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INDEPENDENT REVIEW OF ARTICLE 2 ECHR COMPLIANCE: KENOVA AND RELATED MATTERS

Alyson Kilpatrick BL

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INTRODUCTION

1. I was asked by the Officer in Overall Command (OIOC) Mr. Jon Boutcher QPM Mst (Cantab) FRSA (then Chief Constable of Bedfordshire Police) to conduct an independent review of the investigations, which were known as Operation Kenova investigations. Operation Kenova refers to the initial investigation (announced 2016) concerning an alleged state agent referred to as 'Stakeknife'. Since then, the team set up to investigate Operation Kenova has incorporated multiple additional operations, each with their own tactical operation names. This is detailed below. The umbrella term 'Kenova' is still used to cover the totality of the investigations.[1] Due to the increasing caseload of Kenova, Mr. Boutcher retired from his role as Chief Constable to dedicate his time to Kenova. He continues as OIOC in command of Kenova.

[1] Operation Kenova is the investigation into the activities of alleged agent Stakeknife.

2. From the outset, Mr. Boutcher was aware of his legal responsibilities to conduct effective official investigations, which complied with the requirements of the Human Rights Act 1998.[2] He was acutely aware of the need for public confidence in the investigations and the role he played in protecting peace, democracy and the rule of law. He chose to engage me, an independent barrister in private practice, to conduct a review of Kenova from a human rights perspective. In doing so he impressed upon me his desire for a thorough, independent review, using established legal principles that identified both the positive and negative aspects of Kenova *as per* Article 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), as interpreted by the UK courts taking into account the judgments of the European Court of Human Rights (ECtHR). In the event that I identified any failings I was asked to make recommendations for improvement.

3. In accepting his instructions, we agreed that I would be given unrestricted access to whatever I needed to view. It was also agreed that I would have private access to any person within Kenova with whom I wished to speak. I have also benefitted enormously from speaking with victims and survivors and their families and others who represent them. Because of Mr. Boutcher's commitment to a timely and efficient resolution of the investigations I thought it helpful to provide interim updates aimed at identifying any issues that needed to be addressed as soon as possible. Both updates were made available on the Kenova website. For ease of reading, I include some material from both updates in this final report, which necessarily means there is some duplication. At no time has Mr. Boutcher or anyone else within Kenova attempted to influence my review.

4. My review is confined to Kenova. It is not and should not be mistaken for a commentary on dealing with cases generally. I can, however, say that Kenova, given its clear compliance with the law, its success in securing a high level of trust and confidence from those most directly affected – victims and

[2] See further below.

survivors and their relatives – demonstrates Article 2 ECHR compliance that is both practical and effective.

5. In conducting this review I have kept in mind that the Article 2 obligation to protect life would be meaningless in the absence of a commensurate procedural obligation to conduct an effective investigation intended to expose any breach and hold the perpetrators to account.[3] Importantly, at the outset, I note that practical effectiveness is not measured by its ultimate outcomes; the number or success of prosecutions is not the test, but 31 files have been placed before the DPP for decision as to prosecution. Those files comprise more than 50,000 pages of evidence relating to a total of 17 murders and 12 abductions. Further files are to be submitted to the DPP by the end of 2021.

6. Kenova is progressing and making announcements regularly. For example, the recent announcement that caused the family of a man allegedly murdered by the IRA 30 years ago to say that they have fresh hope that "the net is closing on those responsible."[4] Kenova recovered new DNA evidence which, it is suggested, could aid a successful prosecution.[5] Moreover, Mr. Boutcher has said recently "I believe we have already demonstrated that the truth can be uncovered as regards what happened to victims in unsolved legacy cases. It is of course right to stipulate that in some cases we have found very little, but in most cases we have discovered information that is not known to the families and should be shared with them as it would be in a homicide case anywhere else in the UK."[6]

7. I understand, however, that the DPP has advised Mr. Boutcher that the earliest date for decisions on any of those files is likely to be April 2022. That, I believe, is as a result of a lack of resources. I return to the issue of resources but suffice it to say this is a good example of the obstacle to Article 2

[3] *McCann v UK* (1995) ECtHR.
[4] *Fresh Hope for Family of Ira Murder Victim*, Julian O'Neill NI Home Affairs Correspondent, BBC News online, 19 July 2021.
[5] Tom Oliver, a 43-year-old man, was abducted from his farm in the Republic of Ireland on 19 July 1991, before being found the next day shot dead.
[6] Written evidence submitted by Jon Boutcher, Officer in Overall Command, Operation Kenova (LEG0041), NI Affairs Committee, 2021.

compliance presented by under-funding. Practical decisions and actions have a direct impact upon legal compliance.

BACKGROUND AND FACTUAL SUMMARY

1 The genesis of Kenova can be summarised as follows.

2 Over the course of 14 years, during three official government enquiries into allegations of collusion involving the alleged state agents (Covert Human Intelligence Sources or CHIS) Mr. Brian Nelson and Mr. William Stobie, Sir John Stevens (now Baron Stevens of Kirkwhelpington) raised a number of issues with the Force Research Unit (FRU), the Army's agent-handling unit in Northern Ireland. Lord Stevens reported “My Enquiries have highlighted collusion, the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, and the extreme of agents being involved in murder. These serious acts and omissions have meant that people have been killed or seriously injured.”[7]

3 Lord Stevens observed “last November [2002] a considerable amount of additional documentation from the Ministry of Defence, giving rise to several new and major lines of enquiry, became available to the Enquiry team for the first time. I record this late disclosure with considerable disquiet. I had encountered the same problem of late disclosure during my two previous Enquiries and expressed then my strong concerns surrounding the issue.”

4 In his conclusion Lord Stevens stated “I have uncovered enough evidence to lead me to believe that the murders of Patrick Finucane and Brian Adam Lambert could have been prevented. I also believe that the RUC investigation of Patrick Finucane's murder should have resulted in the early arrest and detection of his killers. I conclude there was collusion in both murders and the circumstances surrounding them. Collusion is evidenced in many ways. This ranges from the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder.”

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[7] *Stevens Enquiry: Overview and Recommendations, 17 April 2003, Sir John Stevens QPM, DL Commissioner of the Metropolitan Police Service.*

5 He found that "the failure to keep records or the existence of contradictory accounts can often be perceived as evidence of concealment or malpractice. It limits the opportunity to rebut serious allegations. The absence of accountability allows the acts or omissions of individuals to go undetected. The withholding of information impedes the prevention of crime and the arrest of suspects. The unlawful involvement of agents in murder implies that the security forces sanction killings." He continued "My three Enquiries have found all these elements of collusion to be present. The co-ordination, dissemination and sharing of intelligence were poor. Informants and agents were allowed to operate without effective control and to participate in terrorist crimes. Nationalists were known to be targeted but were not properly warned or protected. Crucial information was withheld from Senior Investigating Officers. Important evidence was neither exploited nor preserved."

6 As a result of his enquiries, Lord Stevens became aware of the activities of another alleged British Army agent, referred to as 'Stakeknife'. There followed discussions to expand the Stevens Investigation to cover those activities. In March 2006, however, the matter was instead passed to the PSNI Historical Enquiries Team (HET). The HET later referred papers to the Police Ombudsman Northern Ireland (PONI).

7 In 2009, the Criminal Cases Review Commission (CCRC) referred a number of convictions, relating to the kidnapping of Mr. Alexander Lynch, to the Court of Appeal. Those convictions were quashed. As a result, the then Director of Public Prosecutions (DPP), Sir Alasdair Fraser QC, issued a direction (pursuant to Section 35(5) of the Justice (Northern Ireland) Act 2002[8]), requesting information from the Chief Constable in relation to potential criminal conduct of police and military personnel. In October 2014, the then DPP Mr. Barra McGrory issued a section 35(5) direction following the

[8] The Act permits "The Chief Constable of the Police Service of Northern Ireland must, at the request of the Director, ascertain and give to the Director: (a) information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland, and (b) information appearing to the Director to be necessary for the exercise of his functions."

quashing of convictions for offences connected to the murder (in 1989) of Mr. Joseph Fenton.

8 In June 2015, PONI contacted the Public Prosecution Service (PPS) to advise that their review of the Stakeknife papers, referred by the HET in 2012, was complete. On 11 August 2015, in response, the DPP issued a section 35(5) direction seeking information on the affairs of an alleged agent known as Stakeknife. In October 2015, a section 35(5) direction was issued regarding the possible commission of criminal offences of perjury connected to the alleged agent. Meanwhile, in 2011, following a HET review of the 1993 murder of Mr. Joseph Mulhern, the PSNI Serious Crime Branch reopened the investigation into Mr. Mulhern's death.[9]

9 Having received those directions and reopened the investigation into the murder of Mr. Mulhern, the then PSNI Chief Constable considered the appropriate response. He decided that an independent team should be appointed to investigate. He reviewed the options and decided that Mr. Jon Boutcher (then Chief Constable of Bedfordshire Constabulary) was well placed to undertake the investigations given his experience, expertise and independence. In a recent independent review, reference was made to that appointment. The following observation is made "Jon Boutcher is an accomplished senior leader with vast experience and accreditation in managing high profile investigations, ranging from international counter terrorism to serious and major crime investigation, at tactical, strategic and executive levels."[10]

10 Mr. Boutcher's appointment was confirmed following discussions about the terms of reference and the operating environment. Mr. Boutcher agreed to the appointment on the strict condition that he would be able to set up his own

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[9] That investigation is still progressing and an interim report was forwarded to the Public Prosecution Service in January 2016.
[10] *Thematic Peer Review Kenova*, NPCC Homicide Working Group, January 2021.

independent team and retain ultimate command and control of the investigations.[11]

11 Mr. Boutcher was appointed on that basis and assumed the task of setting up his independent team. Importantly, Mr. Boutcher had, and still has, the full delegated authority of the PSNI Chief Constable. That means he has the power to direct the investigation with full police powers (and responsibilities). He does not rely on the 'permission' of the PSNI to conduct his enquiries, to gather evidence, to make arrests or to refer files to the DPP. The investigation team's statutory foundation is section 98(1) of the Police Act 1996, which permits a Chief Officer of police in England or Wales, on the application of the Chief Constable of the PSNI, to provide constables or other assistance for the purpose of enabling the PSNI to meet any special demand on its resources. Moreover, while a constable is provided under this section for the assistance of another police force, he or she is under the direction and control of the PSNI Chief Constable and has the like powers and privileges as a member of the PSNI.

12 Mr. Boutcher appointed former Metropolitan Police Commander Keith Surtees as Senior Investigating Officer (SIO) and thereafter put together an experienced investigation team. An independent review in 2021 refers to Commander Surtees as an SIO with "a wealth of experience in tackling serious and organised crime, homicide, sensitive enquiries and high-profile counter terrorist investigations." In respect of the investigative team, that same review notes they have "been recruited from a broad range of investigative disciplines. Documents examined in respect of staff skills and accreditation provide a comprehensive record of their experience in line with national standards." I was impressed, when I met the team, at their discipline, experience and sheer dedication to Kenova.

13 Kenova now encompasses Operation Kenova and other investigations: Operation Mizzenmast;[12] and, Operation Turma.[13] Operation Kenova is at an

[11] Correspondence between Chief Constable PSNI and Mr. Boutcher.

advanced stage with multiple separate investigations into alleged offences including murder, attempted murder, kidnap and serious assaults. A number of files are with the DPP for decision. A decision has been issued in relation to 4 files, which I consider further below.

14 It is important to keep the background to and context of Kenova firmly in mind, not least because the Court of Appeal in Belfast recently observed "past investigatory failures should be taken into account in deciding the separate questions as to whether there is a lack of hierarchical or institutional connection and whether there is practical independence."[14]

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[12] Concerning the murder of Mrs. Jean Smyth-Campbell, which in 2019, was brought within the scope of Kenova as per a request by the PSNI Chief Constable.
[13] Concerning the murders of 3 RUC officers Sean Quinn, Allan McCloy and Paul Hamilton, which was brought within the scope of Kenova in 2019, as per a request by the PSNI Chief Constable.
[14] *McQuillan (Margaret's) Application* [2019] NICA 13.

LEGAL FRAMEWORK AND ANALYSIS

Introduction

1. It is primarily the Human Rights Act 1998, an Act of the Westminster Parliament which was brought into force across the United Kingdom in 2000, that dictates the standards relevant to Kenova investigations. When considering human rights compliance, including in respect of the right to life, most commentary refers to Article 2 of the ECHR, but It is the 1998 Act of Parliament that gives the right its real and immediate effect. The duty to comply however pre-dates the 1998 Act and will continue after the 1998 Act, should it be repealed. What is different is the direct effect of article 2 and its means of enforcement. In this review, for ease of reference, I use simply 'Article 2' to refer broadly to the standards required of Kenova.

2. I set out in some detail the legal framework within which Kenova operates. It is important that I am clear about the legal standards to which I have carried out this review. The following is derived from domestic legislation and international standards, which the UK has committed to. This is neither an aspirational analysis nor a personal opinion. I do not set out every judgment or legal standard that applies, to do so would be unmanageable in a report of this kind, but I did consider everything for the purposes of providing what I hope is a helpful summary.

3. I did not measure Kenova against what I think ought to be done, but what should be done according to established legal principles. Kenova has, impressively, evolved to deal with and fulfil all legal obligations and it complies with standard legal principles. In case it is suggested that Kenova has 'gone too far' and is more than is necessary, my professional view is that it has not. Rather, Kenova has achieved Article 2 compliance and *because* of that it has built confidence among victims' families and survivors, which in turn has led to it being an effective investigation protective of the rights of all involved, while respecting democracy and the rule of law.

The right to life and duty to investigate the taking of life

4. The Human Rights Act was intended to "give further effect to rights and freedoms guaranteed under the European Convention on Human Rights."[15] The ECHR, which the 1998 Act sought to incorporate into domestic law, was the first Council of Europe treaty to deal with the protection of human rights. The ECHR is based directly upon the Universal Declaration of Human Rights and was signed by member states of the Council of Europe on 4 November 1950. The ECHR came into force on 3 September 1953. The United Kingdom ratified the ECHR in 1991. By ratifying the ECHR, member states of the Council of Europe, in which the UK remains, guarantee for their citizens the rights and freedoms contained within the ECHR. By passing the Human Rights Act, the ECHR is enforceable directly in local courts in Great Britain and Northern Ireland.

5. It is worth pausing to note that section 32 of the Police (Northern Ireland) Act 2000 also continues to apply. It makes it the general duty of police officers to: protect life and property; preserve order; prevent the commission of offences; and where an offence has been committed, to take measures to bring the offender to justice. It goes on to dictate that police officers shall, so far as practicable, carry out their functions in co-operation with, and with the aim of securing the support of, the local community. In essence, even without Article 2 ECHR and the Human Rights Act 1998, there is an obligation to investigate the offences encompassed by Kenova.

6. Given the requirement to carry out functions with the aim of securing the support of the local community,[16] the 2000 Act clearly imposes an obligation to avoid conflicts of interest in the investigation of offences – similar, in my view, to the requirement for independence *as per* Article 2 ECHR. Note, however, that the Court of Appeal in Northern Ireland held that this general duty was subject to the accountability provisions in the Act with a central role being played by the Policing Board and the ultimate power to require the Chief

[15] Human Rights Act 1998, Introductory Text, 9 November 1998
[16] At s. 31(1).

Constable to resign. The Court of Appeal did not "consider that it enables the courts to impose Article 2 compliant standards on or to micro manage investigations."

7. To guarantee oversight of the rights enshrined in the ECHR, the European Court of Human Rights (ECtHR) was set up in 1959. Case law emanating from the ECtHR ensures that the ECHR remains a 'living instrument' capable of adapting as society evolves. The ECtHR consolidates the rule of law (i.e., it enforces the legal maxim that no-one is above the law) and democracy throughout the Council of Europe's jurisdiction. The ECtHR's judgments are binding on member states in that if the ECtHR finds a violation of the ECHR, the member state concerned is required to take action to ensure a similar violation will not recur.

8. The Human Rights Act, at section 2, provides that any domestic court or tribunal determining a question of an ECHR right must take into account: any judgment, decision, declaration or advisory opinion of the ECtHR; any opinion of the Commission given in a report adopted under the Convention; certain decisions of the Commission; certain decisions of the Committee of Ministers. The duty to take into account applies so long as, in the opinion of the court or tribunal, it is relevant to the proceedings in which the question has arisen. So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with ECHR rights. Parliamentary sovereignty is preserved by the proviso that section 2 does not affect the validity, continuing operation or enforcement of incompatible primary or subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility. In such circumstances, a court can only make a declaration of incompatibility. In other words, it was the UK Parliament that directed that local courts must take account of ECHR jurisprudence.

