CUSTOMARY INTERNATIONAL LAW IN THE IRISH LEGAL SYSTEM

Abstract: This article seeks to revisit customary international law's place in the Irish legal system, analysing the relevant case law on the issue, and considering the consequences of customary international law entering the Irish legal system through the vehicle of Article 29.3 of the Irish Constitution. In doing so, it argues that a prevailing sense of judicial scepticism, as well as the general lack of certainty in the case law, has contributed towards a general failure on the part of the Irish courts to properly engage with the specific methodologies involved in identifying rules of customary international law.

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Introduction

Since gaining independence and attaining statehood, Ireland has been externally bound as a state by international law. Thus, for the past century the Irish state has been subject to the full gamut of international law, inclusive of both treaty law and customary international law (CIL). However, Ireland has, through its internal constitutional framework, sought to align itself amongst those states which define themselves as dualist and maintain a separation between international law and their own municipal legal systems. For these states, international law is not directly justiciable except insofar as it has been converted or transposed into municipal law through legislation. While this is the approach taken in Ireland regarding the content of multilateral and bilateral treaty obligations, the treatment of CIL has been considerably more confused, and rests on a somewhat haphazard legal footing. Drawing on earlier scholarship by Symmons[1] and Fennelly,[2] this article aims to redirect attention back to the question of CIL in the Irish legal system, and to shed light on the shortcomings of its treatment in Ireland.

Accordingly, this article will proceed in four parts. The first part of this article will provide an outline of the concept of CIL as it exists in international law. The second will outline two competing theories as to how CIL is incorporated into Irish municipal law. Following this, the third part will focus on Article 29.3 of the Irish Constitution as the dominant vehicle for incorporation. At last, the fourth and final part will briefly consider some of the failures of the Irish courts in their treatment of CIL. An assessment that Irish juridical precision in matters of international law is considerably lacking relative to municipal law serves as the animating concern behind this article, which requires not only a revisiting of this question by the courts, but a fundamental shift in judicial approach.

The Concept of Customary International Law

CIL, or 'international custom, as evidence of a general practice accepted as law', is one of the primary sources of public international law, as set out in Article 38 of the Statute of the International Court of Justice.[3] It is an unwritten body of law, derived from state practice and the view of states. This is captured in the definition provided in the Statute: CIL is hinged upon the *general practice* of states, but only insofar as it is *accepted as law*. Thus, CIL is based on two essential elements: (i) state practice, and (ii) a general belief of states that they are acting

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[1] Clive R Symmons, 'The Incorporation of Customary International Law into Irish Law' in Gernot Biehler (eds), *International Law in Practice: An Irish Perspective* (Round Hall 2005).

[2] David Fennelly, *International Law in the Irish Legal System* (Round Hall 2014).

[3] United Nations Statute of the International Court of Justice, (adopted 26 June 1945, entered into force 18 April 1946) XV UNCIO 355 (hereinafter '*ICJ Statute*'), Art 38(1)(b).

pursuant to a legal right or obligation (*opinio juris sive necessitates*, or more simply *opinio juris*).[4] For it to be said that a rule of CIL exists, both of these elements must be proven.

Taking both of these elements in turn, the state practice requirement can be described as an objective element. In order to satisfy this element, 'State practice, including that of States whose interests are specially affected,[5] should have been both extensive and virtually uniform'.[6] This is not to say that some deviations in state practice would defeat the emergence of a customary rule – rather, the International Court of Justice ('ICJ') has held that it is 'sufficient that the conduct of States should, in general, be consistent' with the alleged rule.[7] It has never been established how long a given practice must be in place. While the court has specifically stated that a short-time span would not necessarily militate against the crystallisation of custom,[8] the International Law Commission has noted that a longer period of time would allow for a more extensive survey of state practice, and has cautioned against the embracing of a notion of 'instant custom'.[9] Similarly, there is no specific form that practice must take, and it may originate from either the executive, legislative, or judicial branches,[10] all of which are considered to be organs of the state, and thus capable of acts of state.[11] Physical acts, statements, and omissions or inaction will be accepted.[12] Importantly, legislative provisions and decisions of national courts qualify as state practice.[13]

Second, it must be demonstrated that the requisite *opinio juris* exists. As was put by the ICJ in the *North Sea Continental Shelf* decision:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it … The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[14]

This requirement can be described as the subjective element of CIL. Thus, if the practice of states is not animated by a belief that they are obligated – or have a right – to do something, it will not give rise to a customary rule. Similarly, if international opinion is too divided on any given matter, it cannot be said that there is a related customary rule. This was the case in the *Nuclear Weapons* litigation, wherein the ICJ held that no prohibition on the use of nuclear weapons exists as a matter of CIL, owing to the widespread international disagreement on

[4] *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, [1985] ICJ Rep 13, at [27]: 'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States'; quoted in *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America),* (Merits) [1986] ICJ Rep 14 (hereinafter '*Nicaragua Judgement*'), at [183]; International Law Commission (ILC), 'Identification of Customary International Law: Text of the draft conclusions as adopted by the Drafting Committee on second reading' (17 May 2018) UN Doc A/CN.4/L.908* (hereinafter 'CIL draft conclusions'), Conclusions 2-3.

[5] On the troublesome notion of 'specially affected states', see Kevin Jon Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112(2) American Journal of International Law 191.

[6] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, at [74]; *Asylum Case (Columbia/Peru)* [1950] ICJ Rep 266, 276.

[7] *Nicaragua Judgment* (n 4) [186].

[8] *North Sea Continental Shelf Cases* (n 6) [74].

[9] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc A/73/10 (hereinafter 'Commentary to CIL draft conclusions'), 137-138.

[10] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* [2012] ICJ Rep 99, at [55].

