Cork Online Law Review

Edition 8
2009

Cork Online Law Review

Published annually at http://colr.ucc.ie

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Email: submissions@corkonlinelawreview.com

This edition may be cited as (2009) COLR.

Submissions

The Editorial Board of the Cork Online Law Review at University College Cork, Ireland, would like to invite submissions for the 9th edition, due to be launched in March 2010.

All submissions should be on a legal topic, and be between three and nine thousand words in length. Submissions are also welcome in Irish, French and German. Book reviews and case notes will also be considered.

The closing date for submissions is the: **19th December 2009.**

All interested parties should submit their articles and enquiries to:

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Acknowledgements

The Editorial Board of the Cork Online Law Review wish to sincerely thank Dr. Conor O'Mahony in the Law Faculty, University College Cork, for offering his continued guidance and direction to the Law Review. Without his support this year's edition would not have been a success. The Editorial Board of the Law Review would also like to acknowledge the assistance of the members of the Law Faculty for their involvement in this year's edition.

Hopefully this edition builds on the achievements of past editions and that the Cork Online Law Review will continue to go from strength to strength in the future especially in these doubtful times.

Finally, we wish to extend our gratitude to our Webmaster and friend Jean-Paul Frenett for his patience.

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Editors-in-Chief of the 8th Edition of the Cork Online Law Review,
July 2009.

FOREWORD

As the most recent (of many) UCC graduates to have served as the President of the Law Society of Ireland I am very honoured to have been asked to contribute the foreword to the latest addition to the Cork Online Law Review. To mask my own embarrassment I will not list those who have gone before me in accepting this task, but it is no exaggeration to say that they are drawn from the very finest in their respective disciplines and all with a different perspective on the justice scheme. It is therefore a tribute to the quality, and especially the relevance of the work of the review, that it has been acknowledged as being of real value to such a broad range of legal interest.

From the point of view of the practitioner the review provides a welcome break from dry study of the application of Statutes and decided cases, and permits of a broader analysis of underlying legal principle. We all benefit from the efforts of those who take time to conduct such in depth analysis of legal topics, where a practitioner might not readily make the time to "review" and might feel ill-equipped to "critique".

It would be, I think, unreal to ignore the fact that in 2009 global society is convulsed with consideration of the financial crisis. The helplessness experienced by many people could easily lead to despondency and inaction in the face of eroding rights. It is heartening therefore that the contributors to the Online Law Review have continued to devote their energies to major topics both domestic and international which touch on the core principles that the rule of law seeks to protect. To that extent the review is not only an invaluable academic and indeed practical resource, but an inspiration to us all both personally and professionally.

Mr. James McGuill,
Former President of the Law Society,
March 2009.

Editorial Board of the 9th Edition of the Cork Online Law Review 2009

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THE DEFICIENCIES OF INTERNATIONAL HUMANITARIAN LAW IN ARMED CONFLICTS OF A 'MIXED' CHARACTER – TOWARDS A SINGLE LAW OF ARMED CONFLICT?

Marie-Claire Rush *

A INTRODUCTION

There is scarcely a portion of our globe that has not felt, at some time, the sting of war and conflict. It is important to regard war as a global phenomenon and everyone has an interest, indeed a moral obligation, to defend human dignity and security wherever it is threatened. International Humanitarian Law or the Law of Armed Conflict is, like other forms of international law, based primarily upon treaties and customary international law. It constitutes a broad corpus of laws designed to regulate armed conflicts agreed to and codified among states and their representatives. A state-centred focus is thus highly visible throughout the content of the various provisions. Key to the applicability of international humanitarian law is the classification of the conflict as being either international or non-international in character. Unfortunately there remain significant divergences between the two regimes with the latter suffering from a far less comprehensive and satisfactory system of regulation. This 'two-box' approach,[1] as it has become known, is no longer adequate to deal with many current features of armed conflict which have developed over the last thirty years to such a point where this traditional dichotomy is now commonly regarded as redundant. Armed conflicts no longer fit neatly into categories of 'international' or 'non-international' and many conflicts now frequently contain a mixture of elements both international and non-international, making the task of classification alone, highly complex. While it remains doubtful that states would be willing to concede the application of a single body of law to their internal conflicts, the acceptance of the full body of international humanitarian law in mixed conflicts, would be a significant achievement in itself and would pave the way towards a fuller extension of the law to non-international armed conflicts at some future date. This essay lends its support to the academic commentators, judicial decisions and legal developments which have made tentative yet valuable steps towards a gradual erosion of the barrier between the two humanitarian law regimes. At the heart of this ideology is the acceptance of a fundamental principle of 'humanity' and the acknowledgement that regardless of whether a conflict is classified as international or internal, all victims deserve to be treated humanely and with respect for their person.

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[1] Fenrick 'The Development of the Law of Armed Conflict Through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia' (1998) 3 Journal of Armed Conflict Law 197, 198.

B INTERNATIONAL HUMANITARIAN LAW

1 International Armed Conflicts

International humanitarian law was created by and for states to regulate their mutual relations when an armed conflict exists between them. The principle treaties regulating international armed conflict are the *Hague Conventions of 1899*, the *1907 Hague Convention on the Laws and Customs of War* and *Annexed Regulations*[2] and the four *Geneva Conventions of 1949*.[3] As a whole, this vast system of law lays down detailed rules and more general principles governing the conduct of war and the protection of the victims of war. It constitutes a highly sophisticated and comprehensive corpus of laws designed to regulate the resort to armed force i.e. treaties limiting the production and use of certain weapons, while 'Geneva Law' covers actual wartime conduct and is concerned primarily with protecting the victims of war. Together, the two strands of law make up what is commonly referred to as *jus in bello* whose provisions apply irrespective of the legality of the resort to force, as distinct from *jus ad bellum* – the law on the use of force. The content of international humanitarian law, therefore, attempts to balance competing concerns of states' military requirements as against humanitarian concerns. While it is beyond the scope of this article to comprehensively detail these legal instruments, it is worth noting the following points:

> *Hague Convention IV concerning the Laws and Customs of War* and its annexed set of Regulations,[4] are probably regarded as the most relevant in today's conflicts and their main significance lies in the grounding principles contained within; the choice in the means of conducting the conflict is not unlimited (Hague Regulations A22), the means employed must not be of a nature designed to cause unnecessary suffering or superfluous injury (Regulations A23(e)), undefended towns, villages are not to be attacked; this implies that military operations must only be directed towards military objectives (Regulations A25, 27). The proportionality principle also operates to circumscribe the extent of attacks which may be launched and a reasonable balance made in good faith must be achieved between the military purpose and any other consequences which may result from the operation (Regulations A2(e), (g)).
>
> The four *Geneva Conventions of 1949* represent the more 'human face' of the laws of armed conflict and are primarily concerned with the protection of the victims of conflict such as the wounded, sick and shipwrecked, prisoners of war and civilians. The Conventions impose far-reaching obligations on belligerents in

[2] Roberts and Geulff *Documents on the Laws of War* (3rd edn Oxford Press 2000) Hague Conventions and Declarations 59-84.
[3] ibid The Four Geneva Conventions of 12 August 1949 195-299.
[4] ibid 1907 Hague Convention IV (and annexed Regulations) 67-84.

order to achieve the optimum balance between humanitarian principles and military goals, as such; murder, torture, mutilation and inhuman treatment are prohibited, wounded enemy soldiers should be collected and cared for, civilians should be protected and treated humanely, religious and medical personnel are to be respected at all times. These rules represent a minute portion of the wide and expansive ambit of the Geneva Conventions and respect for them is paramount in all situations of international armed conflict and occupation. In terms of the scope of these documents, much rests on what is deemed to constitute a 'belligerent' and a 'combatant.' An army or militia seeking to gain acceptance as a belligerent must fulfil four conditions:

(i) To be commanded by a person responsible for his subordinates;
(ii) To have a fixed distinctive emblem;
(iii) To carry arms openly; and
(iv) To conduct operations in accordance with the laws and customs of war.

Unfortunately such criteria presented an obstacle to part-time soldiers and resistance fighters in occupied territory where soldiers may also be part-time non-combatants. The real effect of the article is to include members of organized and uniformed armed groups. The definitions offered make it clear that, as codified, humanitarian law was designed solely to regulate intra-state armed conflicts with regular armed forces. In the early and mid-1900s this approach was to be expected given the nature of warfare and the overarching principles of international law upholding state sovereignty and prohibiting interference in the domestic affairs of a state.

However, with the advent of the 20th Century and the emergence of liberation struggles against colonial domination, it became clear that the law as it stood was insufficient to cope with the pressures imposed upon it by modern warfare. As a response to these challenges, two *Additional Protocols to the Geneva Conventions* were adopted in 1977.[5] Additional Protocol I sought to enhance the scope of the law and the measure of protection afforded to affected persons and attempts to take account of the modern reality of hostilities such as clandestine operations, soaring civilian casualties and national resistance movements. However according to Aldrich, the 'polemical terms' such as 'colonial domination' of Article 1(4) which defines the scope of the Protocol drastically limit its potential reach and as such there is little room for resistance groups to comply with its provisions and the conflict is unlikely to be covered. The Protocol as adopted therefore elucidated a highly restrictive level of application so that in reality, very few liberation movements are capable of complying with its conditions. This failure to keep

[5] ibid 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts 1977 Geneva Protocol II Additional and Relating to the Protection of Victims of Non-International Armed Conflicts 419-512.

pace with the changes in modern conflicts has caused a number of difficulties in the application of humanitarian law for a great number of today's most violent and destructive conflicts.

(a) Non-International Armed Conflicts

'A foreign war is a scratch on the arm; a civil war is an ulcer which devours the vitals of a nation.'[6]

Even with the ever-increasing incidence of catastrophic internal armed conflicts, the relevant system of regulation is desperately lacking when compared to international armed conflicts. Of greatest significance is *Common Article 3*, the sole provision in the Geneva Conventions that covers non-international armed conflicts. Common Article 3 contains the most basic and rudimentary protections of humanitarian law although it is now regarded as reflecting customary international law.[7] The threshold for its application is difficult to determine and the major defect with its applicability is that it is left up to the state in question to admit to its operation, no guidance is offered in the text itself as to what qualifies as an armed conflict. The level of application is only defined in negative terms as 'an armed conflict not of an international character' and it is no easy task to successfully demarcate between sustained, violent internal disturbances and the existence of an armed conflict. In reality, governments embroiled in a civil conflict or an insurrection are highly reluctant to engage international law and are much more eager to quell such insurrections via harsh emergency laws which suspend a great deal of valuable human rights. On a positive note, the scope of the Article is relatively broad and regular armed forces need not be involved in an internal conflict in order for the threshold to be reached.

