
LAW REFORM COMMISSION

DISCUSSION PAPER

DOMESTIC IMPLEMENTATION OF INTERNATIONAL OBLIGATIONS

(LRC 124-2020)



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

Discussion Paper

Domestic Implementation of International Obligations

(LRC 124 – 2020)

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Styne House, Upper Hatch Street, Dublin 2, D02 DY27

T. + 353 1 637 7600

E. info@lawreform.ie

W. <http://www.lawreform.ie>

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Commissioner (full-time):

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Commissioner:

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Commissioner:

Ms Justice Carmel Stewart, judge of the High Court

Commissioner:

Thomas O’Malley, Barrister-at-Law

Commission Staff

Law Reform Research

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Morgane Hervé, BCL (NUI), Maîtrise (Paris II), LLM (KCL)

Suzanne Scott, LLB (Ling Germ) (Dubl), LLM (NUI)

Principal Legal Researchers for this Discussion Paper:

Rónán Condon, PhD (EUI)

Meghan McSweeney, BCL (Intl) (NUI) with Hist, LLM (Georgetown), Attorney-at-Law (NY)

Mgr. Alexandra Molitorisová (Charles University, Prague)

Coordinating Commissioners for this Discussion Paper:

Raymond Byrne, Barrister-at-Law

Donncha O'Connell, Established Professor of Law, NUI Galway

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Professor Ciarán Burke, University of Jena, former Director of Research, Law Reform Commission

Dr David Fennelly BL and Assistant Professor of Law, School of Law, Trinity College Dublin

Peter Fitzsimons, Department of Transport, Tourism and Sport

Dr Ruth Gallagher, Irish Human Rights and Equality Commission

Eilish Kennedy, Department of Transport, Tourism and Sport

James Kingston BL, Legal Adviser, Department of Foreign Affairs and Trade

Patricia O'Brien, Department of Transport, Tourism and Sport

Michael O'Neill, Irish Human Rights and Equality Commission

Trevor Redmond BL, Legal Counsellor, Department of Foreign Affairs and Trade

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OVERVIEW AND SUMMARY

1. This Discussion Paper comprises the second and final element of the Commission's research on the domestic implementation of Ireland's international obligations, which is a project in its *Fourth Programme of Law Reform*.¹ The first element of the project was the publication in 2018 of a *Draft Inventory of International Agreements Entered into by the State*.²
2. The Discussion Paper builds on the research that led to the publication of the Draft Inventory by describing the methods used by the State to implement and comply with the international treaties and conventions to which it has agreed to be bound, what is usually described as the State's treaty practice. The Discussion Paper is accompanied by an Appendix that contains a detailed case study on the steps leading up to the ratification of the 2006 UN Convention on the Rights of the Persons with Disabilities (UNCRPD).
3. The two elements that comprise the research involved in this project differ from many other Commission publications in that they are primarily descriptive and do not involve recommendations for law reform.³
4. In carrying out this project, the Commission has had the benefit of the interest and assistance of a number of individuals and bodies, as well as the Department of Foreign Affairs and Trade, for which it is extremely grateful. The Commission has also had the benefit of the growing literature on both the development of Ireland's international relations and of the impact of international law in Ireland.⁴ The

¹ *Report on Fourth Programme of Law Reform* (LRC 110-2013), Project 10.

² *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018).

³ The Commission's *Report: An Examination of the Law of Bail* (LRC 50-1995) similarly contained a review of the existing law and did not make any recommendations for reform. That Report was prepared at the request of the Attorney General as a background document for a 1996 constitutional referendum that inserted (by the *Sixteenth Amendment to the Constitution Act 1996*) Article 40.4.6° (concerning bail) into the Constitution.

⁴ An early example of a detailed analysis of the impact of international law in Ireland is Symmons, *Ireland and the Law of the Sea* (Round Hall 1993), which also noted the limited amount of available writing on international law in the State at that time. The position has greatly improved since then, and there is now a growing literature on both the development of Ireland's international relations, and of the influence of international law in Ireland. This includes Symmons, *Ireland and the Law of the Sea* 2nd ed (Round Hall 2000), *Irish Yearbook of International Law* (Hart/Bloomsbury Professional, annually since 2006), Kennedy, Tonra, Doyle and Dorr (eds), *Irish Foreign Policy* (Royal Irish Academy and Gill Education 2012) Fuller, *Biehler on International Law: An Irish Perspective* 2nd ed (Round Hall 2013), Fennelly, *International Law in the Irish Legal System* (Round Hall 2014), and the ongoing collection of volumes entitled *Documents on Irish Foreign Policy* (Royal Irish Academy 1998-current).

Commission emphasises that, as with all its other publications, it takes full responsibility for the content of the Discussion Paper.

1. Purpose of this Discussion Paper

5. The Commission's overall purpose in carrying out the research involved in this Discussion Paper is to provide a general description of the State's treaty practice, and is not, therefore, a text on international law as such. The Commission intends, rather, that the Paper may be of practical use to Government policy makers, the Oireachtas, statutory bodies with an interest in this area and NGOs alike. On that basis, the Discussion Paper:
 - describes the development of Ireland's active participation in the international law community since 1922, which has involved ratification of over 1,400 international agreements (listed in the Draft Inventory), including the leading global and regional human rights treaties and conventions as well as those concerning a wide range of other matters such as international trade, mutual assistance in criminal law enforcement, peaceful settlement of disputes, nuclear disarmament, public health, refugees, and succession law;
 - discusses the process involved in implementing international agreements, including the provisions in Article 29 of the Constitution that require the approval of the Oireachtas before any international agreement becomes part of Irish law (the "dualist" approach to international law);
 - discusses examples of best practice in ratifying international agreements, including the use of policy tools, such as "roadmaps to ratification" and Regulatory Impact Analyses, which set out clear and transparent pathways towards implementing the obligations in those agreements in our national law; and
 - describes the role played by various bodies, including national and international monitoring bodies and NGOs, which ensure that the highest possible standards are applied in the ongoing implementation of Ireland's international obligations.

2. Impact on Irish law of over 1,400 ratified international agreements

6. In **chapter 1**, the Commission begins by noting the general effect on Irish law of Ireland's engagement with international law over the past century. The wide-ranging subject matter of the 1,400 entries in the Draft Inventory published in 2018 underlines this.

7. This includes Ireland's ratification of the key UN human rights conventions, including:
 - the 1966 International Covenant on Civil and Political Rights (ICCPR);
 - the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR);
 - the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
 - the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);
 - the 1989 Convention on the Rights of the Child (UNCRC); and
 - the 2006 Convention on the Rights of Persons with Disabilities (UNCRPD).
8. Ireland has also ratified more than 1,000 other multilateral and bilateral treaties on subjects such as employment law, intellectual property law, international arbitration and peaceful settlement of disputes, marine and maritime law, mutual assistance in criminal law enforcement, nuclear disarmament, public health, refugees, and succession law.
9. In **chapter 1**, the Commission notes that many of the 1,400 ratified international agreements have either been fully made part of Irish domestic law through the enactment of a specific Act, or else have greatly influenced the content of domestic Irish law. This is not surprising, because Ireland's increasingly outward-looking approach to economic and social policy since the second half of the 20th century has meant that it has been in the State's interests to remain actively engaged in implementing international law.
10. Ireland's emergence as an independent state has also coincided with an enormous increase in the volume and range of international agreements, evidenced by the wide-ranging subjects covered in the Draft Inventory. This has led to the codification of many areas of international law through international treaties and conventions, many of which have been developed through the UN and its agencies. The Commission also notes in the chapter that this has influenced its own research work in specific law reform projects. The momentum towards codification of international law mirrors the increased volume of enacted domestic legislation in most states since the second half of the 20th century, which includes the consolidation, and sometimes codification, in legislative form of much of the State's laws.

3. Ireland's Role in International Law since the Foundation of the State

11. The Commission then proceeds in **chapter 1** to provide an overview of how Ireland's role in international law has developed in the past 100 years since the State was founded in 1922. This begins with a discussion of the importance that the pre-1922 Provisional Government attached to international relations, beginning with its unsuccessful attempts to achieve recognition at the 1919 Versailles Peace Conference. In the wake of the 1921 Anglo-Irish Treaty and the establishment of the State in 1922, the importance of the international dimension was underlined when, in 1924, the Government lodged the 1921 Treaty as an international treaty with the League of Nations.
12. **Chapter 1** then provides a brief discussion of Ireland's international standing during the 1920s, at a time when it was a Dominion of the British Commonwealth of Nations. This includes examination of the question of the extent to which legislation enacted after 1922 by the United Kingdom Parliament, as Imperial Parliament for the British Commonwealth, was binding on Ireland, and other Dominions.
13. The 1926 meeting of the Commonwealth agreed that Dominions were largely free of the legislative power of the UK Imperial Parliament. This was placed on a statutory footing when the UK Parliament enacted the *Statute of Westminster 1931*, which confirmed that British Dominions such as Ireland, Canada and Australia were independent states so far as international relations, including treaty-making, was concerned.
14. **Chapter 1** then discusses the State's growing international role from the 1930s onwards. This includes the provisions of Article 29 of the Constitution of Ireland 1937, which set out a clear statement of Ireland's commitment to general principles of international law, and an equally clear statement that international agreements can only form part of Irish domestic law if the Oireachtas agrees to that. In international law terms, this reflects the "dualist" nature of the Irish legal system, which is discussed in more detail in chapter 2, below.
15. Other important milestones have been the State's founding membership of the Council of Europe in 1949, membership of the United Nations Organization (UN) since 1955, and accession, in 1973, to the three European Communities, now the European Union. These have had a profound effect on Irish law. Indeed, the century since Ireland's independence has coincided with the most active period of international treaty-making in history. In the second half of the 20th century and the first two decades of this century, major areas of international law that were previously based on custom and practice (customary international law) are now

available in treaties, the equivalent of legislation or codes in the national or domestic context.

16. This reflects the parallel increase in the amount of legislation enacted in most States through the 20th century and the first two decades of this century. Indeed, as the examples in this Discussion Paper illustrate, the international treaties have been the direct catalyst for the enactment of national legislation. For many states, membership of international organisations has been the source of much reforming and modernising national legislation.
17. Having sketched this history of Ireland's engagement in international relations, **chapter 1** then discusses the status of international agreements ratified by the United Kingdom prior to 1922. This is referred to as the issue of State succession, that is, to what extent these pre-1922 international agreements were carried over as part of the laws of the Irish Free State that was established in 1922. Almost a century later, this issue has a modest continuing effect, but it is nonetheless worth discussing how the State in its early years addressed this.
18. The Chapter then discusses some examples of international treaties ratified by Ireland in the nearly 100 years since the State was founded. These examples have been chosen to illustrate how a large number of pre-1922 treaties –to which the State may, or may not, have succeeded – have been replaced by, or amended by, post-1922 treaties, and which independent Ireland has expressly ratified. The examples chosen are:
 - Ireland and the law of war and armed conflict: the 1907 Hague Conventions on the Law of War and the post-World War II Geneva Conventions on the Law of War and Humanitarian Treatment in War;
 - Ireland and the Permanent Court of Arbitration: the 1907 Hague Convention for the Pacific Settlement of International Disputes; and
 - Ireland and intellectual property law: from the 1883 Paris Convention and 1886 Berne Convention to WIPO Conventions and the globalised digital era.
19. The Commission also discusses two examples of post-1922 international law that underline Ireland's active participation in the international community. First, its acceptance (in 2011) of the compulsory jurisdiction of the UN's International Court of Justice; and, second, Ireland's implementation (in 2020) of the emergency measures required to respond to the Covid-19 pandemic, which were greatly assisted by the World Health Organization's *International Health Regulations* and guidance from the European Centre for Disease Prevention and Control.

20. **Chapter 1** concludes with an overview of the subject-matter of the 1,400 entries in the Commission's 2018 *Draft Inventory of International Agreements Entered Into by the State*⁵ and an introduction to the State's mechanisms for monitoring Ireland's international obligations, including key UN human rights Conventions. These international law obligations have had, and continue to have, an enormous impact on the reform of our domestic law. The Draft Inventory also provides a clear picture of Ireland's current extensive engagement as a participant in the international community, including as a member of the UN Security Council, to which Ireland was, in June 2020, elected for a fourth time for the period 2021-2022.
21. The chapter concludes with an introduction to the role of monitoring mechanisms, which are discussed in detail in chapter 4. The State's monitoring mechanisms include the role played by the Department of Foreign Affairs and Trade, which has overall responsibility within the Government for facilitating the ratification of international human rights treaties. The Irish Human Rights and Equality Commission (IHREC) is Ireland's statutory National Human Rights Institution (NHRI), and has the highest rating, "A" status, in terms of the relevant international standard, the "Paris Principles." Non-governmental organisations (NGOs), such as Amnesty International Ireland, the Free Legal Advice Centres (FLAC) and the Irish Council for Civil Liberties (ICCL), also play important monitoring roles, nationally and internationally.
22. The following chapters of the Discussion Paper refer to a number of international agreements in order to illustrate the State's treaty practice in implementing them in domestic law. The Appendix to the Discussion Paper contains a detailed case study intended to illustrate detail treaty practice in action. The case study, on the ratification of the 2006 UN Convention on the Rights of persons With Disabilities (UNCRPD), underlines the level of complexity, and challenge, involved in ensuring that the State fulfils the international obligations to which it has committed itself.

4. How Ireland Implements its International Law Obligations: the State's Treaty Practice in a "Dualist" System

23. In **chapter 2**, the Commission discusses Ireland's treaty practice against the background of the recognition in the Constitution that this is done through what is called a "dualist" system. This means that treaty practice has, firstly, an international dimension that operates between Ireland and other states and, secondly, a national, or domestic law, dimension that determines the effect of international agreements in Irish law.

⁵ *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018).

24. At the international law level, the State will in the first place sign a treaty or convention, which indicates that it agrees in principle to implement the treaty. But it is only where a state ratifies, or accedes to, a treaty or convention that the other State party or State parties to that agreement can insist that, as between those State parties, Ireland is bound by and must meet the commitments in that agreement. This commitment is often supported by monitoring and reporting mechanisms under the relevant treaty or convention, under which the State is required to report on and explain, on a periodic basis, how it has implemented, or not implemented, the commitments in the relevant treaty or convention. These are discussed in chapter 4.
25. The “dualist” nature of Ireland’s relationship with international law is clearly set out in the Constitution of Ireland, which provides that an international treaty or convention can only become part of our national law – from the point of view of international law, our “domestic law” – where it is incorporated into national law by the Oireachtas. This is often done by an Act (primary legislation) or sometimes also by statutory Regulations (secondary legislation), and sometimes a combination of both.
26. This aspect of dualism has the important consequence that (with the exception of EU law, the special position of which is discussed below), regardless of the State’s commitments to other states at an international level, including periodic reporting obligations, those international commitments cannot be relied on in Irish law unless and until they have been incorporated – or “transposed” – into Irish law by an Act or, as the case may be, statutory Regulations. Put simply, the “dualist” approach to international law that is enshrined in the Constitution usually prevents an Irish court from applying the terms of an international agreement in any dispute, civil or criminal, unless that international agreement has been incorporated into Irish law through our National Parliament, the Oireachtas.
27. It is important to discuss the interaction between these two levels of Ireland’s treaty practice, the international law level and the domestic law level. **Chapter 2** therefore discusses the international law level by reference to relevant principles of international law, many of which were codified in the 1969 UN Vienna Convention on the Law of Treaties, which Ireland ratified in 2006. The domestic law level is discussed by reference to Article 29 of the Constitution and its clear application of the dualist approach.
28. The special position of European Union (EU) law in Irish law is also discussed. This includes the unique legal status of EU law, which has direct legal effect in Irish law, in a major exception to the general dualist nature of the Irish legal system. Membership of the EU has another complicating, and significant, effect on Irish law. This is because EU member states have agreed, in the treaties establishing the EU,

that the EU may enter into international agreements where these are related to the functions of the EU. These include entering into Free Trade Agreements (FTAs) with non-EU member states as well as acceding to many multilateral trade and human rights treaties. In turn, the accession of the EU to an international agreement, such as an FTA, can require Ireland to ratify a related international agreement. The Commission discusses how the 1992 EU-EEA Agreement required Ireland to ratify a related UN/WIPO (World Intellectual Property Organization) convention on intellectual property law.

29. This analysis forms the basis for the detailed discussion of Ireland's treaty practice in chapter 3, and the monitoring mechanisms discussed in chapter 4 of the Paper.

5. How Ireland Ratifies and Implements International Agreements

30. **Chapter 3** describes in some detail the various procedures and practices involved in Ireland's implementation of international agreements. The State's usual, though not invariable, approach to a multilateral international treaty, such as a UN Treaty, is this. Firstly, the State will agree in principle to accept the contents of the international treaty by signing the treaty. Before Ireland agrees to be bound by the terms of the treaty, through ratification or accession, the Government (the Department of Foreign Affairs and Trade, or the Government Department with functional responsibility for the specific policy area) will, again usually but not invariably, carry out an audit of existing domestic legislation to determine to what extent additional legislation is required to comply with the treaty's provisions. Assuming new legislation is required, the usual practice is that Ireland will not ratify the treaty until most, though not necessarily all, of the relevant domestic legislation has been enacted.
31. The chapter describes how, in carrying out a pre-ratification audit, a practice has begun to develop in which the Government may publish a "roadmap" towards ratification. Such a roadmap usually includes a description of existing legislation that has, in effect, already implemented some elements of the treaty, as well as what legislation is still required to implement other elements. This was used, for example, in the process leading to the ratification in 2018 of the 2006 UN Convention on the Rights of Persons with Disabilities (UNCRPD).
32. Another useful practice is to publish a Regulatory Impact Analysis (RIA) in advance of both ratification and enactment of domestic legislation. The use of an RIA, which is an element of good regulatory practice, is especially useful in the context of international agreements with an economic or technical component that may involve direct costs for the private sector. RIAs have been used in the context of ratification of international marine and maritime conventions.

33. The Commission notes in **chapter 3** that the general policy approach, that ratification usually occurs only after the enactment of required domestic legislation, has the advantage that it indicates the serious intent with which Ireland seeks to implement its international obligations. However, it also has the disadvantage that the eventual ratification of an international treaty may take longer than would otherwise be the case, because it is dependent in particular on the allocation of limited parliamentary time to the enactment of the required domestic legislation.
34. The Commission also notes that while this is the general approach, there are occasions when the State has departed from this practice and ratifies before the enactment of key, identified, legislation. The Commission refers in this respect to examples related to international treaties on intellectual property law and, in the human rights area, in the case of the UNCRPD.
35. **Chapter 3** also discusses Ireland's treaty practice concerning reservations to international agreements, including in connection with two of the core UN human rights Conventions, the 1966 UN International Covenant on Economic, Social and Cultural Rights (ICESCR) and the 1966 UN International Covenant on Civil and Political Rights (ICCPR).
36. A reservation may arise because of the need to adjust the application of a specific provision in the international agreement in light of a provision in the Constitution: this was the case with both the ICESCR and the ICCPR. Another reason is that a reservation may amount to a holding position, allowing for the preparation and enactment of legislation and then the later withdrawal of the reservation. In the case of the original reservations to the ICCPR, a number of these were subsequently withdrawn following the enactment of relevant legislation in Ireland.
37. **Chapter 3** concludes with a discussion of the different legislative enacting methods used in practice to implement international agreements. These are:
 - full incorporation into Irish law by an Act: this can include enacting legislation that contains the key elements of the agreement, which is sometimes supplemented by including the full text of the international agreement in a Schedule to the implementing legislation, a technique used in the *Adoption Act 2010* to implement a 1993 Convention on intercountry adoption;
 - full incorporation into Irish law by an Act (primary legislation), supplemented by Regulations (secondary legislation) that implement detailed requirements: this can be used for international conventions that are regularly updated, such as those on merchant shipping and other aspects of the maritime and marine environment, a technique used in a number of *Merchant Shipping Acts*; and
 - partial, indirect and implicit incorporation into Irish law:

- partial incorporation may be required because the international agreement requires wide-ranging reforms across many policy areas, which is especially the case with the major UN human rights treaties such as the UNCRPD;
- indirect incorporation may arise through the requirements of EU law; and
- implicit incorporation may be noted during Oireachtas debates rather than in the text of the implementing legislation.

6. Monitoring and Enforcement Mechanisms for International Agreements

38. In **chapter 4**, the Commission discusses the various mechanisms that have been developed to monitor and report on compliance with international obligations. The chapter also discusses the range of available enforcement mechanisms at international level.
39. The chapter begins with a discussion of the underlying principles concerning the monitoring and enforcement of international agreements. This includes the principle *pacta sunt servanda* (literally, “agreements must be complied with”), a general principle of international law. The principle of good faith, that a State will not act contrary to its international commitments, also forms part of the general principle of *pacta sunt servanda*. The chapter notes that the general approach at international level towards monitoring and enforcement is, at least initially, to facilitate a non-complying party and to provide for non-confrontational, non-judicial and consultative procedures to restore compliance. More stringent enforcement mechanisms, such as suspension, termination or judicial enforcement are not commonly used.
40. **Chapter 4** goes on to describe the various judicial mechanisms that have emerged at the international level to enforce the obligations contained in a treaty or convention. This includes the innovative jurisdiction conferred in 1950 on the Council of Europe European Court of Human Rights (ECtHR) by its Convention on Human Rights and Fundamental Freedoms (ECHR). The chapter also notes the effect of dualism in this context, already discussed in detail in **chapter 2**.
41. The Commission then proceeds in **chapter 4** to discuss Ireland’s national monitoring mechanisms. This includes the role played by the Department of Foreign Affairs and Trade, which has overall responsibility within the Government for facilitating the ratification of international human rights treaties. The chapter discusses the Department’s role in periodic reviews of specific UN human rights

treaties, as well as in the unique process initiated in 2006 by the UN, the Universal Periodic Review (UPR).

42. Ireland's first UPR Review took place in 2011. In 2014 Ireland published a voluntary National Interim Report setting out progress achieved since the first Review. In 2016, the State's second National Report was transmitted to the UN, and the then Tánaiste and Minister for Justice and Equality led the Irish delegation at the second Review in 2016. Ireland's third UPR Review is scheduled for 2021.
43. The Commission then discusses the role played by the Oireachtas. This includes the role of the Oireachtas Joint Committee on Foreign Affairs, Trade and Defence, which has a general monitoring role concerning international relations and international law, notably in shadowing and scrutinising the work of the Department of Foreign Affairs and Trade.
44. Since Irish treaty practice is to have all international agreements to which the State is party laid before Dáil Éireann, including those of a technical character, this practice provides an opportunity for members of Dáil Éireann to debate, for example, the merits of implementing, in whole or in part, any such agreement in Irish law. In addition, Parliamentary Questions are often used by members of Dáil Éireann to pose important questions as to the ratification and, if ratified, the effect, of international agreements.
45. In addition, under the *European Union (Scrutiny) Act 2002*, all Oireachtas Committees, including the Joint Committee on Foreign Affairs, must be consulted on any EU legislative proposal from the European Commission, whether a proposed EU Regulation or a proposed EU Directive. Bearing in mind the reach of EU law, whether in terms of the direct effect of EU law or the impact of the EU in its role as negotiator of international trade agreements, this is an extremely significant role in terms of international law.
46. **Chapter 4** then discusses the significant role of the Irish Human Rights and Equality Commission (IHREC), Ireland's statutory National Human Rights Institution (NHRI). IHREC has the highest rating, "A" status, in terms of the relevant international standard, the "Paris Principles." The effect of this "A" status is that IHREC has specific participation rights in UN processes and mechanism, including speaking rights immediately following the State at the Human Rights Council for the purposes of the UPR, and before some UN Treaty bodies. In Europe, as an "A" status NHRI, IHREC also has comparable rights of audience within the Council of Europe and EU institutions. IHREC also engages with national NGOs in carrying out its statutory mandate. For example, in developing its submission to the Second UPR for Ireland in 2015, IHREC partnered with the Irish Council for Civil Liberties (ICCL)

to engage in public consultations with civil society organisations and members of the public.

47. Some conventions, such as the UNCRPD, require state parties to establish a special monitoring committee at national level. This can facilitate national dialogue and monitoring in between the periodic reporting obligations. This can also assist in identifying what legislative or policy gaps might need to be filled, thus ensuring ongoing compliance with the obligations under the relevant treaty or convention. In 2019, IHREC has established such a body.
48. The Commission then proceeds in **chapter 4** to discuss the role of non-governmental organisations (NGOs), such as Amnesty International Ireland, the Free Legal Advice Centres (FLAC) and the Irish Council for Civil Liberties (ICCL). The most significant role for NGOs in this area is by submitting what are referred to as shadow reports, that is, reports that shadow the national reports submitted by Governments. In other words, NGOs may submit their own assessments of the State's compliance with its obligations under, for example, the ICCPR and the ICESCR, as well as part of the more wide-ranging review under UPR. Such shadow reports are often used by the international panel of experts appointed to carry out the periodic reviews as the basis for assessing the formal national report submitted by the Government.
49. **Chapter 4** concludes with a discussion of various mechanisms that have been developed under international agreements to accept individual or group submissions and communications. Ireland was one of the first states to accept the jurisdiction of the European Court of Human Rights (ECtHR) to accept individual applications under the Council of Europe 1950 Convention on Human Rights and Fundamental Freedoms (ECHR).
50. In addition, special compliance monitoring mechanisms have also been developed, for example, in the 2002 Optional Protocol to the 1984 UN Convention Against Torture (OP-CAT). The Programme for Government adopted in June 2020 has reiterated the State's commitment to ratify OP-CAT.
51. The **Appendix** to the Discussion Paper comprises a detailed case study on the steps leading up to the ratification in 2018 of the 2006 UN Convention on the Rights of the Persons with Disabilities (UNCRPD).

CHAPTER 1 IRELAND'S ROLE IN INTERNATIONAL LAW SINCE THE FOUNDATION OF THE STATE

- [1.1] In this chapter, the Commission provides an overview of Ireland's¹ role in international law. This can be traced to the immediate aftermath of the first meeting of Dáil Éireann in 1919, although the establishment of the State in 1922 allowed for Ireland's formal international recognition.² The chapter therefore includes, in part, a chronology of Ireland's participation in the international community since independence. The chapter also includes, in part, a retrospective element in that, from the perspective of 2020, a century of international engagement has resulted in the State being a committed participant in the key international conventions and treaties, including those involving commercial law, human rights and international trade.
- [1.2] As noted in chapter 2, below, there are a number of terms used to describe how a State expresses its agreement at international level to be bound by and comply with an international treaty, convention or agreement. This usually begins with signing a treaty, but must be followed by the ratification, or accession, acceptance or approval of the treaty.³ For convenience, this Discussion Paper often uses the term ratification to indicate the State's consent to be bound by a treaty at an international level; similarly the word treaty is often as a shorthand for international agreements, conventions and treaties.

¹ In the first 15 years of the State's existence, between 1922 and 1937 (when the 1922 Constitution was in force), the State was known as the Irish Free State, in the Irish language Saorstát Éireann (Article 1 of the 1922 Constitution). Since 1937 (when the 1937 Constitution came into force), the name of the State is Ireland, in the Irish language Éire (Article 4 of the 1937 Constitution). As the State's name has been Ireland for 82 years (as of 2020), this Discussion Paper uses that name of the State. Section 2 of the *Republic of Ireland Act 1948* provides that "the description of the State shall be the Republic of Ireland", but this does not alter or affect the name of the State.

² For a general overview, see Hayes and Kingston, "Ireland in International Law: The Pursuit of Sovereignty and Independence" in Kennedy, Tonra, Doyle and Dorr (eds), *Irish Foreign Policy* (Royal Irish Academy and Gill Education 2012), Chapter 5. That chapter was largely written by Mahon Hayes, former legal adviser to the Department of Foreign Affairs and Trade. From 1987 to 1991, he was also a member of the UN's International Law Commission, the only Irish person to have carried out that role.

³ See Articles 11-15 of the 1969 UN Vienna Convention on the Law of Treaties, discussed in chapter 2, below.

1. Impact on Irish law of over 1,400 ratified international agreements

- [1.3] The century of the State's international engagement since independence in 1922 means that Ireland has become an active participant in all major international and regional bodies, such as the United Nations Organization (UN), the Council of Europe and the European Union (EU). Since it joined the UN in 1955, Ireland has ratified seven core UN human rights conventions.⁴ At a regional European level, Ireland was a founding member of the Council of Europe in 1949 and, in 1973, it became a member of what were then the three European Communities, now the European Union (EU).
- [1.4] In addition, Ireland has agreed to be bound by over 1,400 multilateral and bilateral treaties, conventions and agreements. The Commission organised these into over 30 subject headings in its 2018 *Draft Inventory of International Agreements Entered Into by the State*.⁵ The 1,400 entries cover areas such as employment law, intellectual property law, international arbitration and peaceful settlement of disputes, marine and maritime law, mutual assistance in criminal law enforcement, nuclear disarmament, public health, refugees, and succession law.
- [1.5] These subject headings, and the selection of treaties and conventions discussed in this chapter, and in the succeeding chapters of the Discussion Paper, illustrate that Ireland's wide-ranging international engagement has had a considerable impact on the content of Irish law.

(a) General effect of international law on domestic law

- [1.6] Bearing in mind the 1,400 entries in the Draft Inventory published in 2018, this Discussion Paper is necessarily selective and does not attempt in any way to provide a complete picture or analysis of the impact of international law on Irish

⁴ Ireland has ratified the following seven "core" UN human rights Conventions: (1) International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD); (2) International Covenant on Civil and Political Rights (1966) (ICCPR); (3) International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR); (4) Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW); (5) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (UNCAT); (6) Convention on the Rights of the Child (1989) (UNCRC); and (7) Convention on the Rights of Persons with Disabilities (2006) (UNCRPD). Two other UN Conventions make up what are usually referred to as the nine "core" UN Conventions, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ratified by many "sending states" but, to date (August 2020), not ratified by any European state) and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

⁵ *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018).

law. It is nonetheless worth referring briefly to the general effect of the level of international law-making activity that they represent.

- [1.7] International law is often described as the law between states or, more traditionally, the law of nations. That remains an accurate description, especially in Ireland, because Article 29.6 of the Constitution (discussed in detail in chapter 2, below) provides that no international agreement shall be part of the domestic law of the State “save as may be determined by the Oireachtas.” This is a clear example of the dualist approach to international law, shared by Ireland with most other states, that international law operates as obligations between states and does not become enforceable within a state unless a law is enacted by its national parliament to give it the force of law within the state.
- [1.8] Nonetheless, it is also important to note that, of the 1,400 ratified international agreements, many have been “determined by the Oireachtas” to be either fully part of Irish domestic law through the enactment of a specific Act, or else they have greatly influenced the content of domestic Irish law. This is not surprising, given Ireland’s committed participation in the international community since 1922. In addition, Ireland’s increasingly outward-looking approach to economic and social policy since the second half of the 20th century has meant that it has been in the State’s interest to remain actively engaged in implementing international law, whether in the area of human rights, international humanitarian law or intellectual property law.

(b) Progressive development and codification of international law

- [1.9] Ireland’s emergence as an independent state has also coincided with an enormous increase in the volume and range of international agreements, evidenced by the wide-ranging subjects covered in the Draft Inventory. In this respect, it is important to note that Article 13 of the 1945 UN Charter provides that the UN General Assembly is mandated, among other matters, to initiate studies and make recommendations for the purpose of “encouraging the progressive development of international law and its codification.”
- [1.10] This has, indeed, led to the codification of many areas of international law through hundreds of international treaties and conventions that have been developed through the UN and its agencies since 1945. This has been facilitated by the Codification Division of the UN Office of Legal Affairs, which assists the UN General Assembly in carrying out the mandate in Article 13 of the UN Charter, in particular by providing secretariat services to relevant bodies established by the Assembly, such as the International Law Commission, as well as the General Assembly’s Sixth

(Legal) Committee, and to diplomatic conferences of plenipotentiaries convened to negotiate multilateral treaties.⁶

- [1.11] The momentum towards codification of international law mirrors the increased volume of enacted domestic legislation in most states since the second half of the 20th century. Ireland's increased legislative output in the last decades of the 20th century and the first two decades of this century reflects this international trend. This has included the enactment by the Oireachtas of significant consolidating and codifying pieces of legislation, and this reflection in the domestic law arena of developments in international law has been separately analysed by the Commission.⁷

(c) The Commission's engagement with international law

- [1.12] It is also worth noting the Law Reform Commission's engagement with international law. The Commission's statutory mandate under the *Law Reform Commission Act 1975*, to examine the law with a view to its reform, includes reform with a view to the modernisation and codification of the law, which is remarkably similar to the mandate at international level in Article 13 of the UN Charter. The purpose of noting this aspect of the Commission's work is to indicate that, like many other State bodies, the Commission's research has been influenced by the State's active engagement at international level.
- [1.13] The Commission's research work has included assisting in the assessment as to whether international agreements in the private law area should be ratified by the State. This has included, for example, the 1985 *Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters*⁸ in which the Commission recommended that the State should ratify the 1980 Hague Convention, which was implemented by the enactment of the *Child Abduction and Enforcement of Custody Orders Act 1991*. Similarly, in the 1998 *Report on the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*,⁹ the Commission recommended that the State should ratify the 1993

⁶ On the work of the Codification Division of the UN Office of Legal Affairs, see <<https://legal.un.org/cod/>> accessed on 27 August 2020.

⁷ This is discussed in the Commission's forthcoming *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020).

⁸ *Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters* (LRC 12-1985).

⁹ *Report on the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (LRC 58-1998). The Commission reiterated this view in the *Report on Aspects of Intercountry Adoption Law* (LRC 89-2008).

Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which was implemented in the *Adoption Act 2010*.¹⁰

- [1.14] The core UN human rights conventions, and comparable Council of Europe conventions, have also influenced much of the Commission's work. For example, in the 2010 *Report on Legal Aspects of Family Relationships*,¹¹ the Commission took account of Articles 7 and 18 of the 1989 UN Convention on the Rights of the Child (UNCRC), which concern, respectively, the right of a child to know and be cared for by his or her parents and the sharing of parental responsibilities by both parents. The Commission also took into account Article 5 of Protocol 7 (of 1984) of the Council of Europe Convention on Human Rights and Fundamental Freedoms (ECHR), which provides that spouses shall enjoy equality of rights and responsibilities between them and in their relations with their children and that this shall not prevent States from taking measures that are necessary in the interests of the children.
- [1.15] The Commission recommended in the 2010 Report that the law should provide for automatic registration of the name of the father of a child, and that the father should usually be joint guardian of a child. This was implemented in the *Civil Registration (Amendment) Act 2014* (automatic registration of the name of the father of a child), and in the *Children and Family Relationships Act 2015* (unmarried father will automatically be a guardian if he has lived with the child's mother for 12 months, including at least 3 months with the mother and child following the child's birth).¹²
- [1.16] Similarly, in the 2016 *Report on Harmful Communications and Digital Safety*,¹³ the Commission took account of competing rights in the ECHR (and comparable rights in the Constitution of Ireland) in assessing to what extent harmful online communications ought to be regulated. Thus, Article 8 of ECHR concerns the right to private life (comparable to the right to privacy under Article 40.3 of Constitution), which is to some extent in competition with the right to freedom of expression under Article 10 of the ECHR (and the comparable right in Article 40.6 of the Constitution). Having considered these matters, the Commission recommended reforms of the criminal law in this area, and that an online safety commissioner

¹⁰ See the discussion paragraphs 3.108-3.121, below.

¹¹ *Report on Legal Aspects of Family Relationships* (LRC 101-2010).

¹² At the time of writing (August 2020), these provisions of the 2014 and 2015 Acts have not yet been commenced by Ministerial Order.

¹³ *Report on Harmful Communications and Digital Safety* (LRC 116-2016).

should be established on a statutory basis. At the time of writing (August 2020), both elements of the 2016 Report are in the process of being implemented.¹⁴

- [1.17] The Commission now turns to discuss the State's engagement with the international community, and in particular with international law, over the past 100 years.

2. Ireland's initial efforts at international recognition and the international status of 1921 Anglo-Irish Treaty

- [1.18] Ireland's first efforts to be recognised on the international stage began in the immediate aftermath of the first meeting of Dáil Éireann in January 1919. That meeting was followed by the establishment of a Provisional Government, which sent representatives to France in order to seek recognition of Ireland as an independent state at the Versailles Peace Conference that met after the end of World War I (1914-1918). The attempt to secure international recognition was not successful, partly because British Dominions such as Australia and Canada sought, and obtained, separate representation, as part of their efforts to gain recognition on the international stage, but within the framework of the British Community of Nations, later called the Commonwealth. In 1919, the Irish representatives accepted that separate recognition of Ireland was not likely to occur until the then-ongoing campaign seeking independence from the United Kingdom was resolved.¹⁵
- [1.19] That campaign ultimately led to a ceasefire in mid-1921. This was followed by the formal decision of the elected representatives in what became Northern Ireland to remain within the United Kingdom and, in accordance with the *Government of Ireland Act 1920*, to continue with a devolved Parliament in Belfast. While the establishment of Northern Ireland was not initially accepted by the Provisional Government, its reality was, in practice, recognised in the Articles of Agreement for a Treaty Between Great Britain and Ireland that was signed on 6th December 1921 between the representatives of the Provisional Government and those of the United Kingdom (the 1921 Treaty).
- [1.20] From an international perspective, the 1921 Treaty provided that the Irish Free State (in the Irish language, Saorstát Éireann) would have the same constitutional status as other members of the British Commonwealth, such as Australia, Canada

¹⁴ The *Harassment, Harmful Communications and Related Offences Bill 2017* proposes to implement the Commission's recommendations concerning reform of the criminal law. The *General Scheme of the Online Safety and Media Regulation Bill*, published by the Government in January 2020, proposes to establish an online safety commissioner.

¹⁵ See generally *Documents on Irish Foreign Policy Volume I, 1919-1922* (Royal Irish Academy, 1998) and Lynch, *Revolutionary Ireland, 1912-25* (Bloomsbury Academic 2015), page 141.

and New Zealand, who as noted above had already obtained some international recognition at the 1919 Versailles Peace Conference.

- [1.21] The 1921 Treaty was ratified by a majority in Dáil Éireann in January 1922, and those who voted in favour subsequently received the majority of votes in the General Election held in 1922. The terms of the 1921 Treaty formed the basis for the content of the Constitution of the Irish Free State 1922, and the 1922 Constitution was the first Act enacted by the Oireachtas (National Parliament) of the Irish Free State, in the *Constitution of the Irish Free State (Saorstát Éireann) Act 1922*. The full text of the 1921 Treaty was scheduled to the 1922 Constitution.
- [1.22] Underlining the importance attached by the new State to international relations, it successfully applied for membership of the League of Nations in September 1923, joining other Dominions of the British Commonwealth.
- [1.23] While the vote to approve the 1921 Treaty also led to a bitter Civil War that lasted for five years and had long-standing political and social effects, the Treaty itself might also have been:

“the first conclusive instrument of modern Irish independence and... interpreted as the first international treaty entered into by the new Irish state.”¹⁶

- [1.24] Indeed, within months of Ireland joining the League of Nations, in July 1924 the Government lodged the 1921 Treaty with the League as an international treaty between two states. The UK Government objected to this on the ground that the Treaty was an internal agreement,¹⁷ which anticipated its approach up to the mid-1920s that Ireland had limited independent international treaty-making capacity. Nonetheless, the 1921 Treaty was accepted by the League of Nations, who registered it as an international treaty between two states.¹⁸ Ireland also appointed its first permanent delegation to the League in Geneva at this time.¹⁹ In subsequent years, Ireland played an active part in the League of Nations, supplying,

¹⁶ Fuller, *Biehler on International Law* 2nd ed (Round Hall 2013), para. 5-04.

¹⁷ See Kennedy, *Ireland and the League of Nations, 1919-1946: International Relations, Diplomacy and Politics* (Irish Academic Press, 1996), pages 129-188.

¹⁸ See *League of Nations, Treaty Series*, Volume 26 (1924), page 9, *Treaty between Great Britain and Ireland, signed at London, December 6, 1921* (No 636), available at <<https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2026/v26.pdf#page=9>> accessed on 26 August 2020.

¹⁹ See Farrell, “The Drafting of the Irish Free State Constitution” (1970) 5 *Irish Jurist* 120.

successively, the High Commissioner for Danzig and the Secretary General of the League, while also being actively engaged in many of the League's bodies.

3. Ireland's international standing in the 1920s and 1930s prior to the 1937 Constitution

(a) Initial assertions of Ireland's status at international level

- [1.25] Ireland's assertion of its independent international standing after joining the League of Nations continued during the 1920s. This complemented similar assertions by other larger, and more well-established Dominions in the British Commonwealth, such as Australia and Canada, which had begun in 1919 at the Versailles Peace Conference. Ireland was therefore in a position to build on these developments in asserting its international status.
- [1.26] At that time, the UK Government organised regular meetings of the British Dominions through what were called Imperial Conferences. The UK Government had attempted to build on the co-operation between the Dominions during World War I (1914-1918) to develop a common foreign policy for the Commonwealth of Nations, but this was resisted by the Dominions at the 1919 Imperial Conference, and the UK therefore abandoned the idea.
- [1.27] As a new Dominion, Ireland was invited to, and attended, the 1923 Imperial Conference,²⁰ during which it was acknowledged that the Dominions had independent authority to conclude international agreements. Although this involved the UK monarch as Head of State, it was also agreed that the involvement of the king was in a purely formal capacity only, as indicated by the phrase "acting on the advice of" the negotiating government.²¹ The same phrase, "acting on the advice of the government", is also used in the 1937 Constitution of Ireland in connection with the vast majority of the functions of the President of Ireland, such as on the appointment of judges, which also underlines that the key role rests with the government rather than the President.
- [1.28] While the 1923 Imperial Conference accelerated a pattern of conferring effective autonomous decision-making power on Dominions, there were also ongoing questions over the precise nature of that autonomy. In formal terms, the UK Parliament continued, as the Imperial Parliament, to reserve the power to enact

²⁰ Carroll, "Ireland Among the Nations of the Earth: Ireland's Foreign Relations from 1923 to 1949" (2016) 41(1) *Études d'histoire et de Civilisation* 35.

²¹ Hayes and Kingston, "Ireland in International Law: The Pursuit of Sovereignty and Independence" in Kennedy, Tonra, Doyle and Dorr (eds), *Irish Foreign Policy* (Royal Irish Academy and Gill Education 2012), Chapter 5, at page 74, discussing the effect of the enactment in the UK Parliament of the *Royal and Parliamentary Titles Act 1927*.

laws for the Dominions, though in practice the UK acted only where a Dominion gave its consent.

- [1.29] The 1922 Constitution, derived from the 1921 Treaty, reflected the evolving nature of Dominion status, because it contained a formal role for the Crown but it also recognised that the practical exercise of power was moving towards the Dominion Governments and Parliaments. Thus, the Crown was represented in Ireland through the Governor-General, a role expressly modelled in the 1921 Treaty on the Canadian equivalent. The Governor-General signed Bills into law on behalf of the Crown, but acting on the advice of the Government.
- [1.30] A similar ambiguous approach was reflected in the fact that, on the one hand, the 1921 Treaty required Ireland to allow the UK's navy to retain a presence in what became known as the "Treaty ports", including making these available during any UK-declared war. On the other hand, Article 49 of the 1922 Constitution required the approval of the Oireachtas to any participation by Ireland in any UK-declared war. This was a clear example of the "consent" formula that applied to other Dominions, and which anticipated the neutral stance that Ireland would take in future wars, including during World War II (1939-1945).
- [1.31] The tentative or ambiguous nature of Ireland's international status as a Dominion was also reflected in the title of Irish representatives abroad: "Irish ministers" rather than ambassadors. Further, they were formally accredited by the Crown.²² However, as a matter of domestic Irish law, the *Ministers and Secretaries Act 1924*, which established the Departments of Government (and which continues in force in 2020), included the establishment of a Department of External Affairs, later renamed the Department of Foreign Affairs and Trade. The 1924 Act provides that the Department was, and remains, responsible for:

"communications and transactions between the Government of [Ireland] and the Government of any other state or nation, diplomatic and consular representation of [Ireland] in any country or place, international amenities, the granting of passports and of *visés* to passports..."²³

- [1.32] This indicated that, at a domestic level in 1924, Ireland was clearly asserting its independence on the international stage.

²² See Whelan, "Recognition of the Irish Free State, 1924: The Diplomatic Context to the Appointment of Timothy Smiddy as the First Irish Minister to the US" (2015) 26 *Irish Studies in International Affairs* 121.

²³ *Ministers and Secretaries Act 1924*, section 1(xi).

(b) Ireland's early international engagement as a Dominion

- [1.33] At the international level, the legacy of the UK's imperial power continued to have some influence. For example, at some, but not all, of the international conferences held in the early 1920s to discuss amendments to 19th Century Conventions, the conference rules might have previously agreed that the UK would have a block vote to be shared out among its Dominions. When Ireland emerged as a new Dominion after 1922 and began to attend these conferences as a member of the League of Nations, the question arose as to whether an additional vote should be conferred on Ireland. This rather arcane issue (certainly looking back from 2020) can be illustrated by Ireland's membership of and participation in the Universal Postal Union (UPU) and the International Telecommunications Union (ITU).
- [1.34] Both the UPU and ITU were established in the 19th Century at conferences attended by the great imperial powers of that time, including the United Kingdom. By the early 1920s, these bodies were engaged in updating and amending their respective founding international conventions, and a growing number of countries that had gained independence following the end of World War I (1914-1918) sought and obtained, like Ireland, separate representation at their international decision-making conferences. In 1923, Ireland was admitted to the UPU, and was then given voting rights at the International Postal Conference held in Stockholm in 1924, at which the question of additional voting rights did not apparently arise.
- [1.35] Ireland also joined the ITU and sent two delegates to its International Radiotelegraph Conference held in Washington in 1927. A question then arose as to whether Ireland could have voting rights at the 1927 Conference. The problem arose because the UK had a "block" of six votes, which had previously been allocated in 1912 to the UK itself and its then-existing other four self-governing Dominions (Australia, Canada, New Zealand and South Africa) and British India. While the UK actually argued for an additional vote to include its "new" Dominion, Ireland, it appears that this was resisted and the result was that the Washington Conference omitted any provision relating to voting in the resulting Convention.
- [1.36] It should be noted that this voting conundrum did not prevent the two Irish delegates from signing the 1927 Convention, and it has had no ongoing relevance to Ireland's participation subsequently in either the UPU or the ITU. Like many other comparable international bodies established in the 19th century, since the foundation of the United Nations Organization (UN) in 1945 the UPU and the ITU have both become specialised agencies of the UN. Ireland continues to be actively engaged in the regular amendments to the governing Conventions of both the UPU and the ITU, which remain the leading international standard-setting bodies for postal communications and telecommunications.

(c) 1926 Balfour Declaration clarified Ireland's international status

- [1.37] The voting debate at the 1927 ITU Conference also reflected increased recognition at contemporary Imperial Conferences of the international status of Dominions. The 1926 Imperial Conference marked a significant step change in this respect, through the inclusion in the Conference Report of what became known as the Balfour Declaration. This included a statement that all the self-governing units of the British Empire were autonomous, equal in status and in no way subordinate in their domestic and external affairs to Britain. As a result, in practice the Dominions were recognised as international actors in the fullest sense, and the formal diplomatic unity of the British Empire, which no longer existed in practice, had been abandoned.²⁴
- [1.38] The increased acceptance that British Dominions were seen as equal participants on the international stage was also evident in 1928 when the US invited all Dominions, including Ireland, to participate in the conclusion of the Treaty for the Renunciation of War, better known as the Kellogg-Briand Pact. Each Dominion also signed the Treaty in its own right.
- [1.39] In 1929, Ireland indicated its strong sense of independent action by ratifying without reservation the Statute of the League of Nations' Permanent Court of International Justice (PCIJ) (ITS No 8 of 1930), the forerunner of the UN's International Court of Justice (ICJ). By ratifying without reservation, the State accepted Article 26 of the PCIJ's Statute, the "Optional Clause", which conferred compulsory jurisdiction on the Court without reservation. Other Dominions had opted to ratify the PCIJ's Statute but with a Reservation concerning Article 26.²⁵
- [1.40] The 1930 Imperial Conference agreed that the contents of the 1926 Balfour Declaration should be placed on a formal statutory footing, and this was done through the enactment in the UK Parliament of the *Statute of Westminster 1931*. Section 2 of the 1931 Act confirmed the legislative independence of the Dominions, by providing that no Dominion law could be regarded as void or inoperative on the ground that it was "repugnant to the Law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom", and

²⁴ Hayes and Kingston, "Ireland in International Law: The Pursuit of Sovereignty and Independence" in Kennedy, Tonra, Doyle and Dorr (eds), *Irish Foreign Policy* (Royal Irish Academy and Gill Education, 2012), Chapter 5, at page 74.

²⁵ As noted below, at paragraphs 1.154-1.161, until 2011 Ireland had entered a Reservation to the compulsory jurisdiction of the PCIJ's successor, the UN's International Court of Justice (ICJ), for pragmatic reasons related to the original content of Articles 2 and 3 of the 1937 Constitution and how the ICJ might address the position of Northern Ireland. In 2011, Ireland removed the reservation, as one of the many consequences of the 1998 Belfast / Good Friday Agreements, following which Articles 2 and 3 were amended.

it also provided that the Dominions could repeal or amend any UK Act in so far as any such Act applied to the Dominion. Section 4 of the 1931 Act formally ended the power of the UK Parliament to enact laws for the Dominions, by providing that no Act of the UK Parliament applied to a Dominion unless it was expressly declared in the Act that that Dominion had requested, and consented to, the enactment of such an Act. The Preamble to the 1931 Act also provided that, given that all member states of the British Commonwealth of Nations shared a connection to the Crown, any issue concerning the succession to the throne required the assent of all Dominions, an issue that arose in 1936 during the "Abdication Crisis" concerning King Edward VIII, discussed below.

- [1.41] In 1931, the Oireachtas debated and approved the decisions made at the 1930 Imperial Conference, but it did not enact any corresponding legislation to the 1931 Act. Instead, the Minister for External Affairs issued a press release stating that the UK 1931 Act merely confirmed the Irish view that the 1921 Treaty, and the 1922 Constitution, marked a definitive break with the UK, and that from 1922 onwards Ireland was an independent actor on the international stage.

(d) Ireland's view on UK Imperial Acts of Parliament

- [1.42] Mohr,²⁶ in his detailed analysis of the legal position of the Irish Free State between 1922 and 1931, has noted that this Irish view involved, in effect, ignoring the fact that it was a Dominion, and consequently ignoring the fact that the UK Parliament, as the Imperial Parliament, had long claimed the authority to legislate not just for the UK but also for all the Dominions. As Mohr has pointed out, this led to diplomatic tensions between the Irish and UK Governments throughout the 1920s. A significant example was that the Irish authorities refused to facilitate the arrest any British Army deserters in the 1920s, and argued that two pre-1922 Imperial Acts enacted by the UK Parliament that authorised such arrest, the *Naval Deserters Act 1847* and the *Naval Discipline Act 1866*, simply did not apply in the Irish Free State. This reflected the Irish view that, from 1922, Ireland was a new State that had seceded from the UK, rather than a form of semi-independent entity over which the UK continued to exercise power. The UK Government clearly disagreed, though it did not seek to enforce its view, and ultimately it might be said that there was an agreement to disagree in this respect.
- [1.43] Nonetheless, Mohr has correctly pointed out that it remained unclear whether pre-1922 Imperial Acts applied in Ireland after 1922, and indeed whether post-1922

²⁶ See Mohr, "The Colonial Laws Validity Act and the Irish Free State" (2009) 43 *Irish Jurist* 21; Mohr, "Irish Imperial Statutes and Irish Sovereignty: Statutes Passed Before the Creation of the Irish Free State" (2010) 31(3) *Journal of Legal History* 299; and Mohr, "Irish Imperial Statutes and Irish Sovereignty: Statutes Passed After the Creation of the Irish Free State" (2011) 32(1) *Journal of Legal History* 61.

Imperial Acts, such as the *Statute of Westminster 1931*, applied in Ireland. In this respect, Ireland operated an entirely pragmatic policy, even if this created real ambiguity as to the application in Ireland of pre-1922 UK legislation. With the passage of time, this ambiguity has largely become moot. It is notable, for example, that the *Statute Law Revision Act 1983* repealed what remained in force of the *Naval Discipline Act 1866*, thus suggesting that, by 1983, it had been accepted that the 1866 Act had, after all, applied in Ireland. Moreover, the *Statute Law Revision Act 2007* retained in force whatever remained of the *Naval Deserters Act 1847*, which also confirms that, since the 1847 Act has not been repealed at the time of writing (August 2020): to the extent that its provisions have any residual effect it remains part of Irish law.

[1.44] Mohr's analysis of the ambiguous position concerning pre-1922 and post-1922 Imperial Acts overlaps with another related issue, to what extent Ireland succeeded to, or carried over, pre-1922 international conventions that had been ratified by the UK. This question of State succession, which was expressly raised in 1925 and 1933, is discussed below, but Mohr notes that the issue of the effect of pre-1922 Imperial Acts arose in connection with whether the *Copyright Act 1911*, an Imperial UK Parliament Act, was in force in Ireland. The Irish view in the 1920s, consistent with its pragmatic approach, was that the 1911 Act was no longer in force, but this created difficulties on the international level, because the 1911 Act also involved implementation of the main international treaties in this area, the Berne Union Conventions of the 1880s. Ireland's wish to be an active international actor therefore conflicted with its view on pre-1922 UK legislation, but this was resolved by the enactment of the *Industrial and Commercial Property (Protection) Act 1927*, which repealed the 1911 Act in its entirety.

[1.45] Again, this appeared to concede, albeit retrospectively, that the 1911 Act had been carried over after 1922. In any event, as noted below, Ireland has been actively engaged since the 1930s in ratification of the 20th century successors to the Berne Union Conventions and, as a result, Irish intellectual property law since the second half of the 20th century has been regularly updated. The debates of the early 1920s concerning the status of UK Imperial Acts, and the overlapping issue of State succession, have therefore become largely moot. For completeness, we return below to how the question of State succession was addressed in the 1920s and early 1930s.

(e) Amendments to the 1922 Constitution and the 1936 Abdication Crisis

[1.46] In the wake of the 1932 General Election, the new Government led by Mr de Valera began the process of removing the remaining vestiges of the 1921 Treaty from the 1922 Constitution. Even before 1932, the Irish view had been that it was free to amend the 1922 Constitution without any constraints linked to the 1921 Treaty. Mr

de Valera's government proposed further wide-ranging amendments that would remove virtually all references to the Crown and to external controls from London, including appeals to the British Empire's final court of appeal, the (Judicial Committee of) the Privy Council. With the enactment of the *Statute of Westminster 1931* the UK view was that such dismantling of the 1921 Treaty was also acceptable, but as already noted the Irish chose a different perspective, albeit with the same result.

- [1.47] Ireland did not attend any Imperial Conference after 1932, but the State remained something of a semi-detached member of the Commonwealth. The Abdication Crisis of 1936, in which King Edward VIII abdicated in order to marry Wallis Simpson, required the UK government to consult all Dominions under the *Statute of Westminster 1931* because it raised an issue of Crown succession. This allowed the Irish authorities to participate in this Commonwealth-based process by enacting the *Executive Authority (External Relations) Act 1936*, which recognised the abdication and the consequent succession of King George VI.²⁷ The 1936 Act also took the opportunity to provide that diplomatic and consular representatives of Ireland in other countries would be appointed on the authority of the Government (at that time known as the Executive Council), and that in terms of the State's treaty-making power, every international agreement concluded on behalf of Ireland would be concluded by or on the authority of the Government. This Act was enacted one day after the enactment of the *Constitution (Amendment No 27) Act 1936*, which removed the last remnants of the Crown from the 1922 Constitution. Nonetheless, it was also notable that the *Executive Authority (External Relations) Act 1936* continued to acknowledge Ireland's membership of the British Commonwealth and, on that basis, it provided that the British Monarch would continue to accredit Ireland's diplomatic and consular representatives, acting on the advice of the Irish Government. What had been a constitutional reference to the Crown was now set out as a statutory requirement.²⁸

4. Ireland's relationship with international law since the coming into force of the 1937 Constitution

- [1.48] The amendments to the 1922 Constitution were part of a wider project to replace it with a new Constitution, on which drafting work had begun in 1934. The first full

²⁷ The Act came into force on 12 December 1936 on its enactment. The Irish legislation, and corresponding legislation enacted in the other Dominions, followed the enactment by the UK Parliament on 11 December 1936 of *His Majesty's Declaration of Abdication Act 1936* which included the instrument of abdication signed by Edward VIII on 10 December 1936 as a Schedule to the Act, as did the Irish Act.

²⁸ See Coffey, "British, Commonwealth, and Irish Responses to the Abdication of King Edward VIII" (2006) 44 *Irish Jurist* 95.

draft of the Constitution was discussed by the Government in October 1936, it was debated in the Oireachtas in the first half of 1937 and was approved by a referendum in July 1937. The 1937 Constitution came into force on 29 December 1937.

(a) International relations and international law in the 1937 Constitution

- [1.49] Unlike the 1922 Constitution, the 1937 Constitution addresses in some detail the State's international relations, and the status of international law in Irish law. Article 29.4.1° of the Constitution places on a constitutional footing the approach enacted in the *Executive Authority (External Relations) Act 1936*, that the executive power of the State in or in connection with its external relations is exercised by or on the authority of the Government.
- [1.50] Article 29.4.2° also provides that the State may avail of any method or procedure for the purposes of membership of any "group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern", an oblique reference to both the British Commonwealth and the League of Nations. This in effect allowed the State to continue to have its diplomatic and consular representatives formally accredited by the British Crown, which continued until 1949 when the *Republic of Ireland Act 1948* came into force. Since 1949, Irish diplomatic and consular representatives are accredited by the President of Ireland, acting on the advice of the Government.
- [1.51] Thus, while the Crown disappeared from Ireland's internal system of government in 1936, the Crown remained a formal presence for external purposes such as diplomatic and consular appointments until 1949. This also included the formal sealing of international treaties, so that until 1949 international treaties were sealed by the Great Seal of the State and transmitted to the UK monarch for signature.

(b) The 1937 Constitution and generally recognised principles of international law

- [1.52] Article 29, in sections 1 to 3, goes much further than the 1936 Act or the 1922 Constitution had in terms of the relationship between Ireland and international law generally, and these sections are worth quoting in full:

"1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.

2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.

3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.”

- [1.53] Article 29.1 underlines Ireland’s non-aggressive approach to international relations, underlined by its active participation in the League of Nations and, since 1955, in the UN. This is reinforced by the reference in Article 29.2 to the principle of the peaceful settlement of international disputes by international arbitration or judicial determination, which echoes the ratification in 1929 of the Statute of the League of Nation’s Permanent Court of International Justice, discussed above.

(c) The 1937 Constitution and dualist approach to international treaties

- [1.54] Article 29.3 emphasises the State’s commitment to international norms by confirming that it accepts the generally recognised principles of international law in connection with its relations with other states.²⁹ At the same time, it is important to note the legal effect of what are now Article 29.5 and 29.6. Article 29.5 provides that every international agreement to which the State becomes a party must be laid before Dáil Éireann, and that the State “shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.” Even more significantly from the point of view of legal effect, Article 29.6 provides:

“No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.”