[11] CIL draft conclusions (n 4) Conclusion 5; see also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) ICJ Rep 1999, 62 at [62].

[12] ibid, Conclusion 6.

[13] Commentary to CIL draft conclusions (n 9) 134 and sources cited *infra*.

[14] *North Sea Continental Shelf Cases* (n 6) [77].

the question. The court cited, by way of evidence of this fact, the number of abstentions and negative votes to General Assembly resolutions regarding the alleged unlawfulness of nuclear weapons, and the broader continued commitment to the policy of nuclear deterrence.[15] As with state practice, evidence of *opinio juris* may take numerous forms, including governmental statements, publications, provisions of national legislation, and decisions of national courts. Similarly, a failure to object to the development of a customary rule may in some circumstances be taken as acceptance of its emergence.[16]

Finally, there are a number of sources which have been recognised as being of subsidiary value in discerning the existence of a rule of CIL. These have been helpfully set out by the International Law Commission in its 2018 draft conclusions on CIL as including international treaties,[17] resolutions of international organisations and intergovernmental conferences,[18] decisions of international or national courts and tribunals identifying the existence of customary rules,[19] and the '[t]eachings of the most highly qualified publicists of the various nations.'[20] Nonetheless, these ought to be used with caution, and do not supplant the substantive requirement of state practice and *opinio juris*. Court materials and scholarly works may be particularly problematic in this regard, and absolute deference to such sources ought to be avoided. While judgments of superior courts are typically considered as binding in common law systems – such as Ireland – it must be recalled that municipal courts and judges are often not specifically trained in international law,[21] and even international courts, inclusive of the ICJ, routinely engage in dubious methodological practices.[22]

Two Theories of Incorporation

To date, there have been two possible means identified through which CIL may enter the Irish legal system. These are, firstly, the common law and, alternatively, Article 29.3 of the Irish Constitution. Neither approach requires legislative action in order to bring CIL into municipal Irish law, as required for law originating from international treaties and agreements, as governed by Article 29.6.[23] It is therefore perhaps overly simplistic to accept the seemingly orthodox premise that Ireland maintains a wholly dualist system, whereby international and municipal law are kept separate.[24] Fennelly accordingly notes that, in contradistinction to the dualist system envisaged in Article 29.6 for treaty law, the mechanisms governing CIL may be better described as monist in nature.[25] While this does not delineate Ireland as a wholly monist system, as many civil law jurisdictions are,[26] it is

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[15] *Legality of the Threat of Use of Nuclear Weapons* (Advisory Opinion) ICJ Reports 1996, 226, at [71]-[73].

[16] See Commentary to CIL draft conclusions (n 9) 141-142; note however the notion of the 'persistent objector', CIL draft conclusions (n 4) Conclusion 15.

[17] CIL draft conclusions (n 4) Conclusion 11.

[18] ibid, Conclusion 12.

[19] ibid., Conclusion 13.

[20] ibid., Conclusion 14.

[21] Commentary to CIL draft conclusions (n 9), 150.

[22] On the methodological failures of the ICJ in identifying and dealing with CIL, see Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction, and Assertion' (2015) 26(2) European Journal of International Law 417.

[23] Article 29.6 reads: 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'; this follows the position in the UK, see Lord Millett's judgement for the Privy Council in *Thomas v Baptiste* [2000] 2 AC 1 (PC), 23.

[24] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 45-47; see also Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 98-99.

[25] Fennelly (n 2), 4-55.

[26] As a general rule, civil law jurisdictions tend to be monist in nature, whereas common law jurisdictions are generally dualist. This is not an absolute rule, however, and monist systems may have dualist elements, and vice versa. For a helpful explanation see Pieter Dan Dijk, 'Comments on the Implementation of International

nonetheless useful terminology to illustrate this core distinction between the place of treaty law and CIL within the Irish courts and constitution.

Despite being generally accepted that CIL is not required to undergo a process of transformation into municipal law by the Oireachtas, the question as to whether the common law or Article 29.3 is the more appropriate avenue for direct incorporation is a more nuanced, if confused, debate. Proponents of the common law approach direct to the traditional conception of CIL as a component of the "law of nations" being part of the common law.[27] Consistent with this line of thought, as adopted by such common law jurisdictions as the United Kingdom, CIL is directly 'incorporated' into municipal law, as opposed to being 'transformed' into municipal law by statute. As articulated by Lord Denning in the oft-cited *Trendtex* case:

> Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law.[28]

Subsequent judgments in the UK have provided further clarity on this point, identifying CIL as one of the sources of the common law.[29] This follows a strong incorporationist tradition in the UK,[30] whereby CIL may be directly applicable save for situations where there exists a contrary principle of municipal law.[31] Recently, the British superior courts have held that 'given the generally beneficent character of customary international law, the presumption should be in favour of its application.'[32] This is not to say that CIL is part of British municipal law *per se*, but rather a source of the common law's content, as a component of British law.[33]

The argument, outlined most succinctly by Fennelly,[34] follows that CIL's place in the Irish legal system is rooted in its origins in the English common law tradition. CIL's induction into the Irish common law is thus posited to have been facilitated through Article 73 of the

Human Rights Treaties in Domestic Law and the Role of Courts' (European Commission for Democracy through Law, 2014) Study No. 690/2012, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2014)050-e> accessed 17 November 2023.

[27] See*, inter alia, The Paquete Habana* (1900) 175 US 667; *West Rand Central Hold Mining Co Ltd v* R [1905] 2 KB 391; *Chung Chi Cheung v* R [1939] AC 160, 168; *Ex Parte Pinochet (No. 1)* [2000] 1 AC 61,81; see also Gerard W Hogan and others, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) 5.3.02.

