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Brief

How Scotland can establish a European Convention on Human Rights Article 2 compliant public inquiry into deaths arising from COVID-19 and further utilise a 'Human Rights Based Approach' to demonstrate global leadership in human rights

A brief addressed to the Scottish Government

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Introduction

On the 11th of March 2020, Scotland experienced its first recorded case of SARS-CoV-2 (COVID-19) (coronavirus) (the virus)¹. On the 13th of March 2020, its first recorded death from the virus². As of 1st February 2021, there have been 10,341 recorded deaths linked to COVID-19 in Scotland³. COVID-19 has killed discriminately and in unprecedented numbers. Both individual cases and overarching policy decisions in relation to the response to the virus must be taken into consideration if an inquiry into

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¹ 'Coronavirus (COVID-19): daily data for Scotland' (*gov.scot*, 2021).

<<http://www.gov.scot/coronavirus-covid-19>> accessed 05 February 2021.

² Ibid.

³ National Records of Scotland, *Deaths involving coronavirus (COVID-19) in Scotland* <Deaths involving coronavirus (COVID-19) in Scotland | National Records of Scotland (nrsotland.gov.uk)> accessed 23 December 2020.

these deaths is to meet the standards in Article 2 of the European Convention on Human Rights (ECHR) (convention). Additionally, we must seek to ask whether merely satisfying the criteria set out in Article 2 of the ECHR is a satisfactory response to the worst public health crisis in one hundred years and how, if at all, Scotland might set a model public inquiry into deaths associated with COVID-19. This brief will assess the relevant Article 2 issues and how these can be discharged and surpassed in the context of a public inquiry into COVID-19 deaths in Scotland.

1.1 Ethnic Disparities Data

By consulting data compiled by the National Records of Scotland, we can begin to understand the discriminate nature of coronavirus deaths, which will be central to any subsequent inquiry. The following analysis is based on data for *all* deaths in Scotland, occurring on or after the 12th of March 2020 and registered by 14th of June 2020 (this period can be considered as the first ‘wave’) and uses an odds ratio to look at whether the likelihood of a death involving coronavirus differs by ethnic group. Its key findings included:

The data on deaths during this period shows that deaths amongst people in the South Asian ethnic group were almost twice as likely to involve COVID-19 as deaths in the White ethnic group, after accounting for age group, sex, area-level deprivation, and urban, rural classification⁴.

To further refine its findings, the National Records of Scotland grouped ethnicities into Chinese, South Asian, and White for the purposes of this study. These groups were established using a methodology of linking 2011 census records to NHS Central Register data, as although the death registration process is statutory, ethnic information about the deceased person is collected on a voluntary basis. This meant that there were too many cases of ethnicity not being recorded to carry out analysis for each ethnic group.

⁴ National Records of Scotland, *Analysis of deaths involving coronavirus (COVID-19) in Scotland, by ethnic group*, Para 1, <<https://www.nrscotland.gov.uk/files//statistics/covid19/ethnicity-deceased-covid-19-june20.pdf>> accessed 8 June 2020.

Thus, the 'Chinese' ethnic group is comprised of *Chinese, Chinese Scottish or Chinese British*. The number of deaths involving COVID-19 in the foregoing ethnicities made it possible for reliable data to be taken for analysis of this group.

The 'South Asian' ethnic group is comprised of *Bangladeshi, Bangladeshi Scottish or Bangladeshi British; Indian, Indian Scottish or Indian British; and Pakistani, Pakistani Scottish or Pakistani British*. Due to the large number of incomplete records for deaths involving COVID-19 in the *Bangladeshi, Bangladeshi Scottish or Bangladeshi British* category, it was impossible to carry out analysis for this group on its own. Thus, by including the additional categories, an overarching 'South Asian' ethnic group gave a larger population sample, capable of providing reliable data after analysis.

'*White ethnic group*' is comprised of *White Scottish; White Other British; White Irish; White Gypsie/Traveller; White Polish; Other White Ethnic Group*. Analysis of the 2011 census, death registration records, and the Annual Population Survey (2019) suggest a considerable degree of inconsistency or movement between the *White Other British* category and *White Scottish* categories and similarly between *White Scottish* and *White Irish* categories over time and between sources. Due to the low number of death registrations involving COVID-19 in the *White Polish* and *White Gypsie/Traveller* categories, it was impossible to carry out reliable analysis for these ethnic groups when considered separately. The *Other White* ethnic group comprises a diverse range of ethnicities, and this information has been collected through a 'free-text field in the census questionnaire'⁵. Consequently, one should bear in mind throughout chapter 1.1.2 that the '*White ethnic group*' will contain the widest range of individually identifiable ethnicities. This should temper findings such that it is an even greater disparity for the '*White ethnic group*' to have sustained the lowest number of coronavirus-related deaths despite the larger intake compared to the other ethnic groups.

⁵ Ibid methodology note, para 2.

1.1.1 Ethnic Disparity Findings

By grouping these ethnicities and applying an odds ratio formula, wherein the likelihood of one death within the 'White ethnic group' relating to COVID-19 is represented by 1, the ratio for the 'Chinese ethnic group' was 1.7 and for the 'South Asian ethnic group' it was 1.9⁶. The result is that we find a considerably higher likelihood that people of non-white ethnicity - who have died over the relevant time period - have died as a result of, or in relation to, COVID-19.

Given the openness of this methodology and the substantive method of applying an odds ratio formula, we believe these statistics give an accurate reading of what they aim to communicate, which is to offer an ethnic-based proportional overview of all deaths connected to COVID-19. I also believe that these grouping methods are effective as they offer workable data from demographics that otherwise may find themselves unrepresented in COVID-19 death ethnic proportionality analysis. Given the massive disparity between *white* and *non-white* ethnicities, I believe this data is extremely important in highlighting a need to delve deeper into the causes of this disparity. This will ultimately involve the de-grouping of the above ethnic groups in order to understand precisely why deaths of those of non-white ethnicities are more likely to be COVID-19 related than those of white ethnicities. This, however, will be contingent on more comprehensive data, the gathering of which must be prioritised. This can and should be done prior to a public inquiry, not least to ensure the enquiry has the most comprehensive data possible, but any inquiry will have to wait until it is safe to be held given the ongoing nature of the pandemic in order that information gathering is not so impeded.