- [1.55] Article 29.5.3° provides that this laying requirement “does not apply to agreements or conventions of a technical and administrative character.” The long-standing practice of the Department of Foreign Affairs and Trade is to lay all international agreements or conventions before Dáil Éireann. This sensible practice is connected to the difficulty of distinguishing between, on the one hand, agreements or conventions of a technical and administrative character and, on the other hand, those that fall outside this category.³⁰
- [1.56] Article 29.6, in particular, emphasises that Ireland firmly adheres to what is described as the “dualist” approach to international law. This in effect means that the question of the legal effect of international law operates at two levels, the international level and the national, or domestic, level. At the international level,

²⁹ See generally Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Grotius 1987).

³⁰ See the discussion in paragraph 2.39, below.

Article 29.1-3 accept the State's obligations in its relations with other states, the state-to-state level. Article 29.6 underlines that the Oireachtas determines whether an international agreement has any legal effect as a matter of domestic law. This is consistent with Article 15.2.1° of the Constitution, which provides that 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." The dualist approach is discussed in detail in chapter 2, below.

(d) The 1937 Constitution and extra-territorial legislation

- [1.57] As a consequence of the 1998 Belfast Agreements (the Good Friday Agreements) between the UK and Ireland, the contentious claims in Articles 2 and 3 of the Constitution that the State's territory included the whole island of Ireland were removed in the consequent referendum that also approved the Belfast Agreements. Articles 2 and 3 involved a limited claim that the State could legislate extra-territorially. In order to address the removal of this claim, the 1998 referendum also approved that the text of what is now Article 29.8 should be inserted, which provides:

"The State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law."

- [1.58] This affirmed that the extent of the State's capacity to legislate outside its territory would be bound by general principles of international law, which also facilitated the State's participation in international treaties that require such jurisdiction. In the context of sexual offences, an example of such extra-territorial legislation is the *Sexual Offences (Jurisdiction) Act 1996*. The wider application of Irish criminal law extra-territorially is addressed in the *Criminal Law (Extraterritorial Jurisdiction) Act 2019*.

(e) Effect of the Republic of Ireland Act 1948

- [1.59] The *Republic of Ireland Act 1948*, which came into force on 18 April 1949, provided that the State was to be described as the "Republic of Ireland", though without changing the name of the State, Ireland (in the Irish language, Éire) as set out in the 1937 Constitution. As noted above, the 1948 Act also provided that Irish diplomatic and consular representatives were, from then on, to be accredited by the President of Ireland, acting on the advice of the Government, thus replacing the British Crown in connection with the State's international relations. In that respect, it has been

noted that the enactment of the 1948 Act was the “final step in the evolution of the international position of the Irish State.”³¹

- [1.60] The enactment of the 1948 Act was directly connected with the decision of the then Government to leave the British Commonwealth, which at that time did not include members who were fully independent states as opposed to Dominions. Although this could have led to Ireland being regarded as an entirely foreign country as far as the UK was concerned, Australia and Canada engaged in extensive diplomatic discussions on Ireland’s behalf in 1948 to secure a unique status for Ireland. This resulted in the enactment by the UK Parliament of the *Ireland Act 1949*, which provides that even though it was no longer a Dominion, Ireland was “not a foreign country for the purposes of any law in force in any part of the United Kingdom or in any colony, protectorate or United Kingdom trust territory.” This facilitated the continuation of various reciprocal arrangements between the UK and Ireland that had been in place since 1922, often referred to as the “Common Travel Area”. These involved reciprocal legislative and administrative arrangements concerning not only unrestricted travel arrangements but also, for example, reciprocal social security and pension arrangements. These arrangements became highly significant again in the wake of the withdrawal of the UK from the European Union in 2020 (Brexit).

(f) Membership of the Council of Europe

- [1.61] In 1949 Ireland also became a founding member of the Council of Europe and was actively involved in drafting the Council’s major human rights instrument, the 1950 European Convention on Human Rights and Fundamental Freedoms. Ireland ratified the Convention in 1953 (ITS No 12 of 1953), which included the oversight jurisdiction of the European Court of Human Rights (ECtHR). Ireland also accepted the provisions in the Convention that allowed individuals to initiate proceedings against their own State in the ECtHR, an innovation in an international human rights treaty at that time. Indeed, the first such individual petition was against Ireland, *Lawless v Ireland*,³² in which the ECtHR rejected the applicant’s challenge to his internment under the *Offences Against the State (Amendment) Act 1940*.
- [1.62] While Ireland had ratified the Convention in 1953, it did not at that time incorporate it into Irish law, so that when the *Lawless* case was heard in the Irish

³¹ Hayes and Kingston, “Ireland in International Law: The Pursuit of Sovereignty and Independence” in Kennedy, Tonra, Doyle and Dorr (eds), *Irish Foreign Policy* (Royal Irish Academy and Gill Education 2012), Chapter 5, at page 78.

³² *Lawless v Ireland (No 1)* [1960] ECHR 1, (1960) 1 EHRR 1 (procedure) (14 November 1960); *Lawless v Ireland (No 2)* [1961] ECHR 1, (1960) 1 EHRR 1 (procedure) (7 April 1961); and *Lawless v Ireland (No 3)* [1961] ECHR 2, (1960) 1 EHRR 1 (substantive decision dismissing the case) (1 July 1961). See the discussion at paragraphs 2.19-2.20, below.

courts, under the name *In re Ó Laighléis*,³³ the High Court and Supreme Court, applying the dualist principle, held that no argument could be made in an Irish court alleging a breach of the Convention. Another consequence of the 1998 Belfast / Good Friday Agreements was a commitment by the UK and Irish governments to give effect in domestic law to the 1950 Convention. In the UK, this was achieved with the enactment of the UK *Human Rights Act 1998* and in Ireland by the *European Convention on Human Rights Act 2003*. While the enactment of the 2003 Act has empowered the Irish courts to have full regard to the 1950 Convention, and to the case law of the ECtHR, the 2003 Act involved domestic incorporation of the Convention at a “sub-constitutional” level. This means that, while the courts are empowered to make a “declaration of incompatibility”, that is, that a statutory provision is in breach of a Convention right, this does not affect the validity of the law, and it remains a matter for the Oireachtas to determine whether to amend the law. This is in contrast with a declaration of unconstitutionality, which involves a declaration that the law is invalid and cannot any longer be enforced.

(g) Membership of the United Nations Organization

- [1.63] Another significant development in Ireland’s international standing was its membership of the United Nations Organization (UN) in 1955. The UN had been founded in 1945 in the immediate aftermath of World War II (1939-1945), as a successor to the League of Nations. Article 93 of the Charter establishing the UN provides that member states also automatically must adhere to the Statute establishing the International Court of Justice (ICJ), sometimes known as the World Court, in effect the UN successor to the League of Nation’s Permanent Court of International Justice (PCIJ).³⁴
- [1.64] A motion approving the Government’s application for UN membership was passed by Dáil Éireann in 1946,³⁵ but the application was resisted by the USSR, which as a member of the UN Security Council had a veto on new members. Nine years later, in December 1955 a “package deal” was agreed in which 16 states, including Ireland, were accepted as new members of the UN. Immediately following the admission of the State to the UN, the question was raised whether ratification of the Charter of the UN was required. The then Taoiseach indicated that since Dáil Éireann had unanimously agreed in 1946 that the Government should apply for UN

³³ [1960] IR 93 (decided in 1957): see paragraph 2.20, below.

³⁴ As noted below, at paragraphs 1.154-1.161, until 2011 Ireland had entered a Reservation to the compulsory jurisdiction of the PCIJ’s successor, the UN’s International Court of Justice (ICJ), for pragmatic reasons related to the original content of Articles 2 and 3 of the 1937 Constitution and how the ICJ might address the position of Northern Ireland. In 2011, Ireland removed the reservation.

³⁵ Vol.102 Dáil Éireann Debates (25 July 1946).

membership, and that this had been the consistent policy of all governments since then, ratification did not arise, but he agreed that any funds arising from membership would require approval of Dáil Éireann under Article 29.5 of the Constitution.³⁶ In 1965, the UN Charter and the Statute of the International Court of Justice, as amended by the General Assembly in December 1963, were presented to Dáil Éireann by the Minister for External Affairs (ITS No 11 of 1965).³⁷

- [1.65] Ireland has been an active participant in the UN since joining in 1955, which has included ratifying seven core UN human rights treaties.³⁸ Ireland has also been a strong advocate of the peaceful resolution of international disputes, consistent with the commitment in Article 29 of the Constitution. This has been exemplified by its consistent support since the late 1950s of proposals for international agreements on nuclear disarmament, which was instrumental in the conclusion of the 1968 UN Nuclear Non-Proliferation Treaty, which Ireland signed and ratified in 1968 (ITS No 8 of 1970). As noted below, Ireland has continued to engage actively in arms control and disarmament issues, including the adoption of the UN Convention on Cluster Munitions at an international conference in Dublin in 2008.³⁹
- [1.66] Consistent with this approach, and with the State's policy of military neutrality, Ireland has actively participated in UN peace keeping and peace enforcement missions where these have been approved by the UN Security Council, the highest

³⁶ Vol.153 Dáil Éireann Debates (15 December 1955).

³⁷ Fennelly has noted that questions have been raised as to the constitutional validity of Ireland's membership of the UN, but that in *Pringle v Government of Ireland* [2012] IESC 47, [2013] 3 IR 1, O'Donnell and Clarke JJ assumed the validity of the State's UN membership. See Fennelly, *International Law in the Irish Legal System* (Round Hall Thomson Reuters, 2014), para 5.17.

³⁸ Ireland has ratified the following seven "core" UN human rights Conventions: (1) International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD); (2) International Convention on Civil and Political Rights (1966) (ICCPR); (3) International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR); (4) Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW); (5) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (UNCAT); (6) Convention on the Rights of the Child (1989) (UNCRC); and (7) Convention on the Rights of Persons with Disabilities (2006) (UNCRPD). Two other UN Conventions make up what are usually referred to as the nine "core" UN Conventions, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

³⁹ See paragraph 1.110, below, in the context of the wider discussion of Ireland's implementation of the 1949 UN Geneva Conventions on the law of war and international humanitarian law.

decision-making authority of the UN.⁴⁰ This began with the involvement of the Irish Defence Forces in the UN's first mandated peace-keeping mission in the Congo in 1960, which necessitated amendments to the *Defence Act 1954*, enacted by the *Defence (Amendment) Act 1960*. Since then, the Defence Forces have been involved in peace keeping missions in many parts of the world, notably on the borders between Lebanon, Syria and Israel from the late 1970s. The nature of Ireland's military neutrality in the context of relevant international law principles was discussed by the High Court in *Horgan v An Taoiseach*.⁴¹

- [1.67] As noted, the UN Security Council is the UN's key decision-making body. Ireland has been successful in securing one of the non-permanent positions on the Security on three previous occasions, in 1962, in 1981-1982 and in 2001-2002. In June 2020, Ireland again secured membership of the Security Council, for the two-year period 2021-2022.
- [1.68] Since 1945, many League of Nations bodies such as the International Labour Organization (ILO) have been incorporated into the UN system as UN agencies. This is also the case with many other pre-1945 international bodies such as the Berne Union concerning intellectual property law, since renamed the World Intellectual Property Organization (WIPO) as a UN agency. In addition, since 1945, the UN has also established many other entirely new agencies, such as the World Health Organization (WHO), whose founding Constitution of 1946 came into force in 1948. Even before Ireland became a full member of the UN, in 1948 the State ratified the 1946 Constitution of the WHO (ITS No 14 of 1948). In 2020, the State's continued membership of the WHO became more prominent than at any time previously. As noted below,⁴² Ireland, in line with most WHO members, used the WHO *International Health Regulations*, and related guidance from the European Union's independent European Centre for Disease Prevention and Control (ECDC), to inform the State's public health advice and consequent public policy decision-making on Covid-19.

(h) Membership of the European Union

- [1.69] One final, but highly significant, aspect of Ireland's participation at international level is that, in 1973, it joined what were then known as the European

⁴⁰ On the legal status of Security Council resolutions in Irish law, including where they are implemented through EU law, see Fennelly, *International Law in the Irish Legal System* (Round Hall Thomson Reuters, 2014), Chapter 5.

⁴¹ [2003] IEHC 64, [2003] 2 IR 468, discussed at paragraph 1.112, below.

⁴² See paragraph 1.162, below.

Communities,⁴³ now the European Union (EU), following a referendum which also involved amendments to Article 29 of the Constitution. A significant feature of EU membership is that EU law involves a pooling, or sharing, of national sovereignty among the member states. This required amending Article 29 to provide that nothing in the Constitution could prevent EU law from having legal force in Ireland.

- [1.70] The effect of this is that EU law has a highly unusual status in international law. It operates both as a set of rules at the international level between the member states but also, crucially, as a set of legal rules that are enforceable in each of the member states. The amendments made to Article 29 therefore operate as a kind of agreed exception to the dualist approach, because EU law can be invoked in national courts. The Commission discusses this further in chapter 2.
- [1.71] The member states have also conferred on the EU some treaty-making powers as an international body, which are then binding on the member states. This creates a certain level of complexity, because in those areas where the EU has competence to ratify an international treaty, this sometimes has the effect that Ireland is required to implement that treaty as an EU member state and also as a member of the international body (often the UN or one of its agencies) that has drafted that treaty. In addition, the EU may sometimes develop EU legislation that reflect some, though not necessarily all, aspects of a global international treaty. An example of this complexity, discussed below, is the implementation in Irish law of international and EU-derived rules on intellectual property law.

5. Ireland and state succession to pre-1922 treaties ratified by the UK: a pragmatic approach

- [1.72] Before discussing some examples of international treaties that Ireland has ratified since 1922, the Commission turns to the question of the extent to which Ireland succeeded to pre-1922 treaties ratified by the UK.

⁴³ In 1973, the European Communities comprised three inter-related Communities. These were: the European Coal and Steel Community (ECSC, established by Treaty signed at Paris on 18th April 1951); the European Economic Community (EEC, established by Treaty signed at Rome on 25th March 1957); and the European Atomic Energy Community (Euratom, established by Treaty signed at Rome on 25th March 1957). Of these three Communities, the most wide-ranging in scope was the EEC, because its founding Treaty (often referred to as the "Treaty of Rome") proposed the establishment of a "Common Market" for goods and services (as a result of which it was said that Ireland "joined the Common Market" in 1973). As the ECSC Treaty had a defined lifespan of 50 years, the ECSC ceased to exist in 2002, but its functions were absorbed into the other two Communities. Through further amendments to the other two founding Treaties of 1957, notably in the 2007 Treaty of Lisbon, which came into force in 2009, the European Communities have become the European Union.

(a) 1922 Constitution did not address state succession

- [1.73] As already noted, the effect of the 1921 Treaty, and the establishment of the Irish Free State in 1922, was that the new State was no longer part of the United Kingdom of Great Britain and Ireland. Article 73 of the 1922 Constitution provided for the “carrying over” of all laws in force in 1922 that had applied in Ireland up to then, that is, legislation enacted in the various England-based Parliaments that had exercised jurisdiction over Ireland, as well as the legislation enacted in the pre-1922 Irish-based Parliaments. This carrying over of pre-1922 laws applied unless and until they were repealed by the Oireachtas and was also subject to the proviso that the pre-1922 laws must not be in conflict with any provision of the 1922 Constitution itself.
- [1.74] Article 73, which had the important effect of retaining in place all in-force pre-1922 legislation, did not apply to pre-1922 international agreements that had been ratified by the United Kingdom (though, as discussed above, some pre-1922 Acts enacted as Imperial Acts in the UK Parliament had an international dimension, because they applied not only to the UK but to its Dominions also). Instead, the question as to whether international agreements ratified by the United Kingdom prior to 1922 were binding on the new State is a separate matter in international law, referred to as state succession.
- [1.75] The literature on state succession refers to two possible approaches or theories.⁴⁴ The first is the “clean slate” theory, under which the new state has seceded from the old state, that the old state’s identity has disappeared, and that the new state does not have any legal connections with the predecessor state. This approach requires the new state to opt-in to, by ratifying or acceding to, the international agreements that previously applied in its territorial area. The second approach or theory, succession theory, is that the new state has not seceded from the old state and that it therefore succeeds to all the rights and obligations that applied within the territorial area that comprises the new state.
- [1.76] In Ireland’s case, the Government of the newly established State leaned towards a “clean slate” approach, as an expression of its wish to be seen as an independent state actor on the international stage that had seceded from the UK, but as noted below this was accompanied by a quite pragmatic approach. On the other hand, the UK government’s approach was that the new State had, under the 1921 Treaty, remained part of the British Commonwealth of Nations with Dominion status (like Australia, Canada, New Zealand and South Africa) and had not seceded, and that it therefore remained bound by all pre-1922 treaties that the UK had ratified. During the 1920s, these differing approaches were played out at both national and

⁴⁴ See generally, O’Connell, *The Law of State Succession* (Cambridge University Press 1956).

international levels and, ultimately, both the new State and the UK took a pragmatic approach to the issue, though not before some diplomatic contestation.⁴⁵

(b) State succession: case study of 1899 US-UK Treaty on succession rights of non-residents

- [1.77] The question of state succession was first expressly raised by the US State Department in 1925, and later in the Oireachtas in 1933, both concerning an 1899 Treaty or Convention made between the US and the UK.
- [1.78] In 1925, the US State Department raised with the UK Foreign Office the question as to whether the establishment of the Irish Free State had any effect on the applicability to the State of the 1899 Convention as to the Tenure and Disposition of Real and Personal Property (also known as the Hay-Pauncefote Treaty),⁴⁶ which had been concluded between the US and the UK. It is notable that an enquiry about State succession involved a Convention concerning succession law.⁴⁷

⁴⁵ Both the clean slate and succession theories are included in the 1978 UN (Vienna) Convention on Succession of States in Respect of Treaties. While the 1978 Convention has not been ratified by many states, the detailed commentaries (sometimes referred to as *travaux préparatoires*) on its draft provisions, published in 1974 by the International Law Commission, include useful and informative material on the different approaches to this question of the UK and Irish governments during the 1920s. See *Draft Articles on Succession of States in Respect of Treaties With Commentaries*, in *Yearbook of the International Law Commission 1974*, vol 2, part 1, pages 162-269, available at: <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf> accessed on 24 August 2020.

⁴⁶ It was common at one time for bilateral international treaties to be named after their principal drafters, in this case the then US Secretary of State John Hay and the then UK Ambassador to the US Lord Pauncefote. A more well-known, and more controversial, Hay-Pauncefote Treaty was the US-UK Panama Canal Treaty of 1901 that allowed the US to develop the Panama Canal. The fact that international treaties are named after drafters, and that different treaties have the same shorthand, is reflected in the similar confusion in domestic 19th century legislation, where shorthand titles such as "Lord Denman's Act" could refer to any one of three different Evidence Acts: see the Commission's *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117-2016), at para 9.16, fn 15. The modern practice of referring to international treaties and conventions by reference to the city where they were initially signed, such as "the Vienna Convention", is equally confusing. There are more than 10 "Vienna" Conventions, including the 1961 UN Vienna Convention on Diplomatic Relations, the 1968 UN Vienna Convention on Road Signs and Signals, the 1969 UN Vienna Convention on the Law of Treaties, and the 1976 UN Vienna Convention on Succession of States in Respect of Treaties.

⁴⁷ The principal provisions of the 1899 Convention were as follows. First, where a US or UK citizen inherited land (real property) in the other country, he or she could sell the land and withdraw the proceeds, and the taxes, probate and other charges in such cases were not to

- [1.79] The 1899 Convention had expressly provided that it was not to apply to any UK colony or foreign possession. The British Foreign Office replied that the creation of the Irish Free State did not change the application of the 1899 Convention to Ireland.⁴⁸ Thus, as far as the British Foreign Office was concerned, the new Irish State had automatically succeeded to the 1899 Convention, clearly favouring the succession theory over the “clean slate” theory.
- [1.80] The question arose again in 1933, in response to a Parliamentary Question (PQ) in Dáil Éireann. The PQ enquired whether the Minister for External Affairs was aware that, in respect of pre-1922 treaties entered into between the US and the UK, the US was contending that, since 1922, such treaties were no longer in force between the US and Ireland. However, as seen from the discussion of the 1925 exchange above, the opposite was in fact the case. The PQ added (making an implicit reference to the 1899 Hay-Pauncefote Treaty) whether the Minister was aware that this contention “affects the heir-at-law rights of citizens of this State who inherit real property situate in the United States of America.”
- [1.81] In reply, Mr de Valera, President of the Executive Council (equivalent of Taoiseach) and also the Minister for External Affairs, stated:

“the Deputy has been misinformed. The Government of the United States have never contended that treaties referred to in the Deputy’s question are not in force between the Irish Free State and the United States. Such treaties have been acted upon by the two countries as occasion has arisen. With regard to the specific matter mentioned in the Deputy’s question, namely, heir-at-law rights of Irish nationals to real property situated in the United States, the Hay-Pauncefote Treaty of the 2nd March, 1899, applies. The provisions of that treaty confer upon the citizens of each country rights of disposal with regard to property situated in the other. There are, as the Deputy is no doubt aware, certain States of the

exceed those applicable to citizens in the other country. Second, US or UK citizens were to have full power to dispose of their personal property in both countries, and their successors could take possession of that personal property without paying duties in excess of those required of citizens of either country. Third, where a citizen of the US or UK died in the other country without heirs or testamentary executors, the local authorities had to inform the consular officer of the deceased’s country, and the consular officer had the right to appear personally on behalf of the absent heirs or creditors in proceedings in relation to the estate until they were otherwise represented.

⁴⁸ Shea, “Ireland,” in Gaebler and Shea (eds), *Sources of State Practice in International Law*, 2nd rev ed (Martinus Nijhoff 2014) pages 276, citing Hackworth, *Digest of International Law* Volume 5, Treaties (US State Department 1943) §512, pages 369 – 370.

Union in which, by the law of the State, foreigners are deprived of rights of inheritance to real property, but such State laws do not operate against nationals of countries with which the United States has treaty relations similar to those established by the Hay-Pauncefote Treaty of 1899. By virtue of Article 6 of the Constitution of the United States, treaties concluded by the United States are part of 'the supreme law of the land.'"⁴⁹

- [1.82] Mr de Valera then added the following important general comment on Ireland's approach to State succession:

"The present position of the Irish Free State with regard to treaties and conventions concluded between the late United Kingdom and other countries is based upon the general international practice in the matter when a new State is established. When a new State comes into existence, which formerly formed part of an older State, its acceptance or other wise of the treaty relationships of the older State is a matter for the new State to determine by express declaration or by conduct (in the case of each individual treaty) as considerations of policy may require. The practice here has been to accept the position created by the commercial and administrative treaties and conventions of the late United Kingdom until such time as the individual treaties and conventions themselves are terminated or amended. Occasion has then been taken, where desirable, to conclude separate engagements with the States concerned."⁵⁰

- [1.83] This was a pragmatic, half-way house, approach to State succession, neither a "clean slate" approach nor an "automatic succession" one. Thus, the new State accepted the reality of the position created by the UK's pre-1922 commercial and administrative treaties and conventions, and that this applied unless and until they were "terminated or amended." Certainly, given the clear advantages of a Convention or treaty such as the Hay-Pauncefote Treaty this approach also made

⁴⁹ Shea, "Ireland," in Gaebler and Shea (eds), *Sources of State Practice in International Law*, 2nd rev ed (Martinus Nijhoff 2014) page 276, citing Vol 48 *Dáil Éireann Debates* (Ceisteanna - Questions: Oral Answers –The Saorstát and American Treaties) (11 July 1933), available at <<https://www.oireachtas.ie/en/debates/debate/dail/1933-07-11/3/>> accessed on 24 August 2020.

⁵⁰ *Ibid.*

eminent sense. Whether this reflected “general international practice”, as Mr de Valera asserted, might have been challenged by the British Foreign Office.

- [1.84] Regardless of the different general approaches to succession taken by the Irish and UK Governments, Ireland clearly acknowledged the application in Irish law of the Hay-Pauncefote Treaty, and the US courts also accepted this. Thus, in *Hanafin v McCarthy*,⁵¹ the New Hampshire Supreme Court held in 1948 that Irish non-US residents were entitled to inherit from the estate of a New Hampshire resident under the Hay-Pauncefote Treaty, which (as Mr de Valera had noted in 1933) had been incorporated into US law under Article 6 of the federal US Constitution, the “Supremacy Clause.”
- [1.85] The New Hampshire Supreme Court referred in this context to the views expressed by the British Foreign Office in 1925, which the Court noted had been “printed as a note by the [US] Department of State to the original [1899] Convention.”⁵² The Court also noted that section 3 of the *Aliens Act 1935* provided that aliens may take, acquire, hold, and dispose of real property in Ireland in the same manner as citizens, which the Court took to indicate an intention on the part of the State to act consistently with the 1899 Convention.⁵³

(c) Non-residents and the equality principle in international law

- [1.86] Section 3 of the 1935 Act remains in force at the time of writing (August 2020). Indeed, a comparable provision was included in section 3 of the *Refugee Act 1996*. In addition, the *Capital Acquisitions Tax Consolidation Act 2003*⁵⁴ provides that, where property passes under a deceased person’s will or intestacy or under the *Succession Act 1965*, and where the personal representatives and one or more of the beneficiaries are non-Irish resident, an Irish-resident agent is to be appointed, who is responsible for paying the tax. The tax is payable on the same basis as it would be for a resident of the State.
- [1.87] These legislative provisions reflect the non-discrimination clause in the 1951 UN Convention on the Status of Refugees, which Ireland ratified in 1956 (ITS No 8 of 1956) and which the 1996 Act implemented, in part, in Irish law. There is no specific international treaty or convention that sets out a comprehensive list of the rights of individuals who are not citizens of a host State. However, the combined effect of

⁵¹ 57 A 2d 148, 95 NH 36 (1948), cited in Whiteman, *Digest of International Law* (US State Department, 1963), Vol. 2, Chapter 4, State Succession, §10 Treaties, pages 982-983.

⁵² 57 A 2d 148, at 150, 95 NH 36, at 39 (1948).

⁵³ 57 A 2d 148, at 149, 95 NH 36, at 38 (1948).

⁵⁴ Section 45AA of the *Capital Acquisitions Tax Consolidation Act 2003*, as inserted by section 147 of the *Finance Act 2010*.

the non-discrimination clauses in the 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination (ITS No 20 of 2001) and in the 1966 UN International Covenant on Civil and Political Rights (ITS No 9 of 1990) supports the view that the contexts in which different treatment may operate are to be narrowly applied.⁵⁵

- [1.88] The general equality principle may, however, be subject to some limitations, such as the right to vote, though some of these may in turn be reformed so that they move in the direction of equality. Thus, under section 45 of the *Land Act 1965*, non-Irish citizens were required to obtain permission from the Land Commission before land within its area of responsibility could be purchased. Since the enactment of the 1965 Act, and in particular since Ireland's membership of the European Union, EU and EEA citizens are no longer subject to this requirement.⁵⁶ The application of this equality principle can also be seen in the ongoing debate in 2020 concerning the policy and legislation surrounding the asylum and refugee system generally in Ireland, including the direct provision system, which is discussed in chapter 2, below.⁵⁷

(a) Non-residents and double taxation treaties: from bilateral agreements to the OECD Model Double Taxation Convention

- [1.89] Returning to the Hay-Pauncefote Treaty, it also provided that the taxes, probate and other charges to be applied in such cases were not to exceed those applicable to citizens in the other country, which is also reflected in section 3 of the *Aliens Act 1935*. Applying this in practice required another type of bilateral agreement called a Double Taxation Convention or Agreement. In this respect, it is notable that, since 1922, Ireland has made Double Taxation Agreements on Inheritance Tax with only two countries, the US and the UK. The Double Taxation Convention with the US is one of the oldest such agreements, having been made in 1949 (ITS No 8 of 1951). It is set out in full as Schedule 1 to the *Finance Act 1950* and it remains in force at the time of writing (August 2020). The Convention with the UK was made in 1977 (ITS No 4 of 1978), and is set out in the Schedule to the *Double Taxation Relief (Taxes on*

⁵⁵ See *The Rights of Non-citizens* (Office of the United Nations High Commissioner for Human Rights, 2006), available at <https://www.ohchr.org/Documents/Publications/noncitizensen.pdf> accessed on 24 August 2020.

⁵⁶ See the *Land Act 1965 (Additional Category of Qualified Persons) Regulations 1972* (SI No 332 of 1972), the *Land Act 1965 (Additional Category of Qualified Person) Regulations 1983* (SI No 144 of 1983) and the *Land Act 1965 (Additional Categories of Qualified Persons) Regulations 1995* (SI No 56 of 1995).

⁵⁷ See the discussion in paragraphs 2.135-2.137, below.

*Estates of Deceased Persons and Inheritances and on Gifts) (United Kingdom) Order 1978.*⁵⁸

- [1.90] It is notable that the 1977 Convention agreed with the UK was based on the OECD Model Double Taxation Convention,⁵⁹ first published in 1963. The 1963 Convention built on work previously begun under the League of Nations in the early 20th century to prevent double taxation between countries, which had included the development of double taxation treaties, on which the 1949 Ireland-US Convention had been based. The OECD Model Convention has been amended many times since 1963, the most recent version being the 2017 OECD Tax Convention on Income and on Capital.⁶⁰ The OECD Convention, as amended, has become the basis for virtually all bilateral double taxation agreements between countries, including Ireland. The Commission's 2018 *Draft Inventory of International Agreements Entered Into by the State*⁶¹ contains over 140 entries for double taxation agreements, thus representing about 10% of the 1,400 total number of entries in the Draft Inventory. The vast majority of these are based on the OECD Model Convention. It is also worth noting that less than 20 of these agreements were made between 1930 and 1960, while over 120 were made between the 1960s and the present (July 2020). This is a useful illustration of Ireland's accelerating commercial and trade engagement on the international arena since the 1960s, which followed in the wake of the Economic Plans of the late 1950s.

(b) Conclusions on Ireland's pragmatic approach to state succession

- [1.91] Returning to the pragmatic approach adopted by Ireland during the 1920s, this was well summarised in 1974 by the International Law Commission:

"In the case of multilateral treaties, the Irish Free State seems in general to have established itself as a party by means of accession, not succession, although it is true that the Irish Free State appears to have acknowledged its status as a party to the 1906 Red Cross Convention on the basis of the United Kingdom's ratification of the Convention on 16 April 1907. In

⁵⁸ Section 45AA of the *Capital Acquisitions Tax Consolidation Act 2003*, as inserted by section 147 of the *Finance Act 2010*.

⁵⁹ This is expressly acknowledged in the Explanatory Note to the *Double Taxation Relief (Taxes on Estates of Deceased Persons and Inheritances and on Gifts) (United Kingdom) Order 1978* (SI No 279 of 1978).

⁶⁰ See the discussion on the OECD's website, at <<https://www.oecd.org/tax/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm>> accessed on 24 August 2020.

⁶¹ *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018).

the case of the Berne Union for the Protection of Literary and Artistic Works, however, it acceded to the Convention, although using the United Kingdom's diplomatic services to make the notification. The Swiss Government, as depositary, then informed the parties to the Union of this accession and, in doing so, added the observation that the Union's International Office considered the Irish Free State's accession to the Convention as 'proof that, on becoming an independent territory, it had left the Union.' In other words, the Office recognized that the Free State had acted on the basis of the clean slate principle and had not 'succeeded' to the Berne Convention. Moreover, in Multilateral Treaties in respect of which the Secretary-General [of the UN] performs Depositary Functions the Republic of Ireland is listed as a party to two conventions ratified by Great Britain before the former's independence and in both these cases the Republic became a party by accession."⁶²

- [1.92] The examples provided by the International Law Commission underline the tentative nature of Ireland's emergence as an international actor in the 1920s. The State preferred to operate on a "clean slate" basis, but this was not always feasible. Thus, in the case of the Red Cross Convention of 1906, Ireland used the UK's ratification in 1907 as being sufficient. In the case of the Berne Union Intellectual Property Rights Convention, it acceded, but with the benefit of the UK's diplomatic services. Nonetheless, opt-in accession was preferred to automatic succession, as the discussion above of the 1899 Hay-Pauncefote Treaty also illustrated.

6. Examples of Ireland ratifying post-1922 treaties that replaced pre-1922 treaties

- [1.93] In this section, the Commission discusses some examples of treaties that Ireland has ratified in its own right, which demonstrate that the question of State succession has become virtually a moot point. This is because most pre-1922 treaties, including the Red Cross Convention of 1906 and the Berne Convention on Intellectual Property Rights, have either been formally ratified by Ireland in its own right since 1922, or else have been superseded by later treaties of the second half

⁶² *Draft Articles on Succession of States in Respect of Treaties With Commentaries*, in *Yearbook of the International Law Commission* 1974, vol 2, part 1, page 264, available at: <https://legal.un.org/ilc/publications/yearbooks/english/ilc_1974_v2_p1.pdf> accessed on 24 August 2020.

of the 20th century and first two decades of the 21st century, which Ireland has also ratified.

- [1.94] In this respect it is notable that the second half of the 20th century and the first two decades of the 21st century have been the most active of any era in terms of the volume of international treaty-making. For that reason, the volume of pre-1922 treaties to which the State may have succeeded, and that remain in force, is close to zero. This is clear from the date stamps of the 1,400 entries in the Commission's 2018 *Draft Inventory of International Agreements Entered into by Ireland*, which is discussed below.⁶³

(a) The law of war and international humanitarian law: 1899 and 1907 Hague Conventions on Law of War, 1949 Geneva Conventions, and 1977 Protocols on Law of War and Humanitarian Treatment in War

- [1.95] A good example of how State succession has become moot can be seen by examining, from the perspective of 2020, the fate of the Hague Conventions on the Law of War of 1899 and 1907. These pre-1922 Conventions were (with one exception) replaced by the Geneva Conventions of 1949. While the 1949 Conventions originally dealt with humanitarian treatment during war only, later amendments made by Protocols from the 1970s (a Protocol is the equivalent of an amending Act of the Oireachtas), also address many aspects of the law of war. Ireland has ratified all of the Geneva Conventions and their Protocols, and enacted domestic law to implement relevant provisions in domestic law.

(i) 1899 Hague Convention on Pacific Settlement of International Disputes and Conventions on Laws and Customs of War

- [1.96] The Hague Conventions of 1899, which could be described as the first widely accepted consolidation and codification of the international rules of war and humanitarian law, even though they were originally agreed between a relatively small group of countries, included:
- Convention for the Pacific Settlement of International Disputes, known as Convention I, which established the Permanent Court of Arbitration (PCA), and which, as noted below, Ireland ratified in 2002; and
 - Convention Respecting the Laws and Customs of War, the most detailed Convention, known as Convention II, which:
 - contained provisions on the treatment of prisoners of war and wounded soldiers and also prohibited a range of matters, including:
 - the use of poisons,

⁶³ *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018).

- the killing of enemy combatants who have surrendered,
 - looting of a town or place,
 - the attack or bombardment of undefended towns,
 - collective punishment, and
 - forcing inhabitants of occupied territories into military service against their own country.
- Convention Relative to the Rights and Duties of Neutral Powers and Persons in Case of War on Land, known as Convention V, which as its title clearly indicates dealt with the role of neutral states, but was one of the 1899 Conventions that was not widely ratified, although as noted in *Horgan v An Taoiseach*⁶⁴ it codified customary international law.

(ii) *1907 Hague Convention on Pacific Settlement of International Disputes and Conventions on Laws and Customs of War*

[1.97] The Hague Conventions of 1907, which were the equivalent of consolidating and amending Acts, included:

- Convention for the Pacific Settlement of International Disputes, which confirmed and expanded on Convention I of 1899; and
- Convention Respecting the Laws and Customs of War, which confirmed, with minor amendments, the provisions of Convention II of 1899.

[1.98] In 1900, the United Kingdom of Great Britain and Ireland ratified the Hague Conventions of 1899, and in 1909 it ratified most of the Hague Conventions of 1907, including the amendments to Convention II.⁶⁵ On this basis, it is at least arguable that, in 1922, the State may have succeeded to them. However, reflecting the case-by-case approach taken in 1933 to the US-UK Hay-Pauncefote Treaty on succession law, discussed above, it would appear that, in practice, a similarly pragmatic view was taken to the 1899 Conventions, as amended in 1907.

(iii) *Hague Conventions on Laws and Customs of War and Ireland's neutrality in World War II*

[1.99] As to Convention II on the Laws and Customs of War, the question of its application arose in World War II (1939-1945) in the context of how to treat military personnel from the Allied and Axis forces who landed in Ireland. Ireland remained a neutral state during World War II, and the application of Convention II proved problematic because it did not address the position of a neutral country (as noted below, the

⁶⁴ [2003] IEHC 64, [2003] 2 IR 468, discussed in paragraph 1.112, below.

⁶⁵ The United Kingdom ratified the 1907 amendments to Convention I, on the Pacific Settlement of International Disputes, in 1970. As noted below, Ireland ratified the 1907 amendments to Convention I in 2002.

Geneva Conventions of 1949, as amended, addressed this gap). It appears that, in the early period of the war, the Irish authorities treated these personnel in accordance with the terms of Convention II, but changed this at some point and treated them as internees under the *Emergency Powers Act 1939*, and then towards the end of the war reverted to treating them as prisoners of war under Convention II.

- [1.100] It also appears that this changing approach was largely influenced by entirely pragmatic considerations, such as ensuring at different times that those combatants who landed in the State were kept under relative levels of surveillance at different times and also, at times, whether visitors from the International Red Cross, whose status was recognised under the Conventions, would be allowed to inspect the places of detention.⁶⁶

(iv) 1949 Geneva Conventions and 1977 Protocols on International Humanitarian Law (Conduct of War)

- [1.101] Since the end of World War II, the question of whether the Hague Conventions of 1899 and 1907 applied to Ireland has gradually become moot and redundant. This is because the key elements of the Hague Conventions (other than Convention I, discussed separately below) have been replaced by the Geneva Conventions of 1949, and in particular two amending Protocols of 1977.
- [1.102] The Geneva Conventions of 1949 comprise four separate Conventions:
- The first Geneva Convention protects wounded and sick soldiers on land during war and was, in effect, the fourth revision of previous Geneva Conventions on this matter (replacing those previously adopted in 1864, 1906 and 1929). It also recognises what are referred to as the two distinctive emblems, the Red Cross and the Red Crescent.
 - The second Geneva Convention, whose provisions are broadly the same as the first Geneva Convention, protects wounded, sick and shipwrecked military personnel at sea during war, and replaced one of the Hague Conventions of 1907.
 - The third Geneva Convention deals with prisoners of war, and replaced the Geneva Prisoners of War Convention of 1929, which was the relevant Geneva Convention that applied in World War II.

⁶⁶ For a detailed discussion, see Kelly, *Military Internees, Prisoners of War and the Irish State during the Second World War* (Palgrave Macmillan 2015).

- The Fourth Geneva Convention deals with the protection of civilians, which had been previously been considered to some extent in the Hague Conventions of 1899 and 1907. However, the Fourth Geneva Convention addressed this in much more detail to take account of the impact on civilians of the conduct of World War II. It therefore sets out detailed obligations of an occupying power to the civilian population in an occupied territory, including humanitarian relief for such people.

- [1.103] The four Geneva Conventions of 1949 are primarily concerned with one of two elements of the law of war and armed conflict, International Humanitarian Law (IHL), or the rules on how military forces conduct a war or armed conflict once it has begun (*ius in bello*). They did not, originally, address the second element of the law of war and armed conflict, which concerns the rules that apply to determine whether to engage in war in the first place (*ius ad bellum*), which had been addressed to some extent in the Hague Conventions of 1899 and 1907. However, in 1977 two additional Protocols to the Geneva Conventions dealt for the first time with this second aspect.
- [1.104] The two 1977 Protocols, Protocol I and Protocol II, are primarily mirror images of each other. Protocol I deals with the protection of victims of international armed conflicts, while Protocol II deals with non-international armed conflicts. Protocol II was the first international treaty that dealt exclusively with non-international armed conflicts, including what it described as wars of national liberation.
- [1.105] Both Protocol I and Protocol II contain a fundamental principle of the law on war and armed conflicts, namely, that the right of the parties to the conflict to choose methods or means of warfare is “not unlimited,” which implies acceptance of the principle of limited warfare, as opposed to total warfare. The Protocols also set out two fundamental rules that follow from this principle. The first rule prohibits the use of weapons and other methods of warfare that cause unnecessary injury. The second rule requires the parties to the conflict to distinguish at all times between the civilian population and combatants, as well as between civilian property and military objectives, and to direct their operations only against military objectives.
- [1.106] Finally, it is also worth noting that the four Geneva Conventions of 1949 each contain an identical Article 3, which is referred to as “the common Article 3.” This common Article 3 set out a minimum standard of humane treatment by prohibiting the following acts against any persons who are taking no active part in the hostilities, including members of armed forces who have laid down their arms or are wounded (*hors de combat*):

“(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment; and

(d) the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized peoples.”

[1.107] Whatever the position in Irish law of the Hague Conventions of 1899 and 1907, whether as a matter of State succession or otherwise, the position concerning the Geneva Conventions of 1949, and of Protocol I and Protocol II of 1977, is clear:

- In 1962 (ITS No 1 of 1963), Ireland ratified the four Geneva Conventions of 1949; and
- In 1999 (ITS No 62 of 2007 and ITS No 63 of 2007),⁶⁷ Ireland ratified Protocol I and Protocol II of 1977.

[1.108] In terms of the implementation of relevant elements in Irish law, this has been achieved through the combined effects of:

- the *Red Cross Act 1954*, which established the Irish Red Cross,
- the *Prisoners of War and Enemy Aliens Act 1956*,
- the *Geneva Conventions Act 1962*: Schedules 1 to 4 to the 1962 Act helpfully contain the full text of the four Geneva Conventions of 1949; and
- the *Geneva Conventions (Amendment) Act 1998*, which amended the 1962 Act and also followed the good practice of inserting the full text of Protocol I and Protocol II as Schedules 5 and 6 to the 1962 Act.

[1.109] Thus, by 1998 the interesting historical question as to whether Ireland had succeeded to the 1899 and 1907 Hague Conventions had become redundant.

(v) 1949 Geneva Conventions and 1977 Protocols form part of wider group of treaties concerning declarations of war and conduct of war

[1.110] It is important to note that, bearing in mind the significantly increased pace of international treaty-making since the second half of the 20th century, the Geneva Conventions are one component (albeit an extremely important component) of a wider group of international treaties and Conventions that now regulate the two elements of the law of war and armed conflicts referred to above. Thus:

⁶⁷ Ireland’s instruments of ratification to Protocols I and II were deposited with the Swiss Government on 19 May 1999.

- the 1945 Charter of the United Nations includes a number of key provisions on the aspect of the law of war and armed conflict that determines whether to engage in war in the first place (*ius ad bellum*), such as obligations concerning a declaration of war, as well as important rules concerning collective global action under UN mandates (in which Ireland has participated under a series of UN-mandated peace-keeping and peace enforcement actions since 1960); and
- other Conventions concerning the second aspect of the law on war and armed conflict, International Humanitarian Law (IHL, or *ius in bellum*) have also been agreed, such as:
 - the 1997 UN Convention on Anti-Personnel Mines, which Ireland ratified in 1997 (ITS No 22 of 2000) and
 - the 2008 UN Convention on Cluster Munitions, which was agreed at an international conference held in Dublin, which Ireland also ratified in 2008 (ITS No 28 of 2011),
 - both of which were implemented in Irish law by the enactment of the *Cluster Munitions and Anti-Personnel Mines Act 2008*.

[1.111] These developments underline not only the limited contemporary relevance of pre-1922 Conventions and treaties, but also emphasise Ireland's direct engagement through the 20th and 21st centuries in the ongoing regulation of the two elements of the law of war and armed conflicts, while also maintaining its policy of military neutrality.

(vi) Ireland's military neutrality and Hague Convention V as declaratory of customary international law

[1.112] As noted above, Ireland never ratified Hague Convention V, although since the State's foundation it has applied a consistent policy of military neutrality. In *Horgan v An Taoiseach*,⁶⁸ the plaintiff claimed that the State was in breach of its duties under international law as a neutral State in its long-standing policy of allowing overflights of US military planes in Irish territorial airspace and landing facilities in Shannon airport. This arose against the background of the decision of a number of countries, including the US and the UK, to declare war on Iraq in 2003. The US authorities then requested the continuation of the long-standing overflight and landing facilities. The Government brought a motion to Dáil Éireann to approve the granting of this facility, and this motion was approved. The plaintiff then initiated his claim.

[1.113] The High Court (Kearns J) dismissed the plaintiff's claim, principally on the ground that the case law had consistently regarded the exercise by the Executive of its

⁶⁸ [2003] IEHC 64, [2003] 2 IR 468.

authority under the Constitution in international relations as being largely non-justiciable. The Court noted in particular that the Government had obtained approval from Dáil Éireann for continuing the overflight and landing arrangements, and this lent weight to the reluctance of the judiciary to interfere with what was, essentially, a political question.

- [1.114] Before arriving at this conclusion, the Court noted that nothing in the submissions made by the defendants suggested that the Court was precluded from, firstly, identifying a general principle of international law and then, secondly, considering if and how it may operate in domestic law.
- [1.115] On the first issue, to determine the position in international law of a neutral country during a war, the Court quoted the following provisions of Articles 1, 2 and 5 of Hague Convention V:

"Article 1. The territory of neutral Powers is inviolable.

Article 2. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

Article 5: A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory. It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory."

- [1.116] The High Court accepted that the literature on international law cited to the Court supported the view that Hague Convention V was, in effect, declaratory of customary international law.⁶⁹ Therefore, although Ireland had never ratified Hague Convention V, the Court took account of its provisions in considering the plaintiff's argument. The following passage indicates the view of the Court on the scope of Ireland's position as a neutral state:

"Despite the great historic value attached by Ireland to the concept of neutrality, that status is nowhere reflected in Bunreacht na hÉireann [the Constitution], or elsewhere in any domestic legislation. It is effectively a matter of government

⁶⁹ This Discussion Paper does not address the general question of the effect of customary international law in Ireland. The question is discussed in detail in Fuller, *Biehler on International Law: An Irish Perspective* 2nd ed (Round Hall 2013), Chapter 3, and in Fennelly, *International Law in the Irish Legal System* (Round Hall 2014), Chapter 4.

policy only, albeit a policy to which, traditionally at least, considerable importance was attached.

Ireland is thus in a different position than certain other States, who have incorporated a permanent status of neutrality in their domestic laws.

Without exhaustively requoteing from the charters, conventions and writings relied upon by the plaintiff in this case, I am satisfied that there does still exist in international law a legal concept of neutrality whereunder co-relative rights and duties arise for both belligerents and neutrals alike in times of war in circumstances where the use of force is not 'UN led'.

Traditionally, as noted by Lauterpacht (ed), *Oppenheim's International Law*, (1952), [Vol.2,] p. 675, there was a duty of impartiality on neutral States which comprised abstention from any active or passive co-operation with belligerents. At para. 316 the authors state:

'It has already been stated above that impartiality excludes such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to one of the belligerents as benefit the other, and that it includes active measures on the part of the neutral for the purpose of preventing belligerents from making use of neutral territories and neutral resources for their military and naval purposes ...'

1907 Hague Convention V is asserted to be declaratory of customary international law. The various texts relied upon by the plaintiff certainly tend to support such an interpretation. The defendants have argued that a more qualified or nuanced form of neutrality also exists, being one which has been practised by this State for many years, and indeed throughout the Second World War. However, it does not appear to me that even that form of neutrality is to be seen as including the notion that the granting of passage over its territory by a neutral State for large numbers of troops and munitions from one belligerent State only en route to a theatre of war with another is compatible with the status of neutrality in international law. No authority has been offered to the court by the defendants to support such a view. Nor

can it be an answer to say that a small number of other states have done the same thing in recent times. Different questions and considerations may well arise where measures of collective security are carried out or led by the UN in conformity with the Charter: Article 2 (5) of the Charter obliges *all* [emphasis in original] members to assist the UN in any action it takes in accordance with the Charter.

The Court is prepared to hold therefore that there is an identifiable rule of customary law in relation to the status of neutrality whereunder a neutral state may not permit the movement of large numbers of troops or munitions of one belligerent State through its territory en route to a theatre of war with another."⁷⁰

[1.117] While this view of the High Court on the scope of neutrality has some significance in terms of international law, in the sense of the relations of Ireland with other states, the Court ultimately concluded that these were matters that were not justiciable as a matter of national law. This was because, in accordance with the dualist nature of the Irish legal system as described in Article 29 of the Constitution (discussed in chapter 2, below), principles of international law become part of domestic law only to the extent that no constitutional, statutory or other judge made law is inconsistent with the principle in question. Where a conflict arises, the Court held, the rule of international law must in every case yield to domestic law. In that respect, the Court held that the operation of a general principle of customary international law should not be capable of curtailing what the Court accepted was the wide discretion given to the Government in the Constitution in how it carried out its foreign policy. The Court added:⁷¹

"In reaching this conclusion, I am mindful that the implications of holding to a contrary view would inevitably include the following:-

(a) the conduct of international relations, normally characterised by discretion, flexibility and the ability to adapt to changing circumstances, would now be constrained by constitutional rules, the content of which would be impossible to determine without a court ruling;

⁷⁰ [2003] IEHC 64, [2003] 2 IR 468, at page 504-505.

⁷¹ [2003] IEHC 64, [2003] 2 IR 468, at 504-505.

(b) the generally recognised principles of international law themselves are not defined by the Constitution and are not discernible by any process of interpretation of it and are liable to disputes;

(c) although the conduct of international relations sometimes requires urgent action, there could be no certainty that any step would be consistent with the Constitution without prior declarations from the courts;

(d) while it is acknowledged that the generally recognised principles of international law may change if the practice of States change, Ireland alone would be freeze-bound by the pre-existing principles. It could not itself be a participant in any such change. Ireland would thus have to conform to a norm established by the practice of other States, but could not become one of the States whose conduct could change such a norm;

(e) interpretation of the Constitutional principles as argued for by the plaintiff would clearly permit a challenge to a war declared by the Executive even with the approval of the Dáil under Article 29.3, on the grounds that it was a war that did not comply with justice and morality, or the principle of pacific settlement of disputes, under Articles 29.1 and 29.2."

[1.118] The Court therefore accepted the submission of the defendants that the provisions of Article 29.1-3 are to be seen as statements of principle or guidelines rather than binding rules on the Executive. Thus, the Court affirmed the view in the case law that the courts had a very limited role in reviewing Government decisions on foreign policy, including where these had been approved by vote in Dáil Éireann. On that basis, as already noted, the Court dismissed the plaintiff's claim.

[1.119] The decision in *Horgan* was similar to the approach of the English High Court in *R (Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom*.⁷² In the *Campaign for Nuclear Disarmament* case, the English High Court (Simon Brown LJ) had held, firstly, that it had no jurisdiction to interpret an international instrument that had not been incorporated into English domestic law and which it was unnecessary to interpret for the purpose of determining a person's rights or duties under domestic law. In that case, the question was whether UN Security

⁷² [2002] EWHC 2759.

Council Resolution 1441 authorised UN states to take military action in the event of non-compliance by Iraq with its terms. The English High Court held, secondly, that in any event it declined to embark upon the determination of an issue where to do so would be damaging to the public interest in the field of international relations, national security or defence.

- [1.120] In the *Horgan* case, the High Court agreed with the arguments of the defendants that the *Campaign for Nuclear Disarmament* case may be relied on “as emphasising the strictly circumspect role which the courts adopt when called upon to exercise jurisdiction in relation to the Executive’s conduct of international relations generally.” Thus, the Court held that while the legality of the 2003 war in Iraq was “in the words of a recent article about these proceedings in an Irish national newspaper ‘the elephant in the room that is impossible to ignore’, this case has proceeded in a manner where both sides have given that ‘elephant’ a wide berth, a course which permits, indeed compels, this court to do likewise.” This comment by the court indicates the extremely limited extent to which the courts are likely to interfere with the exercise of international relations by the State.

(b) Ireland and the Permanent Court of Arbitration: Hague Convention for the Pacific Settlement of International Disputes (1907)

- [1.121] As noted above, one of the Hague Conventions of 1899, as confirmed and amended in 1907, is Convention I, the Convention for the Pacific Settlement of International Disputes, which established the Permanent Court of Arbitration (PCA). As with the other Hague Conventions, it is at least arguable that the State also succeeded to that Convention in 1922, although the practice with those Conventions was, as already noted, that Ireland took an ambivalent approach to them during World War II (1939-1945). In any event, this is now of historical interest only, because in 2002 Ireland ratified the 1907 Convention (ITS No 1 of 2002).

(i) Rationale for ratifying 1907 Convention on Permanent Court of Arbitration in 2002

- [1.122] When the 1907 Convention was presented to Dáil Éireann in 2002 to approve its ratification, the pragmatic test set out by Mr de Valera in 1933 concerning the 1899 US-UK Hay-Pauncefote Treaty on succession law, discussed above, was once again in evidence. The Minister for Foreign Affairs, Mr Cowen, stated in 2002:⁷³

⁷³ Vol 5 *Select Committee on Foreign Affairs Debates* (19 March 2002) (Convention for the Pacific Settlement of International Disputes), available at <https://www.oireachtas.ie/en/debates/debate/select_committee_on_foreign_affairs/2002-

“The failure to date [2002] by the State to ratify this [1907] convention is explained on historical and practical grounds. Initially, upon the independence of the State, Ireland was invited to adhere to the convention as a state successor to the international rights and obligations of the United Kingdom, which it declined to do. Later, as the role of the Permanent Court of Arbitration diminished, it was decided that, while the aims of the convention remained laudable, there was little practical benefit in adhering to it.”

- [1.123] The Minister added, however, that the PCA had developed a more expansive role for itself, particularly in respect of the arbitration of disputes between various classes of parties – states, international organisations, legal and private persons – and not just disputes between states as originally envisaged. He stated that, because of these developments, 96 states had adhered to the Convention by 2002, including all EU and OECD member states, except Ireland. Again, for that pragmatic reason, it was decided to ratify the Convention.
- [1.124] The PCA has a permanent secretariat or Registry, the International Bureau of the PCA, but it does not have a permanent bench of judges. It is, in reality, an arbitration body rather than a court in the ordinary sense. In that respect, it resembles Ireland’s Labour Court, which is despite its title also a non-court adjudicative body. Ratification of the 1907 Convention entitled Ireland, in common with other member states, to nominate four persons to the PCA Panel of Arbitrators, from which arbitrators are chosen subject to the agreement of the parties to any particular dispute.⁷⁴
- [1.125] Originally, only state parties to the 1907 Convention could bring disputes to it, but as the Minister for Foreign Affairs pointed out in 2002, the International Bureau of the PCA was later authorised to offer its services to disputes where only one of the parties is a state. The PCA is also authorised to appoint an arbitrator in any arbitration conducted under the UN Commission on International Trade Law (UNCITRAL) 1985 Model Law on International Commercial Arbitration. The UNCITRAL Model Law, as amended in 2006, was adopted by Ireland as the basis for all commercial arbitrations, both international and domestic, in the *Arbitration Act 2010*, and the full text of the Model Law, as amended, is set out in Schedule 1 to

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[19/5/2?highlight%5B0%5D=convention&highlight%5B1%5D=pacific&highlight%5B2%5D=settlement&highlight%5B3%5D=international&highlight%5B4%5D=disputes](https://www.pca-cpa.org/19/5/2?highlight%5B0%5D=convention&highlight%5B1%5D=pacific&highlight%5B2%5D=settlement&highlight%5B3%5D=international&highlight%5B4%5D=disputes)> accessed on 24 August 2020.

⁷⁴ In 2018, Ireland nominated four persons to the PCA Panel of Arbitrators for the standard six-year term. See <<https://docs.pca-cpa.org/2017/07/4a124bce-current-list-annex-1-members-of-the-court-20200326.pdf>> accessed on 27 August 2020.

the 2010 Act. The 2010 Act also re-affirmed Ireland's ongoing commitment to a further series of international agreements on arbitration dating back to the 1920s, which it had previously ratified by including their text in Schedules 2-5 to the 2010 Act.⁷⁵

(ii) *Ireland used Permanent Court of Arbitration prior to ratification*

- [1.126] Before the State's ratification in 2002 of the 1907 Convention, Ireland had invoked the jurisdiction of the PCA in a dispute with the United Kingdom under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention). The OSPAR Convention is a European-based regional Convention, the executive functions of which are carried out by the OSPAR Commission.⁷⁶ Ireland had ratified the OSPAR Convention in 1997 (ITS No 7 of 1998), and it was incorporated into Irish law by the *Dumping at Sea Act 1996*, as amended.⁷⁷
- [1.127] The dispute under the OSPAR Convention concerned Ireland's claim that it was being inhibited from making effective submissions in opposition to the then-proposed nuclear Mixed Oxide Plant (MOX Plant) at Sellafield in England. The dispute could be compared with the process in civil litigation called discovery of documents, which involves each party agreeing to provide, or being ordered to provide, written documents to the other party. In the MOX Plant case, Ireland

⁷⁵ Schedule 2 to the 2010 Act contains the text of the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which Ireland had ratified in 1981 (ITS No 6 of 1981). Schedule 3 contains the text of the 1965 International Bank for Reconstruction and Development (part of the World Bank Group) Convention on the Settlement of Investment Disputes Between States and Nationals of other States (the Washington Convention), which Ireland had also ratified in 1981 (ITS No 99 of 2007: an example of delayed acknowledgment of this in the ITS). Schedule 4 contains the text of the 1927 UN (originally, League of Nations) Convention on the Execution of Foreign Arbitral Awards (another Convention given the informal title of the Geneva Convention), which Ireland ratified in 1957 (ITS No 16 of 1957). Schedule 5 contains the text of the 1923 UN (originally, League of Nations) Protocol on Arbitration Clauses (the Geneva Protocol), which Ireland also ratified in 1957 (also in ITS No 16 of 1957). These Conventions had previously been implemented in Irish law through the *Arbitration Act 1954*, the *Arbitration Act 1980* and the *Arbitration (International Commercial) Act 1998*. These three Acts were repealed and replaced by the *Arbitration Act 2010*.

⁷⁶ The OSPAR Commission's website is <<https://www.ospar.org/>> accessed on 27 August 2020. The predecessors of the OSPAR Convention were the 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (the Oslo Convention) and the 1974 Paris Convention on Marine Pollution from Land-based Sources (the Paris Convention). The acronym OSPAR is derived from a combination of Oslo and Paris.

⁷⁷ The 1996 Act repealed and replaced the *Dumping at Sea Act 1981*, which had implemented the two predecessors of the OSPAR Convention, referred to in the footnote immediately above, and which Ireland had ratified in 1992 (ITS No 3 of 1992).

claimed that the UK had incorrectly redacted (deleted) certain environmental information in documents it had supplied to the State, contrary to Article 9 of the Convention, and Ireland sought the unredacted version of these documents. The PCA Arbitral Panel appointed to hear the dispute dismissed Ireland's claim in 2003.⁷⁸ Ireland subsequently sought to challenge the construction of the MOX Plant under the UN 1982 Convention on the Law of the Sea (UNCLOS), which Ireland had ratified in 1996 (ITS No 1 of 1998). However, the European Commission sought and obtained, in effect, an injunction from the Court of Justice of the EU, which held that as the EU had acceded to UNCLOS, the State was prohibited from bringing such proceedings because it violated the principle of co-operation between member states under the EU treaties.⁷⁹

- [1.128] The MOX Plant was subsequently built and it operated for a number of years, its sole customer being Japan, who used its output in its nuclear power facilities. In March 2011, there was a catastrophic release of radiological material at the Fukushima Daiichi nuclear power plant in Japan, following the plant's failure to withstand a tsunami. As a result of the decommissioning of the Fukushima plant, Japan's orders from the MOX Plant ceased. Later in 2011, the UK Nuclear Decommissioning Authority (UKNDA) announced that the MOX Plant would close because of this. The entire Sellafield site is being, gradually, decommissioned by the UKNDA.