[28] *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, 544; R *(Campaign for Nuclear Disarmament) v Prime Minister of the UK* (2002) 126 ILR 727; see also Hans Kelsen, *Principles of International Law* (Rinehart 1952) 195, fn. 67.

[29] R *v Jones (Margaret)* [2007] 1 AC 136, 155; *Al-Saadoon v Secretary of State for Defence* [2015] 3 WLR 503, 579; R *(Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin), 166.

[30] Note, however, the brief rejection of incorporationism in *R v Keyn* (1876) 3 Burr 1478; see also Shaw (n 24) 112, arguing that 'the approach positing automatic incorporation has given way to one proposing presumptive incorporation.'

[31] Crawford (n 24) 65-67.

[32] R *(Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin), 166; *The Law Debenture Trust Corporation plc v Ukraine (acting upon the instructions of the Cabinet Ministers of Ukraine)* [2023] UKSC 11, 204.

[33] *Belhaj & Ors v Straw & Ors* [2017] UKSC 3, 252; [2023] UKSC 11, 204.

[34] Fennelly (n 2) 4-27 – 4-30.

1922 Free State Constitution,[35] and later through Article 50.1 of the modern Constitution.[36] It is indeed noteworthy that in the early case of *Zarine v Owners of the SS 'Ramava'*[37] the direct applicability of CIL was assumed, and interrogated nowhere in the *dicta* of Hanna J. Similarly, as identified by Symmons, repeated reference to classic British jurisprudence on the question of incorporation – including cases such as *West Rand Gold Mining v R*[38] and *Chung Chi Cheung v R*[39] – do indicate some degree of support for the common law approach.[40]

However, the common law approach, and the strength it would afford to CIL in the Irish legal system, has been hampered by the importance given to Article 29.3 by the Irish judiciary. This provision sets out that 'Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States' and was first raised as an alternate entry point for CIL – interpreted as the 'generally recognised principles of international law' – in the 1945 *De las Morenas* case.[41] Having satisfied himself that the principle of sovereign immunity existed as a matter of international law, O'Byrne J indicated that the principle 'must now be accepted as a part of our municipal law by reason of Article 29, para. 3, of our Constitution'.[42]

It is interesting to note that O'Byrne J's reading of the 'generally recognised principles of international law' as referring to CIL was, at the time, a novel one. Taken literally, this terminology appears more similar to 'general principles of law accepted by civilized nations' as recognised as a distinct source of international law in the Statute of the Permanent Court of International Justice[43] and the Statute of the International Court of Justice.[44] As the threshold for establishing a rule of CIL imposes a higher burden than 'general' recognition, bridging the international concept of CIL and the constitutional notion of 'generally recognised principles of international law' was not at all an obvious interpretation of the text of the provision. The Supreme Court in *De las Morenas* thus effectively gave Article 29.3 an autonomous meaning, divorced from accepted international legal parlance as it stood at the time. Nonetheless, there is no meaningful opposition today to the premise that Article 29.3 refers to CIL.

In his analysis of this decision, Fennelly argues that this invocation of Article 29.3 should not be read as to have the effect of supplanting the common law approach seemingly taken in *Zarine*. He suggests that, owing to the characterisation of O'Byrne J's dictum on sovereign immunity as obiter by O'Flaherty J in *Government of Canada v Employment Appeals Tribunal* ('*Canada*'),[45] excitement for this early reference to Article 29.3 should be tempered.[46] However, it is similarly possible to read O'Flaherty J's comment – '[i]t is clear that anything

[35] Article 73 reads: 'Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Eireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.'

[36] Article 50.1 reads: 'Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.'

[37] [1942] 1 IR 148.

[38] [1905] 2 KB 391.

[39] [1939] AC 160.

[40] Symmons (n 1) 5-02.

[41] *Saorstát and Continental Steamship Co. Ltd v de las Morenas* [1945] IR 291.

[42] [1945] IR 291, 298.

[43] Statute of the Permanent Court of International Justice (adopted 16 December 1920), Art 38(3).

[44] ICJ Statute, Art 38(2).

[45] [1992] 2 IR 484, 497.

[46] Fennelly (n 2) 4-32.

the Court had to say about sovereign immunity in that case was *obiter*' – as not necessarily impugning the importance of O'Byrne J's comments with regards the question of the incorporation of CIL, distinct from the question of the operation and substantive content of the specific relevant CIL rule on sovereign immunity. Ultimately, any debate on the true dicta of *De las Morenas* is essentially of historical interest, as subsequent judicial practice has been to adopt the constitutional, as opposed to the common law, route to incorporation.

The Embrace of Article 29.3 as the Basis for Incorporation

The embrace of Article 29.3 as the basis for the incorporation and application of CIL in Ireland began in earnest in *Canada*.[47] O'Flaherty J – despite voicing disapproval of O'Byrne J's dictum in *De las Morenas* – proceeded on the assumption that the effect of Article 29.3 is automatic incorporation. This is apparent through the judge's use of imperative language ('Ireland's obligation is to accept "the generally recognised principles of international law as its rule of conduct in its relations with other States"'), as well as his dismissal of the argument from the Government of Canada that a shift in the content of CIL may only be actioned through an Act of the Oireachtas.[48] This latter point in particular illustrates the potential synchronicity between the common law and constitutional approaches to incorporation, and has, as prudently noted by Symmons:

> shades of Lord Denning's memorable dictum in *Trendtex Corporation v. Central Bank of Nigeria*, that international law knows "no doctrine of *stare decisis*" as it indicates a willingness to ignore previous precedent at least on appropriate occasions where international law has "moved on" from a previous position covered by case law.[49]

Despite this possibility for an alignment of the two approaches, already in *Canada* a judicial desire to lean into a constitutional approach independent of the common law may be identified. Symmons suggests that the Supreme Court's decision may be read as an attempt to move away from the UK-influenced common law approach, owing to a lack of reliance on previous British or even Irish case law on this point.[50] Indeed, McCarthy J's reference to reserving 'for another day the question of the true construction of [Article 29] s. 3 and, in particular, as to whether or not a claim under the Unfair Dismissals Act imports conduct in its relations with other states within the meaning of the section',[51] puts considerable emphasis on the provision's constitutional formulation, and a supposed limited application to instances involving direct intercourse between states.