In an attempt to address these deficiencies in light of the growing frequency of internal conflicts, *Additional Protocol II of 1977* sought to enhance the level of regulation for non-international armed conflicts. Much of the content represents a great improvement upon the scant substance of Common Article 3. However, what was achieved in substance meant little in practice, as the conditions needed to trigger the Protocol's application were set at such a high level as to effectively require the existence of a 'classic' civil war before its provisions could be engaged as the level of organization required to constitute an 'organized armed group' is broadly analogous to that of regular armed forces. The Protocol fails to deliver on the most serious failure found in Common Article 3, namely when an armed conflict actually comes into existence.[8] It simply provides under Article 1(2) that internal disturbances and riots do not reach the necessary conditions for its operation. Moreover, the Protocol is unenforceable where fighting occurs among opposing irregular armed forces - no matter how severe such fighting may be. Essentially the Additional Protocol fails to provide any effective improvement upon

[6] Victor Hugo *Military Quotation Book* (St Martin's Press 1990) 43.
[7] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 11 218-220.
[8] Moir *The Law of Internal Armed Conflict* (Cambridge University Press 2002) 101.

the current regime and is highly deficient when one considers the nature of modern hostilities.

It is difficult to envisage an internal armed conflict that can be neatly categorized according to the various thresholds laid down between the two strands of law. The chameleon-like nature of internal armed conflicts means that the intensity of the violence can vary widely at any place and time and can move upwards or downwards along the scale of severity. Furthermore, attempting to hold non-state actors accountable under the Additional Protocols to international standards is highly speculative and problematic, especially since the Protocols provide that their legal status remains unchanged.[9] The phenomenon of internationalized conflicts which embody both international and internal elements presents a very real obstacle to the continuation of the two-strand system of regulation.

An analysis of the recent conflict in Somalia will bring such difficulties to bear upon the current state of humanitarian law and the drastic need for change.

C MODERN CHALLENGES FOR INTERNATIONAL HUMANITARIAN LAW AND 'MIXED CONFLICTS'

The glaring dichotomy between the two systems of regulation is neatly exemplified by the close to six hundred articles contained in the Geneva Conventions and Additional Protocol I, when only Common Article 3 remains to regulate internal hostilities in the vast number of cases.[10] Over fifty years ago, when the four Geneva Conventions were being negotiated, the principles of sovereignty and non-intervention were the cornerstones of international law and while their force today is still apparent, the interdependence of states, the regional groupings of many states, global concerns such as terrorism and the commission of widespread human rights violations, has eroded the traditional inviolability of borders. The dichotomy in humanitarian law is not only implausible today, but it is also fundamentally unworkable given the current conditions of many conflicts.

One faces a gruelling task of classifying conflicts as either international or non-international when dealing with internal armed conflicts which contain international elements which may or may not be sufficient to render the conflict international. It is quite conceivable that a single territory may experience a civil war with outside military support on either side, outside logistical or financial support, or even simultaneous independent internal conflicts all at one.

[9] Cassese 'The Status of Rebels Under the 1977 Geneva Protocols' (1981) 30 ICLQ 416, 425.

[10] Stewart 'Towards the Definition of a Single Definition of Armed Conflict in International Humanitarian Law' (2003) 85 International Review of the Red Cross No 850 313, 319.

1 Somalia: An Internationalized Non-International Armed Conflict?

In many conflict situations the government may be involved in some manner, but where an internal conflict takes place within a 'failed' or 'failing' state such as Somalia, the conflict often displays a complex mix of characters, fighting against each other in an attempt to establish their authority. Somalia has not had an effectively functioning government in sixteen years and after many failed attempts to install a government, a *Transitional Federal Government (TFG)* was established in 2004.[11] Somalia's political system is based largely on clan division and this has led to deep ruptures among society and a highly patriarchal system of governance.

In June 2006, a hard-line Islamist group, the *Union of Islamic Courts (UIC)*, took control over the capital Mogadishu, in a battle with government troops. The UIC began exercising authority throughout much of the central and southern parts of the country. As the Horn of Africa is an extremely delicate region, internal instability breeds external and regional insecurity and there is a great deal of concern for its development due to its location on the economically-vital Red Sea shipping channel linking Africa to Asia. Ethiopia became involved in the conflict from July 2006 when it began to establish a military presence in the country to support the weak forces of the TFG. Ethiopia, being a Christian state with a Muslim minority with secessionist ambitions, is very wary of the dangers posed by allowing Islamist hardliners to control significant portions of its neighbour, Somalia. By October, TFG forces backed by Ethiopia troops were waging an all-out war with the UIC and aimed to drive the UIC out of the country. Ethiopia claimed to be acting out of a need to defend her own sovereignty which begs the question as to whether Ethiopia was becoming involved in a separate conflict with an insurgent force in another territory, or whether its involvement can be seen as part of the civil strife between the interim government and the UIC?[12] Finally, on 28 December 2006, the efforts of the Ethiopian military paid off and by supporting Somali government troops, Mogadishu was recaptured. Under international pressure Ethiopia agreed to pull out troops once a full African Union peace-keeping force was deployed, however so far only 2500 Ugandan troops have arrived out of a promised 8000 and so Ethiopia still maintains a significant military presence in the region.[13]

In addition to Ethiopia's direct and sustained participation in the armed conflict, a United Nations Commissioned Report leaked to the Washington Post, lists ten countries which it alleges have been violating the UN arms embargo[14] in order to send weapons into Somalia on either side.[15] Countries such as Yemen, Syria, Uganda, Djibouti and

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[11] The Somali Democratic Republic Humanitarian Country Profile IRIN Humanitarian News and Analysis 23 March 2007.

[12] 'Ethiopia PM admits Somali Action' BBC News <http://news.bbc.co.uk/2/hi/africa/6208373.stm> (1 July 2009).

[13] 'AU peacekeepers Mired in Somalia' BBC News <http://news.bbc.co.uk/2/hi/africa/7633625.stm> (1 July 2009).

[14] Security Council Resolutions 733 (1992) and 1724 (2006).

[15] 'Powers 'Stoking Somali Conflict'' BBC News <http://news.bbc.co.uk/2/hi/africa/6149276.stm> (1 July 2009) and Colum Lynch 'U.N Report Cites Outside Military Aid to Somalia's Islamists' Washington Post

Libya were all implicated in the report, with Ethiopia and Eritrea named as the 'biggest violators.' Supplies have included military personnel and weapons to the UIC and arms to the TFG. There are further concerns that in sympathy with the deep-rooted tensions between Ethiopia and Eritrea, the Somali conflict will become the battle-field for an all-out war in the Horn. The UN has estimated that at least 8000 Ethiopian troops have been deployed in the country and that a further 2000 were sent by Eritrea in support of the insurgents despite a categorical denial of this by the Eritrean Prime Minister, Isaias Afewerki.

Such a complicated and tempestuous environment does not lend itself to a quick and easy determination of the relevant law applicable and it does not seem unreasonable to draw a comparison with the horrific war that ravaged the Democratic Republic of the Congo in the late 1990s, which involved over nine state armies, at least twenty-one armed groups and covert participation of at least a further three countries. In a case before the *International Court of Justice* concerning the legality of the continued presence of Ugandan troops on DRC soil, the Court seemed in no way dissuaded from applying the full body of the law of armed conflict in determining that violations and grave breaches of humanitarian law were committed by Uganda.[16]

Compounding issues further, was the United State's involvement in the conflict in Somalia as an extension of its global 'War on Terror.' Since early 2007, the USA has launched a number of air strikes in southern parts of Somalia against suspected Al-Qaeda operatives believed to be sheltering among the Islamists. The USA maintains a military base in neighbouring Djibouti. There have also been press reports from Pentagon officials that a small number of US soldiers have been present on the ground prior to the attacks and it is clear that Washington and Addis Ababa have worked closely together on these initiatives.[17] It is typical of such conflicts that civilians should suffer the most; and Somalia is no exception with over 2000 people killed and up to 500,000 have fled Mogadishu alone.[18] Humanitarian agencies are facing tremendous pressure and despite seizing Mogadishu, daily attacks continue in the capital with the UIC allegedly fleeing temporarily underground - they are far from defeated.

(a) A Legal Analysis

For a conflict to be international it must involve armed conflict between two high contracting parties, or be a case of total or partial occupation. Unless Ethiopia could be established as partially occupying Somalia, it is clear that the conflict was not overtly international and commenced as a non-international armed conflict between the government forces and an insurgent group. This violence seems certainly sufficient to

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<http://www.washingtonpost.com/wp-dyn/content/article/2006/11/14/AR2006111401320.html> (1 July 2009).

[16] Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda) Judgment of 19 December 2005.

[17] Rice & Goldenburg 'How US Forged an Alliance with Ethiopia over Invasion' The Guardian <http://www.guardian.co.uk/world/2007/jan/13/alqaida.usa> (1 July 2009).

[18] 'Somalian 'Ghost City' Wracked by War' BBC News <http://news.bbc.co.uk/2/hi/africa/7651776.stm> (1 July 2009).

trigger Common Article 3, and it is arguable, leaving aside the fact that Somalia is not party to the Additional Protocols and the fact that it is labelled a 'failed state' without an effective government, that as the situation intensified with the UIC expanding their control over Mogadishu and much of the south, the conditions needed to activate Additional Protocol II were met. The UIC were certainly well-organised and had the ability to carry out sustained and concerted military operations, in addition to establishing law and order. Nevertheless, absent Somalia's ratification, Common Article 3 is of sole relevance. However, current trends in humanitarian law may well support the thesis that due to the extent of external elements all playing various roles in the armed conflict, it became an internationalized non-international armed conflict. The policies and political interests surrounding third state intervention in internal armed conflicts are many and varied. Rosenau believes that internal wars hold too much potential for drastic social change to be guided by legal rather than political considerations and in such situations the level of external interest is maximised.[19] This certainly seems compatible with the motivations of the US and pro-West states for intervening in the Somali conflict, who saw their security interests as being threatened with the UIC take-over in mid-2006. As for the insurgents, they seek to supplant the incumbents and so must develop the same machinery in order to constitute a credible alternative and there will generally be sympathisers capable of lending support to their cause.[20] This allows insurgents to build a series of external relationships, as with Eritrea's alleged military and financial support for the UIC. Of course, despite the nature and extent of international activity in the armed conflict, states will be eager to stifle their influence; publicly at least. As the full extent of Hague and Geneva law are deemed to apply to international conflicts, this would seriously restrain the government's capacity to obliterate the insurgents. Therefore, there is a lot at stake in arguing for the non-international character of the conflict. Furthermore, political relationships would change if acceptance of the full body of law was achieved; it would operate as an implicit recognition that the insurgents had achieved belligerent status and while some states are willing to support insurgent groups, this must be done covertly.