(iii) 2019 bilateral Host Country Agreement Between Ireland and PCA reinforced Ireland's strategy as forum for international commercial arbitrations post-Brexit

- [1.129] In 2019, Ireland signed a bilateral Host Country Agreement with the PCA. This was facilitated not only by the 2002 ratification of the 1907 Convention, but also the adoption by Ireland of the UNCITRAL Model Law and other key international agreements on arbitration in the *Arbitration Act 2010*. This was underpinned by making a statutory Order under the *Diplomatic Relations and Immunities Act 1967* conferring relevant privileges and immunities on the PCA and its personnel.⁸⁰ In welcoming the signing of the Host Country Agreement, the Minister for Foreign Affairs and Trade noted that it had been concluded against the background of

⁷⁸ *Ireland v United Kingdom*, Final Decision (Award) of Arbitral Tribunal, The Hague, 2 July 2003. The Arbitral Tribunal comprised Professor W Michael Reisman, Professor of International Law, Yale Law School (agreed Chair), Gavan Griffith QC (Irish designate) and Lord Mustill (UK designate). The majority (Professor Reisman and Lord Mustill) concluded that the UK was entitled to redact the material under Article 9, with Dr Griffith dissenting on this point. The decision is available at: <https://www.dfa.ie/media/dfa/alldfawebstimedia/ourrolesandpolicies/internationallaw/judgement-mox-case.pdf> accessed on 27 August 2020.

⁷⁹ C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635.

⁸⁰ *Permanent Court of Arbitration (Privileges and Immunities) Order 2019* (SI No 539 of 2019).

Brexit, the then-pending withdrawal of the United Kingdom from the European Union (which occurred in 2020):⁸¹

“Ireland has a huge amount to offer as a venue for international arbitration. Our legal system is highly respected internationally. Post-Brexit we will be the only fully common law, English speaking country in the EU. We also benefit from a geographic location and transport links that make Ireland very accessible from Europe, North America and further afield.”

- [1.130] The Host Country Agreement with the PCA thus reinforced Ireland’s strategy to be seen as a potential forum for international commercial arbitrations.⁸² It was also expressly linked by the Minister to the post-Brexit legal services initiative of the Bar Council of Ireland and the Law Society of Ireland published in 2018,⁸³ to which the Government gave its support in January 2019.⁸⁴

(c) Ireland and intellectual property law: 19th Century Conventions, 20th Century UN WIPO Conventions, EU law and 21st century globalised digital era

- [1.131] Another example of how State succession has become, in practice, a matter of historical interest only is how Ireland has ratified two key 19th century international Conventions on intellectual property law, the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works. The Paris Convention deals with patents, trade marks, industrial designs, service marks, trade names and geographical indications. The

⁸¹ See “Tánaiste Welcomes Host Country Agreement with Permanent Court of Arbitration” (6 March 2019), available at <<https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2019/march/tanaiste-welcomes-host-country-agreement-with-permanent-court-of-arbitration.php>> accessed on 27 August 2020.

⁸² The *Arbitration (International Commercial) Act 1998*, since repealed and replaced by the *Arbitration Act 2010*, had first adopted the UNCITRAL Model Law, but the 1998 Act limited its application to international commercial arbitrations. Following the enactment of the 2010 Act, a non-statutory promotional body representing arbitration practitioners, Arbitration Ireland, was established to promote Ireland as a venue for international arbitrations. In 2012, the Dublin Dispute Resolution Centre was opened as a purpose-built venue for such arbitrations: see <<https://arbitrationireland.com>> accessed on 27 August 2020.

⁸³ Bar Council of Ireland and the Law Society of Ireland, *Promoting Ireland as a Leading Centre Globally for International Legal Services* (May 2018), available at: <<https://www.lawlibrary.ie/media/lawlibrary/media/Secure/Promoting-Ireland-as-a-leading-centre-globally-for-international-legal-services.pdf>> accessed on 27 August 2020 .

⁸⁴ See “Minister Flanagan announces Government support for Legal Services Sector Brexit Initiative” (4 January 2019), available at <<http://www.justice.ie/en/JELR/Pages/PR19000005>> accessed on 27 August 2020.

Berne Convention deals with copyright protection for literary and artistic works such as books, films (movies), photographs, plays and songs.

- [1.132] Like other 19th Century Conventions, such as the Hague Conventions already discussed, both of these Conventions on intellectual property have been amended many times since 1886. The amendments usually refer back to the original 1883 and 1886 dates of the original Conventions, but they are also often, in effect, consolidated versions with later amendments included. In terms of a comparison with domestic legislation, these amendments resemble Consolidating and Reforming Acts, or Revised Acts.⁸⁵ Similarly, Ireland has ratified the various iterations of the two Conventions, as amended, which has involved three separate ratifying exercises for each Convention.
- [1.133] Another important development that occurred during the 20th century was that the two Conventions were incorporated into the international institutional structure established after World War II. The two Conventions had initially emerged from typical 19th century gatherings of a small group of state parties, as was the case with the Hague Conventions discussed above. Shortly afterwards, the state parties set up two separate bureaux to administer the Conventions, and these were merged in 1893 to form the United International Bureaux for the Protection of Intellectual Property (BIRPI).⁸⁶ In 1960, BIRPI moved to Geneva, the European seat of many United Nations agencies.
- [1.134] In 1967, the Convention Establishing the World Intellectual Property Organization (WIPO) was concluded, and WIPO in effect absorbed BIRPI. In 1970, Ireland signed and ratified the WIPO Convention on the same day (ITS No 14 of 1970). In 1974, WIPO became an organisation within the United Nations. These developments reflect the growth and globalisation of international law during the second half of the 20th century. In addition, as noted below, these 19th century Conventions, as amended, have been supplemented by other WIPO Conventions and other global and regional agreements.

⁸⁵ There is a general discussion of Consolidation and Reform Acts, and Revised Acts, in the Commission's forthcoming *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020).

⁸⁶ BIRPI refers to *Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle*, which reflects the French and Swiss origins of the Bureaux, and the historical use of French in international and diplomatic contexts.

(i) *1883 Paris Convention for the Protection of Industrial Property: Patents, Trade Marks and Industrial Designs*

[1.135] Turning to Ireland's implementation of the 1883 Paris Convention, as amended, Ireland has ratified:

- In 1958 (ITS No 13 of 1958), the 1883 Paris Convention for the Protection of Industrial Property, as amended in London in 1934;
- In 1967 (ITS No 8 of 1967), the 1883 Paris Convention for the Protection of Industrial Property, as amended in Lisbon in 1958 (the Lisbon Act); and
- In 1970 (ITS No 13 of 1970), the 1883 Paris Convention for the Protection of Industrial Property, as amended in Stockholm in 1967 (the Stockholm Act).

[1.136] The effect of each successive ratification was that the previous ratification was, in effect, repealed and replaced by the later ratification, although this is not a process that is formally recognised at international level. For example, there is no provision in the 1967 Stockholm Act version of the Convention that repeals the 1958 Lisbon Act version, though that was the effect in practice.

[1.137] Domestic implementation of the Convention, as amended, is clearer. The series of core intellectual property legislation enacted since 1922 to give effect to the 1883 Convention, as amended, has involved the repeal of the relevant previous pieces of legislation. Thus:

- the *Patents Act 1992* repealed and replaced the *Patents Act 1964*,
- the *Trade Marks Act 1996* repealed and replaced the *Trade Marks Act 1963*, and
- the *Industrial Designs Act 2001* repealed and replaced the *Industrial and Commercial Property (Protection) Act 1927* (the short title of the 1927 Act gives the clearest clue as to its link to the 1883 Convention).

(ii) *Later WIPO and other Conventions on Patents, Trade Marks and Industrial Designs*

[1.138] It is also important to note that, by the time of the enactment of the 2001 Act, the international regulation of industrial designs was no longer a relatively simple matter of giving effect in Irish, domestic, law to a recent amendment to the 1883 Convention. Thus, the 2001 Act also involved the domestic legislation required to implement:

- the 1999 Geneva Act related to the Hague Agreement on the International Registration of Industrial Designs (in effect, a sub-Convention of the Paris Convention, which provides for an international registration system for industrial designs at WIPO),

- the industrial design provisions of the 1994 World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), and
- the European Union Directive on Industrial Designs, Directive 98/71/EC.

[1.139] In addition, a number of other WIPO and European-based treaties have been developed, and amended or even replaced, which reflects the increased pace of international regulation of intellectual property. This has also, in turn, played a role in the increased pace of domestic regulation of intellectual property law. Thus:

- in 2000 (ITS No 2 of 2000), Ireland ratified the WIPO 1994 Trade Mark Treaty, and this ratification was followed by the enactment of the *Patents (Amendment) Act 2006* (despite its short title it also amended the *Trade Marks Act 1996*), which also implemented the patents-related elements of the 1994 TRIPS Agreement;
- in 2014 (ITS No 16 of 2014), Ireland ratified the amendments made in 2000 to Article 65 of the 1973 European Patent Convention (EPC) (the 2000 amendments are known as the London Agreement), and this ratification was preceded by the enactment of the *Patents (Amendment) Act 2006*; and
- in 2016 (ITS No 5 of 2016), Ireland ratified the WIPO 2006 Trade Mark Treaty (the Singapore Treaty), which revised and updated the 1994 Trade Mark Treaty, and this ratification was preceded by the enactment of the *Intellectual Property (Miscellaneous Provisions) Act 2014*.

(iii) 1886 Berne Convention for Protection of Literary and Artistic Works (Copyright)

[1.140] A similar, complex, picture emerges in relation to the 1886 Berne Convention, in respect of which Ireland has ratified:

- in 1935 (ITS No 6 of 1935), the 1886 Berne Convention for the Protection of Literary and Artistic Work, as amended in Rome in 1928;
- in 1959 (ITS No 4 of 1959), the 1886 Berne Convention for the Protection of Literary and Artistic Work, as amended in Brussels in 1948; and
- in 2004 (ITS No 2 of 2005), the 1886 Berne Convention for the Protection of Literary and Artistic Work, as amended in Paris in 1971 and 1979.⁸⁷

⁸⁷ The front cover of ITS No 2 of 2005 provides a full history of the 1886 Convention, as amended, referring to the "Berne Convention for the Protection of Literary and Artistic Works for the Protection of Literary and Artistic Works Done at Berne on 9 September 1886, completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979."

[1.141] As with the 1883 Paris Convention, the effect of each successive ratification was that the previous ratification was, in effect, repealed and replaced by the later ratification, but there is no clear method of “repealing” the previous ratifications in 1935 and 1959, even though they had become, in effect, obsolete. Similarly, domestic implementation of the 1886 Convention, as amended, is clearer. Thus, the *Copyright Act 1963*, whose provisions reflected the earlier iterations of the 1886 Convention, was repealed and replaced by the *Copyright and Related Rights Act 2000*, which reflects the later versions of the Convention.

(iv) Later WIPO and other Conventions on Copyright

[1.142] The 2000 Act also reflected not just the requirements of the 1886 Convention, as amended, but also other international agreements on copyright protection. While the text of the 1886 Convention was not scheduled to the 2000 Act, there were numerous references to it during the Oireachtas debates on its provisions. In addition, section 188 of the 2000 Act in conjunction with the Third Schedule to the Act, referred to a list of the key international Conventions that had been adopted at that time and to which statutory recognition could be given by Orders made under section 188. The list of Conventions in the Third Schedule is:

- The 1886 Berne Convention itself, as amended in 1971 and 1979 (now a WIPO Convention);
- The 1952 UNESCO Universal Copyright Convention, as revised in 1971;
- The 1992 EEA Agreement, that is, the Agreement between the EU and the three remaining European Free Trade Association (EFTA) states (Iceland, Liechtenstein and Norway), which extends most of the EU’s single market rules to the EFTA states (this was included because Protocol 28 of the EEA Agreement required EU member states to ratify the Berne Convention, as amended in 1971 and 1979: see also the discussion below of Ireland’s acceptance, *Commission v Ireland (Berne Convention)*,⁸⁸ that it had not done this within the timetable agreed in the EEA Agreement);
- The 1994 WTO (TRIPS) Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods;
- Articles 5 and 6 of the 1961 WIPO International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations;
- The 1996 WIPO Copyright Treaty; and
- The 1996 WIPO Performances and Phonograms Treaty.

⁸⁸ Case C-13/00 *Commission v Ireland (Berne Convention)* ECLI:EU:C:2002:184, [2002] ECR I-2943 (judgment of 19 March 2002), discussed in paragraph 1.144, below.

- [1.143] As with the 1883 Convention, this list of seven international agreements also underlines the increasing pace of international regulation of copyright law, which includes a number of WIPO Conventions that have supplemented the original scope of the 1886 Convention. In addition, the inclusion in the list of the EEA Agreement indicates the overlap with EU law (and the extension of single market rules to the three EFTA states), as was the case with the *Industrial Designs Act 2001*, discussed above. Indeed, the 2000 Act also placed on a primary legislative footing a series of five EU Directives from the 1990s, four of which had previously been implemented by way of Regulations made under section 3 of the *European Communities Act 1972*.⁸⁹

(v) *Ratification of Berne Convention as amended in 1971 and 1979, the EEA Agreement and CJEU decision in Commission v Ireland (Berne Convention)*

- [1.144] It is worth referring to another EU dimension to the enactment of the *Copyright and Related Rights Act 2000*. We have noted, above, the State's ratification in 2004 of the 1886 Berne Convention for the Protection of Literary and Artistic Work, as amended in Paris in 1971 and 1979 (ITS No 2 of 2005), which followed previous ratifications of earlier versions of the Berne Convention and also followed the enactment of the 2000 Act. The 2004 ratification also came in the wake of the decision of the Court of Justice of the European Union (CJEU) in 2002 in *Commission v Ireland (Berne Convention)*.⁹⁰ This arose after the European Commission had, in 1998, sent a Reasoned Opinion (a warning notice) to Ireland on the ground that it had failed to fulfil its obligations under Protocol 28 of the 1992 the EEA Agreement, which required EU member states to ratify, by 1 January 1995, the Berne Convention, as amended in 1971 and 1979 (this was the reason the EEA Agreement was included in the Third Schedule to the 2000 Act).
- [1.145] When Ireland received the Reasoned Opinion in 1998, it immediately conceded that it had failed to fulfil its obligations under the EEA Agreement, but requested further time to do so on the basis that it was in the process of finalising a *Copyright Bill* which, when enacted, would be followed by the State's ratification of the Berne Convention, as amended in 1971 and 1979. The *Copyright and Related Rights Bill*

⁸⁹ These were: (1) Directive 91/250/EEC on the Legal Protection of Computer Programs; (2) Directive 92/100/EEC on Rental Right and Lending Right and on Certain Rights Relating to Copyright in the Field of Intellectual Property; (3) Directive 93/83/EEC on the Co-Ordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission; (4) Directive 93/98/EEC Harmonising the Term of Protection of Copyright and Certain Related Rights, and (5) Directive 96/9/EC on the Legal Protection of Databases. Only the 1996 Directive had not previously been implemented by Regulations made under section 3 of the *European Communities Act 1972*.

⁹⁰ Case C-13/00 *Commission v Ireland (Berne Convention)* ECLI:EU:C:2002:184, [2002] ECR I-2943 (judgment of 19 March 2002).

1999 was, indeed, published and introduced to Seanad Éireann in May 1999, but its passage through the Oireachtas was rather slow. When the 1999 Bill had not been enacted by early 2000, the European Commission initiated proceedings against Ireland in the CJEU. The 1999 Bill was ultimately enacted as the *Copyright and Related Rights Act 2000* in July 2000, and the majority of its provisions were brought into force by Ministerial Order in January 2001.⁹¹

- [1.146] The decision of the CJEU was delivered in March 2002, and the Court pointed out that it was well-established under EU law that the relevant date for determining whether Ireland was in breach of its obligations under the EEA Agreement was the date of the Reasoned Opinion, that is, in 1998. The Court also pointed out that a member State “cannot plead provisions, practices or situations within its internal legal order in order to justify its failure to fulfil obligations” under EU law. On that basis, the CJEU found that Ireland was in breach of its obligations.
- [1.147] It is notable that the UK Government intervened in the case and had argued that the European Commission was not competent to bring the proceedings in the first place, on the ground that the Berne Convention was an example of a “mixed competence” international agreement (which the Commission discusses in chapter 2, below⁹²) and therefore not a matter in respect of which it could initiate this type of enforcement proceedings. The CJEU held that the UK Government had no standing to intervene in the case, but in any event it also held that there was “no doubt” that the Berne Convention covered an area which came in large measure within the scope of EU competence and EU law. The Berne Convention, therefore, created rights and obligations within that area, and the CJEU concluded that it was in the interest of the EU as a whole for the European Commission, subject to review by the CJEU itself, to ensure that all contracting parties to the EEA Agreement should adhere to the Berne Convention. As already noted, in December 2004 Ireland ratified the Berne Convention, as amended in 1971 and 1979 (ITS No 2 of 2005).

(vi) Concluding comments on Ireland’s engagement with international intellectual property law developments

- [1.148] Looking at this history of implementation over time of the 1883 and 1886 Conventions, as amended, and the many other Treaties and Conventions listed, it is clear that Ireland has become fully engaged in the growing internationalisation of intellectual property law. This is the case in particular as that internationalisation

⁹¹ *Copyright and Related Rights Act 2000 (Commencement) Order 2000* (SI No 404 of 2000).

⁹² See paragraphs 2.151-2.152, below.

has developed in the later decades of the 20th century and the first decades of the 21st century.

- [1.149] This engagement at the international level has been increasingly seen as an integral part of Ireland's policy of supporting an open market economy, which has encouraged the development of indigenous and multinational high tech and high value business activity. This is the case both in manufacturing, such as in biotechnology and pharma, and the services sector, where software developments has been greatly encouraged. In these areas, it has been emphasised during the Oireachtas debates on the intellectual property legislation referred to above that the legislative framework of Irish intellectual property law needs to remain fully consistent with international standards in order to maintain the State's competitive advantage in an increasingly globalised and digital world.⁹³
- [1.150] Consistent with this policy, in 2011 the Government established a Copyright Review Committee to examine and identify any aspects of copyright law that were perceived to create barriers to innovation, to identify solutions for removing any such barriers and make recommendations for legislative reform, bearing in mind the EU and international obligations of the State. The resulting 2013 Report of the Copyright Review Committee, *Modernising Copyright*⁹⁴ was, rather unusually, expressly referred to in the long title of the *Copyright and Other Intellectual Property Law Provisions Act 2019*, which stated that it was enacted to give effect to certain recommendations in the 2013 Report.
- [1.151] Before the enactment of the 2019 Act, the complex interaction between international law, EU law and national policy on intellectual property law was again evident because of the need to implement the 2013 WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (MVT). The MVT was ratified by the EU under its "exclusive competence" to do so under EU law,⁹⁵ and this also required EU member states to implement the related EU Directive (EU) 2017/1564, which established a mandatory exception to copyright and related rights, by 11 October 2018. In Ireland's case this was achieved in the *European Union (Marrakesh Treaty)*

⁹³ See the discussion of the Oireachtas debates on the *Patents (Amendment) Act 2012* in Byrne and Binchy (eds), *Annual Review of Irish Law 2012* (Round Hall 2013), pages 59-62, and of the *Intellectual Property (Miscellaneous Provisions) Act 2014* in Byrne and Binchy (eds), *Annual Review of Irish Law 2014* (Round Hall 2015), pages 76-78.

⁹⁴ Report of the Copyright Review Committee, *Modernising Copyright*, available at <<https://dbei.gov.ie/en/Publications/Publication-files/CRC-Report.pdf>> accessed on 24 August 2020. The Committee had been chaired by Professor Eoin O'Dell, Trinity College Dublin.

⁹⁵ For discussion of the "exclusive competence" of the EU to enter into international agreements and its application to the Marrakesh Treaty, see paragraphs 2.138-2.160, below.

Regulations 2018 (SI No 412 of 2018), made under section 3 of the *European Communities Act 1972*, which were signed on 9 October 2018 and came into effect on 11 October 2018, the final date specified in the 2017 Directive.

- [1.152] The making of the 2018 Regulations, and the enactment of the 2019 Act in order to implement some, though not all, of the recommendations in the 2013 Report of the Copyright Review Committee, indicate that further reform of this area, as with many other areas of law, remains an ongoing matter for policy formation and consequent legislative initiatives. It is also the case that this is an area in which international standards, and national policy objectives, will continue to interact and overlap into the future.⁹⁶

7. Ireland and the International Court of Justice and the World Health Organization

- [1.153] The Commission considers that it may be useful at this point to discuss two case studies concerning Ireland's relationship with the UN. The first concerns the State's acceptance of the compulsory jurisdiction of the UN International Court of Justice and the second concerns Ireland's relationship with the World Health Organization (WHO), a UN agency. These case studies do not involve an examination of pre-independence treaties that Ireland ratified, but they indicate the active participation of the State in the 21st century with the UN and its agencies.

(a) Ireland and the UN International Court of Justice

- [1.154] As noted above, in 1929 Ireland ratified without reservation the Statute of the League of Nations' Permanent Court of International Justice (PCIJ) (ITS No 8 of 1930), the forerunner of the UN's International Court of Justice (ICJ). By ratifying without reservation, the State accepted Article 26 of the PCIJ's Statute, the "Optional Clause", which conferred compulsory jurisdiction on the Court without reservation. Other Dominions had opted to ratify the PCIJ's Statute but with a Reservation concerning Article 26.
- [1.155] As also noted above, Ireland joined the UN in 1955. Article 93 of the Charter establishing the UN provides that member states also automatically must adhere to the Statute establishing the ICJ. Until 2011 Ireland had entered a Reservation to the compulsory jurisdiction of the ICJ. This appears at first sight to involve a reverse of the position adopted in 1929 in connection with the PCIJ, and indeed with the spirit of Article 29.2 of the Constitution, which affirms Ireland's adherence to the principle of the pacific settlement of international disputes by international arbitration or

⁹⁶ A similar complex layering of international influences can be seen in the discussion of Ireland's international extradition arrangements: see the discussion in paragraphs 2.47-2.59, below.

judicial determination. In fact, the impediment was, as with the PCA discussed above, a pragmatic one, though involving a very different factor. Until 2011, the key issue was Northern Ireland. This was because the original text of Article 2 of the 1937 Constitution made a claim that Northern Ireland formed part of the national territory, albeit tempered by Article 3 which stated that the laws enacted in Ireland would not apply to Northern Ireland. This claim would have, to say the least, been difficult to assert in any case before the ICJ.

- [1.156] Articles 2 and 3 were also provisions that caused significant friction between the State and those in Northern Ireland who pointed out that Northern Ireland formed part of the United Kingdom of Great Britain and Northern Ireland. The 1998 Belfast/Good Friday Agreements committed the Government to supporting a referendum to amend Articles 2 and 3 of the Constitution. This was achieved in 1999, and Article 3 now provides that the firm will of the Irish nation is:

“to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island.”

- [1.157] These changes to Articles 2 and 3 thus paved the way for Ireland to accept the compulsory jurisdiction of the ICJ. Nonetheless, as noted in 2012,⁹⁷ even then it took more than a decade for Ireland to accept the ICJ’s jurisdiction. Again, pragmatic considerations were explained for this delay and, ultimately, for accepting the compulsory jurisdiction in 2011.
- [1.158] As to the delay, one of the main reasons given was “a feeling that not accepting the Court’s jurisdiction was not doing us any concrete harm. There was also a degree of caution about accepting the jurisdiction of a judicial body which, though distinguished, was not very familiar to policy makers.”⁹⁸

⁹⁷ The discussion in the succeeding paragraphs is based on the statement by James Kingston, Legal Adviser, Department of Foreign Affairs and Trade on behalf of Eamon Gilmore TD, Tánaiste and Minister for Foreign Affairs and Trade, at the launch of Vols IV-V of *Irish Yearbook of International Law*, University College Cork, 9 November 2012, page 2, available at: <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/internationallaw/statement-irish-yearbook-international-law-ucc-2012.pdf> accessed on 24 August 2020.

⁹⁸ Statement by James Kingston, Legal Adviser, Department of Foreign Affairs and Trade on behalf of Eamon Gilmore TD, Tánaiste and Minister for Foreign Affairs and Trade, at Launch of Vols IV-V, *Irish Yearbook of International Law*, University College Cork, 9 November 2012, page 2.

- [1.159] Two main factors were given for lodging the declaration recognising the ICJ's compulsory jurisdiction in December 2011 (ITS No 32 of 2012). The first was described as the increasing familiarity with international settlement of disputes in various fora, as well as familiarity with the ICJ itself. This included Ireland's participation in a number of advisory proceedings at the ICJ: *Legality of the Threat or Use of Nuclear Weapons*,⁹⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹⁰⁰ and *Accordance with International Law of the Unilateral Declaration of Independence of Kosovo*.¹⁰¹ This approach mirrored the similar pragmatic pre-ratification approach to the PCA, discussed above.
- [1.160] The second reason referred to was recognition that a broad-based acceptance of the Court's jurisdiction provided greater opportunities for the peaceful settlement of disputes than a purely *ad hoc* recourse to arbitral and judicial bodies. This was because it could be difficult, in the midst of a dispute, to agree with those with whom one is having the dispute what issues should be put forward for settlement and before what forum. Coupled with this was the realisation that acceptance of the Court's jurisdiction added another tool to the tool-kit available to the State, but did not preclude it from using other means of dispute settlement where appropriate.
- [1.161] It was also noted that the terms of the declaration accepting the ICJ's jurisdiction made one exception, namely with respect to any dispute with the UK in regard to Northern Ireland, reflecting the excellent relations between the two countries and the considered opinion of the Government that the institutions and mechanisms established by the 1998 Belfast / Good Friday Agreements, as subsequently amended, provide the best framework for settling any differences that might arise.

(b) Ireland, the World Health Organization and Covid-19

- [1.162] As noted above,¹⁰² before Ireland became a full member of the UN in 1995, the State had ratified the 1946 Constitution of the World Health Organization (WHO) in 1948 (ITS No 14 of 1948).¹⁰³ In 2020, the State's membership of the WHO became more prominent than at any time previously. Ireland, in line with most WHO members, was greatly assisted by the World Health Organization's *International Health Regulations*, and related guidance from the European Centre for Disease

⁹⁹ [1996] ICJ Rep 226.

¹⁰⁰ [2004] ICJ Rep 136.

¹⁰¹ [2010] ICJ Rep 403.

¹⁰² See paragraph 1.65, above.

¹⁰³ See also Fennelly, *International Law in the Irish Legal System* (Round Hall 2014), paras 5.64-5.67.

Prevention and Control, to inform the State's public health advice and consequent public policy decision-making on Covid-19.

- [1.163] As we now know, the novel form of coronavirus since named Covid-19 had been circulating in the city of Wuhan in the Hubei Province of the People's Republic of China in late 2019, hence "Covid-19" rather than "Covid-20". On 4 January 2020, the WHO reported a cluster of pneumonia-type cases in Wuhan. Less than three weeks later, on 22 January 2020, the WHO issued a statement that there was evidence of human to human transmission in Wuhan of this disease, and that more investigation was needed to understand the full extent of transmission.
- [1.164] On 30 January 2020, the WHO reconvened its Emergency Committee, which advised that the outbreak constituted a Public Health Emergency of International Concern (PHEIC) within the meaning of the WHO *International Health Regulations* (IHR) of 2005, as amended in 2016.¹⁰⁴ The IHR, made in accordance with the mandate to do so under the 1946 Constitution of the WHO, constitute an international agreement between 196 countries, including all WHO Member States, to work together for global health security. The IHR include agreed specific measures to limit the spread of health risks from highly infectious diseases, including preventative measures, reporting requirements to WHO when a highly infectious disease arises, subsequent public health hazard and risk assessments based on the "precautionary principle", and travel and trade restrictions which are aimed at ensuring that traffic and trade disruption is kept to a minimum consistent with public health risk assessment.
- [1.165] In response to the Covid-19 pandemic, the Oireachtas enacted two Acts in quick succession in March 2020. These were the *Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020* ("first Covid-19 Act 2020") and the *Emergency Measures in the Public Interest (Covid-19) Act 2020* ("second Covid-19 Act 2020").
- [1.166] The first Covid-19 Act 2020 contained the legislative framework for exceptional and unprecedented restrictions on the free movement of persons, including a lockdown of virtually all economic activity and effective ban on public social gatherings. The content of the first Covid-19 Act 2020 can, broadly, be traced to the public health precautionary principle set out in the WHO International Health Regulations (IHR) of 2005 as amended in 2016, referred to above. The contents of the lockdown in the first Covid-19 Act 2020 includes virtually unprecedented restrictions on free

¹⁰⁴ The full text of the WHO International Health Regulations (IHR) of 2005, as amended in 2016, is available at <https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=05DB0A56E7EEDFA7BD91DA2B7451C92A?sequence=1> accessed on 24 August 2020.

movement of persons, both nationally and internationally, and at one stage virtually complete shutdown of all high-street retail outlets with the exception of food outlets. Freedom of assembly was also severely restricted for some time, including in its connection with religious ceremonies, whether daily or weekly services and prayer gatherings. It also placed severe restrictions on other life events, whether religious or secular, such as weddings and funerals. In addition, the first Covid-19 Act 2020 contained enforcement mechanisms, including Garda powers and the prospect of criminal prosecutions and, on conviction, significant fines and the possibility of a sentence of imprisonment. In summary, this involved restrictions that would, in any other context (other than, perhaps, in wartime) be regarded as entirely impermissible in a democratic society governed by internationally agreed standards and the rule of law.

- [1.167] The second Covid-19 Act 2020 addressed the need for significant emergency financial and other regulatory interventions to mitigate to some extent the effects of the lockdown enacted in the first Covid-19 Act 2020. Financial interventions included wage subsidy arrangements to facilitate continuity of employment for businesses whose activities were disrupted by the lockdown, and enhanced social security payments for those who were “furloughed” following the lockdown. Regulatory interventions included extensions of the period of validity of various licences, and facilitating online arrangements for regulatory bodies to carry out their functions. Thus, the second Covid-19 Act 2020 amended the *Residential Tenancies Act 2004*, notably by prohibiting for a period of three months: (a) serving a notice of termination in relation to the tenancy of a dwelling and (b) prohibiting rent increases on dwellings. The second Covid-19 Act 2020 also amended the *Mental Health Act 2001*, including making special provision for appointing members of Mental Health Tribunals (who review detention orders in designated mental health institutions) where this was not possible in the usual way under the 2001 Act “due to the exigencies of the public health emergency” posed by Covid-19.
- [1.168] In addition to these two Acts, further legislative interventions were required to address the effects of the Covid-19 pandemic on the administration of justice. Thus, the *Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020* enacted reforms to provide a statutory underpinning to ensure continuity in the administration of justice, including through provision for remote pre-trial hearings and greater use of ICT in the administration of justice.
- [1.169] The Commission does not propose to assess here the compatibility with national or international human rights standards of the legislative reforms enacted in the wake of the Covid-19 pandemic. In Ireland, the High Court (Meenan J) in *O'Doherty and*

*Waters v Minister for Health*¹⁰⁵ dismissed a constitutional challenge to the first two Covid-19 Acts enacted in March 2020. It is notable that a challenge to the comparable restrictions enacted in the UK, which were also based on the public health precautionary principle in the WHO International Health Regulations, was rejected by the High Court of England and Wales (Swift J) in *R (Hussain) v Secretary of State for Health and Social Care*,¹⁰⁶ in which judgment was delivered just over a week after the decision in the *O'Doherty and Waters* case.

- [1.170] The relevance to this Discussion Paper of the response in Ireland to the Covid-19 pandemic is that it illustrates the engagement of Ireland with the international community, through the WHO, in a coordinated global effort to address one of the most complex challenges to public health in many decades.

8. Monitoring Ireland's 1,400 international agreements, including the core UN Human Rights Conventions

(a) Impact of the State's 1,400 international agreements

- [1.171] The first element of the Commission's research work on this project was to publish in 2018 a *Draft Inventory of International Agreements Entered Into by the State*.¹⁰⁷ The Draft Inventory contains over 1,400 entries, which underlines the extensive nature of Ireland's current extensive engagement as a participant in the international community, and the impact that these international law obligations have had, and continue to have, on our domestic law. The vast majority of the 1,400 entries in the Draft Inventory was derived from the Department of Foreign Affairs and Trade's Irish Treaty Series (ITS),¹⁰⁸ which has compiled the most extensive record of Ireland's treaty obligations to date. The ITS details international agreements that have entered into force with respect to Ireland, for example international treaties and conventions that the State has ratified, as well as other bilateral agreements that the State has agreed to, that have binding force in international law. The ITS does not include a list of international treaties that the State has signed but not ratified, but the Department of Foreign Affairs and Trade also maintains a link to these on the homepage of the ITS.
- [1.172] The Commission's Draft Inventory includes international agreements that the State has signed, as well as those it has ratified. It therefore includes agreements that it

¹⁰⁵ [2020] IEHC 209.

¹⁰⁶ [2020] EWHC 1392 (Admin).

¹⁰⁷ *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018).

¹⁰⁸ The Irish Treaty Series is available at <<https://www.dfa.ie/our-role-policies/international-priorities/international-law/find-a-treaty/>> accessed on 24 August 2020.

would not be appropriate to include in the ITS. The Commission included these agreements in order to provide the public, the business community as well as various professionals (legal practitioners, policy-makers from central and local government, non-governmental organisations, and judges) with information that may assist them to ascertain not only the international agreements in force to which Ireland is a party (the contents of the ITS) but also instruments that may at some point become binding if and when they are ratified. While these additional instruments in the Commission's Draft Inventory may not become binding for some time (or at all), their inclusion is intended to provide potential signposts for the future.

[1.173] The Commission also organised the 1,400 entries in the Draft Inventory under more than 30 subject headings, which include:

- agriculture and food,
- communications,
- criminal law,
- diplomatic relations,
- employment law,
- environmental law,
- family law,
- health services,
- human rights generally,
- human trafficking,
- intellectual property,
- international trade,
- narcotics,
- outer space,
- refugees,
- law of the sea,
- social security,
- taxation
- transport, and
- the law of war and international humanitarian law.

[1.174] The purpose of this subject-based classification is to assist the accessibility of the 1,400 entries, in particular for those who may seek information on particular subject areas, such as Environment, Family Law or Taxation. This mirrors the Commission's existing approach to making domestic legislation more accessible by presenting it in subject-matter form, through the publication of the Classified List of In-Force Legislation, which groups Irish domestic legislation under 38 subject headings. In keeping with that approach to accessibility, the Commission's Draft Inventory has attempted where possible to link each entry with corresponding domestic

measures in Acts (primary legislation) or, as the case may be, statutory Regulations and Orders (secondary legislation).

- [1.175] The Commission's Draft Inventory was published on the Commission's website in 2018 as a basis for public discussion, including in connection with any errors or omissions in it and also in terms of its presentation. To date (August 2020), the Commission has received a number of helpful comments and submissions on the Draft Inventory, and it has put in place procedures to ensure that both the content and presentation of the Draft Inventory will be reviewed and updated on an ongoing basis, and that it is available in an accessible format on its website. This is also consistent with the Commission's development of the Classified List of In-Force Legislation, which has been updated from time to time since it was first published in 2010. Since February 2020, the Classified List is available on the Commission's website as a searchable database.
- [1.176] In relation to updating the 2018 Draft Inventory, the Commission has had the benefit of continuing engagement with the Department of Foreign Affairs and Trade. The Department has provided relevant updating material on new entries to the Irish Treaty Series, which the Commission uses to update the Draft Inventory.
- [1.177] The vast range of subject matter in the Draft Inventory indicates how extensive the effect of international law has been on Irish domestic law. This has been especially the case since the second half of the 20th century when, in the wake of the establishment of the UN in 1945, and of a range of international bodies concerning trade, such as the Organisation for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO), there has been an exponential growth in the number of international agreements. This activity at the international level has mirrored the comparable growth of domestic legislation in many states, including Ireland. It might be said that this period has seen something close to the codification of international law, at the same time as many states, including those from the common law tradition, have consolidated much of their laws into legislation.

(b) International and national monitoring mechanisms

- [1.178] The growth of international treaties, in effect the growth of international legislation, has also given rise to significant monitoring and enforcement mechanisms, at international and national level, to ensure the implementation of these treaties.
- [1.179] These processes are discussed in detail in chapter 4, below. Briefly, at national level, this includes the role of Department of Foreign Affairs and Trade, which has overall responsibility within the Government for facilitating the ratification of international human rights treaties. It also includes the role of the Irish Human Rights and Equality Commission (IHREC), Ireland's statutory National Human Rights Institution

(NHRI), established under the *Irish Human Rights and Equality Commission Act 2014*.

- [1.180] The Department of Foreign Affairs and Trade and IHREC both engage actively with Non-Governmental Organisations (NGOs) in connection with international human rights issues. The most significant role in this respect is by submitting what are referred to as shadow reports, that is, reports that shadow the national reports submitted by Governments. In other words, NGOs may submit their own assessments of the State's compliance with its international obligations. We return to this important matter in chapter 4.

CHAPTER 2 HOW IRELAND IMPLEMENTS ITS INTERNATIONAL LAW OBLIGATIONS: THE STATE'S TREATY PRACTICE IN A "DUALIST" SYSTEM

- [2.1] In this chapter, the Commission discusses Ireland's treaty practice against the background of the recognition in the Constitution that this is done through what is called a "dualist" system. This means that treaty practice has, firstly, an international dimension that operates between Ireland and other states and, secondly, a national, or domestic law, dimension that determines the effect of international agreements in Irish law. This chapter therefore discusses the international law level by reference to relevant principles of international law, many of which were codified in the 1969 Vienna Convention on the Law of Treaties, which Ireland ratified in 2006. The domestic law level is discussed by reference to Article 29 of the Constitution and its clear application of the dualist approach.

1. Overview of Dualism in the Constitution

- [2.2] As noted in chapter 1, the 1937 Constitution marked an important departure from the 1922 Constitution because it included a number of provisions in Article 29 concerning Ireland's relationship with international law.
- [2.3] Article 29.1 affirms Ireland's commitment to friendly co-operation amongst nations, Article 29.2 affirms Ireland's adherence to the principle of the peaceful settlement of international disputes by international arbitration or judicial determination, and in Article 29.3 Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States. These three opening provisions set out the State's operating principles as they apply at the international state-to-state level.
- [2.4] Article 29.6 then sets out a clear statement of the effect of international agreements in our national, domestic law:

"No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

- [2.5] Article 29.6 emphasises that Ireland firmly adheres to what is described as the "dualist" approach to international law. This in effect means that the question of the legal effect of international law operates at two levels, the international level and the national, or domestic, level. Article 29.1 to 3 accept the State's obligations in its relations with other states, the state-to-state level. Article 29.6 in particular emphasises that the Oireachtas determines whether an international agreement

has any legal effect as a matter of domestic law. This is entirely consistent with Article 15.2.1° of the Constitution, which provides that 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.”

- [2.6] Dualism may be contrasted with monism, another approach to the relationship between international and domestic law. Monism considers domestic and international law to be a single legal order. This approach would mean that the terms of any international agreement which a State had ratified could be invoked in the national courts in support of any claim that the State was in breach of that international agreement. Another effect would be that, if international agreements automatically become part of domestic law this could prevent any delays that may occur while a state is considering implementing legislation.
- [2.7] The monist approach is sometimes summarised by the Latin phrase *lex posterior legi priori derogat*, which translates as “the later law is taken to repeal the earlier law.” Under the monist approach, the effect would be that the later international agreement that a State ratified would be deemed to repeal any previous domestic law that conflicted with the international agreement. This rather drastic effect of the monist approach means that a number of States, including Ireland, take the dualist approach to international law. The dualist approach also gives the Government flexibility in choosing between different ways and methods of implementation of international agreements.
- [2.8] It should be noted that, in two respects, the Constitution involves an approach to international law that could be described as monist. The first, and highly significant, exception is reflected in the amendments made to Article 29 to allow for the direct effect in Irish law of the obligations necessitated by Ireland’s membership since 1973 of the European Union: this is discussed separately below in Part 4 of this chapter. The second is reflected in Article 29.3, which provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States. While this has been referred to and relied on in a number of Irish court decisions, this provision operates primarily in terms of the international relations between Ireland, represented by the Government, and other states.¹ Subject to these exceptions, Article 29 primarily applies the dualist approach to international law.

¹ For example, in *Horgan v An Taoiseach* [2003] IEHC 64, [2003] 2 IR 468, discussed at paragraph 1.112, above, the High Court (Kearns J) referred to relevant provisions of the 1907 Hague Convention V, which Ireland has not ratified but which is regarded as codifying general principles of international law, to determine whether the State had acted in violation of principles of international law concerning neutral states.

- [2.9] This dualist approach in Article 29 also provides a key procedural role to the Oireachtas. This is underlined by Article 29.5, which provides that any international agreement to which the State becomes a party, except one of a technical and administrative character, must be laid before Dáil Éireann; and that, if any international agreement involves “a charge upon public funds”, it is not binding on the State unless it is approved by Dáil Éireann.
- [2.10] The long-standing practice of the Department of Foreign Affairs and Trade is that all international agreements and conventions are laid before Dáil Éireann, including those of a technical and administrative character. As discussed below in Part 3 of the chapter, this practice is connected with the difficulty of defining with precision what falls into the category of technical and administrative agreements.
- [2.11] We now turn to discuss the practical effects of dualism in Irish law under Article 29.6, followed by a discussion of the procedural aspects of ratifying an international agreement and bringing it before Dáil Éireann under Article 29.5.

2. The effect of dualism in Irish law

- [2.12] The effect of dualism, as set out in Article 29.6, is that an international agreement cannot have any significant practical effect in Irish domestic law unless and until the Oireachtas decides what effect that agreement should have. This can be done in a number of ways, but the most straightforward is to convert the international agreement into national law through an Act of the Oireachtas.

(a) Case study of clear and transparent implementation of international agreements in an Act of the Oireachtas: Cluster Munitions and Anti-Personnel Mines Act 2008

- [2.13] Chapter 1 contains a number of examples of Acts of the Oireachtas that have implemented in national law various international agreements, including those on the peaceful settlement of disputes by international arbitration, the law of war and international humanitarian law and on intellectual property law. Of these, it may be useful to recall the example of:
- the 1997 UN Convention on Anti-Personnel Mines (which Ireland ratified in 1997: ITS No 22 of 2000) and
 - the 2008 UN Convention on Cluster Munitions, which was agreed at an international conference held in Dublin (which Ireland ratified in 2008: ITS No 28 of 2011),
 - both of which were implemented in Irish law by the enactment of the *Cluster Munitions and Anti-Personnel Mines Act 2008*.

- [2.14] The 2008 Act is one of many good examples of clear implementation of the international agreements to which they refer. The text of the Act itself refers to the two UN Conventions, and provides for clear oversight arrangements within the State to ensure compliance with the prohibition on cluster munitions and anti-personnel mines under the Conventions, including criminal sanctions for non-compliance. In addition, the full text of the two Conventions is contained in the two Schedules to the 2008 Act. Finally, the short title of the 2008 Act makes clear its subject matter.
- [2.15] In terms of the focused type of international agreements to which the 2008 Act refers, it provides a useful and important case study of clarity and transparency, because:
- the title of the implementing Act provides a clear signal of the international agreements to which it refers;
 - the implementing Act contains relevant oversight and enforcement mechanisms to ensure that the purposes behind the relevant international agreements are given practical effect in Irish law; and
 - the full text of the international agreements is set out in the implementing Act.

(b) Use of road maps for complex international agreements, including human rights Conventions

- [2.16] Not every Act of the Oireachtas that involves implementation of an international agreement is, or can be, as clear as the 2008 Act. This can sometimes arise because the complex and wide-ranging nature of the international agreement may make this more difficult to achieve. This is especially the case with the core UN human rights Conventions, which may require the enactment over time of a significant number of Acts within the responsibility of a number of different Government Departments.
- [2.17] In such instances, different methods can be used to provide a significant degree of clarity and transparency around the implementation in national law of such complex international agreements. This can include the use of published “roadmaps to ratification and implementation”, such as in the case of the 2006 UN Convention on the Rights of Persons with Disabilities (UNCRPD), which the Commission discusses in chapter 3, below (the UNCRPD is also discussed in detail in the Appendix to this Discussion Paper, below).

(c) The effect of dualism when the Oireachtas has not incorporated an international agreement: case study of the ECHR prior to 2003

- [2.18] It is clear from Article 29.6 that, if an international agreement is not one of the 1,400 international agreements that the State has agreed to be bound by, it cannot have any significant practical effect in Irish domestic law. This effect of Article 29.6 has been affirmed on many occasions by the courts.
- [2.19] A significant example of this was in connection with Ireland's ratification of the Council of Europe's Convention on Human Rights and Fundamental Freedoms (the ECHR). Ireland ratified the Convention in 1953, and laid it before Dáil Éireann (ITS No 12 of 1953). The State's ratification included the oversight jurisdiction of the European Court of Human Rights (ECtHR), and Ireland also accepted the provisions in the Convention that allowed individuals to initiate proceedings against their own State in the ECtHR, an innovation in an international human rights treaty at that time. Indeed, the first ever individual petition involving a Council of Europe member state was against Ireland, *Lawless v Ireland*,² in which the ECtHR rejected the applicant's challenge that his internment under the *Offences Against the State (Amendment) Act 1940* was in breach of the State's commitments under the ECHR. The case was based primarily on the fact that the State had notified the Council of Europe in advance of using the 1940 Act that it would do so on the basis of a derogation from the ECHR.
- [2.20] While the State ratified the ECHR in 1953, thus allowing the applicant in the *Lawless* case to bring his case to the ECHR, the ECHR had not at that time been incorporated into Irish law through an Act of the Oireachtas. Therefore, when the *Lawless* case was, in 1957, heard and dismissed in the Irish courts (a precondition to his application to the ECtHR), under the name *In re Ó Laighléis*,³ the High Court and Supreme Court, applying the dualist principle, held that no argument could be made in an Irish court alleging a breach of the ECHR. Delivering the judgment of the Supreme Court in the *Ó Laighléis* case, Maguire CJ made the following comments on dualism that have been quoted with approval on many occasions since then:

"When the domestic law makes its own provisions it cannot be controlled by any inconsistent provisions in international law... The insuperable obstacle to importing the provisions of

² *Lawless v Ireland (No 1)* [1960] ECHR 1, (1960) 1 EHRR 1 (procedure) (14 November 1960); *Lawless v Ireland (No 2)* [1961] ECHR 1, (1960) 1 EHRR 1 (procedure) (7 April 1961); and *Lawless v Ireland (No 3)* [1961] ECHR 2, (1960) 1 EHRR 1 (substantive decision dismissing the case) (1 July 1961).

³ [1960] IR 93 (decided in 1957).

the Convention for the Protection of Human Rights and Freedoms into the domestic law of Ireland – if they be at variance with that law is, however, the terms of the Constitution of Ireland. By Article 15.2.1° of the Constitution it is provided that ‘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’. Moreover, Article 29, the Article dealing with international relations, provides at s.6 that ‘no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas’.

The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law.

No argument can prevail against the express command of section 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws.

The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms. Nor can the Court accede to the view that in the domestic forum the Executive is in any way estopped from relying on the domestic law. It may be that such estoppel might operate as between the High Contracting Parties to the Convention, or in the Court contemplated by Section IV of the Convention if it comes into existence [the ECtHR had not yet been established in 1957], but it cannot operate in a domestic Court administering domestic law. Nor can the Court accept the contention that the Act of 1940 is to be construed in the light of, and so as to produce conformity with, a convention entered into ten years afterwards.”⁴

⁴ *Ibid*, at 124-125.

- [2.21] The decision of the Supreme Court in the *Ó Laighléis* case fully captures the duality involved in the dualist approach to international law that Article 29 invokes. First, at the national level, Irish law remains dominant where a claim is made in Irish courts in respect of an international agreement that has not been made part of Irish, domestic, law. Second, at the international level, if the State has ratified an international agreement but does not align its domestic law with the terms of the international agreement, this may create difficulties for the State when it meets the other states who have ratified the agreement (the High Contracting Parties under the ECHR) at the regular meetings of those states. But those difficulties at the state-to-state international level do not have any effect on the decisions of Irish courts where the international agreement has not been incorporated into Irish law.
- [2.22] In the *Ó Laighléis* case, this potential state-to-state conflict did not, in fact, arise because, as already noted, when the ECtHR heard the case, *Lawless v Ireland*, the claim was dismissed. A clear example, however, of where the conflict arose in practice was in litigation involving a challenge to provisions in the *Offences against the Person Act 1861*, first in the Irish courts, *Norris v Attorney General*,⁵ and later in the ECtHR, *Norris v Ireland*.⁶
- [2.23] In *Norris v Attorney General*,⁷ the Supreme Court held, by a 3-2 majority, that sections 61 and 62 of the *Offences Against the Person Act 1861*, which had criminalised consensual sexual relations between males, were not in breach of the Constitution. By the time of the Court's decision in 1983, the ECtHR had already decided two years earlier, in *Dudgeon v United Kingdom*,⁸ that sections 61 and 62 of the 1861 Act, which were then still in force in Northern Ireland (they had been repealed in the rest of the UK in 1967), were in breach of the right to privacy under Article 8 of the ECHR. Delivering the decision of the majority of the Supreme Court in *Norris v Attorney General*, O'Higgins CJ pointed out that, under the dualist approach, the 1981 decision of the ECtHR was not relevant to the question as to whether sections 61 and 62 of the 1861 Act were in conflict with the Constitution. O'Higgins CJ stated:

"The Convention is an international agreement to which Ireland is a subscribing party. As such, however, it does not and cannot form part of our domestic law, nor affect in any way questions which arise thereunder. This is made quite

⁵ *Norris v Attorney General* [1983] IESC 3, [1984] IR 36.

⁶ *Norris v Ireland* [1988] ECHR 22, (1988) 13 EHRR 186.

⁷ *Norris v Attorney General* [1983] IESC 3, [1984] IR 36.

⁸ *Dudgeon v United Kingdom* [1981] ECHR 5, (1981) 4 EHRR 149.

clear by Article 29, s.6 of the Constitution which declares:-
 'No international agreement shall be part of the domestic law
 of the State save as may be determined by the Oireachtas.'

[O'Higgins CJ then cited with approval the passage quoted
 above from the judgment delivered by Maguire CJ in the *Ó
 Laighléis* case, and continued:]

I agree with these views expressed by the former Chief
 Justice... Neither the Convention on Human Rights nor the
 decision of the European Court in *Dudgeon v United Kingdom*
 is in any way relevant to the question which we have to
 consider in this case."⁹

- [2.24] There is no doubt that O'Higgins CJ was correct in his analysis of the formal legal position. However, delivering the leading judgment of the two-judge minority in *Norris v Attorney General*, Henchy J stated that, in view of the decision of the ECtHR in the *Dudgeon case*, sections 61 and 62 of the 1861 Act "seem doomed to extinction."¹⁰ This prediction turned out to be correct because, five years later, in *Norris v Ireland*,¹¹ the ECtHR affirmed its decision in the *Dudgeon case*, and held that sections 61 and 62 of the 1861, as they operated in Ireland, were in conflict with Article 8 of the ECHR.
- [2.25] That decision of the ECtHR created in practice the difficulty identified in principle in the *Ó Laighléis* case, a direct conflict between, on the one hand, Ireland's domestic law and, on the other hand, the State's international obligations as a party to the ECHR. While sections 61 and 62 of the 1861 Act remained part of Irish law for a further five years after the decision of the ECtHR, they were ultimately repealed by the Oireachtas as part of a wider reform of the law on sexual offences in the *Criminal Law (Sexual Offences) Act 1993*. The enactment of the 1993 Act thus removed this specific incongruity between national law and the State's obligations under the ECHR.

(d) Effect of incorporation of the ECHR at a sub-constitutional level under the European Convention on Human Rights Act 2003

- [2.26] On the wider question of the status of the ECHR in Irish law, a consequence of the 1998 Belfast / Good Friday Agreements, discussed in chapter 1, was a commitment by the UK and Irish governments to give effect in domestic law to the ECHR. In the

⁹ [1983] IESC 3, [1984] IR 36, at 66-67.

¹⁰ [1983] IESC 3, [1984] IR 36, at 78.

¹¹ *Norris v Ireland* (1988) 13 EHRR 186.

UK, this was achieved with the enactment of the UK *Human Rights Act 1998* and in Ireland by the *European Convention on Human Rights Act 2003*.

- [2.27] While the enactment of the 2003 Act has empowered the Irish courts to have full regard to the 1950 Convention, and to the case law of the ECtHR, the 2003 Act involved domestic incorporation of the Convention at what has been described as a “sub-constitutional” level. This means that, while the courts are empowered to make a “declaration of incompatibility”, that is, that a provision of Irish legislation is in breach of a right contained in the ECHR, this does not alter or affect the validity of the law as a matter of domestic law. Therefore, even after a declaration of incompatibility under the 2003 Act, it still remains a matter for the Oireachtas to determine whether to amend the legislation in question.
- [2.28] The two High Court decisions in *Foy v An tArd-Chláraitheoir*¹² illustrate that, since the enactment of the 2003 Act, the ECHR and the case law of the ECtHR can have a significant effect on the outcome of an Irish court’s decision. This involves an important break from the analysis of the Supreme Court in the *Ó Laighléis* and *Norris* cases. In 2002, the applicant in *Foy*, who had transitioned from male to female, sought an order of the High Court correcting the record of her gender in the register of births from male to female. She argued that, if no such finding were attainable, the legal regime for the registration of births infringed her constitutional rights to privacy, dignity and equality. In *Foy v An tArd-Chláraitheoir*¹³ the High Court refused the reliefs sought and found no breach of the Constitution. Two days later, the ECtHR held, in *Goodwin v United Kingdom*¹⁴ and reaffirmed this in 2003 in *I v United Kingdom*,¹⁵ that the UK system for the registration of births, which was, broadly speaking, comparable to the Irish system that existed at that time, failed to respect a person’s rights to privacy under Article 8 of the ECHR. The ECtHR also held that the interference in those rights was disproportionate. The first decision of the High Court in the *Foy* case was appealed to the Supreme Court, and, following the enactment of the 2003 Act, the Court returned the case to the High Court so that the ECHR issues could be addressed.
- [2.29] The High Court, in *Foy v An tArd-Chláraitheoir (No 2)*,¹⁶ took full account of the decisions of the ECtHR in the *Goodwin* and *I* cases. The Court accordingly granted a declaration of incompatibility under the 2003 Act in the applicant’s favour

¹² *Foy v An tArd-Chláraitheoir* [2002] IEHC 116 and *Foy v An tArd-Chláraitheoir (No 2)* [2007] IEHC 470.

¹³ *Foy v An tArd-Chláraitheoir* [2002] IEHC 116.

¹⁴ *Goodwin v United Kingdom* (2002) 35 EHRR 447.

¹⁵ *I v United Kingdom* (2003) 36 EHRR 53.

¹⁶ *Foy v An tArd-Chláraitheoir (No 2)* [2007] IEHC 470.

concerning the system for the registration of births in Ireland. While the second High Court decision in *Foy* involved some improvement for applicants, in the sense that ECtHR decisions can now be cited and relied on in Irish courts under the 2003 Act, it remains the position that the Oireachtas must still enact legislation to resolve any conflict between national and international law. On the issue of gender recognition, the required legislation, the *Gender Recognition Act 2015*, was enacted eight years after the second High Court decision in *Foy*.

- [2.30] While the 2003 Act thus involves some improvement on the pre-2003 position, it remains true that, from a practical point of view, the Oireachtas retains ultimate control of the decision as to whether international obligations form part of our domestic law. That is the clear consequence of the dualist approach in Article 29 of the Constitution.

(e) Contrast between declaration of incompatibility under 2003 Act and declaration of unconstitutionality, including suspended declaration

- [2.31] A declaration of incompatibility under 2003 Act may be contrasted with a declaration of unconstitutionality, which involves a declaration that the law is invalid and cannot any longer be enforced. An example of this is provided by the Supreme Court decision in *The State (Gilliland) v Governor of Mountjoy Prison*.¹⁷ The case is discussed in more detail below in the context of the requirement under Article 29.5.2° that any international agreement that involves “a charge upon public funds” is not binding on the State unless it is approved by Dáil Éireann. In the *Gilliland* case, the Supreme Court declared unconstitutional the *Extradition Act 1965 (Part II) (No 20) Order 1984*,¹⁸ which had attempted to implement a 1983 Ireland-US extradition treaty. Because the 1983 treaty involved a charge on public funds but had not been laid before Dáil Éireann under Article 29.5.2°, the 1984 Order was unconstitutional.
- [2.32] The effect of the declaration of unconstitutionality was that no extradition could occur under the 1983 treaty. The 1983 treaty was subsequently laid before, and approved by, Dáil Éireann under Article 29.5.2°, and the *Extradition Act 1965 (Part II) (No 22) Order 1987*¹⁹ then provided the statutory basis on which extradition requests under the 1983 treaty could recommence.
- [2.33] The *Gilliland* case is an example of where the State could address the unconstitutionality at issue. There are many instances in which a declaration of unconstitutionality means that the State cannot “mend” the defect or re-enact the

¹⁷ [1986] IESC 3, [1987] IR 201.

¹⁸ (SI No 300 of 1984).

¹⁹ (SI No 33 of 1987).

same law. For example, in 1975, in *de Búrca v Attorney General*,²⁰ the Supreme Court declared unconstitutional the provisions of the *Juries Act 1927* which limited jury panels to property owners, and which in effect prevented women from being selected for jury service. It would not have been possible (in the absence of a constitutional amendment) for the Oireachtas to enact new legislation containing those restrictions, and the *Juries Act 1976* provided that, in general, men and women who are qualified to vote in a general election are also qualified to sit on juries.²¹

- [2.34] In some strictly limited instances, the courts have suspended the operation of a declaration of unconstitutionality in order to allow the State some time to enact legislation, where this is possible to remove the defect in the law. However, this is very different from a declaration of incompatibility under the 2003 Act because the court retains jurisdiction in the case and will make the declaration of unconstitutionality once the limited time given to the State has passed.
- [2.35] For example, in *NVH v Minister for Justice and Equality*,²² the Supreme Court held that the complete legislative ban on asylum seekers accessing the labour market while awaiting the determination of their asylum claims, in section 9(4) of the *Refugee Act 1996* and section 16(3)(b) of the *International Protection Act 2015*, was “in principle” unconstitutional. The Court allowed the State six months to rectify this position, and at that stage then made declarations of unconstitutionality in respect of section 9(4) of the 1996 Act and section 16(3)(b) of the 2015 Act.
- [2.36] A statutory right to apply for a work permit while awaiting the determination of asylum claims was shortly afterwards introduced in the *European Communities (Reception Conditions) Regulations 2018*²³, which implemented Directive 2013/33/EU, the 2003 EU (Recast) Directive on Reception Conditions. Ireland, along with the United Kingdom and Denmark, had initially chosen to opt-out of the 2013 Directive, using the Opt-Out Protocol concerning Justice and Home Affairs. Following the decision in the *NVH* case, the Government decided to opt in to the 2013 Directive, which required the approval of both Houses of the Oireachtas: see the discussion of Article 29.4.5°-7° of the Constitution in Part 4, below, which discusses the effect of EU law on Irish law.

