Transitional Justice in the Context of European Convention Obligations:

The Right to Life and Dealing with the Past

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Backdrop to families engaging Article 2

In the late 1990's a conversation began within Relatives for Justice (RFJ) about the nature of killings including a wider governmental policy objective concerning the use of lethal force; shoot-to-kill; and collusion. The core issue of accountability v impunity was also at the heart of that debate and of how it was virtually impossible within the domestic criminal justice system to achieve accountability for systemic human rights violations perpetrated during the conflict concerning these particular experiences. Essentially the investigative framework was deliberately flawed and placed families bereaved by these violations at a significant disadvantage compared to other violations carried out by non-State combatant forces. A legal strategy was required that put human rights first.

The debate led to human rights lawyer, and then RFJ Board member, Peter Madden along with senior counsel Seamus Treacy and Fiona Doherty, developing the concept of putting the flawed investigative system on trial at the ECtHR on behalf of families his legal practice, Madden & Finucane Solicitors, represented, and who were also RFJ members. The Committee on the Administration of Justice (CAJ) lawyer, Paul Mageean, also played a key role in further developing this work along with families they represented and who were also RFJ members.

These cases became known as the McKerr group of cases in which judgment was delivered in May 2001. This was an important landmark ruling. As a result hundreds of families affected by State violations sought to have the ruling retrospectively applied to their cases given that they too were equally subjected to the flawed investigative processes concerning the killings of loved ones. Importantly the McKerr ruling said that the next of kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests. This was a first – a positive. Article 2 was now on the agenda.

However, since then there have been various ongoing legal challenges by the families concerned, including many other bereaved families seeking Article 2 investigative rights following similar controversial State killings. There have also been counter challenges by the State. Other cases have since been to the ECtHR with successful outcomes. Families that have taken Article 2 cases have altered the legal landscape and criminal justice system in seeking to ensure that the UK Government meets its legal obligations concerning Article 2. That is to be acknowledged and applauded but there remains a distance yet to go in ensuring that full uninterrupted rights are guaranteed and safeguarded, which families are all too aware of. There equally needs to be awareness of the politics of seeking accountability and the wider marginalization and vilification of families at the fore.

The May 2001 judgment also came at time when other significant political developments where taking shape within our society around the 'peace process' - the reforms to policing and the criminal justice system among those institutions where change was recommended and where Article 2 is most visible. However, resistance to these changes with a minimalist agenda characterizes more generally the approach overall by the authorities with an old guard mindset.

Vested Interest and hiding behind the 'resources argument'

With vested interest where the State uses its sovereignty as a shield we saw the UK Government using the 'package of measures', its response to the Committee of Ministers, in a perfunctory way with the objective of getting Europe off its back post the rulings – the HET being the most obvious. The 'package of measures' has clearly failed. Frustratingly RFJ ploughed a lonely furrow first publishing on the HET in 2006 setting out our analysis and the fact that this was not a human rights compliant framework. Of course more recently the architect of this initiative, former PSNI Chief Constable Sir High Orde, told RFJ and families

in August this year that HET was never designed to be Article 2 compliant – it was the government, he informed us, that said it was in response to Europe.

There has, from families' experience, been a strategic approach by the UK Government to safeguard against exposure concerning the extent of its role in and culpability for human rights violations and where impunity continues.

Article 2 has focused on these issues and managed to create key changes – the Coronial Inquest Court being most noticeable. Article 2 frames the debate on the past and this is important for families.

And where this State strategy is challenged by accountable and transparent approaches, such as those by the current Police Ombudsman, then resources are withheld and subterfuge is deployed. Using the claim of a 'lack of resources' within this part of the UK's jurisdiction is now common practice in delaying compliance.

Whilst acknowledging that the functionaries on the ground have a duty to discharge Article 2 this ultimately reverts back to the 'resource' argument in that these functionaries operate from the block grant allocated to the devolved institutions by the UK Government. Not providing the resources is therefore convenient cover.

Telling Europe that the matter is one for the devolved Executive is disingenuous.

The argument therefore is that the UK Government, through its Treasury, should carry the cost of Legacy as these matters

happened on their watch and as part of their overall security policy at the time. They are the signatories to the convention.

RFJ raised this very matter in a meeting with the Justice Minister David Ford, MLA, on September 18th last. In fairness the Justice Minister then raised the matter publicly at the Assembly's Justice Committee meeting on October 1st where he publicly supported the position. RFJ also made a submission to the Assembly's Justice Committee on this and other related matters on October 8th.

Creative ambiguity exists too. The British Ministry of Defence (MoD), (covert and overt - having been culpable for a significant proportion of the killings), and the British Home Office are also centrally involved in these Article 2 cases, including destroying evidence. Both of these London based institutions do not fall under the devolved administration. The British Secretary of State for the North retains legacy matters when it concerns 'national security', invoked conveniently when necessary. The devolved institutions did not respond to Europe – the British Secretary of State did as a direct representative of the UK Government.

The devolved administration is not the signatory to the convention.

We also note that whilst on one hand there is the claim of no resources, the State is content to continue paying compensation for breaches in delay within the domestic court - these following standardized payments from the ECtHR as part of their rulings.

