THE HIGH COURT

2003 No.
3739P

BETWEEN

EDWARD HORGAN

PLAINTIFF

AND

AN TAOISEACH, THE MINISTER FOR FOREIGN AFFAIRS, THE MINISTER FOR TRANSPORT, THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Kearns delivered the 28th day of April, 2003.

The plaintiff is an Irish citizen and a retired officer of the Irish Defence Forces. He has a distinguished history of service to the State, including service on United Nations Peacekeeping Missions in Cyprus in 1966, 1971 and 1973, and in the Middle East in 1973/74. He left the army in 1986, since which time he has held positions in Trinity College, Dublin and Aughinish Alumina Limited in Co. Limerick. He has been engaged in full time education and research as a mature student at the University of Limerick where he completed a B.A. in History, Politics and Social Studies in 2001. He was awarded an M. Phil. (Peace Studies) degree by Trinity College in 2000. Over the past 10 years he has also worked as a civilian United Nations volunteer on election and democratisation missions with the United Nations and the European Union in the following countries: Bosnia, Croatia, Nigeria, Indonesia, Zimbabwe and East Timor.

In these proceedings, the plaintiff claims:

1. A declaration that the decision by the Government made on the 19" of March 2003 to maintain arrangements whereby military and civilian aircraft of the United States of America engaged in the prosecution of the military attack of the United States of America and the United Kingdom of Great Britain and Northern Ireland against the State of Iraq will continue to be permitted to overfly the State and to land and be refuelled at Shannon Airport, Co. Clare and the transit through the State with the permission of the fourth named defendant of troops of the United States en route to the said war is in breach of Ireland's neutral State duty not to permit the movement of troops or convoys of either

munitions of war or supplies across its territory as a neutral Power and that the said decision of the Government is thereby in breach of Article 29.3 of the Constitution

2. A declaration that the decision of the Government of the 19" of March 2003 and the permissions of the second and third defendants to facilitate the overflight and landing and refuelling in Ireland and in particular at Shannon Airport, Co. Clare of United States military and civilian aircraft whereby troops of the armed forces of the United States of America or convoys of either munitions of war or supplies across the territory of the State in transit to the theatre of war being prosecuted by the United States of America against the State of Iraq constitutes participation by the State in the said war and is thereby in breach of Article 28.3 of the Constitution in that a valid and constitutional assent of Dáil Éireann under Article 28.3 to such prosecution of war has not been given

3. A declaration that the decisions of the second and third defendants pursuant to the Air Navigation (Foreign Military Aircraft) Order 1952 and Article 5 of the Air Navigation (Carriage of Munitions of War, Weapons and Dangerous Goods) Order 1973 as amended by the Air Navigation (Carriage of Munitions of War, Weapons and Dangerous Goods) Amendment Order 1989 and consequent permissions granted whereby military and civil aircraft of the United States of America are and will be permitted to fly over and through the air space of the State and to land at airports, and in particular, Shannon Airport, Co. Clare within the State and refuell there and to move troops or convoys of either munitions of war or supplies across the territory of the State constitutes a breach by the State as a neutral State of the customary rules of international law and is thereby unconstitutional, unlawful, and void by virtue of the Constitution and in particular Article 29.3 of the Constitution

4 A declaration that the decision of the Government of Ireland made on the 19th of March 2003 to permit military and civil aircraft of the United States engaged in the prosecution by the United States of America of a war against the State of Iraq to fly into Irish airspace and to land at Shannon Airport for the purpose of refuelling and other facilities including the movement of troops and/or the munitions of war to the theatre of the said war constitutes an assistance by the State to the prosecution of the said war by the United States of America against the State of Iraq contrary to the generally recognised principles of international law contrary to the Constitution and in particular Article 29 thereof."

The Statement of Claim delivered on the 24th day of March 2003 in addition claims certain injunctive remedies against the defendants to restrain the matters complained of.

The relevant portions of Article 28 of the Constitution of Ireland provide:*"2. The executive power of the State shall, subject to the provisions of this Constitution, be*

exercised by or on the authority of the Government.

3.1 War shall not be declared and the State shall not participate in any war save with the assent of Dáil Éireann*."*

The relevant portions of Article 29 of the Constitution provide:*"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.

4.1 The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government. 2. For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be

determined by law avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members 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."

Section 5 of the Air Navigation and Transport Act, 1946 provides that an order made by the Minister for Industry and Commerce under that Act can be made applicable to any aircraft in or over the State and authorises the Minister to make regulations in respect of such matters and things as might be specified in such order.

The Air Navigation (Foreign Military Aircraft) Order 1952, made by the Minister for Industry and Commerce in exercise of the powers conferred on him by the 1946 Act, contains the following provisions:*"3. No foreign military aircraft shall fly over or land in the State save on the express invitation or with the express permission of the Minister (i.e. the Minister for External Affairs)*

5 Every foreign military aircraft flying over or landing in the State on the express invitation or with the express permission of the Minister shall comply with such stipulations as the Minister may make in relation to such aircraft"

On the 29th of August 1973 the Air Navigation (Carriage of Munitions of War, Weapons and Dangerous Goods) Order 1973 became applicable to all aircraft when in or over the State. It contained the following provisions:*"5. The Minister may, by direction, exempt any class of aircraft from any of the provisions of Article 6 or 7 of this Order.*

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6 (1) In this Article "munitions of war" means weapons and ammunition designed for use in warfare and includes parts of or for such weapons and ammunition

(2) (a) Subject to subparagraph (b) of this paragraph –(i) it shall be unlawful to carry munitions of war on an aircraft;

(ii) it shall be unlawful for a person to take or cause to be taken on board an aircraft, or to deliver or cause to be delivered, for carriage thereon, goods which he knows or has reason to suspect to be munitions of war.

(b) This Article shall not apply to munitions of war taken or carried on board an aircraft which is registered elsewhere than in the State ~ under the laws of the State in which the aircraft is registered the munitions of war may be lawfully taken or carried on board for the purpose of ensuring the safety of the aircraft or the persons on board.

The Air Navigation (Carriage of Munitions of War, Weapons and Dangerous Goods) (Amendment) Order 1989 amended the 1973 Order by substituting for Article 5 the following Article:

"5. The Minister may, by direction, exempt a spec fled aircraft in regard to a particular aircraft operation from all or any of the provisions of Article 6 or 7 *of this Order."*

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Recent Events

On the 20th of March 2003 a military attack was launched on the State of Iraq by the military forces of the United States of America and the United Kingdom. The court was informed that the Government of the United States of America had Sent approximately 220,000 troops, together with munitions of war, to the Middle East in preparation for the military campaign. It is not in dispute that a portion of such troops and munitions passed through Shannon Airport en route to the theatre of war.

The military and civilian aircraft carrying the said troops and/or munitions

which overflew or landed in the State at Shannon Airport did so with the permission of the Minster for Foreign Affairs granted pursuant to Article 3 of the Air Navigation (Foreign Military Aircraft) Order, 1952 or under an exemption granted by the third named defendant pursuant to Article 5 of the 1973 Air Navigation Order as amended.

> For the purpose of the present application, the parties were invited to agree a "statement of facts" in relation to the nature and extent of facilities granted to the United States forces at Shannon, both leading up to and following the commencement of hostilities against Iraq on the 20th of March 2003. This invitation was extended by the court with a view to obviating the necessity to consider taking evidence in this regard. This suggestion was accepted by both sides and on the 4th of April 2003, the Chief State Solicitor wrote to the plaintiff's solicitors setting out the factual position for the period from 1st January 2003 to date as follows:*"There were 762 overflights by US military aircraft in the period from 1 January 2003 to 31 March 2003 inclusive. However, as the Department of Foreign Affairs receive statistics on such overflights on a monthly basis, no breakdown of overflights of US military aircraft since 20 March 2003 is available.*

A total of 41 US military aircraft were given permission to land at Shannon Airport in the period from 1 January 2003 to date. No US military aircraft has landed at Shannon Airport since 20 March 2003.

The Department of Foreign Affairs does not routinely receive information as to the number of personnel on board military aircraft effecting such landings. However, from the nature of the aircraft —generally small passenger aircraft and transporters – the number of personnel on board these aircraft is likely to be low.

US military personnel are mainly transported by civil aircraft which do not require special permission to transit or overfly if they are not carrying weapons or munitions. As a result, it is impossible to state with precision the number of US troops that have passed through Shannon Airport travelling to the military conflict in Iraq. However, it is estimated, on the basis of the most recent data available, that the total number of US troops and associated civilian personnel passing through Shannon Airport in the period from 1 January 2003 to 19 March 2003 was around 34,500. A further 3,000 passed through Shannon Airport in the period between 20 March 2003 and 29 March 2003 inclusive.

In relation to the carriage of weapons or munitions on flights landing in Ireland or overflying its airspace, the Department of Transport granted 180 exemptions in the period between 1 January 2003 and 19 March 2003 inclusive. 35 exemptions were granted for flights in the period between 20 March 2003 and 30 March 2003 inclusive. The vast majority of these exemptions were in respect of aircraft carrying troops accompanied by their weapons and ammunition.

The refuelling of aircraft at Shannon Airport is handled on a commercial basis. Fuel is provided by or on behalf ofAer Rianta at commercial rates without any differentiation as to the type of aircraft whether civil or military. Fuel is supplied to aircraft for the purposes of getting such aircraft to its destination. Contrary to popular belief fuel has not been supplied to refuelling tanker aircraft for the purpose of mid-air refuelling. No such services have been sought."

Mr. Rogers S.C. on behalf of the plaintiff indicated to the court that, in the absence of any contrary information, the plaintiff accepted the information contained in the letter as being an accurate statement of the factual position.