Due to the extensive level of international involvement in the Somali conflict, it seems reasonable to assume that it became internationalised at the moment foreign armed forces entered on *either* side. This approach is all the more practicable and principled when one seeks to disentangle the distinct legal relationships that may be created: between the original parties (the TFG and the insurgents) regulated under Common Article 3 and Additional Protocol II (if ratified and where applicable), the insurgents and the foreign state who intervenes on behalf of the government (Ethiopia and UIC), foreign states entering on opposing sides (Ethiopia and Eritrea) and finally, the 'established' government and the foreign state intervening on the insurgents' behalf (TFG and Eritrea).[21] As William Hall remarked as early as 1924:

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[19] Rosenau *International Aspects of Civil Strife* (Princeton University Press 1964) 63.
[20] ibid Modelski 'The International Relations of Internal War' 14-17.
[21] Gasser 'Internationalised Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon' (1983-84) 33 American University Law Rev 145.

> [If intervention] is directed against rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state.[22]

Only the *International Criminal Tribunal for the Former Yugoslavia (ICTY)* to date, has made any sort of attempt to offer a rationalisation to the problem and in an effort to reconcile the divergences between the international and non-international regimes, the Appeals Chamber in the *Tadic Appeal Judgment* confirmed that an internal conflict may become international if:

(i) Another state intervenes in the conflict through its troops, or
(ii) Some of the participants in inter internal conflict act on behalf of that other state.[23]

Although no definite standard of military intervention was articulated under the first limb, based on its reasoning in the *Blaskic Judgment*, the Trial Chamber seemed to suggest that even indirect military intervention may be enough.[24] Matters were also left unresolved in relation to the 'agency limb' of the internationalisation test and there have been differences in the approaches proffered by both the International Court of Justice in the *Nicaragua Case* and the ICTY Appeals Chamber. The ICJ had espoused an 'effective control' test in relation to actors alleged to be acting on behalf of a state while the ICTY favoured a less rigorous and more oblique three-tiered approach known as the 'overall control' test.[25] Clearly the issue is in a state of legal flux with two highly authoritative institutions espousing different tests and no signs of the confusion abating. The issue of classification is however, only the tip of the iceberg and further controversy surrounds the question of whether in an internationalized conflict, the full body of international humanitarian law should be applied to the whole of the territory including independent internal conflicts, or whether it should only apply to the internationalized elements.[26] While the former approach is simpler and affords greater levels of protection, it is difficult to justify where unrelated internal struggles are taking place with no determinate finishing points and involving groups unable to comply with the cumbersome provisions. On the other hand the latter approach is a more laborious and complex solution, especially as some internal conflicts may be indistinguishable from the internationalized elements.

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[22] Hall *A Treatise on International Law* (8th edn Clarendon Press 1924) 347.
[23] *Prosecutor v Tadic* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction [IT-94-1-AR72] 2 October 2005 84.
[24] *Prosecutor v Blaskic* (2000) IT-95-14 para 94.
[25] *Prosecutor v Delalic at Al* (Celebici Appeal Judgment) IT-96-21-A (2001) para 13.
[26] *Stewart* (n 10) 326.

All in all, the situation created is highly problematic and unrealistic. Humanitarian law is insufficiently malleable to allow it to accommodate all the various demands that may be placed on its application. The difficulties highlighted above are present in a whole host of conflicts taking place across the globe. In view of the current nature of affairs, the time seems ripe to reconsider the establishment of a single body of humanitarian law applicable in all situations of armed conflict. As McDonald has observed:

> With the increase in the number of internal and internationalized armed conflicts, is coming greater recognition that a strict division of conflicts into internal and international is scarcely possible, if it ever was.[27]

D A SINGLE LAW OF ARMED CONFLICT?

Among the main sources of international law listed in *Article 38(1) of the ICJ Statute* is international custom.[28] As regards customary humanitarian law, the pronouncements of the ICTY are highly authoritative and progressive. The Appeals Chamber affirmed that Common Article 1 and 3 of the Geneva Conventions represented customary principles and found that war crimes could be committed in both international and internal armed conflicts including violations of the Hague Conventions, infringements of the Geneva Conventions other than grave breaches and violations of Common Article 3.[29] By classifying the conflict in the Balkans as 'mixed,' this facilitated a smoother development of the law as the entire law for internal conflicts could be examined with increased focus upon its customary content. On criminality, the Tribunal was authoritative and it has been lauded for its determination that individual criminal responsibility exists for violations of humanitarian law in internal conflicts.

> In light of the fact that the majority of the conflicts in the contemporary world are internal, to maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts, would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the person.[30]

However, in contrast to this flexible approach, the ICTY took a more legalistic stance in relation to Article 2 of the Statute and found that grave breaches could only be committed in international armed conflicts,[31] thus reflecting the unwillingness to fully do away with the outmoded 'two-box' approach as it stands today.

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[27] Meron 'The Humanisation of Humanitarian Law' (2000) 94 AJIL 239, 261.
[28] Statute of the International Court of Justice see Brownlie *Principles of Public International Law* (6th edn Oxford Press1998) 3.
[29] *Tadic (Jurisdiction decision)* (n 23) para 124. See also Boelaert-Souminen Grave Breaches 'Universal Jurisdiction and Internal Armed Conflict' (2000) 5 Journal of Conflict and Security Law 63, 75.
[30] ibid *Tadic* para 126.
[31] ibid para 80.

In 2005 a study was formulated by the *International Committee of the Red Cross* on the rules applicable to both types of conflict. It has been a welcome and commendable effort to contextually analyse available evidence on the conduct of parties to all types of armed conflict.[32] Some of the various sources relied upon were military manuals, official statements, battlefield behaviour, national case-law and international conferences. With 167 and 163 ratifications respectively, many provisions of Additional Protocol I and II are now regarded as falling within customary principles of humanitarian law, including the principle of distinction, the prohibition of attacking those who are hors de combat and the prohibition on attacking civilian objects. Notwithstanding these advancements, the greatest improvements to the law have been made where customary law is deemed to have expanded beyond the treaty provisions to encompass some of the laws and customs of war found in *Hague Convention IV* such as principles of proportionality, obligations to take precautions before and during attack and access to humanitarian relief. Utilising more general principles in the Study means that it is sufficiently malleable to adapt to prevailing circumstances and can alleviate many of the deficiencies in the current regime of regulation as the obligations are binding on all parties.

Aside from the progressive advancement of customary law there have further independent endeavours which symbolise the growing demand for a more unitary system of law such as the *'Declaration of Turku'* which was formulated by a non-governmental human rights body seeking to establish a minimum set of humanitarian standards which would apply in all armed conflicts, including internal disturbances and public emergencies.[33] Unfortunately the Declaration lacks legal authority and its influence is purely persuasive, however it succeeds in raising awareness to the plight of the victims caught up in contemporary conflicts and to declare that there is no principled basis for the continuation of this hazardous distinction between international and internal conflicts in humanitarian law. Furthermore, the 1999 *Secretary General's Bulletin on Observance by UN Forces of International Humanitarian Law* obliges all UN forces involved in peacekeeping or enforcement missions to respect fundamental norms of humanitarian law regardless of the characterisation of the conflict.[34] The Bulletin draws upon the most vital principles found in both the Geneva and Hague Conventions, which also have their roots in human rights law, such as proportionality, distinction and protection of the civilian population.

Within treaty law some recent developments such as the *Blinding Laser Weapons Protocol*, contain no indication of any limitation upon its scope and field of operation.[35]

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[32] Henckaerts and Doswald-Beck (eds) *Customary International Humanitarian Law* (2 Vols Cambridge University Press 2005).

[33] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Minimum Humanitarian Standards 51st Session UN Doc E/CN 4/1995/116 (1995). See also the Seoul Resolution on the Relevance of International Humanitarian Law in Today's Armed Conflicts Res/Seoul 42/SP/1 (2003).

[34] Secretary General's Bulletin on Observance by UN Forces of International Humanitarian Law UN Doc ST/SGB/999/13 (1999).

[35] Protocol IV on Blinding Laser Weapons (1995). See also Amended Protocol II on the Prohibition (1996) or Restriction on the Use of Mines, Booby-Traps and Other Devices.

Developments such as these point towards the gradual meshing of particular human rights and humanitarian law norms which are so basic and fundamental that they apply regardless of whether a conflict is deemed international or non-international. Slowly but surely, actors within the international community are beginning to see the benefits – both principally and practically - of introducing a more coherent and efficient regime of humanitarian law.

E CONCLUSION

Upon reflection of the various treaty and customary law developments which have taken place, we are faced on the one hand, with real and innovative efforts at eroding the outmoded distinction currently hindering the effective application of humanitarian law, and on the other hand, with the staunch opposition of a small number of states resolute against accepting any further encroachments upon their sovereignty. It is possible to achieve a successful outcome whilst also safeguarding state's interests in maintaining domestic law and order. Political stubbornness remains the greatest obstacle to realising the goal of a unified body of humanitarian law that would offer effective and sufficient protection for all of those caught up in war. Such a system would be accessible, reliable and known to all and would far surpass the current indeterminacy surrounding the application of humanitarian law in conflicts of a mixed character.

This essay has sought to offer a brief overview of the current system governing armed international and non-international conflicts respectively. Through the prism of the Somali conflict, it is hoped that some of the difficulties in applying the law to a conflict with both international and internal elements, have been highlighted. In tune with some recent developments on the international stage perhaps it is time for the international community to reassess the future of the current regime and to realise that changes in the nature of warfare will compel changes in the law and if states remain obstinate against this change, then it will envelop them. Whether or not a unified body will find favour, only time will tell, but if humanity is the natural goal of humanitarian law, then a commitment to improvement is required, however such improvement proceeds.