²⁰ [1976] IR 38.

²¹ The Commission, in its *Report on Jury Service* (LRC 107-2013), reviewed the jury qualification provisions of the 1976 Act and made recommendations for reform. At the time of writing (August 2020), these recommendations are under consideration by a Working Group on Juries, established by the Department of Justice and Equality in April 2018.

²² [2017] IESC 35, [2017] IESC 82, [2018] 1 IR 246.

²³ (SI No 230 of 2018),

3. Laying ratified international agreements before Dáil Éireann and Ireland's ratification practice

[2.37] As noted in the Commission's 2018 *Draft Inventory of International Agreements Entered Into by the State*,²⁴ the State has, in one form or another, given approval to the implementation in Irish law of more than 1,000 international agreements. The Commission now turns to discuss the procedure at national and international level involved in this.

(b) All ratified international agreements are, in practice, laid before Dáil Éireann

[2.38] Article 29.5 of the Constitution contains the following three elements:

- Article 29.5.1°: any international agreement to which the State becomes a party must be laid before Dáil Éireann (except one of a technical and administrative character: see Article 29.5.3°, below);
- Article 29.5.2°: if any international agreement involves "a charge upon public funds", it is not binding on the State unless it is approved by Dáil Éireann; and
- Article 29.5.3°: any international agreement of a technical and administrative character need not be laid before Dáil Éireann.

[2.39] The long-standing practice of the Department of Foreign Affairs and Trade²⁵ is that all international agreements and conventions are laid before Dáil Éireann, including those of a technical and administrative character. This practice is connected with the difficulty, discussed below, of defining with precision what falls into the category of technical and administrative agreements.

[2.40] A useful case study on this difficulty concerns the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. In its 1995 *Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*,²⁶ the Commission recommended that the State should ratify the 1961 Convention. The Commission also considered whether the Convention was of a "technical and administrative character" under Article 29.5.3°. The Commission noted that this term had not been considered by the courts, but suggested that:

²⁴ *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018).

²⁵ See Fennelly, *International Law in the Irish Legal System* (Round Hall 2014), para 2.27.

²⁶ *Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* (LRC 48-1995).

*"Technical probably pertains to what is purely formal and specialised and without general substantive effect, and administrative to what is organisational or managerial and which does not seek to alter the resulting substantive effects."*²⁷

- [2.41] The Commission concluded that the 1961 Convention met both these tests, and that, if the State ratified it, it would therefore not need to be laid before Dáil Éireann because it fell within Article 29.5.3°.²⁸
- [2.42] The 1996 *Report of the Constitution Review Group* accepted that it is not easy to identify the scope of agreements of a technical and administrative character under Article 29.5.3°. The 1996 Report also noted the Commission's conclusion in its 1995 Report as to the status of the 1961 Convention. The 1996 Report commented:

*"The wording [in Article 29.5.3°] is considered by the Review Group to be uncertain in the sense that it is not readily ascertainable what criteria are, or should be, applied to identify agreements as technical and administrative and so escape the control otherwise required of Article 29.5.1° and 2°. An example is supplied in the Law Reform Commission report on *The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* [LRC 48-1995]. It expresses the view that this Convention is an agreement of a technical and administrative character – although this is arguable."*²⁹

- [2.43] The Constitution Review Group recommended that Article 29.5.3° should be amended so that the laying requirement in Article 29.5.2° would apply to technical and administrative agreements where they involve a charge upon public funds, with the consequence that they should require prior Dáil approval.³⁰
- [2.44] The entire 1996 Report of the Constitution Review Group was then referred to an All-Party Oireachtas Committee on the Constitution, which published ten Progress Reports between 1997 and 2006. That Committee's *Eighth Progress Report*, published in 2003, examined the provisions of the Constitution dealing with the

²⁷ *Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* (LRC 48-1995), at para 8.4. Italics in original.

²⁸ *Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* (LRC 48-1995) at paras 8.5-8.6.

²⁹ *Report of the Constitution Review Group* (Stationery Office 1996) at page 118.

³⁰ *Ibid* at page 119.

Government, including Article 29. The Committee concluded that the proposal in the 1996 Review was “unsatisfactory and overcomplicated” and instead recommended “the simple deletion of Article 29.5.3°.”³¹

- [2.45] The Commission is inclined to agree with the views expressed by the Constitution Review Group in 1996 that the correct meaning of Article 29.5.3° is difficult to identify with any precision, and that it is probably “arguable” one way or the other whether the 1961 Hague Convention falls within or outside its scope. The Commission is also inclined to agree with the view of the All-Party Oireachtas Committee that it may be preferable to simply delete Article 29.5.3°.
- [2.46] Given that no proposal has been put forward to either amend, or delete, Article 29.5.3° the Commission fully supports the Department of Foreign Affairs and Trade’s practice of laying all ratified international agreements before Dáil Éireann. This practice has the great benefit of providing the Oireachtas with the opportunity to be aware comprehensively of the number and extent of our international obligations. As noted in the Commission’s 2018 *Draft Inventory of International Agreements Entered into by the State*,³² this amounts to over 1,400 international agreements.

(c) Agreements involving a charge on public funds must be approved by Dáil Éireann: case study of Ireland’s international extradition arrangements

- [2.47] As already noted, Article 29.5.1° provides that ratified international agreements must be laid before Dáil Éireann, while Article 29.5.2° provides that if any international agreement involves “a charge upon public funds”, it is not binding on the State unless it is approved by Dáil Éireann. The vital nature of the distinction between, on the one hand, laying the agreement before Dáil Éireann and, on the other hand, having an agreement approved by Dáil Éireann, can be illustrated by the outcome of an extradition case, *The State (Gilliland) v Governor of Mountjoy Prison*.³³
- [2.48] The *Gilliland* case concerned a 1983 bilateral extradition treaty between Ireland and the United States, the first bilateral treaty that the State had entered into with another state, other than a European state. It appeared that the 1983 extradition treaty had been incorporated into Irish law by the *Extradition Act 1965 (Part II) (No*

³¹ All-Party Oireachtas Committee on the Constitution, *Eighth Progress Report* (2003), page 35, available in the digital archive of Documents Laid on the Oireachtas website, <www.oireachtas.ie> accessed on 27 August 2020.

³² *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018): see paragraph 1.171, above.

³³ [1986] IESC 3, [1987] IR 201.

20) *Order 1984*,³⁴ which included the text of the 1983 treaty and which provided that Part II of the *Extradition Act 1965* was to apply to a US extradition request under the 1983 treaty. Copies of the 1984 Order, which as noted included the text of the treaty, were laid before both Houses of the Oireachtas on 20 November 1984. In the *Gilliland* case, this was described as having laid the treaty before Dáil Éireann under Article 29.5.1°, although it could also be described as the process of laying an Order made under the 1965 Act before both Houses of the Oireachtas, as required by section 4 of the 1965 Act (which provides for the “negative annulment” procedure, that is, that such an Order remains valid unless annulled by vote of either House). Regardless of how this process might be described, it was agreed that the 1983 treaty had not been approved by Dáil Éireann under Article 29.5.2°.

- [2.49] The US authorities applied under the 1983 extradition treaty to have the applicant extradited to the US. The applicant challenged the extradition request on a number of grounds. For the purposes of this Discussion Paper, the key issue he raised was that the 1983 extradition treaty involved a charge on public funds within the meaning of Article 29.5.2° and that, because it had not been approved by Dáil Éireann under Article 29.5.2°, it had not been validly incorporated into Irish law and that the 1984 Order was therefore also unconstitutional and invalid.
- [2.50] In the *Gilliland* case, the Supreme Court held that “incidental or consequential expenses” that may arise from the State complying with an international agreement would not bring the agreement within the requirements of Article 29.5.2°. For example, the Court held that the requirement in the 1983 extradition treaty that the Attorney General must provide for the representation of the interests of the US in any extradition proceedings did not involve a charge on public funds because it “imposes instead an obligation on a constitutional officer, namely, the Attorney General, to advise and assist and represent or provide for the representation of the interests of the United States in connection with extradition.”³⁵
- [2.51] The Supreme Court took a different view of the requirements in the 1983 extradition treaty that provided that Ireland would bear all costs: (a) of translating documents, (b) of the transport of the person sought in the extradition request, (c) of expenses arising from the extradition request and (d) arising from any related extradition proceedings. The Supreme Court held that these provisions involved “a charge upon public funds” within the meaning of Article 29.5.2° of the Constitution because they involved “entering into a commitment to the United States of America to bear certain expenses”, and the Court noted in particular that the State’s obligation to bear the costs of extradition proceedings amounted to an indemnity

³⁴ (SI No 300 of 1984).

³⁵ [1986] IESC 3, [1987] IR 201 at 237.

"which, were it not for that provision, could presumably be claimed against the United States."³⁶

- [2.52] For those reasons, the Supreme Court concluded that the 1983 treaty should have been not only laid before Dáil Éireann under Article 29.5.1° but should also have been approved by Dáil Éireann under Article 29.5.2°. Because it had not been approved by Dáil Éireann, the State was, under Irish law, not bound by the 1983 treaty. The Supreme Court also held that the *Extradition Act 1965 (Part II) (No 20) Order 1984*³⁷ was unconstitutional because of the failure to comply with Article 29.5.2° and was therefore invalid. The result was that there were no valid extradition proceedings before the Irish courts, and the extradition application was therefore refused.
- [2.53] The *Gilliland* case provides a useful distinction between those international agreements that must be merely "laid before" Dáil Éireann under Article 29.5.1° and those that require positive approval by Dáil Éireann under Article 29.5.2°. While the distinction between "incidental or consequential expenses" and a "charge on public funds" may appear to be a fine one, the decision provides useful guidance.
- [2.54] The outcome of the *Gilliland* case underlines a specific aspect of the dualist nature of Article 29. From the domestic law perspective, although the 1983 extradition treaty had been formally signed in 1983 on behalf of both the Irish and US Governments, and that the Irish Government had formally decided in 1984 to ratify it, it had no effect in Irish law, and therefore no extradition could take place between Ireland and the US. From the international, state-to-state perspective of dualism, this raised the kind of conflict, or embarrassment, that Maguire CJ referred to in the *Ó Laighléis* case, especially having regard to the especially friendly relations between Ireland and the US. At that state-to-state level, the US Government would be entitled to rely on the Irish Government's decision in 1984 to ratify the 1983 treaty, and it would not need to inquire as to whether all of the domestic procedural steps had been properly followed.³⁸ This is summarised in the international law (and, indeed, commercial law) principle *pacta sunt servanda* (literally, "agreements must be complied with"), under which the US Government would expect that the treaty would be implemented by the Irish authorities.
- [2.55] Given the good relations between Ireland and the US, the Government moved quickly to remedy the problem identified in the *Gilliland* case. This involved two key steps. First, the Government laid the 1983 treaty before Dáil Éireann and brought a

³⁶ [1986] IESC 3, [1987] IR 201, at 237.

³⁷ (SI No 300 of 1984).

³⁸ See the decision of the League of Nations Permanent Court of International Justice (PCIJ) in *Legal Status of Eastern Greenland (Denmark v Norway)* (1933) PCIJ Rep Series A/B No 53.

motion seeking its approval under Article 29.5.2°, which was given on 25 November 1986.³⁹ The 1983 treaty then became part of the Irish Treaty Series (ITS No 3 of 1987). The second step was that a new Order was made under the *Extradition Act 1965* to provide that Part II of the 1965 Act was to apply to an extradition request under the 1983 treaty. This was done by the *Extradition Act 1965 (Part II) (No 22) Order 1987*⁴⁰ which contained in its preamble a specific reference to the approval of the 1983 treaty by Dáil Éireann on 25 November 1986 (which the 1984 Order did not), and it also appended the text of the 1983 treaty (which the 1984 Order had). As a result of these steps, extradition requests under the 1983 treaty recommenced.⁴¹

- [2.56] It is worth noting that the question of extradition between Ireland and the US is now also affected by the State's membership of the European Union (EU), which is discussed in Part 4 below. The EU has competence to enter into agreements, in effect treaties, including extradition agreements, on behalf of the EU member states with other countries, including the US. In 2003, the EU and the US entered into an extradition agreement, which provides for enhanced cooperation between EU member states and the US where an EU member state already has an extradition arrangement with the US. The terms of the 2003 US-EU Extradition Agreement were approved by Dáil Éireann and Seanad Éireann on 16 October 2008.
- [2.57] Article 3(2) of the 2003 US-EU Extradition Agreement in turn contemplated that an "Instrument" would be agreed between the US and each EU member State to provide for such enhanced cooperation, and such an Instrument was signed between Ireland and the US in 2005, which was, in turn, approved by Dáil Éireann by resolution passed on 21 October 2008. On 11 August 2009 and 12 August 2009, in accordance with Article 5(a) of the 2005 Instrument, Ireland and the US

³⁹ Vol.370 *Dáil Éireann Debates* (25 November 1986): Treaty on Extradition between Ireland and the United States: Motion, available at: <<https://www.oireachtas.ie/en/debates/debate/dail/1986-11-25/27/>> accessed on 25 August 2020.

⁴⁰ (SI No 33 of 1987).

⁴¹ The 1987 Order was revoked and replaced by the *Extradition Act 1965 (Application of Part II) Order 2000* (SI No 474 of 2000), which was in turn revoked by the *Extradition Act 1965 (Application of Part II) (Revocation) Order 2019* (SI No 372 of 2019). The 2019 Order was part of a major consolidation of the State's extradition arrangements. As noted below, the 1983 Ireland-US extradition treaty, as affected by the 2003 EU-US extradition treaty, is now implemented in the *Extradition (United States of America) Order 2019* (SI No 393 of 2019). A list of all Orders made under the 1965 Act, including those made in 2019, is contained in the preliminary notes to the Revised Act of the *Extradition Act 1965*, available on the Commission's website at <<http://revisedacts.lawreform.ie/eli/1965/act/17/front/revised/en/html>> accessed on 25 August 2020.

exchanged notes that notified each other that their respective applicable internal procedures for the entry into force of the Instrument had been completed. This might be seen as a sensible fail-safe to avoid a repeat of the circumstances that arose in the *Gilliland* case. In October 2009, Council Decision 2009/820/CFSP approved the 2003 US-EU Extradition Agreement on behalf of the EU.

- [2.58] Finally, the *Extradition (United States of America) Order 2019*⁴² gave further effect in Irish law to the 1983 Ireland-US Extradition Treaty, as affected by the EU-US 2003 extradition agreement, and it included references to each of the implementing measures referred to above, including the resolutions in the Oireachtas, and it also set out the full text of the 2003 EU-US agreement and the 2005 instrument.
- [2.59] This is another example of how Ireland's engagement at the international level involves both the State's direct bilateral engagement with another state and also the added level of complexity arising from our membership of an international body, in this case the EU (the effect of which is further discussed in Part 4 of this chapter, below). In that respect, it mirrors the complexity that was evident in the discussion in chapter 1 of how our domestic law on intellectual property law has also been influenced by a diverse range of international organisations, which in turn influence the content of our laws and related economic policies.⁴³

(d) Dáil Éireann Standing Orders on international agreements: case study on approval of air services agreements between Ireland and Egypt and the United Arab Emirates

- [2.60] The detailed arrangements concerning how Dáil Éireann approves an international agreement under Article 29 are set out in the Standing Orders of Dáil Éireann.⁴⁴ Standing Order 187 deals specifically with the approval of international agreements involving a charge on public funds:

“(1) Where approval by the Dáil of the terms of any international agreement involving a charge upon public

⁴² (SI No 393 of 2019).

⁴³ See for example the discussion in paragraphs 1.131-1.152, above, of the developments in the second half of the 20th century and first two decades of the 21st century of Ireland's intellectual property (IP) law. These have included, initially, implementation of 19th century Conventions, followed by UN-derived WIPO Conventions and EU-derived obligations, which have interacted with national policy that places the reform of IP law in the context of the need for Ireland to remain competitive in a globalised digital era.

⁴⁴ The Commission has had the benefit of the informal consolidation of the Standing Orders of Dáil Éireann of 2016, updated to January 2019, available at <https://data.oireachtas.ie/ie/oireachtas/parliamentaryBusiness/standingOrders/dail/2019/2019-01-11_consolidated-dail-eireann-standing-orders-january-2019_en.pdf> accessed on 25 August 2020.

funds is required, a motion to that effect may be made by a member of the Government or Minister of State.

(2) Subject always to the requirement of Article 29.5.2° of the Constitution, nothing in this Standing Order shall preclude the referral of a proposal contained in any such motion to a Select Committee for its consideration."

[2.61] Order 187(2) is linked to Standing Order 84A, which deals with the functions of Departmental Select Committees. Standing Order 84A(3)(b) provides that a Select Committee shall consider any motion referred to it, including any motion referred to it under Standing Order 187(2). Bearing in mind the exceptionally broad range of international agreements to which the State is party, Dáil Éireann has considered agreements and treaties of a relatively narrow nature, such as on extradition arrangements or air traffic agreements, as well as exceptionally broad human rights treaties.

[2.62] Once the Government has approved the ratification of an international agreement, either the Minister for Foreign Affairs and Trade or the relevant line Minister will prepare a motion of approval and present it to Dáil Éireann. In the case of an agreement involving a charge on public funds, this is usually formulated as:

"That Dáil Éireann approves under Article 29.5.2° of the Constitution the terms of [name of agreement] ... copies of the agreement were laid before Dáil Éireann on [date]".

[2.63] As noted, under Standing Order 187(2) the Dáil may decide to refer the agreement to a Departmental Select Committee for its consideration under Standing Order 84A(3)(b). Following this consideration, the Departmental Select Committee sends an opinion or report (referred to as "a message") to the Dáil in accordance with Standing Order 90.

[2.64] For example, on 3 July 2018, a motion on approving the terms of two air services agreements between Ireland and, respectively, the Arab Republic of Egypt and the United Arab Emirates was referred by Order of the Dáil to the Departmental Select Committee on Transport, Tourism and Sport. Under Standing Order 92, the Dáil requested that the Select Committee send a message to the Dáil not later than 12 July 2018 stating that it has completed its consideration of the motion. The Departmental Select Committee considered the motion on 11 July 2018, and noted

that a briefing document prepared by the Department of Transport, Tourism and Sport had been circulated in advance to members of the Committee.⁴⁵

- [2.65] The Select Committee completed its consideration of the motion that the Dáil approve the terms of the agreement and, in accordance with Standing Order 90, it sent the following message to the Dáil:

"The Select Committee on Transport, Tourism and Sport has completed its consideration of the following motion:

That the proposal that Dáil Éireann approves under Article 29.5.2 of the Constitution the terms of:

(i) the Air Services Agreement between the Government of the Arab Republic of Egypt and the Government of Ireland; and

(ii) the Agreement between the Government of Ireland and the Government of the United Arab Emirates for Air Services Between and Beyond their Respective Territories; copies of both agreements were laid before Dáil Éireann on 27th June, 2018, be referred to the Select Committee on Transport, Tourism and Sport, in accordance with Standing Order 84A(3)(b), which, not later than 12th July, 2018, shall send a message to the Dáil in the manner prescribed in Standing Order 90, and Standing Order 89(2) shall accordingly apply."⁴⁶

- [2.66] This report completed the formal steps required to comply with Article 29 of the Constitution. It is nonetheless worth noting that during the consideration of the motion the Minister for Transport, Tourism and Sport discussed the background to both agreements. He noted in this respect that they were both facilitative in that they were not necessary pre-conditions to air flights between Ireland and the two countries involved. The Minister also noted that the majority of international trade in goods and services was governed by international trade and investment

⁴⁵ Dáil Éireann (2018). Select Committee on Transport, Tourism and Sport debate - Wednesday, 11 Jul 2018. Air Services Agreements: Motion.

⁴⁶ Dáil Éireann (2018). Select Committee on Transport, Tourism and Sport debate - Wednesday, 11 Jul 2018. Message to Dáil. Available at <https://www.oireachtas.ie/en/debates/debate/select_committee_on_transport_tourism_and_sport/2018-07-11/3//> accessed on 25 August 2020.

agreements under the World Trade Organization (WTO) system, but that international air transport remained outside the WTO system and was instead governed by bilateral air services agreements negotiated between states within the framework of the 1944 Chicago Convention on International Civil Aviation, which had established the International Civil Aviation Organization (ICAO), now also a UN specialised agency. Ireland ratified the Chicago Convention in 1946 (ITS No 6 of 1946), and gave effect to it in Irish law in the *Air Navigation and Transport Act 1946*. As amended since 1944, the Annexes to the Chicago Convention include more than 12,000 international standards and recommended practices (SARPs), all of which have been agreed by consensus by ICAO's member states, which number over 190.

- [2.67] The Minister noted that international aviation agreements, including those under discussion by the Committee, generally followed a prescribed format and the two agreements were no different in that regard. Their main purpose was to provide for the reciprocal granting of air traffic rights to airlines from both countries to operate scheduled air services. The agreements also covered a list of other standard provisions to facilitate air services, such as those relating to aviation safety and security and the facilitation of passengers and cargo.
- [2.68] The Minister noted that Ireland and the United Arab Emirates (UAE) have had close cooperative relations for many years. The text of the Ireland-UAE air services agreement was initially agreed at official level in 1995, and was updated by a new agreement at a meeting in Dublin in December 2011. Both sides had agreed to apply them on an administrative basis, pending entry into force. The Minister also noted that the vast majority of air services in and out of Ireland were now governed either by the EU Single Aviation Market or by EU aviation agreements with third countries, such as the EU-US "Open Skies" agreement. However, a number of important new services still operated under national level agreements, such as the agreement with the UAE. The Minister also noted that, in terms of the services operating, the agreement with the UAE was one of Ireland's most important national level agreements, pointing out that the two largest UAE airlines, Emirates and Etihad, operated daily flights from Dublin to Dubai and Abu Dhabi. Etihad had begun services in 2007 and Emirates in 2012. Finally, the Minister noted that while there were no scheduled flights in 2018 between Ireland and Egypt, there were, from time to time, a certain level of holiday-related charter flights between Ireland and Egypt.

4. Ireland's ratification practice and the 1969 UN Vienna Convention on the Law of Treaties

- [2.69] Article 29.3 of the Constitution provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with

other States. Ireland's treaty practice is therefore guided by international sources of rules governing treaties. This includes customary international law and, notably, the 1969 UN Vienna Convention on the Law of Treaties (VCLT), which Ireland ratified in 2006 (ITS No 4 of 2006). The VCLT in effect codified customary international law in this area.⁴⁷ The VCLT formally applies to Ireland's treaty practice from 2006 onwards only, but because it codified established customary international law it is useful to refer to its provisions when describing Ireland's treaty practice both before and after 2006.

(a) Department of Foreign Affairs and Trade leads the Government's treaty making practice

- [2.70] Article 29.4.1° of the Constitution vests the State's treaty-making power in the Government. In practice, the Government ordinarily authorises the Minister for Foreign Affairs and Trade to sign or ratify, or to arrange for the signature or ratification of, a treaty. Where an international agreement is concerned with a particular policy area, the Minister and Department with lead responsibility for that area will, together with the Minister for Foreign Affairs and Trade, undertake the negotiations.⁴⁸
- [2.71] For example, the Minister for Justice and Equality has lead responsibility within Government for the law on domestic violence, and the Minister and Department was therefore involved with the Minister for Foreign Affairs and Trade, in implementation of the 2011 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, the Istanbul Convention.
- [2.72] The only exception to the involvement of the Minister for Foreign Affairs and Trade has been that, in the case of International Labour Organization (ILO) Conventions, authority to sign or ratify an ILO Convention was conferred exclusively on the Minister for Business, Enterprise and Innovation, who may also delegate that function to a Minister of State within the Department.⁴⁹ This practice may have arisen from the fact that the ILO was originally a League of Nations body,

⁴⁷ Fuller, *Biehler on International Law: An Irish Perspective* 2nd ed (Round Hall 2013), para 3.14; Fennelly, *International Law in the Irish Legal System* (Round Hall 2014) at para 2.05.

⁴⁸ Shea, "Ireland," in Gaebler and Shea (eds), *Sources of State Practice in International Law*, 2nd rev ed (Martinus Nijhoff 2014), page 278.

⁴⁹ See *Cabinet Handbook* (updated 2019), paragraph 3.6, available at <<https://www.gov.ie/en/publication/05c2e2-cabinet-handbook/>> accessed on 25 August 2020. See also Council of Europe Committee of Legal Advisors on Public International Law (CAHDI), *Expression of Consent by States to be Bound by a Treaty: Analytical Report and Country Reports* CAHDI (2000) 13 Final (23 January 2001), page 39, available at <<https://rm.coe.int/168004ad95>> accessed on 25 August 2020.

subsequently incorporated into the UN system. A consequential effect of this was that ILO Conventions were not, until 2015, included in the Irish Treaty Series. In 2015, the 2006 ILO Maritime Labour Convention (ITS No 8 of 2015) and the 2011 ILO Domestic Workers Convention (ITS No 11 of 2015), both of which Ireland ratified in 2014, were included in the Irish Treaty Series. The Commission has, for ease of reference, included all ILO Conventions in its *Draft Inventory of International Agreements Entered into by the State*.⁵⁰

- [2.73] The Department of Foreign Affairs and Trade is also responsible for coordinating consultations with other Governments on an international treaty, notably where a treaty is under negotiation at the international level. In this respect, Ireland has been actively engaged since it joined the UN in 1955 in proposing, signing and ratifying UN treaties on limiting the spread of nuclear weapons, including the 1968 UN Nuclear Non-Proliferation Treaty, which Ireland signed and ratified in 1968 (ITS No 8 of 1970). As noted in chapter 1, Ireland has continued to engage actively in arms control and disarmament issues, including with the adoption of the UN Convention on Cluster Munitions at an international conference in Dublin in 2008.⁵¹
- [2.74] Similarly, Ireland was actively engaged between 1973 and 1982 in the development of the 1982 UN Convention on the Law of the Sea (UNCLOS), including its provisions on the extent of a country's continental shelf, an issue of particular interest to Ireland in connection with the Rockall outcrop.⁵² Ireland ratified UNCLOS in 1996 (ITS No 1 of 1998).
- [2.75] Ireland also engaged actively over many years in the development of the 2006 UN Convention on the Rights of Persons with Disabilities (UNCRPD), which the State signed immediately on its being finalised. As discussed in chapter 3, below, and the Appendix, Ireland ratified the UNCRPD in 2018 (ITS No 5 of 2018).

(b) Authority to enter into treaty negotiations

- [2.76] It is important that those engaged in treaty negotiations for their State have full powers to do so. Article 7 of the VCLT provides that a person is considered as representing a State for the purposes of adopting or authenticating the text of a treaty, or for the purposes of expressing the consent of the State to be bound by a

⁵⁰ See the subject heading Employment and Labour in the *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018).

⁵¹ See paragraph 1.110, above, in the context of the wider discussion of Ireland's implementation of the 1949 UN Geneva Conventions on the law of war and international humanitarian law.

⁵² See Hayes and Kingston, "Ireland in International Law: The Pursuit of Sovereignty and Independence" in Kennedy, Tonra, Doyle and Dorr (eds), *Irish Foreign Policy* (Royal Irish Academy and Gill Education 2012), at page 80.

treaty, if he or she produces appropriate “full powers.” It also provides that certain individuals such as Heads of State, Heads of Government, Foreign Ministers, heads of diplomatic missions and accredited representatives, are deemed to represent their State, without having to produce “full powers.”⁵³ Article 2(1)(c) of the VCLT defines “full powers” as involving a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.

- [2.77] In Ireland, as noted the Department of Foreign Affairs and Trade is usually the lead Department for the State’s treaty practice and has full powers to do so. The Department therefore drafts any proposal concerning the signing or ratification of a treaty, which the Minister presents by way of a Memorandum to Government setting out the details of the agreement to the Cabinet.⁵⁴ Once the Cabinet has given its approval, the treaty can be signed or, as the case may be, ratified – provided that the requirements of Article 29 have been complied with.

(c) Adoption and authentication of treaty text

- [2.78] Article 9 of the VCLT provides that the adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up. It also provides that this may be done by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule. Article 10 of the VCLT provides that the text of a treaty is established as authentic and definitive either: (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up, or else (b) by the signature or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

(d) How a State agrees to a treaty: expressing consent to be bound

- [2.79] The VCLT refers to how an international agreement imposes obligations on a State, which is referred to as the State “expressing its consent to be bound.”⁵⁵ Article 11 of VCLT provides:

⁵³ See also the decision of the (League of Nations’) Permanent Court of International Justice (PCIJ) in *Legal Status of Eastern Greenland (Denmark v Norway)* (1933) PCIJ Rep Series A/B No 53.

⁵⁴ *Cabinet Handbook* (updated 2019), paragraph 3.6, and Appendix 1, paragraph 8. See also Chapter 3, below.

⁵⁵ See, for example, Corbett, “The Consent of States and the Sources of the Law of Nations” (1925) 6 *British Yearbook of International Law* 20.

"The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

- [2.80] While Article 11 suggests that signature of a treaty indicates that a State may be agreeing to be bound by an international agreement, in the case of Ireland's treaty practice a signature indicates that the State is expressing a general intent to be bound, but that this is conditional on ratification or accession. As discussed above, Article 29 of the Constitution requires that significant domestic steps must be taken before an international agreement can be regarded as part of Irish law. The consequences of non-compliance with Article 29 are clear from the outcome in *The State (Gilliland) v Governor of Mountjoy Prison*,⁵⁶ discussed above.
- [2.81] In any event, as Article 11 of the VCLT notes, consent to be bound is dependent on the means agreed between the parties. This is underlined by Article 12 of the VCLT, which provides that a signature signifies the consent of a State to be bound by a treaty if: (a) the treaty provides that signature shall have that effect, (b) it is otherwise established that the negotiating States were agreed that signature should have that effect or (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiations.
- [2.82] In light of the requirements of Article 29 of the Constitution, Ireland would never authorise its representatives to indicate that signature constitutes agreement to be bound. Indeed, other provisions of the VCLT, discussed below, note that individual treaties will provide for the specific methods of ratification or accession, often acknowledging that a State may have in place specific constitutional or statutory ratification or accession requirements.⁵⁷ In addition, as noted below, a State may, depending on the treaty itself, modify or exclude some provisions of the international agreement by depositing reservations to it.⁵⁸ The use, and effect, of reservations is discussed in chapter 3, below.

⁵⁶ [1986] IESC 3, [1987] IR 201.

⁵⁷ See Hinojal-Oyarbide and Rosenboom, "Treaty Formation, Managing the Process of Treaty Formation", in Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012), page 248.

⁵⁸ See, generally, Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) pages 257-303.

(e) State has absolute discretion to decide whether to ratify after signing a treaty, and cannot be compelled to ratify

- [2.83] The effect of the dualist approach in Article 29 of the Constitution is that the Government has, in effect, absolute discretion as to when to ratify an international agreement. Indeed, this is also the long-established position set out in the leading textbooks on international law.
- [2.84] This view was applied by the High Court (Blayney J) in *Hutchinson v Minister for Justice*.⁵⁹ The applicant was a British national who had been convicted of murder in the Central Criminal Court in 1980, and he was serving the mandatory sentence of life imprisonment in an Irish prison. His parents lived in England, and he wished to be transferred to a prison in England to serve the remainder of his sentence. In 1986, the Irish Government had signed the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, but at the time of the application in the *Hutchinson* case, Ireland had not ratified it.
- [2.85] The applicant applied to the High Court for an order of *mandamus* that would have compelled the State to ratify the 1983 Convention. The Court dismissed the application, and cited three leading authorities on international law in support of the view that the State has an absolute discretion as to whether to ratify an international agreement it has signed.⁶⁰
- [2.86] The first authority cited was Schwarzenberger, *A Manual of International Law* (6th ed, 1976), page 119, which stated:

“In the case of a treaty which is subject to ratification, this act, which is absolutely discretionary, makes the treaty definitely binding. Thus, until ratification, the signature of the treaty leaves the contracting states free to choose between acceptance and rejection of the text as it stands.”

- [2.87] The second authority cited in *Hutchinson* was *Oppenheim on International Law* (4th ed, 1928), vol 1, page 723, which stated:

“The fact upon which everyone agrees is that international law does in no case impose a duty of ratification upon a contracting party ... in practice ratification is given or withheld at discretion.”

⁵⁹ [1993] 3 IR 567.

⁶⁰ [1993] 3 IR 567, at 570.

- [2.88] The third authority cited was *O'Connell on International Law* (2nd ed, 1970), vol 1, page 222, which stated:

"Ratification has become discretionary except in those instances where the treaty is intended to come into force on signature."

- [2.89] Having regard to the first two authorities, Schwarzenberger and Oppenheim, the High Court held that there was no general principle of international law, including any principle based on the concept of good faith (as to which see Article 18 of the VCLT, discussed below), that required the State to take any steps towards ratifying a treaty such as the 1983 Council of Europe Convention on the Transfer of Sentenced Prisoners.
- [2.90] The High Court in *Hutchinson* also considered the comment in O'Connell that ratification is discretionary except where a treaty is intended to come into force on signature. The Court held that the 1983 Convention was not such a treaty, because Article 18(3) of the Convention expressly provided that it would come into force "in respect of any signatory state which subsequently expresses its consent to be bound by it." This clearly indicated that signature was a separate event from consent to be bound. For these reasons, the Court rejected the applicant's case.
- [2.91] We note that the 1983 Convention was subsequently ratified by Ireland on 31 July 1995 (ITS No 53 of 2007),⁶¹ which followed the enactment of the *Transfer of Sentenced Persons Act 1995* on 17 July 1995. In chapter 3, we discuss the reservation attached to the ratification of the 1983 Convention.⁶² The 1995 Act implemented the 1983 Convention, as supplemented by the 1987 Agreement on the Application among the Member States of the European Communities (now the European Union) of the 1983 Convention.
- [2.92] This is another example of the overlap between related international agreements, in this case involving an overlap between the Council of Europe and the European Union. It was also pointed out during the Oireachtas debates on the 1995 Act that ratification, and the operation in practice of the 1995 Act, was considered to be an element of the consolidation of the peace process⁶³ then underway in Northern

⁶¹ At one time, there were delays in registering ratified treaties in the Irish Treaty Series.

⁶² See paragraph 3.95, below.

⁶³ Vol. 144 *Seanad Éireann Debates* (7 July 1995) (*Transfer of Sentenced Persons Bill 1995: Second Stage*), available at <<https://www.oireachtas.ie/en/debates/debate/seanad/1995-07-07/6/>> accessed on 25 August 2020.

Ireland, which was ultimately to lead to the 1998 Belfast / Good Friday Agreements and the restoration of a devolved Northern Ireland Executive and Assembly.

(f) Where exchange of instruments indicates consent to be bound

- [2.93] Article 13 of the VCLT provides that the consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when: (a) the instruments provide that their exchange shall have that effect or (b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect. This applies in particular to bilateral treaties or agreements.

(g) Where ratification indicates consent to be bound

- [2.94] Article 14 of the VCLT provides that the consent of a State to be bound by a treaty is expressed by ratification when: (a) the treaty provides for such consent to be expressed by means of ratification, (b) it is otherwise established that the negotiating States were agreed that ratification should be required, (c) the representative of the State has signed the treaty subject to ratification or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation. Again, having regard to Article 29 of the Constitution, ratification is the principal means used by Ireland to indicate its consent to be bound by an international agreement.
- [2.95] As discussed in detail in chapter 3, below, Ireland's treaty practice is based on the approach that ratification occurs when the State has put in place many, though not necessarily all, of the domestic law requirements needed to comply with the obligations in an international agreement. In the case of complex human rights treaties that require a wide range of legislative reforms, this may mean a significant time lag between signing a treaty and its ratification. The advantages and disadvantages of this approach are discussed in chapter 3, below.
- [2.96] As noted above in the context of the process to address the problems thrown up by the *Gilliland* case, Dáil Éireann approval of an international agreement under Article 29 of the Constitution, such as an extradition treaty, can take the form of a formal motion followed by vote in favour of ratification. The Government then formally authorises the ratification, followed by the instrument of ratification (the document formally indicating consent to be bound) being executed under the seal and signature of the Minister for Foreign Affairs and Trade. In terms of domestic law requirements, in the case of the 1983 Ireland-US extradition treaty, this involved making a statutory Order (secondary legislation) made under the *Extradition Act 1965* (primary legislation). In other instances, an Act of the Oireachtas (primary legislation) may be required. This is usually the case concerning agreements involving Irish participation in international financial institutions, which

require Dáil Éireann's approval for payments out of the Exchequer's Central Fund to discharge the State's contribution to the relevant institution's fund.⁶⁴ In the case of an Act that gives effect to an international agreement, this will also involve the direct engagement of Seanad Éireann, the second, upper, House of the Oireachtas, as well as Dáil Éireann.

(h) Where accession indicates consent to be bound

- [2.97] Article 15 of the VCLT provides that the consent of a State to be bound by a treaty is expressed by accession when: (a) the treaty provides that such consent may be expressed by that State by means of accession, (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession or (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.
- [2.98] Accession is likely to occur where a State such as Ireland is agreeing to join in a treaty that is already in force, or is agreeing to join an organisation that is already established. For example, Ireland became a member state of the three European Communities, now the European Union through a Treaty of Accession.

(i) Exchange, deposit and notification formalities

- [2.99] Article 16 of the VCLT provides that, unless the treaty otherwise provides, instruments of ratification or accession establish the consent of a State to be bound by a treaty upon: (a) their exchange between the contracting States, (b) their deposit with the depositary or (c) their notification to the contracting States or to the depositary, if so agreed.

(j) Refraining from acts to defeat object of treaty pending ratification or accession

- [2.100] Article 18 of the VCLT provides that a State is obliged to refrain from acts that would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it makes its intention clear not to become a party to the treaty, or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. This is consistent with the concept that states will act in good faith with each other, comity between states.
- [2.101] In light of Article 29 of the Constitution, it is clear that, in Ireland's case, signature is almost always "subject to ratification" under Article 18 of the VCLT. At the same

⁶⁴ Fennelly, *International Law in the Irish Legal System* (Round Hall 2014), para 2.70.

time, it is equally the case that a decision by Ireland to sign a treaty indicates an intent to act in good faith, because it will have followed from a formal Government decision to sign. In the case of a newly-finalised international treaty, such as the 1982 UNCLOS and the 2006 UNCRPD, signing may also have followed from significant engagement by Irish representatives over a number of years in the drafting process leading to the finalisation of the treaty. In that respect, Ireland will have already expressed a commitment in principle to support the general thrust of the contents of the treaty.

- [2.102] It is highly likely, therefore, that the State will act in good faith to avoid any breach of Article 18 of the VCLT, even if the time lag between signature and ratification may be significant, in the case of UNCLOS 14 years, and in the case of UNCRPD 12 years. In each case, during the intervening years between signature and signing, the State will also have been involved in various monitoring and reporting requirements that arise from UN membership. These, together with the State's own monitoring mechanisms, have significant moral persuasive power, even if not legally enforceable as such.
- [2.103] It is nonetheless important to reiterate that, as discussed by the High Court (Blayney J) in *Hutchinson v Minister for Justice*,⁶⁵ the good faith principle does not affect the absolute discretion of a State to decline to ratify an international agreement it has signed.

(k) Signing or ratifying subject to reservations

- [2.104] Article 19 of the VCLT provides that a State may, when signing, ratifying or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty, (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made, or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.
- [2.105] By way of example and as noted in chapter 1,⁶⁶ until 2011 Ireland had entered a general reservation to the compulsory jurisdiction of the UN's International Court of Justice (ICJ). When this general reservation was removed in 2011, it was replaced with a much-modified reservation. The extent to which treaties provide for reservations, and Ireland's use of reservations, is discussed in detail in chapter 3, below.

⁶⁵ [1993] 3 IR 567: see paragraph 2.84 above.

⁶⁶ See paragraphs 1.155-1.162 above.

(l) Amending a treaty

- [2.106] Article 39 of the VCLT provides that a bilateral treaty may be amended by agreement between the parties. Article 40 of the VCLT provides for the following rules concerning the amendment of multilateral treaties. Article 40.2 provides that any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in: (a) the decision as to the action to be taken in regard to such proposal; and (b) the negotiation and conclusion of any agreement for the amendment of the treaty. Article 40.3 of the VCLT provides that every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

(m) Terminating a treaty

- [2.107] Article 54 of the VCLT provides that a treaty may be terminated either: (a) in accordance with the provisions of the treaty, or (b) at any time by consent of all the parties after consultation with the other contracting States.
- [2.108] Article 65.2 of the VCLT provides that if no party to the treaty raises an objection to the termination of a treaty, the termination usually becomes effective three months after the deposit of the last required instrument of acceptance of the termination of the treaty. Article 65.3 provides that if, however, objection has been raised by any other party, the parties must first attempt an agreed solution under Article 33 of the UN Charter. Article 66 provides that if agreement cannot be reached in this way within 12 months, any one of the parties may submit a request to the UN Secretary-General who will establish a panel of conciliators in accordance with the procedure set out in the Annex to the VCLT.
- [2.109] Termination of a treaty can occur because the contracting parties have agreed to replace the original treaty with a new treaty. For example, the 1931 International Convention for the Regulation of Whaling was terminated because it was superseded by the 1946 International Convention for the Regulation of Whaling 1946.⁶⁷ This type of termination is the equivalent of the repeal and replacement of domestic legislation. For example, the *Freedom of Information Act 1997*, as amended, was repealed and replaced by the *Freedom of Information Act 2014*.
- [2.110] Termination can also occur because a treaty has become obsolete in light of later overarching treaties. For example, many International Labour Organization (ILO) Conventions of the early 20th century that had prohibited women from working in certain occupations became obsolete towards the end of the 20th century in light of international treaties on employment equality. This type of termination, referred

⁶⁷ <<http://legal.un.org/avl/ha/icrw/icrw.html>> accessed on 25 August 2020.

to as denunciation, is the equivalent of repeal of domestic legislation without replacement.

5. Ireland, European Union law and the link to international law generally

[2.111] The general dualist approach reflected in Article 29 of the Constitution is subject to one key exception, the effect of Ireland's membership of the European Union, and the nature of European Union law.

(a) The "direct effect" of EU law in Irish law

[2.112] When Ireland joined what were then called the three European Communities in 1973, it was already well-established that the members of those Communities, now the European Union (EU), agreed to pool their sovereignty. In doing so, the laws that derived from that pooling were to take priority over domestic law: the concept of "direct effect" of EU law. This had been established in a series of decisions of the European Court of Justice, now called the Court of Justice of the European Union (CJEU). In *Van Gend en Loos v Nederlandse Administratie der Belastingen*⁶⁸ and *Costa v ENEL*⁶⁹ the CJEU held that EU law enjoys supremacy over and has direct effect in the domestic legal systems of EU Member States. And, significantly from Ireland's point of view, the CJEU had decided in 1970, in *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel*,⁷⁰ that national constitutional provisions could not prevent EU law from having legal force in domestic law. The effect of these decisions can be summarised as follows:

- in contrast with other international agreements and treaties, the treaties establishing the European Communities, now the European Union, had created a new system of law;
- in relation to the subjects covered by the EU Treaties, the member states had pooled their sovereign powers and transferred them to this new system of law;
- this new system of law had become an integral part of the domestic legal systems of the member states, it could be relied on in the courts of the member states and those courts were required to apply its rules;
- the law contained in and arising from the EU treaties may not be overridden by any domestic law of a member state, including the national

⁶⁸ Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁶⁹ Case 6/64, *Costa v ENEL* [1964] ECR 585.

⁷⁰ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

Constitutions of the member states, since this would call into question the legal basis of the EU, although this was tempered by respect for fundamental rights, including those within the constitutional traditions common to the member states.

(b) Article 29 was amended to reflect the “direct effect” of EU law in Irish law

[2.113] In agreeing to accede to the EU treaties, Ireland accepted this existing position. As a result, a referendum on membership was held in 1972, which involved amending Article 29 of the Constitution to provide that no provision of the Constitution could be invoked to prevent any laws enacted, acts done or measures adopted by the EU and its institutions from having the force of law in the State where these were “necessitated” by EU membership. Since 1972, a number of referendums have been held in connection with amending EU Treaties, which have in turn necessitated further amendments to Article 29.4 of the Constitution.

[2.114] The relevant EU-related provisions of Article 29.4.5° to Article 29.4.7° of the Constitution provide:

“5° The State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007 (“Treaty of Lisbon”), and may be a member of the European Union established by virtue of that Treaty.

6° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—

- i the said European Union or the European Atomic Energy Community, or institutions thereof,
- ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or
- iii bodies competent under the treaties referred to in this section,

from having the force of law in the State.

7° The State may exercise the options or discretions—

- i to which Article 20 of the Treaty on European Union relating to enhanced cooperation applies,
- ii under Protocol No. 19 on the Schengen acquis integrated into the framework of the European Union annexed to that treaty and to the Treaty on the Functioning of the European Union (formerly known as the Treaty establishing the European Community), and
- iii under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, so annexed, including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State,

but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.”

(c) General effect of EU law on Irish law

- [2.115] Since Ireland joined the EU in 1973, a significant body of EU law has become an integrated part of Irish law. This has derived primarily from two types of EU legislation authorised by the EU treaties, the EU Regulation and the EU Directive.
- [2.116] An EU Regulation is “directly applicable” in national law, that is, it “automatically” becomes part of national law in accordance with its terms. For example, Article 99 of the 2016 EU General Data Protection Regulation (EU) 2016/679 (GDPR) provided that it came into force in all EU member states on 25 May 2018. In principle, no further legal steps were necessary to enforce the provisions of the GDPR in an Irish court from 25 May 2018. In practice, some of the detailed provisions of the GDPR required domestic legislation, notably the details of the supervisory and regulatory powers to enforce its provisions. In Ireland’s case, this involved enacting the *Data Protection Act 2018*, which conferred regulatory powers on the Data Protection Commission. Reflecting the “directly applicable” nature of the GDPR, the 2018 Act does not contain the full text of the GDPR, including key definitions such as the meaning of the term “data”: this is found in Article 4 of the GDPR.
- [2.117] The EU Directive, by contrast, is not “directly effective” but it contains a series of legal rules that must be implemented in the EU member state from the date designated in the Directive itself. The precise form of implementing those legal rules is left to the member state, but they must be implemented. In 2016, the EU member states agreed a companion law to the GDPR, the EU Directive on Data Protection in Law Enforcement, Directive (EU) 2016/680, which specified that it must be implemented by 6 May 2018. The 2016 Directive was implemented in Part

6 of the *Data Protection Act 2018*. Because Part 6 of the 2018 Act implemented an EU Directive, it contains all relevant definitions from the 2016 Directive.

- [2.118] The legal obligations arising from EU law may also be implemented by Ministerial Regulations made under section 3 of the *European Communities Act 1972*. In *Browne v Ireland*,⁷¹ the Supreme Court held that the authority to create indictable offences must be clearly set out. In the *Browne* case, the Court held that a statutory ministerial Order made under the *Fisheries (Consolidation) Act 1959*, which had created an indictable offence in respect of fisheries offences within waters to which EU law applied, and also in respect of comparable offences on the high seas, was *ultra vires* the 1959 Act. The 1959 Act authorised the creation of an indictable offence by statutory Order provided this was to give effect to an EU law that applied in waters that fell within the remit of the EU. However, while the statutory Order had done this, and to that extent was therefore within the principles and policies set down by EU law, it had gone beyond those principles and policies by creating an indictable offence in respect of fishing offences not only within EU waters but on the high seas. On that basis, the 1959 Act did not contain sufficient policies and procedures on which the statutory Order could be based.
- [2.119] The Court in the *Browne* case also noted that a statutory Order to give effect to an EU law could have been made under section 3 of the *European Communities Act 1972*, but the Court pointed out that, as originally enacted, section 3 of the 1972 Act authorised the creation of summary offences only. The Supreme Court took this as a clear indication that the Oireachtas had at that time reserved the creation of indictable offences to Acts of the Oireachtas, primary legislation. In *Kennedy v Attorney General* the Supreme Court followed *Browne* and held that the Oireachtas had retained the power to create indictable offences, a position consistent with EU law, as the method of implementing EU law is a matter for each member state. The *European Communities Act 2007* was enacted in response, amending section 3 of the *European Communities Act 1972* to provide a process by which every regulation made under section 3(3) of the *European Communities Act 1972* that creates an indictable offence must be laid before the Houses of the Oireachtas as soon as it has been made. Deputies and Senators may seek to have the regulation annulled within 21 sitting days. The net result is that Regulations made under section 3 of the 1972 Act may now create indictable offences where this is required to give effect to EU law.

⁷¹ [2003] IESC 43, [2003] 3 IR 205. Similar issues arose in *Kennedy v Attorney General* [2005] IESC 36, [2007] 2 IR 45. See, generally, Fahey, "*Browne v Attorney General* and *Kennedy v Attorney General*: The Current State of the *Ultra Vires* Doctrine and the Necessitated Clause" (2005) 23 ILT 258.

- [2.120] The power of annulment in section 3A of the 1972 Act, as inserted by the 2007 Act, was used for the first time in 2018 when the *European Union (Common Fisheries Policy) (Point System) Regulations 2018*⁷² were annulled on foot of a motion to annul them and consequent vote on 29 May 2018 to annul them.⁷³ In *O’Sullivan v Sea Fisheries Protection Authority*,⁷⁴ the Supreme Court reaffirmed that it is sufficient for the purposes of the “principles and policies test” that Regulations made under section 3 of the 1972 Act involve the implementation of principles and policies contained in the relevant EU law being implemented.
- [2.121] The Acts and Regulations enacted and made since 1973 to implement EU law have had a wide-ranging impact on Irish law in the areas in which the EU has legal competence.
- [2.122] These include: agriculture and food law; the law on chemical safety, including pharmaceuticals and pesticides; company law; competition law; consumer protection law; customs duties; employment law, including equal access to employment and equal pay; environmental protection; exchange control and capital movements; intellectual property law; indirect taxation such as Value Added Tax; and international transport, notably liberalisation of air traffic.
- [2.123] The EU does not have competence in certain key areas of national law, notably: the general principles of civil liability (contract law and the law of tort, including liability for personal injuries), civil court procedure, the overwhelming majority of the content of criminal law and criminal procedure, education law, land law, and personal and corporate taxation. These remain matters of national competence, although as already noted in the examples given in chapter 1, and in this chapter, they are, at least in part, influenced by international agreements to which the State has agreed to be bound.

(d) Ireland’s Opt-Out and Opt-In under Protocol 21 of the EU Treaty: case study on 2013 EU Reception Conditions Directive, direct provision and general asylum and refugee policy

- [2.124] The general “direct effect” of EU law in the domestic law of member states is subject to a number of important exceptions that some member states, including Ireland, have agreed with the other states as part of the negotiations concerning the many treaties amending the governing treaties of the EU itself. These

⁷² (SI No 89 of 2018).

⁷³ See <<https://www.oireachtas.ie/en/debates/debate/dail/2018-05-29/5/>> accessed on 26 August 2020, and Byrne and Binchy (eds), *Annual Review of Irish Law 2018* (Round Hall Thomson Reuters 2019), pages 383 – 384.

⁷⁴ [2017] IESC 75, [2017] 3 IR 371: see the discussion in paragraph 3.147, below.

exemptions are sometimes referred to as “Opt-Outs”, and are often included as appendices, called Protocols, attached to the main text of an amending EU Treaty. Thus, many EU member states secured an Opt-Out from the requirement to introduce the single Euro currency under the 1992 Treaty on European Union, usually known as the Maastricht Treaty.

(i) *Protocol 21 Opt-Out*

- [2.125] Similarly, under Protocol 21 of the Treaty on European Union and the Treaty on the Functioning of the European Union,⁷⁵ Ireland obtained a flexible opt-out to any proposals concerning the area of freedom, security and justice. This opt-out was intended to protect certain fundamental characteristics of Irish law, especially the accusatorial and adversarial components of Irish criminal law and procedure. The opt-out is flexible in that Protocol 21 permits the State to opt-in to such an EU proposal at any stage, subject to the requirement in Article 29.4.7° that there must be prior approval of both Houses of the Oireachtas. It is notable that this requirement involves both Houses, rather than the position concerning an international agreement involving a charge on public funds which requires the approval of Dáil Éireann alone.

(ii) *Opting in to the 2013 Reception Conditions Directive under Protocol 21*

- [2.126] A case study on the operation of the opt-in under Protocol 21 occurred in January 2018 in connection with Directive 2013/33/EU, the 2013 EU Reception Conditions Directive. This opt-in occurred in the aftermath of *NVH v Minister for Justice and Equality*,⁷⁶ in which the Supreme Court held that the complete legislative ban on asylum seekers accessing the labour market (whether as employees or self-employed) while awaiting the determination of their asylum claims, in section 9(4) of the *Refugee Act 1996* and section 16(3)(b) of the *International Protection Act 2015*, was unconstitutional. As noted above, unusually, the Court allowed the State six months to rectify this position.
- [2.127] In the aftermath of the decision in the *NVH* case, the Government decided to respond with a more expansive approach, which took account of some initiatives it had taken since 2014 to reform the direct provision system, of which the ban on asylum seekers working formed an element. This included the 2015 *Report of the Working Group on Improvements to the Protection Process, including Direct Provision*

⁷⁵ The 2007 Treaty of Lisbon, referred to in Article 29.4.5° above, amended the 1992 Treaty on European Union. It also altered the title of the Treaty establishing the European Community (previously called the Treaty establishing the European Economic Community) to the Treaty on the Functioning of the European Union (TFEU). The Treaty of Lisbon came into force in 2009.

⁷⁶ [2017] IESC 35, [2017] IESC 82, [2018] 1 IR 246, discussed in paragraph 2.35, above.

and Supports to Asylum Seekers (the McMahon Report),⁷⁷ which had noted that Ireland had opted in under Protocol 21 to certain EU Directives in this area but not others.

- [2.128] The McMahon Report recommended that Ireland should align its refugee and asylum system more closely with EU norms and standards, including by opting in to the 2013 EU Reception Conditions Directive. In the aftermath of the *NVH* case, the Government decided to give effect to this recommendation in the McMahon Report and to exercise the opt-in to the 2013 Directive. It was noted at the time that this went beyond the issue of “labour market access” which had been the sole issue in the *NVH* case. The 2013 Directive also includes provisions on children’s rights, including rights for unaccompanied minors, as well as provisions on health care and education. Opting in to the 2013 Directive thus placed the provision of material reception conditions for applicants, which had until then been provided for under the executive system of direct provision, on a statutory basis and that this would also be underpinned by EU law for the first time.
- [2.129] The 2013 Directive was first laid before Dáil Éireann in November 2017 and was then referred to the Oireachtas Joint Committee on Justice and Equality, which considered it in January 2018. The motion to approve the Directive was then debated in Seanad Éireann on 23 January 2018 and later that same day in Dáil Éireann. The formal motion was:

“That Dáil Éireann approves the exercise by the State of the option or discretion under Protocol No. 21 on the position of the United Kingdom⁷⁸ and Ireland in respect of the area of freedom, security and justice annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, to accept the following measure:

⁷⁷ The Working Group was chaired by Mr Justice Bryan McMahon, former judge of the High Court. The Report is available at: <http://www.justice.ie/en/JELR/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf/Files/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf> accessed on 25 August 2020.

⁷⁸ At the time that Protocol 21 was agreed, the United Kingdom was a member state of the EU.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast),

a copy of which was laid before Dáil Éireann on 22nd November, 2017.”⁷⁹

- [2.130] The motion to approve the opt-in under Protocol 21 was approved by both Houses. It was noted during the debates on the motion that, once the approval of both Houses was given, the Government would send a formal notification letter to the European Council and the European Commission immediately, which would then trigger the four-month compliance procedure with the Commission under Protocol 21.
- [2.131] Returning to the *NVH* case, the Supreme Court granted the formal declarations of unconstitutionality in respect of section 9(4) of the 1996 Act and section 16(3)(b) of the 2015 Act in February 2018, after the motions had been passed but before the legislation providing for market access had been made. This was done in the form of the *European Communities (Reception Conditions) Regulations 2018*⁸⁰, which were made under section 3 of the *European Communities Act 1972*. The 2018 Regulations, as well as implementing the 2013 EU Directive, took account of the State’s existing employment permits system for non-EU (third country) nationals.
- [2.132] Indeed, the Supreme Court decision in the *NVH* case acknowledged that the Executive and the Oireachtas have the principal roles in setting the detailed parameters of these systems. Thus, the 2018 Regulations provide for access for eligible applicants by way of an immigration permission which exempts applicants from the employment permits system and any associated fee.

(iii) Wider context of asylum and refugee policy, direct provision reform proposals, the equality principle in international law and the UN 1951 Convention on Refugees

- [2.133] This case study on the use of the opt-in under Protocol 21 reflects, like many other examples referred to in this Discussion Paper, the complexity of the interweaving of international law, EU law, Irish constitutional law and national policy making. In this instance, it provides a glimpse into the many-faceted debate concerning how international obligations on asylum and refugee law have been implemented in practice. Thus, it is important to note that the McMahon Group, whose Report was

⁷⁹ Vol. 964 *Dáil Éireann Debates* (23 January 2018): Reception Conditions Directive: Motion, available at <<https://www.oireachtas.ie/ga/debates/debate/dail/2018-01-23/30/>> accessed on 25 August 2020.

⁸⁰ (SI No 230 of 2018).

published in 2015, was established by the Government after considerable debate, and criticism, as to whether the largely non-statutory direct provision system for asylum seekers and refugees fully met the State's international obligations. The terms of reference of the McMahon Group were limited to considering reform of the existing direct provision system, including issues such as labour market access. As noted above, the recommendations in the 2015 Report on labour market access had not been acted on prior to the decision of the Supreme Court in the *NVH* case. After the making of the 2018 Regulations, the wider questions concerning the direct provision system remained the subject of considerable ongoing debate.

- [2.134] As a result, in 2019 the Government established a follow-up group to the McMahon Group, namely, the Expert Group on the Provision of Support, Including Accommodation, to Persons in the International Protection Process. This Group, chaired by Dr Catherine Day, former Secretary General of the European Commission, was given a much broader remit than the McMahon Group, which allowed it to make recommendations for achieving the long term approach to support persons in the international protection process unconstrained by existing policies. In June 2020 the Group provided the Government with an interim Briefing Note, which identified measures that were described by the Minister for Justice and Equality as ones that "would immediately improve the situation of those currently in direct provision and signal that more far-reaching changes will be made."⁸¹
- [2.135] These significant measures reflect the influence of the non-discrimination clause in the 1951 UN Convention on the Status of Refugees, which Ireland ratified in 1956 (ITS No 8 of 1956) and whose provisions were, in part, implemented in the *Refugee Act 1996* and the *International Protection Act 2015*. It is important to note that when Ireland ratified the 1951 Convention in 1956, it entered a number of reservations to it, including reserving the capacity to limit access to the labour market for refugees consistently with the approach to other non-Irish citizens (aliens). We discuss in chapter 3, below, Ireland's treaty practice concerning reservations to international agreements.⁸² It is sufficient to note here that by

⁸¹ The measures identified in this June 2020 Briefing Note were: extending the right to work; exploration of alternative housing models and funding provisions; clear guidance with regard to ensuring all applicants can open bank accounts; reducing the amount of time taken to process positive decisions; ensuring binding standards for centres are applied and enforced by January 2021; compulsory training and regular networking for centre managers; moving away from the use of emergency accommodation; ensuring vulnerability assessments take place; and working with the Department of Transport, Tourism and Sport towards access to driving licences. See "Statement by Ministers Flanagan and Stanton regarding the Direct Provision system", available at: <http://www.justice.ie/en/JELR/Pages/PR20000105> accessed on 25 August 2020.