On the 19th of March 2003 the Irish Government, having received the advices of the sixth named defendant, approved the terms of a Motion to be put before Dáil Éireann on 20th March 2003. It was in the following terms:*"Dáil Éireann, noting the imminence of military action by a United States led coalition against Iraq:*

- *reaffirms Ireland's commitment to the United Nations as the guarantor of collective global security and as the appropriate forum for the resolution of disputes threatening international peace and security;*

- *condemns the continued refusal of the Government of Iraq over a period of 12 years to comply with its obligations to disarm as imposed by numerous*

- *resolutions of the United Nations Security Council, most recently in Resolution 1441;*

- *recalls that Resolution 1441 found Iraq in material breach of its obligations under relevant resolutions, afforded Iraq a final opportunity to comply with*

these obligations, and recalled the Security Council's repeated warnings that Iraq would face serious consequences as a result of its continued violations of its obligations;

- *expresses its deep regret that efforts within the Security Council to reach agreement on how to address the question of Iraqi non-compliance have failed;*

- *recalls Ireland's statement as a member of the Security Council on the adoption of Resolution 1441 that it would be for the Security Council to decide on any ensuing action in the event of further Iraqi non-compliance;*

- *regrets that the coalition finds it necessary to launch the campaign in the absence of agreement on a further resolution, notwithstanding the claims of the coalition to be acting on the basis of an existing Security Council mandate;*

- *endorses the decision of the Government that Ireland will not participate in the coalition's proposed military action against Iraq;*

expresses its earnest hope that military action, should it occur, will be of short duration and that loss of life and destruction will be kept to a minimum;

declares its commitment to the sovereignty, independence and territorial integrity of Iraq;

calls on all parties to any conflict to respect the provisions of international humanitarian law, in particular, the Geneva Conventions; welcomes the stated intention of the coalition to act swiftly to address the food and humanitarian needs of the Iraqi people;

- *welcomes the arrangements put in place by the Government to ensure that Ireland will be able to contribute rapidly to the humanitarian effort in Iraq;*

- *calls on the United Nations to assume a central role in securing the humanitarian needs of the Iraqi people and the reconstruction of Iraq in which Ireland will play its full part;*

- *recalls the longstanding arrangements for the overflight and landing in Ireland of US military and civilian aircraft;*

- *supports the decision of the Government to maintain those arrangements."*

A resolution in the terms of the Motion was passed by Dáil Éireann on 20th March 2003.

It is immediately apparent that the said resolution was not, and did not purport to be, an assent of Dáil Éireann under Article 28.3.1. *to 'participation'* in the war. On the contrary, the resolution specifically endorsed the decision of the Government that Ireland *"Will not participate in the coalition's proposed military action against Iraq* . Secondly, the resolution supported the decision of the Government to maintain the *"long standing arrangements for the overflight and landing in Ireland of US military and civilian aircraft".*

In his statement to Dáil Éireann on 20th March 2003, the Taoiseach addressed the question of whether Ireland should continue to facilitate the landing and overflight of aircraft belonging to States engaged in the military action against Iraq. He stated as follows: .

"Essentially, we are talking about US military aircraft and civilian aircraft, carrying military personnel and equipment, on behalf of the US Government.

The Government discussed this matter at length yesterday. We have decided not to change our current policy in relation to stopovers or overflights. I want to assure Dáil Éireann*, and the Irish People, that the Government has carefully considered what is best for this country in a very difficult situation where no simple answers exist. We took our decision after long reflection. We took into account the present circumstances, the principles that underpin our foreign policy, our international relations and our broader national interests.*

The issues concerned are not black and white. International relations involve difficult dilemmas. It is easy to address issues in absolute terms. The responsibility of Government does not always allow that luxury. There are a number of important facto rs relevant to our decision. The first and crucial consideration is that the Government does not regard the provision of landing and overflight facilities to foreign aircraft as participation in a war. This has been the consistent position of successive Irish Governments and was our position in relation to the Gulf War. At that time the Government pointed out that whether any role adopted or action taken by the Government in relation to a Gulf War would constitute participation in that war is, in the last analysis, a question of substance and degree. The Government then and now maintain that merely to permit the use of a civilian airport in this manner is not of sufficient degree or substance to constitute participation in the war.

The provision of the facilities does not make Ireland a member of a military coalition. Nor does anybody regard it as such. We remain militarily neutral. The decision we have taken on this issue is our own. Ireland has made

overflight and landing facilities available to the US for the last 50 years. This period covers many crises and military confrontations, which involved the US taking military action without specific UN endorsements - Kosovo, being the most significant. We did not withdraw or suspend those facilities at any stage during that period.

There is no reason to act differently towards the United States now than we did during previous conflicts.

No other country is known to be contemplating the withdrawal of existing facilities from the US. This includes Germany and France, who have been the strongest opponents of US intentions on the Security Council. It also includes a number of Arab countries who have taken a strong position against war. These countries would not accept that, by maintaining overflight or landing facilities to the US, they are endorsing or participating in the US military

action. It would be extraordinary for Ire land to adopt a position of opposition in regard to the United States that no other country, not even its strongest critics on the Security Council, is prepared to take."

In his affidavit sworn on 31st day of March, 2003, the plaintiff (at paragraph 20 thereof) asserts that the current granting of facilities (i.e. in the form and to the extent agreed by both sides to exist) *"constitutes the most fundamental and far reaching change in national policy in relation to the State's practice in time of war in the absence of an express request for assistance from the Security Council."*

It is his contention that the historic materials which relate to the *"long standing arrangements for overflight and landing"* demonstrate that permissions for

foreign military aircraft to overfly or land in the State were granted in limited circumstances and subject to specific conditions.

Given that the present level of aid and assistance being provided at Shannon by the Irish Government is alleged to amount to a *"participation"* in the war against Iraq, it now becomes necessary, at least for the purpose of comparison with the present arrangements, to examine the *"long standing arrangement* .

The 1on~ standing arrangements.

A series of documents were tendered to the court relating to the policy governing the use of Irish airspace by foreign military aircraft over the last 50 years. Some of these documents consisted of memos or minutes submitted by the Department of Foreign Affairs to the Taoiseach's Department, whereas others deal with requests to the Department of External Affairs for overflight or landing facilities. Extracts from Dáil debates were also tendered in which details of Government policy on this issue were stated and restated over a number of years in Dáil Éireann.

A key memo dated 16 September, 1958 from the Department of External Affairs to the Taoiseach's Department states the following: *"I am directed by the Minister for External Affairs to state that an informal*

approach was recently made to this Department by the American Embassy, with the object of ascertaining how we would react to a request for rights for US military aircraft to overfly the country, on the clear understanding that such aircraft:

(1) would be unarmed; and

(2) would be engaged solely in conveying cargo and passengers.

The cargo would consist of "support supplies" being flown primarily to Britain, France and Germany. "Support supplies" is defined generally as such things as food, clothing and household equipment. According to the American Embassy, the primary reason why the US authorities would wish to have the authorisation in question is to effect a saving in expenditure by permitting a more direct route between the points of departure and the points of arrival of the aircraft concerned. The USA at present enjoy a blanket permission, renewable periodically, for

(a) emergency landings in, and overflights of the country in air/sea rescue operations and

(b) listing Shannon airport as a clearance alternate for aircraft of the US Military Air Transport Service (MA. T.S.) on

transatlantic flights.

The flights about which the American Embassy has inquired could, of course, serve indirectly to help certain American military operations ‑in the sense that the bases in Europe which are supplied by such flights may be used for actions such as that recently undertaken in the Lebanon. However, there is nothing in international law which prevents a country from authorising such flights in time of peace.

In the circumstances, and having regard to the reason alleged by the American Embassy for seeking permission for ovey7ight (a reason which he has no ground for questioning), the Minister for External Affairs is disposed to have the American Embassy advised that a formal request, if received, would be granted, subject to the understanding that, in the event of a serious

deterioration in the political situation in Europe or in the Middle East, it would lapse."

A response from the Taoiseach, following a meeting of the Government, on

23rd September 1958, stated; *"I am directed by the Taoiseach to state, following informal consultation by*

him with the Ministers for Industry and Commerce, Defence and Justice, that the American Embassy may be informed that a formal request for rights for

United States military aircraft to overfly Ireland would be granted on the clear understandings mentioned in the first paragraph of your minute and on the further understanding that the permission would be subject to reconsideration in the event of a serious deterioration in the international situation."

On the 31st July 1959, the British Government made an application for permission to use Tory and Inishtrahul Islands for refuelling helicopters participating in naval exercises. This request was refused. The minute prepared by the Department of Foreign Affairs in respect of the application states: *"Applications are frequently received by An Roinn Gnothai Eachtracha for permission for foreign military aircraft to overfly or land in the State. These are generally in relation to individual aircraft engaged in various missions including training flights. The US has "blanket" permission*

(a) for emergency landings in and overflights of Ireland for aircraft participating in air/sea rescue operations,

(b) to list Shannon Airport as a clearance alternate for aircraft of the US Military Air Transport Service on transatlantic flights,

(c) for unarmed military planes operated for or on behalf of the US Government to overfly Ireland (such planes would carry only cargo and passengers) .

The departmental note dated 21St July, 1959, compiled before the decision to refuse was made, states: *"On the face of it, it is difficult to see how this request could be acceded to. The islands mentioned are as much part of the national territory as Stephen's Green. It is known that we give permission for the landing in our territory of unarmed military planes engaged on peaceful duty e.g. US army planes carrying US personnel for leave in Ireland or in transit to the USA. It is quite another thing to give permission not only for aircraft engaged on warlike exercises to land on our territory but also to use our territory as a refuelling base for such exercises. Apart from the political aspect of the matter, the views of the Department of Defence would have to be obtained."*

Where individual ministerial permissions have been granted under the Air Navigation (Foreign Military Aircraft) Order 1952, the relevant policy considerations have been stated and restated on various occasions in reply to parliamentary questions in Dáil Éireann. The court was furnished with details of such replies given on the 25th October 1983, 9th December 1986, 2nd May 1989, 24~ October 1990 and 3rd March 1998.

On 25th October 1983, the then Minister for Foreign Affairs stated in Dáil Éireann:
"On occasion, limited numbers of United States military personnel have passed

through Shannon Airport. Insofar as this transit involves the use of

foreign military aircraft, permission has to be sought in each case from my Department, who consult with the Departments of Transport, Defence and Justice in each case. Requests for foreign military overflights and landings are considered in the light of long standing procedures and criteria applied by successive Irish Governments. These criteria include.

- *that clearance should be consistent with the Government's foreign policy as expressed in* Dáil Éireann*, in the United Nations and elsewhere;*

- *that the overflight or military landing must not be an integral part of training manoeuvres by foreign military aircraft; likewise, clearance is not granted where a troop-carrying aircraft is en route to military exercises.*

- *that clearance be in no way prejudicial to the security or safety of the State.*

while the clearance of commercial aircraft is primarily a matter for the Minister for Transport, the same criteria apply in the case of commercial aircraft in military service. lam satisfied that in all such cases considered by my Department, these criteria were met. The granting of requests for such overflights or landings in accordance with these procedures and criteria has no implications for Ireland's neutrality."