1.2 Age Disparities

In addition to disproportionality in ethnicity, we also find different age groups being affected differently. If we take the National Records of Scotland's report on week 51 as an example, we find that 81% (165 deaths) of deaths during the relevant period were aged 75+⁷. This is a microcosm of the entire pandemic as those aged 75+ have

⁶ Ibid 4, Table 3.

⁷ National Records of Scotland (n 3) week 51, key findings.

died in the highest numbers of any of the typical age groupings. While there are clinical and virological reasons why older people are more likely to die after contracting coronavirus, social factors allude to care-worker policy, travel accessibility, medical policy, and other factors that fall within governmental control or influence must also be investigated.

Alongside the ethnic disparities we have discussed, we must also take age differences into account in the commissioning of any subsequent inquiry if it is to be effective. In identifying which groups are most vulnerable to dying from coronavirus, the Scottish Government's positive obligations under Article 2 ECHR towards these groups are engaged and must be scrutinised in particular during any subsequent inquiry. This scrutiny should focus on both individual cases and overarching policy decisions.

1.3 Individual Cases and Policy Decisions

Corollary to individual cases raised by affected parties in Scotland, an inquiry into COVID-19 related deaths must also consider the policy decisions made by the Scottish Government at relevant times and how this has impacted the resultant figures. A central part of any inquiry should be the decision to move sick COVID-19 patients from hospitals into care homes without adequate testing for the virus. As of 6th January 2021, 40% of COVID-19 registered deaths related to deaths in care homes⁸. Public Health Scotland subsequently published a statement in response to this, outlining that:

There were 3,599 discharges from hospital to a care home between 1 March and 21 April. The majority (81.9%) of which were not tested for COVID-19, in-keeping with clinical guidance which restricted testing to those with symptoms of infection. Of the 650 who were tested, 78 received a positive result while in hospital⁹.

⁸ Coronavirus (COVID-19): daily data for Scotland, gov.scot, <<https://www.gov.scot/publications/coronavirus-covid-19-daily-data-for-scotland/>> accessed on 06 January 2021.

⁹ Discharges from NHS Scotland hospitals to care homes, Public Health Scotland, <<https://publichealthscotland.scot/publications/discharges-from-nhsscotland-hospitals-to-care-homes/discharges-from-nhsscotland-hospitals-to-care-homes-between-1-march-and-31-may-2020/>> accessed on 28 October 2020.

This data raises two important questions regarding the Scottish Government's policy regarding care homes at this time. Firstly, why did 81.9% of patients moving from hospitals to care homes go without a COVID-19 test when it was known that those over 75 were at heightened risk of dying from the virus? Secondly, why were the 78 who received positive coronavirus tests still sent to care homes? Both of these questions, which arise from Government policy, have potentially severe implications where ECHR Article 2 is concerned, and it would be up to any subsequent inquiry to determine the discharge or otherwise of positive obligations here. There are also questions over whether care home residents, older people, or disabled people were, or felt, pressurised into signing 'Do Not Attempt CPR forms'¹⁰, whether clinical guidance was appropriate throughout the pandemic¹¹, and whether adequate personal protective equipment (PPE) was available to both staff and residents¹². All of these questions engage Article 2 rights, and some of them extend beyond the realm of care homes. As such, it will be crucial that any subsequent inquiry does as well.

1.4 Literature Review

1.4.1 The Sources

Key sources for this literature review are:

- Scottish Human Rights Commission (SHRC) Care Homes and Human Rights report¹³ (source 1);
- Equalities and Human Rights Committee, Inquiry COVID 19¹⁴ (source 2) and;

¹⁰ SHRC COVID-19: Care homes and human rights, Introduction, para 1, <https://www.scottishhumanrights.com/media/2054/coronavirus-care-homes-briefing-140720_vfinaldocx.pdf> accessed on 14 August 2020.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ SHRC Equalities and Human Rights Committee, Inquiry COVID-19, <<https://www.scottishhumanrights.com/media/2063/covid-19-ehrc-submission.pdf>> accessed on 22 August 2020.

- Human Rights and Equalities Commission Summary of Submissions Following Phase 1 of the Grenfell Tower Inquiry¹⁵ (source 3).

1.4.2 Summaries of the sources

Source 1 is a report that sets out a route map of how the Scottish Government can conduct an ECHR Article 2 compliant inquiry into Coronavirus deaths in care homes. It also makes sound recommendations for establishing human rights leadership through the panel approach, which I will expand upon later in this brief. However, the scope in this source is limited to care homes which may leave people who feel that a similar inquiry in their sector is necessary feeling left behind. The Scottish Human Rights Commission is an independent public body accountable to the people of Scotland through the Scottish Parliament. The duties and powers of the commission are set out in the *Scottish Commission for Human Rights Act 2006*. The commission is accredited as an 'A Status' National Human Rights Institution (NHRI) within the United Nations system. The Commission has powers to recommend changes to law, policy and practice; promote human rights through education, training and publishing research; and conduct inquiries into the policies and practices of Scottish public authorities¹⁶. Given these credentials, I am confident that the SHRC can be relied upon - as this brief shall - for accurate data and relevant guidance on international human rights law. Importantly, given their inquiries related powers, the SHRC guidance on this subject will be crucial to ensure a seamless coming together of the law surrounding inquiries and the execution of the inquiry. Again, this is the overriding aim of this brief.

Source 2 is a submission by the Scottish Parliament Equalities and Human Rights Committee and provides a broader scope for COVID-19 related deaths in Scotland than *Source 1*. While further agreeable recommendations are included, there is much

¹⁵ Human Rights and Equalities Commission, Summary of Submissions Following Phase 1 of the Grenfell Tower Inquiry, <<https://www.equalityhumanrights.com/sites/default/files/summary-of-submissions-following-phase1-of-the-grenfell-tower-inquiry.pdf>>accessed on 22 August 2020.

¹⁶ 'About | Scottish Human Rights Commission' (scottishhumanrights.com, 2021) <<https://www.scottishhumanrights.com/about/>> accessed 15 March 2021.

less legal detail regarding the structure of an inquiry, particularly in relation to Article 2 obligations.

Where *sources 1* and *2* will be considered both comparatively and conjunctively and provide recommendations of what *to do*, *source 3* will provide a backdrop of things *to avoid* regarding the structure and execution of a public inquiry. As a summary of submissions into the ongoing inquiry into the Grenfell Tower disaster, valuable lessons can be taken from the shortcomings raised here, and recommendations on how the Scottish Government might avoid replicating these can be abstracted.