THE INTERNATIONAL CRIMINAL COURT: GOOD INTENTIONS, BAD FOUNDATIONS; STATE COOPERATION AND OBSTACLES IN SECURING ARRESTS AND PROSECUTIONS FOR INTERNATIONAL CRIMES: A CASE STUDY.

Rachel Kemp *

A INTRODUCTION

In 1996, the President of the International Criminal Tribunal for the former Yugoslavia (ICTY), Antonio Cassese, remarked that his tribunal was like an 'armless and legless giant which needs artificial limbs to act and move. These limbs are the state authorities … the national prosecutors, judges and police officers. If state authorities fail to carry out their responsibilities, the giant is paralysed, no matter how determined its efforts. [1] As Happold astutely points out, this comment is equally, if not more, apposite with regard to the ICC.[2] The self-referral by the Ugandan government of the situation in the northern portion of the country, to the ICC in December 2003 was encouraging to many supporters of the Court. However, subsequent developments, including the almost three year period in which the five arrest warrants against the leading commanders of the Lord's Resistance Army have been awaiting execution, have drawn attention to the tenuous powers of enforcement open to the Court. Peace negotiations opened between the Ugandan Government and the LRA in 2006 and according to some reports these talks included discussion of a possible amnesty for the LRA leadership.[3] The pursuit of peace at the cost of justice in Uganda may prove to be a major stumbling block for the ICC in securing arrests and prosecutions of the indicted LRA leadership. If the Ugandan Government withdraws its support, the ICC may have to look beyond state cooperation to alternative enforcement mechanisms to ensure arrests and prosecutions are secured. In the course of this article, the obstacles facing the ICC in securing arrests and prosecutions, concentrating on the situation in Uganda, will be explored. The framework for state and intergovernmental organisation cooperation provided for in the Rome Statute will be critically assessed and alternative enforcement mechanisms proffered.

B SECURING ARRESTS AND PROSECUTIONS IN UGANDA

In December 2003, the government of Uganda referred the situation in northern Uganda to the ICC. Uganda was the first country to invoke Articles 13(a) and 14 of the Rome Statute to grant the ICC jurisdiction.[4] On 28 June 2004, the Prosecutor Moreno-

[1] A Cassese 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 European Journal of International Law 2, 13.
[2] M Happold 'The International Criminal Court and the Lord's Resistance Army' (2007) 8 Melbourne Journal of International Law 159, 181.
[3] ibid 161.
[4] P Akhavan 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 American Journal of International Law 403.

Ocampo announced his conclusion that there was a 'reasonable basis' to proceed with an investigation.[5] The Prosecutor assembled a team of twelve investigators and lawyers and conducted more than fifty missions to Uganda with a view to assembling evidence.[6] On 6 May 2005, almost 17 months after the referral of the situation by Uganda, Moreno Ocampo submitted applications for five arrest warrants, in accordance with Article 58 of the Rome Statute, and on 8 July 2005, sealed arrest warrants were issued. These were to be the first arrest warrants issued by the ICC for crimes against humanity and war crimes. The warrants were issued against five leaders of the LRA: Joseph Kony (Chairman and Commander of the LRA), Vincent Otti (Vice-Chairman and 2nd in Command of the LRA) and three other senior LRA commanders.[7] The alleged crimes included rape, murder, enslavement, sexual enslavement and the forced enlisting of children.[8] On the 9th September 2005, the Prosecutor applied to have the warrants unsealed.[9] The Pre-Trial Chamber decided to grant this request and the warrants became known to the public on 14 October 2005.[10]

The efforts of the ICC to hold the LRA accountable have, however, been hampered recently by the Ugandan Government entering into peace negotiations with the LRA.[11] The opening of peace talks has been hailed as the most important development towards the securing of peace in northern Uganda.[12] Negotiations began in July 2006 in the southern capital of Sudan, Juba.[13] However, neither Joseph Kony nor Vincent Otti has attended these peace talks due to fears that they may be arrested on foot of the outstanding ICC warrants against them.[14] The LRA are reported to have demanded a public guarantee from the Ugandan Government that they will not be surrendered to the ICC.[15] Happold highlights the fact that any possible peace deal between the Ugandan Government and the LRA would probably provide for an amnesty for the rebel commanders.[16] Diaz submits that such a sweeping amnesty would not be compatible with international criminal law as its main goal is 'to fight impunity, and an obligation to prosecute the gravest crimes takes priority over amnesties as an available tool for

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[5] WA Schabas *An Introduction to the International Criminal Court* (3rd edn Cambridge University Press Cambridge 2007) 37.
[6] ibid.
[7] 'The Investigation in Northern Uganda' ICC OTP Press Conference <http://www2.icccpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8 D61D4F350A20/277306/Uganda-PPpresentation6.pdf> (22 February 2009).
[8] ibid .
[9] 'Situation in Uganda' ICC-02/04-01/05-20 'Prosecutor's Application for Unsealing of the Warrants of Arrest' cf Schabas (n 5) 38.
[10] Statement by Chief Prosecutor on the Uganda Arrest Warrants The Hague 14 October 2005 <http://www.icc-cpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_LMO_Speech_141020091.pdf > (21 February 2009).
[11] SD Roper LA Barria 'State Co-operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects' (2008) 21 Leiden Journal of International Law 457, 474.
[12] *Happold* (n 2) 180.
[13] ibid.
[14] ibid.
[15] ibid 181.
[16] ibid.

reconciliation via pacification.' A report by the UN High Commissioner for Human Rights on the situation in northern Uganda stated that 'a blanket amnesty, particularly where war crimes and crimes against humanity have been committed, promotes a culture of impunity and is not in conformity with international standards and practice.'[17] The OHCHR has voiced its concern that the Government of Uganda has on various occasions promised the withdrawal of the Court warrants in exchange for peace.[18] However, if such reports are to be believed, the Ugandan Government could be accused of duplicity and misleading the ICC, as in recent correspondence with the Court, it reiterates its commitment to its obligations under the Rome Statute and its agreements with the ICC.[19] The Ugandan Government, however, also ambiguously states that it 'remains committed to executing [the warrants] should the LRA leadership fail to subject themselves to the process of justice in Uganda.'[20] While recent reports indicate that interest in domestic trials for serious crimes committed in northern Uganda has gained momentum during the course of peace talks,[21] it must be stressed that the future course of indictments is exclusively for the ICC to decide.[22]

Reports show that as of yet,[23] the Ugandan Government has not approached the Prosecutor requesting him to reconsider his position on the basis that a prosecution is no longer in the interests of justice, and that therefore the warrants of arrest should be withdrawn.[24] Article 53(2) (c) of the *Rome Statute* allows the Prosecutor to discontinue proceedings if he concludes that:

> A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victim and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime…

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[17] UN High Commissioner for Human Rights, Report on the Mission Undertaken by Her Office, Pursuant to Commission Resolution 2000/60, to Assess the situation on the Ground with Regard to the Abduction of Children from Northern Uganda, UN Doc. E/CN.4/2002/86 (9 November 2001). <http://www.unhcr.org/refworld/docid/3c7b91425.html> paras 12-13 (22 February 2009).

[18] OHCHR Report on the Work of the Office of the High Commissioner for Human Rights in Uganda A/HRC/4/49/Add.2 (12 February 2007). <http://daccessdds.un.org/doc/UNDOC/GEN/G07/111/39/PDF/G0711139.pdf?OpenElement <http://daccessdds.un.org/doc/UNDOC/GEN/G07/107/52/PDF/G0710752.pdf?OpenElement> para 60 (22 February 2009).

[19] Reply of the Ugandan Government to a Request for Information From the Republic of Uganda on the Status of Execution of the Warrants of Arrest (ICC-02/04-01/05-286-Anx2 28 March 2008).

[20] ibid.

[21] 'Uganda: New Accord Provides for War Crime Trials' Human Rights Watch <http://hrw.org/english/docs/2008/02/19/uganda18094_txt.htm> (22 February 2009).

[22] ibid.

[23] 'Top Ugandan LRA Rebels Snub Talks' BBC News <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/5171698.stm> (22 February 2009).

[24] Rome Statute Article 53(2), (4).

Happold comments that the application of this provision to amnesties remains unclear as they are not explicitly mentioned.[25] Yet in light of recent statements made by the ICC Prosecutor regarding such, it is doubtful whether sweeping amnesties for the most serious crimes are compatible with the spirit of the Court.[26] Moreno-Ocamo highlights the fact that amnesties, immunities and other ways of avoiding prosecutions are being called for by many States Parties 'supposedly in the name of peace.'[27] Yet he stresses the fact that such proposals are inconsistent with the Rome Statute and that arrest warrants must be implemented; ' … there can be no political compromise on legality and accountability.'[28] While domestic legal systems are usually cleanly cut by the separation of powers between political and legal bodies, the international arena is highly politicised and an international criminal court may have to take the politics of the situation into account. In light of the complex, political enforcement procedure of state cooperation which the ICC must rely on, it is submitted that the Court may have to take into account the *Realpolitik* of international relations. Acholi community leaders in northern Uganda have supported the negotiations in order to bring peace to the area. The complex debate on peace versus justice has thus come to the fore in the Ugandan context. Walter Achola, council chairman in the northern district of Gulu, succinctly states:

> The ICC's intervention is counter-productive to the already successful peace processes on the ground. The priority should be peace first and justice later… [W]ho will arrest Kony anyway? The government and the army have repeatedly failed.[29]

Appuuli astutely notes that the UPDF and its auxiliary associates have been trying in vain to capture Kony and his top lieutenants for the past twenty years.[30] It would appear that this inability to apprehend the LRA commanders led to Uganda's referral of the situation to the ICC in the first place. If the UPDF could have captured the rebel force leaders they would presumably have brought them to justice within the domestic Ugandan system and not sought the aid of the ICC. The efficacy of the ICC's request to the governments of Uganda, Sudan and the Democratic Republic of the Congo to execute the warrants against the indicted LRA leadership must then be seriously doubted. It appears that the Ugandan Government has become disillusioned with the efforts of the ICC to secure arrests and prosecutions. According to Ugandan Government spokesman Robert Kabushenga 'the issue … is that the enforcers of the international law have themselves not been very keen on enforcing it, and that is why the government decided