On the 2nd May 1989, the then Minister for Foreign Affairs stated in Dáil Éireann *"The Air Navigation (Foreign Military Aircraft) Order, 1952, provides that foreign military aircraft may not fly over the State unless at the express invitation or with the express permission of the Minister for Foreign Affairs. Accordingly, permission for overflights of foreign military aircraft has to be*

sought from me. The granting of such permission is dependant on certain conditions being met which are drawn to the attention of the countries concerned. The most important of these conditions are that the aircraft be unarmed, not carry arms, ammunition or explosives and not engage in intelligence gathering. Further, the flights in question must not form part of military exercises or operations."

An assurance in similar terms was given to Dáil Éireann by the Minister for Foreign Affairs on 24th October 1990.

In the aftermath of the atrocities perpetrated on September 11th2001, a number

of further documents were prepared by the Security Policy Section of the Department of Foreign Affairs, including a briefing note for use in Brussels by the Political Director dated 20th September 2001. In a section entitled *"Use of Irish Air Space by US Military Aircraft"* the following appears: *The Taoiseach has stated that Ireland can support any overflights that are governed by the UN Charter,*

- *During Operation Desert Storm – which had a UN. mandate - the US refuelled at Shannon. We would certainly give our support to any future operation which had a UN mandate,*

- *Anything outside of that context has to be looked at on an individual basis,*

- *Under an Air Navigation Order, foreign military aircraft require the permission of the Minister for Foreign Affairs to overfly, or land in, the State,*

- *Requests for overflight of Irish air space are handled through standard procedures on a case by case basis."*

In relation to overflights by military aircraft, a contemporaneous policy document from the Security Policy Section dated 20th September 2001 states:

"1. The legislative basis for control of military overflights is as follows: Under the Air Navigation (Foreign Military Aircraft) Order 1952, foreign military aircraft require the permission of the Minister for Foreign Affairs to overfly or land in the State.

2. Where permission is given for overflights or landings it is granted on condition that

(1) The aircraft in question are unarmed,

(2) They carry no ammunition,

(3) They do not engage in intelligence gathering and

(4) They are not involved in military exercises."

In the aftermath of September 11th 2001, the Government made clear on the 21st September, 200lthat it would facilitate overflight, landing and refuelling of aircraft engaged "in pursuit of Resolution 1368". Resolution 1368 of the Security Council classified the terrorist attacks of 11 September 2001 as a threat to international peace and security. The resolution called on all States to work together urgently to bring to justice the perpetrators, organisers and sponsors of the attacks and called on the international community to redouble efforts to prevent and suppress

terrorist acts.

A memo dated 14th September 2002 from the Political Division of the Department of Foreign Affairs states: *"In making this offer of overflight and landing facilities, Ireland is not participating in a war, nor does it mean we have joined a military alliance.*

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Rather, it is simply fulfilling its international legal obligations, acting in accordance with Irish Law, to assist a concerted international response to deal with the threat to international peace and security]'

By way of further clarification, the Minister for Foreign Affairs on 9th October 2002 informed Dáil Éireann:*"Permission for foreign military aircraft to overfly or land in the State is granted by the Minister for Foreign Affairs under the Air Navigation (Foreign Military Aircraft) Order 1952. Permission is normally granted on the basis of confirmation that the aircraft is unarmed, does not carry arms, ammunition or explosives and does not form part of a military exercise or operation. US military aircraft meeting these conditions have been granted permission to refuel at Shannon airport over a period of decades.*

In addition and on an exceptional basis, a decision was taken to waive the normal conditions for the granting of permission for overflight and landing in respect of military aircraft operating pursuant to UN Security Council Resolution 1368, adopted on 12th September2001.

It has also been the practice, going back many years, for commercial charter aircraft carrying US servicemen between the US and bases overseas to land and refuel at Shannon. Such flights do not require special permission and are subject to the requirements of civil aviation regulations.

No arrangements have been agreed with the US Government to facilitate the use of Shannon Airports for the transfer of troops and equipment to the Middle East. Any request for such agreement would be considered in

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the light of the position of the UN Security Council and in the context of ongoing efforts to reach a peaceful resolution of the issue."

A briefing document prepared by the Security Policy Section of the Department of Foreign Affairs dated 16 December, 2002 contained the following restatement of Irish Government policy in the context of suggested replies to supplementary questions to PQ26780:—

"1. Under what authority does a Government permit use of Irish air space or landing

facilities by foreign military aircraft?

In giving permission for foreign military aircraft to overfly or land in the State, the Government is acting under the Air Navigation (Foreign Military Aircraft) Order 1952 which allows the Minister for Foreign Affairs to grant permission to foreign military aircraft to overfly or land in the State.

Under the terms of this order, the conditions to be complied with by foreign military aircraft overflying or landing in Ireland are for the Minister for Foreign Affairs to determine.

In the case of routine landings of military aircraft, confirmation is normally required that the aircraft is unarmed, does not carry arms, ammunition or explosives and does not form part of a military exercise or operation.

Foreign military aircraft meeting these conditions have been granted permission to refuel at Shannon over a period of decades.

2. Under what circumstances can the usual stipulations be waived?

On an exceptional basis a decision was taken to provide landing and refuelling facilities for military aircraft pursuant to the State 's obligations under UN Security Council Resolution 1368, adopted in response to the terrorist attacks Qf┘lth September. This Resolution class fled the attacks of 11th September as a threat to international peace and security and called on all States to work together to bring to justice the perpetrators, organisers and sponsors of the attacks."

A reply in the above terms was made by the Minister in Dáil Éireann on 17th December 2002.

On 14th January 2003, the briefing document for the Minister contained the following in paragraph (21):-

"The US military aircraft landing at Shannon are primarily for cargo and passenger transportation. As I have said, it is simply not the case that Shannon is being used to transport large quantities of arms to the Gulf The Government therefore has no intention of altering the present arrangements. In the event of a UN decision to sanction military action against Iraq or in the event of unilateral action by the US, the Government would review the situation and seek to have the matter debated in the Dáil."

In an affidavit sworn on 2nd April 2003, Mr. David Cooney, Political Director of the Department of Foreign Affairs, deposes that US military aircraft have been landing in and overflying Ireland through sovereign Irish airspace since at least the end of the Second World War. Overflights have frequently occurred at significantly

higher levels than is presently the case. He refers to records which show that over flights in the year December 1986 to November 1987 exceeded 8,700, compared to a total of 1,330 in 2002. Military landings at Shannon have continued throughout the period. Sample annual figures are 61 in 1966, 96 in 1986, 184 in 1996 and 372 in 2002.

At paras 9-10 of his affidavit, he deposes as follows: *"Civilian aircraft carrying US military personnel between the US and points*

in Europe and the Middle East have been landing in Shannon since at least 1948. Files reveal that, for instance, at least 71 charter aircraft carrying

1,230 US military personnel transited through Shannon in October 1948.

10. 1am not aware that the State has ever sought to revoke or restrict permission to the United States to avail of such approved landing and overflights facilities on the basis of the United States participation in a military conflict. During this period United States forces have been involved in the following conflicts: Korea (1950—1953), Lebanon (1958), Vietnam (1961 –75), Lebanon (1982-84) Grenada (1983), Panama (1989), Kuwait (1991), Somalia (1 992-1993), Bosnia (1995), and Kosovo (1999)." In the light of those matters, he proceeded to depose his belief as to his belief

that the Taoiseach was entirely correct when saying in Dáil Éireann on 20th March that *"the withdrawal of such facilities at this time could not but be seen, by any objective observer, as a radical and far reaching change in our foreign policy."*

He contends that there is no basis whatsoever for saying that the decision by the Government to maintain current policy in relation to overflights and landing by United States military and civilian aircraft and the resolution of Dáil Éireann endorsing that decision constitutes a change in the policy and practice of the State

during military conflicts with regard to the provision of overflight and landing facilities to foreign military aircraft or civilian aircraft carrying munitions.

On the question of Ireland's traditional neutrality, Mr. Cooney exhibited in his affidavit a schedule of historical sources and writings which he submitted established that at the break of hostilities in 1939 the Irish Government adopted a position "somewhat different" from the traditional role of neutrality which had been referred to

in the affidavit of Dr. Scobbie, the law expert who had sworn an affidavit on behalf of the plaintiff herein. He cited by way of example a number of recorded incidents of Irish authorities refuelling Allied aircraft and British service vessels being given permission through Irish territorial waters to pursue and destroy hostile submarines. He further made reference to an Appendix attached to a War Cabinet Memorandum prepared by the Secretary of State for Dominion Affairs on 21st February, 1945 which, while it recorded Ireland's refusal to grant the use of bases or to remove the Axis Legations nonetheless recited the granting of a number of facilities which were provided by the Irish Government *"which would not be regarded as overtly prejudicing their attitude of neutrality."*

Nothing in the material submitted by Mr. Cooney, however, suggests that at any time between 1939 – 1945 were large movements of troops or munitions en route to any theatre of war permitted to avail of Irish national territory or Irish ports.

The Plaintiff's Case

At the outset, counsel on behalf of the plaintiff submits that the plaintiff have *locus standi* to seek the relief sought in these proceedings as a citizen of Ireland, relying on the approach adopted by the High Court and Supreme Court in ***Crotty v. An Taciseach*** [1987] I.R. 713, *McKenna v. An Taoiseach (No. 2)* [1995] I.R. 10 and ***McGimpsey v. Ireland*** [1988] I.R. 567.

The same authorities are relied upon to argue that the plaintiff has raised justiciable issues which this court may determine. While it is accepted by the plaintiff that the courts have indicated that their jurisdiction to restrain the exercise of executive power by the State is one which can only be exercised with considerable judicial restraint, it is nonetheless submitted that in the conduct of the State's external relations, the government is not immune from judicial control if it acts in a manner or for a purpose which is inconsistent with the Constitution.

It is contended on behalf of the plaintiff that the State is in breach of its obligation under Articles 28 and 29 and that the plaintiff is, as a concerned citizen, entitled as a matter of public law to invite the judicial organ to so declare. Such an entitlement, counsel submits, clearly derives under ***Crotty v. An Toaiseaclz*** and from the following passage of the judgment of Walsh J. at p. 777—8 where he stated: *"It is the Government alone which negotiates and make treaties and it is the sole organ of the State in the field of international affairs. For these functions it does not require as a basis for their exercise an Act of the Oireachtas. Nevertheless the powers must be exercised in subordination to the applicable provisions of the Constitution. It is not within the competence of the Government, or indeed of the Oireachtas, to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. To the judicial organ of government alone is given the power conclusively to decide i/there has been a breach of*

constitutional restraints."