1.4.3 Similarities across the sources

There is some overlap between *Sources 1 and 2* where both sources highlight the discriminatory nature of the pandemic; while *source 1* refers specifically to death figures, *source 2* gives a wider account of how different groups have been affected disproportionately where other rights are concerned. *Source 2* includes in its recommendations:

The specific rights of women, disabled people, older people, children and black and minority ethnic people must be further protected and implemented alongside economic, social, cultural and environmental rights in responding to the experience of this pandemic¹⁷.

Source 1 similarly highlights the disparities in both age and ethnic background, as referenced in chapter 1.1 of this brief. *Source 1* has a narrower scope in only concerning the impact on the likelihood of dying with coronavirus in a care home; *source 1* does not consider other potential rights infringements as *source 2* does. However, *sources 1 and 2* highlight the particular importance of an investigation into policy surrounding care homes.

Source 1 is a report into care homes specifically, and *source 2* includes a section on care homes which features some of the same data and raises the same questions regarding whether clinical guidance, PPE, and the availability and distribution of testing

¹⁷ SHRC n(14) para 1, Overarching Recommendations.

(including the transfer of patients from hospitals to care homes) was adequate¹⁸. The section on care homes in *source 2* is almost the same as the data included in *source 1*, indicating that both reports have been commissioned by the SHRC and will draw on the same data and source material.

Sources 1 and 2 posit recommendations, and *source 1* refers to a PANEL human rights-based approach to a public inquiry¹⁹. This human rights-based PANEL approach is a recommendation I found to be extremely important and will go on to explain it in detail later in this brief. The recommendations found in *source 1* will provide specific Article 2 inquiry guidance. While many of the recommendations found in *source 2* do not relate to Article 2 rights engagements, they will be important in retaining a grasp on the scope of the inquiry into deaths outwith care homes. For example, *source 2* posits:

Recommendations

All changes to restrictions and services by government and other public bodies or those providing public services must reflect a rights-based approach, prioritising areas which support the delivery of rights for those who require most above other social goods within a phased approach. This should be reflected in robust impact assessments which inform decision making. There is a need to build human rights capacity across Government to ensure this approach is embedded²⁰.

Here is reflected both the comparatively broader scope of *source 2* and its shared commitment with *source 1* for a rights-based approach to Governmental conduct, including any subsequent inquiry into deaths arising from COVID-19.

While the substantive content of *source 3* refers to a completely separate incident, there are similarities in the nature of Article 2 rights and obligations engagements, as well as the need to structure an investigation into both the Grenfell Tower Disaster and the Coronavirus Pandemic within Article 2 investigative obligations.

¹⁸ Ibid para 4.1, Care Homes.

¹⁹ SHRC (n 10) para 52.

²⁰ SHRC (n 14) para 2.3. Routemap and Human Rights.

1.4.4 Differences across the sources

There are important distinctions between the sources, particularly *sources 1 and 2*, that can be used to abstract a balanced overview of how an inquiry must be structured. *Source 1* includes a vast amount of guidance on the relevant human rights law which will be essential to the subsequent inquiry as it is crucial for the inquiry to be conducted to the standards and obligations set out in ECHR Article 2.

Sources 1 & 2

Source 1 explains in good detail the requirements of Article 2, which are understandable to a layperson and can be used by this brief. Although *source 2* contains far less detail of the relevant human rights law, it does provide a much wider scope of areas where there have been rights engagements and does not confine itself to care homes as *source 1* does. Accordingly, in order to make the best possible recommendations for an inquiry into COVID-19 deaths, both of these articles must be referred to in conjunction with each other (and *source 3*). *Source 1* explains the *procedural obligation to investigate*²¹ included in Article 2, which will be imperative to any inquiry into deaths where state responsibility is potentially engaged.

Source 2 expands the scope given in *source 1* beyond care homes and into the rest of society. While care homes must make up a large part of any inquiry into COVID-19 deaths, with 40% of deaths occurring in care homes, it is vital that the inquiry does not limit its scope, an issue discussed in *source 3*. Taken together, *sources 1 and 2* offer relevant legal guidance of the investigative obligations in Article 2 as well as an accurate picture of the extent of the scope of rights engagements in Scotland during the pandemic.

Source 3

Source 3 refers to the shortcomings of the Grenfell Tower inquiry and is a contemporaneous example of an inquiry into Article 2 engagements and where Article

²¹ SHRC (n 10) para 15.

2 investigative obligations are triggered. It is important to consider the issues that arise here in order to avoid making the same mistakes in a COVID-19 deaths inquiry.

Concerns were raised about the access to the Grenfell inquiry²². These relate to the venue for the inquiry potentially preventing survivors, bereaved, and members of the community from participating and the ability to properly question witnesses, resulting in some issues not being fully explored. Concerns at Grenfell regarding access to the inquiry are significant as COVID-19 has been nationwide, and as a result, the onus must fall on the Scottish Government to ensure that travel and accommodation are provided for witnesses, survivors and affected members of the community where necessary in providing evidence to the inquiry.

Concerns at Grenfell over the ability for affected parties' representative's ability to question witnesses will also be more complicated to address for a COVID-19 inquiry than at Grenfell. Affected parties must be able to put questions to high profile figures behind the governmental decision-making processes surrounding key areas such as the decision to transfer patients into care homes without testing, PPE, and medical guidance. The Scottish Government must ensure they are fully accountable where appropriate. This is particularly important in securing public confidence in the inquiry as there will be grievances raised where the Scottish Government should not necessarily be accountable. Thus, full accountability where appropriate is vital in securing legitimacy and the trust of the Scottish people.

The Grenfell inquiry also raises concerns about scope in 5 key areas highlighted by the *HREC* report that will be necessary to discharge investigative duty in establishing state responsibility in Grenfell and potential ongoing similar breaches²³. This means any COVID-19 inquiry must establish state responsibility or non-responsibility over a broad scope of issues relating to COVID-19 deaths and establish if there are potential ongoing violations of a similar nature and how to avoid these in the future. By

²² Human Rights and Equalities Commission (n 15) page 8, Access to the inquiry.

²³ Human Rights and Equalities Commission (n 15) para 123.

referring to *source 2*, there will be a better chance of avoiding too narrow a scope as may be the case if only care homes deaths were included in the inquiry.

Concerns were also raised about the delay in the Grenfell inquiry both at the beginning of phase one and now to the beginning of phase two. Health and safety restraints on a COVID-19 inquiry, given the ongoing nature of the pandemic, dictate that it should only be conducted when it is safe to do so; however, it must aim to be started as soon as possible after that is the case. Investigations and information gathering should already be underway.