This formulation came abruptly to the fore in *ACT Shipping (PTE) Ltd v Minister for the Marine*,[52] wherein Barr J in the High Court considered Article 29.3, Article 15.2.1°,[53] and the troublesome case law originating in *Re Ó Laighléis*[54] and *The State (Sumers Jennings) v Furlong*.[55] These latter two sources in particular warrant consideration before proceeding.

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[47] [1992] 2 IR 484.
[48] [1992] 2 IR 484, 498.
[49] Symmons (n 1) 5-39.
[50] ibid, 5-21.
[51] [1992] 2 IR 484, 491.
[52] [1995] 3 I.R. 406.
[53] Article 15.2.1° reads: 'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.'
[54] [1960] IR 93.
[55] [1966] IR 183.

In *Re Ó Laighléis*, it was argued on behalf of the applicant that his detention under the Offences Against the State (Amendment) Act 1940 was in breach of the European Convention on Human Rights, and that Article 29.3 may be used to circumvent the requirement for treaty law to be transformed into statute in accordance with Article 29.6.[56] In response, the state went so far as to say that '[c]ustomary international law forms no part of domestic law save in so far as it is adopted into it; so far as it does not conflict with domestic law, it may be enforced with it'.[57] The language of 'adoption', and the use of domestic law as a mechanism for enforcing international law indicates that, in the view of the state, the proper handling of CIL would be to treat it as functioning in the same manner as treaty law, and that a statutory anchor would be necessary for it to be relied upon in an Irish court. Further, the state introduced Article 15.2.1 into its argumentation, suggesting that to directly apply the provisions of the European Convention would be tantamount to superseding the Oireachtas's exclusive legislative authority.[58]

Maguire CJ, speaking for the Supreme Court, made a number of crucial findings. First, that Article 29.3 'clearly [refers] only to relations between states and [confers] no rights on individuals'.[59] Second, the former Chief Justice made a nominal recognition of the doctrine of incorporation, by stressing that it 'applies to such parts of international law as are based on universally recognised custom and not to such parts as depend upon convention.'[60] Third, it was recalled that the existence of a rule of municipal law, such as a statutory provision, contrary to the terms of the Convention would in any event defeat any supposed rule of the common law originating from CIL.[61] Finally, Maguire CJ acknowledged and approved of the state's argumentation on Article 15.2.1, and the related *proviso* in Article 29.6.[62]

In *Sumers Jennings*,[63] Davitt P put considerable emphasis on the need to avoid conflict between Article 29.3 and other constitutional provisions, including Article 15.2.1. Accordingly, he saw the suggestion that expunging Part III of the Extradition Act 1965 on the grounds of being out of step with a rule of CIL as essentially 'being asked to bring the provisions of sections 1 and 3 of Article 29 of the Constitution into conflict with the other provisions.' Instead, he held that the Supreme Court's approach in *Re Ó Laighléis* avoided precisely such a conflict.[64]

In turn, Henchy J in a separate opinion introduced the Irish-language formulation of Article 29.3, which, the learned judge suggested, indicates the Article 'merely provides that Ireland accepts the generally recognised principles of international law as a guide (*ina dtreoir*) in its relations with other states.' This wording is used to support the contention, clearly influenced by the presence of Article 15.2.1°, that Article 29.3 'was not enacted, and is not to be interpreted in these Courts, as a statement of the absolute restriction of the legislative powers of the State'.[65] Fennelly identifies this as an attempt to extend the *Ó Laighléis* principle, and further limit CIL in the Irish legal system, by confining its relevance to interstate relations

[56] [1960] IR 93, 111-112.
[57] [1960] IR 93, 114-115.
[58] [1960] IR 93, 115.
[59] [1960] IR 93, 124; note also *The State (Gilliland) v Governor of Mountjoy Prison* [1986] ILRM 381, 392.
[60] [1960] IR 93, 124.
[61] [1960] IR 93, 124; compare with Maguire CJ's earlier decision wherein he appeared to entertain the opposite position, albeit in an *obiter* statement, *The State (Duggan) v Tapley* [1952] IR 62, 85.
[62] [1960] IR 93, 124-125.
[63] [1966] IR 183.
[64] [1966] IR 183, 186-187.
[65] [1966] IR 183, 190.

and matters of foreign policy; in effect, 'the decision appeared to challenge the legally binding character of the 'generally recognised principles of international law'.'[66]

The difficulty in these precedents lie for our purposes, it is submitted, in an unduly restrictive reading of Article 29.3. The Article is here being stretched in two different directions – it is at once being taken expansively, so as to include the entire corpus of CIL in the 'generally recognised principles of international law', however is at the same time limiting its applicability to an almost non-legal setting, relevant only as 'guidance' in resolving inter-state disputes. The opinion of Henchy J in particular, through the invocation of Article 15.2.1°, can be seen as an attempt to insulate the Irish legal system from external interference by principles of CIL.