In relation to Article 29, it is submitted on behalf of the plaintiff that Ireland's obligations under Article 29.3 obliged the State to accept and apply generally recognised principles of international law. This principle, Mr. Rogers submitted, has been clearly established and applied in a number of cases, including ***Government of Canada v. Employment Appeals Tribunal & Burke*** [1992] 2 I.R. 484, ***ACT Shippinz (PTE) Limited v. Minister for the Marine, Ireland and the Attorney General,*** [1995] 3 I.R. 406 and ***McElhinney v. Williams and Her Majesty's Secretary of State for Northern Ireland*** [19951 3 LR. 382.

These authorities establish, it is submitted, that, absent some contrary provision of the Constitution, statute or common law, the provisions of customary international law form part of domestic or municipal law in this State.

Customary international law dictates the obligations of a neutral State which were summarised in the 1907 Hague Convention V (Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land) in the following terms: *"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 Zn violation of its neutrality unless the said acts have been committed on its own territory."

While it is accepted that neither Ireland, Iraq or the United Kingdom have ratified the Convention and are thus under no obligation to apply its provisions as a matter of treaty law, nevertheless, the plaintiff submits, 1907 Hague V is regarded as

declaratory of customary international law (Schwarzenberger's International Law (1968) 549, 550, 552 and 567).

By the same token, it is submitted that Article 18 of the San Remo Manual (which was based on Article 42 of the 1923 Hague Convention Draft Rules of Aerial Warfare) is also declaratory of customary international law. It provides as follows

"Belligerent military and auxiliary aircraft may not enter neutral air space. Should they do so, the neutral state shall use the means at its disposal to require the aircraft to land within its territory and shall intern the aircraft and its crew for the duration of the armed conflict. Should the aircraft fail to follow the instructions to land, it may be attacked, subject to the special rules

relating to medical aircraft as specified in paragraphs 181 to 183."

Mr. Rogers on behalf of the plaintiff pointed out that the duty on neutral states to repel belligerent aircraft from its territory is emphasised in **Oppenheim** Lauterpacht's International Law (1952), p. 685.

Mr. Rogers also referred to the United States Military Handbook (published in Washington (1956) by the Department of the Army and updated to 1976) which confirms the continued vitality of the law and practice relating to the duties and obligations of neutral states. It refers to Hague Convention V where at paragraph 516 of the Military Handbook it states:

"516. Movements of troops and convoys of supplies
Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral power H. V. Art. 2)."

There could, Mr. Rogers submitted, be no question of Ireland adopting some form of *qualified* neutrality: a country could either participate in a war or adopt 'Hague' neutrality.

The rules or indicia for neutrality were authoratively stated, he submitted, by Schwarzenberger's International Law (1968) at p. 549 in the following terms: *"For purposes of presenting the law as applied on the international judicial level, it is convenient to break up into five rules the basic rules of the international customary law of neutrality:*

(1). A neutral state must abstain from taking sides in the war and assisting either belligerent and, in matters of discretion, deal impartially with all belligerents.

(2) A neutral state must prevent its territory from being used as a base of hostile operations by any belligerent

(3) A state not participating in a war is entitled to respect by the belligerents of its rights as a neutral Power. It must, however, acquiesce in restrictions which, under the laws of war and neutrality, belligerents are entitled to impose on the relations between their enemies and neutral nationals.

(4) A neutral state, as distinct from a neutralised state, may change its status to one of belligerence; otherwise, the state of neutrality is co-extensive with that of war.

(5) Any violation of legal duties owed by belligerents and neutral states to one another is a breach of international law and entails the consequences of an international tort."

It is against this background, that the plaintiff advances three submissions for adjudication to the court.

Firstly, it is submitted that the provision of the kind of aid and assistance being rendered in the current conflict constitutes a breach of the generally recognised principles of international law and is therefore contrary to Article 29 of the Constitution because the defendants are acting in breach of a fundamental norm of international law by aiding and assisting the United States and the United Kingdom in the use of force against the State of Iraq without having first concluded that the use of such force is lawful.

Mr. Rogers argued that the fourth defendant has not concluded that the military attack on Iraq by the United States of America and the United Kingdom constitutes "a lawful action". He therefore submits, that by virtue of the Constitution, and in particular by virtue of Article 29.1, 29.2 and 29.3, it was and is incumbent on the fourth defendant before making a decision to authorise the continued use by the military forces of the United States of America of Ireland's airspace and landing and transit facilities at Shannon Airport to determine that the prosecution by the United State of the war against Iraq was and is founded on international justice and morality. In the absence of a determination by the Government that the said war is in accordance with the principles of international justice and morality, Mr. Rogers submits that any assistance given by the Government of Ireland to aid the prosecution of the war is contrary to those provisions of the Constitution.

He submits that the prohibition of the use of force is regarded as a *Ju.s Cogens,* that is, a peremptory norm of international law, so described by Brownlie in Principles **of Public International Law** (5th ed) 1998 *515.* The general principle at international law, Mr. Rogers submitted, is that all states are obliged, insofar as

possible, to resolve disputes by peaceful means, as provided for in Article 2 (3) of the UN Charter, which states: *"All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, shall not be compromised."*

Mr. Rogers argued that the current rules governing the lawfulness of the use of force are contained in the UN Charter and customary international law. The general rule, enshrined in Article 2 (4) of the UN Charter is that the use of force is prohibited. Article 2 (4) provides: *"A 11 members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations."*

Article 2 (4) has been described by the International Court of Justice (ICJ) as a peremptory norm of international law, from which States cannot derogate. The effect

of Articles 2 (3) and 2 (4) is, Mr. Rogers argued, that the use of force can only be justified as expressly provided for under the Charter, and even then only *in* situations where *it* is consistent with the United Nations purposes. The only exceptions to this general prohibition involve:

(a) the use of force in necessary self defence in the event of an armed attack, until such time as the Security Council has taken measures necessary to maintain international peace and security (Article 51 of the UN Charter) or

(b) Security Council authorisation of the use of force, on the basis that the Council determines it necessary for the maintenance or restoration of international peace and security.

Mr. Rogers submitted that for any resort to armed force to be legitimate, it should fall within one of the foregoing exceptions. He argued that the State cannot provide aid or assistance to a belligerent engaged in armed conflict unless it has concluded that the involvement of that belligerent in the armed conflict is lawful.

Mr. Rogers in concluding this submission refrained from inviting the court to make any determination as to whether the use of force against Iraq by the United States and United Kingdom was unlawful in international law, contending that it was sufficient for present purposes that the court determine and declare that, having regard to the provisions of Article 29, it should not provide aid or assistance to the use of force against the State of Iraq without first making an enquiry and determination about the lawfulness or otherwise of the use of force.

The second submission is to the effect that the provision of such aid and assistance constitutes a breach of the generally recognised principles of international law and is therefore contrary to Article 29 of the Constitution in that it constitutes a breach of a neutral states's duties in a war under customary international law.

Given that the Irish Government has expressly declared that Ireland is not a participant in the current conflict and that it is maintaining its military neutrality, it is in consequence, he submits, bound to apply those provisions of customary international law which apply to neutral States. These principles clearly indicate that a neutral state must not allow belligerents to move troops or munitions across its territory in time of war.

While a *de minimis* breach of this principle might not offend customary international law, the scale and degree of troop and munitions movements in this case could only be considered as constituting a clear breach of customary international law which, for the reasons already offered, constitute part of Ireland's domestic law also.

Mr. Rogers third submission is that the aid and assistance rendered by Ireland to

the military forces of the United States constitutes "participation" in a war and is therefore unconstitutional as no resolution authorising such participation has been passed under Article 28.3. If correct in this submission, Mr. Rogers argued that the permissions of the second and third named defendants to facilitate overflights, landings and troops movements within the State and the decision of the Government to maintain the continuance of those arrangements are void at law, unconstitutional and unlawful by virtue of Article 28.3.1.

Mr. Rogers submitted it was a matter of some importance to note that Article 49 of the Free State Constitution provided: "save in the case of actual invasion, the Irish Free State shall not be committed to active participation in any war without the assent of the Oireachtas". In marked contrast, Mr. Rogers continued, the 1937 Constitution simply adopted the word "participation". Mr. Rogers submitted that this change clearly lowered the threshold for the kind of participation which requires Dáil approval. He submitted that a level of aid and assistance which would be regarded as a breach of the status of neutrality could only be seen as a level of participation which requires a Resolution under Article 28.3.1.

He further submitted that the concept of participation could best be understood by considering relevant principles of international law. If Ireland could incur international responsibility for the use of armed force against another State, it could

hardly be suggested that such a significant consequence would not be regarded as a 'participation'.

Under Article 16 of the International Law Commission Articles on State Responsibility (adopted by the ILC in 2001) which are generally regarded as reflecting customary law, Ireland, by virtue of the aid and assistance it has and continues to offer, could be liable if found to be aiding or assisting the wrongful acts of another state.

Article 16 provides: *"A State which aids or assists another State in the commission of an*

internationally wrongful act by the latter is internationally responsible for doing so

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State."

The International Law Commissions commentary on Article 16 (which forms part of the official draft rules) states at paragraph 10:-

"The assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State."

The Commentary on Article 16 makes it clear, it is submitted, that responsibility under Article 16 arises when another State commits a wrongful act but it *arises* from the conduct of the assisting State alone.

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Professor Vaughan Lowe, in an article entitled: "Responsibility for the Conduct of other States" (Japanese Journal of International Law) 1 –15 (2002) states in relation to Article 16:-

> *"Some aspects of the article are clear. The ILC has made plain that no particular kind or level of aid or assistance is necessary in order for responsibility to arise, as long as the aid or assistance must, as the IL* ***C'S*** *special rapporteurs put is "materially facilitates" or "contributes significantly to" the performance of the wrongful act. Neither state practice nor the work of the ILC indicates that it is necessary that the aid should have been essential for the achievement of the wrongful act. On the other hand, aid that assists in a remote and indirect or a minimal way is clearly not a sufficient basis for responsibility. There is, accordingly, a de minimis threshold, but no other limitation on the nature of the assistance. Common sense demands that there be a de minimis threshold. If it were otherwise, because practically every friendly contact with a foreign state might be said to lend at least moral support to its actions, the category of unlawful aid and assistance would become impossibly wide."*

Having regard to the threshold thus established by the ILC, Mr. Rogers argued that Ireland would not be able to defend itself at international law level by claiming that the aid and assistance it had furnished did not in its view amount to a "participation" when it clearly constituted a sufficient involvement to make it liable for the commission of a tort in international law.