Participation and legitimacy are 2 of the paramount concerns for any inquiry, and COVID-19 should be no different. In line with the Equalities Act 2010,²⁴ non-discrimination must be a priority in the structuring of the inquiry, and this is particularly important as COVID-19 has affected certain societal demographics discriminately. The main participation concerns surrounding the Grenfell inquiry were:

- (1) The venue initially not being of adequate size or appropriate location²⁵;
- (2) The legal representatives representing survivors, the bereaved and other affected members of the community have been prevented from putting questions to witnesses themselves²⁶;
- (3) *Disclosure*. Disclosure has been voluminous as would be expected. However, the burden on the legal representatives representing the survivors, the bereaved and other affected members of the community appear to have been enormous given the limits of the resources available to them²⁷.

As points 1 & 2 have been discussed above, I think it suffices to say that in relation to disclosure concerns, the Scottish Government must work to ensure legal professionals

²⁴ Equalities Act 2010 s.149.

²⁵ Human Rights and Equalities Commission (n 15) para 126.

²⁶ *Ibid*.

²⁷ *Ibid*.

involved in the inquiry have adequate resources available to promote the inquiry's efficacy.

These criticisms of the Grenfell inquiry serve, in conjunction with recommendations set out in *sources 1 and 2*, as a means by which the coronavirus inquiry can self-assess its functional legitimacy.

1.4.5 How this brief complements existing literature and the importance of the originality of this brief

The gaps left in each of these sources can, in many ways, be filled by each other, and that is what this literature review, and this brief as a whole, seeks to achieve. By taking the legal direction in *source 1*, together with the scope of Article 2 rights engagements documented in *source 2 and* supplementing this with the topical guidance found in *source 3*, we can establish a solid starting point for structuring an Article 2 compliant inquiry into coronavirus deaths in Scotland that should avoid major structural issues. The importance of the originality of this brief is that it seeks to take this further and demonstrate how Scotland might set a model inquiry and display global human rights leadership. This brief uses existent guidance and compiles it into one brief, which can offer both relevant legal guidance and an accurate representation of the scope of Article 2 rights engagements in Scotland. It then seeks to frame this as a minimum acceptable standard rather than a target itself. Finally, after setting out how to meet this minimum standard, it will offer recommendations on how it can be surpassed.

The Law

This chapter will consult Article 2 ECHR and the European Court of Human Rights (ECtHR) (Strasbourg) (the court) caselaw to dissect the doctrines of positive obligations, operational choices, the margin of appreciation, and how Article 2 obligations are affected by a medical care setting. It will then explore the development of the procedural element of Article 2 and how caselaw sets out the requirements for the discharge of this. It will seek to identify the underlying legal principles relevant to coronavirus deaths in Scotland from these sources by employing a doctrinal and socio-legal approach to the case law of the ECtHR. It will then demonstrate how Article 2 is

engaged by deaths that occur with medical care and how this affects the overarching policy decisions outlined in chapter 1. However, caselaw will also reflect the scope of potential Article 2 violations within the pandemic. As with Chapter 1.4, while emphasis is placed on the importance of deaths arising from care homes, breadth of caselaw will demonstrate the importance of avoiding limiting an inquiry to just those deaths.

2.1 - ECHR Art.2 Positive Obligations

It was first established in the *LCB* case²⁸ that the first sentence of Article 2(1) confers not only a negative obligation on states to refrain from the intentional and unlawful taking of life but also a positive obligation to take appropriate steps to safeguard the lives of those within their jurisdiction²⁹. This is known to be an extensive duty, with the Grand Chamber holding in the *Öneryildiz* case: ‘that this obligation [to take appropriate steps to safeguard the lives of those within the State’s jurisdiction] must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake.’³⁰

The obligation then requires, at its most basic, a duty to put in place a legislative and administrative framework for the purposes of avoiding unlawful killings/deaths with state liability. In the context of the coronavirus pandemic, this translates to legislative framework and policy imperatives to minimise the number of deaths sustained as a nation in Scotland. Although in the context of a pandemic, it is unavoidable that lives will be lost, there is not a particular threshold number that would signal unlawfulness. As discussed in Chapter 1, lawfulness would be determined through analysis of individual cases and overarching policy decisions by the inquiry. Having established the relevance and engagement of Article 2 within the context of a pandemic in a general sense, I will now seek to elaborate on which component obligations of Article 2 will be relevant to Scotland. To explore the scope of these obligations generally, we

²⁸ *LCB v United Kingdom* (App. 23413/94), 9 June 1998, (1998) 27 EHRR 212, ECHR 1998-III.

²⁹ Jacobs, White, and Ovey, *The European Convention on Human Rights* (7th edn, OUP 2017) 161.

³⁰ *Öneryildiz v Turkey* (App 48939/99) (2005) 41 EHRR 325, ECHR 2004-XII, § 72.

will look at the *Budayeva and Others* case³¹ and temper analysis with the obligations where medical care is explicitly concerned, and there will be analysis of the *Lopes de Sousa Fernandez* case³². Again, these cases are considered separately to give an accurate depiction of the scope of obligations under Article 2 whilst understanding that those arising in a medical care setting will be of particular importance.

2.1.1 *Budayeva and Others v Russia*

I will use a doctrinal will allow us to consolidate our understanding of exactly what these obligations entail as set out in Article 2 and ECtHR case law. From here, we will see what obligations Scotland will be under and what it might do to discharge and even surpass them.

The *Budayeva* case concerned the Russian authorities' response to known risks of mudslides, which had occurred in the region every year since 1937. Mudslides in July 2000 caused considerable devastation, and the first applicants' husband had been killed when he stayed behind in a block of flats to help his parents-in-law, and those flats collapsed. The court identified a string of deficiencies in the response of the authorities to the known risk and ruled Article 2 had been violated due to the inadequacy of the defence system and the failure to establish any form of warning system³³:

The Court concluded that there had been no justification for the authorities' failure to implement land-planning and emergency relief policies in the hazardous area of Tyrnauz concerning the foreseeable risk to the lives of its residents, including all the applicants. Moreover, it found that the serious administrative flaws which had prevented the implementation of those policies had caused the death of Vladimir Budayev and injuries to his wife, to Fatima Atmurzayeva and members of their family. The Russian authorities had therefore failed in their duty to establish a legislative and administrative framework with which to provide effective deterrence against a threat to the right to life, in violation of Article 2³⁴.