The question in *ACT* was thus how the ostensibly incorporationist basis of substantive CIL analysed in *Zarine* and *Canada,* may be rectified with the comparatively conservative and transformist *dicta* in *Re Ó Laighléis* and *Sumers Jennings*. Barr J's solution was to restate the common law position: that CIL may form part of Irish domestic law, and be relied upon as such, in situations where customary rules are not in conflict with the Constitution, statute law, or a contrary rule of the common law.[67] Owing to the facts of the case – concerning the customary right of anchorage or refuge of a damaged vessel – the High Court was not faced with any relevant or contrary statute law.[68] Barr J accordingly sought to distinguish the case at hand from *Ó Laighléis* and *Sumers Jennings* on the basis that while in those cases the applicants wished to directly rely upon international law in a domestic setting, in *ACT* the plaintiff wished to rely upon principles of CIL which had already been incorporated into municipal law, and thus were already part of domestic Irish law.[69]

The judge provided no explanation as to at what time such incorporation may have taken place[70] – 'I am satisfied … that this customary right has long since merged into Irish domestic law' – however did provide an explanation as to why such a timeline may be irrelevant. Taking note of earlier invocations of Article 15.2.1, Barr J held that the Article, concerned with the 'making' of laws by the Oireachtas, does not apply to the manner in which CIL emerges or 'evolves'.[71]

From an international law perspective, where the creation and origins of legal principles lean towards the mysterious and are not always forthcoming, this appears to be an elegant solution to the tensions in the case law, particularly the difficult opinion expressed by Henchy J in *Sumers Jennings*.[72] Nonetheless, Barr J's nuanced attempt to distinguish between already incorporated principles of CIL and those in tension with existing statutory provisions has largely fallen on deaf judicial ears, or otherwise been defeated by the hierarchically superior *dictum* of Maguire CJ. Finnegan J for the High Court in *Kavanagh v Governor of Mountjoy*[73], in questioning the correctness of Barr J's decision,[74] squarely restated the point that Article 29.3

[66] Fennelly (n 2) 4-35; see also James Casey, *Constitutional Law in Ireland* (3rd edn, Round Hall 2000) 194, fn. 14 on the use of the Irish *treoir* as the term for 'directive' within the Irish-language versions of the EC Treaties.
[67] [1995] 3 IR 406, 422-423; this is the same approach adopted by the British courts, see [2023] UKSC 11, 205.
[68] Note also that [1942] 1 IR 148 and [1945] IR 291 similarly concerned legal issues which the Oireachtas has never provided robust legislation for, in those cases sovereign immunity.
[69] [1995] 3 IR 406, 421-422.
[70] See, however, Barr J's alternate explanation for incorporation, suggesting the relevant rules of safe refuge were in place as a matter of CIL prior to 1937, and thus entered into the Irish legal system through the enactment of the 1937 Constitution, [1995] 3 IR 406, 422
[71] [1995] 3 I.R. 406, 422; approved in *Horgan v An Taoiseach* [2003] 2 IR 468, 505.
[72] See, for example, Symmons (n 1) 5-53.
[73] [2001] IEHC 77.
[74] [2001] IEHC 77, 21; Symmons (n 1) 5-27.

applies solely 'to relations between states and [confers] no rights on individuals', and that thus '[t]he right found for by Barr J. must be justiciable only at the suit of the State in which the vessel concerned is registered.'[75] In any event, failing to find a congruity between the decisions in *ACT* and *Ó Laighléis*, Finnegan J stressed that the Court was bound to follow the decision of the Supreme Court over a decision from an inferior court,[76] making clear his interpretation that *ACT* was decided contrary to the Supreme Court precedent. This was upheld on appeal by the Supreme Court, where, considering Article 29.3, Fennelly J held in notably equivocal terms that '[i]t is patent that this provision confers no rights on individuals. No single word in the section even arguably expresses an intention to confer rights capable of being invoked by individuals',[77] further averring that '*O Laighleis* [*sic*] has stood the test of time because the words that it interpreted are clear beyond argument and do not admit of any other construction.'[78]

The Irish courts moved further from Barr J's approach in the subsequent *MFM*[79] and *Horgan*[80] cases by focusing their attention on the normative level at which CIL would enter the Irish legal system. Some confusion had existed on this point previously,[81] including amongst members of the non-judicial joint 1974 Irish-British Law Enforcement Commission. The Irish members of this Commission[82] expressed trepidation over whether, owing to Article 29.3, 'the Government of Ireland could legally enter into any agreement or that the legislature could validly enact any legislation affecting its relations with other states which would be in breach of the generally recognised principles of international law.'[83] For the Irish members, neither *Ó Laighléis* nor *Sumers Jennings* indicated that Ireland is not bound 'by the Constitution' to adhere to the recognised principles of international law in its relations with other states, and thus they concluded that the state could not validly legislate for powers which were forbidden by CIL.[84] Moreover, the Irish members were of the view that, should the legislature or executive attempt to create such powers, 'the courts can intervene to set aside any executive or legislative act which contravenes this or any other constitutional provision.'[85] The British members[86] disagreed, however, and found no 'criticism or ground for criticism of Henchy J.'s interpretation of Article 29, s. 3' in the observations of the Irish members. They accordingly found that Irish legislation could not be found repugnant to the Constitution on the basis of Article 29.3.[87]

The opinion of the Irish members is, however, at odds with the subsequent dicta of Hederman J in *Canada*, wherein it was suggested that the Oireachtas has an inherent power 'to qualify or to modify' a rule of CIL insofar as it is applicable within Ireland's jurisdiction.[88] In theory, if a CIL rule were to enter the Irish legal system at the constitutional level, this would elevate it to the point of being able to effectively strike down statutory provisions. It must be stressed that, even if CIL was to be given such force, this happening in practice