9. The 1998 Act, at section 6, goes on to provide that it is unlawful for a public authority to act in a way which is incompatible with an ECHR right unless: as the result of one or more provisions of primary legislation, the authority could

not have acted differently; or in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the ECHR rights, the authority was acting so as to give effect to or enforce those provisions. An act includes a failure to act but does not include a failure to: introduce in, or lay before, Parliament a proposal for legislation; or make any primary legislation or remedial order. A safeguard for existing human rights is guaranteed by section 11 of the 1998 Act, which provides that a person's reliance on an ECHR right does not restrict: any other right or freedom conferred by or under any law having effect in any part of the United Kingdom; or the right to make any claim or bring any proceedings. In other words, the 1998 Act is intended to enhance existing rights at a domestic level, not to diminish rights.

10. The 1998 Act sets out expressly the rights that are directly enforceable, including the right to life (Article 2). The 1998 Act replicates the text of Article 2 ECHR, which provides "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, and in action lawfully taken for the purpose of quelling a riot or insurrection."

11. Article 2 ECHR is, through the operation of the Human Rights Act, binding upon public authorities including police services and public prosecutors. It applies to the use of lethal or potentially lethal force and requires that such force be no more than is "absolutely necessary" to defend any person from unlawful violence, to effect an arrest (or prevent escape) or to quell a riot or insurrection. The use of lethal or potentially lethal force to effect arrest (or prevent escape), however, is very strictly limited. In *Nachova v Bulgaria*,[17] the

[17] 43577/98 (6th July 2005).

ECtHR made clear that it would not be absolutely necessary to use lethal or potentially lethal force to arrest an individual unless he or she was violent and posing a threat to life or limb.[18] That means, the test for the use of lethal force to effect an arrest or prevent escape is the same as the use of lethal force to defend any person from unlawful violence.

12. Because of the fundamental nature of the right to life, Article 2 ECHR has implications for all security actions including training, planning and control of operations. For example, in *Simsek v Turkey*, the ECtHR made it clear that the police officers in question should have been provided with effective training "with the objective of complying with international standards for human rights and policing".[19] The ECtHR also made it clear that the police should have received "clear and precise instructions as to the manner and circumstances in which they should make use of firearms".[20]

13. The ECtHR has also made clear that Article 2 requires the authorities to plan and control operations in which lethal or potentially lethal force might be used "so as to minimise, to the greatest extent possible, recourse to lethal force".[21] In *Simsek v Turkey*, the ECtHR said "… police officers should not be left in a vacuum when exercising their duties, whether in the context of a prepared operation or a spontaneous pursuit of a person perceived to be dangerous. A legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in light of the international standards which have been developed in this respect".[22]

14. That is, briefly, the substantive obligation to protect life. It is often stressed that the obligation to protect life would be ineffective in the absence of an obligation to investigate the taking of life. Another way of putting it is that the substantive right is dependent upon the procedural obligation to investigate alleged infringements; life is demeaned and the right to protection diluted in

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[18] *Nachova v Bulgaria*, para. 95.
[19] *Simsek*, para. 109.
[20] *Simsek v Turkey*, para.109.
[21] *McCann v UK* (1996) 17 EHRR 97 para. 194; *Andonricou and Constantinou v Cyprus* (1997) 25 EHRR 491 para. 181.
[22] *Simsek v Turkey*, para. 105.

any case where an investigation does not follow. The investigation is as important and should be taken as seriously as the loss of life itself. Article 2 is concerned with the loss of life – any life – but imposes a particularly high standard to investigations in which those that are meant to protect life are implicated, whether by the taking of life or the failure to protect that life from others.

15. In the seminal case of *McCann & Others v UK* (1995) the ECtHR explained "...a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. 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 State." What the ECtHR was restating in *McCann* was how the obligation to protect life is meaningless in the absence of a commensurate procedural obligation to conduct an effective investigation intended to expose any breach and hold the perpetrators to account.

Investigations – Article 2

The extent of the duty

16. After *McCann* the ECtHR went on to consider what was required for an effective investigation, in the Article 2 sense.

17. The first ECtHR case which found a violation of the procedural obligation, *Kaya v Turkey* (1998), concerned the killing of a man by security forces in disputed circumstances in south-east Turkey. The ECtHR held that the case could not be considered a clear case of lawful killing and therefore could not be disposed of with minimal formalities. It found the investigation to have been seriously deficient for want of a proper forensic examination and an autopsy.

The ECtHR noted that the investigating authorities had proceeded on the assumption that the deceased was a terrorist who had been killed in an 'armed clash' with security forces. The ECtHR observed that neither the prevalence of armed clashes in the region nor the high incidence of fatalities could dispense the authorities of the obligation under Article 2 to ensure that deaths arising out of such clashes were effectively investigated.

18. *Kaya* set some parameters for the investigative duty as follows: "the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances." The ECtHR went on "In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure."

19. In 2001, in four cases against the UK,[23] the ECtHR set out the core principles of the procedural obligation, which have not been departed from but have been refined in more recent cases. The ECtHR said the investigation must be "effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances... and to the identification and punishment of those responsible... This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony...Any deficiency in the investigation which undermines its ability to

[23] *McKerr v. the United Kingdom*, no. 28883/95, ECHR 2001-III; *Kelly and Others v. the United Kingdom*, no. 30054/96; *Shanaghan v. the United Kingdom*, no. 37715/97; and *Hugh Jordan v. the United Kingdom*, no. 24746/94, ECHR 2001.

establish the cause of death or the person or persons responsible will risk falling foul of this standard."

20. As the ECtHR observed in *Öneryildiz v Turkey* (2005) "the competent authority must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue." Moreover, in *Nachova v Bulgaria* (2005), it observed, "any deficiency in the investigation which undermines its ability to establish the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness."

21. In *Al-Skeini v UK* (2011), the ECtHR observed, "the investigation must be broad enough to permit the investigating authorities to take into account not only the actions of the State agents who directly used lethal force, but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life."

22. In *Tunç v Turkey* (2014) the ECtHR clarified further, "In order to be 'effective' as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate... That is, it must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible." Lastly, in this context, in *Mocanu and Others v Romania* (2014), the ECtHR Grand Chamber emphasised that "the investigation must be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation."

23. While there must be a system which is designed to ensure that persons against whom there is sufficient evidence are prosecuted, Article 2 does not extend to require that a prosecution *must* follow.[24] For example, the Public Prosecution Service can decide that despite the evidential test being satisfied a prosecution would not be in the public interest. However, if there is sufficient evidence to mount a prosecution any decision not to prosecute must be supported by reasons which meet the reasonable expectations of interested parties that a prosecution would follow or a reasonable explanation for not prosecuting.[25]

24. It is clear that to be effective the investigation must be adequate i.e., it must be capable of leading to a determination of what happened and of identifying and – if appropriate – punishing those responsible. As above, this is not an obligation of result but of means: *Armani Da Silva v UK* (2016). The ECtHR has refused, expressly, to determine a set model for Article 2 investigations for that reason. It depends upon the circumstances in each case, with independent investigators best placed to determine what is needed to secure all elements of compliance. What is determinative however is what it *cannot* be. If investigators are not free to conduct a thorough, objective and impartial analysis, Article 2 will be breached. Failing to follow an obvious line of inquiry for example would undermine to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible. The investigators must take whatever reasonable steps they can to secure the evidence concerning the incident, including, amongst other things, eyewitness testimony.

Independence

25. The requirement under Article 2 - that investigators have independence from those potentially implicated - is well known. It is part of ensuring an effective investigation. Independence in the strict sense requires demonstration that

[24] This is also the position in England and Wales.
[25] See e.g., *R v DPP ex parte Manning & Melbourne* [2001] QB 330 DC; *R (Denis) v DPP* [2006] EWHC 3211; *R (Armani de Silva) v DPP*EWCA 3204.

there is nothing which undermines the capacity of the investigators to conduct an independent investigation. Absence of conflict is undoubtedly an essential element of an investigation but independence in the Article 2 sense is more than that.

26. The ECtHR has held that "it is generally regarded as necessary that the persons responsible for and carrying out the investigations to be independent from those implicated in the events. This means not only a lack of institutional connection but also a practical independence."[26] Therefore, independence must be demonstrated as a matter of institutional, hierarchical *and* practical independence. If the investigation appears to be institutionally and hierarchically independent but is not, in fact, independent there is likely be a violation of Article 2. The purposes of the investigation were described by Lord Bingham "... to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their loved ones may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."[27]

27. Importantly, the requirements of independence apply whether the inquiry subject to scrutiny is investigative only or has additional functions such as deciding on prosecution or making recommendations.[28] In other words, because another independent body is ultimately responsible for deciding on whether to prosecute in an individual case does not absolve the investigation of its obligation to demonstrate the requisite independence.

28. Independence, in the context of PSNI investigations into alleged RUC misconduct, was considered specifically by the ECtHR in 2007. One case (the *Brecknell* case) considered the investigation into the attack on Donnelly's bar in Armagh, in which the initial investigation had been undertaken by the RUC

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[26] *Jordan v United Kingdom* (2003) 37 EHRR 2.
[27] *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653.
[28] See *Ali Zaki Mousa and others v The Secretary of State (No.2)* [2013] EWHC 1412 Admin, Divisional Court.

but taken over by the PSNI in 2004. The ECtHR held, on the question of independence, that "the PSNI was institutionally distinct from its predecessor even if, necessarily, it inherited officers and resources. It observes that the applicant has not expressed any doubts about the independence of the teams which took over from 2004 (the SCRT Serious Crime Review Team) and the HET (Historical Enquiries Team). However this does not in the circumstances detract from the fact that for a considerable period the case lay under the responsibility and control of the RUC. In this respect, therefore, there has been a failure to comply with the requirements of Article 2." [29]

29. On the facts as presented in the *Brecknell* case, the ECtHR was content that the PSNI (through the SCRT and HET) was capable of demonstrating the necessary independence from the RUC for the purposes of an article 2 compliant investigation. Importantly, however, that finding was made in the absence of any doubts expressed about the practical independence of the investigative teams that took over from the RUC. That means that while the PSNI is not *in*capable of investigating the RUC, because it is institutionally independent, the other elements of independence must also be demonstrated in the circumstances of an individual case: hierarchical and practical independence. Had the next of kin expressed doubts about the independence of the teams that carried out the investigation in 2004 the ECtHR would have had to go on to consider those elements expressly.

30. Crucially, if there is any suggestion that those officers are neither hierarchically nor practically independent, that has the potential to taint the investigative process and likely result in a finding that it is *not* Article 2 compliant. By way of example, a PSNI officer who is a former RUC officer who was or may have been concerned in any way either personally or through his or her contact with other RUC officers who may be implicated in the subject of the investigation, should not be involved in the investigation at any stage. That may include any officer who was responsible for policy, training or

[29] *Brecknell v the United Kingdom* Application nos. *32457/04,* 34575/04, 34622/04, 34640/04, 34651/04, November 2007. Importantly, the ECtHR was considering the arrangements as they existed before changes were revealed by the HMIC report, set out below.

supervision of those officers. Even if a PSNI officer was not formerly a member of the RUC, if he or she is not practically or hierarchically independent from those who may be implicated in the investigation or not free to exercise his or her duties free from improper interference, the process is likely to fall foul of Article 2. A self-recusal process is unlikely in itself to be sufficient to ensure the independence of the process.[30]

31. The High Court in Belfast considered a number of issues arising from the inquest into the death of Mr. Patrick Pearse Jordan.[31] For present purposes, the relevant challenge was to the involvement of former RUC Special Branch Officers and a former RUC Intelligence Officer (in the Legacy Support Unit) in the process of complying with the Chief Constable's obligations to disclose material to the Coroner. It was alleged that their involvement in the disclosure process compromised the independence of that process and meant that the inquest was not compliant with Article 2. The officers about whom the challenge was made were described as support staff under the direction of PSNI Legal Services Branch. They were not involved in any investigative capacity but were solely involved in collating and preparing materials for appropriate public interest immunity (PII) certification and onward disclosure to the next of kin.

32. To determine that issue, Mr. Justice Stephens examined the function performed by those officers. The evidence provided by PSNI was that: the officers were subject to close internal and external scrutiny; where former RUC officers are employed to examine archived material they do so under the supervision of PSNI Legal Services Branch; where there was a PII process the materials are examined by independent counsel, the Chief Constable, the Secretary of State or Minister of State prior to any PII certification; the processes are under the supervision of the Coroner who ultimately has access to all disclosure materials including un-redacted materials.[32] PSNI also relied upon the additional fact that those officers had no delegated

[30] *As per Ali Zaki Mousa (No. 2).*
[31] *Jordan's Applications* [2014] NIQB 11, Judgment of Stephens J. delivered on 31 January 2014.
[32] As above, at paragraph 323.

responsibility for the disclosure process which remained with the Chief Constable. Furthermore, the Coroner and the Coroner's counsel had un-redacted access to all Stalker/Sampson material and to all documents involved in the Stevens Inquiry. The Coroner and his counsel could instruct that any document was relevant and should be disclosed. In other words, there was independent oversight of the disclosure process.

33. Stephens J described the legal safeguards in place as sufficient to ensure that the independence of the PII and Article 2 redactions was not compromised. However, importantly, it was because the officers were not involved in the investigatory process but had limited duties that the independence of the investigation itself was not compromised.[33] Had the officers been involved in the investigatory process it is likely, by implication, that Stephens J. would have reached a different view.

34. The courts have observed that the operational model adopted to meet and discharge the obligation must be tailored to the individual investigation(s). What there is *not* is discretion to interpret the extent of the obligation so as to undermine the essential criteria or to disapply them in any case. In other words, the model adopted might be different in different cases but any model must satisfy all of the criteria. There is scope for the State and investigators to make operational arrangements best suited to the particular circumstances of the case(s), so long as the minimum criteria are met. The law provides the framework (an obligation of means), the operational model is provided by the State and independent investigators. Article 2 does not require a particular process to be followed or any particular outcome to be achieved (there is no obligation of result). While the model can be adapted to better meet the obligation, the obligation is clear and there is no room to depart from its fulfilment.

35. The scope and discretion allowed is to enable member states to use the framework and resources available to them unless and until there is anything

[33] *Jordan's Applications* [2014] NIQB 11, Judgment of Stephens J. delivered on 31 January 2014.

in the framework or allocation of resources which is capable of undermining the criteria. I certainly do not suggest there is a single way to address Article 2 but I do suggest that there is a relatively simple way to address a failure to carry out an article 2 ECHR investigation – to carry out an article 2 investigation which at least meets the minimum criteria set and confirmed by the courts. My assessment of Kenova is that it does precisely that.

36. While the courts have refused to prescribe one model to satisfy all cases, they have certainly given guidance on what is not sufficient to satisfy the obligation. For example, in *Al-Skeini v. the United Kingdom* it was stressed that the form of an investigation which will achieve the purposes of Article 2 may vary depending on the circumstances but whatever model is employed, "the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures". This is because, in the words of the European Court "in cases of homicide the interpretation of Article 2 as entailing an obligation to conduct an official investigation is justified not only because any allegations of such an offence normally give rise to criminal liability, but also because often, in practice, in the context of killings allegedly perpetrated by or in collusion with State agents, the true circumstances of the death are, or may be, largely confined within the knowledge of State officials or authorities so that the bringing of appropriate domestic proceedings such as a criminal prosecution, disciplinary proceedings and proceedings for the exercise of remedies available to victims and their families, will be conditioned by an adequate official investigation."[34]

37. Essentially, it seems to me, Article 2 is flexible but it is the independent investigators who must decide how to conduct the investigation as they and they alone know the facts and practical realities of their work, so long as the essential minimum criteria are met. The independent team should be left to conduct the investigation as they see fit. That there might be a different Article

[34] Guide on Article 2 of the European Convention on Human Rights - Right to Life, Council of Europe, 31 December 2020, citing e.g., *Makaratzis v. Greece; Khashiyev & Akayeva v. Russia*.

2 model appropriate for a different case does not impact on the Article 2 compliance of Kenova.

38. I have dealt with resources separately but it merits repetition here to say that a potential obstacle to Article 2 compliance is under-funding of the investigations. Mr. Boutcher, to remain independent in the legal sense, should be able to determine the level of resources he needs to complete his investigation and how to allocate them. As the old adage goes "he who pays the piper..." The vulnerability of the investigation to under-funding is not missed by the public, the courts or, more acutely, by the families: Article 2, if properly understood and respected, should ensure that does not happen. The structures and practical arrangements, for ensuring resources are adequate, must be kept under close scrutiny. It should not be for those potentially implicated (remembering the court's finding in *McQuillan* etc. as to practical independence of the PSNI) to control access to the tools necessary to reach factual findings and hold those responsible to account.