³¹ *Budayeva and Others v Russia* (Apps. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02), 20 March 2008, ECHR 2008.

³² *Lopes de Sousa Fernandez v Portugal* (App. 56080/13), 15 December 2015.

³³ Jacobs (n 29) 167.

³⁴ *Budayeva* (n 31) Decision of the Court, Article 2, para 7.

The major underlying legal principles upon which a violation was ruled to have occurred in *Budayeva* are the principles of legislative and administrative foreseeability and preparedness. While it is not the aim of this brief to establish whether or not violations of Article 2 have occurred, I will posit evidence that suggests that on the basis of foreseeability and preparedness, as established in *Budayeva*, this will at least be engaged by the pandemic in Scotland. An independent report³⁵ by the Auditor General of Scotland³⁶ suggests that The Scottish Government's failure to heed warnings over its pandemic planning in the last decade may have led to PPE shortages and stretched social care capacity that hindered Scotland's response to the Covid-19 pandemic. Given that the Auditor General reports to the Scottish Parliament through the Public Audit and Post-legislative Scrutiny Committee³⁷, I believe this report can be considered truly independent and would be probative evidence for any subsequent inquiry. This evidence would be probative on the basis that it outlines the same underlying legal principles of foreseeability and preparedness - in the context of the pandemic in Scotland - as established in *Budayeva* as, at the very least engaging, the positive obligations set out in Article 2.

As a means of providing a counterbalance upon this obligation, the ECtHR in *Budayeva* also noted that the burden placed on a contracting state must be reasonable. This is known as a margin of appreciation, preventing contracting states from being held to an impossible standard. In this context, it manifests corollary to considerations afforded to the contracting state in respect of their operational choices:

An impossible or disproportionate burden must not be imposed on authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources...this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres...This consideration must be afforded

³⁵ Audit Scotland, Tracking the implications of Covid-19 on Scotland's public finances, February 2021, <<https://www.audit-scotland.gov.uk/report/covid-19-tracking-the-impact-of-covid-19-on-scotland-s-public-finances>> accessed 22 February 2021.

³⁶ 'Stephen Boyle has occupied this role since July 2020', <<http://www.audit-scotland.gov.uk/about-us/auditor-general>> accessed 22 February 2021.

³⁷ 'Parliament To Nominate New Auditor General For Scotland - News & Parliament TV: Scottish Parliament' (parliament.scot, 06.03.2020) <<http://www.parliament.scot/newsandmediacentre/114768.aspx>> accessed 22 February 2021.

even greater weight in the sphere of emergency relief...which is beyond human control, than in the sphere of dangerous activities of a man-made nature³⁸.

This gives us markers for where the beginning and the end of the scope of Article 2 positive obligations lie in a general sense. While I have suggested there is probative evidence pertaining to the foreseeability of the pandemic and lack of preparedness of the Scottish Government, any inquiry must take into account the wide margin of appreciation as The UK is a contracting party to the ECHR, Scotland is subject to the Convention as a member of the UK. This is important because the same margin of appreciation does not necessarily bind the recommendations and conclusions of any inquiry. If, in certain cases, violations of Article 2 were found not to exist for the foregoing reasons if/when brought to Strasbourg, an inquiry would still have scope to make a variety of alternative conclusions and disposals drawn from domestic Scots law and public policy.

2.1.2 Lopes De Sousa Fernandes v Portugal

This case will supplement the general scope considerations for Article 2 positive obligations with considerations to be applied to where death arises in a medical care setting.

Traditionally, the ECtHR has taken the view that a death caused by negligence in the healthcare setting does not amount to a violation of Article 2;³⁹ however, this case sets out exceptions to that general rule. The case concerned the death of Ms Lopes de Sousa Fernandes' husband following nasal polypectomy surgery, and the subsequent procedures opened for various instances of medical negligence. The Court found in particular that the mere fact that the patient had undergone a surgical operation presenting a risk of infectious meningitis should have warranted a medical intervention in conformity with the medical protocol on post-operative supervision. Without wishing to speculate on the chances of survival of Ms Lopes de Sousa Fernandes' husband, the Court took the view that the lack of coordination between the ear, nose and throat department and the emergencies unit inside the hospital

³⁸ *Budayeva* (n 31) [135].

³⁹ *Powell v United Kingdom* (App. 45305/99), 4 May 2000, Decision on Admissibility.

revealed a deficiency in the public hospital service, depriving the patient of the possibility of accessing appropriate emergency care. The Court held by five votes to two that there had been a violation of Article 2 of the European Convention on Human Rights as to the right to life and unanimously that there had been a violation of Article 2 under its procedural head⁴⁰.

In this ruling, the ECtHR had to consider medical negligence and the suitability of domestic professional standards. From this, the court claimed that two very exceptional sets of circumstances could lead to a violation of Article 2 in a medical care setting. They are:

- A. Where life is 'knowingly put in danger by denial of access to lifesaving treatment' and;
- B. Where a 'systematic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment, and the authorities knew or ought to have known about the risks and failed to undertake the necessary measures to prevent that risk materialising.'⁴¹

In exception B, we find the underlying legal principle of Article 2 that will concern potential violations arising from medical care settings, including care homes, during the course of the pandemic in Scotland. In *Lopes de Sousa Fernandez*, the ruling of an Article 2 violation largely turns on the substandard communications between hospital departments insofar as they contributed to the death of Ms Sousa Fernandes' husband. Once again, while this brief aims not to attempt to determine whether Article 2 violations have occurred or not during this pandemic, it is pertinent to note evidence that infers the engagement of Article 2 obligations. In October 2020, Scottish Care, who represent over 400 organisations, totalling almost 900 individual services, delivering residential care, nursing care, day care, care at home and housing support services⁴², providing 'A Scottish voice for care providers, their workforce and people who access care and

⁴⁰ *Lopes* (n 32), Decision of the Court, Article 2 (the right to life), para 2.

⁴¹ *Ibid.*

⁴² <www.scottishcare.org/our-vision/> (2021 Scottish Care), accessed 25 February 2021.

support'⁴³, released a statement covering discharges from hospitals to care homes. In this statement, pre-existing communication concerns are highlighted:

Even before Covid-19 there were circumstances where the eagerness to discharge from hospital in some locations had led to a strain or breakdown in relationships with the care home sector. The most commonly cited instance for these tensions was where a clinician considered someone capable of being supported in residential care, whereas after they were discharged it became clear to care staff that they required nursing and not residential care.