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The Defendants Case

As there were no significant differences between the submissions submitted on behalf of the first four named defendants by Mr. Gallagher S.C., and those submitted on behalf of the fifth and sixth named defendants by Mr. O'Donnell S.C., the same can

be summarised together.

The defendants accept that the plaintiff has *locus standi* in the sense that he may, qua citizen, bring declaratory proceedings for relief under the Constitution. Insofar as the case under Article 28 goes, the defendants further accept that a justiciable issue arises under that Article. However, the defendants maintain that no justiciable issue arises under Article 29 because Article 29, it is contended, operates at the level of public international law and does not create individual rights or give rise to any binding obligations which require the international relations of the State to be conducted in any particular way. Particular reliance in this regard was placed on ***O'Laizhleis*** [1960] I.R. 93, ***State (Sumers Jennings) v. Furlong*** *[19661* LR. 183 and ***Kavanagh v. The Governor of Mountjoy Prison*** [2002] 2 I.L.R.M. 81.

On behalf of the defendants it was stated that the courts had previously declined to intervene in Article 29 cases, even where a personal or private right of a constitutional nature was alleged to have been breached. In the instant case the plaintiff could not assert a private right but simply sought, as a concerned citizen, to hold the State to what he perceived as its duties and obligations arising under certain provisions of the Constitution.

The defendants contend that Sections 1 .3 of Article 29 are not justiciable because they do not lay down any clear legal rules or import binding norms of international law capable of enforcement in Ireland's own domestic courts. Article 29.3, it is argued, does not require the executive power of the State to be exercised in

any particular way and any contention that the Executive is bound to act in accordance with generally recognised principles of international law, assuming such could be identified, had already been rejected by a Divisional Court of the High Court in *State (Sumers Jenninzs)* 1.'. *Furlonz* [1966] I.R. 183

Any other interpretation, it was submitted, would have staggering implications. The plaintiff's contentions, if correct, would for example permit a challenge to a war declared by the Executive 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 Article 29.2.

The text of Article 29, it was submitted, is not in terms suited to the creation of obligations enforceable by proceedings. Its terms are broad, somewhat vague and aspirational in nature. *"Ireland"* is the subject of each clause. Article 4 of the Constitution provides that the name of the State is Ireland and Article 5 provides that Ireland is a sovereign, independent and democratic state. Elsewhere in the Constitution, the State is referred to by the title *"the State* . The deliberate use of the word "Ireland" in Articles 29.1, 2 and 3 suggest, it was argued, that these particular provisions are being addressed externally (rather than internally) and operate only in that forum.

It was argued that the conduct of international relations lies at the very heart of the executive function. Only the Executive can bind the State at international law. The Executive is, in turn, accountable to the Dáil and not both houses of the Oireachtas. Article 28.4 emphasises the exclusive role of the Executive and affirms the primary method of constitutional control, namely accountability to the directly elected House of the Oireachtas.

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It was submitted that the emphasis repeatedly stated in the Constitution that the conduct of external relations of the State is consigned to the Executive is of particular significance. The area of Executive powers is defined in the Constitution (in negative terms as the area not the judicial or legislative powers) but neither the *content* nor *manner of exercise* of the powers is otherwise defined or circumscribed. The area of the executive function is, therefore, characterised by very significant freedom of discretion. ***(Crotty v. An Taoiseach*** [1987] 1 I.R. 713).

While the courts ***inACTShippin~ (PTE) Limited v. The Minister of the Marine*** [1995] 3 I.R. 406, ***Government of Canada v. EAT*** 2 I.R. 284 and ***McElhinney v. Ireland*** [1995] 3 LR. 382 acknowledged that principles of international law could operate in domestic law, they were found capable of doing so in very specific circumstances where those principles did not conflict with any provision of either the Constitution, statute law or rule of common law. Further, they were admissible only at the behest of sovereign States or, in the case of individuals, to determine private law claims only.

Customary international law did not, it was submitted, enter Irish law at constitutional level and could not encroach upon any area of power or discretion conferred on the Executive by the Constitution. It could not operate to amend the Constitution by stealth. Nor could principles of customary international *'freeze-bind"* the State in its conduct of international relations as a result of the practice of other sovereign states in a process in which the State itself might not participate in any way.

Counsel referred to ***MFM v. MC*** [2001] 2 I.R. 385 in which O'Sullivan J. had been invited to hold that the Constitution included a limited self perpetuating and39

self-amending provision, namely, that pursuant to Article 29.3 it could incorporate

principles of international law as and when they become generally recognised for the conduct of Ireland in its relations with other States. At p. 397 O'Sullivan J. however stated: .

> *"It seems to me that Bunreacht na hEireann provides at Article 46 an explicit mechanism for the amendment of the Constitution itself whether by way of amendment of the Constitution itself whether by way of variation, addition or appeal. I cannot construe Article 29.3 as in any way or in any case supplanting this mechanism. Not only does this sub article not say that the*

Constitution shall be amended in accordance therewith as appropriate but if this were to be applied it could indeed give rise to a situation where an instrument solemnly adopted by the people and solemnly amended from time to time by the people could also from time to time be amended without such ratification. This seems to me to be entirely repugnant to the fundamental principles which underpin the Constitution and which have been recognised in such cases as ***Byrne v. Ireland*** *[1972] JR. 241. Such an interpretation would, in truth, upend the Constitution itself"*

The defendants next submitted that there was no clear law of neutrality in international law. It was not sufficient, they argued, for the plaintiff to establish that neutrality, as such, is a recognised concept, even with some level of agreement as to the elements of its content. The plaintiff, it was submitted, must go further and establish as a generally recognised principle of international law the proposition that on the outbreak of hostilities, all non-belligerent States are obliged (and not merely permitted) as a matter of international law to adhere to the strict impartiality contemplated by the Hague Convention, 1907.

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Article 38 of the Statutes of the International Court of Justice (ICJ) identifies as sources of international law, not only the conventions and treaties establishing rules expressly recognised by the contesting states, the general principles of law recognised by civilised nations, judicial decisions and the teachings of the most highly qualified authors, but also the international custom and practice of States. Since Article 29 requires any principle to be "generally recognised" that requirement necessarily implies paying due regard to the conduct of States. The most compelling evidence of whether any principle is generally recognised, is the conduct of other States and, in particular, this State. It was submitted that the schedule exhibited in Mr. Cooney 's affidavit relating to the conduct of this State during the Second World War provided compelling evidence that Ireland did not consider itself neutral in the strict Hague Convention sense. It was open to Ireland to adopt a qualified or nuanced form of neutrality arising as a consequence of its diplomatic relations with particular States. Such a form of neutrality had been adopted between 1939 and 1941 by the USA, during which period it had provided assistance to the Allies, culminating in the lend/lease programme and the escorting by US naval vessels of Allied shipping between Iceland and the US.

Since 1945, it was submitted that the practice of States contradicts rather than supports any general principle that on the outbreak of hostilities, any non belligerent was obliged to adopt a position of strict impartiality, so as, for example, to be obliged to refuse permission for overflights by a military aircraft of one of the belligerents. In essence, it was submitted, the concept of neutrality was at its height in the 19th century. That concept of neutrality was significantly adapted by, firstly, the League of Nations and then later by the UN Charter. The defendants relied in this regard on a

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passage in Roberts and Guelff - Documents on the Law of War (3rd Ed. P. 86) as

follows:

> *"The adoption of the UN Charter in 1945 increased the controversy over the status of a traditional concept of neutrality.., the preferable view is to regard the traditional concept of neutrality as having been modified but not totally superseded by the UN Charter ..Security Council resolutions authorising economic and other sanctions, have called upon all states to recognise such sanctions. Further, some states not directly involved in UN authorised military action have granted transit rights or given other assistance to forces involved in such action. This is probative of the position that a new form of "non belligerency" or "qualified neutrality" has emerged, in which states not participating in the military action authorised by the Security Council may, nonetheless, take part in sanctions or provide other assistance ..while some view the term "neutral" "non belligerent" and "other States not Parties to the conflict" as being more or less synonymous with exactly the same body of law applying to all, the distinction between neutrality and non belligerency in these treaty provisions is compatible with the view that third states may adopt an intermediate position in relation to a conflict, for example, favouring the victims of aggression in certain respects. In this reasoning "neutrals" are those states which apply the law of neutrality in its entirety, including its requirements regarding impartiality; while "non belligerents" or "other states not parties to the conflict" are those which, departing from certain aspects of the traditional law of neutrality, assist one of the parties to the conflict or discriminate against another."*

In relation to the submission under Article 28, the defendants urged the Court to exercise extreme restraint in considering whether or not to intervene, even if that issue was justiciable.

Firstly, the defendants stressed to the court that the decision of the Executive and the resolution of D~til Eireann both enjoy a presumption of constitutionality ***(Goodman International v. Hamilton*** [1992] 2 I.R. 542 at 586/587). In present circumstances, it was submitted that that presumption must be especially strong given that:

> "The conduct of the foreign policy of the State is not a matter which easily lends itself to judicial review and if there is any area in which judicial restraint is appropriate, that is it."
>
> *(Mc Glinchey v. Ireland* [19881 I.R. 567 at 582~, per Barrington J.).

The defendants also opened to the Court a passage from a decision of the United States Supreme Court in ***Harisiades v. Shaughnessv*** (342 US 580 at *589)* per Jackson J.

> *"Policies in relation to the conduct of foreign relations and the war power.., are so exclusively entrusted to the political branches of*

Government as to be largely immune from judicial enquiry or interference."

Thus, it was argued, the Court must start from the assumption that the Resolution correctly identifies and interprets the relevant Constitutional provisions and represents a considered view by Dáil Éireann of the nature and extent of its role in respect of the continued provision, in present circumstances, of the facilities in issue.

