

24. That the final report of the Commission be made the subject of parliamentary deliberations, with a view to accepting and implementing the recommendations contained therein.

A handwritten signature in black ink, appearing to read 'Arlene Harrison Henry', followed by a horizontal line.

ARLENE HARRISON HENRY
Public Defender

February 2016