Before the pandemic, therefore, the process of clinical discharge into care homes was one which was not always smooth and frequently problematic. As a result, there was often a local distrust in the discharge system and process⁴⁴.

Given that concerns over the state of communications between medical care departments were pre-existent and can be considered to have been exacerbated by the pandemic, the egregious nature of this breakdown would seem to be self-evident. It also further evidences the engagement of the principles of foreseeability and preparedness as discussed through *Budayeva*. Thus, given that in *Lopes de Sousa Fernandez*, the breakdown of communications between medical care departments was ruled as amounting to a violation of Article 2 insofar as it resulted in a patient's death, it seems evident that this will also engage Scotland's response to the pandemic. Thus, once again accentuating the importance of thoroughly investigating the policy decisions around care homes during the pandemic.

2.2 The Procedural Head of ECHR Art.2

2.2.1 Evolution of The Procedural Head

The starting point for the development of Article 2's interpretation to include a procedural or investigative element is the *McCann* case⁴⁵. Here, the Strasbourg Court observed that any general legal prohibition of arbitrary killing by agents of the state

⁴³ Ibid.

⁴⁴ Scottish Care statement on discharge into care homes, Scottish Care, 28th October 2020, paras 3&4. <<https://scottishcare.org/scottish-care-statement-on-discharges-into-care-homes/>> accessed 25 February 2021.

⁴⁵ *McCann and Others v United Kingdom* (App. 18984/91), 27 September 1995, Series A No 324, (1996) 21 EHRR 97.

would be ineffective in practice without a procedure for reviewing the lawfulness of the use of lethal force by state authorities⁴⁶:

The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention' requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the state⁴⁷.

I will first consult a socio-legal methodology to chart the development of the procedural element of Article 2 and subsequently a doctrinal methodology to explore the requisite elements this development has established. These methodologies will allow for an understanding of the forces that have shaped this development and how the current interpretation is relevant to a public inquiry into coronavirus deaths in Scotland. As set out above, the initial interpretation of this procedure was exclusive to deliberate killings by agents of the state, so we will now explore its metamorphosis to cover the issues contained in this brief.

The first relevant case we will consider, positing the notion that Article 2 investigative obligations could be engaged where there is the absence of state responsibility for death, was the case of *Menson*⁴⁸. In this case, the applicant's brother, a member of the BAME community, died after being set on fire by a gang of white youths. The applicant did not allege that the state had in any way caused the death, nor that they should have in any way known that he was at risk of violence⁴⁹:

However, the absence of any direct State responsibility for the death of Michael Menson does not exclude the applicability of Article 2. It recalls that by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *LCB v. the United Kingdom*, judgment of 9 June 1998, Reports 1998-III, p. 1403, § 36), Article 2 § 1 imposes a duty on that State to secure the right to life by putting in place effective criminal law provisions to

⁴⁶ Jacobs (n 29) 168, para 1.

⁴⁷ *McCann* (n 45) § 161.

⁴⁸ *Menson and Others v United Kingdom* (App. 47916/99), Decision of 6 May 2003, ECHR 2003-V.

⁴⁹ Jacobs (n 29) 177, para 1.

deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.⁵⁰

The underlying facts of this case suggest, from a socio-legal perspective, that this development in the interpretation of Article 2 investigative obligations seeks to address a deficiency in investigations into criminal conduct with racial aggravation. It was suggested that the investigation, in this case, was inadequate as a result of underlying racial biases within the police. In light of this, the investigative obligation in Article 2 was extended in the hope that, where this was to happen again, recourse would be available to families who felt they had been let down by the investigations into the deaths of their loved ones at the hands of (actors other than) the state. Consequently, even if the State were to successfully argue they had not engaged Article 2 rights during the course of the pandemic in Scotland, the procedural head would still confer an investigative obligation.

Further development is offered in the *Ramsahai* case,⁵¹ where the Grand Chamber offer an even more comprehensive overview of the requirements of the Article 2 investigative obligation:

In order to be 'effective' as this expression is understood in the context of Article 2 of the Convention, an investigation into a death that engages the responsibility of a Contracting Party under that Article must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard...Secondly, for the investigation to be 'effective' in this sense it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical

⁵⁰ *Menson* (n 48).

⁵¹ *Ramsahai and others v the Netherlands* (App. 52391/99), 15 May 2007 [GC], (2008) 46 EHRR 983, ECHR 2007 - nyr.

independence...What is at stake here is nothing less than the public confidence in the states monopoly on the use of force⁵².

Taking a doctrinal approach to this case as it is concerned with a non-analogous fatal shooting by a police officer, we are offered the most comprehensive interpretation of the procedural obligation. In the interests of this brief, the crucial part of this ruling is that we are told an investigation must follow any '*death that engages the responsibility of a Contracting Party under that Article*'. As Article 2 positive obligations have been established throughout this brief, the *Ramsahai* case should now illustrate that following the pandemic, Scotland faces a legal obligation to investigate these deaths 'effectively' or risks being found to have unsuccessfully fulfilled its procedural obligations under Article 2.

The somewhat general interpretation in *Ramsahai* can be tempered once again with caselaw relating specifically to a medical care setting. The *Šilih* case⁵³ concerned a twenty-one-year-old man who was being treated for urticaria. He had an allergic reaction to one of the drugs administered to treat his condition and subsequently died. The case concerned the enquiries into the circumstances of the death and any liability for it. In Slovenia, this can be done through both criminal and civil proceedings. The man's parents used both processes, which proceeded at a snail's pace. This was not a case of absence of procedures, but the way the procedure had operated in the case of the man's death. The Grand Chamber emphasised the need for a prompt response, especially to a sudden death in a hospital setting⁵⁴:

The excessive length of the criminal proceedings, and in particular of the investigation, could not be justified by either the conduct of the applicants or the complexity of the case. The civil proceedings were still pending more than 13 years after they were instituted⁵⁵.

Despite early dicta to the contrary, it is now clear that the procedural obligation is not confined to cases where it can be established that agents of the state caused the death, but also arises wherever life has been lost in the circumstances potentially engaging

⁵² Ibid [325].

⁵³ *Šilih v Slovenia* (App. 71463/01), 9 April 2009 [GC], (2009) 46 EHRR 996, ECHR 2009 – nyr.

⁵⁴ Jacobs (n 29) 176, para 4.