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Both decisions were made by appropriate decision makers within the sphere of responsibility designated by the Constitution for that purpose.

It followed from the foregoing, it was submitted, that a further ground for judicial restraint arose from the fact that the Resolution concerned the inter-relationship between the Dáil and the Government. The Supreme Court had made it clear that the Courts would not:

"Accept every invitation to interfere with the conduct by the Oireachtas of its own affairs: such an approach would not be consistent with the separation ofpowers enjoined by the Constitution." (Per Keane C.J. *inMaguire v. Ardazh* [2002] 1 LR. 385 at 537).

Further in *O'MaZley v. An Ceann Comhairle* [1997] 1 I.R. 427, the Supreme Court considered the issue of how questions in the D~il should be framed for answer by Ministers of the Government and stated:

"It is so much a matter concerning the internal working of Dáil Éireann that it would seem inappropriate for the Court to intervene except in some very extreme circumstances which it is impossible to envisage at the moment."

It was submitted that an even greater obligation of restraint devolved on the judicial organ with regard to the question of what constitutes *"participation"* in war for the purposes of Article 28.3.1. The related questions of whether, and in what circumstances Ireland should participate in a war, and what constitutes *"participation"* for this purpose, are committed by the very text of the Constitution to the judgment of the Dáil and the Government. By way of illustration of the suggested

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approach the Court should adopt, counsel for the defendants referred the Court to the judgment of Brennan J. in the US Supreme Court in ***Baker v. Carr*** (369 US 182, 217 [1962]) when he stated:

"Permanent on the surface of any case held to involve apolitical

question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or the impossibility of a Courts undertaking independent resolution without expressing lack of respect due to coordinate branches of Government; or an unusual need for unquestioning adherence to apolitical decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

The defendants submitted that this reasoning applies *afortiori* to this jurisdiction where, unlike the United States, the Executive is directly answerable to a key element of the legislative branch, given that Article 28.4.1 provides that the Government *"shall be responsible to* Dáil Éireann.*"* If the Dáil considered at any time that the Government had overreached its constitutional authority on this issue and that it usurped a power rightfully vested in the Dáil alone, it too had *"ample powers"* to remedy the situation. It could, for example, withhold confidence in the Government (Article 28.4.1), with the result that the Taoiseach would be obliged forthwith to resign unless the President dissolved Dáil Éireann (Article 28.10 and

Article 13.2.2). Likewise, the D~il could refuse to approve the Estimates (Article 28.4.), or approve appropriations of monies (Article 17).

The duty of restraint on the court had been highlighted time and time again in various decisions of the Supreme Court and the High Court, perhaps best encapsulated in the statement of Fitzgerald C.J. in <u>*Boland v. An Taoiseach*</u> [19741 I.R. 338 at 362 where he said:- *The Courts have no power, either express or impliedi, to supervise or interfere with the exercise by the Government for its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution."*

The defendants submitted that further meaning was given to the phrase *"clear disregard"* by Murray J. in the course of his judgment in ***TD v. Minister or <u>Education</u>*** [2001] 4 I.R. 259 when he stated at p. 337:-

"In my view, the phrase 'clear disregard' can only be understood to mean a conscious and deliberate decision by the organ of State to act in a breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness."

It was submitted on behalf of the defendants that the Court should not inteffere

with the assessment which the Government and the Dail had made, being one for which they are peculiarly well equipped and for which the court in contrast is peculiarly ill equipped. Otherwise, the court could in any given case become the

arbiter of foreign policy without the constitutional safeguards that the Constitution provides.

Without prejudice to that submission, the defendants went on to discuss what 'participation' should be taken as meaning. The defendants submitted that the object of Article 28.3.1 is to ensure that the Government's general constitutional authority to conduct foreign affairs is subject to the specific control of the Dáil, so as to provide the necessary democratic legitimacy for any such decision.

In the present instance, the court was concerned with the meaning of the word *"participation."* In its ordinary sense, the term means *"take part in"* a definition highlighted by the Irish text which uses the phrase *"ná páirt a bheith."* As such, the defendants contended, the words imply a direct involvement in the object of the participation. When applied to a concept such as war, it necessarily implies joining into or becoming involved in the hostilities.

The defendants submit that the continued operation of an arrangement with another friendly power whereby that power permits the use of airspace or facilities for its military and civilian aircraft could not realistically be understood to convert Ireland into the status of a 'participant' in the war. The provision of the facilities was far removed from the war. Their provision did not involve Ireland in any decision relating to the war. It did not involve the commitment of any troops to the war or any involvement in hostile activities. The arrangement was no different from that provided by many other countries who clearly did not regard themselves as participating in the war.

Furthermore, it was contended, the use of the word *"participation"* in the same context as *"declaration"* of war suggests clearly an actual involvement in the hostilities. It was clear, the defendants submitted, that the reference to participation

was designed to ensure that the Government could not commit Ireland to a war without the approval of the Dáil merely by refusing to declare war but nonetheless engaging in the hostilities. The primary distinction between *"declare"* and *"participation"* in this context related to the manner of involvement in the war rather than the type of conduct involved and certainly was not intended to cover a situation where the State had no direction, control or involvement in the war.

Mr. Gallagher submitted that the use of the term "active" in conjunction with the word "participation" in the Free State Constitution could not be relied upon as an aid to interpreting the word "participation" in Article 28 of the 1937 Constitution. Article 51 of the Free State Constitution provided that the Executive authority of the Irish Free State was vested in the King and exercisable in accordance with law. It followed that the very executive authority of which the declaration or participation in

war is an attribute was vested in somebody different from the State and in an entity independent of the State. The context in which Article 49 existed bore no resemblance to the structure which now exists in Ireland under Article 28.3.1. In any event, he submitted, the term "active participation" was tautologous.

Finally, the defendants submitted that it was difficult to believe that the Constitution should be interpreted in a way whereby the court was asked, in effect, to substitute its judgment for that of Dáil Éireann and, in effect, to declare that the Dáil was wrong when it concluded that the maintenance of *"long standing arrangements"* did not involve a participation in war. The plaintiff was, for all practical purposes, inviting the Court to tell the Dáil that it resolve yet again an issue upon which it has already determined on the presumed basis that the Court was better suited than the Dáil Éireann for deciding what constituted participation in a war.

DECISION

(a) Preliminary: The war on Iraq and considerations of legality in the use of force

The plaintiff in the Statement of Claim delivered herein on the 24~ of March 2003 alleges that the military attack on Iraq by the forces of the United States of America and the United Kingdom of Great Britain and Northern Ireland is illegal. It is contended that the military attack was a breach of Article 2 (3) and 2 (4) of the Charter of the United Nations which prohibit the threat or use of force against the territorial integrity of any State, subject to exception in cases of necessary self defence or in cases where the Security Council has authorised the use of force.

The final portion of par. 11 of the Statement of Claim asserts:

> *"The said military attacks have not been authorised by the Security Council of the United Nations pursuant to Article 42 of its Charter. The attack by the said forces of the United States and of the United Kingdom upon the State of Iraq is contrary to the principles of international law and to the Charter of the United Nations and is unlawful."*

Notwithstanding the inclusion of such a claim, the plaintiff has not, in the course of the hearing before this court, invited the court to adjudicate or rule specifically on this issue, asserting that the plaintiff need not do so at this juncture at least. The plaintiff reserved his position to argue the matter further, if necessary.

However, as the issue has been raised before the court and then left to one side, and while the court will not adjudicate upon the issue, it is useful in the context of the remaining issues to be determined to consider a recent, and one might add topical, decision of a Divisional Court in England in ***CND*** i.'. ***Prime Minister of the United Kingdom***, (judgment delivered on the 17th December 2002.) In those proceedings, the plaintiffs sought an advisory declaration as to the true meaning of U.N. Security Council Resolution 1441 and more particularly as to

whether it authorised States to take military action in the event of non compliance by Iraq with its terms.

The case was relied upon by the defendants in this court on the basis that it throws into sharp focus, they say, the enormous difficulties which beset any court called upon to adjudicate upon the lawfulness of international agreements, or the propriety of the Executive's behaviour in its international relations with other States. Given that the latter consideration lies very much at the heart of the issues before this court, the decision of the court is to that extent certainly of relevance and importance.

In refusing the relief sought, Lord Justice Simon Brown concluded, firstly, that the court had no jurisdiction to declare the true interpretation of an international instrument which 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. Secondly, the court in any event 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: *"Whether as a matter of juridical theory such judicial abstinence is properly to be regarded as a matter of discretion or a matter of jurisdiction seems to me for present purposes immaterial. Either way I regard the substantive question raised by this application to be non-justiciable."*

At pars. 37 —40 of his judgment he stated:

"What is sought here is a ruling on the interpretation of an international instrument, no more and no less. It is one thing... for

our courts to consider the application of an international treaty by reference to the facts of an individual case. It is quite another thing to pronounce generally upon a treaty's true interpretation and effect. There is no distinction between the position of the United Kingdom and that of all other States to whom Resolution 1441 applies. Why should the English courts presume to give an authorative ruling on its meaning? Plainly such a ruling would not bind other States. How could our assumption ofjurisdiction here be regarded around the world as anything other than an exorbitant arrogation of adjudicative power?

The general rule is that, in the interest of comity, domestic courts do not rule on questions of international law which affect foreign sovereign states. As Diplock LJ said in ***Buck v. Attorney*** *General [1965] Ch. 745, 770:-*

"For the English court to pronounce upon the validity of a law of a foreign sovereign State within its own territory, so that the validity of that law became the res of the resjudicata in the suit, would be to assert jurisdiction over the internal affairs of that State. That would be a breach of the rules of comity. In my view, this court has no jurisdiction so to do.

... Here there is simply no foothold in domestic law for any ruling to be given on international law. There would need to be compelling reasons for the court to take the unprecedented step of assuming jurisdiction and no good reason not to. In fact, however, the opposite is the case."

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Lord Justice Simon Brown (at par. 42) went on to consider as a reason for refusing to intervene the following:

> "*… the Executive is better placed than the court to make these assessments of the national interest with regard to the conduct of foreign relations in the field of national security and defence."*

The defendants contend, I believe correctly, that this case may be relied upon by the court 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, while the legality of the war in Iraq may well be, 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.

(b) *Neutrality*

Nothing in the submissions of the defendants suggests that this court is inhibited or precluded from, firstly, identifying a general principle of international law and then, secondly, considering if and how it may operate in domestic law.