Promptness

39. An article 2 investigation must be prompt. The requirement of promptness and reasonable expedition is an important element of the Article 2 obligation. It is also considered to be essential to maintaining public confidence in the State's "adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[35] In July 2013, the ECtHR considered the investigation into the killing of Mr. McCaughey and Mr. Grew by the British security forces in Northern Ireland in 1990. That decision was concerned only with delay.[36] The ECtHR restated the importance of investigations being instigated promptly and being proceeded with reasonable expedition. The ECtHR criticised the inquest process and said that delay in carrying out inquests, in cases of killings by security forces in Northern Ireland, was an endemic problem and emphasised the urgency of reforms to "involve the state

[35] *Jordan v United Kingdom* (2003) 37 EHRR 2

[36] There being domestic remedies still to be exhausted. The matter may therefore return to the ECtHR on the substantive allegations of breach.

taking, as a matter of some priority, all necessary and appropriate measures to ensure…that the procedural requirements of Article 2 are complied with expeditiously." The ECtHR held that the excessive investigative delay of itself meant the investigation was ineffective for the purposes of Article 2.

40. It goes without saying that investigations into the Kenova cases were not instigated promptly. That element of Article 2 compliance has long been breached and cannot now be remedied. It is essential however that no further delay is permitted. Already, the passage of time means prosecutions are less likely, but not impossible. Those who have the right to an article 2 investigation are not responsible for any of that delay. Delay should not now be allowed to derail investigations that are proceeding. If respect is to be paid to Article 2, Kenova must proceed with all possible urgency. The link to adequate resourcing is clear in this respect.

Public scrutiny

41. Article 2 investigations must have arrangements in place to guarantee public scrutiny. When considering the nature and degree of scrutiny required to satisfy the minimum threshold for effectiveness that depends upon the circumstances of the particular case assessed on the basis of all relevant facts and with regard to the practical realities of investigative work. The ECtHR has offered guidance drawing from different cases[37] some points of which can be summarised as follows: (i) It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria; (ii) where a suspicious death occurred at the hands of a State agent, particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation; (iii) in cases characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information, deliberate concealment and/or obfuscation drawn out over time there is a continuing obligation; (iv) an investigation could not be

[37] See e.g., *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania; Velikova v. Bulgaria; Enukidze* and *Girgvliani v. Georgia*; *Armani Da Silva v. the United Kingdom*; *Varnava and Others v. Turkey*; *Mazepa and Others v. Russia*. See also NI Court of Appeal in *Rosaleen Dalton's Application* [2020] NICA 27.

considered adequate in the absence of genuine and serious investigative efforts taken with the view to identifying the person or people who were responsible above and beyond the person who carried out the murder.

42. A sufficient element of public scrutiny is required to secure accountability in practice as well as in theory. It is a legal requirement. The ECtHR has reminded States that effectiveness should not be assessed according to a check-list of simplified criteria: *Velikova v. Bulgaria* (2000). Article 2 has, at its core, the maintenance (or rebuilding) of public confidence in the State's adherence to the rule of law and seeks to prevent any appearance of collusion in, or tolerance of, unlawful acts. As the ECtHR observed in *McKerr v UK* (2002), the degree of public scrutiny required may well vary from case to case but particularly stringent scrutiny must be applied by the relevant domestic authorities to the investigation of a death in which State agents have been implicated.

43. *McKerr* concerned the death of Gervaise McKerr, who was killed in Northern Ireland in 1982 after over 109 rounds were fired into a car by police officers, killing all 3 inside, none of whom were armed. The ECtHR, in finding that the subsequent inquiry did not comply with Article 2, gave weight to the fact that the inquiry's reports and their findings were not published in full or in extract meaning the investigation lacked public scrutiny. The court noted that, "this lack of transparency may be considered as having added to, rather than dispelled, the concerns which existed." Furthermore, no reasons were given to explain the decision that prosecutions were not in the public interest.

44. The ECtHR in its interpretation of Article 2 applies a degree of pragmatism – it is not an arid academic exercise – and does not go so far as to require all aspects of all proceedings to be public as disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects on private individuals or other investigations. However, in all cases, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. Investigating authorities do not have to satisfy every request for a particular investigative measure

made by a relative in the course of the investigation if there is a legitimate reason to deny it: see e.g., *Ramsahai and Others v the Netherlands* (2007); *Giuliani and Gaggio v Italy* (2011) but embarrassment or inconvenience for state authorities is certainly not a legitimate reason to withhold.

45. The Kenova team has balanced these competing factors in a way which is not just impressive from a managerial perspective but from a legal one. The utmost care is taken to identify and protect information which is sensitive and which could have prejudicial effects on private individuals or other investigations while providing sufficient information and updates to relatives to secure their legitimate interests are protected.

46. The recent decision of the High Court in London, *MA & BB*, merits mention.[38] *MA & BB* was a case of alleged breach of article 3 (the right not to be tortured). In it Mrs Justice May DBE restated with approval the observations of Lord Bingham (in the Article 2 case *R (Amin) v Secretary of State for the Home Department)*.[39] She notes "A succinct description of the scope and purpose of an effective enquiry following an arguable breach of Article 2 (right to life) was given…The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others." She goes on to observe that the 'learning lessons' element of an investigation is critical, as "the purpose of the investigation is to buttress the substantive prohibition for the future. The best way to ensure future compliance is to learn lessons from the past. Depending upon the precise nature of the breaches this may involve looking into "questions of system, management and institutional culture".

[38] [2019] EWHC 1523 (Admin). A proper reading of this case reinforces the Kenova approach and the analysis set out above.
[39] [2004] 1 AC 653.

47. In *MA & BB*, all interested parties agreed that the requirements of an effective investigation, including the level of public scrutiny and the extent of victim involvement that is necessary, depends upon the facts of a particular case. The issue in *MA & BB* turned on whether the particular facts demanded that wider powers be made available for the purposes of a bespoke investigation into the allegations. It was accepted by everyone that the power to compel witnesses was critical to an article 2 investigation, but *may* not be to an article 3 investigation. Recognising the manifest difference between Article 2 and article 3 cases, May J. went on to conclude that power to compel witnesses was necessary to discharge the article 3 duty in that particular case and that "The full extent of Article 3 abuse said to have been experienced by both Claimants needs to be investigated".

48. May J. also proceeded on the basis that evidence must be explored to identify management and systemic issues. "The degree of public scrutiny required may well vary from case to case". What is required, she observed, is "a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts". Continuing, she said "Whether or not public scrutiny requires hearings to be held in public depends on the facts of an individual case. In some cases publication of the final report may be sufficient to secure compliance with Article 3…"

49. May J. was at pains not to prescribe a particular model for that investigation but to observe that in her view interviewing witnesses (one to one) in private was unlikely to suffice and that a significant degree of public scrutiny was required. "There is a serious issue as to whether private hearings could secure sufficient accountability, allay suspicions of state tolerance of mistreatment of the weak, and ultimately maintain public confidence in the rule of law." She continued "…I am firmly of the view that it is not for me in these proceedings to prescribe which of the PPO's hearings should be in public; I am clear, however, that the power to do so, with sufficient funds provided for the purpose, must be afforded to her." In other words, within

certain parameters, she was satisfied that it was a matter for the investigator (the PPO). Her point was not that a particular formal process was required, rather that whatever process is followed it must comply with the essential criteria for official effective investigations.

50. The Court of Appeal in Belfast also recently emphasised the importance of public scrutiny and transparency, not just to Article 2 investigations but to all policing operations. The Court referred to the Patten Commission Report and noted "The Patten report identified proper accountability of the police in two senses one of which was the explanatory and co-operative sense, meaning that the public and the police must communicate with each other. Section 31A of the Police (NI) Act 2000 enshrines the core principle of securing the support of the local community and of acting in co-operation with the local community. On this appeal there was not nor could there be any sensible challenge to [Maguire J's] finding of "a real possibility of bias." We should not have to make it expressly clear but we do that this was a most serious finding… As far as we are aware the Chief Constable or those PSNI officers acting on his behalf have not proffered any expression of regret to the applicant or to her family and again so far as we are aware the Chief Constable has not directed or carried any investigation into the failures of the 2006-2008 HET process and as to whether the reasons for the failure were or were not benign. We consider that the lack of an investigation and the lack of any dialogue with the applicant would be a failure of accountability in the explanatory and co-operative sense and would not be in accordance with the core principles in Section 31A."[40]

51. In May 2020, the Court of Appeal in Northern Ireland delivered its judgment in a challenge to the Attorney-General's decision that a fresh inquest was not required by virtue of Article 2 ECHR (as applied by the Human Rights Act 1998), into the murder of Mr. Dalton, Mrs. Lewis and Mr. Curran. The three died as a result of a bomb explosion (in Derry/Londonderry on 31 August 1988), which detonated in a residential flat they were visiting to offer

[40] *McQuillan (Margaret's) Application* [2019] NICA 13.

assistance to a close friend and neighbour whom they believed was in difficulty.[41]

52. Referring to *Hackett v United Kingdom*, the Court of Appeal noted with approval "events or circumstances may arise which cast doubt on the effectiveness of the original investigation and trial or which raise new or wider issues and an obligation may therefore arise for further investigations to be pursued. It considered that the nature and extent of any subsequent investigation required by the procedural obligation would inevitably depend on the circumstances of each particular case and might well differ from that to be expected immediately after a suspicious death has occurred... there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity."

53. Referring to the UK Supreme Court analysis, in *Finucane*,[42] the Court of Appeal NI observed "the Supreme Court held that there had been a breach of the procedural obligation to carry out an effective official investigation and that this obligation had been revived as there had emerged information and material which potentially undermined earlier conclusions or earlier inconclusive investigations. The court noted that the need for an effective investigation went well beyond facilitation of a prosecution. In the court's view, there had been constraints placed on the review and its capability to establish vital facts had been undermined. This was particularly so because the reviewer lacked the power to compel the attendance of witnesses. Further, those who had met with him had not been subjected to testing to probe the veracity and accuracy of their accounts. In the court's opinion, the review had not been conducted in sufficient depth and lacked the tools necessary to uncover the truth with the result that it could not satisfy the requirements of Article 2, which remained unmet."

[41] *Dalton's Application* [2020] NICA 26.
[42] *In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7.

54. The Court of Appeal NI drew attention to Lord Kerr's judgment and relied upon a number of findings. For example, it agreed that "the opportunity to prosecute as a result of evidence uncovered... does not foreclose on the question whether an effective investigation into Mr Finucane's death, compliant with Article 2, has taken place. The need for an effective investigation into a death goes well beyond facilitating a prosecution." Furthermore, they restated the general point that "the revival of the duty to investigate had to be viewed in the light of the fundamental importance of Article 2. The state authorities had to be sensitive to any information which had the potential either to undermine the conclusions of an earlier investigation or which allowed an earlier inconclusive investigation to be pursued further."

55. Considering whether the independent review carried out in *Finucane* had been sufficient to satisfy Article 2 they restated Lord Kerr's concerns about the review; that the "capability to establish vital facts such as the identity of those involved was undermined... much of what the reviewer said in his conclusion was qualified or expressed in terms of generality... officers who were in a position to give warnings could not be identified... a particular view of the reviewer was unmistakably an instance of inconclusiveness...[and] overall there was an inability for the review to deliver an Article 2 compliant inquiry." He observed further "If he [the reviewer] had been able to compel witnesses; if he had had the opportunity to probe their accounts; if he had been given the chance to press those whose testimony might have led to the identification of those involved in targeting Mr. Finucane; if the evidence of the handler had been obtained, or alternatively, medical evidence of her incapacity to provide it had been forthcoming, one might have concluded that all means possible to identify those involved had been deployed. Absent those vital steps the conclusion that an art 2 complaint inquiry into Mr. Finucane's death has not yet taken place is inescapable."

56. Public scrutiny and the engagement of families is reduced by some to 'window dressing'; soft skills taking second place to independence. That is not the

case with the Kenova team, which gives those elements their proper place as strict legal requirements. Article 2 compliance must be assessed taking all parts together. This should be kept clearly in mind particularly when one witnesses, as I did, the extraordinary and deserved support for the Kenova team, which has resulted in unprecedented cooperation and engagement with victims and relatives. Those who have engaged with the Kenova team are unlikely to ever do so again if obstacles are put in the way of the investigation.

57. Importantly, the Court of Appeal NI when considering the revival of the Article 2 duty said "The court accepts that in *Brecknell* there is a strong emphasis on further investigative measures being required where there exists a bridge between the relevant new material which has emerged and the goal of eventual prosecution or punishment of those who perpetrated the unlawful criminal behaviour. *But care needs to be taken not to read too much into that*." It clarified "it does not necessarily follow that 'identification and/or punishment of perpetrators' is the only circumstance in which revival can occur. There is scope, it seems to the court, for a broader interpretation to be adopted... the Strasbourg court spoke of the essential purpose which underlay the need for investigations into unlawful or suspicious deaths." In *Brecknell* the purpose was explained as the need "to secure the effective implementation of the domestic laws which protect the right to life". Such laws will normally include laws which enjoin the State to refrain from the intentional and unlawful taking of life but it will normally also include laws which are designed to require the State to safeguard the lives of those within its jurisdiction."

58. In passing, although not directly relevant as it is accepted that Kenova requires compliance with Article 2, *Brecknell* also considered how the obligation is triggered – or when it begins. The ECtHR in *Brecknell* clarified that "It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the state authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further." It also observed that "the

Convention provides for *minimum* standards, not for the best possible practice, it being open to the contracting parties to provide further protection or guarantees... where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures."

59. On that point, the Court of Appeal in *Dalton* held "the doctrine of revival can apply in this case [Dalton], notwithstanding that it is not the object of the investigation to identify and punish those who are the *direct perpetrators*." They noted that "There was no investigation into the responsibility or accountability of the police for the protection of life" either in the original investigation or the inquest and that the initiation of the complainant's complaint in 2005 [to the Ombudsman] and the disclosure of material in support of it by the complainant, met the Brecknell revival test.

60. Critically, the Court of Appeal went on to consider whether the Ombudsman's investigation into Mr Dalton's son's complaint satisfied the Article 2 obligation so as to exclude any ground for ordering a new inquest or other inquiry. This is an issue which remains pertinent to the current debate. The Court expressed it as follows. "The issue for the court is not simply about whether the complainant and/or the families may feel some measure of vindication from the conclusions which have been reached by the PO. It is also about whether, having regard to the context and to the evolution of the investigative process to date, an effective investigation has been provided. Bare conclusions alone will often not be enough to satisfy the Article 2 obligation, if the basis upon which they have been reached, and the reasoning leading to them, remain unexplained."

61. The Court was critical of the Ombudsman's investigation "In particular it is unclear how key conclusions were arrived at. While there are references to police intelligence which the PO has seen and while there is reference to some police officers or retired police officers who assisted the PO's work, there is little which is which nailed down or specified in detail... An effective

investigation, it might be thought, will entail a picture of the investigative process which leads to particular conclusions so that the extent of the investigation can be seen together with the investigator's reasoning to his or her conclusions. This enables those affected to arrive at a balanced view of the quality of the process which has been undertaken. Such will expose or be likely to expose failings or omissions or shortcomings."

62. The Court made this important observation "In a case such as this, where there has been a refusal to co-operate with the PO by senior and well-placed retired police officers and where it is known that a range of documents are missing from the investigation these matters assume great importance. Where the investigator – here the PO – feels obliged to say, as he has done in relation to his report – that his work has been "significantly hampered" in relation to the investigation and examination of the case, this inevitably detracts from the level of public confidence a report of this type enjoys and points towards the need for still further probing of the facts…Having regard to the history of the present case and to the particular role which the police played in this case as a body safeguarding the right to life of the local population, the court concludes that the argument that the PO's report has satisfied the Article 2 obligations which have been revived should be rejected..."

63. The court continued "If the unmet obligations of Article 2 can be met the court would expect this to be the course which should be taken, but equally, if they can't be met, this may indicate a need to acknowledge this and to bring the process to an end... It is also the case that attention should be devoted by the AGNI to the issue of the extent to which a modern inquest will be able to overcome logistical difficulties. In this context the court notes that a coroner, if appointed to hear a fresh inquest, now possesses power – in section 17A of the 1959 Act – to require the attendance of witnesses and to procure the production of documents. These are powers not possessed by the PO."

Cross-border cooperation

64. Article 2 ECHR also requires cooperation across jurisdictions – an issue which clearly arises in these investigations.

65. The ECtHR has held that, in general, the procedural obligation falls on the Contracting State under whose jurisdiction the victim was at the time of death: *Emin and Others v Cyprus, Greece and UK* (2008), unless there are special features which require a departure from this general approach. Even in the absence of special features the ECtHR has emphasised that the corollary of the obligation on an investigating State to secure evidence located in other jurisdictions is a duty on the State where evidence is located to render any assistance within its competence sought under a legal assistance request: *Rantsev v Cyprus and Russia* (2010). In other words, where there are cross-border elements to an incident the authorities of the State to which the perpetrators have fled and in which evidence of the offence could be located may be required to take effective measures: *Cummins and Others v UK*, *O'Loughlin and Others v UK* (2005).