⁵⁵ *Šilih* (n 53) Conclusion: (b)Merits.

the responsibility of the state. In the socio-legal respect, this violation has been found on the grounds of the investigation being inadequately prompt. Prompt investigations limit the chances of evidence issues and maximise the aspiration of reliable evidence. The interpretation of the procedural limb of Article 2 here has been developed in this case to accommodate this. The *Ramsahai* case speaks of the ‘effectiveness’ of investigation and, along with *Šilih*, has already revealed two of the three main requisites that a COVID-19 inquiry in Scotland will have to satisfy to ensure a violation of Article 2 is not found under the procedural head.

2.2.2 Requisite Elements Under the Procedural Head

The three essential elements for ensuring a lawful investigation under Article 2 as established in ECtHR caselaw are: independence⁵⁶, promptness⁵⁷, and involvement of the family⁵⁸. I will discuss these through doctrinal methodology to establish what is required of the contracting state to discharge its investigative obligation. I will then offer a socio-legal methodological conclusion positing that, in the context of the pandemic in Scotland, Article 2 compliance should be used as a minimum standard and not an aspirational target.

Independence

Turning back to the *Ramsahai* case, in its ruling, the ECtHR offer a comprehensive understanding of what it means by independence:

...for the investigation to be ‘effective’ in this sense it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence...⁵⁹

Independent investigations reflect the principle of the rule of law and ensure that there are no conflicts of interest. The Grand Chamber found an Article 2 violation in *Ramsahai* under the procedural head as there had been a delay of over 15 hours before

⁵⁶ *Ramsahai* (n 51).

⁵⁷ *Šilih* (n 53).

⁵⁸ *Güleç v Turkey* (App. 21593/93) 27 July 1998, (1999) 28 EHRR 121, ECHR 1998-IV.

⁵⁹ *Ramsahai* (n 51) [325].

the investigation was handed over to someone unconnected with the police force to which the officers were attached. The Grand Chamber is clear here that the independence cannot be merely a formal one but has to be totally substantive to allow for a practically effective and independent investigation. Once again, referring to the credentials of the SHRC, a body such as this with the inquiry related powers and the independence it enjoys would represent an ideal model of independence from the state along with the faculties for practical effectiveness.

Promptness

Returning to the *Šilih* case, the Grand Chamber finds that Article 2's procedural limb has been violated due to the pace at which the domestic proceedings were heard:

“As regards the Convention requirements relating to the effectiveness of an investigation, the Court has held that any investigation should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible for an offence. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, such as by taking witness statements and gathering forensic evidence, and a requirement of promptness and reasonable expedition is implicit in this context (see *Denis Vasilyev v. Russia*, no. 32704/04, § 100, 17 December 2009, with further references). The promptness of the authorities' reaction to the complaints is an important factor (see *Labita v. Italy* [GC], no. 26772/95, §§ 133 et seq., ECHR 2000- IV). Consideration has been given in the Court's judgments to matters such as the time taken to open investigations, delays in identifying witnesses or taking statements (see *Maťašaru and Savit̃chi v. Moldova*, nos. 38281/08, §§ 88 and 93, 2 November 2010), the length of time taken for the initial investigation (see *Indelicato v. Italy*, no. 31143/96, § 37, 18 October 2001), and unjustified protraction of the criminal proceedings resulting in the expiry of the statute of limitations (see *Angelova and Iliev v. Bulgaria*, no.55523/00, §§ 101-103, 26 July 2007, and *P.M. v. Bulgaria*, no. 49669/07, § 66, 24 January 2012)”⁶⁰.

When an investigation is carried out promptly, this minimises the chances of misremembered evidence, the opportunity for collusion and ensures that the state involved has to be working to investigate the case of the applicant. While health and

⁶⁰ *Šilih* (n 53) [64].

safety concerns surrounding the ongoing nature of the pandemic have been highlighted, pre-inquiry investigative procedures and evidence gathering should be underway. This will ensure the promptness of an inquiry as soon as it is safe to be held.

Involvement of Family

The final requisite under Article 2 procedure can be understood from the *Güleç* case. This case involved killings by Turkish security forces during a demonstration and the subsequent inadequate investigation into the circumstances: 'The applicant asserted that those responsible for his son's death had been protected by their superiors during the administrative inquiry.'⁶¹

In this case, the deceased's family would have been able to offer evidence that an agent of the state had killed the deceased, and the refusal to involve them worked to protect that officer: 'According to the applicant, his son was killed by the security forces, who fired on the unarmed demonstrators to make them disperse.'⁶²

The case also revealed that by not involving the family, the investigating officer was able to protect those other officers who had been involved in the shooting. In addition to ensuring the practical effectiveness of an investigation, involvement of the family affords the bereaved family dignity. This is a central theoretical component of Article 2 and international human rights law in general, and the involvement of family in investigations is a manifestation of that concept of dignity.

2.3 Procedural Head Conclusions

As I have argued throughout this brief, these three requisites, though important and a solid base for any inquiry must form a minimum acceptable standard rather than an aspirational one. While we must ensure that each of these elements is discharged, a further process ensuring the participation of the public and grounded in human rights values must also be utilised. In doing so, Scotland can set an example of how such inquiries should be executed and will be able to promote the underlying values of

⁶¹ *Güleç* (n 58) [74].

⁶² *Ibid* [9].

human rights. To do this, Scotland must take a 'Human Rights Based Approach', and the following chapter will outline some of the essential tenets of this.

'A Human Rights Based Approach'

3.1 What is a Human Rights Based Approach?

This brief first encountered the concept of a human rights-based approach in Chapter 1.4 when reviewing existing literature from the SHRC. I will once again refer to the *SHRC Care Homes and Human Rights*⁶³ report to elaborate on this concept. I will then employ a doctrinal methodology to posit the PANEL approach, explaining what this is and how it should be executed. I will then offer a socio-legal methodological conclusion as to why I have found it appropriate for this inquiry's purposes.

Looking back to the *SHRC Care Homes and Human Rights report*, we have extensive details about what a human rights-based approach would look like for a public inquiry.

The Commission believes that the Scottish Government should further commit to taking a human rights-based approach to any public inquiry which specifically gives consideration as to whether human rights standards and principles have been met.

A human rights-based approach is about empowering people to know and claim their rights, and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling human rights. There are some underlying principles which are of fundamental importance in applying a human rights-based approach in practice⁶⁴.

From the caselaw developing the procedural limb of Article 2, we were able to see the practical requirements for an effective and lawful investigation. From this description of a human rights-based approach, we see that it must not just be the instant investigation that is the concern of the state but the broader idea that the population

⁶³ SHRC (n 10).