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[25] *Happold* (n 2) 82.
[26] L Moreno-Ocampo 'Building a Future on Peace and Justice' Nuremberg, 24 June 2007 <http://www2.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf > (22 February 2009).
[27] ibid.
[28] ibid.
[29] PC Diaz 'The ICC in Northern Uganda: Peace First, Justice Later?' (2005) 2(7) Eyes on the ICC 17, 25.
[30] KP Apuuli 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda' ICJ 4(1) 179, n 44-45.

that the option of the soft landing be pursued.'[31] The LRA arrest warrants have now remained ineffective since their issue in July 2005 and have undoubtedly damaged the credibility of the Court by exposing its drastically deficient enforcement mechanisms. As Roper and Barria point out:

> The inability to apprehend suspects not only undermines the credibility of a justice system but, more fundamentally, thwarts the prosecution of cases and ultimately denies the possibility of justice to individuals as well as the establishment of a historical record which can serve as a basis for possible national reconciliation … the inability to apprehend suspects undermines the entire international human rights regime.[32]

Article 63(1) of the Rome Statute prevents trials being held in absentia of the accused; therefore the inability of the Court to secure arrests has literally paralysed proceedings. In light of this pre-condition, the lack of any independent enforcement mechanism seriously and fundamentally hinders the functioning of the Court. It would appear, however, that the result of Uganda's referral to the ICC has had many positive effects despite the lack of arrests of those indicted. International attention has been drawn to a conflict perceived as being of little importance as a 'forgotten war in Africa [has been transformed] into a litmus test for the ICC.'[33] The referral and arrest warrants have significantly weakened the LRA by pressuring Sudan to distance itself from erstwhile allies that had now been transformed into an international liability.[34] In March 2004, Uganda and Sudan renewed their bilateral military protocol resulting in 'Operation Iron Fist II' which allowed Ugandan troops to pursue LRA rebels across Sudanese borders.[35] As one commentator succinctly notes '[t]he new-found LRA willingness to negotiate with the government is a mark of desperation resulting from this reality.'[36] The isolation of the indicted commanders of the LRA and the continued offer of amnesty to others has created significant divisions within the group and led to numerous defections.[37]

Claims that the referral of the situation to the ICC and the issuance of arrest warrants by the Court have been counterproductive and threaten peace prospects for the region fail to take into account the positive developments in the conflict as a direct result of the ICC's involvement. The LRA has maintained a guerrilla campaign against the

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[31] BBC News (n 23).
[32] *SD Roper LA Barria* (n 11) 458.
[33] A Payam 'Developments at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission on the First State Referral to the International Criminal Court' (2005) 99 AJIL 403, 416.
[34] ibid 417.
[35] UN Office for the Coordination of Humanitarian Affairs, Consolidated Appeals Process: Uganda 2005, 5 <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/1463710c996cedd2c1256f41004aa7f1> (22 February 2009).
[36] *Payam* (n 33) 416.
[37] ibid 417.

Ugandan government and those it considers to be its collaborators since the late 1980s.[38] The conflict between the LRA and government forces has kept the northern Acholi population internally displaced and in a constant state of fear and economical disadvantage.[39] One commentator alludes to the fact that peace negotiations have proved unfruitful for the past 18 years and that every single peace initiative has failed.[40] Only since the ICC's intervention in this long-neglected conflict have peace prospects for the region improved. Even though Uganda initially referred the situation to the ICC, its cooperation throughout the entire investigative and prosecutorial process cannot be guaranteed. If the Ugandan Government persists in offering amnesty to the indicted LRA commanders and/or requests the Prosecutor to reconsider the arrest warrants, the Court will face significant setbacks in ensuring apprehension of the indictees. The development of the situation in Uganda will prove extremely instructive with regards to the ICC's policy of justice in the light of prevailing political tensions and the extent to which 'justice' will be sacrificed for 'peace' and 'politics'.

C SECURING ARRESTS AND PROSECUTIONS:

In light of the difficulties of enforcement which the Court has experienced in the Ugandan context, the legal framework providing for the cooperation of state and intergovernmental organisations with the ICC will now be critically assessed and possible alternative enforcement mechanisms will then be explored.

1 State and Intergovernmental Organisation Cooperation - Legal framework

Due to its horizontal relationship with State parties, the ICC lacks any direct power to carry out the arrests of indictees. It therefore relies heavily on states for cooperation and judicial assistance and to act as its enforcement arm. Mr Luis Moreno-Ocampo, the Prosecutor of the International Criminal Court, has highlighted the difficulty in enforcing international criminal justice standards in the absence of a global police force or enforcement agency and emphasised that State cooperation is of fundamental importance to the success of the Court.[41] He urges State parties that '[i]n all situations, more State cooperation in terms of securing arrests is needed. For the ultimate efficiency and credibility of the Court *you* created, arrests are required.'[42] Kaul also highlights the crucial nature of State cooperation with the Court:

[38] *Happold* (n 2) 162-163.
[39] *Diaz* (n 29) 19.
[40] ibid 28.
[41] *Moreno-Ocampo* (n 26).
[42] ibid (emphasis added).

> It has no police force of its own, no powers of enforcement, no soldiers. It can only be as strong as the effective, speedy, unreserved, and ongoing cooperation by the member states allows it to be.[43]

Article 86 of the Rome Statute imposes a general obligation on State Parties to cooperate with the ICC in its investigation and prosecution of crimes within its jurisdiction. Wartanian contrasts this obligation against those which apply to the UN ad-hoc tribunals of the ICTY and the ICTR which were organised under Chapter VII resolutions by the Security Council. Thus *all* states are required to comply with investigations.[44] She highlights the comparative weakness of the ICC obligation by citing an example of an indicted war criminal who seeks refuge in a country not party to the ICC; that country would not be obliged to turn over that criminal.[45]

Article 87(1)(a) states that '[t]he Court shall have the authority to make requests to States Parties for co-operation.' Article 87(7) provides that failure by a State Party to comply with a request to cooperate allows the Court to make such a finding and refer to the Assembly of State Parties (ASP) or the Security Council (if the case originated as a Security Council referral). While Zhou notes that such a referral will result in 'enforcement measures,'[46] Wartanian states that it is unclear whether the ASP can take any action beyond making a finding of non-compliance.[47] Harmon and Gaynor refer to the practice of referring state non-compliance to the Security Council by the ICTY and are critical of the contamination of the administration of justice system with political considerations which such a referral entails.[48] Harmon and Gaynor also highlight the inefficacy of the Security Council in the face of state recalcitrance in relation to the ICTY.[49] From the foregoing, it therefore appears that the referral of a failure of a State to cooperate with the Court to the ASP or the Security Council under Article 87(5)(b) and Article 87(7) cannot be equated with an effective enforcement mechanism.

Article 59 imposes an obligation on State Parties who have received a request for arrest or arrest and surrender to 'immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9 [International Cooperation and Judicial Assistance].' Article 89(1) provides for transmission of arrest warrants to *any* State in which the indicted person may be found and that the Court *shall* in such circumstances request the cooperation of that State in the arrest and surrender of a person. It then proceeds to impose an obligation on State Parties, in accordance with the

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[43] HP Kaul 'Developments at the International Criminal Court. Construction Site for More Justice: The International Criminal Court after Two Years' (2005) American Journal of International Law 370, 383.
[44] A Wartanaian 'ICC Prosecutor's Battlefield: Combating Attrocities While Fighting For States' Cooperation: Lessons from the U.N. Tribunals Applied to the Case of Uganda" [2005] Georgetown Journal of International Law 1290, n 15-16.
[45] ibid n 17-18.
[46] Han-Ru Zhou 'The Enforcement of Arrest Warrants by International Forces' (2006) 4(2) JICJ 202, 210.
[47] *Wartanian* (n 44).
[48] M Harmon F Gaynor 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings' (2004) 2(2) JICJ 403, n 46-47.
[49] ibid n 51-52.

provisions of Part IX of the Statute and their national law to comply with such requests. Zhou submits that this Article provides for an obligation to cooperate with the Court in the event that the state receives a request for arrest, whether or not it is a party to the Rome Treaty.[50] However, it is submitted that unless a State who is a non-party to the Treaty agrees to enter into an ad hoc arrangement with the Court to provide assistance under Part IV of the Treaty, such an obligation does not exist.[51] Thus the power of the Court in relation to non-state parties is seriously weakened.

Article 87(6) provides that the Court may *ask* any intergovernmental organisation to provide cooperation. Zhou notes that by using the term 'ask' the Article clearly envisions that intergovernmental organizations are not under an obligation to cooperate with the Court. Zhou submits that this provision thus amounts to a contradiction of ICTY case law which held that international bodies (or intergovernmental organizations) have the same duty as states to cooperate and provide judicial assistance to the tribunal.[52] This perceived weakening of the Court's position in relation to relevant intergovernmental organisations may have major repercussions on securing arrests. As Zhou astutely points out, these organizations now know that the ICC has no actual power to oblige them actively to search and arrest indicted persons and may therefore refuse to risk their troops in engaging in such tasks.[53] Between December 1995 and July 1997, NATO forces in the former Yugoslavia did not make a single arrest.[54] Only a combination of political and judicial pressure persuaded NATO to shift its policy and engage in the arrest of indicted individuals. It is submitted that the support of intergovernmental organisations is potentially invaluable in securing arrests and therefore prosecutions before the ICC. The weakly worded, voluntary cooperation provided for in Article 87(6) does not reflect the vital importance of a strong and effective cooperation between the ICC and intergovernmental organisations.