66. In the case of *Güzelyurtlu and Others v Cyprus and Turkey* (2019), the ECtHR considered the duty of the State to cooperate with foreign authorities and found a violation of Article 2 based on a lack of cooperation. It observed, "In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Court finds that the Convention's special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice... Article 2 may require from both States a two-way obligation to cooperate with each other, implying at the same time an obligation to seek assistance and an obligation to afford assistance. The nature and scope of these obligations will inevitably depend on the circumstances of each particular case... States concerned must take whatever reasonable steps they can to cooperate with each other, exhausting in good faith the possibilities available to them under the applicable international instruments on mutual legal assistance and cooperation in criminal matters."

67. Mr. Boutcher has endeavoured to obtain from An Garda Síochána all material relevant to the Kenova investigations. Cooperation is ongoing despite some occasional barriers to recovery of material. I understand those obstacles are under discussion. Mr. Boutcher is well aware of the need for access to all material, wherever it is located, and is going to great efforts to recover it. At the time of writing, the barriers are no longer present in Operations Kenova, Turma or Mizzenmast.

Other international treaties

68. In addition to the ECHR, which is incorporated into domestic law, there are other standards that, for completeness, must be considered. Despite the failure of the UK to incorporate, they must still be taken into account. Not least because since 1974 the courts have been prepared to take into account the provisions of unincorporated international treaties in the course of interpreting and applying domestic statutes.

69. The cases which considered the impact of the unincorporated ECHR (i.e., cases pre-dating October 2000) are instructive when considering the application of unincorporated treaties. The ECHR was said to be a legitimate source of enabling courts to decide issues of public policy: e.g., *Blathwayt v Lord Cawley* [1976] AC 397, Lord Wilberforce at p. 426. Furthermore, since incorporation of the ECHR by the Human Rights Act 1998, domestic jurisprudence has demonstrated the increasing importance of unincorporated treaties on the development of the domestic law by supplementing or augmenting ECHR rights, albeit with some important limitations: e.g. *A v The Home Secretary* [2005] AC 68 as to article 14 ECHR in which their Lordships considered the provisions of the unincorporated International Covenant on Civil and Political Rights (the ICCPR).

70. International law has long been used to resolve legislative ambiguity. Therefore, if there is a provision in a domestic statute which may either conflict with or conform to a treaty right, Parliament will be presumed to have

intended to conform rather than conflict and the domestic statute will be interpreted accordingly. There is a strong presumption in favour of interpreting domestic statutory law in a way which does not place a member state in breach of its international law obligations: *R v Lyons* [2002] UKHL 44 *as per* Lord Hoffman. Lord Bingham has held "the words of a United Kingdom statute, passed after the date of a treaty and dealing with the same subject-matter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it."[43] That principle applies to primary and secondary legislation.[44] Therefore, in cases of legislative ambiguity international treaty obligations can have a very important direct impact upon the outcome of a case. He explained if the signing and ratifying of an international treaty does not create any obligation unless and until incorporated directly into domestic law the international treaty is meaningless and suggests the commitment of the State Party was a hollow one.

71. The United Nations human rights framework also requires member states to guarantee equal rights and the equal protection of laws. The Universal Declaration of Human Rights provides the framework for the principles of equal rights and non-discrimination, and was the first international instrument to affirm that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as "race", colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The International Covenant on Civil and Political Rights (ICCPR), expands on those principles. For example, Articles 6 and 7 ICCPR protect an individual's right to life and freedom from inhuman and degrading treatment, respectively. Article 2 ICCPR requires that states have sufficient legislative, judicial and other measures to ensure that a remedy is available in the event of treaty violations.

[43] *A v Secretary of State for the Home Department (No2)* [2005] UKHL 71; see also *Assange v the Swedish Prosecution Authority* [2012] UKSC 22.
[44] *R v Secretary of State for the Home department, ex p Brind* [1991] 1 AC 696, at para 760G.

72. The United Nations Human Rights Committee, which oversees the ICCPR's implementation, has emphasised that States have an obligation to investigate violations against individuals committed by state and private actors. The ICCPR therefore obliges states to investigate offences of violence and to do so without discrimination.

73. The United Nations has also issued standards and guidelines specific to law enforcement. Of particular relevance are the following. The UN Code of Conduct for Law Enforcement Officials provides that "Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession." Police officers must in the performance of their duty, respect and protect human dignity and maintain and uphold the human rights of all persons. They may only use force when strictly necessary and to the extent required for the performance of their duty…"

74. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials require governments and law enforcement agencies to adopt and implement rules and regulations on the use of force and firearms by law enforcement officials. In developing such rules and regulations, they must keep the ethical issues associated with the use of force and firearms constantly under review.

75. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power lay down standards for the treatment of victims. They cover for example: access to justice and fair treatment; restitution; and compensation. Importantly, they apply to all victims and a person may be considered a victim, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. Victim includes, where appropriate, the immediate family or dependants and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Victims must be treated with compassion and respect for their

dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

76. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states "Law enforcement officers shall not use firearms against persons except in self-defence or the defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve those objectives. In any event, the intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".[45] It is the genuine and honest belief of the person using force that is examined. So long as he or she genuinely and honestly believes that lethal or potentially lethal force is "absolutely necessary" for one of the permitted reasons, Article 2 ECHR will be satisfied, even if that belief subsequently turns out to be mistaken. The European Court has taken the view that to hold otherwise would impose "an unrealistic burden" on the police in the execution of their duty "perhaps to the detriment of others". [46]

A note on disclosure and national security

77. One issue that has given cause for concern is the impact of national security interests to investigatory or prosecutorial decisions; in particular, reference in the DPP's decision to not prosecute on files relating to the alleged perjury of four individuals including Mr. Scappaticci.[47] In its decision the DPP refers to

[45] *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* 1990, para.9.
[46] *McCann v UK* (1995) 21 EHRR 97 para. 200; *Bubbins v UK* 50196/99 ECHR 2005.
[47] See letter published on PPS website.

the government policy known as ‘Neither Confirm nor Deny’ (NCND) as a factor relevant to the decision not to prosecute. This is an issue which is directly linked to Operation Kenova’s ability to discharge the State’s obligation under article. 2.

78. NCND is a policy, application of which is relied on by various public authorities to resist the disclosure of sensitive information, which would otherwise be disclosed. It has been used in response to freedom of information applications and media investigations. It has also been relied upon to resist the disclosure of material and information in the course of litigation. NCND is a departure from the usual rules of procedure underpinned by natural justice. It should therefore be used only exceptionally. Or, as Lord Kerr (dissenting) put it in *Home Office v Tariq* the “withholding of information from a claimant which is then deployed to defeat his claim is, in my opinion, a breach of his fundamental common law right to a fair trial.” See also Lord Dyson’s observation in *Al Rawi v The Security Service* “the open justice principle is not a mere procedural rule. It is a fundamental common law principle”.

79. Importantly, Lord Justice Maurice Kay warned the courts to be vigilant when considering NCND “...it is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so.”

80. The High Court in Belfast has also considered the issue. In *Re Scappaticci,* Mr Scappaticci challenged the refusal of the Minister of State at the Northern Ireland Office to neither confirm nor deny that he was the undercover agent referred to in the media as Stakeknife. He argued that the Government owed him a duty as per Art. 2 ECHR (the right to life) to confirm that he was not an agent. His application was considered by Lord Chief Justice Carswell who observed: “To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent

may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger." That is, essentially, the rationale for NCND more generally. Importantly, however, Carswell LCJ recognised that NCND was not a doctrine set in law. The case proceeded on the implicit understanding that it could be breached in certain cases.

81. The Lord Chief Justice set out the factors he took into account in reaching his decision in that case "My conclusion on this part of the case is that the Minister's decision did not constitute a breach of the positive obligation placed upon her as a public authority and upon the Government to take appropriate steps to safeguard the applicant's life. In reaching this conclusion I have taken into account the several factors which I have mentioned, the risk to the applicant's life, the extent to which a statement from the Minister would protect him, the risk that departure from the NCND policy in this case would endanger the lives of agents on other occasions and the effect on the Government's ability to continue to obtain intelligence in order to combat terrorism. Having weighed these matters, I am of the firm opinion that the Minister's decision not to depart from the NCND policy did not constitute a breach of Article 2."

82. The blanket application of NCND is *not* required by law *or* policy yet it continues to be applied. It is still sometimes said that to ever confirm or deny would be to render the policy pointless. In other words, the policy is only successful if applied consistently in all situations; if the identity of an agent was ever confirmed or denied inferences would be drawn from future failures to confirm or deny and that, in turn, endangers people and the operational ability to recruit future agents and protect current agents. While that reasoning is superficially plausible it does not bear close scrutiny.

83. If a court is satisfied that the lives of agents would be endangered and there would be an impact on operational activity it would be reasonable to assume that application of NCND by a public authority would be held to be rational. Similarly, if NCND is used to protect an ongoing undercover operation a court is likely to accept the response and refuse to compel disclosure. Accepting that NCND may be appropriate depending upon the circumstances of an individual case, it is clear that it may also impede access to justice in others, and undermines the procedural obligation to provide an Art. 2 compliant investigation. Each incidence of NCND must be considered and justified on a case-by-case basis. That is entirely consistent with the rule of law; the so-called consistency principle or blanket policy is not. Lord Justice Mitting explained it this way "NCND "does not ... have a life of its own" and rejected the consistency principle.

84. In the context of litigation, Lord Justice Maurice Kay described NCND as a subset of Public Interest Immunity (PII). PII is the process by which a public authority can apply for a certificate to protect material from disclosure. Unlike the NCND response, which is an administrative policy used to avoid requests for information where the very existence of the material may be in question, PII requires the applicant to satisfy a court that to disclose the material would be detrimental to the public interest. PII can be used in any legal proceedings.

85. The important safeguard within PII is the opportunity for a Judge and, where necessary, special counsel, to look at the material and decide whether it should or should not be disclosed. In the case of *Wiley*, Lord Templeman said "A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the documents outweighs the public interest in securing justice." An NCND response, even one made in the course of litigation, is less amendable to scrutiny or review; courts often have to make decisions with little or no information and simply accept government assurances. One may only hear "it relates to national security". In a report, in 2011, it was noted as follows: "it is somewhat disturbing that the courts have been so willing to accommodate NCND even at the cost of considerable

damage to the principles of open justice and procedural fairness and ultimately their own integrity."

86. In *DIL v Commissioner of Police of the Metropolis* the 'official confirmation' issue was considered by Mr Justice Bean. DIL concerned a claim for damages arising out of long-term and intimate sexual relationships with alleged undercover police officers. The MPS relied on the "well established policy that the police will neither confirm nor deny ... whether a particular person is either an informer or an undercover officer... The [NCND policy is to] protect undercover officers and to uphold the effectiveness of operations and the prevention and detection of crime." Bean J. however, held there was "no legitimate public interest" in maintaining NCND in response to general allegations and, critically, with regard to specific allegations against undercover officers, he observed that they had been named by the media. That being the case, he held, NCND could not be relied upon in relation to the individuals who had been publicly named by the MPS or had self-disclosed. In relation to those who had not been named officially or self-disclosed he accepted the NCND policy - against disclosure.

87. Lord Justice Pitchford, in setting out the legal framework and procedures for the Undercover Policing Inquiry, said "I accept the invitation by the police services and the Home Office to treat with due respect the risk assessments made by those who are expert in policing and the risks attendant on the exposure of identities and police operations. However, this acceptance does not mean that I shall accept every expression of opinion offered to me, particularly when the opinion is offered at the level of generality." Subsequently, Pitchford LJ ordered the Metropolitan Police Service to provide open and closed versions of risk assessments in respect of the real and cover names of individual undercover officers. He explained because an exception to the NCND policy "may have the impact of weakening its effect, it does not follow that making the exception will cause significant damage to the public interest."

88. The Information Tribunal has also considered the issue and found that the Secretary of State applied the NCND policy more widely than was necessary to protect national security. It observed that a blanket exemption would relieve the Service of "any obligation to give a considered answer to individual requests." If NCND is used to conceal illegal conduct or because disclosure is inconvenient or embarrassing the very essence of the rule of law is undermined. Certainly, the Article 2 procedural obligation is likely to be infringed.

89. Assuming the above principles are applied and considered in each case NCND does not as a matter of policy infringe Article 2, in my view. Crucially, those decisions should not to be made or influenced by those implicated.

KENOVA – ARTICLE 2 IN PRACTICE

ETHOS, STRUCTURE, GOVERNANCE, RESOURCES

1. Analysis of the structure, resources and governance of Kenova goes directly to its compliance with Article 2 ECHR. Compliance requires protection to be practical and effective.[48] Practical arrangements must be reviewed against that objective. As much as the technical mechanics of Kenova (which I consider below) it is the ethos that runs through the investigations which is crucial. If structures fail, if resources are stretched, if obstacles arise it is the ethos of the team that will carry it forward and ensure human rights compliance (in all its aspects). Governance arrangements put in place to oversee the internal workings of Kenova provide assurance that the ethos is translated into practice and that legal and operational integrity are maintained. Resources are what is needed to permit the Article 2 investigations to achieve its legal objectives.

2. Ethos is a difficult thing to articulate, but is easily recognised and 'felt'. To permit me to make a reliable, informed assessment Mr. Boutcher gave me access not only to documents but to people. He also permitted me access to his own decision-making, contained in his extensive Policy Logs. That access is unprecedented and suggests in itself a deep commitment to transparency and public accountability. I was able to check if the many statements made by Kenova, and Mr. Boutcher in particular, were reflected in reality - they were

3. Mr. Boutcher claimed from the outset that victims' families and survivors would be at the heart of every decision and action. He promised to lead a programme of engagement and to include those who had previously been hard to reach. He was true to his word. During my review I spoke with many victims' families and survivors from a variety of backgrounds and experiences. In every case, I was told that Kenova was the first and only investigation that really included those directly affected. The experience of engaging with

[48] See framework above.

Kenova was positive – extremely so – and had resulted in a deep confidence in the process and trust in the personnel. Every person who spoke to me described Mr. Boutcher and his team as "caring", "kind", "determined", "honest", "thoughtful", "independent" and "transparent". Some described their experience as "surprising" given their past experience. Some said they began with scepticism and distrust but evolved to believe in and trust Kenova. As a direct result many, who had never come forward before, approached the Kenova team and shared information and evidence.

4. The extent of trust placed in this team and in Mr. Boutcher, his SIO and their teams is rare, in my experience. It is also rare in the experience of the National Police Chiefs' Council Homicide Working Group (NPCC).[49] Part of that is accounted for by process: by the mechanics of the investigative structures and demonstrable independence. More than that, however, it is accounted for by the quality of the people who make up the Kenova team. That didn't happen by chance.

5. Kenova's overarching strategy is "To provide effective, efficient and independent investigations that are Article 2 ECHR compliant. Kenova will apply transparency wherever possible with a focus upon, and due consideration towards, the victims and families of the offences being investigated. The investigation applies an equal and fair approach towards all those who are engaged, treating everyone with courtesy and respect". The Kenova vision is "To be trusted by victims and their families. To establish the truth of what happened. To gain the confidence of the communities and stakeholders. To be unwavering in the search for the truth with each agency, department, political party, other organisation or individual that/who might seek to prevent the truth from being established."[50] Both are replicated throughout Mr. Boutcher's Policy Logs, embedded within the Kenova team and reflected in all operational decision-making. Mr. Boutcher reminds his team routinely of the strategy and vision of Kenova and it is clear that his leadership resonates throughout. Having first been careful to select the right

[49] See references throughout my review to *Kenova – A thematic Peer Review*, January 2021, NPCC.
[50] See www.opkenova.co.uk

people, Mr. Boutcher set the tone of Kenova and makes sure that everyone follows. In a review completed in January 2021, the National Police Chiefs' Council Homicide Working Group (NPCC) found, and I agree, "The strategy and vision set are embedded in the culture of the unit and echoed in all operational and stakeholder activity across Kenova."[51]

6. At the beginning of Kenova, a guidance document was produced with the assistance of an independent human rights barrister to guide all decision-making from a human rights perspective. By way of example, there is a stand-alone guidance document for all Kenova members which states "The overriding priority of the investigation is to discover the circumstances of how and why people died and to establish the truth regarding those offences… the investigation will have victims and their families at its centre… the inquiry will be a thorough search for the truth. The investigation will be fully compliant with the European Convention for Human Rights (ECHR)."