We further note that when the court makes such findings that it is the UK Government who pays the awards of damages and not the devolved institutions from the block administration grant to this jurisdiction.

As far as we know there is no weight in the defence of any signatory to the convention citing a lack of resources in failing to meet their obligations concerning one of, if not the most, fundamental rights of the convention.

The British Government has indicated that it would provide the costs for the implementation of a Legacy Commission, as proposed by Haass/O'Sullivan, if there were political agreement by the parties to the Executive. Does this not further make nonsense of the excuse of 'no resources'? And does an absence of political agreement really mean that core governmental Article 2 obligations can be long-fingered as we await the impossible of 'consensus' on the past between local parties while the London government seeks to abdicate that responsibility? The fact notwithstanding that the UK Government was a protagonist in the conflict here also.

Action that could be considered by the ECtHR

We are now at a point where the scale and magnitude in terms of the State's failure to its obligations are systemic – where repetitive cases are met with recurring structural dysfunction and where there exists an underlying problem concerning Article 2 compliance in this jurisdiction. Prolonged non-enforcement of Court decisions and lack of domestic remedy including the excessive length of proceedings are also key areas that have led to further action by the ECtHR in other jurisdictions. The 'package of measures' has failed significantly. RFJ believe there is now considerable merit in seeking to have a pilot procedure judgment by the Court.

We say this because of the casual disregard for the Court in general and that the enforceability of the Court is not having positive effect by way of a satisfactory remedy for families bereaved.

We also must point out that bereaved relatives are dying without seeing any form accountability. Rather theirs is an experience of prevarication, obfuscation, denial, delay and destruction of evidence despite having placed Article 2 at the heart of the criminal justice system and societal discourse. Framing this is the irony that we also have a situation where the State is using convention rights to deny material evidence citing Articles 2 and 8.

We call on the Committee of Ministers for the Counsel of Europe to bring the UK Government back under scrutiny and supervision.

Families also ask if there is remedy that the Court can enforce by way of damages commensurate with the State's GDP that will effectively have the aim of focusing minds resulting in remedial movement on these cases. We note the **just satisfaction potential** in the inter-governmental case in *Cyprus V Turkey* (App No 25781/94, 12 May 2014) in which the Grand Chamber ordered Turkey to pay 30 million Euros in non-pecuniary damages suffered by the relatives of those disappeared, and 60 million in non-pecuniary damages suffered by the Greek-Cypriot residents enclaved in the Karpas peninsula. These amounts are to be distributed by the Cypriot Government to the individual victims under the supervision of the Committee of Ministers.

Pilot procedure judgment – '…cases pending before the European Court of Human Rights are so-called 'repetitive cases', which derive from a common dysfunction at the national level. The pilot judgment procedure was developed as a technique of identifying the structural problems underlying repetitive cases against many countries and imposing an obligation on States to address those problems. Where the Court receives several applications that share a root cause, it can select one or more for priority treatment under the pilot application procedure. In a pilot judgment, the Court's task is not only to decide whether a

violation of the European Convention on Human Rights occurred in the specific case but also to identify the systemic problem and to give the Government clear indications of the type of remedial measures to resolve it.'

Objectives of the Pilot Judgment Procedure;
'Assist the 47 European States that have ratified the European Convention on Human Rights in solving systemic or structural problems at a national level;

'Offer a possibility of speedier redress to the individuals concerned;

'Help the European Court of Human Rights manage its workload more efficiently and diligently by reducing the number of similar – usually complex – cases that have to be examined in detail.'

Codification: Rule 61 of the Rules of the Court
'In Feb 2011 the Court added a new rule to its Rules of the Court clarifying how it handles potential systemic or structural violations of human rights.

'The new rule codifies the Court's existing 'pilot judgment procedure', introduced for cases where there is a systemic or structural dysfunction in the country concerned which has given or could give rise to similar applications before the Court. Taking into account the Court's experience of implementing this procedure in different countries and situations, the new rule establishes a clear regulatory framework for pilot judgments.'

How it works is that the structural systemic problem is identified – the Court requests measures – and follow-up can also occur in that usually a law is passed to remedy the situation. Supervision can also involve the Committee of Ministers.

A number of pilot judgment procedures have been very successful in more recent years.

Prolonged non-enforcement of Court decisions and lack of domestic remedy including the excessive length of proceedings and lack of domestic remedy are also key areas that have been addressed by pilot judgment procedures.

These are precisely the key areas within this jurisdiction that require focus and so to further progress Article 2 RFJ are recommending that the pilot judgment procedure be now considered.

Concluding on a positive, including why the international context is crucially important, I want to leave a thought – a quote from Natassa Mavronicola;

'In a society riven with conflict minimum standards, set by a distant institution charged with respect for human rights are in principle to be welcomed.'

Commissioner Muižnieks we thank you for taking the time to visit this jurisdiction and for listening to us all over the past days – TJI we thank you and all your staff for organizing and hosting this crucially important event – and MEP Martina Anderson we thank you for your good office in terms of linking all this up and helping in making it possible. Lastly I want to thank the families.