⁸² See paragraphs 3.47-3.95, below.

implementing the 2013 EU Reception Conditions Directive under the 2018 Regulations, the actual effect in practice of that reservation altered considerably.

- [2.136] As already noted,⁸³ there is no specific international treaty or convention that sets out a comprehensive list of the rights of individuals who are not citizens of a host State. However, the combined effect of the non-discrimination clauses in the 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination (ITS No 20 of 2001) and in the 1966 UN International Covenant on Civil and Political Rights (ITS No 9 of 1990) supports the view that the contexts in which different treatment may operate are to be narrowly applied.⁸⁴ It can be said that this “narrow application” test was at work in the McMahon Report and, in the wake of the *NVH* case, in the adoption of the 2013 EU Reception Conditions Directive. It could also be said to have influenced the more wide-ranging terms of reference given to the Day Group.
- [2.137] In June 2020, Dr Day also indicated that the Group intended to publish its Report in September 2020. The Programme for Government, *Our Shared Future*, adopted by the Cabinet in June 2020, includes further commitments concerning reform and the ultimate replacement of the current direct provision system within the wider context of asylum and refugee policy development.

(e) Effect in Irish law of EU becoming party to an international agreement

- [2.138] Article 21 of the Treaty on European Union (TEU) provides that the European Union (EU) as an organisation has competence to act on the international scene.⁸⁵ The details of its capacity to enter into international agreements is set out in the Treaty on the Functioning of the European Union (TFEU). The effect is that the EU is therefore limited to entering into international agreements that come within the scope of EU law.
- [2.139] Assuming the international agreement falls within the EU’s competence, Article 216(2) of the TFEU provides that international agreements ratified by the EU are an integral part of EU law and are “binding upon the institutions of the Union and on its Member States.” This is consistent with the general nature of EU law, discussed

⁸³ See the discussion of the equality principle in the context of the law on land ownership, succession and taxation as it applies to non-citizens in paragraph 1.88, above.

⁸⁴ See *The Rights of Non-citizens* (Office of the United Nations High Commissioner for Human Rights, 2006), available at <https://www.ohchr.org/Documents/Publications/noncitizensen.pdf> accessed on 27 August 2020.

⁸⁵ See generally Fennelly, *International Law in the Irish Legal System* (Round Hall Thomson Reuters, 2014), chapter 3.

above and amounts to incorporation of those international agreements into Irish law in so far as they also involve the need to interpret EU law.

(i) "Exclusive competence" and "mixed" EU international agreements

[2.140] Article 3 of the TFEU provides that the EU has "exclusive competence" to enter into international agreements in the following areas: (a) the EU customs union, (b) establishing competition rules necessary for the functioning of the internal market, (c) monetary policy for the Member States whose currency is the euro, (d) the conservation of marine biological resources under the common fisheries policy and (e) the common commercial policy. These agreements do not require the consent of any EU member state in the form of ratification or accession or other expression of consent to be bound.

[2.141] Article 216 of the TFEU provides for a second category of international agreement that the EU may also enter into, that is, when this is provided for in the TEU or the TFEU or in an EU legislative act, such as an EU Regulation or an EU Directive. This second category is referred to as the "mixed agreements" category, because this competence is shared with the member states. EU member states must give their consent to be bound by any mixed agreement. An example of this is in connection with extradition arrangements, discussed above.⁸⁶

(ii) Negotiating process for EU to conclude international agreement

[2.142] Article 218 of the TFEU describes the procedure for the conclusion by the EU of an international agreement. This involves the European Council of Ministers initiating a proposal to do so, which reflects the position in Irish law and many other states that the Government has authority in international relations. Article 218 also provides that the consent of the European Parliament must be obtained before the EU can conclude the ratification of or accession to certain international agreements, including an agreement "with important budgetary implications" for the EU, again echoing the provision in Article 29 of the Constitution requiring the consent of Dáil Éireann where an international agreement involves a "charge upon public funds."

[2.143] The process under Article 218 involves the following elements:

- the European Council (acting either by qualified majority or unanimity, depending on the subject matter) provides negotiating directives (usually referred to as the "mandate") to the European Commission (or other EU negotiator, such as the High Representative for Common Foreign and Security Policy);

⁸⁶ See paragraphs 2.56-2.59, above, discussing the overlap between the 1983 Ireland-US extradition treaty and the 2003 EU-US extradition agreement.

- the European Parliament must be informed immediately at all stages of the procedure;
- on a proposal from the EU negotiator, a Council Decision is required to authorise the EU to sign an international agreement, and a separate Council Decision is required if and when the EU negotiator proposes ratification; and
- the European Parliament is formally consulted on a proposal to conclude an agreement and, depending on the subject matter, must give its consent.

(iii) *CJEU Advisory Opinion 2/15 on EU-Singapore Free Trade Agreement*

[2.144] In total, the EU is party to over 1,200 international agreements, of which approximately three quarters, about 900, have been negotiated and approved by the EU on the basis of its exclusive competence under Article 3 of the TFEU. These exclusive competence agreements are concerned primarily with trade and investment, and for many years would have been confined to, for example, removal of customs duties and non-tariff barriers for trade in goods and services. These could be described as classic Free Trade Agreements (FTAs). In the first two decades of the 21st century, these FTAs have evolved into what are described as “new generation” FTAs, which now often include a range of important additional provisions on, for example, intellectual property protection, investment liberalisation, public procurement, competition, sustainable development, strengthening democracy, good governance and human rights.

[2.145] In view of the evolution of the EU’s competence in international relations, there have been considerable debates as to the precise boundaries between “exclusive competence” and “mixed” agreements. This has been especially the case in respect of “new generation” FTAs. When the European Commission concluded a “new generation” FTA with Singapore in 2015, it suggested that it had done so under the “exclusive competence” heading. This was disputed by many EU member states, and the matter was referred to the CJEU for an Advisory Opinion which, despite its title, is a binding decision of the CJEU.

[2.146] In 2017, in *Opinion 2/15 (EU-Singapore Free Trade Agreement)*,⁸⁷ the CJEU held that many aspects of the EU-Singapore FTA fell within the “exclusive competence” category, though a small number did not. The effect was that the FTA required ratification by all EU member states. The decision is nonetheless significant because the CJEU held that the following elements of the EU-Singapore FTA fell within the “exclusive competence” category:

⁸⁷ *Opinion 2/15 (EU-Singapore Free Trade Agreement)* ECLI:EU:C:2017:376 (judgment of 16 May 2017).

- the provisions on access to the EU market and the Singapore market concerning goods and services (including all transport services) and in the fields of public procurement and of energy generation from sustainable non-fossil sources;
- the provisions concerning protection of direct foreign investments of Singapore nationals in the EU (and vice versa);
- the provisions concerning intellectual property rights;
- the provisions designed to combat anti-competitive activity and to lay down a framework for concentrations, monopolies and subsidies;
- the provisions concerning sustainable development, the Court finding that the objective of sustainable development now forms an integral part of the Common Commercial Policy (CCP) of the EU and that the FTA was intended to make liberalisation of trade between the EU and Singapore subject to the condition that the parties comply with their international obligations concerning social protection of workers and environmental protection;
- the rules relating to exchange of information and to obligations governing notification, verification, cooperation, mediation, transparency and dispute settlement between the parties, unless those rules relate to the field of non-direct foreign investment.

[2.147] The decision of the CJEU thus confirmed that such wide-ranging “new generation” FTAs could come within the “exclusive competence” category. This may lead to the negotiation of more FTAs along those lines in the future. Nonetheless, it is important to note that the EU is a trans-national organisation with almost 30 member states, and that those members, acting through the European Council, have considerable control of the EU’s international treaty practice. This is evidenced by the intervention of the member states to secure an Advisory Opinion from the CJEU on the EU-Singapore FTA.

[2.148] There have been subsequent internal debates as to whether certain FTAs come within the “exclusive competence” or “mixed” categories. Notably, there was considerable debate about the status of the proposed EU-Canada Comprehensive Economic and Trade Agreement (CETA), an FTA that had been negotiated over a number of years between the European Commission and Canada. Many member states had challenged the European Commission’s view that the CETA was an “exclusive competence” FTA and, ultimately in 2016 the Commission agreed to propose its adoption as a “mixed” FTA.

[2.149] This therefore required ratification in all member states, which was successfully completed with the exception of Belgium which, as a federal state, required approval from the Regional Parliaments in both Wallonia and Flanders. The Wallonian assembly voted against the CETA in October 2016, which would have vetoed ratification by the EU. Later that month, however, the federal Belgian

Government reached agreement with Wallonia that allowed the EU to ratify the CETA. This difficulty with the CETA underlines the complexity of the EU's competence on the international level, and also reflects the continuing importance of the inter-governmental nature of the EU decision-making process.⁸⁸

- [2.150] In addition to the international agreements already mentioned, examples of international "mixed" and "exclusive competence" agreements entered into by both the EU and Ireland are set out below.

(f) EU law and international human rights treaties: the EU Charter of Fundamental Rights in Irish law

- [2.151] The EU is party to over 50 UN multilateral agreements and conventions. This includes the 2006 UN Convention on the Rights of Persons with Disabilities (UNCRPD). The EU has also ratified a number of Council of Europe Conventions, and is committed to ratifying the 1950 European Convention on Human Rights and Fundamental Freedoms (the ECHR). The ratification of the UNCRPD and of Council of Europe Conventions clearly fall within the "mixed competence" category of the EU's international treaty-making competence. This means, for example, that Ireland retains its independent authority under Article 29 of the Constitution to ratify those treaties.
- [2.152] In this area, as with many other aspects of international law in the 21st century, the picture is further complicated in respect of such "mixed competence" human rights conventions. This is because the EU member states agreed that the 2007 EU Treaty of Lisbon, which came into force in 2009, should incorporate into EU law the key features of UN and Council of Europe human rights conventions through the detailed provisions of the EU Charter of Fundamental Rights. As already noted, Article 29, as amended, approved Ireland's accession to the Treaty of Lisbon. The effect of this is that the EU Charter can be relied on in applying EU-derived law in Ireland, can be cited in Irish courts where an issue of EU law arises, in the national courts of other EU member states and in the Court of Justice of the European Union (CJEU).

(g) UN Convention on Climate Change, Kyoto Protocol and Paris Agreement

- [2.153] On environmental protection and climate action, an issue of mixed competence, the EU and Ireland have ratified the 1992 UN Framework Convention on Climate Change (UNFCCC) (ITS No 14 of 1994), the 1997 Protocol to the UNFCCC (the Kyoto Protocol) (ITS No 1 of 2005) and the 2015 Paris Agreement on Climate Action

⁸⁸ For a critique of the complexities involved, see Kleimann and Kübek, "The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15" (2018) 45(1) *Legal Issues of Economic Integration* 13.

(ITS No 20 of 2016). At EU level, ratification of these international agreements has led to the enactment of a wide range of EU legislative provisions, and these have been subsequently reflected in environmental protection and climate action legislation in Ireland.

- [2.154] Among the legislative initiatives agreed by EU member states have been binding annual greenhouse gas emission reduction targets by comparison with the reference year 1995, as agreed in the Kyoto Protocol and, later, the Paris Agreement. This has included Regulation (EU) 2018/842, the 2018 EU Effort Sharing Regulation, which sets binding annual greenhouse for the period 2021–2030. In addition, the EU member states have agreed a “European Green Deal”, under which all EEA states (which comprises all EU member states plus Iceland, Liechtenstein and Norway) aim to become climate-neutral by 2050.
- [2.155] The Programme for Government, *Our Shared Future*, adopted in June 2020, includes significant further commitments concerning environmental protection, biodiversity and climate action for the ten-year period from 2020 to 2030. This will necessarily lead to the enactment of further domestic legislation to reflect the international and EU requirements referred to.

(h) WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled

- [2.156] In chapter 1, we discussed the development of Ireland’s law on intellectual property during the 20th and early 21st centuries, which identified the complex interaction between international agreements, EU law and national policy and legislation on intellectual property law.⁸⁹ In the current context, the complexity within EU law was underlined by the process leading to the ratification of the 2013 WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the MVT).
- [2.157] As already noted, in *Opinion 2/15 (EU-Singapore Free Trade Agreement)*,⁹⁰ the CJEU held that the EU has exclusive competence in the area of intellectual property. The CJEU was also asked for an Advisory Opinion on the MVT, and although that request came after the request concerning the EU-Singapore FTA, the Court’s decision, *Opinion 3/15 (EU-Marrakesh Treaty)*,⁹¹ was given shortly before its decision in the EU-Singapore FTA case. In any event, the CJEU held that, as the

⁸⁹ See paragraphs 1.29–1.150.

⁹⁰ *Opinion 2/15 (EU-Singapore Free Trade Agreement)* ECLI:EU:C:2017:376 (judgment of 16 May 2017).

⁹¹ *Opinion 3/15 (EU-Marrakesh Treaty)* ECLI:EU:C:2017:114 (judgment of 14 February 2017).

Marrakesh Treaty involved intellectual property, it fell within the exclusive competence of the EU.

- [2.158] That, however, was not the end of the matter. This was because the EU had already ratified the 1996 WIPO Copyright Treaty, and had provided for its implementation through Directive 2001/29/EC, the 2001 EU Information Society Directive. The MVT was, in effect, a component of the 1996 WIPO Copyright Treaty, and the CJEU therefore held that the MVT had to be implemented within the existing EU legislative framework, namely, the 2001 EU Information Society Directive.⁹²
- [2.159] As a result, before the EU could formally ratify the MVT, it needed to put in place two EU legislative provisions to ensure effective implementation under EU law. The first was Regulation (EU) 2017/1563, which provided for a copyright exception that permits the cross-border exchange of accessible format copies of certain works and subject matter that are ordinarily protected by copyright and related rights between EU member states and third countries who are parties to the Marrakesh Treaty. The 2017 Regulation, because it has direct effect under EU law, came into effect in accordance with its own terms in October 2018. The second was Directive (EU) 2017/1564, which established a mandatory exception to copyright and related rights and which, as a Directive, required each member state to enact implementing domestic measures by 21 October 2018.
- [2.160] In 2018, the Department of Business, Enterprise and Innovation carried out a public consultation on the implementation of the 2017 Directive. Following this, the *European Union (Marrakesh Treaty) Regulations 2018* (SI No 412 of 2018) were made under section 3 of the *European Communities Act 1972*, which were signed on 9 October 2018 and came into effect on 11 October 2018, the final date specified in the 2017 Directive. The 2018 Regulations provide for the reproduction, communication to the public, distribution, lending and making available to the public of certain copyright protected works in formats designed to be accessible to the blind, visually impaired, or otherwise print-disabled, without the permission of the copyright holder. The 2018 Regulations also provide that copies of works made available in accessible formats (for example, braille, large print or audiobook) in one EU member state can be accessed throughout the EU without prior permission from copyright holders.

⁹² *Opinion 3/15 (EU-Marrakesh Treaty)* ECLI:EU:C:2017:114 (judgment of 14 February 2017), at para 112 of the judgment of the Court.

CHAPTER 3 HOW IRELAND RATIFIES AND IMPLEMENTS INTERNATIONAL AGREEMENTS

- [3.1] In this chapter, the Commission describes the general policy and the detailed legislative steps involved in Ireland's implementation of international agreements. As in chapter 2, the Commission refers where relevant to the provisions of the 1969 UN Vienna Convention on the Law of Treaties (VCLT), which Ireland ratified in 2006 (ITS No 4 of 2006).

1. Ratification usually, but not invariably, follows enactment of relevant domestic legislation

- [3.2] Ireland's usual, though not invariable, approach to being bound by a multilateral international treaty, such as a UN Treaty (whether a human rights treaty or a trade-related treaty such as a WIPO treaty on intellectual property) is that, firstly, the State will agree in principle to accept the contents of the international treaty by signing the treaty. Before Ireland agrees to be bound by the terms of the treaty, through ratification or accession, the Government (the Department of Foreign Affairs and Trade, or the Government Department with functional responsibility for the specific policy area) will, again usually but not invariably, carry out an audit of existing domestic legislation. This is to determine to what extent additional legislation is required to comply with the treaty's provisions. Assuming new legislation is required, the usual practice is that Ireland will not ratify the treaty until most, though not necessarily all, of the relevant domestic legislation has been enacted.
- [3.3] Article 26 of the VCLT, which has the subject heading *pacta sunt servanda* (literally, "agreements must be complied with"), provides that every treaty that has entered into force internationally is binding upon the parties to it and must be performed by them in good faith. We have discussed in chapter 2 examples of how Ireland has sought to comply with this good faith requirement. Thus, the Supreme Court decision in *The State (Gilliland) v Governor of Mountjoy Prison*¹ had the effect that the 1983 Ireland-US extradition treaty was not enforceable in Irish law, and the Government acted quickly to correct this by ensuring that all relevant legal steps identified in the *Gilliland* case were complied with.
- [3.4] In some instances, signing an international agreement indicates that the State sees a clear benefit in engaging with other countries as an independent, sovereign, state in its own right. This has included, for example, joining the League of Nations in 1923,

¹ [1986] IESC 3, [1987] IR 201: see paragraphs 2.47-2.59, above.

and then later signing and ratifying international treaties on a wide range of issues, including on trade, public health and human rights.

- [3.5] In light of the good faith requirement in Article 26 of the VCLT, even before an international agreement has been signed by the Government, there will already have been an exploration of the extent to which Irish law may need amendment in order to comply with the agreement. This exploration will become more pressing after signing, because the commitment in principle to ratify that this usually indicates will lead to some pressure to indicate a timeline for doing so. This has increasingly become the case because of Ireland's position as a State committed to engagement on the international stage.

(a) When human rights treaties, such as ICCPR, are already reflected in the Constitution

- [3.6] In the case of some of the major human rights treaties such as the 1966 UN International Covenant on Civil and Political Rights (ICCPR), which Ireland ratified in December 1989 (ITS No 9 of 1990), the provisions may, in places, be comparable to the high level statement of personal and fundamental rights already found in the Constitution of Ireland. Some provisions of the ICCPR may, therefore, be already part of Irish law, in the case of the Constitution, at the highest level of law in Ireland. For this reason, those provisions of the ICCPR may not formally be transposed into Irish law. In the Second Periodic Report by Ireland to the UN Human Rights Committee concerning the ICCPR, submitted in 1998, the State expressed that approach as follows:²

"15. The principles of dualism apply equally to human rights agreements such as the International Covenants and United Nations conventions as well as the European Convention on Human Rights and Fundamental Freedoms. Here, however, further considerations arise which make direct incorporation of such agreements into domestic law difficult to achieve. The provisions of the Covenant are, for the most part, of a type which one would expect to find already covered by the human rights provisions of a Constitution or a Bill of Rights, and such similar provisions are indeed contained in the Constitution of Ireland. Furthermore... the list of fundamental rights expressly protected by the Irish Constitution has been strengthened by the

² Second Periodic Report of Ireland to Human Rights Committee under Article 40 of ICCPR (September 1998), paras 15 and 16, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2f98%2f2&Lang=en > accessed on 25 August 2020).

development of the doctrine of unenumerated personal rights. Over the last 30 years the courts have recognized as many as 20 unenumerated personal rights, including the right to found a family, the right to travel and the right to have access to the courts. Thus, it would generally be inappropriate to make provision for fundamental rights by way of ordinary legislation which would be inferior and subject to existing constitutional provisions. It has also been argued that such a two-tiered approach would be ineffective. Either the provision in ordinary law differs from the fundamental norm, in which case it is ineffective to the extent that it differs, or it is the same, in which case it is superfluous.

16. Direct incorporation could, therefore, only be achieved by way of constitutional amendment. There are a number of reasons why this course has not been taken. Firstly, where existing constitutional guarantees already cover a particular area, it would be inappropriate to amend a constitution to insert a second parallel provision, and would be likely to prove either redundant or a source of potential confusion and even conflict. Such an amendment would also involve jettisoning 60 years of well-established and sophisticated jurisprudence built up around the existing constitutional provisions, addressing both the specified and unspecified rights protected thereunder. In this regard, a leading commentary on constitutional issues has stated that 'the overall impact of the courts on modern Irish life, in their handling of constitutional issues, has been beneficial, rational, progressive and fair.'³ Furthermore, the process of amending the Constitution is a difficult one and would be particularly difficult to justify where no substantive change in the law was being sought. Finally, while it might appear that to have constitutional provisions in the precise terminology of the Covenant would be legally advantageous, the risk would remain that the domestic tribunal would interpret a domestic provision, identical to one in the Covenant, in a different way to that of the Human Rights Committee. Taking all of these considerations into account, and given the advanced system of judicial review of

³ Citing Kelly, *The Irish Constitution* 2nd ed (Jurist Publishing 1994) at xcii. The most recent edition of this leading text is Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018).

legislation in Ireland, the solution of direct incorporation of the Covenant into Irish law has not, therefore, been adopted. It is considered preferable in the Irish context to build on and improve the existing fundamental rights provisions of the Constitution.”

- [3.7] As the 1998 Periodic Report itself pointed out, this approach is consistent with the dualist nature of the Irish legal system as set out in Article 29 of the Constitution, discussed in chapter 2, above. Thus, if the provisions in the Irish Constitution that resembled those in the ICCPR were to be replaced by those ICCPR provisions, the existing understanding of the constitutional provisions would be replaced by uncertainty, which would indeed be undesirable. In addition, there would be the risk of a potential conflict between the interpretation given by Irish courts to the incorporated ICCPR provisions and the interpretation by the UN Human Rights Committee established under the ICCPR itself.
- [3.8] While it may be unavoidable that, in some instances, the view of an Irish court on the application of constitutional rights may conflict with the view of an international human rights body, this conflict can be addressed at the international level, while respecting the internal constitutional arrangements within the State. This was, for example, the position discussed in chapter 2 in connection with the different views expressed by the Supreme Court in *Norris v Attorney General*⁴ and later the Council of Europe’s European Court of Human Rights in *Norris v Ireland*.⁵ This was ultimately resolved by the State with the enactment of the *Criminal Law (Sexual Offences) Act 1993*.⁶

(b) ICCPR led to constitutional amendment abolishing the death penalty and also the enactment of legislation, including on hate speech

- [3.9] It is worth noting that in view of the wide-ranging nature of the ICCPR, a Committee chaired by the Attorney General was formed to identify any areas of conflict between Irish law and the ICCPR. This examination led to a number of proposals, including the enactment of legislation to abolish the death penalty. This was also required by a Protocol to the Council of Europe 1950 Convention on Fundamental Rights and Freedoms (ECHR). No death penalty had, in fact, been carried out in Ireland since the early 1950s, and the *Criminal Justice Act 1990* removed it completely as a possible punishment. Nonetheless, the Constitution of 1937 retained some references to the death penalty, and it was considered important to remove those in order to copper-

⁴ *Norris v Attorney General* [1983] IESC 3, [1984] IR 36.

⁵ *Norris v Ireland* [1988] ECHR 22, (1988) 13 EHRR 186.

⁶ See the discussion in paragraph 2.22-2.25, above.

fasten its final removal from Irish law. This was achieved in a referendum on that subject in 2001. Nonetheless, it may also be the case that some aspect of the Constitution may ultimately require amendment to ensure compliance with a human rights treaty, such as the ICCPR.

- [3.10] The Attorney General's ICCPR Committee also recommended the enactment of legislation that did not require consequential amendments of the Constitution. An example of such consequential legislation enacted prior to ratification was the *Prohibition of Incitement to Hatred Act 1989*.⁷
- [3.11] The Attorney General's ICCPR Committee also formulated seven reservations that Ireland attached to the ratification of the ICCPR in December 1989. We discuss in Part 2, below, the general effect of reservations, and the detailed list of reservations made to the ICCPR, as well as other examples of Ireland's treaty practice on reservations. In the case of the ICCPR, some of the reservations attached to ratification in 1989 could be described as "holding clauses", pending the enactment of later reforming legislation that facilitated the subsequent withdrawal of four of the seven reservations.

(c) Ratification of international agreements is usually, though not invariably, postponed until domestic law has been reformed

- [3.12] As noted in chapter 2, Ireland's usual, though not invariable, practice is that, having signed an international agreement, ratification is postponed until domestic law is reformed to align it with the requirements of the international agreement. The rationale behind this approach has been explained on a number of occasions.
- [3.13] Thus, in 1962, when the *Geneva Conventions Act 1962*, which ensured ratification of the 1949 Geneva Conventions (discussed in chapter 1, above⁸) was being debated in the Oireachtas, the then Minister for External Affairs, Mr Aiken, stated:

"As members are aware, it is our long-established practice not to become a party to any international agreement unless we are in a position to enforce the provisions of the agreement. In the case of most international agreements there is no conflict with our law and we may, therefore, become parties without legislation. Sometimes, however, it is necessary either to change the provisions of our domestic legislation which are in conflict

⁷ It has since been pointed out by a number of bodies, including the Commission, that the 1989 Act is deficient in a number of respects and that it requires reform in the wider context of addressing more effectively hate speech. See the discussion in the *Report on Harmful Communications and Digital Safety* (LRC 116-2016), paragraphs 2.245-2.256.

⁸ See paragraphs 1.95-1.120, above.

with the terms of the international agreement or, as in the present case, to provide that our domestic legislation is properly equipped to enforce the provisions of the international agreement in question. There is, of course, no conflict between our domestic legislation and the provisions of the Geneva Conventions but we would not be in a position fully to enforce those provisions unless this legislation were passed.

This Bill [enacted as the *Geneva Conventions Act 1962*] is not intended to enact into our domestic law all the Articles of the [1949] Geneva Conventions—even though the Conventions are fully set out in the Schedules to the Bill. In fact, only those Articles of the Conventions which are specifically covered in the eight sections of the Bill are brought into our domestic law.”⁹

- [3.14] This approach remains the position under current Irish treaty practice. This is clear from the following more expansive discussion by the Department of Foreign Affairs and Trade:¹⁰

“In Irish treaty practice, the State must be in a position to meet the obligations it assumes under the terms of an international agreement from the moment it enters into force. Often it will not be possible for the State to meet these obligations without first taking steps required by domestic law, or otherwise, enabling it to do so. In these circumstances the agreement will usually be signed on behalf of the State subject to ratification. The steps required by law, or otherwise required, may include the following:

- enactment of legislation (for instance the agreement may require that certain acts were committed in Ireland, on an Irish ship or by an Irish national be made a criminal offence in Irish law);
- the making of a statutory instrument (such as to confer legal personality in Irish law on an international organisation of which the State will become a member

⁹ Vol. 193 *Dáil Éireann Debates* No 1, col. 106 (14 February 1962), *Geneva Conventions Bill 1961*, Second Stage.

¹⁰ “Meeting our Obligations”, available at <<https://www.dfa.ie/our-role-policies/international-priorities/international-law/treaties/>> accessed on 25 August 2020.

upon ratification, pursuant to the Diplomatic Relations and Immunities Acts);

- approval of the terms of the agreement by Dáil Éireann where they involve a charge on public funds (as required by Article 29.5.2° of the Constitution, which provides that the “State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann”); and
- administrative arrangements (for instance it may be necessary to recruit or reorganise staff in order to carry out administrative processes required under the terms of the agreement).“

[3.15] This description of Irish treaty practice captures the pragmatic reasons for postponing ratification until the steps mentioned, such as the enactment of primary legislation, an Act of the Oireachtas, or the making of secondary legislation, Ministerial Regulations or Orders; as well as the requirement to have the international agreement laid before Dáil Éireann (which as noted in chapter 2 is the invariable practice) and, if involving a charge on public funds, to be approved by Dáil Éireann. In addition, as the Department notes, administrative arrangements such as staff recruitment may be required.

[3.16] This approach has the clear benefit of being consistent with the good faith requirement of the VCLT, in particular that domestic law is aligned with the international agreement, which has the resulting benefit that any rights created by the international agreement are enforceable in Irish law. However, it is also subject to the legitimate criticism that it may lead to a significant time lag between signing and ratifying an international agreement. This can occur especially where an Act of the Oireachtas is required, because such legislation will have to compete for scarce Oireachtas time with other, possibly more pressing, legislative demands in a Government’s legislative programme;¹¹ and to compete with the increasing prevalence of Private Member’s Bills, that is, non-Government legislative proposals.

¹¹ Fennelly, *International Law in the Irish Legal System* (Round Hall, 2014), para 2.45.

(d) Examples of ratification of international agreements before reform of domestic law: intellectual property and human rights

- [3.17] While the general practice is to have in place the necessary legislative provisions and administrative arrangements before ratification, this is the general, but not the invariable, practice.
- [3.18] We have already seen in chapter 1 that, in respect of intellectual property law international agreements, ratification has sometimes preceded the enactment of the relevant legislative provisions. The State has ratified a number of World Intellectual Property Organization (WIPO), World Trade Organization (WTO) and European-based treaties on intellectual property. For example:
- in 2000 (ITS No 2 of 2000), Ireland ratified the WIPO 1994 Trade Mark Treaty, and this ratification was followed by the enactment of the *Patents (Amendment) Act 2006* (despite its short title it also amended the *Trade Marks Act 1996*), which also implemented the patents-related elements of the 1994 World Trade Organization (WTO) TRIPS Agreement;
 - in 2014 (ITS No 16 of 2014), Ireland ratified the amendments made in 2000 to Article 65 of the 1973 European Patent Convention (EPC) (the 2000 amendments are known as the London Agreement), and this ratification was preceded by the enactment of the *Patents (Amendment) Act 2006*; and
 - in 2016 (ITS No 5 of 2016), Ireland ratified the WIPO 2006 Trade Mark Treaty (the Singapore Treaty), which revised and updated the 1994 Trade Mark Treaty, and this ratification was preceded by the enactment of the *Intellectual Property (Miscellaneous Provisions) Act 2014*.
- [3.19] In this important area of Ireland's participation in multilateral international agreements, therefore, ratification of the WIPO 1994 Trade Mark Treaty preceded the enactment of the *Patents (Amendment) Act 2006*, a variation from the general treaty practice. By contrast, ratification of the WIPO 2006 Trade Mark Treaty (the Singapore Treaty), which revised and updated the 1994 Trade Mark Treaty, was preceded by the enactment of the *Intellectual Property (Miscellaneous Provisions) Act 2014*, which is of course consistent with Ireland's general treaty practice.
- [3.20] Another useful example of variation from the State's general treaty practice, in the human rights arena, was the ratification in 2018 of the 2006 UN Convention on the Rights of the Persons with Disabilities (UNCRPD) (ITS No 5 of 2018). The Appendix to this Discussion Paper contains a detailed account of the background leading to ratification of the UNCRPD. As noted in the Case Study, Ireland had been an active and influential participant in the lengthy negotiations leading to the conclusion of the

UNCRPD, and Ireland was also one of the first states to sign the UNCRPD in March 2007, when it was first opened for signature.

- [3.21] The UNCRPD was acknowledged internationally as involving a “paradigm shift” from addressing disability in paternalistic and medical terms towards an approach based on equality and social participation. For most states who wished to ratify the UNCRPD, including Ireland, this also involved the need to enact fundamental reforms across a wide spectrum of the law, supported by new regulatory and administrative arrangements and also funding for related policy initiatives.
- [3.22] The Case Study notes that, prior to 2006, Ireland had already enacted a significant body of equality legislation that included disability as one of the protected grounds. Some of this legislation emerged from national policy initiatives, while others derived from Council of Europe or EU-derived obligations. Nonetheless, significant additional measures were also required. Since 2006, the Commission, in those projects within its Programmes of Reform that have involved any overlaps with the UNCRPD, has taken account of the equality-based approach of the UNCRPD in proposing law reform.¹²
- [3.23] More significantly, a number of statutory bodies, including the Irish Human Rights Commission and the Equality Tribunal (which were amalgamated in 2014 into the Irish Human Rights and Equality Commission), and Non-Governmental Organisations, drew attention to the need for significant reforming legislation, while also urging ratification as soon as possible.
- [3.24] Ireland ratified the UNCRPD in 2018 and, as noted below, this occurred in advance of enacting domestic legislation that was signalled in 2015 as being required to comply fully with the UNCRPD itself. In 2015, the Government published a “roadmap to ratification” of the UNCRPD and, because of the importance of this roadmap, the Commission discusses it immediately below as an example of a clear and transparent policy tool in connection with the ratification process. The Commission then discusses another policy tool, the Regulatory Impact Analysis (RIA), which has also been used as

¹² The Commission’s *Report on Vulnerable Adults and the Law* (LRC 83-2006) was published in December 2006 as the UNCRPD was being finalised, and recommended that the UNCRPD would likely require the abolition of the wardship system and its replacement by a rights-based system. The 2006 Report influenced the content of the *Assisted Decision-Making (Capacity) Act 2015*, whose provisions are discussed in more detail in the Case Study on the UNCRPD in the Appendix. In its *Report on Jury Service* (LRC 107-2013), the Commission recommended reform of jury selection to remove the effective exclusion in the *Juries Act 1976* of persons with disabilities, taking account of the equality-based approach of the UNCRPD. Similarly, in the *Report on Sexual Offences and Capacity to Consent* (LRC 109-2013), the Commission recommended the replacement of statutory provisions on capacity to consent in the law of sexual offences with provisions that would be more consistent with the UNCRPD.

a form of roadmap to ratification in connection with marine and maritime international conventions.

2. Roadmaps and RIAs as clear and transparent policy tools prior to ratification of international agreements

(a) UNCRPD Roadmap to Ratification

[3.25] In response to the calls from various bodies to enact reforming legislation and to ratify the UNCRPD, in 2015 the Government published a detailed *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)*.¹³ As noted in the Case Study on the UNCRPD in the Appendix, this Roadmap contained a list of legislative reforms that were planned and which it was intended would be enacted by the end of 2016. The Roadmap reiterated at the outset that the State's general treaty practice would be applied to the UNCRPD:¹⁴

"Ireland is committed to proceeding to ratification as quickly as possible, taking into account the need to ensure all necessary legislative and administrative requirements under the Convention are met.

Ireland is a dualist State, Article 29.6 of the Constitution providing that international agreements have the force of law to the extent determined by the Oireachtas. It is essential therefore that the State is in a position to meet the obligations it assumes under the terms of an international agreement from the moment of its entry into force for Ireland. Before the State can ratify the Convention on the Rights of Persons with Disabilities, enactment of new legislation and amendment of existing legislation is required to ensure obligations will be met upon entry into force for Ireland.

This Roadmap sets out the legislative measures needed to meet those requirements, along with declarations and reservations to be entered by Ireland on ratification."

¹³ The Roadmap, published on 21 October 2015, is available at: <<http://www.justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf>> accessed on 25 August 2020. In view of its importance as an example of transparency in treaty practice it is reproduced in the Appendix below, the Case Study on the UNCRPD.

¹⁴ Roadmap, page 1.

- [3.26] The Roadmap, published in October 2015, set out an ambitious timetable of enacting the legislation envisaged to facilitate ratification under the general treaty practice by the end of 2016. It is also notable as an example of clarity and transparency in treaty practice in identifying in tabular form the relevant Articles of the UNCRPD and the corresponding proposed legislation that it was proposed to enact by end 2016. As the Government press statement that was issued at the same time noted, Ireland was one of the few EU member states not to have ratified the UNCRPD by 2015.¹⁵ The EU had acceded to the UNCRPD in 2011,¹⁶ which created additional pressure on the ratification process.
- [3.27] The complexity and wide-ranging nature of the UNCRPD, which it shares with other core UN human rights treaties such as the ICCPR, made it difficult to achieve the timetable envisaged by the Roadmap. One piece of legislation referred to in the Roadmap, the *Assisted Decision-Making (Capacity) Bill 2013*, was enacted in the timeframe envisaged as the *Assisted Decision-Making (Capacity) Act 2015*. During the Oireachtas debates on the 2015 Act, it was widely acknowledged as involving one of the most significant contributions to ratification of the UNCRPD.
- [3.28] The Roadmap also envisaged other significant reforms, including in connection with jury service, electoral law, mental health law and in a diverse range of areas where deprivation of liberty, or protection of liberty (DoL, or PoL) is involved, such as in the context of residential care facilities. While the Government published a *Draft Equality and Disability (Miscellaneous Provisions) Bill* in 2016 that contained proposals to address many of these areas (though not on DoL / PoL), no formal Bill containing definitive proposals on these areas was enacted prior to the 2016 General Election. Indeed, at the time of writing (August 2020), no Bill to address these areas has been published, which underlines the complexity of the legal issues that arise in seeking to put into effect the equality principles underlying the UNCRPD. In addition, the Commission notes that, while some provisions of the *Assisted Decision-Making (Capacity) Act 2015* have been brought into force, significant provisions have not, and these are not expected to be fully in force until 2021.
- [3.29] Recognising this level of complexity, in 2018 the Government agreed that the State's general treaty practice, as set out in the Roadmap, would not apply to the UNCRPD. For that reason, in March 2018 the Government laid the UNCRPD before Dáil Éireann and, because it involved a charge on public funds under Article 29 of the Constitution

¹⁵ "Fitzgerald and Ó Riordáin publish Roadmap to Ratification of the UN Convention on the Rights of Persons with Disabilities" (21 October 2015), available at <<http://www.justice.ie/en/JELR/Pages/PR15000550>> accessed on 25 August 2020.

¹⁶ See the discussion in paragraphs 2.138-2.160, above, of the capacity of the EU to enter into international agreements.

(discussed in chapter 2, above), it required the formal approval of Dáil Éireann for ratification to proceed. Following a vote of approval in Dáil Éireann, the Government deposited the instrument of ratification (ITS No.5 of 2018), which included the reservations envisaged in the Roadmap (the use of reservations is discussed below).

(b) Regulatory Impact Analysis (RIA)

- [3.30] Since 2005, it is general policy in Ireland to publish a Regulatory Impact Analysis (RIA) in advance of the enactment of legislation, in particular where it is likely to affect the cost of doing business. An RIA involves an assessment of alternative solutions, measuring the costs and benefits of different options, undertaking consultation with interested parties and recommending a best option. RIAs form part of internationally agreed principles on the development of good public policy, including where this involves the enactment of legislation.
- [3.31] The introduction of RIAs in Ireland can be traced to the 2001 *Report on Regulatory Reform in Ireland* prepared for the Government by the Organization for Economic Co-operation and Development (OECD). The 2001 OECD Report involved a wide-ranging review of regulatory policy and reform, some of which is outside the scope of this Discussion Paper, for example the importance of coordinated policy in the development of legislation concerning regulatory powers.¹⁷ Related to this Discussion Paper, the 2001 Report recommended that RIAs should become a feature of the policy development of legislation.
- [3.32] The 2001 Report led to the publication of the Government's 2004 White Paper *Regulating Better*,¹⁸ which set out six OECD-derived principles of good regulation that ought to inform both the production and review of Irish legislation. Those principles are necessity, effectiveness, proportionality, transparency, and accountability, and they were re-affirmed in the Government's 2013 policy statement *Regulating for a Better Future*.¹⁹
- [3.33] The 2004 White Paper led to a number of initiatives that have made Irish legislation more accessible, notably the many enhancements to the electronic Irish Statute Book

¹⁷ The Commission examined this in its 2018 *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018), in which the Commission recommended, in chapter 2, that comparable financial and economic regulators should have a common core set of regulatory powers.

¹⁸ *Regulating Better: A Government White Paper setting out six principles of Better Regulation* (June 2004); available at <<https://www.gov.ie/en/publication/2083d0-better-regulation-archive/>> accessed on 25 August 2020.

¹⁹ *Regulating for a Better Future: A Government Policy Statement on Sectoral Economic Regulation* (Department of the Taoiseach, 2013), available at <https://wayback.archive-it.org/11501/20190208174434/https://www.taoiseach.gov.ie/eng/Publications/Publications_2013/Policy_Statement_on_Economic_Regulation_20131.pdf> accessed on 25 August 2020

(eISB), the Statute Law Revision Project (SLRP), the Legislative Observatory of the Houses of the Oireachtas, pre-legislative and post-legislative scrutiny within the Houses of the Oireachtas, and the existing work of the Commission on Access to Legislation.²⁰ The 2004 White Paper also led to the Government commitment in 2005 to the increased use of RIAs, on which the Government published detailed guidance, which was revised in 2009.²¹

- [3.34] An RIA is especially useful in the context of international agreements with an economic or technical component that may involve direct costs for the private sector. Because of this, RIAs have been used in the context of ratification of marine and maritime international conventions. For example, in 2013, the Department of Transport, Tourism and Sport published an RIA entitled *New Regime for the Registration of Ships in Ireland*.²² The purpose of the RIA was to assess whether the State should enact a new statutory framework concerning the registration of ships using the Irish flag.
- [3.35] The RIA followed the general guidance on RIAs by setting out three options. The first option, the “do nothing” or no change to the existing law option, was rejected on the basis that the existing legislation on ship registration, the *Mercantile Marine Act 1955* (as amended), was deficient in a number of areas that were specified in the RIA. The second option, to amend the 1955 Act (as amended) was also rejected, on the basis that the relevant provisions on ship registration would then be spread across four separate Acts. The third option, to replace the 1955 Act (as amended) with a single piece of consolidated legislation on ship registration, which would include identified reforms, was the preferred option set out in the RIA.
- [3.36] The RIA also noted that the enactment of a single Act on ship registration would also have the following positive benefits:
- An updated and modernised ship registration regime in Ireland;
 - A more accessible registration system for ship owners;
 - One piece of primary legislation supported by flexible secondary legislation;
 - Enhanced safety of ships and positive effects on the environment.

²⁰ These developments in domestic legislation are discussed in the Commission’s forthcoming *Report on Accessibility of Legislation in the Digital Age* (LRC 125-2020).

²¹ *Revised RIA Guidelines: How to Conduct a Regulatory Impact Analysis* (Department of the Taoiseach, 2009), available at <https://govacc.per.gov.ie/wp-content/uploads/Revised_RIA_Guidelines_June_2009.pdf> accessed on 25 August 2020.

²² Regulatory Impact Analysis, *New Regime for the Registration of Ships in Ireland* (December 2013, revised December 2014), available at <<http://dtas.old.gov.ie/sites/default/files/publications/maritime/english/regulatory-impact-analysis-new-regime-registration-ships-ireland/ria-ship-reg-bill-rev-dec-2014.pdf>> accessed on 25 August 2020.

- It may encourage registration on the Irish flag and lead to growth in the merchant fleet.

- [3.37] The RIA also stated that a modern legislative scheme on ship registration was needed against a background of the international growth in maritime trade, an increase in the use of pleasure craft and an increasing emphasis on safety, security and environmental issues both at EU and international level, including through the relevant conventions of one of the UN agencies, the International Maritime Organization (IMO), discussed further below.²³ The RIA noted that the IMO conventions placed increasing obligations on states in regard to ships that fly their flag, including requirements to prevent pollution from ships by addressing the issues of substandard ships.
- [3.38] In this respect, the RIA noted that, in addition to obligations under the IMO conventions, Ireland is a Member State of the 1982 Paris Memorandum of Understanding on Port State Control (the Paris MoU).²⁴ The Paris MoU is an administrative arrangement between 27 participating maritime administrations and covers the waters of the European coastal States and the North Atlantic basin from North America to Europe. It was developed in response to the oil spill that occurred off the coast of France in 1978 as a result of the grounding of the *Amoco Cadiz*. The Paris MoU aims at eliminating the operation of sub-standard ships through a harmonized system of port State control. Annually over 19,000 inspections take place on board foreign ships in the Paris MoU ports, ensuring that these ships meet international safety, security and environmental standards, and that crew members have adequate living and working conditions.
- [3.39] The RIA noted that, in 2009, Ireland was admitted to the prestigious “White List” maintained by the Paris MoU of top performing shipping states in the world in recognition of the significant improvement Ireland has made in recent years in safety standards aboard Irish registered ships. Obtaining “White List” status from the Paris MoU recognised that Ireland operates a quality shipping register. Having reached this position, the RIA noted that Ireland wished to maintain its “white list” status and that new legislation on ship registration would support this. On that basis, the RIA concluded that a consolidated and reforming Act on ship registration should be enacted. Following this, the *Merchant Shipping (Registration of Ships) Act 2014* was enacted.²⁵

²³ See paragraph 3.131, below.

²⁴ See the website of the Paris MoU <<https://www.parismou.org/about-us/organisation>> accessed on 25 August 2020.

²⁵ For an overview of the *Merchant Shipping (Registration of Ships) Act 2014*, see Byrne and Binchy (eds), *Annual Review of Irish Law 2014* (Round Hall 2015), pages 692-698.

- [3.40] The policy of using an RIA in advance of ratifying international marine and maritime safety conventions was followed in 2017 when the Department of Transport, Tourism and Sport published an RIA for a proposed *Merchant Shipping (International Conventions) Bill*.²⁶ Again, three options were put forward. The first option, “do nothing”, was rejected on the basis that it would mean that Ireland would fail to meet its international obligations in the maritime sector and would not be in a position to become a party to a number of Conventions under consideration. Option 2 was to await EU legislation covering the Conventions, on the basis that, as discussed in chapter 2 of this Paper, the EU has competence in this area and has ratified some of the IMO conventions, so that the State could simply follow the EU and introduce ministerial Regulations under section 3 of the *European Communities Act 1972* (which, as discussed below, has also been done where required). Both these options were rejected on the basis that there would be “[r]eputational damage if Ireland is seen as delaying in meeting its international obligations.”
- [3.41] The third option, and the preferred option in the RIA, was to introduce a *Merchant Shipping (International Conventions) Bill* to enable Ireland to: (a) become a party to some of the outstanding IMO and ILO conventions; (b) update existing Irish legislative provisions to address amendments to IMO Conventions and Protocols that Ireland is already a party to; and (c) address some minor amendments required in Irish maritime legislation. The detail of the conventions involved is discussed below.²⁷ The RIA noted that option 3 had the following benefits: improved safety and environmental standards for Irish vessels and vessels in Irish waters; some legislative consolidation and modernisation; and avoiding reputational damage to the State. At the time of writing (August 2020), the drafting of the Heads of the Bill is underway.²⁸

(c) Conclusions on timing of ratification and reform of domestic law

- [3.42] In conclusion, the Commission considers that, consistent with the dualist nature of Article 29 of the Constitution, there are good reasons for the State to apply the general treaty practice of having in place a significant level of legislation before ratification. Nonetheless, the examples of the intellectual property treaties referred to above, and of the UNCPRD, indicate that there are some cases in which this general treaty practice has, for good and pragmatic reasons, been varied. The Commission

²⁶ Regulatory Impact Analysis, *Proposed Bill: Merchant Shipping (International Conventions) Bill* (January 2017), available at <<http://dtas.old.gov.ie/maritime/publications/english/ria-merchant-shipping-international-conventions-bill>> accessed on 25 August 2020.

²⁷ See paragraph 3.122, below.

²⁸ See Government Legislation Programme, Autumn Session 2019 (September 2019), page 18, available at <https://assets.gov.ie/31326/70aceb1799014e84b793a3a27bcb4ed1.pdf>, accessed on 25 August 2020.

would add that, in particular in the case of complex and wide-ranging treaties such as the UNCPRD, it is often difficult to have in place the necessary legislation prior to ratification.

- [3.43] The approach ultimately taken to the UNCPRD in 2018, that ratification should occur while the required legislation remained in preparation, in the Commission's view, was entirely appropriate. It reflects the reality that ratification of a treaty often involves a commitment to implementing its provision according to the good faith principle in Article 26 of the 1969 UN Vienna Convention on the Law of Treaties (VCLT), discussed above. In the case of the UNCPRD, as with other similar treaties such as the ICCPR, it is difficult if not impossible to know the precise extent of the obligations undertaken. These obligations are likely to evolve as the understanding of the general principles they contain is developed with the passage of time.
- [3.44] This is a well-established approach in the comparable domestic law setting of the meaning given over time of the rights recognised in the Constitution. As Walsh J stated in the Supreme Court decision in *McGee v Attorney General*, "no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."²⁹ A similar point can be made in connection with international agreements whose provisions are stated in high level, principles-based, terms. Their meaning in practice may change over time, and therefore the content of domestic legislation intended to implement those provisions may also require ongoing review in light of prevailing interpretations and understanding. Thus ratification, whether it occurs before or after the enactment of a particular suite of domestic legislation, is likely to involve a continuing process, rather than a single event. That continuing process will include both domestic review and international reviews, within the oversight frameworks that have become a feature of international law since the second half of the 20th century and which have accelerated in the first half of this century. These are discussed in chapter 4, below.
- [3.45] A further point of note in the case of the UNCPRD is that the Roadmap published in 2015 remains an extremely useful indicator of the reforming legislation that needs to be enacted in the near future following ratification. This is without prejudice to any further reforms that the monitoring processes under the UNCPRD may indicate in the medium term. For that reason, the use of such a Roadmap for other international agreements would, in the Commission's view, be a welcome development.
- [3.46] The Commission considers that RIAs, as already used in connection with the marine and maritime area, provide an equally clear and transparent policy approach. This is especially because the essential elements of RIAs have been developed by reference to

²⁹ [1973] IESC 2, [1974] IR 284, at 319.

OECD guiding principles. In the case of international agreements of a commercial character with potential economic costs and consequences for business, RIAs provide the affected parties with a well understood policy basis for any subsequently enacted legislation.

3. Use and effect of reservation and declarations

- [3.47] International treaties often, but not always (as discussed below), allow states, when signing or ratifying them, to attach what are called reservations or declarations. Most states, including Ireland, use these as part of their standard treaty practices. A reservation, where permitted by a treaty, seeks to limit the application of the treaty's provisions to the State. This means that the State may limit the scope of its obligations under an international agreement if this is permitted under the agreement in question. The purpose of a declaration is less substantive, and its purpose may be to clarify, at least as far as the State involved is concerned, some ambiguous term in the treaty or to address how a treaty has already been or will be implemented. The State may declare that it regards some of its domestic legislation as already compliant with the requirements of certain provisions of the agreement. As noted below, the 1969 UN Vienna Convention on Law of Treaties (VCLT) (ITS No 4 of 2006) recognises that some reservations may be presented as being temporary in nature, and some made at signing are withdrawn at or after ratification.

(a) Effect of reservations under Vienna Convention on Law of Treaties (VCLT)

- [3.48] Articles 19 to 23 of the VCLT describe the process for making, and withdrawing, reservations, and the extent of the detail involved in these Articles underlines the reality that reservations form a significant and important part of the treaty practice of most states.
- [3.49] Article 2.1(d) of the VCLT defines a reservation as a unilateral statement (unilateral meaning it is made by the individual state), however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, in which the State purports (which means it might or might not have this effect) "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."
- [3.50] Article 19 of the VCLT provides, in effect, that reservations are permissible unless: (a) the reservation is prohibited by the treaty, (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made, or (c) in

cases not falling under (a) and (b), the reservation is incompatible with the object and purpose of the treaty.³⁰

- [3.51] Article 20.1 goes on to provide that where a reservation is specifically authorised by a treaty, the making of a reservation by a State does not require any subsequent acceptance by the other contracting States unless the treaty so provides. Article 20.2 provides, however, that if it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties. Article 20.3 refers to a treaty that also establishes an international organization, such as the 1946 Constitution of the World Health Organization (WHO) (ITS No 14 of 1948), and provides that unless such a treaty otherwise provides, a reservation requires the acceptance of the competent organ of that organization, in the case of the WHO its Secretary-General.³¹
- [3.52] Article 21 of the VCLT deals with the legal effects of reservations and of objections to reservations. Article 21.1 provides that a reservation established with regard to another party in accordance with Articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation and (b) modifies those provisions to the same extent for that other party in its relations with the reserving State. However, Article 21.2 provides that the reservation does not modify the provisions of the treaty for the other parties to the treaty between themselves (*inter se*). Article 21.3 provides that when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

³⁰ Article 19 reflects the analysis of the International Court of Justice (ICJ) in its Advisory Opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15.

³¹ Article 20.4 of the VCLT provides that, in cases not falling under Article 20.1-20.3 and unless the treaty otherwise provides: (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States, (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State, (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. Article 20.5 provides that for the purposes of Article 20.2 and 20.4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

- [3.53] Article 22 of the VCLT deals with withdrawal of reservations and of objections to reservations. Article 22.1 provides that unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State that has accepted the reservation is not required for its withdrawal. Article 22.2 provides that unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time. Article 22.3 provides that unless the treaty otherwise provides, or it is otherwise agreed: (a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State, (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State that formulated the reservation.
- [3.54] Article 23 deals with the formal procedures regarding reservations. Article 23.1 provides that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty. Article 24.2 provides that a reservation, if made when signing the treaty subject to ratification, acceptance or approval, must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation is considered as having been made on the date of its confirmation. Article 23.3 provides that an express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation. Lastly, Article 23.4 provides that the withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

(b) Overview of Irish treaty practice on reservations and declarations

- [3.55] Ireland's treaty practice, like that of most other states, includes the use of reservations and declarations to multilateral treaties, and this is usually done when ratifying a treaty. Ireland has acceded to over 1,000 international agreements, but the number with attached reservations and declarations is relatively low and they are often similar to reservations and declarations made by other state parties. This indicates that Ireland's treaty practice on reservations and declarations is often coordinated with other states with which Ireland has close connections, for example, other EU and Council of Europe member states.
- [3.56] Article 29 of the Constitution does not require the Government to submit reservations or declarations to Dáil Éireann for approval when laying an international agreement before it. Nor does Dáil Éireann vote on individual reservations or declarations attached to a ratification. It may be that the relevant Minister will note any reservations during the debate on the motion to ratify the international agreement, and this question might also be expressly raised by a member of Dáil Éireann in the course of

the debate. Alternatively, the issue might be raised separately in a Parliamentary Question.

- [3.57] In any event, the hosting organisation for most multilateral international agreements (called the depository) will hold the list of reservations deposited by ratifying states. In the past, this might have been difficult for the general public to access easily, but in the digital era this information is almost invariably available free online. For example, the UN Treaty Series (available at www.treaties.un.org) contains not only the full text of all United Nations multilateral treaties and the list of states who have signed and ratified them, but also the full text of reservations and declarations made by all those states.

4. Case study: Ireland's reservations to the ICESR and ICCPR, including withdrawal of some reservations to the ICCPR

- [3.58] On 8 December 1989, Ireland ratified two of the core UN human rights treaties, the 1966 UN International Covenant on Civil and Political Rights (ICCPR) (ITS No 9 of 1990) and the 1966 UN International Covenant on Economic, Social and Cultural Rights (ICESCR) (ITS No 10 of 1990).
- [3.59] In March 1990, the then Minister for Foreign Affairs Gerard Collins TD was asked through a Parliamentary Question if the Minister could outline the reservations made by the State to the ICCPR and the ICESCR, including the reasons for the reservations. The Minister's reply provided a clear summary of Ireland's general approach to reservations, as well as a detailed explanation of the reasons for the reservations attached to the ICCPR and ICESCR.
- [3.60] As to the general approach to reservations and declarations, the Minister stated:

"The Government decide on the ratification of international legal instruments following a full examination of what legislative or other measures may be necessary to allow Ireland become a party to the instrument. The Government may deem a reservation necessary where constitutional, legislative or other considerations might conflict with the full application of a provision of the instrument in question. The effect of a reservation is to limit the application of an element of the instrument to Ireland. This may be necessary, for example, to

enable the completion of legislative measures enabling full compliance with the instrument.”³²

- [3.61] This general approach indicates that a reservation may arise because of the need to adjust the application of a specific provision in the international agreement in light of a provision in the Constitution: this was the case with both the ICESCR and the ICCPR. Another reason given by the Minister is that a reservation may amount to a holding position, allowing for the preparation and enactment of legislation and then the later withdrawal of the reservation. As already noted, withdrawals of reservations are well recognised under the VCLT and, in the case of the original reservations to the ICCPR, a number of these were subsequently withdrawn following the enactment of relevant legislation in Ireland.
- [3.62] The Minister went on in the 1990 reply to discuss the detailed reservations made to the ICESCR and the ICCPR. Because there were two reservations to the ICESCR and seven reservations to the ICCPR, we follow the Minister’s approach and discuss, firstly, the reservations to the ICESCR and then turn to those made to the ICCPR.
- [3.63] As noted below, in connection with one reservation to the ICCPR, concerning the death penalty, Ireland went well beyond the requirements of the ICCPR when, in 2001, the people of Ireland approved a proposal to insert into the Constitution a complete ban on the death penalty. This also anticipated Protocol 13 to the Council of Europe Convention on Human Rights and Fundamental Freedoms (ECHR), which was agreed in 2002. This provides another example of the complex and overlapping nature of international and domestic law, which is a feature of many of the areas of law reviewed in this Discussion Paper.

(a) ICESCR and Irish language policy

- [3.64] The first reservation to the ICESCR was to Article 2.2, which relates to discrimination on the basis of, among other matters, language. The Minister noted in the 1990 reply that this reservation related to general Government policy to foster, promote and encourage the use of the Irish language. The reservation clearly reflects this and provides: “In the context of Government policy to foster, promote and encourage the use of the Irish language by all appropriate means, Ireland reserves the right to require, or give favourable consideration to, a knowledge of the Irish language for

³² Vol.396 *Dáil Éireann Debates* (13 March 1990) Questions: United Nations Conventions (Question to the Minister for Foreign Affairs by Michael D Higgins TD), available at: <https://www.oireachtas.ie/en/debates/debate/dail/1990-03-13/6/?highlight%5B0%5D=covenants&highlight%5B1%5D=covenant&highlight%5B2%5D=covenant&highlight%5B3%5D=covenant&highlight%5B4%5D=covenants> accessed on 26 August 2020.

certain occupations.” This reservation remains in place at the time of writing (August 2020).

(b) ICESCR and compulsory primary education

- [3.65] The second reservation to ICESCR concerned Article 13.2(a), which deals with compulsory primary education. The reservation reads: “Ireland recognises the inalienable right and duty of parents to provide for the education of children, and, while recognising the State’s obligations to provide for free primary education and requiring that children receive a certain minimum education, nevertheless reserves the right to allow parents to provide for the education of their children in their homes provided that these minimum standards are observed.”
- [3.66] The Minister noted in the 1990 reply that the right to free primary education is guaranteed by Article 42.4 of the Constitution. While Article 42.1 of the Constitution refers to the duty of parents to provide for the education of their children, Article 42.2 specifically leaves them free to provide this education in their homes, in private or in State schools. Article 42.3 prohibits the State from obliging parents to send their children to schools established by the State or to any particular type of school designated by the State.
- [3.67] The Minister noted that it could be argued that the provision in the ICESCR referring to compulsory primary education did not preclude the possibility that this may be provided in the home. However, Article 13.3 of the ICESCR specifically recognises the right of the parents to choose schools for their children but makes no reference to their right to provide that education themselves. It was therefore “deemed prudent” for the State to make a reservation in relation to parental rights because if compulsory education were to be interpreted to mean solely education provided in the schools, the obligation under the ICESCR could not be met by the State without an amendment to the Constitution. This reservation remains in place at the time of writing (August 2020).