7. That guidance is intended to provide the Kenova team with "a consistent and coherent approach to ECHR compliance related issues, when making strategic and investigative decisions…" It sets out in detail the procedures to be followed when considering the potential impact and consequences of decision-making. The guidance is a comprehensive and carefully compiled document that includes background, ECHR legal compliance (beyond Article 2), approved policing practice, transparency, accountability and oversight. The guidance concludes by stressing that the "investigation team will treat all parties with courtesy, dignity and respect, and provide the victims and their families with an independent and rigorous investigation into the issues…"

8. All staff receive a comprehensive induction and are issued with their own handbook which includes codes of behaviour, the College of Policing Code of Ethics and other key policies and procedures. The Kenova team are subject to regular, continuous professional development training days, which include legal developments, disclosure and best policing practice plus wider

[51] *Kenova – A Thematic Peer Review*, NPCC, January 2021.

contextual learning. They have received input from a wide range of perspectives. Contributors have included: the Pat Finucane Centre; retired and serving Security Forces personnel (including widows and widowers); and, legacy commentators such as the journalist Peter Taylor. Input has also been received from relevant experts such as Baroness Nuala O'Loan, Lord John Stevens, Lord Robin Eames and Sir John Chilcott. Mr. Boutcher continues to meet and enjoy positive working relationships with: South East Fermanagh Foundation (SEFF); Relatives for Justice; and, the Retired RUC Police Officers Association. They have been invited to contribute to future CPD events. Before being deployed to Kenova, each member of the team received specialist training. Since then, they have also received accredited trauma-informed training from the WAVE Trauma Centre.

9. In 2021, the National Police Chiefs' Council Homicide Working Group (NPCC) reported "clear records of skills, audit and training. The training and staff induction days are impressive and inputs are provided from subject matter experts on key issues relating to Kenova."[52]

10. Mr. Boutcher has said "I strongly believe every family that lost a loved one during the Troubles should have access to an independent and full examination of their case. I am an advocate for a criminal investigation of legacy cases and where evidence is recovered against offenders for a criminal justice process to proceed. All victims deserve such an investigation, not merely a few." In giving evidence to the NI Affairs Committee, in June 2020, Mr. Boutcher said "When families and stakeholders trust a legacy process as being independent and fair they will provide evidence and information that can lead to cases being solved… Where Government agencies are reassured about the information handling and security arrangements of a legacy investigative body they will share information that will potentially enable cases to be solved… Legacy reviews or investigations that do not reach out to and connect with families and stakeholders or that do

[52] As above at para. 5.16.7.

not relentlessly pursue the records held by agencies relevant to these events, will fail to identify investigative opportunities."

11. The NPCC review found "The approach taken by Kenova… is an impressively victim-centred one which has led to a considered understanding of what victims' families and survivors seek. This is a fundamental driver within the culture and ethos of Kenova which is understood by the entire team, whether or not they perform a 'front facing' role or have contact with those affected. These values are clearly embedded within the team who "Listen without prejudice" and continue to build, forge and maintain those critical relationships with victims' families and survivors." I agree.

12. The statements above capture well the intention and ethos I saw throughout Kenova.

13. Mr. Boutcher is the Officer in Overall Command (OIOC) of Kenova and therefore all operations coming under the umbrella of Kenova. His command and leadership ranges across all investigations and reviews. He is responsible for all policy and direction. That *unity* of leadership is critical to Article 2 compliance; only when the links are made, themes identified and lessons learned is Article 2 effectively protected. In such investigations, it is the cross-referencing of cases that often reveals the themes and identifies new evidential possibilities. To have a structure with a single overall commander who is aware of all the cases and the links and can manage each team is essential.

14. Kenova is in a 'Lead Force Arrangement' with Bedfordshire Police[53] which enabled Mr. Boutcher to set up his own independent investigative and support teams from across Great Britain. The Kenova team is based in London but has a presence and carries out enquiries in Northern Ireland. The team does not include any serving member of the PSNI, the Ministry of Defence (MOD) or any of the intelligence and security agencies. Furthermore, before joining

[53] Section 98 of the Police Act 1996.

the team each individual is vetted to ensure no previous service with the Royal Ulster Constabulary (RUC), PSNI, MOD or security and intelligence agencies. While serving with Kenova, each member must also declare any existing or new conflict of interest. There is a conflict of interest register that is kept under review. Independence is more than the absence of conflict – it is a state of mind and approach. Mr. Boutcher and, through his leadership, his team, actively maintain their independence of mind and approach. That is as important as the requirement that there is no actual conflict.

15. Kenova has its own Senior Investigating Officer (SIO) and within Kenova each Operation has its own distinct SIO and Investigating Officer. They are a mixture of serving Detective Inspectors and retired senior investigators with considerable experience in homicide and/or counter-terrorism investigations. Thereunder, each investigation has its own dedicated team of investigators and supervisors. Each member of each team understands their responsibilities and have been put together to ensure the necessary range of experience and skills are included in each team. Mr. Boutcher remains responsible for the strategic investigative policy, which is kept under close review via the internal governance arrangements. That allows each SIO the autonomy to carry out his or her investigation but allows Mr. Boutcher to oversee the strategic implications of all decisions and actions taken.

16. To make sure that ethos is maintained in practice and the investigations are practical and effective the structures must be in place to govern decision-making and provide internal assurance. Mr. Boutcher was mindful of the need to begin with the right structures. As Kenova progressed, he fine-tuned those structures to meet emerging issues and identified weaknesses.

17. It was agreed that PSNI would provide all assistance as necessary to ensure that Mr. Boutcher "receives the logistical and organisational support necessary to discharge his responsibilities." The PSNI also agreed that it would supply any additional operational support required for the investigation, "as requested by Mr. Boutcher". This is important. It reflects the reality of practice but maintains independence by making assistance dependent upon

Mr. Boutcher determining when and how it is required. The PSNI provides some assistance to Kenova. For example, PSNI has some input in relation to community impact assessments and security assessments. That includes risk management concerning visits to Northern Ireland. That assistance is needed; although Kenova has knowledge of individuals, families and communities the PSNI has greater access to information about local issues that might have an impact on security.

18. It is important to note here that Kenova does not share with PSNI details or other personal information of victims' families or survivors. Neither does Kenova share information relevant to the investigations other than that required to update the Chief Constable as to the structure and governance of Kenova.

19. To ensure that staff deployed to Northern Ireland are not exposed to unnecessary or avoidable risk, an intelligence manager briefs all staff deployed to ensure their safety and the safety of others engaging with Kenova. Decisions about deployment of resources however are made by Kenova. Mr. Boutcher has, from the commencement of his investigations, supported those engaging with Kenova. He and his team have visited a number of locations and scenes and the venues of choice of those with whom the team wishes to speak. Because such visits may have an adverse effect on the community, judgements about visits are carefully considered by Kenova in discussion with the PSNI.

20. It must also be recalled that the Police Ombudsman for Northern Ireland (PONI) is the body with responsibility for investigation of complaints against police officers of the Police Service of Northern Ireland or, formerly, the Royal Ulster Constabulary. The Police Ombudsman investigations are ongoing. Crucially, Kenova has access to the information held by PONI that relates to the Op Kenova criminal investigation through a Memorandum of Understanding between Mr Boutcher and the Police Ombudsman. It provides for regular liaison between the Kenova investigation teams and PONI. While there has been some challenge to accessing information held by PONI that

has now resolved. It is essential that PONI and Kenova have a good working relationship enabling access to the information and evidence each other needs. The considerable overlap in some investigations means neither is as likely to conduct an effective investigation without cooperation from the other.[54]

21. Structures are in place internally and externally to ensure best practice on all aspects of the investigations, from operational activities to financial and contract management. It was agreed that Assistant Chief Constable (Legacy and Justice Department) would act as the PSNI Single Point of Contact (SPOC) for the Kenova team.

22. The following internal structures are in place.

- The **Kenova Executive Group** (KEG) is the decision-making forum for all operational activity across all of the investigations and reviews.[55] It meets monthly, chaired by Mr. Boutcher. The KEG is attended by the senior leadership team and investigating officers and other key representatives. All meetings are minuted. The KEG ensures that no links between the investigations and reviews are overlooked and thematic issues can be identified.

- The **Business Kenova Executive Group** (Business KEG) oversees Kenova's organisational business. Meetings are held quarterly, chaired by the OIOC and attended by the Senior Leadership Team including the Kenova Business Manager. The Business KEG's primary function is to review finances, human resources, staff matters, recruitment and leavers, logistics, health and safety and continuous professional development. Minutes are taken at all meetings for transparency and accountability. These meetings are well structured and supported by a risk register.

[54] See also below.
[55] I.e., Operation Kenova (Stakeknife), Operation Mizzenmast (Jean Smyth-Campbell), Operation Turma (Sean Quinn, Paul Hamilton, Allan McCloy), Operation Denton ('Glenanne Gang' series).

- **Operational Kenova Tasking Group**. (OKTG) meets at least weekly to consider operational issues. Those are fed through Kenova for approval by Mr. Boutcher and his senior team.

- **Family Liaison Team** is governed by a policy which has been scrutinised by the Victims' Focus Group. The family liaison team is separate from and not assisted by the PSNI or any other agency.

- **Media and Communications Team** operates under its own Kenova strategy. Media and communications may draw some assistance from PSNI but are under the control of Mr. Boutcher and his team. Overall responsibility for the communications strategy is held by Mr. Boutcher and is regularly reviewed and updated within the KEG. The NPCC 2021 review found "There are effective SPOC arrangements with the PSNI Communications Department although PSNI does not generally make comments on communications relating to Kenova."

23. Additionally, to ensure that best investigative standards are applied to the investigations while maintaining independence, Kenova uses independent forensic specialists to assess all available exhibits that were identified and seized under the original investigations and by subsequent reviews and reinvestigations.

24. The importance of forensic expertise is highlighted and explains, in some part, the real progress made by Kenova which had not been made before. Kenova uses technology which has advanced since the original investigations. In particular the development of DNA testing has advanced significantly. Prior to those advances, forensic scientists were able to search for, and locate, bloodstains and other body fluids but could distinguish only different blood groups. Moreover, very small or microscopic stains could not be analysed. Since then, new forensic technologies mean there is a real chance of identifying and analysing evidence.

25. As the Kenova information website explains, evidence can now be obtained from microscopic material, including cellular material which is deposited during handling or other contact. Any such material discovered and DNA profiled can be compared with DNA profiles provided by victims, witnesses and potential offenders, and in some cases can be searched on DNA databases. Once marks have been discovered and retrieved they need to be compared with those of persons suspected of involvement in the crime. This can be done electronically using an automated fingerprint identification system or manually by an accredited fingerprint expert.

26. The Kenova website observes "Advances in technologies are such that even those finger marks that were previously considered to be of insufficient quality for comparison may be subject to re-evaluation using modern techniques… Our ability to identify and retrieve finger marks on surfaces not previously possible has increased considerably. Kenova has sophisticated software to interrogate large volumes of material and identify links across up to one million pages of information."

27. The Counter Terrorism Home Office Large Enquiry System (CT HOLMES) and Major Incident Room Standardised Administrative Procedures (MIRSAP)[56] are used. MIRSAP principles are applied.[57].

28. As and when Mr. Boutcher requires legal advice, he instructs independent counsel. Mr. Boutcher chooses the most experienced counsel who is independent of the matters under investigation.

29. Operation Kenova also has many bespoke independent elements of oversight.

   - **Kenova Governance Board** examines the business functions and broad investigative structures of Kenova. It comprises independent persons

[56] National Policing Improvement Agency Major Incident Room Standardised Administrative Procedures 2005

[57] See further below.

drawn from across society. The Board ensures the Independent Steering Group (ISG) is functioning properly and is able to conduct its role, which includes examining independent reviews of Kenova and the ongoing work of the Victims' Focus Group.[58] Its chair is an independent member of the KGB.[59] The Governance Board is attended by the senior leadership team and other key representatives. All meetings are minuted and minutes published on the Kenova website.

- **Independent Steering Group** was established in support of the initial investigation of Operation Kenova, to provide oversight, advice and challenge to the OIOC and SIO. It provides additional expertise to the Kenova investigations and to deliver the best possible investigative response.[60] This group consists of renowned international experts with unmatched experience of investigating the most challenging criminal cases from across the world. The group provides an ongoing critical examination of the Kenova investigative processes to ensure that everything that can be done in these cases is being done. The group has met key stakeholders and provides significant further reassurance through their considerable experience and independence to the Kenova families.

- **Kenova Professional Reference Group** (PRG) The PRG advises Mr. Boutcher on the construction and delivery of the public reports that he has undertaken to produce at the conclusion of Kenova investigations. The PRG challenge and advise on the design and structure of these final reports, including on any 'Maxwellisation' and representation. Separate independent legal advice is also received by the PRG. The group ensures independent advice and support is available to Mr. Boutcher from senior

[58] The terms of reference and membership can be viewed on the Kenova website at https://www.kenova.co.uk/governance-board-terms-of-reference.
[59] The Chair is Chief Constable Iain Livingstone QPM, Police Scotland. The KEG comprises Monica McWilliams, Sir John Chilcott, Bertha McDougall, Reverend Harold Good, Father Martin McGill and Iain Livingstone.
[60] Further information and membership of the Group can be accessed at www.kenova.co.uk/meet-the-isg/

policing across GB.[61] This advice and support is invaluable. It enables Mr. Boutcher to discuss pertinent issues and builds resilience into Kenova.

- **Victims' Focus Group** a strategic group formed in order to provide Kenova with independent advice regarding engagement with victims' families, intermediaries and non-governmental organisations (NGOs) representing the interests of victims so as to ensure the highest level of service delivery possible. The VFG's overriding duty is to victims' families and survivors; their rights, needs and interests. This entirely voluntary group meets quarterly and its membership comprises internationally respected practitioners with significant experience of working with victims of serious and traumatic crime and bereavement support. The VFG continues to provide expertise and advocacy for families' needs and remains an essential part of the independent oversight and governance of Kenova.

30. Mr. Boutcher has considered every eventuality, including succession planning should he ever be unable to fulfil the role of Officer in Overall Command.

31. In addition to the structural governance and oversight referred to above, Mr. Boutcher commissioned independent reviews of Kenova.

32. The National Police Chief's Council Homicide Working Group (NPCC) was commissioned by Mr. Boutcher to: provide assurance that the investigations are undertaken in line with the strategic objectives of Kenova; review the consistency of the overall strategic approach, relevant investigative cases and the broader operational approach to ECHR compliance; in the context of the current operating environment and increased demand, consider and where appropriate make recommendations regarding procedures and processes in terms of legitimacy, leadership, effectiveness and efficiency of investigations. This includes wider organisational learning, technological opportunities and legacy considerations. The four thematic areas specifically addressed as part

[61] The PRG comprises the Chair of the NPCC, the Chief Constable of West Midlands Police and Chief Constable of Police Scotland.

of the NPCC review were: strategic command and leadership; investigation management; intelligence management; and, victims and family liaison.[62]

33. Mr. Boutcher commissioned *this* review of ECHR compliance to inform himself and thereafter the families and public as to the effectiveness of Kenova in an Article 2 sense. My two interim reviews were published, as is this final report. During my review I had the opportunity to, and did, speak with members of all the various governance groups. I attended meetings of the Governance Board and Independent Steering Group. Those groups are made up of experienced individuals from a local and international perspective. The quality, calibre and integrity shown by each and every member was truly exceptional. Mr. Boutcher has not shied away from challenge, quite the opposite. He sees that challenge as essential to ensuring an effective investigation, to accountability and public scrutiny.

34. Mr. Boutcher's decision to set up governance arrangements of individuals with such a wealth of domestic and international experience, which meets routinely, to provide both assistance and objective challenge is one which goes to ensuring independence, effectiveness and public confidence. Over the course of three days in February 2020 I attended the ISG which met to receive updates from the Kenova team, to hear from people affected by the issues (including victims, relatives, serving and former members of the security services), to discuss progress and to provide constructive challenge. Having seen the ISG at work, I can say without hesitation that the ISG is an exceptional resource for the Kenova team and provides invaluable service to the community in Northern Ireland. The contribution they make to securing delivery of all aspects of the Article 2 criteria is invaluable.

35. I also had the opportunity to observe directly how Mr. Boutcher and his team engage with those affected by the issues. I was impressed by their forensic approach, independence and resolve to discharge their obligations with the utmost professionalism and integrity. They not only demonstrate capability in

[62] A thematic review of Operation Kenova was undertaken in 2017, followed by a review of the Major Incident Room (MIR)1 and HOLMES2 systems in 2019.

a strict policing sense but have the sensitivity and intelligence to deal with people so that they can participate in the process and recover confidence in the process.

36. Kenova has been assisted greatly by the other oversight group set up to engage victims and victims' relatives – the Victim Focus Group (VFG). The VFG also comprises individuals with unmatched experience of working with victims and is representative of all those affected by the investigation. As the VFG explains, it "is, and will remain, completely independent of Operation Kenova. Its overriding duty is to victims of crime; their rights, needs and interests. The aim of the VFG is to identify best practice on what information, support and protection should be provided to victims of crime."[63]

37. The VFG has enabled the team to reach people who had not engaged previously and eased the Kenova team's passage to retrieval of information. In addition to the VFG Mr Boutcher has reached out to many others some of whom have already expressed to me the importance of his personal accessibility and approach. There is no doubt that confidence lies with this team as a direct result of Mr Boutcher's command.