[75] [2001] IEHC 77, 23.
[76] [2001] IEHC 77, 23.
[77] [2002] IESC 13, 13.
[78] [2002] IESC 13, 14.
[79] *MFM v MC (Proceeds of Crime)* [2001] 2 IR 385.
[80] [2003] 2 IR 468.
[81] See, for example, Casey (n 66) 193-195.
[82] Walsh and Henchy JJ, TA Doyle SC, and D Quigley.
[83] Quoted in James O'Reilly and Mary Redmond (eds), *Cases and Materials on the Irish Constitution* (Law Society of Ireland 1980) 286.
[84] ibid.
[85] ibid, 285.
[86] Sir Robert Lowry LCJ, Scarman LJ, Sir Kenneth Jones, and JBE Hutton QC.
[87] ibid 288.
[88] [1992] 2 IR 484, 490.

would be supremely unlikely, as noted by Casey, owing to the assumption in common law jurisdictions that legislation is intended to conform to international legal principles.[89] It thus follows that, even if Hederman J's view is accepted, where a CIL rule governs the same subject-matter as an existing legislative provision, the former may serve as an interpretive device in ascertaining the effect of the latter, as opposed to invalidating the domestic instrument.[90] Interestingly, it has been suggested by Symmons that another effect of Article 29.3 may be to reinforce this presumption.[91]

Despite the innocuousness of this ambiguity, counsel for the applicant in *MFM* sought to leverage this uncertainty to argue that CIL enters the Irish legal system through Article 29.3 at the constitutional level, and thus functions as a 'limited self perpetuating and self amending provision'.[92] This was forcefully rejected by O'Sullivan J as an attack on the integrity of the constitutional fabric of the state:

> It seems to me that Bunreacht na hÉireann provides at Article 46 an explicit mechanism for the amendment of the Constitution itself whether by way of variation, addition or appeal. I cannot construe Article 29.3 as in any way or in any case supplanting this mechanism. Not only does this sub-article not say that the Constitution shall be amended in accordance therewith as appropriate but if this were to be implied it could indeed give rise to a situation where an instrument solemnly adopted by the people and solemnly amended from time to time by the people could also from time to time be amended without such ratification. This seems to me to be entirely repugnant to the fundamental principles which underpin the Constitution and which have been recognised in such cases as *Byrne v. Ireland* [1972] I.R. 241. Such an interpretation would, in truth, upend the Constitution itself.[93]

This rejection was expanded upon by Kearns J in *Horgan*.[94] Drawing on the wide discretion afforded to the executive in the formulation and enactment of foreign policy as found by Walsh J in *Crotty v An Taoiseach*,[95] Kearns J stressed that the case law provides that 'the executive cannot be told, either externally or internally, how to conduct its relations with other states.'[96] Kearns J argued that if such limitations were to be imposed constitutionally, such as through a binding Article 29.3 commitment to honour the principles of CIL, the state would be effectively hamstrung in conducting its external affairs. The judge warned that this may require court rulings to legitimise foreign policy decisions, may prevent the state from contributing to the development of emerging international state practice and the crystallisation of new principles of CIL, and allow for legal challenges to the state's participation in wars 'that did not comply with justice and morality, or the principle of pacific

[89] Casey (n 66) 195.
[90] On the presumption that domestic legal provisions conform with CIL and treaty obligations see, inter alia, *Heather Hill v An Bord Pleanála & Ors* [2022] 2 ILRM 313, 179-181; *Alcom v Republic of Columbia* [1984] AC 580, 588: 'I agree that if the Act is ambiguous, a court is entitled to have regard to the general principles of international law and to resolve that ambiguity in the way most consistent with those principles'; *Reference by the Lord Advocate* [2022] UKSC 31, [87]: 'The strong presumption in favour of interpreting our domestic law in a way which does not place the United Kingdom in breach of its obligations in international law is well established … However, the presumption will only be a permissible aid to interpretation if the statutory provision is not clear on its face'.
[91] See Clive R Symmons, 'The Law Enforcement Commission Report and Article 29 of the Irish Constitution' (1973) 8(1) The Irish Jurist 33, 50.
[92] [2001] 2 IR 385, 393.
[93] [2001] 2 IR 385, 397.
[94] See also Symmons (n 1) 5-29.
[95] [1987] IR 713.
[96] [2003] 2 IR 468, 511.

settlement of disputes'.[97] Kearns J thus held, in a manner evocative of Henchy J in *Sumers Jennings*, that Article 29.3 is best seen as providing mere guidelines and does not bind the executive.[98] At the same time, the judge made the minor concession of dispelling the *Ó Laighléis* and *Sumers Jennings* assertion that the incorporation of CIL would usurp the legislative authority of the Oireachtas, holding Article 15.2.1° to be largely irrelevant to the consideration of CIL.[99]

The ambitious incorporationist litigation strategies deployed in *MFM* and *Hogan* thus did little more than resurrect and provide further force to Davitt P's transformist *dicta* in *Sumers Jennings* that Article 29.3 must be read restrictively so as to avoid bringing it into conflict with other constitutional provisions. This facet of Kearns J's decision has been warmly accepted by Irish constitutional lawyers,[100] however does little to assuage the concerns of the Irish international lawyer. In the first instance, the decision ignores that, while the state may enjoy immunity from an internal legal challenge, its external legal responsibilities remain engaged, and subject to legal proceedings at the international level.[101] In such settings, it is crucial to recall that contrary domestic provisions are not an acceptable defence.[102] That said, this does not necessarily put Ireland out of step with many of its European neighbours, the judiciaries of many of which, including Germany, demonstrate considerable scepticism of CIL and construct means to limit its force, despite CIL being given pride of place in their respective constitutional frameworks.[103]

In any event, the argument that Article 29.3 granted CIL constitutional status was never a compelling one, and was not substantially developed by the Irish members of the 1974 Commission.[104] It does not necessarily follow from a constitutional recognition of the validity of CIL as a body of law that it is therefore on the same footing as the Constitution itself. That CIL is not of constitutional value was recognised by Barr J in *ACT*, wherein the learned judge acknowledged that CIL is justiciable only where it 'is not contrary to the provisions of the Constitution, statute law or the common law.'[105] Once this is accepted, it becomes clear that there is no infringement upon legislative sovereignty under Article 15.2.1°, as Acts of the Oireachtas may defeat CIL.