Indeed, the courts in Ireland have been faced with and have discharged precisely such a task and function in cases such as ***A CT Shipping (PTE) Limited v. The Minister for the Marine*** [19951 3 I.R. 406, ***Government of Canada v. Employment Appeals Tribunal*** [1992] 2 I.R. 484 and ***McElhinney v. Ireland*** [1995] 3 I.R. 382.

The statute of the International Court of Justice identifies the following sources of international law at Article 38.1:-

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> *"(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States (b) international Custom, as evidence of a general practice accepted as law.*

(c) the general principles of law recognised by civilised nations (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations."

Despite the great historic value attached by Ireland to the concept of neutrality, that status is nowhere reflected in Bunreacht na hÉireann, or elsewhere in any domestic legislation. It is effectively a matter of government 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 requoting 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 Oppenheim Lauterpacht (International Law) 1952 at 675, there was a duty of impartiality on neutral States which comprised abstention from any active or passive co-operation with belligerents. At par. 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* 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.

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(c) Incorporation of International law in Irish domestic law

It now becomes necessary to consider how international law interacts with Irish domestic law.

One may begin by saying that established principles of customary international law may be incorporated into Irish domestic law ***providing*** that they are not contrary to the provisions of the Constitution, statute law or common law. (Brownije: Public **International Law** (5th Ed) p. 42). Further, since customary international law evolved from a practice or course of conduct which in time became widely accepted, it is not law made in the sense envisaged by Article 15.2.1 of the Constitution and, accordingly, that Article does not per se inhibit the incorporation of customary international law into Irish domestic law, subject to the proviso that there is no resultant conflict with the Constitution, statute law or common law.

This was the position as found by Barr J. ***inACTShipping (PTE) Limited v. Minister for the Marine [1995]*** 3 I.R., a case in which the learned judge followed ***In Re O'Lai2hleis*** **[1960] I.R. 93.**

That latter case concerned the applicability of the European Convention of Human Rights within the State. It was moreover a case m which the plaintiff asserted a personal right arising Out of his arrest and detention under Section 30 of the Offences Against the State Act, 1939. The Supreme Court held that the Convention was not part of the domestic law of the State and, under Article 29 of the Constitution, it could not be so.

This case is of particular importance having regard to the clarity of the obligations contained in the Convention, in contrast with the often somewhat "woolly" principles of customary international law. The principle however is the same when it comes to considering the role of international law in Irish domestic law.

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I propose to set out a fairly lengthy passage from the judgment of Maguire C.J. because I believe it encapsulates an authoritative statement of the law in this country which has been followed ever since.

At p. 123 he stated:

"1. Ireland has a written, rigid Constitution which came into force on the 29th December, 1939 having been enacted by the People on the 1st July, 1937.

Article 29 of the Constitution deals with "international relations - Mr McBride relied upon ss. 1 and 3 of Article 29, which are as follows:"1. Ireland affirms its devotion to the ideal of peace and friendly cooperation amongst nations founded on international justice and morality.

3.Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."
*These provisions, Mr. McBride submitted; reproduce the pre -existing common law, and by the common law, he said, those principles which were commonly accepted as binding by civilised nations became part of the domestic law unless they could be shown to be contrary to it. He referred to the English authorities, **Westrand Central Gold Minin2 Co. v.** Rex [190512 KB. 391; Chunk Chi Cheunz v. The King [1939] A.C. 160:- - so far, at any rate, as the courts of this country are concerned; international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our code of substantive law or procedure. The courts acknowledge the existence of*

a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant role is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals?"

Clauses 1 and 3 of Article 29 of the Constitution clearly refer only to relations between States and confer no rights on individuals; they can in no way assist Mr. McBride's argument.

Nor is Mr. McBride's submission aided by what he says is the position at common law, as set out in Lord Atkins speech. Inconsistency with municipal law is there stated to be a ground upon which the common law rejects the principles of international law. Mr. McBride submits that the Act of 1940 is inconsistent with the provisions of the Convention. If it is, then clearly by the common law principles relied upon the Act prevails over the Convention. When the domestic law makes its own provisions it cannot be controlled by any inconsistent pro visions in international law: Mortensen v. Peters /190618 F. 93. The principle of incorporation upon which Mr. McBride relies applies to such parts of international law as are based on universally recognised custom and not to such parts as depend upon convention.

The insuperable obstacle to importing the provisions of the Convention for the protection of Human Rights and Fundamental 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 makelaws for the State."

Moreover, Article 29, the Article dealing with international relations, provides at Section 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, but it cannot operate in a domestic court administering domestic law."

The last sentence of this quotation provides an insight into how customary international law may operate in domestic law. Where the rights of States *inter se* are

concerned, rules of customary international law may create rights and duties between states in a variety of situations.

By way of example, a foreign State may invoke customary international law to protect its position in this State. That is precisely what occurred in two of the cases relied upon by the plaintiff, ***(GovL of Canada v. EAT*** and ***McElhinney v. UK)*** where the respective governments successfully invoked the doctrine of sovereign immunity by way of defence to proceedings brought against those governments in an Irish forum.

Over a long number of years since ***O'Lai,~'hleis*** was determined, and even in cases where invasion of personal rights was alleged, the Irish courts, have repeatedly stressed, as exemplified by the decision of O'Sullivan J. in ***MFN v. MC*** [2001] 385

and the Supreme Court (Fennelly J.) in ***Kavanagh v. Governor of Mountjoy Prison*** [2002] 2 LL.R.M. that a clear distinction is to be maintained between obligations binding in international law and those which are binding by virtue of domestic law. As stated by Fennelly J. in the latter case at p. 94:-

"The Constitution establishes an unmistakeable distinction between domestic and international law. The Government has the exclus'ive prerogative of entering into agreements with other States. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive ftsnction of making laws for the State. These two exclusive competences are not incompatible. Where the Government wishes the terms of an international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation. If this does not happen, Article 29.6 applies. lam prepared to assume that the State may, by entering into an international agreement, create legitimate expectation that its

agencies will respect its terms. However, it could not accept such an *obligation so as to affect either the provisions of a statute or the judgment of a court without coming into conflict with the Constitution."*

One can only conclude therefore that principles of international law enter 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 rule of international law must in every case yield to domestic law.

(4) Justiciablity under Article 29

Two issues arise for determination under this heading:

(a) Does Article 29 confer individual rights?

(b) If so, do the provisions of Article 29 create binding rules whereby the

Executive is bound to act in accordance with generally recognised principles of international law once identified.

The overwhelming line of judicial authority on issue (a) is to the effect that no individual rights arise under Article 29 of the Constitution.

I have already referred to that passage of the judgment of Maguire C.J. in ***O'Laighleis*** in which he confirmed that ss. 1 .3 of Article 29 of the Constitution clearly refer only to relations between States and confer no rights on individuals.

A similar conclusion was arrived at by a Divisional Court of the High Court in the ***State (Sumers Jennings) v. Furlong*** [1966] I.R. 183 and by the Supreme Court in ***Kavanagh v. Governor of Moungoy Prison*** [20021 2 I.L.R.M. 81.

In ***Kavanagh,*** Fennelly J. stated as follows at p. 90:-

"For the purposes of this analysis, it can be assumed without deciding that the appellant is correct in his contention that the principle of

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equal treatment before the law has become a generally recognised principle of international law and even that its scope and content has expanded sufficiently since O'Laighleis was decided to encompass the appellant's treatment at the hands of the Director of Public Prosecutions. It can even be assumed that, again without so deciding, that the principles of international law which Article 29.3 requires the State to respect include the rights claimed by the appellant.

The difficulty for the appellant on this application does not lie on the quality of the principle of equality. It is to be found in the wording of the constitutional pro visions. The obligation of Ireland to respect the invoked principles is expressed only in the sense that it is to be "its rule of conduct in its relations with other States . It is patent that this provision confers no rights on individuals. No single word in the section even arguably expresses an intention to confer rights capable of being invoked by individuals."

It seems to this court that the views of the Supreme Court, so trenchantly expressed by Fennelly J., must be taken as being quite determinative of this particular point. I therefore find in favour of the defendants on the issue of justiciability in respect of all arguments sought to be advanced by the plaintiff under Article 29 of the Constitution.

(b) The court must nonetheless consider whether, in the event of its conclusion under (a) being found to be incorrect, the provisions of Article 29.1 – 3 create binding obligations on the State whereby it must act in accordance with generally recognised principles of international law if and when same are identified.

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Obviously the Constitution must be given a harmonious interpretation, so that consideration of this issue of necessity involves considering not merely Article 29 of the Constitution but those other provisions of the Constitution which bear on the topic. These include Article 5: *"Ireland is a sovereign, independent, democratic State* . Article 6 provides, by Section 1, that *"all powers of government, legislative, executive and judicial, derive, under God, from the people...* . and by Section 2, that *"these powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."*

Article 15 provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas, and that no other legislative authority has power to make laws for the State. Article 28 provides that the executive power of the State

shall, subject to the provisions of the Constitution, be exercised by or on the authority of the government. Under 4.1 of that Article, the Government is responsible to Dáil Éireann. Article 29.5.1 provides that *"every international agreement to which the State becomes a party shall be laid before* Dáil Éireann *"* and Section 6 of that Article provides *"no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."*

These Articles demonstrate that the Government, and the Government alone, can exercise the executive power of government. Its freedom and discretion is limited only by those exceptions as provided for in the Constitution.

The extent of restraints on Executive power, and the role of the courts in relation thereto, were comprehensively addressed by Walsh J. in the course of his judgment in ***CroUy v. An Taoiseach*** [1987] I.R. 713.

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At *p.* 777 he stated:

"The Constitution confers upon the Government the whole executive power of the State, subject to certain qualifications which I will deal with later, and the Government is bound to take care that the laws of the State are faithfully executed. In its external relations it has the power to make treaties, to maintain diplomatic relations with other sovereign States. The Government alone has the power to speak or to listen as a representative of the State in its external relations. It is the Government alone which negotiates and makes treaties and it is the sole organ of the State in the field of international affairs."

At *p.* 778 he continued as follows:

"The powers of external sovereignty on the part of the State do not depend on the affirmative grant of this in the Constitution. They are implicit in the provisions of Article 5 of the Constitution. The State would not be completely sovereign ~f it did not have in common with other members of the family of nations the right and power in the field of international relations equal to the right and power of other States. These powers of the State include the power to declare war or to participate in a war, to conclude peace, to make treaties, and maintain diplomatic relations with other States.