38. The NPCC review states "The evolved governance structure for Kenova is remarkable in how it allows the OIOC [Mr. Boutcher] to achieve a genuinely objective perspective with the advice and guidance of independently appointed practitioners across a wide spectrum of experiences and disciplines." It continues to recommend that the Kenova "approach to organisational structure should be shared across UK policing and considered in doctrine/future Authorised Professional Practice for historical/legacy investigations".[64]

39. I also considered in this context the relationship between the Kenova team and the Police Ombudsman. The powers and duties of the Police Ombudsman in respect of complaints and criminal investigations into serving

[63] See further https://www.opkenova.co.uk/meet-the-vfg.
[64] *Kenova - A Thematic Peer Review*, NPCC, January 2021, Recommendation 5, page 9.

PSNI members are well known. I do not rehearse them here but note simply that the Ombudsman is responsible for complaints made about serving officers and some staff but not for general scrutiny or oversight that has not been provided by statute. I understand an issue has been raised in respect of the accountability of Kenova staff to the Police Ombudsman. In one sense it is irrelevant in the absence of any complaint having been made about any person connected with Kenova but the issue has had an impact which I should address. My consideration is limited to that which is relevant to public confidence and Article 2 ECHR.

40. It has been suggested that because Kenova staff are not accountable, under the NI legislation, directly to the Police Ombudsman, there is an "accountability gap". Suggestion of such an accountability gap has the potential to undermine public confidence in and effectiveness of the investigations. I have therefore reviewed the relevant material and the advice of Senior Counsel who has set out the accountability arrangements in place and have no concern whatever about that issue. There is no accountability gap; a difference in the statutory underpinning for PSNI's accountability and Kenova staff's accountability does not equate to a difference in the *quality* of accountability or oversight.

41. In any event, Operation Kenova does not enjoy a reduced level of scrutiny or oversight; quite the contrary. Operation Kenova's oversight comprises many bespoke independent elements, which combined satisfy the Article 2 requirements for public scrutiny. There is a Kenova Governance Board, an Independent Steering Group, and a Victims' Focus Group, all of which can comment publicly on the human rights compliance of the investigation. The Kenova OIOC also routinely engages with the widest range of established victims' groups and representatives. That engagement is meaningful and transparent. Additionally, as a barrister in private practice, I have been appointed to conduct a review of the investigation from a human rights perspective. My review will be published when complete.

42. In terms of any assessment of value for money, the National Police Chiefs' Council Homicide Working Group has also been appointed to conduct an independent review including of that aspect of the investigation. Questions about value for money must not be confused with questions about human rights compliance or with scrutiny of the efficiency and effectiveness of the PSNI. Importantly, Operation Kenova is not a scheme to address legacy (into which others may have an input); it is an investigation into criminality including a number of murders. It must be seen that way. It merits repetition - this is not about limiting accountability or transparency, both of which are essential and present. Rather, it is about getting the appropriate oversight and transparency *best suited* to ensure Article 2 compliance. They are not one and the same.

43. Before commenting on the current challenges, it is worth recalling that when Kenova was set up in 2016 it was primarily to conduct an article 2 investigation into activities of the alleged agent referred to as 'Stakeknife'. While that in itself was a large undertaking Kenova has since expanded its remit. It is critically important that the additional investigations are subsumed by Kenova given the need for the identification of links, themes, systems and learning. The best and most cost-effective means of conducting those additional investigations is as part of the established and successful Kenova structures.

44. That means, however, that the level of resources must be kept under close review. As the NPCC review suggests "The enquiry is now reaching a tipping point where there is a strong likelihood that financial costs will increase and further resources may need to be considered to avoid impacting on other enquiries under Kenova… The OIOC [Mr. Boutcher] has been very clear that the quality and standard of investigations must not be undermined through financial limitations; a point which the review fully endorses." Despite the pressures, the NPCC review concludes "The [NPCC] review is of the considered view that Kenova offers excellent value for money for the complex enquiries under their remit."

45. Kenova receives funding from PSNI (partly by the allocation of budget by the Department of Justice). PSNI is in a 'Lead Force' arrangement with Bedfordshire Police. The NPCC, which conducted a thorough review of resources and financial management said "It is testament to the commitment of all involved, and especially to that of the Kenova Senior Leadership Team, that this initiative has achieved what it has to date with these existing arrangements and the review team would acknowledge that it has been a successful joint enterprise thus far."

46. Throughout my review, I have considered resources in the context of the impact on the effectiveness (in the Article 2 sense) of Kenova. I observed, in my first interim report, the potential obstacle to compliance presented by funding decisions, both the source of and resources provided to the team investigating. I commented further that for Mr. Boutcher to remain independent in the legal sense, he should be able to determine the level of resources he needs to complete his investigation, and how to allocate them. As the old adage goes "he who pays the piper...". I added "The structures and practical arrangements for ensuring resources are adequate must be kept under close scrutiny. It should not be for those potentially implicated (remembering the court's finding in *McQuillan* etc. as to practical independence of the PSNI) to control access to the tools necessary to reach factual findings and hold those responsible to account." That remains the case.

47. Resourcing (the source and level of) is a primary concern because it has a critically important impact upon the effectiveness and 'reach' of the investigation and is, potentially, a significant factor in determining whether or not the investigation remains independent in the legal sense. I do not suggest that Kenova should be free from oversight or not accountable for public expenditure but how it is and the means by which it is held to account for that expenditure are important in the context of Art. 2. Oversight and accountability for resources links directly to the provision and allocation of resources and decisions made in that context can have a fundamental impact upon operational independence.

48. Furthermore, the Independent Steering Group shares that concern. The ISG wrote independently to the Minister for Justice NI highlighting their concerns about the PSNI being responsible for allocating funding to Kenova. The ISG had met with the PSNI Chief Constable but were not reassured that adequate funding would be guaranteed, given the competing and unfunded financial pressures faced by PSNI.

49. The NPCC review also warns "that the role of PSNI in administering the current funding could also pose a strategic risk to all parties as it could be unfairly inferred by some that any change in future finance allocation might somehow reflect a lack of commitment on their part to legacy investigations within their own community. Indeed, the very perception of PSNI 'holding the purse strings' for Kenova's investigations runs the risk of being seen as a conflict of interest by potentially providing a locus of control over the independence and direction of Kenova's investigations via its funding."

50. Mr. Boutcher himself recognises this. In his written statement to the NI Affairs Committee, in July 2020, he said "I have previously described the employment model that provides for an independent structure and workforce. Funding is allocated to Kenova by the PSNI, this is a major concern to some stakeholders and families. They raise concerns of the risk of restrictions being exerted on Kenova's capabilities through reduced or inappropriate levels of funding. This has not been the case and would be highlighted by me should it occur. However, to reassure families and to ensure operational independence, Kenova's business functions, including budget management and our employment framework, are delivered through Bedfordshire Police. We are not an arm of the PSNI, but a detached part of an England and Wales police force providing it with special assistance under section 98 of the Police Act 1996."[65] Importantly, Mr. Boutcher is a keen guardian of his independence and the impact on that of funding arrangements. He committed to, and I am

[65] Written evidence submitted by Jon Boutcher, Officer in Overall Command, Operation Kenova (LEG0041), July 2021.

sure he will, alert those responsible should his independence be compromised by funding decisions.

51. The means adopted to conduct oversight and provide public reassurance about value for money should not be undertaken by those potentially implicated. An independent investigation is not one overseen by or accountable to those implicated or those with some other conflict of interest in the investigation. With an article 2 investigation, given the very different nature of it, it is my view that oversight and accountability must also be independent. The Policing Board cannot provide that independent oversight because it cannot concern itself in live investigation and in any event is prevented from influencing operational decisions.

52. The funding for and spending decisions on a live investigation are operational matters. The Board's role is limited to monitoring whether the PSNI is complying with the Human Rights Act 1998 and commenting on operational decisions but only after the event. In this context it can be noted that Operation Kenova is an investigation set up to discharge the *State's* ECHR obligations. It is not solely a PSNI obligation, albeit the PSNI receives (as a matter of accounting) the funding for the investigation, which it administers to the independent team who are investigating. The courts have already decided that the PSNI cannot carry out an article 2 investigation because it is not sufficiently practically independent.

53. The Board, through its Performance Committee, can seek reassurance that the investigation's framework is set up to comply with Article 2[66] but operational decisions including spending decisions on the investigation are beyond its remit. Similarly, the PSNI should not interfere in operational decisions taken by the Operation Kenova team, which includes operational spending decisions. It follows that the independent team's assessment of what is necessary to properly fund the investigation should be accepted for

[66] And it has - through its human rights advisors (see human rights annual reports and notes to Board), the attendance of Mr. Boutcher at the Board and, the attendance of the Chief Executive and Former Chair of the Board at the Independent Steering Group.

the purpose of determining the extent of funding necessary. Thereafter, the independent investigation team must be free to decide how to best allocate that funding. If the PSNI decides to manage those decisions for itself it will be undermining the ability of Operation Kenova to discharge an article 2 investigation and be counter-productive.

54. It must also be remembered that the investigation includes the activity of State agents and goes beyond local policing. Only the Operation Kenova team knows what is necessary to conduct the investigation effectively. As emphasised in *Armani Da Silva v UK* (2016), independent investigators are best placed to determine what is needed to secure all elements of compliance. Those investigators must be free to conduct a thorough, objective and impartial analysis. Failing to follow an obvious line of inquiry for example would undermine to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible.

55. Neither the PSNI nor the Board should make or exert any influence over decisions such as what is a good use of time or resources. To illustrate the point, consider another live murder investigation into a contemporary murder. The Board would not describe a line of enquiry as reasonable or unreasonable and would not seek to influence (directly or indirectly) the progress of the investigation. It leaves all of those assessments and decisions entirely to the investigators. Where the murder investigation is an article 2 investigation the same must be said of the PSNI. Quite simply, this is either independent or it is not. If it is to be independent, it must be conducted independently with all that goes with that. Kenova has managed the competing challenges admirably; Mr. Boutcher attends the Board when asked to do so but does not share investigative information.

56. This does not mean Operation Kenova is free from scrutiny or oversight. Operation Kenova's oversight comprises many different independent elements, which combined satisfy the Article 2 requirements for public scrutiny. By way of example, there is an Independent Governance Board, an Independent Steering Group and a Victims Focus Group all of which can

comment publicly on the human rights compliance of the investigation. Moreover, as a barrister in private practice I was appointed to conduct a review of the investigation from a human rights perspective. Kenova has been the subject of a number of independent reviews.

57. There was a NPCC thematic review in 2017, a NPCC HOLMES review in 2019, a NPCC thematic review in 2021 and this human rights review. The NPCC 2021 review found "governance arrangements are comprehensive with appropriate purpose, rigour and transparency." It recommended continuing the review function to "capture ongoing investigative milestones and legal decision making which may assist future activity and wider organisational learning."[67] I agree; to ensure ongoing human rights compliance Kenova should capture and build upon its compliance structures and learning. This not only will protect Kenova; it will assist other investigations.

58. In terms of any assessment of value for money, the National Police Chiefs Council Homicide Working Group conducted an independent review including of its financial management and value for money. Questions about value for money must not be confused with questions about human rights compliance or with scrutiny of the efficiency and effectiveness of the PSNI. Importantly, Operation Kenova is not a scheme to address legacy (into which others may have an input); it is an investigation into criminality including a number of murders. It must be seen that way.

59. During 2020/21 the NPCC, which carried out an in-depth examination and comparison across other police services, concluded that "Kenova offers excellent value for money for the complex enquiries under their remit." The NPCC also noted its concern however at the potential strategic risk from the perception that PSNI is "holding the purse strings", which "runs the risk of being seen as a conflict of interest by potentially providing a focus of control over the independence and direction of Kenova's investigations via its funding." It recommended that alternative funding arrangements were

[67] *Kenova – A Thematic Peer Review*, January 2021, NPCC, recommendation 15, page 23.

explored with the Department for Justice.[68] The NPCC went on to suggest that, in any event, any future PSNI funding should at least be “an agreed annual baseline budget which include costs of inflation, capital costs, pay awards and pensions…[to] represent a true reflection of the financial costs incurred in terms of future scalability.”[69]

60. I can think of no other level of governance or element of oversight that is required. In fact, as suggested in my interim report, any further inappropriate oversight is likely to have a chilling or stifling effect on the progress of the investigations. That remains my view.

[68] *Kenova – A Thematic Peer Review*, January 2021, NPCC, recommendation 12, page 21.
[69] As above at. para 5.15.13, page 21.

INVESTIGATIVE EFFECTIVENESS

1. As is clear from analysis of the legal framework and court decisions summarised elsewhere, the investigations must, first and foremost, be effective. Effectiveness is measured against the actual circumstances of the case and the capacity of the investigation to achieve an outcome. In considering an individual case the courts will look at all of the circumstances and defer to investigators a degree pragmatism. That permits practical and realistic decisions to be taken to suit the needs of an investigation and to protect the ECHR rights of everyone including suspects and their families.

2. The Court of Appeal in Belfast put it as follows "the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals and they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would not in fact have produced concrete results. The extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply will again depend on the particular circumstances of the case…"[70] In other words, there is no blanket approach to be followed. Each must be considered on its merits.

3. In giving evidence to the NI Affairs Committee Mr. Boutcher drew attention to the preparatory work he undertook to ensure he was ready to deal with the varied and sensitive issues he would be facing. He said "Before beginning these cases and designing an investigative structure to examine them, indeed throughout the investigations, I have consulted those who previously led legacy investigations or have knowledge of legacy issues. It was critical to the potential success of a future investigative process to learn the lessons of

[70] *McQuillan (Margaret's) Application* [2019] NICA 13.

those previous inquiries and acquire such knowledge."[71] He spoke with, for example, victims and their families, Lord Stevens, Sir Desmond De Silva, the Historical Enquiries Team (HET), Judge Smithwick and his legal team, Judge Corey's senior counsel (now) Judge Pomerance, retired Chief Constables who served in Northern Ireland, the author of Her Majesty's Inspectorate of Constabularies (HMIC) report on the HET, Lord Eames, Denis Bradley, Sir John Chilcot, the Commissioner for Victims and Survivors in Northern Ireland, victim advocacy groups, political parties and individual politicians (serving and retired - including government Ministers), senior religious leaders, solicitors representing those affected by legacy, academics, senior serving and retired members of the security forces, ex-combatants, human rights organisations and human rights advocates. The time and effort devoted to preparation shows and has been rewarded.

4. Mr. Boutcher described it to me as follows. Kenova is in effect a marriage of what worked well for previous legacy inquiries whilst also being constructed to protect the investigation from issues that caused previous inquiries to fail. Kenova also benefits from the structure and methodology of a modern-day investigation into terrorism or organised crime. That is perhaps best exemplified through the recovery of records, forensic successes and the management of sensitive and covert policing and security forces tactics that can be protected whilst the fruits of such information used for evidential and family information purposes.

5. To be effective an investigation needs to gather and follow the evidence. From the beginning Mr. Boutcher made information retrieval a key priority for Kenova. There is a comprehensive disclosure strategy, input for which was sought from the PPS and independent counsel. It covers all aspects of and potential challenges in relation to disclosure of sensitive material. Importantly, the strategy already covers and provides for the management of sensitive material through criminal justice and other proceedings without compromising the source of the information. The strategy considers Kenova's Article 2

[71] Written evidence submitted by Jon Boutcher, Officer in Overall Command, Operation Kenova (LEG0041), June 2020.

responsibilities in relation to sources of information and secures their protection. Moreover, the strategy considers article 6 (the right to a fair trial) and article 8 (the right to private life and family) insofar as they are engaged when handling suspects and/or witnesses and their families.

6. I looked at, among other things, Mr. Boutcher's own Policy Log. I was able to see for myself how robustly all evidential possibilities are explored and how every attempt is made to obtain original documentary and other evidence. There is a specialist disclosure officer of great expertise and experience. The disclosure officer has a team of people dedicated to the task of managing disclosure. They are well trained, act in accordance with protocols that have themselves been screened for compliance with the Human Rights Act 1998 and the Criminal Procedure and Investigations Act 1996 (CPIA). The protocols and continuous training take account of all guidance on emerging issues. That guidance includes for example the CPIA Code of Practice (and amendments) 2020 and any guidance issued by the Attorney General.[72]

7. Kenova does not simply accept whatever disclosure is offered or reassurances made; it investigates for itself and examines everything for itself. That is particularly impressive. That has been assisted in part by the strength of engagement with partner and stakeholder agencies. Mr. Boutcher has, through persistence and professionalism which he has demonstrated clearly, a more fruitful partnership with key agencies including PSNI, MOD, MI5 and An Garda Scíochána.