(c) ICCPR and abolition of death penalty

- [3.68] Turning to the seven reservations made on ratification of the ICCPR, the first involved a declaration on Article 6.5, which deals with the death penalty for minors. The Government declared that, pending the introduction of further legislation to give full effect to the provisions of Article 6.5, “should a case arise which is not covered by the provisions of existing law, the Government will have regard to its obligations under the Covenant in the exercise of its power to advise commutation of the sentence of death.” The Minister noted in 1990 that this declaration reflected the Government’s intention to introduce legislation removing the death penalty from the statute books, which as noted above indeed occurred later that year in the *Criminal Justice Act 1990*,

which then facilitated the State's withdrawal of this reservation and which was notified to the UN Secretary-General in April 1994.

- [3.69] It should be noted that this was, in turn, followed in 2001 by the approval by referendum of the complete removal from the Constitution of any reference to the death penalty. The referendum also approved the insertion of Article 15.5.2° into the Constitution, which copperfastens a prohibition on the death penalty and provides: "The Oireachtas shall not enact any law providing for the imposition of the death penalty." This prohibition anticipated the prohibition on the death penalty in all circumstances in Protocol 13 to the Council of Europe Convention on Human Rights and Fundamental Freedoms (ECHR), which was agreed in May 2002, and which superseded Protocol 6 to the ECHR of 1983, which had prohibited the death penalty in peacetime.

(d) ICCPR and remand prisoners separate from convicted prisoners

- [3.70] The second reservation to the ICCPR related to Article 10.2, which deals with the detention of accused persons and their separation from convicted persons. The reservation stated: "Ireland accepts the principles referred to in paragraph 2 of article 10 and implements them as far as practically possible. It reserves the right to regard full implementation of these principles as objectives to be achieved progressively." The phrase "achieved progressively is, indeed, the phrase used in the ICCPR itself. The Minister noted that, while "every effort is made to keep remand prisoners separate from convicted prisoners and to achieve the segregation of juveniles from adults, the pressure on accommodation in recent years has made this difficult to achieve."
- [3.71] The problem of prison overcrowding remained, and remains, an ongoing issue, which has had the effect that this is one of three reservations that remain in place at the time of writing (August 2020).

(e) ICCPR and legal assistance in criminal cases and compensation for miscarriages of justice

- [3.72] The third reservation was to Article 14 of the ICCPR, which concerns the right to legal assistance and to legal review and compensation for miscarriage of justice. In this instance, the Government reserved the right to have minor offences against military law dealt with summarily in accordance with the procedures that applied in 1990 and which the Minister noted might not, in all respects, have conformed at that time to the requirements of Article 14 of the ICCPR. Ireland also made the reservation that the provision of compensation for the miscarriage of justice in the circumstances contemplated in Article 14.6 may be by administrative procedure rather than pursuant to specific legal provisions.

- [3.73] The Minister noted that while the statutory procedures for the trial by court-martial of offences against military law conformed to those contained in Article 14 of the ICCPR, except for Article 14.6, the subject of the reservation, the procedures for the investigation and summary trial of offences (in sections 177 to 180 of the *Defence Act 1954*) could not be said to do so in all respects. The Minister noted that, in 1990, unless a capital charge or a charge of murder was involved, legal representation was not allowed at a preliminary investigation or at a summary trial. Furthermore, there was at that time no right to review conviction or sentence arising from a summary trial except in so far as is provided for in section 180 of the 1954 Act. It was therefore considered that the reservation was appropriate in the circumstances.
- [3.74] We note that considerable extensions to the provision for legal aid in courts-martial, and in connection with appeals in summary military matters, were later enacted in the *Criminal Justice Act 1990* and the *Defence (Amendment) Act 2007*. The changes made in the 1990 and 2007 Acts facilitated the withdrawal of this reservation, which was notified to the UN Secretary-General in January 2009.
- [3.75] As to miscarriages of justice, Article 14.6 requires that a person whose conviction is reversed or who is pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice shall have a right to be compensated according to law. The Minister noted in 1990 that, at that time, there was no such right in Irish law although it had been the practice to pay compensation in such cases on an *ex gratia* basis. In the absence of appropriate legislation, it was considered prudent to enter a reservation under Article 14.6.
- [3.76] We also note that this matter was addressed in the *Criminal Procedure Act 1993*, which introduced a statutory scheme along the lines envisaged by Article 14.6 of the ICCPR. As a result, the State withdrew this element of its reservation by notifying the UN Secretary-General in August 1998.

(f) ICCPR and broadcasting regulation

- [3.77] The fourth reservation to the ICCPR concerned Article 19.2, which deals with freedom of expression. The Government reserved the right to confer a monopoly on or require the licensing of broadcasting enterprises, the Minister explaining in 1990 that a State monopoly on broadcasting, which in effect had existed up to 1988, or even broadcasting licensing systems, which had been introduced in the *Broadcasting Act 1988*, might have been regarded as contrary to the provisions of this Article.
- [3.78] This view may have been overly cautious and, in December 2011, Ireland withdrew this reservation to the ICCPR, the withdrawal stating that “legal provisions have now been introduced in Ireland providing for full compliance with Article 19, paragraph 2 of the said Covenant”. This statement reflected the enactment of the *Broadcasting Act 2009*,

which had provided for further liberalisation, and independent regulation, of the broadcasting licensing regime. It is worth noting that this withdrawal of the reservation was given a specific entry in the Irish Treaty Series as a Treaty Action (ITS No 31 of 2012).

(g) ICCPR and prohibiting propaganda for war

- [3.79] The fifth reservation to the ICCPR related to Article 20.1, which prohibits propaganda for war, and was in effect a declaration that Ireland accepted the principle of this provision and would implement it as far as was practicable. The reservation states: "Ireland accepts the principle in paragraph 1 of article 20 and implements it as far as it is practicable. Having regard to the difficulties in formulating a specific offence capable of adjudication at a national level in such a form as to reflect the general principles of law recognised by the community of nations as well as the right to freedom of expression, Ireland reserves the right to postpone consideration of the possibility of introducing some legislative addition to, or variation of, existing law until such time as it may consider that such is necessary for the attainment of the objective of paragraph 1 of article 20."
- [3.80] The Minister noted that there was no existing provision in Irish law in 1990 that prohibited propaganda for war. The Minister also noted that if legislation were introduced, "a reservation might still be necessary unless propaganda for war in all circumstances were prohibited, as it is unclear whether this article outlaws all propaganda for war or only propaganda for war in contravention of international law." The Minister noted in this respect that "war is permitted by international law in certain circumstances, for example, in exercise of the right to self-defence (Article 51 of the UN Charter)."
- [3.81] The Minister added that the extent to which Article 20.1 was compatible with the right to freedom of expression guaranteed by Article 19 of the ICCPR itself had also been considered. The Minister also noted that a "number of States have entered reservations to Article 20, paragraph 1, on the grounds that it is not compatible, while others stated that they did not accept the obligations set out in Article 20, paragraph 1." This comment indicates the influence of the views of other like-minded states in the development of Ireland's treaty practice on reservations.
- [3.82] The Minister also noted that the UN Human Rights Committee established under the ICCPR had "adopted general comments on Article 20 strongly expressing the view that the required prohibitions are fully compatible with the right to freedom of expression 'the exercise of which carries with it special duties and responsibilities, and the text of Ireland's reservation takes account of this.'" While the views of the ICCPR Human Rights Committee are not binding determinations (see the discussion of monitoring mechanisms in chapter 4, below), it is notable that in this instance their views had

influenced Ireland's treaty practice. At the time of writing (August 2020), this is one of three reservations that remain in place.

(h) ICCPR and divorce law

- [3.83] The sixth reservation to the ICCPR concerned Article 23.4, which deals with the dissolution of marriage. The State's reservation was to the effect that Ireland accepted the obligations of Article 23.4 on the understanding that that it did not imply any right of spouses to obtain a dissolution of marriage. The Minister noted that although the last sentence of Article 23.4 ("In the case of dissolution, provision shall be made for the necessary protection of any children"), could be considered to be concerned solely with the situation which arises on the dissolution of marriage, without in itself implying recognition of any right to a dissolution of marriage, it was considered that the making of an interpretative declaration in relation to divorce would be prudent.
- [3.84] Again, with the removal from the Constitution in 1995 of the prohibition on divorce, and its replacement with provision for divorce, this reservation became redundant. Ireland therefore notified the UN Secretary-General of the withdrawal of this reservation in August 1998.

(i) ICCPR and First Optional Protocol on compulsory jurisdiction of ICCPR Human Rights Committee

- [3.85] The seventh and final reservation to the ICCPR referred to by the Minister in 1990 was, in fact, to the First Optional Protocol to the ICCPR, which Ireland also ratified on 8 December 1989 (ITS No11 of 1990). The first Optional Protocol concerns the acceptance of the compulsory jurisdiction of the Human Rights Committee established under the ICCPR. The State's reservation reads: "Ireland does not accept the competence of the Human Rights Committee to consider a communication from an individual if the matter has already been considered under another procedure of international investigation or settlement." The Minister noted that this reservation had also been made by a number of other countries, and was intended to avoid "the possibility of complaints being made to two separate international bodies in respect of the same issue." This reservation remains in place at the time of writing (August 2020).

(j) Ireland's current (August 2020) reservations to the ICESCR and ICCPR

- [3.86] As noted above, Ireland's two original reservations to the ICESCR remain in place at the time of writing (August 2020). The current position of each contracting state to UN

treaties such as the ICESCR, including reservations made and withdrawn, is available on the UN's treaty website.³³

- [3.87] The effect of Ireland's withdrawal, between 1984 and 2011, of four of the original seven reservations to the ICCPR is that, at the time of writing (August 2020), Ireland retains three reservations: to Article 10.2, which deals with the detention of accused persons and their separation from convicted persons; to Article 20.1, which deals with propaganda for war; and to the compulsory jurisdiction of the Human Rights Committee under the first Optional Protocol to the ICCPR. The current position of each contracting state to the ICCPR, including reservations made and withdrawn, is also available on the UN's treaty website.³⁴

5. Other examples of Ireland's treaty practice on reservations

(a) Compulsory jurisdiction of the ICJ

- [3.88] We discussed, in chapter 1, an example of Ireland's use of the reservation, in connection with the declaration made in December 2011 recognising the compulsory jurisdiction of the UN International Court of Justice (ICJ) (ITS No 32 of 2012). The rationale behind the Government's decision to accept the compulsory jurisdiction of the ICJ has already been explained.³⁵
- [3.89] For the purposes of the present discussion, it is sufficient to note that the terms of the declaration accepting the ICJ's jurisdiction made one exception, namely with respect to any dispute with the United Kingdom in regard to Northern Ireland. This was on the basis of the excellent relations between the two countries and the considered opinion of the Government that the institutions and mechanisms established by the 1998 Belfast / Good Friday Agreements, as subsequently amended, provide the best framework for settling any differences that might arise.

(b) UN 1951 Convention on Refugees

- [3.90] When Ireland ratified the UN 1951 Convention on the Status of Refugees in 1956 (ITS No 8 of 1956), it entered a number of reservations. This includes a reservation to Article 17 of the 1951 Convention, which concerns access to the labour market.

³³ Information on the ICESCR, including Ireland's continuing reservations as of August 2020, is available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-3&chapter=4&clang=en#EndDec> accessed on 26 August 2020.

³⁴ Information on the ICCPR, including Ireland's remaining reservations as of August 2020, is available at <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-4&chapter=4#EndDec> accessed on 26 August 2020.

³⁵ See paragraphs 1.154-1.162, above.

Ireland's reservation reads: "With regard to article 17 the Government of Ireland do not undertake to grant to refugees rights of wage-earning employment more favourable than those granted to aliens generally."

- [3.91] In chapter 2, we discussed how, in the wake of the Supreme Court decision in *NVH v Minister for Justice and Equality*,³⁶ the Government decided to exercise its "opt-in" to the 2013 EU Reception Conditions Directive which, having been approved by the Houses of the Oireachtas, was implemented in the form of the *European Communities (Reception Conditions) Regulations 2018* (SI No 230 of 2018).³⁷ The 2018 Regulations provided for a clear pathway for refugee applicants to access employment while awaiting a decision on their application. The 2018 Regulations also took account of the State's existing employment permits system for non-EU (third country) nationals. They therefore provide for access for eligible applicants by way of an immigration permission which exempts applicants from the employment permits system and any associated fee.
- [3.92] The content of the 2013 Reception Conditions Directive, as implemented in the 2018 Regulations, reflects the growing influence of the non-discrimination clause in the 1951 UN Convention on the Status of Refugees. As with the ICESCR and the ICCPR, discussed above, the current position of each contracting state to the 1951 Convention, including reservations, is available on the UN's treaty website.³⁸ At the time of writing (August 2020), the reservation to Article 17 of the 1951 Convention remains in place, but it is also clear that its meaning and effect in practice has altered considerably in favour of refugee applicants. In that respect, while a reservation may remain in place, its effect in domestic law can fundamentally change.

(c) Council of Europe 1983 Convention on the Transfer of Sentenced Persons

- [3.93] In chapter 2, we noted that in 1986 Ireland had signed the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, and that in *Hutchinson v Minister for Justice*³⁹ the High Court (Blayney J) had applied the long-established view of leading authorities on international law that the State has an absolute discretion as to whether to ratify an international agreement it has signed. The 1983 Convention was

³⁶ [2017] IESC 35, [2017] IESC 82, [2018] 1 IR 246, which is discussed in paragraph 2.35, above.

³⁷ The opt-in process leading up to the making of the 2018 Regulations is discussed in paragraphs 2.126-2.130, above.

³⁸ Information on the 1951 Convention on the Status of Refugees, including Ireland's reservations as of August 2020, is available at https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtmsg_no=V-2&chapter=5&Temp=mtmsg2&clang=en#EndDec accessed on 26 August 2020.

³⁹ [1993] 3 IR 567: see the discussion at paragraphs 2.84-2.92, above.

subsequently ratified by Ireland on 31 July 1995 (ITS No 53 of 2007),⁴⁰ which followed the enactment of the *Transfer of Sentenced Persons Act 1995* on 17 July 1995. The 1995 Act implemented the 1983 Convention, as supplemented by the 1987 Agreement on the Application among the Member States of the European Communities (now the European Union) of the 1983 Convention.

- [3.94] This is another example of the overlap between related international agreements, in this case involving an overlap between the Council of Europe and the European Union. It was also pointed out during the Oireachtas debates on the 1995 Act that ratification, and the operation in practice of the 1995 Act, was considered to be an element of the consolidation of the peace process⁴¹ then underway in Northern Ireland, which was ultimately to lead to the 1998 Belfast/Good Friday Agreements and the restoration of a devolved Northern Ireland Executive and Assembly.
- [3.95] When Ireland ratified the Convention in 1995, it made the following reservation and declaration: "Having regard to pressure on prison accommodation, Ireland, when deciding on applications for inward transfer into Ireland (a) reserves the right to limit the excess of inward over outward transfers in the light of the availability of prison spaces, and (b) will regard the degree of closeness of applicants' ties with Ireland as a primary consideration. This reservation remains in force at the time of writing (August 2020). Like the reservation concerning the compulsory jurisdiction of the ICJ, discussed above, this reservation to the 1983 Convention related to policy considerations rather than any question of conflicting national legislation or as a means of indicating that reforming legislation might be under consideration.

6. Different legislative enacting methods used to implement international agreements

- [3.96] The Commission concludes this chapter by discussing the different legislative enacting methods used in practice to implement international agreements. These are:
- full incorporation into Irish law by an Act: this can include enacting legislation that contains the key elements of the agreement, which is sometimes supplemented by including the full text of the international agreement in a Schedule to the implementing legislation, a technique used in the *Adoption Act 2010* to implement a 1993 convention on intercountry adoption;

⁴⁰ At one time, there were delays in registering ratified treaties in the Irish Treaty Series.

⁴¹ Vol. 144 *Seanad Éireann Debates* (7 July 1995) (*Transfer of Sentenced Persons Bill 1995: Second Stage*), available at <<https://www.oireachtas.ie/en/debates/debate/seanad/1995-07-07/6/>> accessed on 26 August 2020.

- full incorporation into Irish law by an Act (primary legislation), supplemented by Regulations (secondary legislation) that implement detailed requirements: this can be used for international conventions that are regularly updated, such as those on merchant shipping and other aspects of the maritime and marine environment, a technique used in a number of *Merchant Shipping Acts*; and
- partial and implicit incorporation into Irish law: this may be required because the international agreement requires wide-ranging reforms across many policy areas, which is especially the case with the major UN human rights treaties such as the UNCPRD.

(a) No single “correct” method

- [3.97] Bearing in mind these different methods of incorporating international instruments into Irish law, a question that could legitimately be asked is whether there is a single correct, or preferable, method that could or should be adopted. The answer appears to be that the courts allow significant discretion to the Oireachtas as to how it chooses to implement an international agreement and will apply the general presumption that the Oireachtas will act consistently with the requirements of the Constitution, the resumption of constitutionality.
- [3.98] This issue was addressed by the Supreme Court in *Leontjava v Director of Public Prosecutions and Attorney General*.⁴² The applicant challenged the constitutionality of section 2 of the Immigration Act 1999 (the 1999 Act), which provided that the *Aliens Order 1946*, a form of secondary legislation made under the *Aliens Act 1935*, “shall have statutory effect as if it were an Act of the Oireachtas.” The text of the 1946 Order was not set out in the 1999 Act, and the applicant argued that the Oireachtas had acted unconstitutionally by, in effect, incorporating by reference the text of the 1946 Order and “converting” into an Act. The respondents argued that incorporation by reference was a long-established legislative device that was available to the Oireachtas, and they referred by way of example to the practice of implementing international agreements in Irish law using this method, which sometimes but not always also included reproducing the text of the international agreement “for convenience.” The Supreme Court agreed with the arguments made by the respondents and rejected the applicant’s claims.
- [3.99] The Court pointed out that there was a notable absence in the Constitution of any detailed requirements as to the form which legislation is to take. The Court added:

“Subject to the overriding prohibition on the enactment of unconstitutional legislation contained in Article 15.4, it was

⁴² [2004] IESC 37, [2004] 1 IR 591.

clearly envisaged that the Oireachtas were to be their own masters so far as both the substance and form of the legislation were concerned... Thus, none of the details of the legislative process in each House – the first and second reading, the committee stage and the report stage – achieve even a mention. The role of political parties and of the leader of the opposition, the committee system and the distinctions between public and private bills, government bills and bills initiated by deputies or senators, are nowhere mentioned. It was obviously envisaged by the framers of the Constitution that, as in [the Constitution of] 1922, all these matters could be left to be determined by the Oireachtas.”⁴³

- [3.100] The Court pointed out that the practice of “incorporation by reference” had been used in pre-1922 legislation and that this had been continued in legislation enacted since the foundation of the State. The Court noted that this practice had been subject to some criticism on the ground that it was not as transparent or clear as including the text of the referenced legislation. Nonetheless, the Court concluded that, since there was nothing in the Constitution prohibiting such a legislative drafting method, the Oireachtas was free to use it.
- [3.101] As noted above, the respondents had also referred to the practice of incorporation by reference in the case of legislation implementing international conventions into Irish law. The Court therefore referred to a number of the examples cited in argument where the implementing legislation provided that the international convention in question “shall have the force of law in the State and judicial notice shall be taken of it” and that the text of the convention would then be set out in a Schedule to the Act “for convenience.” The Court referred in this context to the *Jurisdiction of Courts (Maritime Conventions) Act 1989*, the *Arbitration (International Commercial) Act 1998*, the *International Carriage of Goods by Road Act 1990* and the *Contractual Obligations (Applicable Law) Act 1991*. Chapter 1 of this Discussion Paper also contains some examples of this practice, including the *Arbitration Act 2010*,⁴⁴ which repealed and replaced the *Arbitration (International Commercial) Act 1998* referred to by the Supreme Court in the *Leontjava* case. We also discuss some further examples of this legislative technique below.
- [3.102] As already noted, the Supreme Court rejected the applicant’s argument that the Oireachtas was not empowered to enact legislation that involved “incorporation by

⁴³ [2004] IESC 37, [2004] 1 IR 591, at paragraphs 68 – 70.

⁴⁴ See paragraph 1.125, above.

reference” such as had been used in section 2 of the 1999 Act. The Court concluded that, if the applicant’s case had been accepted it would have had “the remarkable consequence that the procedure normally adopted for incorporating international conventions by reference would be invalidated in its entirety.”⁴⁵ The Court noted that, as the examples it had referred to illustrated, “the relevant legislation in the case of such conventions typically does no more than provide that they are to have the force of law in the State, subject to whatever modifications are considered necessary,”⁴⁶ whereas the applicant had argued, in effect, that the individual provisions of the international convention in question would need to be set out word for word in the body of the Act itself. The Court rejected the applicant’s view.

[3.103] Another argument raised by the applicant related most directly to “incorporation by reference” where the text of the referenced item is not included in the legislation, whether in a Schedule or the body of the Act. This was the case with the *Aliens Order 1946* that had been incorporated by reference in the *Immigration Act 1999*. The applicant argued that this was not constitutionally permissible because it would mean that the copy of an Act enrolled in the Supreme Court under Article 25.4 of the Constitution would not have the required character of legislation because it would not contain the text of the law that was so enrolled, other than by reference. The Court rejected this argument as “wholly unsustainable” because Article 25.4 was intended merely to provide a definitive text of the Act as enacted by the Oireachtas, and the fact that an Act incorporated by reference other legal instruments in accordance with well-established legislative procedures could not deprive it of the character of an Act passed by both Houses, signed by the President and duly promulgated and enrolled in accordance with the Constitution.

[3.104] The Court added an important observation in this respect in connection with an international convention, even where the text of the convention is included in a Schedule to an Act:

“If in any case a dispute arose as to whether the text of the English version of the convention was accurately reproduced in the official volume of statutes published by the Stationary Office, that dispute could not be resolved by reference to the text of the Act as enrolled in the Office of the Supreme Court. It could only be resolved by reference to the signed and authenticated text of the convention itself as deposited with whichever of the contracting parties is nominated as the depository of the

⁴⁵ [2004] IESC 37, [2004] 1 IR 591, at para 86.

⁴⁶ *Ibid.*

instrument in accordance with normal procedures in public and private international law.”⁴⁷

- [3.105] While this comment may not have been necessary for the purpose of deciding the *Leontjava* case, it illustrates another aspect of dualism: ultimately, an international convention, even when its text is incorporated into domestic law also retains an element of its international origins and status.
- [3.106] The Supreme Court in *Leontjava* reinforced the discretion given to the Oireachtas as to the forms it may use in incorporating international agreements into Irish law by rejecting any particular limits on that power:

“This court cannot accept the proposition that the framers of the Constitution in 1937, while conferring on the Oireachtas the exclusive role of making laws for the State, intended to limit their powers to legislate by prohibiting them from incorporating other instruments, such as secondary legislation and treaties, in an Act and giving them the force of law without setting out their provisions *in extenso*.”⁴⁸

- [3.107] In conclusion, it is clear that the Oireachtas has considerable discretion under the Constitution as to how it incorporates international treaties into Irish law. The Commission now turns to discuss those different methods.

(b) Full incorporation of international agreement through Act: 1993 Hague Convention on Adoption and *Adoption Act 2010*

- [3.108] The *Adoption Act 2010* (the 2010 Act) implemented the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which had been recommended by the Commission in two Reports.⁴⁹ A number of aspects of the 2010 Act underline the full extent of the incorporation involved in this method.

(i) Ratification and entry into force aligned with commencement of 2010 Act

- [3.109] The 2010 Act was signed into law by the President on 14 July 2010, and Ireland ratified the Convention on 28 July 2010 (ITS No 31 of 2011). Under the terms of Article 46.2 of the Convention, it entered into force for Ireland on 1 November 2010 (the first day of

⁴⁷ *Ibid.*

⁴⁸ [2004] IESC 37, [2004] 1 IR 591 at para 87.

⁴⁹ *Report on the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (LRC 58-1998). The Commission reiterated this in its 2008 *Report on Aspects of Intercountry Adoption Law* (LRC 89-2008).

the month following the expiration of three months after the deposit of its instrument of ratification). To coincide with this, the 2010 Act was brought into force by Commencement Order on 1 November 2010.⁵⁰

(ii) Convention scheduled to 2010 Act: assists transparency but does not mean it has force of law in the State

- [3.110] Schedule 2 to the 2010 Act contains the full text of the 1993 Hague Convention. Section 3(1) of the 2010 Act provides that this was done “for convenience of reference”. As already noted, the Supreme Court in *Leontjava v Director of Public Prosecutions and Attorney General*⁵¹ pointed out that this practice of “incorporation by reference” is a long-standing legislative drafting practice and is permitted under the Constitution.
- [3.111] The scheduling of the full text of the Convention is of great benefit from the point of view of transparency. It is also important to note, however, that this form of scheduling of the full text “for convenience of reference” does not itself fully incorporate the Convention into Irish law. This requires a separate statement to that effect, which was included in the 2010 Act.

(iii) Full incorporation: Convention stated to have force of law in Ireland

- [3.112] Section 9 of the 2010 Act provides that “The Hague Convention has the force of law in the State”.
- [3.113] This is a very clear statement of full incorporation. As noted, from a legal perspective this is much more significant than the scheduling of the full text of the Convention “for convenience of reference.”

(iv) Explanatory Report to Convention: judicial notice and use in practice by courts

- [3.114] It is a common feature of international law that an expert or experts in the area will be requested by the relevant custodian of the treaty or convention (whether a state or an international body) to prepare an explanatory report on the detailed provisions of the treaty or convention. In the case of the 1993 Hague Convention, section 10 of the 2010 Act provides:

“(1) Judicial notice shall be taken of the explanatory report prepared by G. Parra-Aranguren in relation to the Hague

⁵⁰ *Adoption Act 2010 (Commencement) Order 2010* (SI No 511 of 2010), which was also signed on 1 November 2010.

⁵¹ [2004] IESC 37, [2004] 1 IR 591.

Convention, a copy of which has been placed in the Oireachtas Library.

(2) When interpreting any provision of the Hague Convention, a court or the Authority, as the case may be, shall pay due regard to that explanatory report.”

- [3.115] The term “judicial notice” referred to in section 10(1) of the 2010 Act means that something may be introduced into evidence without formal proof. The rule applies to matters that are so well known that they do not require proof, such as that beer is intoxicating or that a calendar shows that a particular date in a year fell on a specific day. Section 10 of the 2010 Act is a different example of the “judicial notice” rule, but it has the same effect, namely, that the explanatory report prepared in relation to the 1993 Hague Convention may be relied on by a court without the need for its author to be called as a witness to prove that it is the report in question.⁵² Indeed, section 13 of the *Interpretation Act 2005* provides that an Act, such as the 2005 Act itself or the 2010 Act, is a public document and “shall be judicially noticed.”
- [3.116] As to the reference in section 10(2) to paying “due regard” to the explanatory report when interpreting the 1993 Hague Convention, it has indeed been cited and relied on in a number of cases concerning the interpretation of the 2010 Act against the background of the Convention itself and other related international and national instruments. For example, in *CB v Attorney General*,⁵³ the Supreme Court considered the provisions of the Hague Convention, the explanatory report, the 2010 Act, and the extent to which the Hague Convention should be considered in the context of the rights, and best interests, of the child under the 1989 UN Convention on the Rights of the Child (UNCRC), to which the Hague Convention referred, and the rights of the child under the Constitution, including under Article 42A of the Constitution. The decision in the *CB* case provides another illustration of the complexities of the interaction between international and domestic law.
- [3.117] In this case, the question was whether an adoption effected in clear violation of the principles and rules in the Hague Convention could, nonetheless, be recognised under the 2010 Act as an exceptional case where it was established on the facts that this was in the best interests of the adopted child. The Supreme Court, by a majority, held that this was possible. In this respect the majority relied on a number of comments in the

⁵² Professor Parra-Aranguren died in 2016 (see <<https://www.hcch.net/en/news-archive/details/?varevent=528>> accessed on 26 August 2020), but the “judicial notice” rule in the 2010 Act also applied during his lifetime.

⁵³ [2018] IESC 30.

explanatory report. This included paragraphs 411 and 412 of the explanatory report,⁵⁴ which state:

“411 The Convention does not specifically answer the question as to whether an adoption granted in a Contracting State and falling within its scope of application, but not in accordance with the Convention’s rules, could be recognised by another Contracting State whose internal laws permit such recognition. Undoubtedly, in such a case, the Contracting State granting the adoption is violating the Convention, because its provisions are mandatory such conduct may give rise the complaint permitted by Article 33 [the reporting function of the Authority in cases of breaches of the Convention], but the question of the recognition would be outside of the Convention and the answer should depend on the law applicable in the recognising State, always taking into account the best interests of the child.

412 Working document No 104, submitted by Spain when discussing Article 22, suggested to add a new paragraph prescribing: “Equally, any Contracting State may declare to the depository of this Convention that child adoptions will not be recognised in that State unless the functions conferred on the Central Authorities have been carried out in conformity with the first paragraph of this Article”. The idea behind the proposal was the guarantee that has to be made by the State of the habitual residence granting the adoption, to prevent the risks of fraud. However, it was observed that such denial of recognition may not be in the best interests of the child, as is exemplified by Canada with the case of a Spanish professor habitually resident in the United States who obtains a legally valid intercountry adoption without the intervention of the Central Authorities, continues to reside there for ten years or more only afterwards returns to Spain, and the proposal failed. Undoubtedly, it would be very difficult to accept the denial of recognition of the adoption, just because the Central Authorities did not intervene.”

[3.118] On this basis, the majority concluded that there could be exceptional cases in which, even though the provisions of the Convention had not been complied with, it would

⁵⁴ [2018] IESC 30, at para 111 of the judgment of MacMenamin J (with whom Dunne and O'Malley JJ concurred), citing paragraphs 411 and 412 of the explanatory report.

nonetheless be appropriate, if this was in the best interests of the child, to recognise the adoption. The Supreme Court remitted the case to the High Court to consider whether this was such an exceptional case. In *CB v Adoption Authority of Ireland*,⁵⁵ the High Court (Faherty J) carried out an exhaustive analysis of the law, including a comprehensive review of the analysis by the Supreme Court, and of the circumstances that had led to the making of the foreign adoption order. Notwithstanding the non-compliance with the Convention, the Court took fully into account the views quoted above from the explanatory report and concluded that it was in the interests of the two children involved in the case to make an order under section 92(1)(a) of the 2010 Act 2010 directing the Adoption Authority to register the adoption.

- [3.119] It is also useful to note that section 10 of the 2010 Act mentions that a copy of the explanatory report prepared in relation to the 1993 Hague Convention was placed in the Oireachtas Library. This mirrors, in some respects, the “laying” procedure under Article 29 of the Constitution, discussed in Chapter 2, Part 3, above. It is also a good example of transparency within the wider context of implementing the 1993 Hague Convention, especially because in the digital and online era an explanatory report such as this is now available from the website of the Hague Conference on Private International Law, under whose auspices the 1993 Convention was concluded.⁵⁶
- [3.120] As the quotations above from the explanatory report for the 1993 Hague Convention indicates, that report also incorporated relevant material from the negotiations leading up to the conclusion of the 1993 Convention.
- [3.121] In addition, some treaties or conventions are also preceded by detailed working documents prepared by those responsible for developing a treaty or convention, referred to as *travaux préparatoires*, which have also been cited with approval by the courts. For example, in *Bourke v Attorney General*,⁵⁷ the Supreme Court examined the *travaux préparatoires* for the Council of Europe’s 1957 European Convention on Extradition (ITS No 3 of 1966), on which section 50 of the *Extradition Act 1965* was based. Section 50 of the 1965 Act provides for various exceptions to extradition, including at the time of the *Bourke* case the “political offence” exception. The wide range of materials that the Supreme Court considered in the *Bourke* case included: the 1951 Council of Europe Recommendation (51) 16 on the preparatory measures to be taken to achieve the conclusion of a European Convention on Extradition; the Memorandum prepared by the Council of Europe Secretariat-General as part of that

⁵⁵ [2019] IEHC 779.

⁵⁶ Professor Parra-Aranguren’s explanatory report for the 1993 Convention is available on the website of the Hague Conference at <<https://assets.hcch.net/docs/78e18c87-fdc7-4d86-b58c-c8fdd5795c1a.pdf>> accessed on 26 August 2020.

⁵⁷ [1972] IR 36.

1951 Recommendation; the Belgian Extradition Law of 1833 and the German-Turkish Extradition Treaty of 1930, which were cited in that Memorandum; and early drafts, and the final text, of Article 3 of the 1957 Convention, on which section 50 of the 1965 Act was based.⁵⁸

(c) Full incorporation of international agreement through Acts and Regulations: Maritime/Marine Conventions and implementing legislation

- [3.122] The regulation of, and policy concerning, the maritime or marine area⁵⁹ is necessarily complex. This is because it involves a wide range of commercial activities, including: exploration and exploitation of natural resources, traditionally carbon-based and increasingly decarbonised and sustainable; the transport of goods, usually referred to as merchant shipping; fishing and aquaculture. It therefore includes contentious matters such as the extent of a state's jurisdiction and economic reach into the seas and oceans off its shores, a significant issue for an island state such as Ireland. Similarly, the regulation of sustainable fishing in international waters is a matter not only challenging at a global level but also regionally, including within the EU; and the regulation of merchant shipping is also crucial for Ireland as an export-oriented state.

(i) 2012 Integrated Marine Plan for Ireland: Harnessing Our Ocean Wealth

- [3.123] There has been an increasing focus on the relationship between economic activity and the maritime and marine environment. On the one hand, there is clear evidence that various pollution sources, including from oil tanker spillages and "flushable" plastic microbeads, have risked the environmental health of the planet's oceans, as well as human health. On the other hand, there is significant international interest in the positive role that our oceans are likely to play in sustaining our future through

⁵⁸ Separately, a revised version of the explanatory report for the 1957 Convention (which does not contain the Memorandum prepared by the Council of Europe Secretariat-General from which the Supreme Court in the *Bourke* case derived significant background information) is available on the website of the Council of Europe at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900016800c92bc> accessed on 26 August 2020.

⁵⁹ The Government's 2012 Integrated Marine Plan (IMP), *Harnessing Our Ocean Wealth – An Integrated Marine Plan for Ireland*, discussed below, recognised the difficulty in deciding whether to use "marine" or "maritime" in the Integrated Marine Plan (IMP). In the Foreword (first page, not paginated), the IMP stated: "Different European Coastal States have different terminologies to describe activities and resources related to the sea. In formulating the EU Integrated Maritime Policy (IMP-EU), the European Commission felt it necessary to include the terms marine and maritime whilst recognising that they overlap and, in some countries, are synonymous. In Ireland, different stakeholders also use different terminologies to describe activities; e.g. maritime is often associated with the shipping sector only. In this document [the IMP] we use 'marine' to reflect both maritime and marine." The IMP is available at: <https://www.ouroceanwealth.ie/sites/default/files/sites/default/files/Publications/2012/HarnessingOurOceanWealthReport.pdf> accessed on 26 August 2020.

environmentally sustainable alternative energy sources such as offshore wind and wave installations.

- [3.124] Given the wide-ranging issues involved, and their global reach, international agreements have played, and will continue to play, a key role in developing international principles and rules to regulate the maritime or marine area. Equally, these international agreements have greatly influenced national policy. In that respect, in 2012 the Department of Transport, Tourism and Sport, which has responsibility for the marine and maritime area, published *Harnessing Our Ocean Wealth – An Integrated Marine Plan for Ireland*.
- [3.125] The concept of an Integrated Marine Plan (IMP) is based on the many international agreements in this area, and requires each State to have in place a cross-cutting plan in which all relevant policy areas are brought together, ideally under a single entity. Arising from the publication of *Harnessing Our Ocean Wealth* (HOOW), the Irish Maritime Administration (IMA) was established in 2013 within the Department of Transport, Tourism and Sport to integrate the planning and delivery of all the maritime services of the Department under a single national office. The IMA comprises the Marine Survey Office, the Irish Coast Guard, the Maritime Transport Division of the Department and a new Maritime Services Division.
- [3.126] To provide a context for the significance of this sector, it is worth noting that, as an island state, shipping, ports and related services are clearly critical to the Irish economy. In recent years, it has been estimated that sea-borne trade accounted for over 80% of Ireland's trade in volume and over 60% in value terms. There are over 3,000 ships on the Irish register of ships, over 2,000 fishing vessels and thousands more recreational craft.

(ii) Focus on implementation of international agreements on merchant shipping

- [3.127] Given its wide scope, it is not possible to discuss all aspects of policy and legislation on the marine and maritime area. For the purposes of this Discussion Paper, an important question arises as to how Ireland has implemented the range of international agreements in the area of merchant shipping, which is in itself a complex area, in its domestic law. This discussion includes the methods used to implement the 1974 Convention on Safety of Life at Sea (SOLAS).
- [3.128] On the State's establishment in 1922, Ireland inherited what at that time was one of the most comprehensive pieces of legislation in this area, the *Merchant Shipping Act 1894*, which in its enacted form ran to over 600 sections. Since 1922, as with many other areas of international law reviewed in this Discussion Paper, there has been an enormous growth in the number of international treaties and conventions regulating this area, notably those agreed by the member states of the two key UN agencies in

this area, the International Maritime Organization (IMO) and the International Labour Organization (ILO).

- [3.129] Ireland has ratified the vast majority of those IMO and ILO treaties and conventions and, in incorporating them into Irish law, the Oireachtas has enacted separate pieces of legislation that have also repealed and replaced many elements of the 1894 Act. These include the *Merchant Shipping (Safety Convention) Act 1952*, the *Merchant Shipping (Load Lines) Act 1968*, the *Merchant Shipping (Salvage and Wreck) Act 1993* and the *Merchant Shipping Act 2010*.
- [3.130] A great deal of the 1894 Act nonetheless remains in force,⁶⁰ and at the time of writing (August 2020) the Department of Transport, Tourism and Sport has begun exploratory work, with the Commission, on the preparation of a Revised Act version, that is, an administrative consolidation of the 1894 Act in its as-amended form. This is with a view to the possible eventual consolidation and modernisation of all legislation on merchant shipping. Given the scale of the ongoing regulation of this area, this is a major undertaking. In the meantime, specific pieces of merchant shipping legislation have been enacted to ensure that Ireland maintains its status as a state that complies with all relevant international standards, notably from the IMO and ILO.
- [3.131] The Commission has already discussed the helpful deployment by the Department of Regulatory Impact Analyses (RIAs) in the preparation of proposed legislation in this area, including, in 2013, proposing what was ultimately enacted as the *Merchant Shipping (Registration of Ships) Act 2014* and, in 2017, in proposing the preparation of a *Merchant Shipping (International Conventions) Bill*. For the purposes of the present discussion, the key focus is to what extent, as a matter of national law, it is permissible to use a combination of Acts (primary legislation) and ministerial Regulations (secondary or delegated legislation) to achieve this.

(iii) List of merchant shipping international agreements: implemented and proposed

- [3.132] The importance of this issue can be gathered from the range of international conventions already ratified by the State, as well as those that the *Merchant Shipping (International Conventions) Bill* would also implement. The RIA published in 2017 in connection with the proposed Bill noted that Ireland had already ratified the following conventions, but that the proposed Bill would provide for important updating of the amendments made to them:

⁶⁰ See the Legislation Directory entries for the 1894 Act on the electronic Irish Statute Book (eISB), which lists all amendments made to the 1894 Act, available at <<http://www.irishstatutebook.ie/eli/isbc/bps1894.html>> accessed on 26 August 2020.

- IMO Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 (SUA),
- IMO Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988, and related Protocols of 2005 (as amended) (SUA Prot),
- IMO Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREGs),
- IMO International Convention for the Safety of Life at Sea 1974 (SOLAS) (as amended),
- IMO International Convention on Load Lines 1966, and Protocol of 1988 (as amended),
- IMO International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW),
- IMO International Convention on Tonnage Measurement of Ships 1969 and
- ILO Maritime Labour Convention 2006.

[3.133] The RIA then stated that the proposed *Merchant Shipping (International Conventions) Bill* would, in addition, provide for the implementation of the following international conventions:

- IMO Cape Town Agreement of 2012 on the Implementation of the Provisions of the Torremolinos Protocol of 1993 Relating to the IMO Torremolinos International Convention for the Safety of Fishing Vessels 1977,
- IMO Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009,
- IMO International Convention and Protocol on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (as amended) (HNS),
- IMO Nairobi International Convention on the Removal of Wrecks 2007,
- IMO International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel 1995 (STCW-F),
- ILO Seafarers' Identity Documents Convention (Revised) 2003 and
- ILO Work in Fishing Convention 2007.

(iv) EU engagement with merchant shipping international conventions

[3.134] The Commission has already discussed the competence of the European Union (EU) in ratifying international treaties and conventions.⁶¹ Since merchant shipping is directly connected with international trade, the EU has played an increasing role in ratification of many IMO and ILO conventions in parallel with ratification by EU member states.

⁶¹ See paragraphs 2.138-2.160, above.

We have also already noted that the RIA published in 2017 that proposed the enactment of the *Merchant Shipping (International Conventions) Bill* noted that one option would be that the State could await the ratification by the EU of the additional IMO and ILO conventions that the proposed Bill also proposed to implement. The RIA also stated that its preferred option was to proceed with the enactment of the proposed Bill.⁶² As the proposed Bill remains in preparation at the time of writing (August 2020), it is the case that the EU has also been engaged in legislative initiatives that affect some of the IMO and ILO conventions which the proposed Bill would implement.

- [3.135] Thus, a series of Ministerial Regulations in 2014, made under section 87 of the *Merchant Shipping Act 2010* (discussed below), gave effect to various elements of the ILO Maritime Labour Convention 2006, which had been adopted at EU level through Directive 2009/13/EC (amending Directive 1999/63/EC), implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention 2006. The *Merchant Shipping (Maritime Labour Convention) (Seafarer Employment Agreement and Wages) Regulations 2014*⁶³ set out the requirements of the 2006 ILO Convention concerning the minimum contents of seafarer employment agreements, the duties of shipowners with regard to records of employment, obligations towards seafarers who are not employees and minimum notice periods. The Regulations also set out provisions relating to the payment of wages. The *Merchant Shipping (Maritime Labour Convention) (Accommodation, Recreational Facilities, Food, Catering And Ships' Cooks) Regulations 2014*⁶⁴ set out the Convention's requirements on the provision of accommodation and recreational facilities on all seagoing Irish ships constructed on or after 21 July 2015. The requirements of the *Merchant Shipping (Crew Accommodation on Board Ship) Regulations 1951*⁶⁵ continue to apply to pre-2015 ships. The *Merchant Shipping (Maritime Labour Convention) (Shipowners' Liabilities and Repatriation) Regulations 2014*⁶⁶ set out the requirements of the Convention regarding shipowners' liability and repatriation. The *Merchant Shipping (Maritime Labour Convention) (Flag State Inspection and Certification) Regulations 2014*⁶⁷ set out the requirements of the Convention regarding flag State responsibilities.

⁶² See paragraph 3.41, above.

⁶³ (SI No 373 of 2014).

⁶⁴ (SI No 374 of 2014).

⁶⁵ (SI No 95 of 1951).

⁶⁶ (SI No 375 of 2014).

⁶⁷ (SI No 376 of 2014).

- [3.136] The *European Union (Ship Recycling) Regulations 2018*⁶⁸ put in place the necessary administrative measures to ensure full implementation of the 2013 Regulation (EU) 1257/2013 on ship recycling. The Recitals to the 2013 EU Regulation refer to the need to ensure that ship recycling within the EU reflects the approach in the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009, although the detailed requirements of the EU Regulation differ in some respects from the Hong Kong Convention. At the time of writing (August 2020) the Hong Kong Convention has not yet come into force,⁶⁹ but it should also be noted that the recitals to the 2013 EU Regulation also indicate that the EU Regulation itself may be an important stepping stone to its ultimate ratification by EU member states.
- [3.137] The *European Union (International Labour Organisation Work in Fishing Convention) (Food and Accommodation) Regulations 2020*⁷⁰ involved another EU-derived initiative related to an ILO Convention that the proposed Bill would implement. The 2020 Regulations implemented a number of provisions in Directive 2017/159 (EU), which in turn involved implementing the 2012 Agreement between the General Confederation of Agricultural Cooperatives in the European Union (Cogeca), the European Transport Workers' Federation (ETF) and the Association of National Organisations of Fishing Enterprises in the European Union (Europêche) concerning the implementation of the ILO Work in Fishing Convention 2007.⁷¹

(v) *Detailed requirements of SOLAS Convention are regularly updated*

- [3.138] In addition to the number of international conventions involved, it is clear even from the few examples already mentioned that their requirements are subject to regular updating. This is the case with, for example, the detailed requirements of the 1974 SOLAS Convention, whose provisions on detailed matters such as the number of buoyancy aids (life jackets) required on a ship, along with the associated technical

⁶⁸ (SI No 555 of 2018).

⁶⁹ The Hong Kong Convention comes into force subject to three conditions: (a) it is ratified by at least 15 states, (b) representing 40% of the world merchant shipping by gross tonnage, and (c) representing on average 3% of recycling tonnage for the previous 10 years. See <<http://www.imo.org/en/OurWork/Environment/ShipRecycling/Pages/Default.aspx>> accessed on 26 August 2020.

⁷⁰ (SI No 267 of 2020).

⁷¹ The *European Union (International Labour Organisation Work in Fishing Convention) (Health Protection and Medical Care on Board Fishing Vessels) Regulations 2020* (SI No 259 of 2020) and the *European Union (International Labour Organisation Work in Fishing Convention) (Medical Examination) Regulations 2020* (SI No 266 of 2020) also involved implementing elements related to the ILO Work in Fishing Convention.

manufacturing specifications for them, are regularly updated by the expert technical committees appointed by the IMO to update SOLAS.⁷²

- [3.139] Against this background, therefore, the question that arises is to what extent it is permissible to enact primary legislation, an Act of the Oireachtas, implementing the general requirements of international conventions, and to provide in the Act that the detailed requirements, including the regular updating of those conventions, can be implemented by secondary legislation, usually in the form of ministerial Regulations made under the Act, sometimes referred to as delegated legislation.
- [3.140] It is relevant to note that this legislative technique is already well-established. By way of example, the *Merchant Shipping (Collision Regulations) (Ships and Water Craft on the Water) Order 2012*,⁷³ made under sections 418 and 424 of the *Merchant Shipping Act 1894*, implemented the IMO International Regulations for Preventing Collisions at Sea 1972 as amended by Resolutions A.464 (12), A.626 (15), A.678 (16), A.736(18), A.910(22) and A.1004(25) (the International Regulations). The full text of the International Regulations is set out in Schedule 1 to the 2012 Order, and Schedule 1 runs to over 30 A5 pages in the official Stationery Office (pdf) version of the 2012 Order. This underlines the level of detail involved in the international regulation of this area.

(vi) "Principles and policies" test of constitutionality of Regulations made under Act

- [3.141] This legislative implementing technique is entirely understandable because it would be impracticable for the level of detail contained in, for example, the 2012 Order to be enacted in Acts the Oireachtas on an ongoing basis. For the purposes of this Discussion Paper, the question is to what extent this is permissible. This is, in turn, a question of Irish domestic, constitutional, law.
- [3.142] Article 15.2.1° of the Constitution provides that the Oireachtas has the sole and exclusive power of making laws for the State. The courts have recognised, however, that it would be difficult for the Oireachtas, in an increasingly complex world, to prescribe all the rules by way of an Act, primary legislation, for every conceivable situation. In *BUPA Ireland v Health Insurance Authority*⁷⁴ the High Court (McKechnie J) stated that "given the constitutional and statutory framework which operates in this country, it would be impossible, or at least highly impracticable, to oblige the

⁷² On the complexity of implementing the ongoing amendments to SOLAS, see McCarthy, "Shifting tides: Ireland's struggle to keep pace with the Safety of Life at Sea Convention" (2018) 28(1) *Journal of International Maritime Law* 57.

⁷³ (SI No 507 of 2012). The 2012 Order revoked and replaced previous Orders made under the 1894 Act that had implemented earlier versions of the International Regulations.

⁷⁴ [2006] IEHC 431.

Oireachtas to respond in a timely manner to ever changing and evolving circumstances which could have a major impact on fundamental issues”.⁷⁵

- [3.143] The courts therefore accept that the Oireachtas can delegate some legislative details to another person such as a Minister, or to a regulatory body such as the Central Bank of Ireland. The key test is that the Oireachtas must set out the “principles and policies” in an Act that are to operate as a set of guiding instructions to the delegated person or body so that any Regulations made under the Act are kept within the delegated limits. If the principles and policies are not set out in the Act, the Regulations made under the Act will be unconstitutional because they would be in breach of Article 15.2.1° of the Constitution.
- [3.144] The “principles and policies” test is sometimes also known as the “non-delegation doctrine” because it sets the limits on what can, and cannot, be delegated by the Oireachtas under Article 15.2.1° of the Constitution. The Supreme Court decision in *Cityview Press Ltd v An Chomhairle Oiliúna*⁷⁶ is the leading Irish authority on the “principles and policies” test. The plaintiff company challenged section 21 of the *Industrial Training Act 1967* (1967 Act), which allowed An Chomhairle Oiliúna (AnCO), the Industrial Training Authority, to designate certain activities as “designated activities” on which it would then be permitted to impose levies, to be paid by employers carrying out those activities.
- [3.145] The company claimed that section 21 of the Act of 1967 was an unconstitutional delegation of legislative power to AnCO. The Supreme Court dismissed the claim, and in doing so also set out the relevant “principles and policies” test:

“[T]he test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits — if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body — there is no unauthorised delegation of legislative power.”⁷⁷

⁷⁵ [2006] IEHC 431 at para 158.

⁷⁶ [1980] IR 381.

⁷⁷ [1980] IR 381 at page 399.

- [3.146] The principles and policies test is clear: the key principles and policies, the law, must be set out in an Act of the Oireachtas, primary legislation, and the details of that law may be filled in by Regulations or Orders, secondary legislation.
- [3.147] An important refinement to the principles and policies test was discussed by the Supreme Court in *O'Sullivan v Sea Fisheries Protection Authority*,⁷⁸ namely, that where a broad Regulation-making power is conferred on a Minister or other body, this increases the need for guidance to be set out by way of principles and policies, whereas if the delegated power is narrow then relatively little guidance is needed.
- [3.148] The *O'Sullivan* case involved an application of the principles and policies test with a dimension that has some specific relevance to this Discussion Paper. It did not involve the implementation in Irish law of an international agreement as such, but it involved the question of the extent of a delegation arising from EU law. As noted in chapter 2, EU law in effect is part of domestic law but its content is clearly agreed by the EU member states in institutions situated outside the State. In the *O'Sullivan* case, the plaintiffs challenged the constitutionality of the fisheries penalty point system introduced in the *European Union (Common Fisheries Policy) (Point System) Regulations 2014*⁷⁹ (the 2014 Regulations), which were later replaced by the *European Union (Common Fisheries Policy) (Point System) Regulations 2016*⁸⁰ (the 2016 Regulations).
- [3.149] The 2014 Regulations and the 2016 Regulations were both made under section 3 of the *European Communities Act 1972* in order to put in place the required administrative arrangements to implement Article 92 of Regulation (EC) No 1224/2009 (the 2009 EU Regulation) and Title 7 of Commission Implementing Regulation (EU) No 404/2011 (the 2011 EU Implementing Regulation). These required each EU Member State to introduce a point system, broadly the equivalent of the penalty points system in place under the Road Traffic Acts, to address serious breaches of the Common Fisheries Policy (CFP) by licence-holders of a sea-fishing boat. In the *O'Sullivan* case, the Supreme Court noted that the 2009 EU Regulation and the 2011 EU Implementing Regulation both contained significant detail as to the rationale behind the requirement to have in place a point system, in effect the principles and policies involved.
- [3.150] Thus, Title 7 of the 2011 EU Implementing Regulation includes Article 125, which provides that the Member State shall designate a competent authority responsible for both the setting up of a system for the attribution of points for serious infringements as referred to in Article 92(1) of the 2009 EU Regulation, and the assigning of the

⁷⁸ [2017] IESC 75, [2017] 3 IR 371.

⁷⁹ (SI No 3 of 2014).

⁸⁰ (SI No 125 of 2016).

appropriate number of points to the holder of a fishing licence. Under Article 126, the number of points for a serious infringement shall be assigned in accordance with Annex 30 of the 2011 EU Implementing Regulation to the holder of a fishing licence for the fishing vessel concerned. Article 126(4) provides that the points are assigned to the holder on the date set and the decision assigning them. Member states are obliged to ensure that the application of national rules concerning the suspensory effect of review proceedings do not render the points system ineffective. Article 129 provides that the first, second, third and fourth suspensions are triggered by the accumulation of 18, 36, 54, and 72 points respectively, and Article 129(2) provides that accumulation of 90 points will trigger the automatic permanent withdrawal of the fishing licence.

- [3.151] The Supreme Court therefore noted that what was left to Member States was the establishment of a process for the allocation of the points in practice, and that every other step in the process was prescribed by the 2009 EU Regulation and the 2011 Implementing Regulation. The Ministerial Regulations made in 2014 and 2016 under section 3 of the *European Communities Act 1972* were therefore incidental, supplemental and consequential to the principles and policies contained in the 2009 EU Regulation and the 2011 Implementing Regulation. While the Court acknowledged that the Ministerial Regulations involved a choice or a range of choices on the part of the Minister, those choices were severely limited and therefore “raise[d] no issue of broad policy that requires a determination by the Oireachtas” and were therefore not in breach of Article 15.2.1° of the Constitution.⁸¹
- [3.152] In *O’Sullivan*, the Supreme Court also provided a useful example of, on the one hand, what is required in terms of principles and policies in an Act where a wide delegation is involved and, on the other hand, where a narrow delegation is involved. The Supreme Court stated:

“An apparently wide delegation may be limited by principles and policies clearly discernible in the legislation. On the other hand, a very narrow area of delegation may require very little in terms of principles and policies in parent legislation, on the basis that by delegating an area with only a limited number of possible solutions the Oireachtas was plainly satisfied that any one of those outcomes could be chosen consistent with the policy of the Act, and properly be decided on by a subordinate body which might have access to further detailed information, or indeed on the basis that the outcome might be more easily

⁸¹ [2017] IESC 75, at paras 42-43, [2017] 3 IR 751 at paras 43-44.

adjusted within the scope left to the subordinate, in the light of changing circumstances.

To take a simple example, if a body is given authority to fix all the terms of a licence, that is a power which may on its face appear unlimited, and it may be necessary to consider if there are sufficient policies and principles in the parent legislation to narrow the scope of subordinate decision making, and guide the decision-maker. If however the delegation is merely to fix a licence fee within a minimum and maximum already identified, it may follow that the Oireachtas has already contemplated a range of possible outcomes and considered them compatible with the statutory objective, and was content to leave the decision as to what precise point within that scale was the most appropriate in the light of changing circumstances, to a subordinate body. It would not be necessary to look in addition for detailed principles and policies to guide that task.”⁸²

- [3.153] Applying this test to the area of international maritime and marine conventions, it would be important that, for example, the proposed *Merchant Shipping International Conventions) Bill* would set out some guiding principles and policies in order to ensure that any Regulations or Orders made under it would not be in breach of the test. A good statutory precedent in this respect is the *Merchant Shipping Act 2010*.

(vii) Principles and policies test applied: Merchant Shipping Act 2010

- [3.154] The 2010 Act contains a number of elements.⁸³ First, it provided for the implementation of the general amendments made up to 2008 of the 1974 International Convention for the Safety of Life at Sea (SOLAS). Second, Part 3 of the 2010 Act, which constituted the bulk of the Act, enabled the Minister for Transport, Tourism and Sport to make statutory rules and regulations for the safety of cargo and passenger vessels under the Merchant Shipping Acts 1894 to 2010 to cover all relevant categories of vessels, namely cargo, passenger, fishing vessels and leisure craft. The matters in respect of which Regulations may be made under the 2010 Act include construction rules for passenger vessels, cargo ship construction and survey rules, radio rules, navigation and tracking rules, cargo ship bulk carrier rules, fire protection rules, rules for life-saving appliances and arrangements and approval of service

⁸² [2017] IESC 75, at para 40, [2017] 3 IR 751 at para 41.

⁸³ See the discussion of the 2010 Act in Byrne and Binchy (eds), *Annual Review of Irish Law 2010* (Round Hall 2011), pages 645-647.

stations for inflatable life-saving appliances. Part 7 of the 2010 Act provided that the ILO Maritime Labour Convention had the force of law in the State.

- [3.155] Section 6 of the 2010 Act amended the Merchant Shipping (Safety Convention) Act 1952 to include an updated definition of "Safety Convention" to recognise the amended version of the 1974 SOLAS Convention. The 1952 Act had originally defined "Safety Convention" to mean "the International Convention for the Safety of Life at Sea" (the 1948 London Convention), which was the predecessor of the SOLAS Convention. Section 2 of the *Merchant Shipping Act 1981* had previously amended the 1952 Act to provide that all references in the 1952 Act to the 1948 London Convention were to be taken from then on to be references to the 1974 SOLAS Convention. Section 6 of the 2010 Act inserted the following definition into the 1952 Act:

" 'Safety Convention' means the International Convention for the Safety of Life at Sea signed in London on behalf of the Government on 1 November 1974 together with the Protocol to the International Convention for the Safety of Life at Sea signed in London on behalf of the Government on 17 February 1978 and the Protocol to the International Convention for the Safety of Life at Sea signed in London on behalf of the Government on 11 November 1988 and any amendments made to it up to and including those adopted by the 85th session of the Maritime Safety Committee of the International Maritime Organisation held between 26 November and 5 December 2008 and which have entered into force in respect of the State pursuant to Article VIII prior to the passing of the *Merchant Shipping Act 2010*."

- [3.156] A number of provisions of the 2010 Act set out guiding principles, including references to detailed amendments to the 1974 SOLAS Convention, which may have been drafted with the "principles and policies" test in mind. Thus, section 7 of the 2010 substituted a new section 10 into the 1952 Act to enable the making of ministerial Construction Rules for passenger ships. Section 8 amended the 1952 Act to enable the making of Radio Rules and strengthened the relevant inspection and enforcement powers.
- [3.157] Part 3 (sections 16 to 66) of the 2010 Act contains new provisions intended specifically to implement the updated meaning of the SOLAS Convention. Part 3, chapter 1 deals with chemical tanker rules, chapter 2 with liquefied gas carriage rules, chapter 3 with nuclear carriage rules, chapter 4 with high speed craft rules, chapter 5 with tendering operations regulations, chapter 6 with safe manning regulations and chapter 7 with unsafe ships. The basic structure of all of these chapters in Part 3 is the same: each provides for the making of rules to prescribe the particular requirements for structural,

operational and survey requirements for each one of these categories and it also provides for survey, certification, inspection, enforcement and prosecution provisions.