2 Alternative Enforcement Mechanisms

It can be deduced from the above that the legal provisions relating to the enforcement mechanisms of the Court in securing arrests and prosecutions are weak and heavily reliant on state cooperation. Roper and Barria opine that institutions such as the ICC are seen by some as representing the ideal case of full legalisation in which rules of commitment are binding and precise, but that in reality international criminal courts must engage in extra-legal bargaining to elicit co-operation.[55] The international criminal law arena is far more politically complex than its domestic counterparts. What, then, are the

[50] *Zhou* (n 46).
[51] Article 87(5) (a) ICC Statute provides for the Court to invite States not party to the Statute to provide assistance under Part IV of the Treaty on the basis of an ad hoc arrangement. Article 87(5)(b) provides for referral of a failure to cooperate under such an arrangement to the Assembly of State Parties or the Security Council (where the Security Council referred the matter to the Court).
[52] *Zhou* (n 46).
[53] ibid n 46-47.
[54] ibid n 51-52.
[55] *Roper and Barria* (n 32) 460.

alternative enforcement mechanisms open to the Court in cases where States are unwilling or unable to cooperate with the Court's orders? Roper and Barria regard political pressure alone as 'generally having a limited ability to enhance the bargaining effectiveness of the ICC with regard to the capture of indictees.'[56] They stress that diplomacy needs to be accompanied by action in order to secure arrests and prosecutions and view military and economic pressure as being more successful tools in enhancing cooperation with the ICC.[57] Wartanian refers to the alternative or 'soft' enforcement mechanisms developed by the ICTY in the face of state non-cooperation and states that some of these methods may also be available to the ICC Prosecutor.[58] These 'soft' measures include the use of economic aid inducements; the use of diplomatic and economic sanctions; offering cash rewards for assistance leading to the arrest or conviction of indicted war criminals; and the use of military force to effectuate arrest.[59]

(a) Economic Aid Inducements, Diplomatic and Economic Sanctions

Roper and Barria opine that significant economic pressure may be one of the most effective tools available to third parties to support the activity of the ICC.[60] They highlight the significant pressure which can be asserted on export-dependent countries by the international community in order to secure the apprehension of suspects.[61] Wartanian highlights the success of economic aid inducements in securing arrests and surrenders in Croatia by the ICTY.[62] Faced with the Croatian failure to allow or facilitate the execution of arrest warrants, the United States threatened to veto crucial loans from the International Monetary Fund and World Bank. This economic threat led to a spate of 'voluntary surrenders.' It is clear from the experience of the ICTY that conditional economic inducements and sanctions can be a very effective means of ensuring compliance with tribunal and court orders. Wartanian highlights the fact that where multilateral efforts fail, bilateral pressure from a powerful state can prove a strong tool in ensuring cooperation.[63] She also emphasises the very significant role which the US played in securing the successful enforcement of ICTY orders. As the US is not a State Party to the ICC, it is questionable whether it will provide the requisite strong, bilateral pressure to ensure compliance with orders of the Court. However, on a brighter note, Roper and Barria refer to the valuable pressure exerted by the European Union on Croatia and Serbia, when it insisted that accession talks with both states would begin only after fugitives were arrested.[64] This incentive led to improved cooperation with the Tribunal

[56] ibid 466.
[57] ibid 467.
[58] *Wartanian* (n 44) n 55-56.
[59] ibid.
[60] *Roper and Barria* (n 32) 467.
[61] ibid.
[62] ibid.
[63] *Wartanian* (n 44) n 71-72.
[64] *Roper and Barria* (n 32) 461.

and to the important arrest of the former Croatian general, Ante Gotovina, in December 2005.[65] In light of the United States' current disdain for the ICC, it is submitted that the European Union or other powerful states or communities must embrace such hard-line economic aid inducement policies to improve state cooperation with the Court.

(b) Offering Cash Rewards

Wartanian refers to the possible alternative enforcement mechanism of states offering individual cash rewards for information or assistance leading to the arrest or the conviction of indicted war criminals.[66] She notes that while the ICTY and ICTR tribunals did not themselves offer cash incentives, the United States Department of State was responsible for offering monetary rewards for information and assistance.[67] In the Balkans, this programme was highly advertised throughout Europe and was instrumental in the NATO arrests of two significant indictees: Dragan Nikolic and Steven Todorovic.[68] Wartanian notes that although the U.S. is not yet a State Party to the ICC, such future support is still 'plausible.'[69] She suggests that other countries and communities, such as the European Union, could also adopt such programmes and perhaps even the ICC itself. However, there are inevitable risks associated with the use of cash rewards. If indictees have a high enough price on their heads, bounty hunters and professional kidnappers may be encouraged to engage in questionable practices to ensure apprehension and obtain the monetary reward. Gillett astutely warns against the use of force without a legal basis in apprehending an indictee as future proceedings against the accused could be jeopardised.[70] The Rome Statute has a number of provisions specifically protecting the due process rights of indicted persons. Article 59 provides that once an accused has been arrested they are to be brought promptly before a 'competent judicial authority in the custodial state' in order to confirm their identity, that they were arrested through due process, and that their human rights have been respected.[71] Article 55(1)(d) provides that during an investigation conducted under the auspices of the Rome Statute, a person 'shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.' In light of the high standard of due process rights enshrined and guaranteed in the Rome Statute, it is submitted that great care must be taken in ensuring the legality of arrests so as not to undermine the underlying values of the Statute and bring the entire system into disrepute.

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[65] ibid.
[66] *Wartanian* (n 44) n 73-74.
[67] ibid.
[68] *Wartanian* (n 44) n73-n74.
[69] ibid.
[70] M Gillett 'Fighting Impunity: Assisted Arrests at the ICC' (2008) 3(1) Yale Journal of International Affairs 16.
[71] 71 Rome Statute Article 59.

In the ICTY case of Slavko Dokmanovic, the legality of the arrest was called into question.[72] Dokmanovic had been lured within the UN forces' geographic mandate in order to effectuate his arrest and was then transferred to the Hague.[73] The Trial Chamber held that 'luring' the accused to a place where he could be arrested did not constitute a forcible abduction and so did not breach the principles of public international law.[74] However, while Gillett approves of such a 'robust approach to the issues of arrests,' he emphasises that the ICC may not draw such a fine distinction between luring and forced abduction.[75] Gillett also highlights a contrasting approach to the issue of the legality of arrests; *mala captus bene detentus*.[76] The phrase literally means 'bad capture, good detention' which in effect does not allow the circumstances of an accused's apprehension to interfere with the subsequent legality of the trial.[77] This approach was adopted by the Israeli authorities in relation to the illegal kidnapping of the Nazi war criminal Adolf Eichmann from Argentina, and his subsequent trial and execution. However, it is submitted that such an approach could not validly be adopted by the ICC in the light of the numerous provisions regarding the protection of due process rights for accused persons. Indeed, Schabas refers to the 'high standard' of due process protection offered by the Rome Statue and comments that '[i]f such standards were universally respected, there would probably be no need for an international criminal court!'[78]

(c) Use of Military Force to Effectuate Arrest – Assisted Arrest

In the majority of legal systems the capture of suspects is the role of domestic law enforcement agencies such as the police. In the international criminal law arena one might assume that intergovernmental military agencies or peacekeeping forces would assume the guise of law enforcer. However, law enforcement in the international criminal context is not as simple or straightforward as that in the domestic context, due mainly to the complicating factor of state sovereignty. Roper and Barria point out that the most sovereign states are extremely reluctant to allow foreign forces on their soil and even if forces are permitted to enter their mandate is often very restrictive.[79] Wartanian alludes to the limited mandate of NATO forces and the reluctance of commanders to actively seek the arrest of indictees, which resulted in no arrests being secured in the Balkans until mid-1997.[80] However, once the political will existed for NATO to have a more robust policy, military force to secure arrests resulted in a significant number of indictees being apprehended.[81]

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[72] *Prosecutor v Slavko Dokmanovic et al*: Decision on the Motion for release by the Accused Slavko Dokmanovic Trial Chamber ICTY Case No IT-95-13a-PT, Oct 22 1997.
[73] *Gillett* (n 70) n 38-39.
[74] ibid.
[75] ibid.
[76] ibid.
[77] ibid.
[78] *Schabas* (n 5) 253.
[79] *Roper and Barria* (n 32) 467.
[80] *Wartanian* (n 44) n 80-81.
[81] ibid n 82-83.

Wartanian stresses the importance of an explicit mandate giving troops the duty and power to effectuate arrests, whether it be contained in the Security Council resolution or the peace agreement authorising the use of international military force.[82] Such an 'explicit and clear mandate' was conferred by the UN Security Council Resolution 1638[83] on the peacekeeping mission in Liberia (UNMIL) to apprehend and detain former President Charles Taylor in the event of his return to Liberia, and to transfer him to the Special Court for Sierra Leone (SCSL).[84] This development has been welcomed as a significant departure from UN practice and as evincing the Security Council's increasing willingness to strengthen cooperation with international criminal tribunals.[85] This measure was also successful as UNMIL proved instrumental in securing the arrest of Taylor and his surrender to the SCSL in March 2006.[86]

Frulli highlights two other preceding situations where international military forces were invested with the task of apprehending and detaining war criminals; UNOSOM II in Somalia and the NATO-led multinational force (IFOR/SFOR) in Bosnia Herzegovina.[87] Due to a series of brutal attacks carried out by Somali militiamen against UN personnel, the mandate of UNOSOM II was extended to include the policing task of securing investigations and arresting and detaining those responsible for such attacks.[88] However, the UNOSOM II mission notoriously ended in failure after a disastrous military offensive conducted by UN troops against Aidid's militia.[89] The Security Council revised UNOSOM II's mandate to exclude the use of coercive methods[90] and the most sought after individual, General Aidid, was never apprehended or prosecuted. The NATO-led multinational force (IFOR/SFOR) in Bosnia-Herzegovina was somewhat more successful in securing arrests. IFOR/SFOR was never granted explicit authorisation by the Security Council to arrest and detain ICTY indictees but by a resolution of the North Atlantic Council.[91] The Resolution did not explicitly require IFOR to actively search for indictees but rather stated that they should arrest the indictees who came into contact with them in its execution of assigned tasks.[92] The ambiguity of the nature of the obligation imposed on IFOR/SFOR led to much debate and delay before NATO troops began to arrest and transfer indicted individuals to the ICTY.[93]

In the Ugandan context, the forces of the Mission of the United Nations in the Congo (MONUC) have been authorised to arrest the leaders of the Lord's Resistance

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[82] ibid n 83-84.
[83] SC Res 1638 11 November 2005.
[84] M Frulli 'A Turning Point in International Efforts to Apprehend War Criminals- The UN Mandates Taylor's Arrest in Liberia' (2006) 4 Journal of International Criminal Justice 351.
[85] ibid 352.
[86] ibid 351.
[87] ibid 352.
[88] SC Res 837 6 June 1993.
[89] *Frulli* (n 84) 354.
[90] ibid.
[91] ibid 355.
[92] P Gaeta 'Is NATO Authorized or Obliged to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?' (1998) 9 EJIL 174.
[93] *Frulli* (n 84) 355.