8. Those partnerships have yielded more for Kenova than any previous investigation. That cooperation has not been straightforward and is not taken for granted. It requires constant vigilance and determination, which the Kenova team have shown. There have been a number of developments which have contributed to this greater cooperation including the appointment of Special Points of Contacts (SPOCs) with each partner agency. Those SPOCs were carefully selected to perform this very sensitive role. They have

[72] Such as the Attorney General's Guidelines on Disclosure for Investigators, Prosecutors and Defence Practitioners, December 2020, AGO.

developed good working relationships and reached agreements on the transfer of material.

9. They have engaged with partners throughout and built confidence in their ability to manage highly classified material. They have been able, for example, to examine historic material and data-sets not previously accessed. The degree of disclosure given to Kenova is unprecedented, in my experience. The NPCC has also observed "In engaging with partner agencies and exhaustively examining their historic data-sets, some of which are highly classified, they are constantly breaking new ground for the investigative team. Accessing this sensitive material and managing the concerns of partners regarding its revelation and use requires great diplomacy and professionalism."[73]

10. There is a dedicated intelligence management structure that covers discovery, stakeholder liaison and facilitation, research and analysis and risk assessment. The intelligence manager has worked proactively on relationships with partner and stakeholder agencies to ensure timely and complete access to intelligence. A key development and indication of the effectiveness of Kenova over other investigations is the agreement to embed some Kenova staff within MI5. Prior to embedding Kenova staff, decisions e.g., as to relevance were made by MI5 staff. Now, relevance assessments are made directly by Kenova staff who then apply for release.

11. That is extremely positive and reassuring. There is now an effective means for gathering intelligence which is independently verified. In its 2021 review the NPCC also noted this development and commented "This process has been proven to be far more effective and could well serve as a model for intelligence liaison and discovery for any future Historical Investigations Unit."[74]

[73] *Kenova – A Thematic Peer Review*, January 2021, NPCC, para. 6.7.2, page 28.
[74] As above at para. 6.7.3, page 38.

12. Kenova has access to a range of powers to conduct covert surveillance. Kenova's powers are constrained as any police service's powers would be. There is in place detailed policy and guidance which is informed by the Regulation of Investigatory Powers Act 2000 (RIPA) and the Human Rights Act 1998. Guidance and individual decision-making also take account of legal advice received. The NPCC, which considered covert management and authority, reported "Any deployment of covert assets is conducted in accordance with RIPA and other relevant advice…"[75] For reasons which are well understood and accepted by victims' families and survivors and the public there are limits to what can be said in this respect but I can add that my own observation is the same as the NPCC. This is yet another example of Kenova balancing the rights of different individuals and securing for each protection of their ECHR rights.

13. There is an ongoing risk however in relation to effective intelligence management and evidence retrieval, that is that Kenova will not be resourced sufficiently. It is clear from the progress of the investigations so far that the material is voluminous, much of it is unindexed, kept in different forms (much in hard copy or aged micro-fiche) and spread across a number of agencies and locations. Kenova has committed to providing unqualified answers but that is undermined if they cannot reliably access the 'proof' needed. Until all material is digitalised this challenge remains. If resources are depleted (see above) the critically important element of effectiveness will be undermined.

14. To further ensure independent effective investigations and evidence retrieval Kenova uses independent forensic specialists to assess all available exhibits that were identified and seized under the original investigations and by subsequent reviews and reinvestigations. It was decided at an early stage by the Kenova Executive Group that it would not be appropriate to use the services of Forensic Science Northern Ireland (FSNI) as forensic analysts but that FSNI would be utilised for non-interpretative procedures such as post-arrest custody biometric capture.

[75] *Kenova – A Thematic Peer Review*, January 2021, NPCC, at para. 7.6.2 page 43.

15. In 2017, a Forensic Coordinator was appointed to Kenova. The office-holder is employed on a full-time basis and sits on the Kenova Executive Board. The Forensic Coordinator, who is assisted by an Operational Forensic Manager, leads a Forensic Oversight Group and heads a Specialist Investigation Forensic team (SIFT). SIFT includes specialist staff from the Metropolitan Police Force (MPS) and Eurofins Scientific.[76] Eurofins were chosen due to their specialism in 'cold cases' and with samples and exhibits that have deteriorated. The Kenova forensic team has direct independent access to a forensic pathologist. The attention to detail and the care taken to ensure human rights compliance is obvious. Every aspect is considered. By way of example, Kenova is mindful of the requirements of the Protection of Freedoms Act concerning the destruction of biometric data and the retention of historical DNA and fingerprint records. Kenova recognises both the importance of historically held biometric data to its investigations and its obligations under article 8 ECHR. Mr. Boutcher has taken independent legal advice on the issues and is progressing the matter with the PSNI. This is a good example of the sophisticated, human rights approach adopted by Mr. Boutcher. Respect for the rule of law extends to all of the law.

16. The importance of forensic expertise cannot be overestimated. It explains, in some part, the real progress made by Kenova, which had not been made before. Kenova uses technology which has advanced since the original investigations. In particular the development of DNA testing has advanced significantly. Prior to those advances, forensic scientists were able to search for, and locate, bloodstains and other body fluids but could distinguish only different blood groups. Moreover, very small or microscopic stains could not be analysed. Since then, new forensic technologies mean there is a real chance of identifying and analysing evidence.

17. As the information on the Kenova website explains, evidence can now be obtained from microscopic material, including cellular material which is

[76] Eurofins is an international group of commercial laboratories with sites in UK and Ireland.

deposited during handling or other contact. Any such material discovered and DNA profiled can be compared with DNA profiles provided by victims, witnesses and potential offenders, and in some cases can be searched on DNA databases. Once marks have been discovered and retrieved, they need to be compared with those of persons suspected of involvement in the crime. This can be done electronically using an automated fingerprint identification system or manually by an accredited fingerprint expert.

18. The Kenova website observes "Advances in technologies are such that even those finger marks that were previously considered to be of insufficient quality for comparison may be subject to re-evaluation using modern techniques… Our ability to identify and retrieve finger marks on surfaces not previously possible has increased considerably. Kenova has sophisticated software to interrogate large volumes of material and identify links across up to one million pages of information." Kenova also uses its own forensic team to re-examine crimes scenes.

19. Kenova employs a full-time exhibits officer who works with the forensic team and under the forensic coordinator. Importantly, this arrangement permits an early forensic review to be carried out for each investigation. First, the team identifies the potential locations of documents, exhibits and derived materials. Then, the team develops a plan to retrieve the material and examine it. All procedures are followed to protect the forensic integrity of the material. It has been reported that "the systems in place to gain and record best evidence are nothing short of exemplary. Taking in to account the historic nature and complexity of these cases all areas have been covered in detail, including DNA precautions and considerations."[77]

20. The NPCC, when reviewing the forensic strategy and capability, observed "All forensic submissions are carefully considered to maximise their forensic yield, potential evidential value and also to consider the cost effectiveness... Approaches to forensic recovery processes and the use of new and

[77] *Kenova – A Thematic Peer Review*, January 2021, NPCC, para 6.11.14, page 38.

previously untried areas of forensic examination are carefully explored with due regard to the nature of the offences under investigation and condition of each exhibit. This has included new recovery methods for fingerprints and DNA."[78] The NPCC dip-sampled a number of cases and recorded "Dip-sampling has been completed in order to correlate each case within the Kenova forensic strategy. The review observes that the associated submission documents are detailed and thorough with case specific analysis."[79] Despite the exceptional quality of forensic examination and review, Kenova was assessed as providing "exceptional" value for money with "costs far below those of comparable, conventional homicide cases."[80]

21. The system used for managing information is the Counter Terrorism Home Office Large Enquiry System (CT HOLMES). The Major Incident Room Standardised Administrative Procedures (MIRSAP) guidance is followed and principles adhered to.[81] CT HOLMES is an advanced management system for the most sensitive information. MIRSAP principles are applied but tailored, appropriately, to meet the Kenova model.

22. These systems provide a range of functions for the effective management of information including the tasking and coordination of investigative activity. Every piece of information gathered is entered into Kenova's free-standing [82] database, which enables the team to cross-check the totality of information and establish whether there are any links to other evidence or investigations. Drawing upon information from the CT HOLMES database, a comprehensive timeline of events and crimes forming part of Kenova has already been completed. From this, Kenova has reported "the investigation's analysts have identified links between previously unconnected events, information gaps and further lines of enquiry for investigators to examine. Case comparison analysis has helped identify similarities between cases of murder and

[78] *Kenova – A Thematic Peer Review*, January 2021, NPCC, para 6.10.9, page 34.
[79] As above at para. 6.10.10.
[80] *Kenova – A Thematic Peer Review*, January 2021, NPCC. NPCC, para. 6.10.12.
[81] National Policing Improvement Agency Major Incident Room Standardised Administrative Procedures 2005.
[82] The systems enable accurate and comprehensive cross-checking and are the recommended systems for major homicide investigations.

abduction. This has enabled Op Kenova to highlight key pieces of information to help determine which of the many criminal incidents meet the Terms of Reference. At the same time, other cases have been identified which still require further investigation."[83]

23. The management of information is also subject to independent review. The NPCC carried out an in-depth examination of the use of HOLMES in 2019, which was returned to in 2021. Recommendations made in 2019 were adopted. NPCC found "the structure in place is well organised and MIRSAP compliant."[84] The management of information systems have built in safeguards to ensure timely review of progress, action management, supervision and quality assurance. That protects the investigations and the reliability of evidence should it e.g., be prepared for decisions on prosecution.

24. The Public Prosecution Service (PPS) is independent of the PSNI and the Kenova investigation team. It is therefore responsible for reaching decisions about prosecutions. It is not for me to second guess those decisions but I have considered whether the decisions - to not prosecute four individuals – informs me as to the Article 2 effectiveness of the Operation Kenova investigation. Given the sensitive nature of those decisions I will not comment further than to say that the investigation of the four individuals was exemplary and the reasons for the decisions not to prosecute did not include a failure of the investigation.[85]

25. There are in place strict protocols to manage material safely with overall command and responsibility resting with the Officer in Overall Command. Mr Boutcher's expertise, experience, professionalism and integrity is obvious to all and is perhaps one of the single most important factors in maintaining this investigation's compliance – with *all* legalities. He and his team have established a level of trust and public confidence that cannot be overstated.

[83] Kenova website *www.opkenova.co.uk*.
[84] *Kenova – A Thematic Peer Review*, January 2021, NPCC, para 6.9.5, page 31.
[85] I have provided separate comment to the Officer in Overall Command which is not suitable for public release but which confirms that those decisions do not affect my assessment of Kenova. See also my second interim report.

While the focus remains on the consideration of legal requirements and standards, the importance of his personal command of this investigation might be lost – unless viewed in the context of Article 2, in all of its parts.

26. It is worth noting here that the obligation to gather evidence cannot be discharged unless those holding information and evidence cooperate fully with the investigation. If this investigation is to be effective and independent so as to comply with Article 2 those in charge of the investigation must have the autonomy to identify material, to 'follow the evidence' and to recover and use whatever they consider relevant. Any diminution of that will impact adversely on the effectiveness of the investigation. I consider disclosure separately.

27. In addition to my assessment, the National Police Chiefs' Council Homicide Working Group (NPCC) examined a number of those casefiles and concluded that "the investigation is entirely legitimate and is being approached in a methodical and transparent manner… the quality of the case specific synopses reviewed is of an exceptionally high standard… The depth of information and research combined with witness accounts and other evidence is astounding in both content and transparency, with numerous cross-referrals to relevant information." The NPCC made the following unprecedented finding "submissions of such exceptional quality, detail and consistency are rarely seen."[86]

28. The NPCC also considered the investigation of Operation Mizzenmast and found that it "identified previously unknown key facts on behalf of the family… The progress of this investigation has been remarkable… underscores the OIOC's [Mr. Boutcher] commitment that each case is examined individually and every aspect of the information discovered is evaluated and considered." The NPCC went on to observe "The frequency and quality of contact with the victim's family by the OIOC and liaison officers is of an exceptional standard…the forensic strategy has been examined and discussed with the forensic co-ordinator for Kenova. This was found to be comprehensive and

[86] *Kenova – A Thematic Peer Review*, 2021, NPCC, page 26.

had identified fresh lines of enquiry…" Importantly, the NPCC made the following comment (relevant to consideration of Article 2 effectiveness, "The examination of geographical location has been enhanced by using computer aided graphics and mathematical analysis in order to either confirm or disprove a number of the original theories and assumed circumstances within both the original and subsequent investigations." [87]

29. In respect of Operation Turma, the NPCC said "following a comprehensive review of all exhibits, some of which had never been examined before, has gathered significant momentum within a relatively short period… This case has significant potential for tangible evidential and forensic yield… Significantly, the review team is aware that key witnesses have been identified as a direct consequence of the comprehensive and sensitive approach adopted by the Kenova team."[88]

30. It is important to note that the Kenova investigation is a criminal investigation, undertaken by police officers, governed by statute (including the Human Rights Act 1998), the rules of common law (including natural justice) and contemporary investigative practice. Suspects are afforded the same rights and protections as any criminal suspect including in relation to disclosure and legal representation. The final outcome may or may not include prosecutions; if prosecution follows, those implicated will have their rights protected.

31. Kenova's enduring strength is that it is staffed by people of the highest calibre, experience and expertise who have the investigative skills necessary both to uncover the truth but also to run an investigation that will protect the rights of suspects, witnesses, family members and greater society. No scenario has been left out of account. It has been strategically planned by Mr. Boutcher and his senior team with every possible challenge identified and plans to respond.

[87] *Kenova – A Thematic Peer Review*, 2021, NPCC, page 27.
[88] *Kenova – A Thematic Peer Review*, 2021, NPCC, page 27.

INVOLVEMENT OF VICTIMS' FAMILIES AND SURVIVORS

1. It is essential that any Article 2 investigation has at its heart a clear intention and strategy for involving victims' families and survivors. It is a legal requirement of for example Article 2 (see above) and section 31 of the Police Act 2000. It also makes good sense in terms of investigative effectiveness. Kenova is testament to the need for close involvement if an investigation is to stand a chance of being practical and effective.

2. As noted by the Victims' Focus Group "Operation Kenova has shown the key to demonstrating results, in an almost uniquely complex and challenging investigative context, is assuring families of the independence, fairness, and transparency of the investigative process. If the process is not seen as fair by victims and survivors, families and the public the result will be division not reconciliation." That is because, as they observe, "An independent and victim centred approach to investigating outstanding Troubles cases is key to meeting the rights and needs of those who suffered bereavement and harm and to building confidence in Government and the Justice System.[89]

3. Mr. Boutcher, from the very beginning, made it his central focus. He has made personal contact with all victims' families and survivors. He has travelled to meet them wherever they prefer, he has liaised with support groups to improve their experience, he has shared his personal contact details, he has taken advice and received trauma-informed training to enhance his understanding and personally keeps in touch throughout the investigations. Victims' families and survivors are updated regularly and at least in advance of any significant development, media article or government statement. What he demonstrates in practice is respect, compassion and determination whilst maintaining the objective independent approach of a highly experienced investigator.

[89] Report of Kenova Victims' Focus Group, August 2021.

4. Mr. Boutcher does not simply update the families and victims, he listens to all of their concerns and answers their questions. That means they are not only told what is happening but have a real opportunity to influence practice. Crucially, each family has its own family liaison plan recognising that each is different and will have different needs. This is carefully coordinated and kept under review. The family liaison strategy is also kept under review and takes account of national guidance.

5. Mr. Boutcher had a clear structure for engagement with victims' families and survivors, each stage of which was considered carefully and influenced by appropriate external advice and the Victims' Focus Group. The VFG includes experts with domestic and international experience including the then Commissioner for Victims and Survivors who said this on joining the group "It is vital that victims' families are shown respect and I am confident in Jon Boutcher's assertion that he and his team are committed to doing all they can to find the truth for the victims and their families and that they will be at the centre of this investigation at all times. Victims and Survivors are the people who have suffered the most, have been given the least and are actually the people who are cutting a vital path that walks the talk of living with compromise. They have had no choice but to deal with the past but in doing so they deserve a voice in how we build for the future. Let's hope that investigations like this, conducted in a victim centred manner, can be an exemplar of how we give victims, survivors and families respect, dignity, protection and support".

6. Mr. Boutcher also engages routinely with the Commission for Victims and Survivors (CVS) Victims and Survivors Forum and the Victims and Survivors Advocacy Support Working Group.