Finally, Kearns J expanded upon the *Ó Laighléis* principle that Article 29.3 created no rights for individuals, and in effect extended this function of the constitutional provision to conceptualise CIL as a predominantly inter-state body of law, at least insofar as it functions within the Irish legal system. He stated that '[w]here the rights of states *inter se* are concerned, rules of customary international law may create rights and duties between states in a variety of situations. By way of example, a foreign state may invoke customary international law to protect its position in this State.'[106] Alternatively, Kearns J acknowledged, somewhat opaquely, and seemingly in an attempt to explain the applicant's success in *ACT*, that CIL

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[97] [2003] 2 IR 468, 512.
[98] [2003] 2 IR 468, 512.
[99] [2003] 2 IR 468, 505.
[100] See, for example, Hogan and others (n 27) 5.3.24: 'He persuasively argued that …'
[101] Roslyn Fuller, *Biehler on International Law: An Irish Perspective* (2nd edn, Round Hall 2013) 4-33.
[102] See Article 3 and related commentary, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001).
[103] See Jan Wouters, 'Customary international law before national courts: Some reflections from a continental European perspective' (2004) 4(1) *Non-State Actors and International Law* 25, see in particular 35: 'The court described these rules of customary international law as governing the relationships between states, so that an individual lacks the interest to invoke it in litigation with the Belgian State'.
[104] For criticism, see Symmons (n 91) 47-48.
[105] [1995] 3 IR 406, 423.
[106] [2003] 2 IR 468, 507.

may be invoked 'only at the behest of sovereign states or, in the case of individuals, to determine private law claims only.'[107] Thus, Kearns J interpreted the final limb of Article 29.3 – 'in its relations with other States' – as referring to the issue of standing. Perhaps optimistically, Fennelly interprets this as a nod to the possibility of applying CIL through the common law, as, he suggests, was the case in *ACT*:

> Thus, the effect and status of a rule of customary international law within Irish law appeared to depend not only on the party invoking it (whether it was an individual or a state) but also the party against whom it was being invoked and the nature of the claim being advanced (whether it was a "private law" claim or a "public law" claim). Depending on the party invoking it and the nature of the claim being advanced, the legal basis of the rule might be the common law or Art.29.3.[108]

Such a reading is attractive and may help to explain Kearns J's reference to the impossibility of an unlawful war being challenged, due to such a challenge necessarily being a 'public (international) law claim'. Nonetheless, without any explicit endorsement of the common law approach in the leading or subsequent case law, the argument is difficult to fully endorse. By limiting the possibility of public international law claims to situations where such claims are brought by states, the High Court's decision in *Horgan* broadly followed the dicta of Finnegan J in *Kavanagh*, casting further doubt on the precedent in *ACT*, which concerned an issue of public, not private, international law. It is submitted that reading this further obstacle into Article 29.3 is unhelpful in leveraging CIL's potential for filling gaps in Irish domestic law. Similarly, as noted above and stressed by other authors, this restrictive approach amounts to somewhat of a 'head in the sand' mentality *vis-á-vis* the state's potential liability in international legal *fora*.[109] To date, however, no Irish court has sought to overturn or query Kearns J's approach in *Horgan* nor the earlier *dicta* in *Ó Laighléis*.[110]

The end result is an essentially artificial division between CIL and municipal law, whereby the former's place in the latter is acknowledged, but severely neutered, seemingly by a – (it is submitted) – misplaced judicial concern that recognising its domestic applicability would in some way undermine the established constitutional order. There is no issue, in principle, with CIL entering the Irish legal system via Article 29.3, however the exact parameters of this process must not be arbitrary. The lack of textual guidance in the Article, as well as the inconsistent case law discussed above, leaves CIL without the coherence afforded to treaty law under Article 29.6.[111] It is nonetheless clear that CIL has an important role to play in the Irish legal system by filling gaps in existing positive and common law. If the Article 29.3 approach is to be retained, it is submitted that the binding nature of CIL on the state must be appreciated, and the unduly pedantic limitation of standing for such actions to foreign

[107] [2003] 2 IR 468, 495.
[108] Fennelly (n 2) 4-44.
[109] This is explored within the context of treaty law and Article 29.6 by Murray CJ in *McD v L* [2009] IESC 81; note also [2023] UKSC 11, 205, wherein the UK Supreme Court cited the interest in ensuring that the state was not in breach of its international obligations as an important policy consideration in recognising the incorporation of a specific customary rule.
[110] See *Nottinghamshire County Council v B* [2013] 4 IR 662, 39-40, citing Kearns J in *ACW v Ireland* [1994] 3 IR 232, rejecting Article 29.3's applicability to issues of private international law; *Minister for Justice, Equality and Law Reform v Bednarczyk* [2011] IEHC 136; *Minister for Justice, Equality and Law Reform v DL* [2011] 3 IR 146, 14; *Doherty v Ireland* [2011] 2 IR 222, 38; *Dubsky v Ireland* [2005] 1 IR 63, 103; *NS v Judge Anderson and others* [2008] 3 IR 417, 30, citing Fennelly J in *Kavanagh*; *Quinn v O'Leary* [2004] 3 IR 128, 76-78, 92.
[111] For a recent discussion on the relationship between Irish law and treaty law, see *Costello v Government of Ireland* [2022] IESC 44, 3, 112; see also Separate Opinion of MacMenamin J, 62.

states, and the unclear division between public and private international law claims, be abandoned.