Army, who intermittently find refuge within the vast eastern regions of the Democratic Republic of the Congo.[94] INTERPOL has issued 'Red Notices', requesting its 184 member states to arrest and detain the five LRA leaders with a view to their surrender to the ICC.[95] The Red Notice is a mechanism by which INTERPOL informs its member countries that an arrest warrant has been issued for an individual by a judicial authority.[96] Such a Notice is not an international arrest warrant but rather a request for provisional arrest; INTERPOL cannot demand that any member country arrest the subject of a Red Notice.[97] From the foregoing, it can be concluded that the use of military force to effectuate arrest has the potential for success. However, due to the complex issue of state sovereignty, mandates must be sufficiently precise to allow peacekeeping forces or intergovernmental military agencies to effectuate arrests. As noted earlier,[98] Article 87(6) of the Rome Statute imposes no obligation on intergovernmental organizations to cooperate with the Court, thus potentially seriously hampering the enforcement of arrests.

D CONCLUSION

The *ad hoc* Tribunals of the ICTY and ICTR demonstrated that the assumption that arrests and surrenders would be conducted by national authorities proved in practice to be overly optimistic. However, the Rome Statute has nevertheless based the enforcement mechanisms of the International Criminal Court on the flimsy foundations of state cooperation. As exemplified by the long outstanding arrest warrants in the Ugandan context, the enforcement mechanisms of the Court are sadly lacking in effect. Without the ability to secure arrests the Court is effectively paralysed and its authority brought into disrepute. It is submitted that the situation in Uganda highlights the need to explore and develop alternative enforcement mechanisms to reliance on the ephemeral and unreliable cooperation of states.

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[94] Report of the Secretary General of the United Nations pursuant to Resolutions 1653 (2006) and 1663 (2006) (S/2006/478) June 29 2006 para 31.
[95] 'Interpol Issues First Red Notices on behalf of the International Criminal Court' <http://www.interpol.int/Public/News/2006/ICCredNotices20060601.asp> (22 February 2009); INTERPOL and the ICC signed a co-operation agreement in 2005 which also provides the ICC with access to the organizations global police communications system; I-24/7.
[96] ibid.
[97] ibid.
[98] *Zhou* (n 53).

THE IMPACT OF EU MEMBERSHIP ON IRELAND'S SOVEREIGNTY OVER ITS AIRSPACE AND THE IMPLICATIONS FOR GOVERNMENT REGULATION OF THE IRISH AIR INDUSTRY.[1]

Joan Donnelly *

A INTRODUCTION

Ireland's accession to the European Union has had a substantial impact on Ireland's sovereignty over its airspace. EU membership brought about a profound change in the character of the Irish constitutional and legal order. Arising from the doctrine of the supremacy of EU law, the provisions of the Constitution may not be invoked to invalidate EU legislation and where a conflict arises between EU law and domestic law, the domestic provision must be disapplied. The dramatic change triggered in Ireland's constitutional arrangements by EU membership has had far-reaching effects and has substantially ousted Ireland's competence in the regulation of air law. The Community is empowered by Article 80 paragraph 2 of the EC Treaty to assume responsibility in relation to the regulation of aviation matters and, by virtue of Article 94, the Commission is entrusted with the necessary powers to unify technical standards and regulations throughout the Community. Two major initiatives by the institutions of the European Union have had profound implications for the Member States with respect to the regulation of air law. The first involved the proceedings brought before the ECJ by the Commission against eight Member States resulting in the 'Open Skies' judgment, the effect of which was to invalidate certain provisions in bilateral air services agreements between Member States and the US. The second was the decision by the European Union to negotiate an Open Aviation Areas Agreement with the United States with the aim of bringing about liberalisation in the air transport market between the US and the European Union. In this article, it is intended to demonstrate that, despite the apparent diminution in Ireland's law-creating competence that has taken place arising from these initiatives, Ireland's membership of the EU has, in fact, had the paradoxical effect of removing constraints which inhibited the development of its aviation industry, facilitating the replacement of outdated, anti-competitive regulatory structures with open market economic models enabling the indigenous aviation industry to restructure and prosper.

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[1] See generally ICAO CD-Rom World's Air Services Agreements; Jacob Schenkman *International Civil Aviation Organisation* (E Droz Geneva 1955); Brian Havel *In Search of Open Skies* (Kluwer Law International The Hague 1997); PS Dempsey *European Aviation Law* (Kluwer Law International 2004); A Dukes & F Sorensen *EU/US Air Transport Agreement – Potential Impact on Ireland* (Dublin Chamber of Commerce/Air Transport Users Council); House of Commons Select Committee on Environment, Transport and Regional Affairs 18th Report *Air Service Agreements between the United Kingdom and the United States.*

B CONCEPT OF SOVEREIGNTY OVER AIRSPACE

A state's national airspace has been interpreted as referring to the three-dimensional portion of the atmosphere which extends horizontally over a state's physical land-mass and the coastal areas reaching to a 12 mile outward limit. The concept of a nation's sovereignty over its airspace is the creature of customary international law.[2] Developed as an analogue to Grotius's notion of a state's right to exercise sovereignty over its territorial waters, the concept became entrenched during World War 1 as European States shut down their aerial borders to protect their citizens from aerial bombardment by enemy forces. A corollary of the recognition of a nation's sovereignty over its airspace was the right of a host state to exclude another state's aircraft from its airspace. Thus, an aircraft was not entitled as of right to cross another state's airspace; authorisation had to be sought from the host state before an aircraft could exercise a right of passageway through its airspace. Up until 1919 Ireland exercised complete and exclusive sovereignty over its airspace.

The first inroad into Ireland's sovereignty over its airspace occurred as a result of its decision to become a party to the International Air Convention, adopted at the Paris Peace Conference in 1919. Chapter 1 of the Convention, entitled 'General Principles,' deals with the issue of sovereignty in relation to airspace. Article 1 provides that '[t]he High Contracting Parties recognise that every power has complete and exclusive territory over the air space about its territory.' Conditioning the position, Article 2 provides that 'each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States … ' The encroachment into States' national airspace envisaged by Article 2 was very slight, being confined to mere passage, and did not extend to permitting aircraft to land for refuelling or for taking on or discharging passengers.

The United States, a major pioneering player in the sphere of aeronautical experimentation, had not ratified the Paris Convention.[3] The flight and operation of aircraft in the Americas was governed by an alternative air law regime – the Havana Convention[4] – which, upon receiving ratification by the requisite number of States,

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[2] The International Civil Aviation Organisation divides airspace into seven different classes, designated alphabetically from A to G. Classes A to E represent controlled airspace whilst classes F and G describe areas in uncontrolled airspace. Controlled airspace refers to the regions of airspace which are subject to air traffic control. By contrast, in uncontrolled airspace, air traffic control has no executive function, merely a possible advisory role. In deciding on the use and allocation of its airspace, a state's regulatory authorities may sub-divide the airspace into zones of defined dimensions, and assign specified operational activities to those zones.

[3] The United States had not become a member of the League of Nations and, therefore, the possibility of its becoming a party to the Convention Relating to the Regulation of Aerial Navigation Convention did not arise.

[4] Officially designated the Pan American Convention of Commercial Aviation, the 'Havana Convention' was the creature of a Pan American Conference held in Chile in 1923, the central mission of which was to construct an air law regime contoured to the specific needs of the States of the Western Hemisphere. See Duane W Freer *Special Series* ICAO Bulletin June 1986 <http://www.icao.int/cgi/goto_m.pl?icaonet/arch/index.html> (1 July 2009).

entered into force in 1928. The existence of two air law regimes, codifying potentially conflicting rules of air law was liable to cause uncertainty and confusion among administrators involved in applying the rules of international air law. Jurists, disconcerted by the development, advocated a reforming measure, entailing displacement of the two disparate regionally-based air law regimes by the prescriptive coherence of a single unified aeronautical framework.[5]

In 1944, the United States, in a bid to internationalise the challenge of creating a system of air law, called an international conference in Chicago for the purpose of devising an international regulatory framework. The efforts of the participants resulted in the 'Convention on International Civil Aviation,' ('the Chicago Convention') which, on 7 December 1944, was signed by fifty-two states. Chapter 1 of the Convention reaffirms the principle that every State has complete and exclusive sovereignty over the airspace above its territory. Chapter II prescribes rules for flight over territory of contracting states. Each contracting state is accorded the right, in respect of non-scheduled flights, to make flights into or in transit non-stop across the territory of another contracting state, and to make stops for non-traffic purposes without prior permission. In respect of aircraft engaged in the carriage of passengers, cargo, or mail, the carrier will also have the privilege - subject to the right of the host state to impose conditions - of taking on or discharging passengers, cargo or mail. By contrast, with respect to scheduled air services, permission or authorization is required before such services may be operated over or into the territory of a contracting State. Each contracting State has the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo in the course of a contract of carriage for remuneration or hire and destined for another location within its territory.[6]

The Chicago Convention, thus, rehabilitates the doctrine of a state's sovereignty over its airspace, enabling states to raise aerial frontiers to ensure that, in the context of commercial aviation, the allocation of traffic rights in national airspace is strictly controlled. In tandem with the Convention on International Civil Aviation, the participants at the Chicago Conference negotiated two separate documents, each one specifying the substance of different dimensions of the freedoms of the air. The International Air Services Transit Agreement,[7] which is restricted in its application to scheduled international air services, enshrines two 'technical'[8] freedoms of the air. The rights granted are: (i) to overfly the territory of a Contracting State without landing; and, (ii) to stop in the territory of a Contracting State for refuelling or maintenance on the way

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[5] Duane W Freer *Special Series* June 1986 'Regionalism is Asserted, ICAN's Global Prospects Fade 1926 –1943' 41(6) ICAO Bulletin 66-68 <http://www.icao.int/cgi/goto_m.pl?icaonet/arch/index.html> (1 July 2009).

[6] The right to operate commercial air services within the territorial boundaries of another state is known as 'cabotage'. Regulating the exercise of cabotage has been widely exercised in the global aviation industry though recent developments in the EU context have raised the prospect of the emergence of a 'Single European Sky.'

[7] ICAO Doc 7500.