7. Victim involvement and the experience they have of Kenova begins when the Kenova team, including the family liaison specialists and Mr. Boutcher himself, make contact with victims' families and survivors. That first contact is crucial and has the potential to secure or lose participation in the investigation. Each first contact is considered to suit the individual being

approached. It is sensitive to their needs and to the potential impact on wider family and community. Mr. Boutcher developed quickly an almost unique and instinctive understanding of how to engage people. Every person I spoke with was impressed by the way the Kenova team made their first approach. That first approach sets the tone and can secure cooperation but can also break trust and deny investigators vital information and evidence. Mr. Boutcher, drawing on previous investigations, knew he had to get it right. All first approaches are considered in advance and all reasonable steps taken to make it a positive and reassuring encounter.

8. To better inform myself as to the quality of engagement, I met privately with a number of people directly concerned with Kenova. I was unable to speak with every single person but did speak with a wide range of people from different backgrounds. I wanted to make sure that the engagement was not partial, partisan, influenced by any external factors or insensitive to individual backgrounds and experiences. The conclusion I reached was that Kenova has managed the almost impossible; its approach and investigative work is balanced, unpolitical, driven by a search for the truth, victim-centred and compassionate. Because of that, victims' families – whether from security services backgrounds or otherwise – support and trust Kenova. Not one person expressed the view to me that Kenova showed bias, quite the opposite. Kenova is concerned, as it should be, with enforcing the rule of law whomever the alleged law-breaker is.

9. Some people with whom I spoke had been involved in previous investigations and inquiries, some had been contacted by former investigators and reviewers, and some never been approached by anyone. Irrespective, every person commented upon the first contact they had with Mr. Boutcher and his team. The following are some examples of what victims' families and survivors said to me: "I didn't want to hear from anyone ever again because I was let down so badly in the past, but there was something different about this lot and I trusted them."; "I had decided never to speak to the police again but then I got a glimpse of hope that finally someone was going to listen"; "My family are police but I had lost all belief in the system or that I was ever going

to get anywhere"; "They were just so kind and interested. I believe in them."; "They're good people, that was so obvious I just had to speak with them." Mr. Boutcher was aware of the need to secure trust and confidence at the outset and has achieved that.

10. Every person agreed that not only were they not disappointed in how Kenova progressed but that it got better as it went along. Cleary Mr. Boutcher learned at each stage and improved the Kenova processes. One person described it as follows "It started off well but I had been promised all sorts of things before. This time, they have fulfilled their promises. For the first time I believe my loved one matters and that my family matters." Some of the people I spoke with have been with the Kenova investigation for five years. I asked whether the positive experience of their first contact was matched as time passed.

11. Even when I invited suggestions for improvement, there were none. Every person said they could not fault Kenova. That is exceptional. I am aware of no other investigation, review or other process that has such support from those directly affected. Despite occasional negative commentary and dissatisfaction expressed about legacy cases generally, victims' families and survivors are unwavering in their support for the Kenova approach. The following statement was particularly pertinent "I understand that I may never see anyone in court over this but at least I know they have tried and that I and my family will learn what happened." Another said "Whatever the final outcome, this process has restored my faith and I have recovered my self-respect."

12. Mr. Boutcher has already had to have extremely sensitive and potentially hurtful discussions with victims' families and survivors but their confidence in him and in Kenova are undiminished. I have never received such feedback in relation to any other police investigation (contemporary or historical).

13. In concluding, I asked them to identify the particular feature of Kenova that had been successful; the universal response was "it's the whole package, but

mostly the people." All referred to the fact that "they're not from here" and, as a result, were *believed* to be fair and balanced.

14. In conducting this review, I also benefitted from the goodwill that has built up around Kenova. Many people, who are still suffering trauma and hurt, were prepared to speak with me and share their experience. I never underestimated how painful that process was. Victims' families and survivors were not obliged to speak with me, there was nothing in it for them. They agreed because they hoped my review would prove useful to Kenova and other families who have not yet had investigations. Their generosity in doing so was extraordinary. I was struck by the universality of their courage, dignity and resilience. Each was pragmatic, measured and showed compassion for all involved. I am enormously grateful to each and every one of them.

15. Perhaps the success of Kenova can be explained partly by Mr. Boutcher's attachment to the following principle "It should never be the case that those responsible for crimes such as murder are protected by a lack of a thorough examination of the facts. Prosecutions are exceedingly challenging in legacy cases and I would expect them to be very much the exception. The starting point for legacy should be finding the truth for families of what happened. Families want to be listened to, acknowledged and for an investigation to take place that is an independent and robust search for the truth. They are generally realistic about the scope for seeing culprits brought to justice and punished and about the practical utility of such an exercise at this point in time."[90]

16. What Kenova has achieved is, it seems to me, the embodiment of what was recognised in November 2009 by the Office of the First and Deputy First Minister when it said "What is important varies greatly from individual to individual. Many face the consequences of trauma and/or physical disability. There remains a demand for support services including counselling, befriending and a variety of therapies while for many people simply getting

[90] Written evidence submitted by Jon Boutcher, Officer in Overall Command, Operation Kenova (LEG0041), NI Affairs Committee, June 2020.

information about available services is a problem. Some victims and survivors wish to find out more about the circumstances surrounding the death of a relative. Many suffer financial hardship, social isolation, exclusion and a variety of other problems arising from loss or injury. There are those who wish to have their individual stories heard, documented, archived, shared and appropriately acknowledged. Public acknowledgement including memorials and other forms of public recognition of loss is also important to many people."[91] In so far as Kenova is a model for helping victims and survivors its approach recognises in practice the words expressed in the Strategy "Supporting the need for truth, acknowledgement and meeting the needs of those injured and bereaved will contribute to building confidence and cementing peace in areas disproportionately affected by the conflict and in the wider community…"[92]

17. The NPCC in its review, also considered feedback from victims' families. They highlighted the following "No matter what happens, Kenova has already done more for them than they have ever had done."[93] In case, that should be mistaken for an acceptance that little further can or should be done I must also relate the following observations "If this is pulled, I don't think I can live with it", "If Kenova does not finish I am never trusting another person again", and "my loved one was in the security forces, the least they deserve is to have this play out with people who are properly placed to actually achieve something."

18. It is the view of the NPCC, with which I agree, that "The approach taken by Kenova…is an impressively victim-centred one which has led to a considered understanding of what victims' families and survivors seek. This is a fundamental driver within the culture and ethos of Kenova which is understood by the entire team, whether or not they perform a 'front facing' role or have contact with those affected. These values are clearly embedded within the team who *"Listen without prejudice*" and continue to build, forge

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[91] Strategy for Victims and Survivors, November 2009, Office of the First Minister and Deputy First Minister.
[92] As above.
[93] *Kenova – A Thematic Peer Review*, NPCC, January 2021, para. 8.4.2, page 47.

and maintain those critical relationships with victims' families and survivors… This commitment has, without doubt, won the hearts and minds of the community, and whilst many in such a similar position would have delegated this demanding responsibility, the OIOC has made clear his intention to continue to give this his personal attention."[94]

19. The NPCC concludes "As a consequence, evidence and exhibits which have never previously been obtained have been given to the investigation. Possibly the strongest illustration of the success of the strategy is that no families have dropped out or been 'lost' from the Kenova process. This is a testament not just to the Kenova team, but to all those affected, many of whom have had to re-live painful memories from the past."[95]

20. It is also remarkable the positive feedback I received from groups representing victims and other stakeholders, irrespective of their backgrounds. They all talked of the tangible difference in the Kenova approach. They all expressed their support for Mr. Boutcher and his team. That is mirrored in the NPCC's review which reports "A spokesperson from one group that represents the victims went as far as to say that, *"Every legacy investigation from the Troubles, whether subject to a previous HET or LIB report, should go through a new process that takes on the leadership and style of Kenova".* It is no exaggeration to say that the levels of community confidence in Kenova that the review team have experienced are without precedent or parallel and the continued use of the 'Kenova' branding should be considered essential to maintaining the 'hearts and minds' of the victims' families, survivors and the wider communities affected."[96] I cannot add much more other than to say that chimes exactly with my experience.

21. As I said previously, where allegations include collusion with State agents over a passage of time during which victims' relatives have been disappointed by inordinate delay and have lost trust in the system the

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[94] *Kenova – A Thematic Peer Review*, NPCC, January 2021, para. 8.1.1, page 44.
[95] As above para. 8.2.6., page 45.
[96] *Kenova – A Thematic Peer Review*, NPCC, January 2021, para. 8.11.1,.

securing of evidence can be extremely difficult. That is why establishing credibility and trust in the investigation is crucial. It is more than a moral imperative; it is a legal requirement. If there is no trust, there will be no sharing of information, relatives will disengage thereby depriving investigators of a source of evidence and eye witness testimony.

22. The NPCC also observes "It is important to acknowledge that, should Kenova be unable to continue for any reason, there is a very real risk that the trust and confidence generated within the communities will be severely undermined. This could have a serious impact on the ability of future legacy investigations to build the vital relationships necessary to be able to progress. In addition, there will be direct consequences for the legitimacy and standing of the various stakeholders and NGOs which have been instrumental in bringing so many interested parties together, facilitating meetings and helping to build trust in Kenova. Now that such hope has been generated, every effort must be made to deliver on the victims' families and survivors' expectations as far as is possible."[97]

23. The Commission for Victims and Survivors, established under statute, gave the following advice to Government. "The Commission would highlight the ongoing work of Operation Kenova as an example of a live conflict-related investigatory process. From the design, through to the beginning of the process, the need to have a transparent victim-centred approach to the investigation was paramount. From the Commission's perspective there are three key areas within the investigation which have supported and provided reassurance to victims, survivors and those representing them: The practical/operational support of the investigation conducted by the investigation team."

24. Additionally, it states "the Operation Kenova website provides an explanation of what information, support and protection is available and how to access those rights; the Independent Steering Group that advises and supports the

[97] As above. para. 8.4.4.

Chair of the Investigation across all areas of the Operation Kenova investigation; and a Victims' Focus Group has been established, which is independent of the investigation. This is impartial and made up of independent international experts in victims' rights. Members utilise their experience to bring best practice on victims' rights and make recommendations to the investigation in relation to victims' needs and interests. The Commission recommends that learning from the work of Operation Kenova is considered during the design of the HIU to ensure that victims and survivors are aware of, and able to exercise, their rights."[98]

25. In my experience, having reviewed Kenova from a human rights perspective, the team led by Mr. Boutcher not only have shown what Article 2 compliance looks like, they have managed the most complex investigations with the real prospect of criminal justice outcomes and/or the publication of statements of truth. They remain committed and adherent to Article 2 principles. Mr. Boutcher continues to make that commitment manifest. He recently expressed it this way "At the heart of all Kenova activity is the victims, survivors and families who have been affected by these terrible crimes. Despite the many setbacks, delays and unfulfilled promises of the past experienced by a great many families their strength, determination and dignity in relentlessly pursuing the truth whatever obstacles are placed in their way is truly inspirational. The humility and grace demonstrated by the families in seeking to address the injustice they have faced is a lesson to us all."

26. The Operation Kenova Victims' Focus Group (VFG) carried out independent research which included a survey of families involved in Kenova, that identified three inter-related themes that "have enabled Kenova to establish legitimacy, build trust with families and thereby carry out effective investigations."[99] The group emphasised the success of Kenova's rights-based approach. They put this in the following context "The Victims Focus

[98] *Addressing the Legacy of Northern Ireland's Past*, Advice Paper, January 2019, Commission for Victims and Survivors.
[99] Report of Kenova Victims' Focus Group, August 2021.

Group are aware that victims have experienced trauma, fear, and isolation and that this can prevent them from being able to access their rights in practice…These rights are embedded into the Kenova investigations and into the organisational culture. This has been key to building trust and carrying out successful investigations.

27. Additionally, the VFG recorded “the behaviour of the Officer in Overall Command [Mr. Boutcher] and his team in engaging with families has remained consistent with the commitment to a victim centred approach so that they are listened to, understood, and have a voice throughout the investigations.” They go on “the importance of the leadership style demonstrated by the Officer in Overall Command has clearly been central to the success of Kenova, building a focus on families, on fairness, on independence and transparency into the structure, ethos and practice of its investigations. We would also emphasise the importance of the extent of his engagement with an unusually wide range of stakeholders and his personal accessibility to families.” I agree.

PUBLIC SCRUTINY

1. Everything set out in this review contributes to the public scrutiny allowed by Kenova and therefore the public accountability of Kenova in an Article 2 ECHR sense. In addition to the structures and oversight mechanisms, there is a dedicated communications and media strategy which has as its objective facilitating public scrutiny and accountability. There is a comprehensive public website which was established to provide information regarding the investigations that is capable of being placed in the public domain. Mr. Boutcher also routinely engages with a wide range of established victims' groups and representatives. That engagement is meaningful, transparent and has an impact upon practice. Mr. Boutcher engages with the media, academics and the public and answers any questions put to him unless to answer would compromise his ongoing investigations. No meeting is refused and all input considered. Furthermore, Mr. Boutcher has published the independent reviews carried out of Kenova and has committed to publishing an overarching report on Kenova.

2. The Court of Appeal in Belfast recently observed "The Belfast Agreement contained a statement of belief … that the Police Service should be "fair and impartial" and "accountable, both under the law for his actions and to the community that it serves." Accountability includes the explanatory and co-operative sense of communicating in order to maintain trust. Those beliefs and the explanatory aspect of accountability require that the Chief Constable when requested to do so informs the victim, or as here the family of the victim, as to the practical arrangements to secure the independence of an article 2 (or Article 3) police investigation in order to demonstrate that it has the capacity to fulfil the procedural requirement of independence. The prompt provision of such information is not only an aspect of the new era of policing but also is a requirement to enable the victim or the victim's family to determine whether the practical arrangements are so fundamentally and obviously flawed that there is a compelling case that if the investigation was left to conclude that there would be a requirement for a fresh investigation. We consider that as much detail as possible should be given consistent with

the investigatory process itself and also for instance in an appropriate case not compromising the Article 2 rights of the investigators."[100]

3. Kenova has adopted that approach from the very beginning. Because it did, there is no family member or survivor who has expressed dissatisfaction at the level of their involvement in the investigations. Instead, everyone I spoke with was extremely positive about the extent to which Kenova had involved them in the investigations. All of those I spoke with expressed the view that the information shared, the regular updates and advance notice of developments was important to them and was, for the first time, sufficient under Kenova.

4. Transparency is fundamental, but so is the protection of information that may endanger an individual or create a real risk to society. In this context, it is worth noting that to balance public accountability and the protection of security, all relevant Kenova staff are vetted to Developed Vetting (DV) and STRAP level. They sign the Official Secrets Act but also a personal confidentiality agreement. There is a dedicated operational security person who sets high standards across Kenova. The regular continuous professional development for staff always includes an operational security update. Peculiar vulnerabilities or emerging issues are raised and disseminated. The office is checked physically and has been subjected to a spontaneous Police Search Advisor (PoLSA) search. The NPCC also examined operational security and reported it to be "exemplary".[101]

[100] *McQuillan (Margaret's) Application* [2019] NICA 13.
[101] *Kenova – Thematic Peer Review,* January 2021, NPCC, para 6.11 and 6.13, page 38. See further below.

CONCLUSION

1. It is impossible to sum up Kenova and do it justice but I can conclude, without any hesitation, that in so far as Article 2 ECHR compliance is concerned, it is the exemplar of what such an investigation should, and can, be with the right leadership and personnel. I have not been able to identify any failings for which recommendations need to be made other than that the independent investigation must be supported, resourced and continue to be led by an expert independent team.

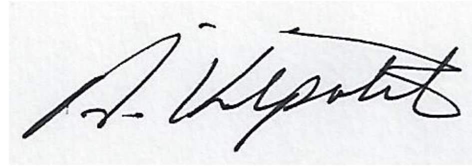
2. The importance of the personal leadership of Mr. Boutcher cannot be overstated. He is both the architect and the guardian of Kenova. It is his personal and hands-on involvement that was mentioned by everyone with whom I spoke – their trust is placed in him and because of that he is able to conduct an effective investigation.

3. Because Mr. Boutcher set up and oversaw the early stages of Kenova to secure support and confidence, he was able to build an exceptional team of people who benefitted from that initial support. They, however, then had to live up to the high standards set. They more than achieved that. I met with a number of people within the Kenova team, at all ranks and roles. From the Senior Investigating Officer (former Commander Keith Surtees) through the structures of Kenova, each member of the team with whom I met, is excellent. That was confirmed by every family member with whom I spoke.

4. The right people are in place and those people have secured, in the most effective way possible in the circumstances, an investigation that is Article 2 compliant and that respects the human dignity of the individual and the rule of law. As agreed by every commentator, there is no one model for Article 2.

5. As the courts have repeatedly found, there must be a degree of deference shown to investigators so long they are independent. In Kenova, the investigators are independent and it is only by them demonstrating that

independence in theory and practice, that the State is capable of discharging its domestic and international obligations.



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26 AUGUST 2021