⁶⁴ *Ibid*, page 17, paras 52-53.

should be able to recognise and engage their rights when they are engaged. To encourage this, the SHRC report lays out the PANEL approach.

3.2 The PANEL Principles

The PANEL approach offers a series of principles that should be accounted for in any situation where human rights are engaged. These are self-evidently relevant to any inquiry into COVID-19 deaths and provide a framework for raising the standard from compliance with ECHR Article 2 to a wider human rights-based approach. Through this approach, we can simultaneously empower people to know and claim their rights while increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting, and fulfilling human rights⁶⁵.

Participation

In the context of an inquiry, rights holders and their families should be involved in both the construction and conducting of an inquiry. This will include effective and accessible communication to ensure everyone affected knows about the inquiry and any other remedies and support are in place, allowing them to participate. Importantly, rights holders and their families should be involved in the design and shape of how the inquiry will operate. Example questions that should involve rights holders and their families are how the independence of the inquiry will be secured; how members of the inquiry should be selected and selection criteria; how the inquiry will operate – including mandate and powers, and what remedies may look like.⁶⁶ This principle is fundamental in light of the concerns raised in the *Human Rights and Equalities Commission Summary of Submissions Following Phase 1 of the Grenfell Tower Inquiry*. With participation issues being one of the central concerns following stage 1 of the Grenfell Tower Inquiry, this guidance can be used as a practical method of avoiding the same shortcomings as set out in Chapter 1.4.

⁶⁵ Ibid, Annex 1 – A human rights-based approach to inquiries/investigations, 14 August 2020.

⁶⁶ Ibid.

Accountability

Meaningful accountability should be central to any inquiry. This will involve identifying what there should be accountability for; who is accountable; how that accountability will manifest; and how to ensure effective remedies. Alongside constructing a public inquiry, the Government – alongside rights holders – should examine the question of what other remedies will be appropriate, ensuring that this is based on human rights law on effective remedy⁶⁷. As mentioned in Chapter 1, meaningful accountability will help the people of Scotland’s confidence in an inquiry.

Non-discrimination

The principle of non-discrimination must run throughout any inquiry. This includes that all rights holders and family members should be able to access the inquiry, regardless, for example, of whether they or their family members were residents in/worked for a public or private care home. Characteristics such as a person’s age, sex, disability, mental health and race could all be relevant factors determining whether their experience amounted to a rights violation⁶⁸. The importance of this principle in the context of the pandemic cannot be understated. As we have seen, the virus has affected those of non-white ethnicities and the elderly significantly worse than other demographics.

Empowerment

Rights holders must be empowered to know and claim their rights. The information must be delivered and made available through various mediums, and support is offered to allow everyone to participate. This can include advocacy and psychological support at various stages of an inquiry process. Rights holders and their families should also be kept informed of how their input is being dealt with, and the process

⁶⁷ Ibid.

⁶⁸ Ibid.

should ensure that expectations around what can and cannot be delivered are managed⁶⁹.

Legality

Finally, there should be a comprehensive assessment of the wide range of human rights law and standards applicable to the situation experienced during the pandemic. This will assist the government and other stakeholders in ensuring the fulfilment of its human rights obligations, applying international best practice and learning lessons for the future⁷⁰.

3.3 Conclusions on a Human Rights Based Approach

From a socio-legal standpoint, this approach will benefit not only the efficacy and veracity of Scotland's inquiry into coronavirus deaths but will allow us to rebuild a stronger society where human rights are spoken about, claimed and respected consistently. The PANEL principles go beyond simply ensuring compliance with relevant law and accountability for those involved; it sets out a framework for respecting, protecting and fulfilling human rights in both practice and outcome. For these reasons, I believe it is critical that the Scottish Government incorporate this approach not only to a COVID-19 inquiry but also to all governmental practices involving human rights engagement. In doing so, Scotland will be seen to display global human rights leadership. This is a legitimate, achievable, and noble target to set in the wake of the coronavirus pandemic.

Conclusions, Recommendations, and Reflections

I began this brief in May 2020 and concluded it in March 2021. Starting even then, I could not have foreseen that we would still be in a pandemic, let alone it be, arguably, at its worst in early 2021. I chose this subject because I firmly believe that human rights values and principles should be central to governmental decision-making. Nowhere did this seem more contemporaneously relevant than the unfolding pandemic and surrounding policy. The pandemic has infected - and killed - so many while affecting

⁶⁹ Ibid.

⁷⁰ Ibid.

every life on the globe over the past 13 months. The scale was *almost* unthinkable prior to 2020. ‘*Almost*’ unthinkable because it has happened before and will, to some extent, happen again. This scale, corollary to the impact of policy decisions and the certainty of future infectious diseases is the greatest demonstration of the need for human rights-centric governmental activity in my life so far.

The brief is objective in dealing with the relevant law and the figures surrounding Scotland’s pandemic. For the inquiry to meet Article 2 obligations and further employ a human rights-based approach, the brief itself must be as objective as it purports any inquiry ought to be. I believe this has been achieved and hope that this brief can offer a contribution to that end.

If I were starting this brief again, I would have liked to have included more detail regarding individual cases of coronavirus deaths. While the vast figures that have accompanied this pandemic are a primary reason as to why the inquiry must be objective, effective, and lawful, they can also invite one to overlook the tragedy of each individual death. I understood that I would be challenged by the contemporaneousness of the pandemic where the depth of existing literature was concerned. For anyone wishing to conduct further research on this, I would encourage a theoretical analysis of the capabilities of international human rights law in dealing with a pandemic of this scale. This brief has outlined the law and how it can be built upon and surpassed in an ostensibly doctrinal fashion, but it may be pertinent to know how something other than international human rights law might handle these post-pandemic issues. Ultimately, accountability, justice, and answers to help prevent a pandemic of this scale reoccurring must be the overriding goals.

In conclusion, this brief has furnished the addressee with a comprehensive account of the relevant obligations under Article 2 ECHR. It has also been recommended that mere compliance with these obligations should represent a minimum acceptable standard. Furthermore, it has posited a framework for surpassing these obligations through PANEL and strongly recommends that the Scottish Government implement this. Additionally, the SHRC should be offered a substantial role in the constructing

and conducting of this inquiry due to their expertise, independence, and contributions of relevant guidance. Overall, the Scottish Government is now faced with an opportunity to begin to make up for the mistakes of the past. The degree to which it takes this opportunity is up to it.