- [3.158] An example of Regulations made under the 2010 Act on life-saving appliances to comply with detailed amendments to SOLAS are the *Merchant Shipping (Life-Saving Appliances) Rules 2018* (SI No 438 of 2018). The 2018 Regulations were made under section 82 of the 2010 Act, and they implemented Chapter III of the Annex to the SOLAS Convention, as amended. They take up over 40 A5 size pages in the official Stationery Office (pdf) version of the 2018 Regulations and they contain detailed requirements for life-saving appliances and arrangements, including requirements for life boats, rescue boats and life jackets according to the type of ship concerned.
- [3.159] Part 7 of the 2010 Act comprises a single section, section 87, which implemented the ILO Maritime Labour Convention 2006. Section 87(2) provides:

“(2) (a) The Regulations, and the Standards of the Code, of the Convention have the force of law in the State and judicial notice shall be taken of them.

(b) A copy of the Convention or the Regulations, or the Standards of the Code, of the Convention purporting to be published by the International Labour Organisation may be produced in every court and in all legal proceedings and is evidence, unless the contrary is shown, of the Convention, the Regulations, or Code of the Convention, as the case may be.”

- [3.160] We have already seen the example in the *Adoption Act 2010* of providing that an international agreement is to have the force of law in the State and that judicial notice is to be taken of it. In the case of the 2006 Convention, given the level of detail involved in the Convention, its Code and Regulations, it would not have been practicable to have included their full text as a Schedule to the Act (unlike the scheduling of the 1993 Hague Convention on Adoption implemented in the *Adoption Act 2010*). Instead, section 87(2)(b) of the 2010 Act provided that a copy of the Convention, its Code and Regulations purporting to have been published by the ILO could be produced in court as evidence of their content.
- [3.161] A series of Ministerial Regulations in 2014, made under section 87 of the 2010 Act, gave effect to various elements of the ILO Maritime Labour Convention 2006, which had also been adopted at EU level through Directive 2009/13/EC (amending Directive 1999/63/EC), implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention 2006. The *Merchant Shipping (Maritime*

Labour Convention) (*Seafarer Employment Agreement and Wages*) Regulations 2014⁸⁴ set out the requirements of the 2006 ILO Convention concerning the minimum contents of seafarer employment agreements, the duties of shipowners with regard to records of employment, obligations towards seafarers who are not employees and minimum notice periods. The Regulations also set out provisions relating to the payment of wages. The *Merchant Shipping (Maritime Labour Convention) (Accommodation, Recreational Facilities, Food, Catering and Ships' Cooks) Regulations 2014*⁸⁵ set out the Convention's requirements on the provision of accommodation and recreational facilities on all seagoing Irish ships constructed on or after 21 July 2015. The requirements of the *Merchant Shipping (Crew Accommodation on Board Ship) Regulations 1951*⁸⁶ continue to apply to pre-2015 ships. The *Merchant Shipping (Maritime Labour Convention) (Shipowners' Liabilities and Repatriation) Regulations 2014*⁸⁷ set out the requirements of the Convention regarding shipowners' liability and repatriation. The *Merchant Shipping (Maritime Labour Convention) (Flag State Inspection and Certification) Regulations 2014*⁸⁸ set out the requirements of the Convention regarding flag State responsibilities.

(viii) *Concluding comments on implementation of IMO and ILO Conventions*

- [3.162] This brief overview of the implementation of IMO and ILO Conventions has focused on the 1974 IMO SOLAS Convention and, to some extent, on the 2006 ILO Maritime Labour Convention. Even this brief discussion illustrates the wide-ranging subject matter of those conventions. The *Merchant Shipping Act 1894*, as enacted, contained a comprehensive legislative code in this important area, but the need to develop new and detailed rules at international level in the 20th and 21st centuries have led to the repeal and replacement of many of the original provisions of the 1894 Act.
- [3.163] The Department of Transport, Tourism and Trade has recognised the difficulty that this has created by beginning the development of a Revised Act of the 1894 Act. In parallel with this is the proposal from 2017 to bring together in a proposed *Merchant Shipping (International Conventions) Bill* all the relevant international conventions in this area that have been agreed during the 20th and 21st centuries. These parallel developments would bring greater clarity to the area.

⁸⁴ (SI No 373 of 2014).

⁸⁵ (SI No 374 of 2014).

⁸⁶ (SI No 95 of 1951).

⁸⁷ (SI No 375 of 2014).

⁸⁸ (SI No 376 of 2014).

- [3.164] The use of RIAs also provides transparency and clarity in the implementation process. From a constitutional point of view, the “principles and policies” test also allows the State to enact a Bill such as the *Merchant Shipping (International Conventions) Bill* and to include a delegated power for a Minister or other body to make Regulations implementing the detail of such international conventions. Such a Bill would meet the relevant constitutional test, as set out in the case law discussed above, provided it contains suitable principles so that the Regulations made under it are left to fill in the details.

(d) Partial, indirect and implicit incorporation of international agreements

- [3.165] In this concluding section, the Commission discusses a number of methods used to implement international agreements either partially or by indirect means.

(i) Partial incorporation: major human rights treaties and conventions

- [3.166] Partial incorporation of an international agreement may be required for pragmatic reasons because the international agreement requires wide-ranging reforms across many policy areas. This may be especially the case with the major UN human rights treaties, such as the 2006 UN Convention on the Rights of Persons with Disabilities (UNCRPD). As discussed above, and in the case study in the Appendix, in 2015 the Government published a Roadmap to Implementation of the UNCRPD, which pointed out that a series of legislative provisions would be required to implement in full the requirements in the UNCRPD. The *Assisted Decision-Making (Capacity) Act 2015* constituted a significant step towards ratifying, and implementing in domestic law, the UNCRPD, but many further legislative reforms remain to be enacted before it could be said that the main elements of the UNCRPD, as currently understood, have been implemented. Indeed, given the wide-ranging nature of the UNCRPD, it is likely that in the future further legislative reforms not currently anticipated may be required to maintain compliance with its requirements.
- [3.167] Another aspect of partial incorporation also discussed above is the use of reservations. Thus, we have already noted that, in respect of the ICESR and the ICCPR, Ireland entered a number of reservations to both Conventions on their ratification. As also already noted, over time a number of these reservations have been removed, thus increasing the scope of the State’s initial ratifications.
- [3.168] Two other forms of partial incorporation may also be noted. As discussed above, an Act that specifically refers to an international agreement may provide that the text of the agreement shall be “judicially noticed” for the purposes of that Act, and in other instances the full text of the agreement may be scheduled to the Act. It is important to note that neither of these provisions, in themselves, has the effect that the international agreement is fully incorporated into Irish law. Full incorporation requires

the Act in question to provide that the international agreement “has the force of law” in the State, which is the phrase used in the *Adoption Act 2010*. In the absence of such a phrase, it is necessary to examine the precise wording of the individual Act to determine the extent to which any provision of the international agreement is enforceable as a part of Irish law.

(ii) Joint or indirect incorporation

- [3.169] We have discussed above examples of joint or indirect incorporation, notably where the State and the European Union have overlapping roles in the implementation of international agreements. This has occurred, for example, in the context of implementing international agreements in the areas of intellectual property and merchant shipping.

(iii) Implicit incorporation

- [3.170] Implicit incorporation occurs where the implementing domestic legislation does not specifically refer to the relevant international agreement. In many instances, a reference to the terms of the agreement in question is made clear during the Oireachtas debates. This occurred during the Oireachtas debates on the *Copyright and Related Rights Act 2000*, discussed in chapter 1, above. While this is a useful means of noting the origins of the statutory provisions in question at that time, the Commission considers that it is not as satisfactory as a more explicit reference in the legislation itself. The benefits of explicit reference in the legislation is that this is then available for all persons who are involved in implementing that legislation, sometimes many years later.

CHAPTER 4 MONITORING AND ENFORCEMENT MECHANISMS FOR INTERNATIONAL AGREEMENTS

- [4.1] In this chapter the Commission examines a number of mechanisms that have been developed to monitor and report on compliance with international obligations. This includes the mechanisms in place in the State and those developed at international level.

1. Basic principles for implementing international obligations

- [4.2] Compliance and monitoring of the State's compliance with an international agreement usually refers to the State's activities after the State becomes bound by an international agreement, that is, after the coming into force of an international agreement for the State. Monitoring compliance with an international agreement can be viewed from the perspective of national law and policy-making as well as from the perspective of international law and international relations.
- [4.3] From the domestic perspective, monitoring compliance takes place at multiple levels, including:
- at Government level, through the relevant Departments, notably the Department of Foreign Affairs and Trade;
 - by the Oireachtas, including through pre-legislative and post-legislative scrutiny;
 - through the courts, in those cases where international law issues are litigated;
 - by other public bodies, including regulatory and adjudicative bodies and local government; and
 - by civil society, including National Human Rights Institutions (NHRIs) and NGOs.
- [4.4] Similarly, at the international level, agreements may also be monitored in a variety of ways, including through:
- meetings of the parties (MOPs) or conferences of the parties (COPs);
 - secretariats or treaty bodies established by, for example, the UN or a particular treaty;

- bilateral commissions;
- party-to-party relations (reciprocity or party trigger of compliance mechanism);
- international courts and arbitrations; and
- independent expert groups.

[4.5] The core concept of compliance with international agreements is set out in Article 26 of the 1969 UN Vienna Convention of the Law of Treaties (VCLT), which as noted already,¹ Ireland ratified in 2006 (ITS No 4 of 2006). Article 26 of the VCLT provides:

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

[4.6] This is also captured by the principle *pacta sunt servanda* (literally, “agreements must be complied with”), a general principle of international law, and also enshrined in the Preamble to the 1945 Charter of the United Nations. The principle of good faith forms an integral part of the principle *pacta sunt servanda* – it is one of the logical bases of the international law of treaties. The Charter of the United Nations itself endorses these principles in Article 2(2), which provides that states must fulfil the obligations assumed by them in accordance with the Charter.

[4.7] These principles are entirely consistent with the commitment enshrined in our domestic law in 1937 in Article 29.3 of the Constitution which, as discussed already,² provides that “Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.” While, as a sovereign State, Ireland is free to determine how it meets its international obligations – those arising from international treaties, customary international law and general principles of international law – it does so in accordance with the commitment in Article 29.3 to apply general principles of international law.

[4.8] Two implications arise from this. Firstly, as discussed in chapter 2, while it is clear that Ireland is not obliged to ratify a treaty merely because it has signed it (signing being subject to ratification), the State will usually apply the principle of good faith and not engage in activity that would directly frustrate the object and purpose of a treaty. Secondly, Article 31 of the VCLT provides that, in interpreting the text of an international agreement, notably after ratification, this should also be done in

¹ See paragraph 2.69, above.

² See paragraph 1.54, above.

accordance with the principle of good faith, applying the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, while taking into account any extraneous norms of international law applicable in the relations between the parties. This interpretive approach is similar to the approach used in the interpretation of domestic legislation.³

- [4.9] It is important to note here the mechanisms for addressing non-compliance with an international agreement. Article 60 of the VCLT provides that a breach of an international agreement may result in various international legal consequences, depending on the position of the parties to the breach. Parties may decide to suspend the treaty's operation in whole or in part, or to terminate it under certain conditions. This is because, at the international level, reciprocity and monitoring of reciprocity of contracting parties drives compliance with international obligations. Political self-control, reciprocity, the promotion of cooperation between parties, and due diligence are typical compliance safeguards for international treaties without other specific compliance mechanisms.
- [4.10] It has been argued that, especially in the area of technical, trade and environmental agreements for some countries, compliance is a problem of financial capacity rather than lack of willingness to implement the treaty itself.⁴ As a result, international environmental law treaties such as the Kyoto Protocol typically envisage the suspension of the rights and privileges resulting from the treaty as a measure of last resort only. Under Article 18 of the Kyoto Protocol, the COP decided what measures to use in cases of non-compliance, including an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance.⁵ The Montreal Protocol on Substances that Deplete the Ozone Layer envisages that non-compliance may be met with appropriate assistance, caution and suspension so there is a gradation of adverse consequences in case of non-compliance.⁶
- [4.11] Some treaties include the possibility of party-to-party triggering, meaning that one party can initiate a non-compliance procedure against another party. Under the

³ See generally Dodd, *Statutory Interpretation in Ireland* (Bloomsbury Professional, 2008) and Craies on Legislation: *A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation* 11th ed (Sweet & Maxwell 2017).

⁴ Chayes and Chayes "On Compliance" (1993) 47(2) *International Organization* 175.

⁵ Decision 27/CMP.1 on Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol adopted by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol.

⁶ Victor, "The Montreal Protocol's Non-Compliance Procedure" in Victor, Raustiala and Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments* (MIT Press, 1998) pages 137 – 176.

UNECE Convention on Access to Environmental Justice (the Aarhus Convention), a submission may be brought before the Committee by one or more parties that have reservations about another party's compliance with its obligations under the Convention.⁷

- [4.12] Although the consequences of failure to comply may be potentially severe, many multilateral agreements try to facilitate the non-complying party and provide for non-confrontational, non-judicial and consultative procedures to restore compliance.⁸ For example, under the Aarhus Convention, the role of the Committee is to monitor, assess and facilitate the implementation of and compliance with the Convention's reporting requirements.
- [4.13] In practice, therefore, the responses to non-compliance are generally facilitative rather than confrontational. An assessment of State practice demonstrates that the traditional means of addressing non-compliance such as withdrawal, suspension, termination, arbitration and judicial means are not commonly used.⁹

2. Overview of role of national and international courts

- [4.14] It is useful to reiterate here the role that domestic courts and international courts play in monitoring international agreements.
- [4.15] The role of national courts is to apply Irish law, which in the dualist context that applies in Ireland may, as already discussed,¹⁰ bring the State into conflict with its obligations at international level. We have already seen an example of this in practice. In the Supreme Court in *The State (Gilliland) v Governor of Mountjoy Prison*,¹¹ the Court was required by Irish law to decide that a 1983 bilateral extradition treaty between Ireland and the United States was unconstitutional because it had not been approved by Dáil Éireann under Article 29 of the Constitution. This created a difficulty for the State because, as set out in Article 27 of the VCLT, it is not permissible under international law to invoke a State's internal laws as a justification for a failure to perform obligations under an international agreement. The State therefore needed to

⁷ This was used once only, in the case of Belarus and Ukraine: see United Nations Economic Commission for Europe: Convention Bodies; Compliance Committee; Submissions by Parties, available at <<https://www.unece.org/submissions.html>> accessed on 27 August 2020.

⁸ Sands, Peel and MacKenzie, *Principles of International Environmental Law*, 3rd ed (Cambridge University Press 2012) page 325.

⁹ Fitzmaurice, "Compliance with Multilateral Environmental Agreements" (2009) 21(2) National Law School of India Review 1.

¹⁰ See paragraphs 2.47-2.55, above.

¹¹ [1986] IESC 3, [1987] IR 201.

make good its commitment at the international level to bring the extradition treaty back into operation, because it could not claim that its national law (in this case the Constitution) created a barrier to doing so. In this instance, the Government made good its obligations under Article 27 of the VCLT by having the extradition treaty approved by Dáil Éireann.¹²

- [4.16] This obligation on the State to act in good faith under the VCLT does not mean that domestic courts are required to accept actions by individuals or companies who invoke provisions of international agreements.¹³ As we have also already seen, Ireland's dualist approach to international law under Article 29 of the Constitution means that the courts must decline to accept arguments based on an international treaty, including a treaty that the State has ratified, unless and until the Oireachtas has enacted legislation to incorporate that treaty into domestic law.¹⁴
- [4.17] At the same time, the courts will, where possible, apply a presumption in favour of interpreting domestic legislation so that it is in conformity with the State's obligations under international law, even if a particular treaty has not been incorporated into domestic law. For example, in the Supreme Court decision *Ó Domhnaill v Merrick*,¹⁵ Henchy J was prepared to consider that the time limits for initiating claims under the *Statute of Limitations 1957* could be viewed as being consistent with Article 6 of the Council of Europe Convention on Human Rights and Fundamental Freedoms (ECHR) which provides that civil disputes should be determined "within a reasonable time" by courts. This approach may also act as a constraint on administrative decision-making and as aid in the determination of the common law, or public policy.¹⁶
- [4.18] Complementing this, at the international level, the State's compliance with ratified treaties that have not been fully incorporated into national law may be monitored by international courts and tribunals. As noted in Chapter 1, Ireland has accepted the jurisdiction of several standing international courts, as well as agreeing to the specific dispute resolution mechanisms of a number of international treaties. For example, in 1930 Ireland became one of the first States to accept the compulsory jurisdiction of the League of Nations' Permanent Court of International Justice (PCIJ), though for

¹² See the discussion at paragraphs 2.47-2.55, above.

¹³ See Murphy, "Does International Law Oblige States to Open Their National Courts to Persons for the Invocation of Treaty Norms that Protect or Benefit Persons," in Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009), page 61.

¹⁴ See the discussion of the effect of dualism in paragraphs 2.12-2.30, above.

¹⁵ [1984] IR 151, at page 159.

¹⁶ See the detailed discussion in Fennelly, *International Law in the Irish Legal System* (Round Hall 2014), paras 2.91-2.98.

pragmatic reasons already discussed it was not until 2011 that it accepted the compulsory jurisdiction of its successor, the UN's International Court of Justice (ICJ).¹⁷

- [4.19] Ireland was one of the of the first member states of the Council of Europe to accept, in 1953, the compulsory jurisdiction of the enforcement mechanisms established under its Convention on Human Rights and Fundamental Freedoms (ECHR), notably the European Court of Human Rights (ECtHR), including its jurisdiction to accept cases from individuals. Indeed, as already noted,¹⁸ the first ever individual petition involving a Council of Europe member state was against Ireland, *Lawless v Ireland*,¹⁹ in which the ECtHR rejected the applicant's challenge that his internment under the *Offences Against the State (Amendment) Act 1940* was in breach of the State's commitments under the ECHR.

3. National and international monitoring techniques

- [4.20] Bearing in mind the growth in the number of range of international agreements since the middle of the 20th century, a significant number of different compliance monitoring techniques have been put in place, which depend on the nature of the international obligation in question. An obligation under an international agreement may be continuing, ongoing or require once-off application only. Similarly, an obligation may refer to multilateral or bilateral agreements, and divergences may apply on the basis of whether the international agreement in question prescribes a specific mechanism for monitoring compliance or whether the international agreement requires adoption of implementing legislation or not.
- [4.21] National techniques in Ireland for monitoring compliance may involve reviewing current legislation, monitoring compliance in Oireachtas debates, review by Oireachtas committees, exchange of information between government Departments and independent agencies and public bodies, systematic data collection, maintaining effective sanctions mechanisms in case of domestic non-compliance, proofing new and existing policies, performing a due diligence in compliance activities, fulfilling report duties or interpreting international obligations in the practices of courts or other public bodies to ensure compliance. Achieving compliance may therefore depend on a number of different State actions.

¹⁷ See the discussion at paragraphs 1.154-1.162, above.

¹⁸ See paragraph 2.19, above.

¹⁹ *Lawless v Ireland (No 1)* [1960] ECHR 1, (1960) 1 EHRR 1 (procedure) (14 November 1960); *Lawless v Ireland (No 2)* [1961] ECHR 1, (1960) 1 EHRR 1 (procedure) (7 April 1961); and *Lawless v Ireland (No 3)* [1961] ECHR 2, (1960) 1 EHRR 1 (substantive decision dismissing the case) (1 July 1961).

- [4.22] In summary, therefore, monitoring compliance takes place at both the international and the domestic level. It is also important to note that one compliance technique may overlap with another. The Commission now turns to provide a brief overview of these monitoring mechanisms.²⁰

(a) Role of the Department of Foreign Affairs and Trade

- [4.23] The Department of Foreign Affairs and Trade has overall responsibility within the Government for facilitating the ratification of international human rights treaties. The Department's website contains important information about its role and associated policies. This includes the publication in 2018 of *Global Ireland: Ireland's Global Footprint to 2025*,²¹ which contains a general overview of the Department's foreign policy and trade objective in the period to 2025.
- [4.24] The website also contains information on Ireland's treaty practice, as well as the Irish Treaty Series²² which, as noted above, was the primary source for the Commission's 2018 *Draft Inventory of International Agreements Entered Into by the State*.²³
- [4.25] As also noted already, Ireland has ratified the core UN human rights treaties. For each UN human rights Covenant or Convention, States Parties must submit periodic reports to specialised committees of the UN, known as the human rights treaty monitoring bodies, on the progress made in implementing the treaty in Irish, domestic, law. For example, the Human Rights Unit of the Department coordinates Irish reporting in relation to the 1966 UN International Covenant on Civil and Political Rights (ICCPR) and the 1966 UN International Covenant on Economic, Social and Cultural Rights (ICESCR). The Department of Justice and Equality and the Department of Children and Youth Affairs coordinate the responses in relation to the other UN human rights treaties.
- [4.26] The national reports are then published by the relevant treaty monitoring body, and National Human Rights Institutions (NHRIs) and interested Non-Governmental Organisation (NGOs) are invited to submit their observations. Subsequent to this, the treaty monitoring body presents a list of issues on which it requests further information from the State. The treaty monitoring body then publishes its Concluding

²⁰ For a comprehensive analysis, see Fuller, *Biehler on International Law: An Irish Perspective* 2nd ed (Round Hall 2013) and Fennelly, *International Law in the Irish Legal System* (Round Hall 2014).

²¹ *Global Ireland: Ireland's Global Footprint to 2025*, available at: <<https://www.ireland.ie/media/ireland/stories/globaldiaspora/Global-Ireland-in-English.pdf>> accessed on 27 August 2020.

²² The Irish Treaty Series is available at <<https://www.dfa.ie/our-role-policies/international-priorities/international-law/find-a-treaty/>> accessed on 27 August 2020.

²³ *Draft Inventory of International Agreements Entered into by the State* (LRC IP 14-2018).

Observations after a hearing is conducted with a national delegation appearing before it to respond to further questions. These hearings normally take place in Geneva.

- [4.27] The Department has recognised the role of NGOs in this process. In 1997 it established an NGO Standing Committee on Human Rights to provide a framework for a regular exchange of views between the Department and representatives of the NGO community, as well as civil society more generally. It comprises human rights experts, academics, NGO representatives and representatives of the Department and other government Departments as required. The Committee meets approximately four times a year to discuss international matters of concern, including Ireland's obligations under international human rights law and Ireland's foreign policy positions on international human rights issues of concern.
- [4.28] In addition, in 1998 the Department established an NGO Forum on Human Rights, which provides a platform for interested NGOs and members of civil society in Ireland to gather, together with representatives of the Department, and exchange views on international human rights priorities of mutual concern.
- [4.29] In addition to the periodic reviews of specific UN human rights treaties, in 2006 the UN initiated the Universal Periodic Review (UPR). The UPR was established when the UN Human Rights Council was created in 2006 by the UN General Assembly in UN Resolution 60/251. This mandated the Human Rights Council to "undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States." The UPR provides an opportunity for all UN member states to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights.
- [4.30] The UPR is a unique process in that it is the only international peer review mechanism for the human rights records of all UN member states. The review of each country takes place during a four and a half to five-year cycle and at one of the sessions of the UPR Working Group. The process involves: the preparation of a National Report by the state under review and submission to the UN of reports by civil society organisations; an interactive dialogue during which other States are given an opportunity to ask questions and make recommendations on human rights issues; and the adoption by the Human Rights Council of the report of the Working Group which includes the State's position on the recommendations made.
- [4.31] Ireland's first UPR Review took place in 2011. In 2014 Ireland published a voluntary National Interim Report setting out progress achieved since the first Review. In 2016, the State's second National Report was transmitted to the UN, and the then Tánaiste

and Minister for Justice and Equality led the Irish delegation at the second Review in 2016. Ireland's third UPR Review is scheduled for 2021.

- [4.32] Other government Departments also carry out specific tasks related to monitoring of compliance. For example, the Department of Transport, Tourism and Sport is the principal department responsible for monitoring of international agreements in the marine and maritime area, including the 1974 UN Convention on Safety of Life at Sea (SOLAS) and its subsequent amendments.
- [4.33] Similarly, the Department of Communications, Climate Action and Environment manages Ireland's participation in and compliance with international conventions on air quality.²⁴ The Aarhus, the Business and Environmental Awareness Division facilitates, among other matters, the public participation under the requirements of the UNECE Convention on Access to Environmental Justice (the Aarhus Convention).

(b) Role of the Oireachtas

- [4.34] Since 1993, when the Oireachtas Joint Committee on Foreign Affairs, Trade and Defence was established, the Committee has been in a position to have a general monitoring role concerning international relations and international law, notably in shadowing and scrutinising the work of the Department of Foreign Affairs and Trade. Its terms of reference have not, to date (August 2020), included monitoring compliance with the State's international agreements.
- [4.35] Nonetheless, since Irish treaty practice is to have all international agreements to which the State is party laid before Dáil Éireann, including those of a technical character,²⁵ this provides a clear opportunity for members of Dáil Éireann to debate, for example, the merits of implementing, in whole or in part, any such agreement in Irish law.
- [4.36] Indeed, we have already seen that Parliamentary Questions have regularly been used by members of Dáil Éireann to pose important questions as to the ratification of, and if ratified the effect of, international agreements.²⁶ This continues to be the case. By way of example, in 2015 the Minister for Foreign Affairs and Trade was asked to confirm that Ireland was not obliged under international law to amend domestic law following the views expressed in reports and recommendations of the UN Human Rights Committee, which was established under the 1966 UN International Covenant on Civil

²⁴ Department of Communications, Climate Action & Environment (2019). About us. Our department. Environment. Available at: <https://www.dccae.gov.ie/en-ie/about-us/our-department/environment/Pages/default.aspx>.

²⁵ See paragraphs 2.39-2.45, above.

²⁶ See the discussion of the Parliamentary Question in 1933 concerning the 1899 Hay-Pauncefote Treaty on Succession, at paragraphs 1.81-1.86, above.

and Political Rights (ICCPR). In reply, the Minister confirmed that, while Ireland had ratified the ICCPR in 1989 (ITS No 9 of 1990),²⁷ it had not become part of domestic law under Article 29.6 of the Constitution. Accordingly, the Minister noted that while the ICCPR was binding under international law it did not have direct legal effect in Irish law. The Minister added:

“The Human Rights Committee is not a court and its recommendations are not legally binding. However given its mandate, status, and the fact that its members are elected on the basis of their independence, qualification and expertise, there is a strong presumption in favour of the Committee’s legal interpretations of the provisions of the relevant treaty and they are of persuasive value as regards states’ international obligations under the International Covenant on Civil and Political Rights. State parties such as Ireland, which support the UN human rights system and the Committee, take its views seriously.”²⁸

- [4.37] It is worth comparing this treaty practice and the use of Parliamentary Questions concerning international agreements generally with the statutory arrangements under the *European Union (Scrutiny) Act 2002*. Under the 2002 Act, all Oireachtas Committees, including the Joint Committee on Foreign Affairs, must be consulted on any EU legislative proposal from the European Commission, whether a proposed EU Regulation or a proposed EU Directive. The effect of the 2002 Act is that the relevant Oireachtas Committee is provided with a briefing at a very early stage in the life cycle of the proposal by officials from the particular Department with line responsibility for an EU legislative proposal. The officials will brief the relevant Committee on the Department’s policy approach, including the negotiating stance of Ireland as the proposed EU law makes its way through the deliberative process at EU level.
- [4.38] The Oireachtas Committee will then determine whether to issue a Report containing its view on this policy approach. This clearly provides a significant level of oversight by the Oireachtas Committees. Bearing in mind the reach of EU law, whether in terms of the direct effect of EU law or the impact of the EU in its role as negotiator of international trade agreements, this is an extremely significant role in terms of international law. Thus, the EU in its international treaty-making capacity and Ireland as an independent State in its own right have ratified many of the UN International

²⁷ See the discussion of the ICCPR at paragraphs 3.6-3.11 and 3.68-3.87, above.

²⁸ Vol. 894 *Dáil Éireann Debates* (3 November 2015) Questions: UN Committees, available at: https://www.oireachtas.ie/en/debates/question/2015-11-03/143/#pq_143.

Labour Organization (ILO) ILO Conventions. At the time of writing (August 2020), Ireland has ratified 73 ILO Conventions and 3 Protocols, including each of the ILOs' eight core or fundamental Conventions,²⁹ and we have also discussed Ireland's ratification of ILO Conventions in the maritime and marine area.³⁰ Ireland's ratifications overlap with those of the EU. As a result, the Department of Jobs, Enterprise and Innovation, as the relevant line Department for the ILO, will also periodically lay before the Oireachtas under the 2002 Act any relevant proposals from the European Commission to accede to an ILO Convention. Thus, in 2020, the Department laid before the Dáil the European Commission's Proposal for a Council decision authorising Member States to ratify, in the interest of the European Union, the ILO 2019 Violence and Harassment Convention (No 190).³¹

- [4.39] In addition, since the EU has also acceded to some international human rights treaties, such as the 2006 UN Convention on the Rights of Persons With Disabilities (UNCRPD), the capacity of Oireachtas Committees to influence Ireland's international law practice is considerable.
- [4.40] Reports from the Special Rapporteur on Child Protection to the Dáil also summarise developments relating to international instruments and standards and domestic legal issues. For example, the 10th Report issued in 2016 focused on commencement issues and pathways to parentage in the *Children and Family Relationships Act 2015*, child protection and the criminal justice system and issued recommendations, *inter alia*, on ratification of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and full incorporation of the UN 1989 Convention on the Rights of the Child (UNCRC).³²
- [4.41] The Oireachtas has also become more involved in monitoring human rights agreements. It established a Sub-Committee on Human Rights and Equality Relative to Justice Matters. Its role was to examine issues, themes and proposals, legislative or otherwise, with regard to compliance with the human rights of persons within the

²⁹ International Labour Organization, Ratifications for Ireland, available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102901.

³⁰ See the discussion at paragraphs 3.122-3.164, above.

³¹ See <https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2020/2020-03-09_edocslaid-weekly-listing-17-21-february-2020_en.pdf> accessed on 27 August 2020.

³² See, for example, Shannon, *Tenth Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas* (2017), available at: <https://www.dcy.gov.ie/documents/2017120710thReportSpecialRappChild_Protection.pdf> accessed on 27 August 2020.

State.³³ It considered in 2015 how Ireland's ratification of the UNCRPD could be streamlined and improved. The Irish Human Rights and Equality Commission (IHREC) and a number of Irish NGOs have also called for the establishment of a new Oireachtas committee on human rights.³⁴ The Committees of the Houses of the Oireachtas also exercise a scrutiny function in relation to the IHREC, which, in addition to its other functions, monitors the State's compliance with international human rights agreements.³⁵

- [4.42] Another committee considering specific human rights matters was established by the Dáil and the Seanad in April 2017, the Joint Committee on the Eighth Amendment of the Constitution³⁶. Its task was to consider the Citizens' Assembly report and recommendations on the Eighth Amendment of the Constitution. The Committee was dissolved in December 2017. The Committee noted in its Final Report that the necessity for constitutional change had been justified by the continuing violation of Ireland's international human rights obligations as demonstrated in cases of *Mellet v Ireland*³⁷ in 2011 and *Whelan v Ireland*³⁸ in 2017 before the UN Human Rights Committee.
- [4.43] There is no formal screening as such for compliance of proposed legislation with Ireland's international obligations. However, since all Government Heads (Schemes) of Bills must, in general, under Dáil Standing Orders, undergo pre-legislative scrutiny, this applies to any Bills that involve the domestic law elements of ratification of international agreements. For example, the *Assisted Decision-Making (Capacity) Act 2015*, which is recognised as a significant contribution to enable Ireland to ratify the 2006 UN Convention on the Rights of Persons With Disabilities (UNCRPD), underwent pre-legislative scrutiny. In 2012 the Oireachtas Joint Committee on Justice, Defence and Equality invited written submissions on what was then titled the *Scheme of the Mental Capacity Bill* and held public hearings on the proposed legislation. The

³³ Donald and Leach, *Parliaments and the European Court of Human Rights* (Oxford University Press, 2016) page 80.

³⁴ Irish Human Rights and Equality Commission, *Annual Report 2015*.

³⁵ Oireachtas Library & Research Service, *International human rights law: operation and impact*. Spotlight No 2 of 2016.

³⁶ See Dáil Éireann Debates (4 April 2017): Establishment of a Special Joint Committee on the Eighth Amendment of the Constitution: Motion, available at: <<https://www.oireachtas.ie/en/debates/debate/dail/2017-04-04/8/>> accessed on 27 August 2020.

³⁷ CCPR/C/116/D/2324/2013. Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No 2324/2013.

³⁸ CCPR/C/119/D/2425/2014. Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No 2425/2014.

Committee issued its report in May 2012,³⁹ which made detailed recommendations on the need for the Bill to reflect fully the right-based analysis required to comply with the UNCRPD. This influenced the eventual rights-based details enacted in the 2015 Act.

- [4.44] The Standing Orders of both Houses of the Oireachtas also provide for a process of post-enactment scrutiny. Again, while this does not specifically refer to monitoring the operation of legislation for compliance with Ireland's international obligations, a number of such post-enactment review reports have involved international agreements, including those in the marine and maritime area.⁴⁰

(c) Role of the Irish Human Rights and Equality Commission (IHREC)

- [4.45] The Irish Human Rights and Equality Commission (IHREC) is Ireland's statutory National Human Rights Institution (NHRI), established under the *Irish Human Rights and Equality Commission Act 2014*.⁴¹ IHREC has the following statutory remit:

- to protect and promote human rights and equality in Ireland;
- to promote a culture of respect for human rights, equality and intercultural understanding;
- to promote understanding and awareness of the importance of human rights and equality; and
- to work towards the elimination of human rights abuses and discrimination.

- [4.46] In establishing IHREC, the 2014 Act merged the former Irish Human Rights Commission and Equality Authority. By contrast with its predecessor, IHREC enjoys increased institutional independence and accountability to the Oireachtas. Thus, section 9(2) of the 2014 Act provides that IHREC "shall... be independent in the performance of its functions." More generally, the 2014 Act was drafted to ensure that it meets the requirements of the UN Principles Relating to the Status of National Human Rights Institutions, originally agreed at an international conference in Paris in

³⁹ See "Mental Capacity Legislation must reflect human rights-based approach to legal capacity" (May 2020), available at <<https://www.oireachtas.ie/en/press-centre/press-releases/20120501-mental-capacity-legislation-must-reflect-human-rights-based-approach-to-legal-capacity-joint-committee-on-justice-defence-and-equality/>> accessed on 27 August 2020.

⁴⁰ Oireachtas Library & Research Service (2017). Spotlight No 1. Post-enactment scrutiny (PeS) by Parliament. Available at <https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2018/2018-01-08_spotlight-post-enactment-scrutiny-in-parliament_en.pdf> accessed on 27 August 2020.

⁴¹ Further information relating to the work of IHREC is available on its website <www.ihrec.ie> accessed on 27 August 2020.

2001, and adopted in 2003 by the UN General Assembly in UN Resolution 48/134.

These principles are usually referred to as the “Paris Principles.”⁴²

[4.47] To meet the requirements of the Paris Principles, a National Human Rights Institution (NHRI):

- must be vested with competence to promote and protect human rights;
- must be given as broad a mandate as possible, which is clearly set out in legislation;
- must be empowered to submit to the Government, Parliament and any other competent body opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights, on proposed and enacted legislation and on general compliance with and implementation of international human rights instruments;
- must be able to monitor any violation of human rights it decides to take up;
- must be empowered to contribute to the reports that States are required to submit to UN bodies and committees, and with regional institutions such as the Council of Europe, and to cooperate with UN and regional institutions;
- must be composed of members who are representative of civil society, and whose appointment must be effected by an official act that includes the specific duration of their mandate, which may be renewed, provided that the pluralism of its membership is ensured;
- must be adequately funded to ensure its independence of the Government;
- must develop relations with relevant non-governmental organisations (NGOs); and
- may be authorised to hear and consider complaints and petitions concerning individual situations: in the case of IHREC, this involves being empowered, having absorbed the functions of the Equality Authority, to hear and determine complaints under equality legislation.

⁴² The full text of the Paris Principles is available at the UN website, <<https://www.un.org/ruleoflaw/files/PRINCI~5.PDF>> accessed on 27 August 2020.

- [4.48] The Global Alliance of National Human Rights Institutions (GANHRI), which is an international umbrella organisation of NHRIs,⁴³ provides independent accreditation as to whether an NHRI complies with the Paris Principles. "A" status accreditation means that the NHRI has demonstrated full compliance with the Paris Principles. "A" status NHRIs have specific participation rights in UN processes and mechanism, including speaking rights immediately following their State at the Human Rights Council, for the purposes of the UPR, and before some UN Treaty bodies. In Europe, "A" status NHRIs also have comparable rights of audience within the Council of Europe and EU institutions. In 2015, GANHRI granted IHREC "A" status accreditation.⁴⁴
- [4.49] It is worth noting that there are two other GANHRI accreditation levels. "B" status accreditation means that the NHRI is recognised by GANHRI as being in substantial compliance with the Paris Principles and therefore entitled to participate in GANHRI institutions and meetings, but without the status at UN and regional organisations reserved for A status NHRIs. "C" status accreditation means that the institution does not comply with the Paris Principles and its membership of GANHRI is terminated unless and until it regains at least "B" status.
- [4.50] Consistent with its "A" status, section 10(2)(h) of the 2014 Act provides that IHREC must consult with international bodies or agencies with a knowledge or expertise in human rights or equality. This also provides a clear basis on which IHREC provides input into the periodic reviews provided for under specific UN human rights UN treaties, such as the ICCPR and the ICESCR, as well as under the more wide-ranging UPR. IHREC also engages with national NGOs in carrying out its statutory mandate. For example, in developing its submission to the Second UPR for Ireland in 2015, IHREC partnered with an NGO, the Irish Council for Civil Liberties (ICCL), to engage in public consultations with civil society organisations and members of the public.⁴⁵
- [4.51] Prior to 2018, IHREC had also recommended ratification of the CRPD and outlined strategies concerning how best to comply with the CRPD's requirements and monitor its implementation. The UN Committee on the Rights of Persons with Disabilities,

⁴³ The GANHRI website is <www.ganrhi.org>, accessed on 27 August 2020.

⁴⁴ See "The Irish Human and Equality Commission welcomes "A" status accreditation", available at <<https://www.ihrec.ie/the-irish-human-and-equality-commission-welcomes-a-status-accreditation/>> accessed on 27 August 2020.

⁴⁵ See, for example, IHREC's *Submission to the Second Universal Periodic Review Cycle for Ireland* (2015), available on its website at <https://www.ihrec.ie/app/uploads/download/pdf/irish_human_rights_and_equality_commission_upr_submission_ireland_2016.pdf> accessed on 27 August 2020.

established under the UNCRPD, recommended, in General Comment No 7 (2018),⁴⁶ that, in implementing and monitoring the UNCRPD, civil society and NGOs should be actively involved and consulted in legal and regulatory frameworks and procedures across all levels and branches of Government. The purpose of this is to assist the implementation of international obligations of the State under international human rights treaties. IHREC established a Disability Advisory Committee in 2019 to support it in its function under Article 33 of the UNCRPD in monitoring Ireland's implementation.⁴⁷ The Committee is made up of a majority of persons with disabilities⁴⁸ and was established under section 18 of the *Irish Human Rights and Equality Act 2014* which provides that, for the purpose of establishing and maintaining effective co-operation with representatives of relevant agencies and civil society, IHREC may appoint advisory committees as it thinks fit, to assist and advise it on matters relating to its functions.⁴⁹

- [4.52] In 2017, IHREC published a study *Ireland and the Optional Protocol to the UN Convention against Torture*,⁵⁰ which proposed paths to achieve Irish compliance with the OP-CAT's requirements and its subsequent ratification. This study has had a significant impact on Government policy and, notably the Programme for Government adopted in June 2020, *Our Shared Future*, reasserts the State's commitment to ratify OP-CAT.
- [4.53] Section 42 of the *Irish Human Rights and Equality Commission Act 2014*, which imposes a general duty on public bodies in this area, is also worth noting as it provides:

⁴⁶ Committee on the Rights of Persons with Disabilities, General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, available at

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhshnbHatuFkZ%2Bt93Y3D%2Baa2pjFYzWLBu0vA%2BBR7QovZhbuyqzjDN0plweYI46WXrJJ6aB3Mx4y%2FspT%2BQrY5K2mKse5zjo%2BfvBDVu%2B42R9iK1p> accessed on 27 August 2020.

⁴⁷ Irish Human Rights and Equality Commission (2018). Disability Advisory Committee Applicant Information Booklet, available at <https://www.ihrec.ie/app/uploads/2018/09/IHREC_Information-Booklet_Disability-Advisory-Committee.pdf> accessed on 27 August 2020.

⁴⁸ *Ibid.*

⁴⁹ See <<https://www.ihrec.ie/new-departure-on-rights-of-persons-with-disabilities-as-formal-committee-begins-work-in-monitoring-irelands-obligations/>> accessed on 27 August 2020.

⁵⁰ See <https://www.ihrec.ie/our-work/cat/opcat/>> accessed on 27 August 2020.

“(1) A public body shall, in the performance of its functions, have regard to the need to—

- (a) eliminate discrimination,
- (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and
- (c) protect the human rights of its members, staff and the persons to whom it provides services.

(2) For the purposes of giving effect to subsection (1), a public body shall, having regard to the functions and purpose of the body and to its size and the resources available to it—

- (a) set out in a manner that is accessible to the public in its strategic plan (howsoever described) an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues, and
- (b) report in a manner that is accessible to the public on developments and achievements in that regard in its annual report (howsoever described).

(3) In assisting public bodies to perform their functions in a manner consistent with subsection (1), the Commission [that is, IHREC] may give guidance to and encourage public bodies in developing policies of, and exercising, good practice and operational standards in relation to, human rights and equality

...

(11) Nothing in this section shall of itself operate to confer a cause of action on any person against a public body in respect of the performance by it of its functions under subsection (1).”

- [4.54] IHREC has launched an ambitious programme pursuant to the public sector equality and human rights duty contained in section 42 of the 2014 Act and is working in partnership with a number of key public sector bodies, including An Garda Síochána,

to promote and embed the duty.⁵¹ As the definition of human rights under the 2014 Act includes international human rights instruments, this public sector duty could add significantly to efforts to implement international human rights norms in the domestic sphere. Read with the qualified performative obligation contained in section 3 of the *European Convention on Human Rights Act 2003* it might even prove useful in litigation even though section 42 of the 2014 Act does not, as noted, give rise to a cause of action that can be litigated in the Irish courts.

(d) Role of other public bodies

- [4.55] Other public bodies and authorities are specifically tasked with monitoring compliance with international agreements. Apart from IHREC, for example, the Special Rapporteur on Child Protection, as described in that office-holder's Terms of Reference, must assess what impact, if any, litigation in national and international courts will have on child protection.⁵² The Special Rapporteur's reports have also referred to developments relating to international instruments and standards.⁵³ The Ombudsman for Children (OCO) also plays a critically important role in respect of children's rights.⁵⁴
- [4.56] There are also instances of ad-hoc monitoring by public bodies and authorities. In November 2017, the Ombudsman published a report under section 4 of the *Ombudsman Act 1980*, *Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalen Restorative Justice Scheme*.⁵⁵ The report recalled the recommendation of the UN Committee Against Torture in its periodic review in May 2011 "to ensure that all victims obtain redress and have an enforceable right to compensation, including the means for as full rehabilitation as possible." The Ombudsman found that there had been a long delay in making payments to some of the Magdalen women under the Department's Scheme, many of whom were vulnerable and may have lacked decision-making capacity. The Ombudsman

⁵¹ See further <<https://www.ihrec.ie/our-work/public-sector-duty/>> accessed on 27 August 2020.

⁵² See Department of Children and Youth Affairs (2019). Special Rapporteur on Child Protection, available at <https://www.dcy.gov.ie/docs/Special_Rapporteur_on_Child_Protection/2302.htm> accessed on 27 August 2020.

⁵³ See, for example, Shannon, *Eleventh Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas* (2018), available at <https://assets.gov.ie/27444/92175b78d19a47abb4d500f8da2d90b7.pdf> accessed on 27 August 2020.

⁵⁴ See generally <<https://www.oco.ie/>> accessed on 27 August 2020.

⁵⁵ Office of the Ombudsman, *Opportunity Lost: An investigation by the Ombudsman into the Administration of the Magdalen Restorative Justice Scheme* (2017), available at <https://www.ombudsman.ie/publications/reports/opportunity-lost/Magdalen-Scheme.pdf> accessed on 27 August 2020.

concluded that the failure of the Department of Justice and Equality to facilitate payments to the women concerned corresponded to “maladministration as being the result of negligence and carelessness.” This was also caused by the delayed commencement of the *Assisted Decision-Making (Capacity) Act 2015* which, as already noted, was a piece of legislation considered essential for the ratification by the State of the UNCRPD. In 2018, the Department of Justice and Equality accepted all the recommendations in the Ombudsman’s report.⁵⁶ Such *ad hoc* reports and studies may be considered another way of monitoring compliance with Ireland’s international obligations.

- [4.57] Policies and administrative actions may, in addition, be “proofed” for issues relating to human rights, including the rights of persons with disabilities and on gender grounds (commonly referred to as equality and disability proofing). This means that, in allocating the State’s budget, the Government examines the impact of the allocation of funds on these issues. For example, the *National Strategy for Women and Girls 2012-2020*⁵⁷ made a commitment to increasing civil and public service capacity with respect to gender mainstreaming. The Government also developed its approach in 2017 in a policy paper entitled *Equality Budgeting: Proposed Next Steps in Ireland*.⁵⁸
- [4.58] Although administrative and policy actions are not subject to judicial review for being contrary to an unincorporated international agreement, the Government often takes into account its international commitments when drafting policies and reviewing legislation. One such example is the review of the *Child Care Act 1991* and the adoption of the *Children First Sectoral Implementation Plan* in 2018 (to be reviewed in 2021), which includes considerations of oversight in ensuring that children’s rights are maintained in compliance with both national and international standards.⁵⁹

⁵⁶ *Annual Report of the Ombudsman 2017*, page 8, available at <https://www.ombudsman.ie/publications/annual-reports/Ombudsman-Annual-Report-2017-ENG-PDF.pdf> accessed on 27 August 2020.

⁵⁷ *National Strategy for Women and Girls 2012-2020* available at [http://justice.ie/en/JELR/National Strategy for Women and Girls 2017 - 2020.pdf/Files/National Strategy for Women and Girls 2017 - 2020.pdf](http://justice.ie/en/JELR/National%20Strategy%20for%20Women%20and%20Girls%202017%20-%202020.pdf/Files/National%20Strategy%20for%20Women%20and%20Girls%202017%20-%202020.pdf) accessed on 27 August 2020.

⁵⁸ Irish Government Economic & Evaluation Service Staff Paper, *Equality Budgeting: Proposed Next Steps in Ireland*, available at <http://www.budget.gov.ie/Budgets/2018/Documents/1.Equality%20Budgeting%20-%20Proposed%20Next%20Steps%20in%20Ireland.pdf> accessed on 27 August 2020.

⁵⁹ Department of Children and Youth Affairs, *Children First Sectoral Implementation Plan* (2018), available at <http://www.justice.ie/en/JELR/Children%20First%20-%20Sectoral%20Implementation%20Plan.pdf/Files/Children%20First%20-%20Sectoral%20Implementation%20Plan.pdf> accessed on 27 August 2020.

- [4.59] Finally, it is relevant to reiterate this Commission's engagement with international law. The Commission's statutory mandate under the *Law Reform Commission Act 1975*, to examine the law with a view to its reform, includes reform with a view to the modernisation and codification of the law, which is remarkably similar to the mandate at international level in Article 13 of the UN Charter. The purpose of noting the Commission's work is to indicate that, like many other State bodies, the Commission's research has been influenced by the State's active engagement at international level.⁶⁰

(e) Role of NGOs

- [4.60] Private actors play an increasingly significant role in domestic compliance, notably NGOs and the media. There is a vast literature on how social movements and firms affect compliance with international law.⁶¹ Monitoring compliance should, in principle, and in particular where required by an international agreement, follow the same approach and facilitate involvement of different public bodies, as well as civic organisations, in the monitoring process.
- [4.61] As noted above, the Department of Foreign Affairs and Trade and IHREC both engage actively with Non-Governmental Organisations (NGOs) in connection with international human rights issues. In addition, NGOs play an important role in the periodic reviews provided for under the UN human rights treaties.
- [4.62] The most significant role in this respect is by submitting what is referred to as a shadow report, that is, a report that shadows the national report submitted by the Government. In other words, NGOs may submit their own assessments of the State's compliance with its obligations under, for example, the ICCPR and the ICESCR, as well as part of the more wide-ranging review under UPR. Such shadow reports are often used by the international panel of experts appointed to carry out the periodic reviews as the basis for assessing the formal national report submitted by the Government. They are also often used to assist in monitoring how a State is complying with its obligations under the relevant UN treaty. Shadow reports have been regularly submitted by NGOs such as Amnesty International Ireland, the Free Legal Advice Centres (FLAC) and the Irish Council for Civil Liberties (ICCL) who, as noted above, also engage proactively with the Department of Foreign Affairs and Trade and, separately, with IHREC.

⁶⁰ See the discussion in paragraphs 1.12-1.16, above, of a number of Commission Reports that have engaged with international law.

⁶¹ See, for example, Risse, Ropp and Sikkink (eds), *The Power of Human Rights* (Cambridge University Press 1999); Muchlinski, "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation" (2012) 22(1) *Business Ethics Quarterly* 157.

(f) Monitoring compliance under international agreements through individual submissions or communications

- [4.63] Various mechanisms have also been developed under international agreements to accept individual or group submissions and communications. Thus, as already noted, Ireland was one of the first states to accept the jurisdiction of the European Court of Human Rights (ECtHR) to accept individual applications under the Council of Europe 1950 Convention on Human Rights and Fundamental Freedoms (ECHR).
- [4.64] BY way of example, Article 15 of the UNECE Convention on Access to Environmental Justice (the Aarhus Convention) establishes arrangements for reviewing compliance with the Aarhus Convention. The Aarhus Compliance Committee may issue determinations concerning possible breaches of the Aarhus Convention. Since 2013, the Committee has considered a number of submissions concerning Ireland's compliance with the Convention.⁶²
- [4.65] Similarly, the 2002 Optional Protocol to the 1984 UN Convention Against Torture (OP-CAT) provides for a special mechanism at national level aimed at preventive monitoring. The OP-CAT sub-committee on the Prevention of Torture was established in 2007 and is composed of 25 members. Article 11 of OP-CAT provides that the sub-committee's mandate stretches over three main areas: visits to places of deprivation of liberty of States parties with the aim of strengthening the implementation of the obligation to prevent torture and other ill-treatment; playing an advisory role in relation to national preventive mechanisms; and cooperation on prevention of torture and other ill-treatment with other UN and regional agencies.
- [4.66] Article 4(1) of OP-CAT requires state parties to allow visits by both the sub-committee and national preventive mechanisms to any place under their jurisdiction and control where persons are or may be deprived of their liberty "either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence." National preventive mechanisms should have the power to "make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations."
- [4.67] National preventive mechanisms produce reports following their visits as well as annual reports and any other form of reports it deems necessary. Article 20(f) of OP-

⁶² On the Compliance Committee's work, see <https://www.unece.org/env/pp/cc.html>, accessed on 27 August 2020.

CAT requires such national mechanisms to establish contacts with the sub-committee, to send information to it and meet it.

- [4.68] In these instances, the possibility of monitoring the State's compliance through individual communications and submissions is clearly limited although it should be noted that such limitations do not apply in respect of individual communications from Ireland under the Council of Europe Convention for the Prevention of Torture (CPT).⁶³ As noted above, the Programme for Government adopted in June 2020, *Our Shared Future*, has reiterated the State's commitment to ratify OP-CAT.

⁶³ For further information on Ireland and the CPT see <<https://www.coe.int/en/web/cpt/ireland>> accessed on 27 August 2020.

APPENDIX CASE STUDY: UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

1. Introduction

1. This Case Study discusses the background to, and steps involved in implementing, the 2006 UN Convention on the Rights of the Persons with Disabilities (UNCRPD or Convention). The UNCRPD was adopted by Ireland on 13 December 2006, signed on 30 March 2007, and ratified on 7 March 2018.
2. The Commission has selected Ireland's implementation of the UNCRPD as a Case Study for this Discussion Paper because it illustrates the use of a clear and transparent roadmap to implement the wide-ranging obligations set out in that Convention into the Irish domestic legal system. The pathway to Ireland's implementation of the UNCRPD was clearly laid out in the *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)*,¹ which was published by the Department of Justice in October 2015. The *Roadmap to Ratification* included a description of existing national legislation that related to the rights of persons with disabilities, as well as the legislative reforms necessary in order to bring national legislation in line with the State's obligations under the UNCRPD. It also set out an ambitious timeframe for the implementation of these reforms. As discussed in the Discussion Paper, the use of a roadmap to implement obligations under an international treaty or convention ensures that the implementation process is transparent and certain.
3. The UNCRPD is also a useful case study as Ireland's implementation of the Convention provides an example of the State departing from the usual practice of waiting to ratify an international convention until the enactment of key, identified legislation has already taken place.
4. Finally, implementation of the UNCRPD has been chosen as the Case Study to accompany the Discussion Paper because the UNCRPD requires State Parties to establish a special monitoring committee at national level, which facilitates national

¹ Department of Justice and Equality, *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)* (October 2015); available at: <<http://www.justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf>> accessed on 31 August 2020.

dialogue and monitoring in between the periodic reporting obligations and assists in identifying what legislative or policy gaps might need to be filled, thus ensuring ongoing compliance with the obligations under the relevant treaty or convention. The UNCRPD therefore provides a useful example of the use of monitoring and reporting mechanisms to ensure that the wide-ranging obligations the Convention contains are fully implemented at the domestic level.

5. This Case Study begins by giving an overview of the UNCRPD, describing the background against which it was adopted, including a discussion of how conceptions of individuals with disabilities shifted significantly from a paternalistic, medically-focused, approach to a more social rights-based approach. The key provisions of the UNCRPD are then discussed in some detail. The Case Study then proceeds to discuss Ireland's process of implementing the UNCRPD, including through the use of the *Roadmap to Ratification*. This is followed by the reproduction of the Roadmap in full, the purpose of which is to allow full understanding of how a Roadmap can be used to guide the implementation of intentional obligations. The Case Study concludes with the Commission's observations.

2. Overview of the UNCRPD

(a) Introduction

6. The Convention on the Rights of Persons with Disabilities (UNCRPD or Convention) is an international human rights instrument adopted by the UN General Assembly on 13 December 2006 and opened for signature on 30 March 2007. It entered into force on 3 May 2008. The Optional Protocol to the CRPD (OP-CRPD) is a side-agreement to the Convention. The OP-CRPD was also adopted on 13 December 2006 and entered into force on 3 May 2008.
7. The UNCRPD was adopted:

"to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity".²
8. The protection that the UNCRPD affords covers persons who have long-term physical, mental, intellectual, or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. The UNCRPD emphasises the will and preferences of people with disabilities

² Article 1 of the CRPD.

and moves away from decisions being made on their behalf and guided by their best interests.

9. The Convention makes explicit references to other international treaties and instruments, such as the Universal Declaration, the International Convention on Civil and Political Rights (ICCPR), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Convention on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture (CAT), the Convention on the Rights of the Child (CRC), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Ireland is a party to each of these treaties and instruments. The connection between the UNCRPD and these other international treaty regimes is underpinned by Article 4 of the UNCRPD, which prescribes that State Parties to the UNCRPD undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities.
10. The UNCRPD not only places wide-ranging obligations on State Parties to it, it also involved a “paradigm shift” from addressing disability in paternalistic and medical terms towards an approach based on equality and social participation, often termed a rights-based approach. For most states that wished to ratify the UNCRPD, therefore, this also involved the need to enact fundamental reforms across a wide spectrum of the law, supported by new regulatory and administrative arrangements and also funding for related policy initiatives.

(b) Background to the adoption of the UNCRPD

11. The issue of disability rights began to be intensely discussed at the international level in the early 1980s. The UN declared 1981 as the International Year of Disabled Persons and emphasised equal opportunities and full participation for those with disabilities.³ In 1982, the UN adopted the World Programme of Action concerning Disabled Persons.⁴ The UN Commission on Human Rights (which has since become the UN Human Rights Council) appointed a Special Rapporteur to examine the relationship between human rights conventions and the rights of people with disabilities.⁵ In 1993, the UN General Assembly adopted the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.⁶ The Council of Europe endorsed the same

³ Doyle, “Disability Policy in Ireland”, in Quinn and Redmond (eds.), *Disability and Social Policy in Ireland* (University College Dublin Press 2003), at page 25.

⁴ *Ibid.*

⁵ *Ibid.*, at pages 25-26.

⁶ Doyle, “Disability Policy in Ireland”, in Quinn and Redmond (eds.), *Disability and Social Policy in Ireland* (University College Dublin Press 2003), at page 26. Note: standard rules are non-binding;

Rules on the Equalisation of Opportunities in 1996.⁷ The Rules formed the blueprint for Europe's disability policy.⁸ The International Labour Organization (ILO) also adopted a disability rights-based convention, the Vocational Rehabilitation and Employment (Disabled Persons) Convention of 1983. Ireland became party to the ILO Convention on 6 June 1986.⁹

12. The UNCRPD was drafted by an *Ad Hoc* Committee, established by the General Assembly by Resolution 56/168 of 19 December 2001. The *Ad Hoc* Committee was mandated by the Resolution to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work carried out in the fields of social development, human rights, and non-discrimination.¹⁰ As mentioned in the Discussion Paper, Ireland was an active and influential participant in the lengthy negotiations leading to the conclusion of the UNCRPD. The *Ad Hoc* Committee held eight negotiation sessions from July 2002 to December 2006; Ireland was represented at three of these negotiation sessions. Additionally, as already mentioned, Ireland was one of the first states to sign the UNCRPD in March 2007, when it was first opened for signature.
13. Both the EU and the Council of Europe continue to engage in activities supporting the rights of people with disabilities. Several action plans have been adopted at the Council of Europe level. The EU also adopted disability policy papers for the years 2003 to 2010, including a disability strategy to support the Member States in their efforts to implement the obligations under the CRPD.¹¹ This was followed by the EU's European

they are guiding principles for States to apply. They are enforceable through political pressure only or may become the basis for a UN treaty body review process.

⁷ Pierce, "Ethnicity and Disability", in Quinn S. and Redmond B. (eds.), *Disability and Social Policy in Ireland*. (University College Dublin Press 2003), page 117.

⁸ *Ibid.*

⁹ International Labour Organization (1998), Vocational Rehabilitation and Employment of Disabled Persons, Appendices. Texts of Convention No. 159 and Recommendation No. 168 Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983, available at <<http://www.ilo.org/public/english/standards/relm/ilc/ilc86/r-iii1ba.htm>> accessed on 31 August 2020.

¹⁰ Audiovisual Library of International Law, Convention on the Rights of Persons with Disabilities. Introductory Note <<http://legal.un.org/avl/ha/crpd/crpd.html>> accessed on 31 August 2020.