Identification of Customary Rules in Irish Courts

That CIL is held at arm's length is perhaps unsurprising, owing to a general lack of rigour with regards the minutiae of CIL in Irish courts. It has not gone unnoticed by commentators that much of the Irish jurisprudence wherein the courts were tasked with interrogating the existence of an alleged rule of CIL have been methodologically lacking. Even in the celebrated *Zarine* case – described as 'one of the finest considerations of an issue of customary international law in the Irish case law' by Fennelly[112]– the judgment of Hanna J defers very heavily to decisions of British courts and scholarly sources.[113] Indeed, in *Horgan*, Kearns J's conclusion that the inviolability of neutral territory, codified in *Hague Convention V* (1907), and considered to be declarative of customary international law,[114] appears to be based on a misreading of CIL in tandem with the law of state responsibility. Kearns J here cites an article by Professor Vaughan Lowe on the issue of legal responsibility of one state for assisting in the internationally wrongful act of another,[115] wherein it is observed that not every example of such actions will incur legal liability if they do not substantially contribute to the wrongful act. Kearns J's judgment quietly shifts the threshold set out in CIL regarding the inviolability of neutral territory from allowing no belligerent incursions into neutral territory to only prohibiting 'large numbers' of belligerent troops.[116]

Symmons similarly voices concern with regards to what he describes as a 'very parochial viewpoint as to the material sources of customary international law'[117] in *McElhinney v Williams*,[118] wherein Hamilton CJ dismissed the importance of 'principles set forth in individual state legislation' as evidence of customary rules.[119] Finally, it is worthwhile to note the judgment of Barr J for the High Court in *Kaptain Labunets*.[120] Tasked with considering the admissibility of an arrest of a sister ship in order to secure and enforce a maritime claim, in a scenario where the flag state was not party to the relevant international treaty,[121] the learned judge chose to dismiss even a cursory consideration of the *travaux préparatories*, ostensibly owing to the lack of an analogous concept in Irish municipal law. In considering the expert testimony of Professor Francesco Berlingieri, author of the leading commentary on the subject of the arrest of ships,[122] Barr J held that:

> Professor Berlingieri also attaches greater status to the *travaux préparatories* relating to the Convention *than would be accorded to such material in Irish law*. I

[112] Fennelly (n 2) 4-31, fn. 67.
[113] [1942] 1 IR 148, 162-169.
[114] Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, entered into force 26 January 1910), Art 1; recognised as CIL in [2003] 2 IR 468, 504.
[115] See Vaughan Lowe, 'Responsibility for the conduct of other states' (2002) 101 *Japanese Journal of International Law 1*; cited at [2003] 2 IR 468, 493.
[116] See [2003] 2 IR 468, 504, 505; note also [2005] 1 IR 63, 94.
[117] Symmons (n 1) 5-19.
[118] [1995] 3 IR 392.
[119] [1995] 3 IR 392, 402; *cf. Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* [2012], ICJ Rep99, 123, at [55]: '… State practice of particular significance is to be found in the judgements of national courts … the legislation of those States …. and the statements made by those States …'
[120] *Constante Trading Ltd v Owners of MV 'Kaptain Labunets'* [1995] 1 IR 164.
[121] International Covenant Relating to the Arrest of Seagoing Ships (adopted 10 May 1952, entered into force 24 February 1956) 439 UNTS 193.
[122] See Francesco Berlingieri, *Berlingerieri on Arrest of Ships: Volume I & II – Commentary on the 1952 & 1999 Arrest Convention* (6th edn, Routledge 2016).

> apprehend that the observations of Lord Wilberforce in *Fothergill* that "the use of *travaux préparatories* in the interpretation of treaties should be cautious" and that their utilisation should be "rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the *travaux préparatories* clearly and indisputably point to a definite legislative intention" would meet with approval in this jurisdiction.[123]

That the *travaux préparatories* of a treaty ought to be treated with caution is unproblematic, however the assertion that a comparative lack of importance given to, for example, transcripts of parliamentary debates to statutory interpretation should impact upon the specific methodologies of international legal interpretation demonstrates a fundamental lack of understanding regarding the differences between the municipal and international legal orders. Even though the courts have limited the extent to which they come into contact with questions of CIL by insisting that its entry point into the Irish legal system is Article 29.3, the treatment of such questions, on the rare occasion where they arise, can still rightly be described as a source of concern for the Irish international lawyer.

Conclusion

Based on the above analysis, it is clear that the Irish legal system – and, by extension, Irish judges – treat CIL with a considerable sense of suspicion and scepticism. The subsequent misapplication of relevant international legal principles and methodologies cannot be seen to be a coincidence; by limiting the scope and applicability of CIL in Ireland, the Irish judiciary has effectively ensured that it will be ill-equipped to grapple with the mysterious qualities of CIL in circumstances where there is no relevant rule of constitutional, statutory, or common law. Whether one agrees with the courts' reliance on Article 29.3 as the vehicle for incorporation of CIL or not, it is difficult to defend many of the side-effects of this approach, in particular, the assertion that only foreign states may reliably invoke customary rules in Irish courts. As a respected judicial branch, the Irish courts have a responsibility to ensure that their judgments, whether they concern matters of CIL or otherwise, are rigorous and based on legal principle. One does not need to look further than the *Horgan* case, which is routinely cited in international scholarship on the law of neutrality, to see the wide doctrinal reach of the Irish courts. It is thus imperative that the Irish position on the incorporation of CIL is revisited and clarified, and that the Irish courts begin to engage more rigorously with international legal methodologies.

[123] [1995] 1 IR 164, 168 (emphasis added).