However, the exercise of the powers is limited. In the first instance, the Government alone has the power, as already mentioned, to speak and listen as the representative of the State, and, subject to the constitutional restraints, to make treaties. Article 28, s. 3, subsection 1 of the Constitution provides that war shall not be declared and the State shall not participate in any war save with the assent of Dáil Éireann*. That is one express*

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constitutional prohibition on the exercise by the Government of its power in its international relations."

The defendants attach considerable significance, and I think correctly, to the fact that nowhere in this portion of his judgment does Walsh J. suggest that the Executive is inhibited in its international relations or in the exercise of sovereign power by anything contained in Article 29.1 –3. On the contrary, Walsh J. emphasises repeatedly that the Executive cannot be told, either externally or internally, how to conduct its relations with other States. This establishes, in my view, the accuracy of the defendants contention that the decision in ***Crotty v. An Taoiseach*** supports their position, rather than that of the plaintiff.

The following observations of Walsh J. at p. 782 also appear to be relevant:

> *"I mentioned earlier in this judgment that the Government is the sole organ of the State in the field of international relations. This power is conferred upon by it by the Constitution which provides, in Article 29.4 that this power shall be exercised by or on authority of the Government. In this area, the Government must act as a collective authority and shall be collectively responsible to Dáil Éireann and ultimately to the people. In my view, it would be quite incompatible with the freedom of action conferred on the Government by the Constitution for the Government to qualify that freedom or to inhibit it in any manner by formal agreement with other States as to qualify it."*

Finally, at p. 783 he stated:

> *"In enacting the Constitution the people conferred full freedom of action upon the Government to decide matters of foreign policy and to*

> *act as it thinks fit on any particular issue so far as policy is concerned and as, in the opinion of the Government, the occasion requires. In my view, this freedom does not carry with it the power to abdicate that freedom or to enter into binding agreements with other States to exercise that power in a particular way or to refrain from exercising it save by particular procedures, and so to bind the State in its freedom of action in its foreign policy. The freedom to formulate foreign policy is just as much a mark of sovereign ~y as the freedom to form economic policy and the freedom to legislate... the foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself the State or upon the people the contemplated restrictions upon freedom of action. To acquire the power to do so would, in my opinion, require a recourse to the people "whose right it is" in the words of Article 6 - in final appeal, to decide all questions of national policy, according to the requirements of the common good."*

For these reasons, the court concluded that the assent of the people was a necessary pre-requisite to the ratification of so much of the Single European Act as consisted of Title III thereof.

If executive powers conferred on the Executive by the Constitution can only be depleted or removed by referendum, can it ever be said that the wide discretion so accorded to it in foreign policy and conduct in international relations can be curtailed by the operation of some general principle of customary law? In my view the answer can only be in the negative.

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

> *act as it thinks fit on any particular issue so far as policy is concerned and as, in the opinion of the Government, the occasion requires. In my view, this freedom does not carry with it the power to abdicate that freedom or to enter into binding agreements with other States to exercise that power in a particular way or to refrain from exercising it save by particular procedures, and so to bind the State in its freedom of action in its foreign policy. The freedom to formulate foreign policy is just as much a mark of sovereign ~y as the freedom to form economic policy and the freedom to legislate... the foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself the State or upon the people the contemplated restrictions upon freedom of action. To acquire the power to do so would, in my opinion, require a recourse to the people "whose right it is" in the words of Article 6 - in final appeal, to decide all questions of national policy, according to the requirements of the common good."*

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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

(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.

I accept and hold with the submission of the defendants that the provisions of Article 29.1 –3 are to be seen therefore as statements of principle or guidelines rather than binding rules on the Executive.

I am more than happy to accept as an authority in this respect the views of Henchy J. in the *State (Sumers Jennings) v. Furlong* [1966] I.R. 183 when he stated at p. 190:-

> *"First, Section 3 of Article 29 of the Constitution was not enacted, and is not to be interpreted in these courts, as a statement of the absolute restriction of the legislative powers of the State by the generally recognised principles of international law. As the Irish version makes clear, the Section merely provides that Ireland accepts the generally recognised principles of international law as a guide (ina dtreoir) in its relations with other States."*

I accept the submission of the defendants that the Constitution is not to be treated like an ordinary statute. While it has precise legal provisions, it also has less precise provisions, such as those relating to fundamental freedoms. It also includes aspirational or declaratory provisions which cannot be made the subject matter of binding legal norms. The declarations contained in Article 29.1 –3 seem to me to fall into this last category.

I further accept the submission of the defendants to the effect that the employment of the word "Ireland" in Article 29 (rather than "the State") is also indicative of the fact that these provisions are entirely addressed to other nations and not to

individuals. They are, as Mr. Gallagher suggests, more akin to the kind of
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assertion one might find in the preamble to a convention, or a treaty agreed between sovereign States.

I have concluded therefore on this aspect of the case, that international law is only admissible in domestic law to the extent already indicated where in certain limited situations it may be availed of to determine private law claims, absent some contrary or conflicting provision of either the Constitution, statute law or common law. It may also avail other States in their dealings with this State on the international plane. It cannot however impose binding public law obligations on the Executive towards its own citizens under Article 29 for all the reasons stated.

Accordingly I find in favour of the defendants on all aspects of the case under Article 29. It follows from this conclusion that I do not accept the plaintiff's view that the court should hold that the Government are obliged as a matter of law under Article 29 to form any particular view in relation to a war. Its only reviewable aspect lies in compliance with the requirements of Article 28.

(e) Article 28 and the issue of alleged participation

Both sides accept that there is a justiciable issue under Article 28.

However, that said, both sides also agree that the exercise of its jurisdiction by the court in circumstances such as these must be subject to restraint of an unusual degree. I have already set out in the course of summarising the defendants arguments the various cases which they rely upon to assert the considerations going to the exercise of restraint as follows:

(a) there is a presumption of constitutionality in favour of both the Government decision and the existing Dáil Resolution
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(b) both decisions were made within the particular spheres of designated responsibility of the Executive and Dáil Éireann within the Constitution

(c) the matter is one uniquely and particularly within the Executive remit. It is submitted, and this court accepts, that quite extraordinary circumstances would require to be established for this court to intervene in the constitutional process which has already taken place.

There is no suggestion of any procedural deficiency or irregularity in the steps taken by the Government to have its decision approved by Dáil Éireann. It is the merits of the decision taken and not the decision-making process which is under

attack. That being so, the court is, in effect, being asked to "second guess" the decision of the Government and the resolution of Dáil Éireann to the effect that the State was not participating in a war.

The restraints on court intervention in such circumstances were most simply stated by Fitzgerald C.J. in ***Roland v. An Taoiseach*** [1974] I.R. at p. 362 when he stated:

> *...in my opinion, the courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution."*

This approach has been confirmed by the Supreme Court in ***Maguire v. Ardazh*** [2002] 1 I.R. 385, ***Kavanazh v. The Government of Ireland*** [1996] 1 I.R. 321, and indeed in ***Crotty v. An Toaiseach*** [1987] I.R. 713.

In the course of their submissions, the defendants referred to the decision of The United States District Court (Columbia District) in ***An2e v. Bush*** (752 F. Supp.

509; 1990 US. Dist). I propose to refer to two passages of relevance from the judgment of Lamberth J. at p. 5 to the following effect:

> *"The judicial branch... is neither equipped nor empowered to intrude into the realm of foreign affairs where the constitution grants operational powers only to the two political branches and where decisions are made based on political and policy considerations. The far reaching ramifications of those decision should fall upon the shoulders of those elected by the people to make those decisions. Certainly, "nothing in the structure of our government or the text of our constitution would warrant judicial review by standards which would require the judicial branch to equate its political judgment with that of Congress, or of the President."*

Later at the same page he stated:

> *"The various provisions of the Constitution do not grant the war power exclusively to either the legislative or the executive branch. The powers granted to both branches, however, enable those branches to resolve the dispute themselves. Meddling by the judicial branch in determining the allocation of constitutional powers where the text of the constitution appears ambiguous as to the allocation of those powers · extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power · Rendering a decision on the merits in this case would pose a greater threat to the constitutional system than would the principled exercise of judicial*

restraint." (Adopting Riegle v. Federal Open Market Committee 656 F. 2d at 880).

I have already referred to the *CND* case in England in which similar sentiments were expressed.

Mr. Gallagher suggested on behalf of the defendants that Murray J. in the course of his judgment in *TD v. Minister for Education* [2001] 4 I.R. 259 had extended the meaning of the phrase "clear disregard" where he stated at p. 337:-

> *"In my view the phrase "clear disregard" can only be understood to mean a conscious and deliberate decision by the organ of State to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness. A court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would impinge on the observance by the State party concerned of any declaratory order made by the court."*

However, I think Mr. Finlay S.C. was correct when in the course of his reply to the defendants submissions he pointed that this observation was made while the learned judge was addressing "other forms of mandatory order" and must be seen in that light.

Nonetheless, this court does accept, for all the reasons stated, that some quite egregious disregard of constitutional duties and obligations must take place before it could intervene under Article 28 of the Constitution. This court is not all persuaded that any untoward conduct has occurred such as would even warrant examining further the particular decision and resolution, yet alone making a determination as to their correctness or otherwise.

The judicial organ does not decide an issue of 'participation' in this context as a primary decision maker. Under the Constitution, those decisions are vested in the Government and Dáil Éireann respectively. This is not a situation where the court can approach the matter on a "clean sheet" basis, ignoring decisions made by those constitutionally designated to do so within their own special areas of competence.

The issue of 'participation' is not a black and white issue. It may well ultimately be, as stated by the Taoiseach, a matter of "substance and degree". However, that is quintessentially a matter for the Government and the elected public representatives in Dáil Éireann to determine and resolve. In even an extreme case, the court would be still obliged to extend a considerable margin of appreciation to those organs of State when exercising their functions and responsibilities under Article 28.

The plaintiff is effectively asking that the Dáil be told by this court to resolve afresh on a matter on which it has already resolved on the presumed basis that the court is better suited than the Dáil for deciding what constitutes 'participation' in a war. The court cannot without proof of quite exceptional circumstances, accept this contention and accordingly the plaintiff's claim under Article 28 of the Constitution also fails.