¹¹ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Equal opportunities for people with disabilities: A European Action Plan. COM/2003/0650 final and Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe. COM(2010) 636 final.

disability strategy 2010-2020, the purpose of which is to promote a “barrier-free Europe” for persons with disabilities to ensure their full participation in society.¹² The Academic Network of European Disability Experts was established by the European Commission in December 2007 to provide scientific support and advice for its disability unit.¹³

(c) Key provisions of the UNCRPD

14. The CRPD takes as its starting point the rights guaranteed by the Universal Declaration of Human Rights and other human rights instruments, to which Ireland is already party. The UNCRPD did not create new rights, rather it particularised the existing body of human rights and international standards concerning specific needs of people with disabilities.

(i) Article 3 – General principles

15. The UNCRPD comprises 50 Articles. However, when interpreting, implementing, and applying the Convention, it is important to understand the guiding principles upon which the Convention rests, as these should lead all treaty actions, including its implementation at the national level. Article 3 UNCRPD contains the Convention’s general principles. These principles include:
 1. non-discrimination;
 2. full and effective participation and inclusion in society;
 3. respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
 4. equality of opportunity (accessibility);
 5. equality between men and women;
 6. respect for the evolving capacities of children of disabilities and respect for the right of children with disabilities to preserve their identities; and
 7. respect for inherent dignity, individual autonomy (including the freedom to make one’s choices), and independence of persons.

(ii) Article 5 – Equality and non-discrimination

16. The Convention is based on a rights-based structure linked with the principle of anti-discrimination, in such a way that this principle is integrated into each one of the

¹² See <<https://ec.europa.eu/social/main.jsp?catId=1484&langId=en>> accessed on 31 August 2020.

¹³ See <<https://www.disability-europe.net/about-us>> accessed on 31 August 2020.

individual rights.¹⁴ However, Article 5 UNCRPD expressly concerns the rights of persons with disabilities to equality and not to be discriminated against.

17. Article 5(3) UNCRPD in particular requires State Parties to the UNCRPD to ensure that "reasonable accommodation is provided to persons with disabilities in order to promote their equality and ensure against their discrimination.

18. Reasonable accommodation is defined in Article 2 of the UNCRPD as meaning:

"necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

19. The aim of reasonable accommodation is to create full accessibility for persons with disabilities.¹⁵ Failure to provide reasonable accommodation must be acknowledged as a form of discrimination. In Ireland, this legal position was already acknowledged as a part of the Equality Tribunal's 2015 ruling in *Wojcik v Sodexo Ireland Ltd*.¹⁶

(iii) Article 33 - National implementation and monitoring

20. State Parties to the UNCRPD are required to establish an Independent Monitoring Mechanism (IMM) in accordance with Article 33(2). The work of IMM should, in principle, complement the work of the Committee and assist State Parties in implementing their obligations under the Convention. In Ireland, the Irish Human Rights and Equality Commission (IHREC) performs this function. It works in cooperation with the National Disability Authority to carry out this monitoring function. Article 33 requires persons with disabilities to be included in the monitoring of implementation of and compliance with the UNCRPD. In 2019, IHREC therefore established the Disability Advisory Committee, the membership of which consists of a diverse group of persons with disabilities, to assist it in this regard.

(d) Committee on the Rights of Persons with Disabilities

21. As with many other UN human rights treaties, the UNCRPD has a treaty body, the Committee on the Rights of Persons with Disabilities (CRPD or Committee). The

¹⁴ Gutierrez, The European Duty to Provide Reasonable Accommodation for People with Disabilities. Reflections Regarding the Duties' Role in the Extinction of Employment Contracts. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3114760> accessed on 31 August 2020.

¹⁵ *Ibid.*

¹⁶ EDA 1517 of 23 November 2015, *Wojcik v Sodexo Ireland Ltd*.

Committee monitors the progress made by State Parties to the Convention and their adherence to their obligations under the Convention. The Committee carries out this monitoring function through periodic review and by engaging in constructive dialogue with State Parties. Article 34 of the CRPD establishes and sets out the functions and composition of the Committee. Members were elected to the Committee within six months from entry into force of the UNCRPD, in accordance with Article 34(2). The Committee's membership initially consisted of 12 experts. Its membership increased to a maximum of 18 members when more than 60 states ratified the Convention.

22. The Articles of the UNCRPD are formulated in a relatively broad manner and further interpretation and specification is required. In this regard, the Committee has published interpretative General Comments, providing guidance to the State Parties. The Committee's first General Comment focused on Article 12, which concerns equal recognition before the law. This comment was published in April 2014. At the time of writing (August 2020), the Committee had issued seven General Comments. Calls for submissions on draft comments are open to all interested stakeholders. As regards Article 19 of the UNCRPD, which concerns the right to live independently and be included in the community, the Centre for Disability Law and Policy (NUI) and Inclusion Ireland submitted their observations. The Committee's other General Comments have focused on Article 9 on accessibility,¹⁷ Article 6 on women and girls with disabilities,¹⁸ Article 24 on the right to inclusive education,¹⁹ Article 19 on the right to independent living,²⁰ Article 5 on the equality and non-discrimination,²¹ and Articles 4.3 and 33.3 on

¹⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 2 (2014): Article 9: Accessibility (CRPD/C/GC/2); available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/2&Lang=en accessed on 31 August 2020.

¹⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 3 (2016): Article 6: Women and Girls with Disabilities (CRPD/C/GC/3); available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en accessed on 31 August 2020.

¹⁹ Committee on the Rights of Persons with Disabilities, General Comment No. 4 (2016): Article 24: Right to inclusive education CRPD/C/GC/4; available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/4&Lang=en accessed on 31 August 2020.

²⁰ Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017): Article 19: Right to independent living CRPD/C/GC/5; available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/5&Lang=en accessed on 31 August 2020.

²¹ Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018): Article 5: Equality and non-discrimination CRPD/C/GC/6; available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en accessed on 31 August 2020.

participation with persons with disabilities in the implementation and monitoring of the Convention.²²

23. Although the Committee's General Comments have provided useful guidance to State Parties in incorporating the obligations and rights contained in the CRPD into domestic law, it has been suggested that not all amendments made to relevant domestic law have been fully compliant with the Committee's recommendations.²³ In some State Parties, a mixed approach towards implementation has been taken, combining supported and substituted decision-making processes. Indeed, Ireland's declaration and reservation concerning Article 12 of the UNCRPD states that the State understands that the UNCRPD permits both supported and substitute decision-making arrangements, as discussed below.
24. The Committee can only oversee a State Party's implementation progress if that State Party is formally bound by the UNCRPD, for example by means of depositing ratification instruments. The Convention offers mechanisms for periodic review of a State Party's activities in the field of disability matters and establishes a means for facilitating constructive dialogue between the State Party and the Committee. The rules on State Party reports and on Committee reports are set out in Articles 36 to 39 of the UNCRPD. Both the Committee and the national IMMs appointed in accordance with Article 33(2), as discussed below, work together to ensure compliance with the Convention.

(e) EU ratification of the UNCRPD

25. The European Union is itself a Party to the UNCRPD. Article 44 of the UNCRPD provides for regional integration organisations such as the EU to become parties to the Convention. Upon accession to the Convention, regional integration organisations must declare which Articles of the Convention they accept, those they accept with substantial modifications, and those that they cannot accept due to the limits of their competence.²⁴

²² Committee on the Rights of Persons with Disabilities, General Comment No. 7 (2018): Article 4.3 and 33.3: Participation with persons with disabilities in the implementation and monitoring of the Convention (CRPD/C/GC/7); available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/7&Lang=en accessed on 31 August 2020.

²³ See European Union Agency for Fundamental Rights, *Legal capacity of Persons with Intellectual Disabilities and Persons with Mental Health* (July 2013); available at: <https://fra.europa.eu/en/publication/2013/legal-capacity-persons-intellectual-disabilities-and-persons-mental-health-problems> accessed on 31 August 2020.

²⁴ Article 44 of the CRPD.

26. The EU has been bound to the UNCPRD since January 2011. The EU acceded to the UNCPRD through Council Decision 2010/48/EC on 26 November 2009,²⁵ and a formal deposit notification was supplied to the UN on 23 December 2010. The UNCPRD was the first international human rights treaty to which the EU became a Party. Its accession to the UNCPRD also marked the first time that an intergovernmental, regional organisation had become a party to a UN human rights treaty.
27. The European Parliament asked the EU Agency for Fundamental Rights (FRA) to draft a report on the requirements of Article 33(2) UNCPRD and issue an opinion.²⁶ Article 33(2), as discussed above, requires Parties to the UNCPRD to appoint Independent Monitoring Mechanisms (IMMs). In May 2016, the FRA published its Opinion on how the EU as an institution should comply with Article 33(2) UNCPRD.²⁷ It concluded that a legally binding act published in the EU Official Journal would be required to provide the basis for the framework need to establish an EU IMM. Initially, the EU Commission was designated under Article 33(2) as the EU IMM. However, because the Commission was also responsible for the EU's implementation of the UNCPRD, the Committee on the Rights of Persons with Disabilities recommended that the EU take measures to remove the Commission from its independent monitoring framework.²⁸
28. The fact that the EU ratified the UNCPRD is significant because, under Article 216(2) TFEU, international agreements that are concluded by the EU are binding on EU Member States and EU institutions. Under mixed agreements, those provisions that fall within EU competence are binding. The UNCPRD is a mixed international agreement, which impacts upon how Ireland incorporates and implements the Convention. Obligations contained within the UNCPRD can fall under different EU competences, some shared, some exclusive. EU Member States are, however, required under mixed

²⁵ Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010D0048>> accessed on 31 August 2020.

²⁶ European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights concerning requirements under Article 33(2) of the UN Convention on the Rights of Persons with Disabilities within the EU context* (March 2016), at page 7; available at: <https://fra.europa.eu/sites/default/files/fra_uploads/fra-opinion-03-2016-cprd.pdf> accessed on 31 August 2020.

²⁷ European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights concerning requirements under Article 33(2) of the UN Convention on the Rights of Persons with Disabilities within the EU context* (March 2016); available at: <https://fra.europa.eu/sites/default/files/fra_uploads/fra-opinion-03-2016-cprd.pdf> accessed on 31 August 2020.

²⁸ European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights concerning requirements under Article 33(2) of the UN Convention on the Rights of Persons with Disabilities within the EU context* (March 2016), at page 11; available at: <https://fra.europa.eu/sites/default/files/fra_uploads/fra-opinion-03-2016-cprd.pdf> accessed on 31 August 2020.

agreements to adhere to a policy of sincere cooperation, which means that they should not take any course of action that would positively frustrate the purpose of the relevant treaty and that they should respectfully assist other Member States in carrying out the functions that are required by that treaty. In *MX v Health Service Executive*,²⁹ the High Court held that this does not mean that once the EU ratifies a treaty, that treaty and all of its obligations and rights automatically become enforceable in EU Member States. Rather, because Ireland, as a Member State of the EU and through Article 29 of the Constitution, agreed that the 2007 EU Treaty of Lisbon should incorporate the key features of UN (and Council of Europe) human rights conventions into EU law through the detailed provisions of the EU Charter of Fundamental Rights, the EU Charter can be relied on in applying EU-derived law in Irish courts where an issue of EU law arises.

3. Ireland's implementation process

(a) Introduction

29. According to the Disability Federation of Ireland, approximately 600,000 people with disabilities live in Ireland.³⁰ Ireland had been involved in international disability advocacy for a significant amount of time prior to the conclusion of the UNCRPD. In 1998, the State tabled biannual resolutions on the human rights of persons with disabilities. In 1999, Ireland was awarded the UN Franklin D. Roosevelt International Disability Award, which is awarded to States that have made significant progress towards the UN programme of action for disabled people.³¹ The then UN Secretary General Kofi Annan, commended the State for its enactment of the *Employment Equality Act 1998* and the establishment of a ministerial post for disability.³²
30. Irish disability policy spans across multiple regulatory areas and a number of Government Departments are involved in its development, notably the Department of Health, the Department of Employment Affairs and Social Protection, and the Department of Justice and Equality.

²⁹ [2012] IEHC 491 at para 35.

³⁰ See <<https://www.disability-federation.ie/about/>> accessed on 31 August 2020.

³¹ United Nations (1999). Press Conference on Franklin Delano Roosevelt Disability Award. Available at: <<https://www.un.org/press/en/1999/19990504.award.brf.html>> accessed on 31 August 2020.

³² United Nations (1999), Press Release: "Cause of the Disabled is a Cause that No One Can Afford to Ignore, Secretary-General States." SG/SM/6981, SOC/4497.

31. Ireland signed the CRPD on 30 March 2007, on the day the CRPD was opened for signature.³³ This signing followed from significant engagement by Irish representatives over a number of years in the drafting process leading to the finalisation of the Convention. This significant engagement reflects the fact that Ireland was already committed in principle to support the general thrust of the contents and purpose of the Convention. As discussed in the Discussion Paper, due to Article 29 of the Constitution, it is clear that, in Ireland's case, signature is almost always "subject to ratification" under Article 18 of the Vienna Convention on the Law of Treaties (VCLT). Given the wide-ranging and complex obligations that are contained in the UNCRPD, it took a number of years for the State to ratify it following its signature. In Ireland, as well as in other State Parties to the UNCRPD, reformulating the legal and policy environment to allow supportive assisted decision-making models for persons with disabilities to be put into operation, has made implementation quite complex.
32. During the period between signing the UNCRPD and ratifying it, however, the Irish State acted in good faith to avoid any breaches of the Convention, in accordance with Article 18 of the VCLT. However, it is important to note again that this good faith principle, although capable of asserting significant moral persuasive power, is not legally enforceable and does not affect the State's absolute discretion to ratify an international convention or treaty.³⁴ The 12-year gap between signature and ratification of the UNCRPD is, therefore, not insignificant.
33. Prior to signing the UNCRPD in 2007, Ireland had already enacted a considerable body of law relating to persons with disabilities, as part of its body of equality legislation. Despite this existing body of legislation, ratification of the UNCRPD required the enactment of additional legislation, as well as significant reform to some of the existing provisions in order to fully implement the paradigm shift that the Convention represented in the conception of disability policy, as discussed. The need for reform of the laws concerning individuals with disabilities had been previously identified by statutory bodies. For example, as discussed below, in 1984, the Department of Health published *Towards a Full Life: Green Paper on Services for Disabled People*,³⁵ in which it recommended that the term "handicapped" should be replaced with "disabled" in all

³³ 84 states signed the UNCRPD on the date it opened for signature, which was a record for an international human rights treaty. See United Nations Treaty Collection, Convention on the Rights of Persons with Disabilities; available at:

<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-15&chapter=4&clang=en> accessed on 31 August 2020.

³⁴ *Hutchinson v Minister for Justice* [1993] 3 IR 567. See paragraph 2.84 of the Discussion Paper, above.

³⁵ Department of Health, *Towards a Full Life: Green Paper on Services for Disabled People* (1984); available at <<https://www.lenus.ie/handle/10147/46676>> accessed on 31 August 2020.

legislation in which it appeared. Similarly, in 1993, the Irish Commission on the Status of People with Disabilities advocated a rights-based model to be adopted towards disability rights within the State. Prior to the conclusion of the UNCRPD, in its 2006 *Report on Vulnerable Adults and the Law*, this Commission recommended the abolition of the wardship system and recommended that it should be replaced with a rights-based system.³⁶

34. Ratification of the UNCRPD requires State Parties to ensure the full and equal participation of persons with disabilities, in particular the most underrepresented groups of persons with disabilities, in decision-making processes concerning the Convention's implementation. Therefore, the State's approach to implementation must be cross-disciplinary and specifically attuned to the needs of persons with disabilities under domestic conditions.

(b) Policy Background

(i) Pre-signature of the UNCRPD

35. As mentioned above, in 1984, the Department of Health published *Towards a Full Life: Green Paper on Services for Disabled People*.³⁷ This Green Paper sought to advance the equality rights of people with disabilities and recommended the replacement of the term "handicapped" with "disabled".³⁸ The Green Paper was followed by the Department of Health's 1990 Report entitled *Needs and Abilities: A Policy for the Intellectually Disabled*.³⁹ The purpose of the 1990 Report was to promote the mainstreaming of services for persons with disabilities into public and private life.⁴⁰
36. In 1993, responsibility for disability rights policy was transferred to the Department of Equality and Law Reform. In the same year, the Department of Justice established the Commission on the Status of People with Disabilities, following the Forum of People

³⁶ *Report on Vulnerable Adults and the Law* (LRC 83-2006).

³⁷ Department of Health, *Towards a Full Life: Green Paper on Services for Disabled People* (1984); available at <<https://www.lenus.ie/handle/10147/46676>> accessed on 31 August 2020.

³⁸ Department of Health, *Towards a Full Life: Green Paper on Services for Disabled People* (1984), at page 14, available at <<https://www.lenus.ie/handle/10147/46676>> accessed on 31 August 2020.

³⁹ Department of Health, *Needs and Abilities: A Policy for the Intellectually Disabled* (July 1990); available at: <<http://www.fedvol.ie/fileupload/Next%20Steps/Needs%20and%20Abilities.pdf>> accessed on 31 August 2020.

⁴⁰ Department of Health, *Needs and Abilities: A Policy for the Intellectually Disabled* (July 1990), at page 15 available at <<http://www.fedvol.ie/fileupload/Next%20Steps/Needs%20and%20Abilities.pdf>> accessed on 31 August 2020.

with Disabilities, which also took place that year.⁴¹ The Commission on the Status of People with Disabilities recommended that the State should move from a medically focused, paternalistic, approach toward disability policy to towards a social and rights-based model. It also recommended the establishment of the Irish Council of People with Disabilities, which was subsequently established in 1997 and renamed in 2000 as the People with Disabilities in Ireland.⁴² It was disbanded in 2011.⁴³

37. In 1999, the National Disability Authority (NDA) was established under the *National Disability Authority Act 1999*. It is an independent statutory body whose mandate is to provide expert advice to the Government on disability policy and practice. The NDA's primary functions are set out in section 8(2) of the 1999 Act and include conducting research, establishing standards and codes of practice, and monitoring and overseeing the employment of persons with disabilities in the public service.
38. The Government published the *National Disability Strategy* (NDS) in 2004 following several consultation phases.⁴⁴ The 2004 NDS was the focus of disability policy in the State under the *Nation Partnership Agreement – Towards 2016* (T2016).⁴⁵ The National Disability Strategy Stakeholder Monitoring Group (NDSSMG) was established under T2016 to oversee and monitor progress made towards implementing the 2004 NDS. The NDSSMG later became the National Disability Strategy Implementation Group and the National Disability Inclusion Strategy Steering Group, which monitor compliance under the *National Disability Inclusion Strategy 2017-2021*.⁴⁶

⁴¹ This forum was dissolved in 2006. Toolan, "An emerging human rights perspective", in Quinn and Redmond (eds.), *Disability and Social Policy in Ireland* (University College Dublin Press 2003), at page 177.

⁴² Frontline: The Irish Voice of Intellectual Disability (2013), "Twenty Years On. The Commission on the Status of People with Disabilities and the development of advocacy for people with disabilities." Available at: <<http://frontline-ireland.com/twenty-years-on/>> accessed on 31 August 2020.

⁴³ *Ibid.*

⁴⁴ National Disability Authority (2015), The National Disability Inclusion Strategy Information Leaflet. Available at: <http://nda.ie/news-and-events/news/disability-inclusion-strategy-information-leaflet-easy-to-read.pdf> accessed on 31 August 2020.

⁴⁵ *Towards 2016: Ten Year Framework Social Partnership Agreement 2006-2015*; available at: <<http://www.socialinclusion.ie/documents/Towards201626June06.pdf>> accessed on 31 August 2020.

⁴⁶ Department of Justice and Equality, *National Disability Inclusion Strategy 2017-2021* (July 2017), available at <<http://www.justice.ie/en/JELR/Pages/WP17000244/>> accessed on 31 August 2020.

(ii) *Post-signature of the UNCRPD*

39. In 2012, the Department of Health published the *National Carers' Strategy: Recognised, Supported, Empowered*.⁴⁷ The objective of the National Carers' Strategy is to provide for a multi-annual plan on care provision in Ireland.⁴⁸
40. The Government approved the *Implementation Plan of the National Disability Strategy* in 2013, which had been prepared and agreed by the National Disability Strategy Implementation Group.⁴⁹ The 2013 Implementation Plan set out the Government's intended actions to further "improve the lives of people with disabilities in Irish society"⁵⁰ for the period 2013 to 2015.
41. In 2015, the Government endorsed a more specific document addressing implementation issues, the *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities*,⁵¹ which is the policy document on which this Case Study focuses in more detail.
42. These are, however, not the only policy documents concerning disability policy in Ireland. There is also the *Comprehensive Employment Strategy for People with Disabilities*,⁵² the *National Housing Strategy for People with a Disability*,⁵³ and a document launched by the Health Service Executive (HSE) entitled *Safeguarding*

⁴⁷ Department for Health, *The National Carer's Strategy: Recognised, Supported, Empowered*, available at <<http://health.gov.ie/wp-content/uploads/2016/02/National-Carers-Strategy.pdf>> accessed on 31 August 2020.

⁴⁸ *Ibid.*

⁴⁹ The National Disability Strategy Implementation Group was established in November 2011 by the Minister for Disability, Equality, Mental Health and Old People.

⁵⁰ National Disability Strategy Implementation Group, *National Disability Strategy Implementation Plan 2013-2015* (July 2013), at page 2.

⁵¹ Department of Justice, *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities* (October 2015); available at <<http://www.justice.ie/en/JELR/Pages/PB15000549>> accessed on 31 August 2020.

⁵² Government of Ireland, *Comprehensive Employment Strategy for People with Disabilities (2015 – 2024)*, available at <<http://justice.ie/en/JELR/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf/Files/Comprehensive%20Employment%20Strategy%20for%20People%20with%20Disabilities%20-%20FINAL.pdf>> accessed 31 August 2020.

⁵³ Department of the Environment, Community and Local Government, *National Housing Strategy for People with a Disability 2011 – 2016* (2011) available at <<https://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/DevelopmentandHousing/Housing/FileDownload,28016,en.pdf>> accessed on 31 August 2020.

Vulnerable Adults together with a Strategic Plan 2017-2021.⁵⁴ The wide spectrum of existing policy documents supports the argument that the UNCRPD's objectives are in line with broader domestic policy goals concerning people with disabilities.

43. The *National Disability Inclusion Strategy 2017-2021* was published in July 2017. In this Strategy 2017-2021, the Government pledged to commence the *Assisted Decision-Making (Capacity) Act 2015*, develop the associated Codes of Practice, and promote and provide training for both by early 2018. At the time of writing (August 2020), significant provisions of the 2015 Act have yet to be commenced.

(c) Implementation process

44. It is advisable that State Parties should, in preparation for ratification of the UNCRPD, evaluate existing national laws, policies, and programmes to determine where reform is necessary to ensure compliance with the purpose and intent of the Convention. Full implementation of the UNCRPD, however, requires not only legislative reform, but rather a combination of legislative, administrative, and other measures. For the UNCRPD to be fully implemented into the domestic landscape, the protection and promotion of the human rights of persons with disabilities should be taken into account in all policies and programmes by State Parties. This is known as policy mainstreaming. In so doing, State Parties shall consult with and actively involve persons with disabilities, including children, through their representative organisations, in accordance with Article 4(3) of the CRPD. The principle of equality and non-discrimination is further upheld by Article 5 of the UNCRPD.
45. As already discussed, the UNCRPD represented a radical shift in the conception of disability rights from endorsing a paternalistic, medical model to moving to a supportive, rights-based model. This radical shift has required State Parties to make significant changes to their existing bodies of disability legislation, which has included the need to address and update outdated terminology. For example, all legislative references to "unsound mind" and "lunatics" had to be identified and replaced with "mentally disabled", which is a term that is compatible with the UNCRPD. In 2008, the Expert Group on Mental Health, which had been established in 2003 by the then Minister for Health, considered that "recovery" could not be included among the guiding principles for future mental health legislation. Instead, a person's own

⁵⁴ National Safeguarding Committee, *Strategic Plan 2017-2021*(November 2016); available at: <<https://www.safeguardingireland.org/wp-content/uploads/2018/10/NSC-Strategic-Plan-2017-2021-2.pdf>> accessed on 31 August 2020.

understanding of their condition and mental health ought to guide future legislation in the area.⁵⁵

46. As discussed, a key document used to describe the pathway through which Ireland has implemented the UNCRPD into Irish law is the *Roadmap to Ratification of the UN Convention on the Rights of Persons with Disabilities (UNCRPD)*. It is important to note that the Roadmap was published in 2015 and that significant legislative reforms had been enacted prior to its publication.
47. For example, in 2007, the *Citizens Information Act 2007* was enacted to amend the *Comhairle Act 2000* and change the name of Comhairle to the Citizens Information Board. The Board was assigned the task of either supporting the provision of, or providing directly, advocacy services to individuals, in particular those with disabilities, that would assist them in identifying and understanding their needs and options and in accessing their entitlements to social services.⁵⁶ In 2011, responsibility for providing advocacy services in the community and voluntary sector was transferred to the National Advocacy Service.⁵⁷
48. In its 2012 Report, the Joint Oireachtas Committee on Justice, Defence and Equality observed that at that time that Ireland did not take a human rights-based approach towards the legal capacity of persons with disabilities.⁵⁸ The Joint Committee further noted that Irish legislation concerning legal capacity derived from legislation dating back to the 19th century and, consequently, did not meet contemporary standards.⁵⁹

(d) Roadmap to Ratification

49. As already mentioned, the Department of Justice and Equality published the *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with*

⁵⁵ Mental Health Commission, *A Recovery Approach within the Irish Mental Health Services. A Framework for Development* (2008); available at <<http://www.mhcirl.ie/File/framedevarecov.pdf>> accessed on 31 August 2020.

⁵⁶ Section 4 of the *Citizens Information Act 2007*.

⁵⁷ Frontline, *Twenty Years On: The Commission on the Status of People with Disabilities and the development of advocacy for people with disabilities* (2013). Available at: <http://frontline-ireland.com/twenty-years-on/>.

⁵⁸ Joint Committee on Justice, Defence and Equality, *Report on hearings in relation to the Mental Capacity Bill* (May 2012), available at: <<http://www.oireachtas.ie/parliament/media/michelle/Mental-capacity-text-REPORT-300412.pdf>> accessed on 31 August 2020.

⁵⁹ *Ibid.*

Disabilities (UNCRPD) (Roadmap)⁶⁰ in November 2015. The Roadmap sets out a range of legislative reforms necessary to bring Ireland's disability legislation into line with the requirements of the UNCRPD prior to ratification. This focused on two pieces of implementing legislation: first, the *Assisted Decision-Making (Capacity) Bill*, which was subsequently enacted as the *Assisted Decision-Making (Capacity) Act 2015*, and, second, the *Disability/Equality (Miscellaneous Provisions) Bill*.

50. The 2015 Act is discussed in greater detail in the following sections. The *Disability (Miscellaneous Provisions) Bill 2016* was initiated in Dáil Éireann in December 2016. It represented a part of a package of reforms proposed by the *General Scheme of the Equality/Disability (Miscellaneous Provisions) Bill*. The *Disability (Miscellaneous Provisions) Bill 2016* progressed to Committee Stage in January 2019; however, at the time of writing (August 2020), it had lapsed with the dissolution of both Houses of the Oireachtas in January 2020. The 2016 Bill had been described by the Minister for Justice and Equality as a "significant part of the overall process of progressive realisation of the [UNCRPD]".⁶¹

51. The Roadmap focuses on several key Articles of the CRPD, indicating whether compliance with each requires existing legislation to be amended and / or further legislative action. Each of these Articles is discussed in the following sections.

(i) *Article 3 – General principles*

52. As discussed above, Article 3 UNCRPD sets out the general principles that are intended to guide interpretation and application of the entirety of the Convention. The Roadmap identified that the only existing legislation that required amendment were sections 188(4)(a) and 188(4)(c) of the *Companies Act 2014*, to remove references to "unsound mind". At the time of writing (August 2020), this amendment had not enacted.

(ii) *Article 5 – Equality and non-discrimination*

53. As discussed above, Article 5 of UNCRPD recognises that persons with disabilities are equal before the law. Article 5(3) in particular provides that:

⁶⁰ Department of Justice and Equality, *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)* (October 2015); available at: <http://www.justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf> accessed on 31 August 2020.

⁶¹ Select Committee on *Justice and Equality, Disability (Miscellaneous Provisions) Bill 2016*: Committee Stage, available at https://www.oireachtas.ie/en/debates/debate/select_committee_on_justice_and_equality/2019-01-30/2/ accessed on 31 August 2020.

“In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”

54. Irish law mandates the provision of reasonable accommodation to persons with disabilities in two pieces of legislation, the *Employment Equality Act 1998* and the *Equal Status Act 2000*. The *Employment Equality Act 1998* provides that an employer “shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities”.⁶² This requirement is based on the understanding that “a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and be fully capable of undertaking”, those activities.⁶³
55. Similarly, the *Equal Status Act 2000*, which proscribes discrimination on the ground of disability, provides that discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.⁶⁴
56. The *Employment Equality Act 1998* emphasises the financial costs to the employer. Under section 16(3)(b) of the 1998 Act an employer “shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities.” However, section 16(3)(c) of the 1998 Act specifies that a refusal or failure to provide such special treatment or facilities shall not be deemed unreasonable where such provision would give rise to a cost, other than a nominal cost, to the employer.
57. Section 34(3) of the 1998 Act goes on to specify that unlawful discrimination shall not be found where it is shown that there is clear actuarial or other evidence that significantly increased costs would result if the discrimination were permitted in those circumstances. In its overview of the *Employment Equality Act 1998* and the *Equal Status Act 2000*, the former Equality Authority (now the Irish Human Rights and Equality Commission) explained that reasonable accommodation involves a dialogue

⁶² Section 16(1)(3)(b) of the *Employment Equality Act 1998*.

⁶³ Section 16(3)(a) of the *Employment Equality Act 1998*.

⁶⁴ Section 4(1) of the *Equal Status Act 2000*.

between the employer or service provider and the person with disabilities as to what the person needs and what is reasonable to be provided.⁶⁵

58. The principle of reasonable accommodation under the UNCRPD applies to all areas of life.⁶⁶ As regards the distinction between the private and public provision of goods and services, the Committee on the Rights of Persons with Disabilities noted that, as long as goods, products, and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise.⁶⁷ This means, therefore, that no distinction is drawn between the private and public provision of goods and services in respect of persons with disabilities.
59. In *In re the Employment Equality Bill 1996*, the Supreme Court held that it would be unconstitutional to impose such liability on employer where compliance with the obligation would result in costs exceeding nominal costs for private entities in the employment context.⁶⁸ The decision was based on the right to private property (including the protection of private financial information) guaranteed by Article 40.3 of the Constitution. Therefore, the Supreme Court's decision limited the employers' mandatory expenditures to a nominal cost.
60. With regard to Article 5 UNCRPD, the Roadmap envisaged legislation to provide for a "disproportionate cost standard" in the provision of goods and services where possible. This must be done in line with the EU Employment Equality Directive.⁶⁹ According to Recital 21 of the Employment Equality Directive, to determine whether the measures in question give rise to a disproportionate burden, account should be

⁶⁵ Equality Authority, Overview of the Employment Equality Act 1998 and the Equal Status Act 2000 in light of the transposition of the EU 'Race' Directive, Framework Employment Directive (FED) and the Gender Equal Treatment Directive (GETD) (2003).

⁶⁶ UN Committee on the Rights of Persons with Disabilities (2015). Concluding observations on the Initial report of Ukraine, CRPD/C/UKR/CO/1, para. 10. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fUKR%2fCO%2f1&Lang=en accessed on 31 August 2020.

⁶⁷ Committee on the Rights of Persons with Disabilities (2014) General comment No. 2, Article 9: Accessibility CRPD/C/GC/2, page 4; available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/2&Lang=en accessed on 31 August 2020.

⁶⁸ *In re Article 26 and the Employment Equality Bill 1996* [1997] IESC 6, [1997] 2 IR 321, at page 13.

⁶⁹ Roadmap, at page 3: "The EU Employment Equality Directive subsequently set the standard at the higher UN standard of 'disproportionate cost' in respect of employment. In relation to provision of goods and services, the advice available to the Department is that the higher standard can also apply to public sector bodies providing services and to those public sector entities that are licensed or regulated for quality of customer service."

taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance. Additionally, Article 5 of the Employment Equality Directive provides that this burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

61. Section 4 of the (now lapsed) *Disability (Miscellaneous Provisions) Bill 2016* responded partly to the obligation under Article 5 UNCRPD. It provided for an amendment to the *Equal Status Act 2000* which would expand the category of obliged persons and align the definition of disproportionate burden with the requirements of the Employment Equality Directive.⁷⁰

(iii) Article 12 – Equal recognition before the law

62. Article 12 of the UNCRPD is important as it guarantees the protection of the right to equal protection before the law of persons with disabilities. It is closely connected to Article 14, providing for liberty and security of a person with a disability, discussed below. Article 12(3) requires State Parties to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”.
63. Under Article 12, State Parties are obliged to replace substituted decision-making systems with systems of supported decision-making. Possible limitations on decision-making should be considered on an individual basis, be proportional, and be restricted to the extent to which they are absolutely necessary. Limitations should not take place when less interfering means are both sufficient, considering the situation, and accessible. Effective legal safeguards must be provided to ensure that such measures are not abused.
64. The enactment of the *Assisted Decision-Making (Capacity) Act 2015* has been the key legislative measure to implement Article 12 of the UNCRPD into Irish law. In April 2014, the Committee on the Rights of Persons with Disabilities issued a general comment on the interpretation of Article 12 of the CRPD. It supports the idea of universal legal capacity, whereby States must abolish denials of legal capacity that are discriminatory on the basis of disability.⁷¹

⁷⁰ *Disability (Miscellaneous Provisions) Bill 2016*. Available at <<https://www.oireachtas.ie/documents/bills28/bills/2016/11916/b11916d.pdf>> accessed on 31 August 2020.

⁷¹ See also Flynn and Artein-Kerslake, “The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?” (2014) 32(1) *Berkeley Journal of International Law*, at page 132.

65. As discussed below, Ireland made a reservation in respect of Article 12, declaring that:

"To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards."

66. The Roadmap recognised the need to amend section 4 of the *Criminal Law (Insanity) Act 2006*, which concerns fitness to be tried. The need for this amendment was also recognised in 2016 by the Interdepartmental Group Report which recommended that section 4 be amended to reflect issues that had arisen in *G v Murphy and Ors*.⁷² There the High Court held that the *Criminal Law (Insanity) Act 2006* provided for unconstitutional discrimination against a person charged with an offence whose fitness to be tried is in question. The Group recommended that the Department of Justice and Equality should examine the possibility of either abolishing the option for out-patient examination or treatment under section 4, or amend the provisions relating to out-patient examination or treatment to provide for a more effective community order.⁷³ The Roadmap had proposed that section 4 of the 2006 Act would be amended by the *Equality/Disability (Miscellaneous Provisions) Bill 2016*. As discussed above, some of the Heads of this Bill became the *Disability (Miscellaneous Provisions) Bill 2016*, which has subsequently lapsed. The proposed amendment to section 4 of the 2006 Act was not contained in the Heads of the 2016 Bill and, at the time of writing (August 2020), section 4 has not yet been amended as intended by the Roadmap.

(iv) Article 13 – Access to justice

67. Article 13 of the UNCRPD requires State Parties to ensure that persons with disabilities have effective access to justice "on an equal basis with others". The Article further specifies that can be achieved, in part at least, by providing "procedural and age-appropriate accommodations" to enable their participation in the legal process. This includes both their direct and indirect participation, including, for example, their participation as witnesses both at investigatory and hearing stages of the legal system.

⁷² *G v Murphy and Ors* [2011] IEHC 445, discussed in, Department of Justice and Equality, First Interim Report of the Interdepartmental Group to examine issues relating to people with mental illness who come in contact with the criminal justice system (2016), page 24. Available at <<http://justice.ie/en/JELR/Pages/First-Interim-Report-of-the-Interdepartmental-Group-to-examine-issues-relating-to-people-with-mental-illness-who-come-in-contact-with-the-criminal-justice-system>> accessed on 31 August 2020.

⁷³ *Ibid.*

68. In order to bring Irish law into compliance with Article 13, the Roadmap proposed that Schedule 1, Part 1 of the *Juries Act 1976* be amended to provide for the presumption of capacity and to make certain other amendments to definitions contained in the 1976 Act. Section 7 of the 1976 Act provides that the persons specified in Part I of Schedule 1 are ineligible for jury service. Ineligible persons include persons who, due to an insufficient literacy level, deafness, or other permanent infirmity, are unfit to serve on a jury. It also includes persons who suffer or have suffered from mental illness or mental disability and, as a result of that condition are resident in a hospital or other similar institution, or regularly attends for treatment by a medical practitioner.
69. Section 1(b) of the proposed *Disability (Miscellaneous Provisions) Bill 2016*, if enacted, would provide for the necessary amendment of the Schedule to the 1976 Act. It would remove the ineligibility of those who are deaf by reason only of the necessity for a sign language interpreter. Instead, the court would use a functional capacity test to ensure that a person has "the mental and intellectual capacity to serve as a juror".⁷⁴ As already noted, however, at the time of writing (August 2020), the 2016 Bill had lapsed.

(v) *Article 14 – Liberty and security of the person*

70. Article 14(1) of the UNCRPD prescribes that:
- "State Parties shall ensure that persons with disabilities, on an equal basis with others:
- a) enjoy the right to liberty and security of person; and
- b) are not deprived of their liberty unlawfully and arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty."
71. The Roadmap proposed that the *Mental Health Act 2001* would be amended to comply with Article 14, and this was achieved with the enactment of the *Mental Health (Amendment) Act 2015*, which amended sections 59 and 60 of the 2001 Act. The Roadmap also proposed that, separately, the *Assisted Decision-Making (Capacity) Bill 2013*, which was enacted as the *Assisted Decision-Making (Capacity) Act 2015* would ensure compliance with Article 14.

⁷⁴ *Disability (Miscellaneous Provisions) Bill 2016*, Explanatory Memorandum.

72. Prior to its amendment, section 59 of the 2001 Act provided for the possibility of administering electro-convulsive therapy to a person without his or her consent. Section 59(1) provided that:

"A programme of electro-convulsive therapy shall not be administered to a patient unless either

(a) the patient gives his or her consent in writing to the administration of the programme of therapy or,

(b) where the patient is unable or unwilling to give such consent

(i) the programme of therapy is approved...by the consultant psychiatrist responsible for the care and treatment of the patient, and

(ii) the programme of therapy is also authorised by another consultant psychiatrist following referral of the matter to him or her by the first-named psychiatrist."

73. The *Mental Health (Amendment) Act 2015* deleted the words "or unwilling" from section 59(1)(b) Act, so that a patient's consent is always required for EST to be administered, where he or she is capable of giving such consent.
74. The 2015 Act made a similar change to section 60 of the 2001 Act, which concerns the administration of medicine to a patient. Section 60 as amended now provides that, where medication has been administered to a patient for the purposes of ameliorating his or her mental disorder for a continuous period of three months, the administration of that medicine shall not be continued unless either the patient gives his or her consent in writing to the continued administration of that medicine or where the patient is unable to give such consent, an approval of the consultant psychiatrist or an authorisation by another consultant psychiatrist following referral is sought. Prior to the amendment effected by the 2015 Act, this was also possible where a patient was "unwilling" to give his or her consent.
75. The *Mental Health (Amendment) Act 2018* was enacted in July 2018. It introduced guiding principles to apply to decisions made in respect of adults and children. It also introduced a presumption of capacity of a person in respect of whom a decision is made and it substituted the definition of "voluntary patient" with a definition which makes reference to the *Assisted Decision-Making (Capacity) Act 2015*.

76. In addition, Part 10 of the *Assisted Decision-Making (Capacity) Act 2015* provides for detention matters, requiring the Mental Health Commission to establish a panel of suitable consultant psychiatrists willing and able to carry out independent medical examinations for the purposes of this Part. The Act lays down conditions for review of detention orders in certain circumstances in both approved and non-approved centres.
77. Separately, the review of the detention of patients detained in centres following criminal proceedings is undertaken by the Mental Health (Criminal Law) Review Board, established under section 11 of the *Criminal Law (Insanity) Act 2006*. The Board reviews the detention of patients who have been referred to the Central Mental Hospital arising from a decision by the courts that they are unfit to stand trial or, having been found not guilty of an offence by reason of insanity.⁷⁵
78. The Roadmap also proposed reform to ensure clarity around the protection of liberty of persons with intellectual disability in nursing homes and care homes. Head 3 of the General Scheme of the *Equality / Disability (Miscellaneous Provisions) Bill 2016* proposed to address this issue by clarifying who has statutory responsibility for a decision that a patient in a nursing home or similar residential care facility should not leave for health and safety reasons and to provide for an appeals process. As noted, however, at the time of writing (August 2020), the 2016 Bill had lapsed and it is expected that more detailed proposals on Protection of Liberty (PoL) will be published by the Department of Health.
79. The Interdepartmental Group undertook to examine issues relating to people with mental illness who come in contact with the criminal justice system in its First Interim Report published in September 2016.⁷⁶ Its recommendations are based on the non-binding interpretation of the UNCRPD as provided by the Committee on the Rights of Persons with Disabilities. As far as Articles 12 and 14 of the CRPD are concerned, the Report stated that the denial of legal capacity of persons with disabilities and their detention in institutions against their will amounts to arbitrary deprivation of liberty. Therefore, deprivation of liberty on the basis of actual or perceived disability, provided there are other reasons for their detention, would therefore require reform. It has also

⁷⁵ See <www.mhclrb.ie> accessed on 31 August 2020.

⁷⁶ Department of Justice and Equality, First Interim Report of the Interdepartmental Group to examine issues relating to people with mental illness who come in contact with the criminal justice system (2016). Available at <<http://justice.ie/en/JELR/Pages/First-Interim-Report-of-the-Interdepartmental-Group-to-examine-issues-relating-to-people-with-mental-illness-who-come-in-contact-with-the-criminal-justice-system>>, accessed on 31 August 2020.

been suggested that involuntary detention based on presumptions of risk or dangerousness tied to disability is contrary to Article 14 of the CRPD.⁷⁷

80. Furthermore, the *National Disability Inclusion Strategy 2017-2021*⁷⁸ noted that the Government will introduce statutory safeguards to protect residents of nursing homes and residential centres, and ensure that they are not deprived of liberty, save in accordance with the law as a last-resort measure in exceptional circumstances and that appropriate guidance and training for staff and carers would be developed.

(vi) Article 15 – Freedom from torture or cruel, inhuman or degrading treatment or punishment

81. Article 15(1) of the UNCRPD provides that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.”

82. As referred to above, prior to their amendment by the *Mental Health (Amendment) Act 2015*, sections 59(1) and 60 of the *Mental Health Act 2001* provided for the provision of electro-convulsive therapy where a patient was “unwilling” to give his or her consent to such treatment. The necessary amendment to the 2001 Act was clearly set out in the Roadmap and has subsequently been implemented. It is no longer possible to administer ECT without the consent of a patient.

(vii) Changes to the language used in legislation

a. Legal capacity

83. In its 2012 Report, the Joint Oireachtas Committee on Justice, Defence and Equality observed that at that time Ireland did not take a human rights-based approach towards the legal capacity of persons with disabilities.⁷⁹ The Joint Committee further

⁷⁷ Statement on Article 14 of the Convention on the Rights of Persons with Disabilities, United Nations Office of the High Commissioner (2014), Committee on the Rights of the Persons with Disabilities.

⁷⁸ Department of Justice, *National Disability Inclusion Strategy* (2017-2021) Available at: <<http://www.justice.ie/en/JELR/dept-justice-ndi-inclusion-strategy-booklet.pdf/Files/dept-justice-ndi-inclusion-strategy-booklet.pdf>> accessed on 31 August 2020.

⁷⁹ The Joint Committee on Justice, Defence and Equality, *Report on hearings in relation to the Scheme of the Mental Capacity Bill* (May 2012); available at <<http://www.oireachtas.ie/parliament/media/michelle/Mental-capacity-text-REPORT-300412.pdf>> accessed on 31 August 2020.

noted that Irish legislation concerning legal capacity derived from legislation dating back to the 19th century and, consequently, did not meet contemporary standards.⁸⁰

b. *Assisted Decision-Making (Capacity) Act 2015*

84. The *Assisted Decision-Making (Capacity) Bill* was presented to the Dáil in July 2013 and was signed into law in December 2015. However, at the time of writing (August 2020), certain provisions have not yet been commenced.
85. The *Assisted Decision-Making (Capacity) Act 2015* provides for the establishment of the Decision Support Service. The Decision Support Service's mission is to raise public awareness of the UNCRPD, as provided for in section 95(1)(a) of the 2015 Act, reflective of the fact that awareness-raising is one of the preconditions for effective implementation of the UNCRPD. The Decision Support Service is also currently (August 2020) developing codes of practice in cooperation with a multidisciplinary working group, in accordance with section 91 of the 2015 Act. In accordance with sections 95(1)(g) and 95(1)(h) of the 2015 Act, it advises state bodies and it makes recommendations to the Minister for Health, in accordance with section 95(1)(k).
86. The original Heads of the *Disability/Equality (Miscellaneous Provisions) Bill*, which preceded the Act of 2015, were separated into two parts. One of these became the *Assisted Decision-Making (Capacity) Act 2015* and the second became the *Disability (Miscellaneous Provisions) Bill 2016*. At the time of writing (August 2020), the 2016 Bill had lapsed with the dissolution of Dáil and the Seanad in January 2020.

(viii) *Declarations and Reservations*

87. Ireland has made a number of declarations and reservations to Articles 12, 14 and 27 of the UNCRPD.
88. As mentioned above, Ireland made a declaration and reservation in respect of Article 12 of the Convention, which concerns equal recognition before the law of persons with disabilities. To the extent that Article 12 may be interpreted as requiring the elimination of all substituted decision-making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards. This potentially has repercussions for the fulfilment of other obligations under the Convention because Article 12, together with the general principles set out in Article 3 and the anti-discrimination principle set out in Article 5, is an integral provision of the Convention. In its first General Comment,⁸¹ the Committee

⁸⁰ *Ibid.*

⁸¹ Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014): Article 12: Equal recognition before the law (CRPD/C/GC/1); available at <

on the Rights of Persons with Disabilities noted that "the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making."⁸²

89. Ireland also made a declaration on Articles 12 and 14 concerning compulsory care or treatment of persons with disabilities. Additionally, Ireland made a reservation to Article 27(1) of the UNCRPD, which relates to the equal treatment in employment and occupation of persons with disabilities. Reservations or declarations may be revised in the future and withdrawn at any time, depending on the outcome of progressive realisation of certain obligations under the UNCRPD.
90. As discussed above, one of the most interesting aspects of Ireland's implementation of the UNCRPD was the publication in 2015 of the *Roadmap to Ratification of the UN Convention on the Rights of Persons with Disabilities (UNCRPD)*.⁸³ This Roadmap contained a detailed list of planned legislative reforms necessary for the State to fully implement and ratify the UNCRPD. Ambitiously, the Roadmap stated these reforms would be enacted by the end of 2016. The speed with which it was intended to enact these reforms can perhaps be understood by the fact that, at the time of the publication of the Roadmap, Ireland was the only signatory to the UNCRPD not to have ratified it. Additionally, the Government faced pressure from a number of statutory bodies to enact the necessary legislative reforms and ratify the Convention, as discussed above.
91. The Roadmap reiterated at the outset that the State's general treaty practice would be applied to the UNCRPD:⁸⁴

"Ireland is committed to proceeding to ratification as quickly as possible, taking into account the need to ensure all necessary legislative and administrative requirements under the Convention are met.

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en > accessed on 31 August 2020.

⁸² Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014): Article 12: Equal recognition before the law (CRPD/C/GC/1) at paragraph 3; available at < https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en > accessed on 31 August 2020.

⁸³ Department of Justice and Equality, *Roadmap to Ratification of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)* (October 2015), available at <<http://www.justice.ie/en/JELR/Roadmap%20to%20Ratification%20of%20CRPD.pdf/Files/Roadmap%20to%20Ratification%20of%20CRPD.pdf>> accessed on 31 August 2020.

⁸⁴ Roadmap, page 1.

Ireland is a dualist State, Article 29.6 of the Constitution providing that international agreements have the force of law to the extent determined by the Oireachtas. It is essential therefore that the State is in a position to meet the obligations it assumes under the terms of an international agreement from the moment of its entry into force for Ireland. Before the State can ratify the Convention on the Rights of Persons with Disabilities, enactment of new legislation and amendment of existing legislation is required to ensure obligations will be met upon entry into force for Ireland.

This Roadmap sets out the legislative measures needed to meet those requirements, along with declarations and reservations to be entered by Ireland on ratification.”

92. As noted in the Discussion Paper, ultimately the Government decided in 2018 that it would proceed to ratification of the UNCRPD even though all the legislation envisaged in the Roadmap had not been enacted at that time. Indeed, as noted above, due to the complexity of the many legislative reforms involved, the full list of envisaged legislation has not been enacted at the time of writing (August 2020).
93. A notable feature of the Roadmap is that it sets out the planned legislative reforms in the context of the UNCRPD. It also sets the relevant Articles of the UNCRPD and the corresponding proposed legislation that it was proposed to enact by end 2016.
94. Because of its value in terms of clarity and transparency in setting a pathway to ratification, the full text of the Roadmap is set out below.⁸⁵

⁸⁵ Footnote references in the Roadmap have been removed but the content of those footnotes is discussed in the Commission’s general discussion on the Roadmap above.

Article 3 - General principles

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
<p>Article 3</p> <p>The principles of the present Convention shall be:</p> <p>a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;</p>		<p>Enactment of Assisted Decision-Making (Capacity) Bill 2013.</p> <p>Amendment of Companies Act 2014 188 (4) (a) and (c) to remove reference to "unsound mind"</p>	<p>The Bill is currently awaiting Report Stage in the Dáil.</p> <p>The Companies Act 2014 will be amended by the Department of Jobs, Enterprise and Innovation in the upcoming Accounting Bill 2015, enactment of which is intended by end-2015.</p>

Article 5 – Equality and non-discrimination

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
<p>Article 5</p> <p>3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.</p>	<p>Equal Status Acts</p>	<p>Legislation required to provide for 'disproportionate cost' standard in provision of goods and services where possible, having regard to the Supreme Court judgment in Art. 26 Referral (EEB1996) that the cost burden on private employers cannot exceed a nominal cost.</p>	<p>The terms of the Supreme Court decision precluded the imposition of a reasonable accommodation requirement where the cost was more than a nominal cost for private employers. The EU Employment Equality Directive subsequently set the standard at the higher UN standard of 'disproportionate cost' in respect of employment. In relation to provision of goods and services, the advice available to the Department is that the higher standard can also apply to public sector bodies providing services and to those public sector entities that are licensed or regulated for quality of customer service. The provision of the higher standard in the case of the remaining private sector providers can be considered in the light of developments in relation to EU anti-discrimination legislation and may need to be subject [in the interim] to a progressive realisation declaration.</p> <p>The Department of Justice and Equality will bring forward legislation in this regard in the Equality/Disability (Miscellaneous Provisions) Bill for enactment in 2016.</p>

Article 12 - Equal recognition before the law

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
Article 12 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.		Enactment of Assisted Decision-Making (Capacity) Bill 2013	Enacted by end-2015
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.	Criminal Law (Insanity) Act 2006 , section 4	<p>Enactment of Assisted Decision-Making (Capacity) Bill 2013</p> <p>Amendment to section 4 of the Criminal Law (Insanity) Act 2006 necessary to address the issue that was the subject of the judgment of the High Court in <i>G. v. District Judge Murphy</i></p> <p>Declaration in relation to Ireland's understanding of Article 12, along the lines of those entered by Canada, Australia and Norway on ratification.</p>	<p>As above</p> <p>Amendment to be included in the Equality/Disability Miscellaneous Provisions Bill for enactment in 2016, if not progressed in separate legislation before then.</p>
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.		Enactment of Assisted Decision-Making (Capacity) Bill 2013	As above in 12.1

<p>4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.</p>		<p>Enactment of Assisted Decision-Making (Capacity) Bill 2013</p>	<p>As above in 12.1</p>
<p>5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.</p>		<p>Enactment of Assisted Decision-Making (Capacity) Bill 2013</p>	<p>As above in 12.1</p>

Article 13 – Access to Justice

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
<p>Article 13</p> <p>1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.</p>		<p>Amend Schedule 1, Part 1 of Juries Act 1976 to provide for presumption of capacity and change definitions, which will be included in the Assisted Decision-Making (Capacity) Bill 2013</p> <p>Enact Assisted Decision- Making (Capacity) Bill 2013</p>	<p>Enacted by end-2015</p> <p>As above</p>

Article 14 - Liberty and security of the person

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
Article 14 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:			
a) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.	Mental Health Act 2001	<p>Amendment of Mental Health Act 2001</p> <p>Enactment of Assisted Decision-Making Capacity Bill 2013</p> <p>Provisions on involuntary detention: need for a declaration with regard to involuntary detention, along lines of Australia and Norway</p> <p>Clarity on issue of nursing homes and care homes for people with intellectual disabilities. The Department of Health is considering the issue further and will seek further legal advice. The Department of Justice and Equality is open to taking the necessary amendments forward as part of the Equality/Disability Miscellaneous Provisions Bill.</p>	<p>It is expected that an amending Mental Health Bill will be published in 2016.</p> <p>Enacted by end-2015</p> <p>Subject to legal advice, the Departments of Health and Justice and Equality will cooperate to include any required legislative provisions in the Equality/Disability (Miscellaneous Provisions) Bill for enactment in 2016.</p>

Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
<p>Article 15</p> <p>1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.</p>	<p>Mental Health Act 2001, by means of the Mental Health (Amendment) Bill 2008</p>	<p>Action required on administration of ECT. When enacted, the Mental Health (Amendment) Bill 2008 will make immediate changes to the Mental Health Act 2001.</p>	<p>Enactment is expected by end-2015.</p>

Article 23 - Respect for home and the family

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
<p>Article 23</p> <p>1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:</p>			
<p>a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;</p>	<p>Article 5 of the Criminal Law (Sexual Offences) Act 1993</p>	<p>Progress Sexual Offences Bill</p>	<p>Enactment is expected in early 2016.</p>

Article 27 - Work and employment

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
<p>Article 27</p> <p>1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:</p>			
<p>a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;</p>		Reservation to be put forward as per legal advice	
<p>b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;</p>		See above at (a)	

Article 29 - Participation in political and public life

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
<p>Article 29</p> <p>States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:</p>			
<p>a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:</p>	<p>Schedule 1, Part 1 of Juries Act 1976</p> <p>Section 41(i) of the Electoral Act 1992</p> <p>Section 42 of the Electoral Act 1992</p>	<p>Amend Schedule 1, Part 1 of Juries Act 1976 to provide for presumption of capacity and change definitions; to be included in the Assisted Decision-Making (Capacity) Bill 2013.</p> <p>Amend/repeal Section 41(i) of the Electoral Act 1992.</p> <p>Amend Section 42 of the Electoral Act 1992.</p>	<p>Enactment by end-2015</p> <p>The Department of Justice and Equality will bring forward the necessary amendments, in consultation with the Department of the Environment, Community and Local Government and the Attorney General, in the Equality/Disability (Miscellaneous Provisions) Bill, for enactment in 2016.</p>

<p>b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:</p> <ul style="list-style-type: none"> i. Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties; ii. Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels. 	<p>Companies Act 2014</p>	<p>Amendment to section 188.4 (a) and (c) of the Companies Act 2014 (reference to “unsound mind”)</p>	<p>Amendment of Companies Act to be undertaken by DJEI in upcoming Accounting Bill 2015, enactment of which is intended by end-2015.</p>
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Article 33 - National implementation and monitoring

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
<p>Article 33</p> <p>1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.</p>	<p>Legislation will be required for ratification; seek legal advice as to whether focal point needs to be designated by law.</p>	<p>Equality Division in the Department of Justice and Equality to be designated as the focal point.</p>	<p>Already in place at an administrative level.</p>
<p>2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.</p>		<p>The monitoring framework proposed would comprise:</p> <ul style="list-style-type: none"> • The Irish Human Rights and Equality Commission as the Independent Mechanism with the function to protect, promote and monitor implementation of the Convention, and to submit periodic independent reports to the UN. As Ireland's National Human Rights Institution (NHRI), IHREC fully meets the standard of independence in accordance with the Paris Principles. • The National Disability Authority, with the function to prepare independent 	<p>Further consultations in 2016. Legislative provisions to be included as necessary in Equality/Disability Miscellaneous Provisions Bill, for enactment in 2016.</p>

		<p>assessments of progress, including compilation of statistical information, which would inform the periodic independent reports of the Irish Human Rights and Equality Commission</p> <p>Provision will be made in the amending legislation for formal consultation with all relevant stakeholders.</p>	
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Article 33 - National implementation and monitoring

Provision of UNCRPD	Legislation to be amended	Further Action Required	Estimated time required
3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.		<p>We envisage an active role for civil society and stakeholders in the monitoring process. IHREC is specifically mandated in section 18 of the Irish Human Rights and Equality Commission Act 2014 to establish Advisory Committees and other methods of consultation with relevant agencies and with NGOs and other civil society interests.</p> <p>The Department of Justice and Equality also consults with the Disability Stakeholders Group. The group comprises both disability service users and disability service providers, and was set up to participate in monitoring and oversight of the National Disability Inclusion Strategy.</p> <p>In addition, the NDA can advise on effective ways to consult with people with disabilities and if so requested, could also undertake consultation with people with disabilities to inform the reporting and monitoring process.</p>	<p>Further consultations in 2016 – legislative provisions to be included as necessary in Equality/Disability Miscellaneous Provisions Bill, for enactment in 2016.</p>

		<p>Taken together, these mechanisms provide a good basis for civil society to fully participate in the monitoring process, and consultation on the precise form of such involvement will continue. The Minister will bring final proposals in that regard to Government when seeking approval for ratification of the General Scheme of the necessary legislation.</p>	
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4. Concluding remarks

95. The implementation of the obligations contained in the UNCRPD illustrates both that the use of an implementation roadmap ensures transparency and certainty, and that it is possible to ratify an international treaty or convention even if all of the identified key legislation has not yet been amended or enacted, as applicable.
96. There are improvements that could be made to the way in which an implementation roadmap can aid in the State's fulfilment of its obligations under international treaties or conventions should this approach be taken again. The Roadmap to Ratification of the UNCRPD could, for example, have been updated or reviewed in light of the General Comments that had been issued by the Committee on the Rights of Persons with Disabilities in the intervening period between its publication and implementation. Despite the updates or reviews that could have been made to increase the transparency of the Roadmap, however, it remains a very useful example of best practice in implementing international obligations into Irish domestic law.

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its *Fifth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act it was approved by the Government in March 2019 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's Access to Legislation work makes legislation more accessible online to the public. This includes the Legislation Directory (an electronically searchable index of amendments to Acts and statutory instruments), a selection of Revised Acts (Acts in their amended form rather than as enacted) and the Classified List of Legislation in Ireland (a list of Acts in force organised under 36 subject matter headings).



LAW REFORM
COMMISSION/COMISIÚN UM
ATHCHÓIRIÚ AN DLI

Styne House, Upper Hatch Street, Dublin 2, Ireland
T. +353 1 637 7600
F. +353 1 637 7601
info@lawreform.ie
lawreform.ie

The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975