[8] The rights are so-called 'technical' rights as they are exercisable for reasons not connected with the transport of passengers, cargo or mail.

to another, without transferring passengers or cargo. The International Air Services Transit Agreement (IASTA) entered into force on 30 January 1945 and, as of 2007, has 123 adherents. Ireland, by virtue of deposit of its notification of acceptance on 19 November 1957, has become a party to the Agreement.

Unlike the IASTA - which is a multilateral arrangement - the International Air Transport Agreement, defining a bundle of five diverse freedoms for scheduled international air service providers, is negotiable between individual states.[9] In addition to incorporating the two freedoms the subject of the IASTA, the International Air Transport Agreement also creates a further three freedoms of the air. The additional rights granted are: (iii) the right to carry passengers or cargo from one's own country to another; (iv) the right to carry passengers or cargo from another country to one's own; and, (v) the right to carry passengers from one's own country to a second country, and from that country to a third country.

By contrast with the 'Two Freedoms Agreement,' only a small minority of States endorsed the 'Five Freedoms Agreement;' its failure to attract a larger number of adherents is attributable to a multiplicity of logistical, technical and economic issues raised by the prospect of granting 'fifth freedoms' rights to all the other Contracting States.[10]

By becoming a contracting party to the International Air Services Transit Agreement, Ireland has accepted an inroad into its law-creating competence with respect to use of its airspace, a development which has impacted, in particular, on its ability to exploit its strategic/geographic position at Shannon Airport as a stop-off point on North Atlantic routes. By contrast, in opting not to ratify the International Air Transport Agreement, Ireland has preserved discretion on the issue of regulating use of its airspace for commercial exploitation by airlines of other States. Following the example of the United States and Great Britain, Ireland has adopted the device of the bilateral air services agreement to regulate the allocation of traffic rights in its airspace, utilising its sovereign prerogatives to both define the rights and privileges to be accorded to other States and also to designate the airlines to be permitted to exercise those rights and privileges. By skilful drafting and deployment of individually tailored air services agreements the State has succeeded in producing finely-tuned air regulatory structures to underpin it in the pursuit of its strategic objectives for the aviation sector.

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[9] The United States, a staunch advocate of the freedom of the airs and open competition, was the sponsor of the Five Freedoms Agreement (as it became to be known) which was designed to promote a multilateral exchange of traffic rights. As Havel notes '[a]fter the failure of the Five Freedoms Agreement to prompt a multilateral exchange of rights of access, the bilateral treaty developed as the principal diplomatic and political vehicle for these trades.' See B Havel *In Search of Open Skies* (Kluwer Law International The Hague 1997) 39, n 40.

[10] See ICAO '*Proceedings of the International Civil Aviation Conference*' <http://www.icao.int/icaonet/arch/chicago/conf_proceed.html> (1 July 2009).

C BILATERALISM – THE BERMUDA AGREEMENTS

In February 1946, the United States and Great Britain concluded a commercial air agreement, - the 'Bermuda Agreement'[11] - which, codifying a flexible framework for exchange of air traffic rights between the two States, was to provide a template for other States seeking criteria for the formulation of air services agreements. Bermuda 1 – as it came to be known – embodied a liberal framework for the exchange of air traffic rights, which neither attempted to fix the frequency of flights on prescribed routes nor prohibit multi-designation of airlines to provide services on the routes. As Havel notes:

> While not a wholesale suppression of state intervention, Bermuda 1's omission of rigid anterior controls over capacity reflected the flexibility sought by the Bermuda negotiators, who hoped to accommodate both American expansionism and British protectionism in the same regulatory formula.[12]

Faithful to its ethos of promoting equity between the parties, the Final Act of the Bermuda Conference provides that each contracting state should have a 'fair and equal opportunity' to operate the agreed international services[13] and that

> [I]n the operation by the air carriers of either [g]overnment of the trunk services described in the Annex to the Agreement, the interests of the air carriers of the other [g]overnment shall be taken into consideration so as not to affect unduly the services which the latter provides on all or part of the same routes.[14]

By focussing on individual rights and equality of opportunity, the agreement has imposed a straitjacket on the development of commercial aviation resulting in artificial configuration of traffic access rights, allocative-inefficiency, high prices and restriction of consumer choice.

The successful conclusion of the Bermuda Agreement prompted the decision of the United States to withdraw from the International Air Transport Agreement, an initiative which led other States to also denounce the Agreement. The decision of the United States to jettison the Five Freedoms Agreement was undoubtedly a retrograde step, forcing states to exchange traffic rights within a schematic bilateral template in which the three incidents of commercial aviation – fares, access and capacity – would define negotiations and foster the development of anti-competitive regulatory models which would inhibit the growth of international aviation.

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[11] Officially designated *Agreement between the government of the United Kingdom and the government of the United States relating to Air Services between their respective Territories* Bermuda 11 February 1946.
[12] *Havel* (n 1) 42.
[13] (n 13) para 4.
[14] ibid para 5.

The Bermuda 1 Agreement regulated the commercial aspects of aviation between the Contracting States of the Chicago Convention until the 1970s spawning a vast progeny of bilateral air services agreements. Envisaged by the United Kingdom as a vehicle for curbing the financially and politically more powerful United States - which if unconstrained, would be in a position to impose its will on a fledgling air transport industry - it became clear that the Agreement was, in fact, working to the disadvantage of the United Kingdom.[15] In 1977 a revised air services agreement, Bermuda II,[16] was adopted. The renegotiated Bermuda Agreement was a highly restrictive agreement which, as Havel notes, '[replaced] Bermuda 1 style *ex post facto* consultation and compromise [with] a new regime of regulatory architecture where virtually all of the restrictions were negotiated and codified in the treaty itself.'[17] The distinguishing features of the new regime were the imposition of capacity controls on designated routes and, on certain routes, the replacement of multiple designations by monopolies and duopolies. The Bermuda II Agreement, thus, entrenched the 'directive, protectionist and competition restrictive policies'[18] of Bermuda I posing further challenges to the proponents of free trade in opening up air transport to the unbridled forces of competition.

D IRELAND'S AIR SERVICES AGREEMENTS[19]

Ireland's Air Services Agreements constitute the cornerstone of its economic framework for regulating the commercial aspects of civil aviation. The State is a party to a large number of air services agreements the majority of which comprise bilateral arrangements involving other sovereign States and which define the rights and privileges exchanged between the contracting States. Adopting the model Bermuda 1 Agreement as its template, the State has succeeded in crafting panoply of bilateral air service instruments, each instrument individually fine-tuned to dovetail with the exigencies of Irish commercial reality and enabling the State to exercise regulatory control over the granting of privileges in its airspace.

Socio-economic factors have shaped Ireland's air transport policy. Ireland is a small island state which, at the time of independence, was blighted by a very weak economy. In order to enable its nascent air industry to develop an infrastructure and to become profitable, the State opted for aggressively protectionist policies. In the absence of a tightly controlled regulatory architecture enabling the State to calibrate the interplay of the three variables of commercial aviation - route access, fares and capacity - the

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[15] Airlines in the United States had become disproportionately powerful, deriving large profits from their exclusive monopoly over the US domestic airline market. In the 1960s, US airline companies, spawning the so-called 'hub and spoke' system, had developed trans-Atlantic services from 'gateway' airports in the US linking the services with feeder flights from numerous cities around the United States.

[16] Officially designated *Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the United Kingdom concerning Air* Services, Bermuda, 23 July 1977.

[17] *Havel* (n 1) 46.

[18] Report of *Comité des Sages* cited by *Havel* (n 1) 28.

[19] See generally (n 11).

fledgling industry would have been swamped by powerful UK and US competitors. Ireland's evolving air transport policy, as manifested by a graduated and increasingly liberal extension of use of its airspace to foreign airlines, parallels the state's progression towards economic prosperity. Originally agrarian in character, Ireland's economy has changed and diversified. A solid industrial base now exists which has boosted economic growth, generated wealth for the people and created high levels of employment.[20] International air transportation, involving movement of input factors to nodes of production and distribution of manufactured goods to ultimate markets, is an indispensable ingredient in Ireland's policy of promoting industrial expansion and entrepreneurial initiative.

The historical evolution of Ireland's bilateral Air Service Agreements records a progressive erosion of a protectionist ethos - primarily designed to protect the 'stop-over' status of Shannon Airport - towards acceptance of the dictates of market forces, a development which has recently culminated in the Irish State's commitment to end Shannon's stop-over status by 2008. With respect to commercial regulation, the State has effectively converted the bilateral air services agreement into a carefully calibrated tool of economic planning which, in conjunction with other elements of the States' dedicated Business Plans for the development of Irish aviation, has facilitated the State in promoting its strategic goals of building a dynamic requirements-driven, results-oriented air transport industry.[21]

E THE EUROPEAN UNION – DIVISION OF COMPETENCE IN AIR TRANSPORT MATTERS BETWEEN MEMBER STATES AND THE EUROPEAN UNION

The Treaty of Rome, which gave birth to the European Economic Community, contains provisions empowering the Community to prescribe regulation for the governance of international transport, specifically directing the Council to formulate measures in the context of a single trade policy. The relevant provisions – applicable to transport by rail, road, waterway and air – are contained in Title IV of the Treaty. The European Court of Justice has held that whilst Article 84(2) of the Treaty does not establish an external Community competence in the field of air transport, it does make provision for a power for the Community to take action in that area albeit one that is dependent on there being a prior decision by the Council. The Court further held that the

[20] According to Dukes and Sorensen (n 1) 26: 'After a decade of sustained economic growth, employment in Ireland in 2004 was higher than at any time since the foundation of the State. Irish living standards exceed the EU average. Government indebtedness has been reduced from the highs of the 1980s and now ranks second lowest in the euro-zone…The *Medium-Term Review 2003-2010*, carried out by the Economic and Social Research Institute (ESRI) projected an average annual GNP growth of 5.4% for the Irish economy in the second half of this decade.'

[21] 'Cullen announces a new Ireland Canada Air Transport Agreement' issued by Department of Transport 28 April 2007; Statement 'Plans by Aer Lingus or other carriers to close down existing services or open new air routes in the future with particular reference to both long and short haul services' Dáil Debate 13 May 2008.

Community's competence to conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted within the framework of those provisions by the Community institutions. A consequence of this principle is that the exclusive external competence of the Community, arising by virtue of the adoption of internal measures, also has application in the context of Article 84(2) of the Treaty which confers upon the Council the power to decide 'whether, to what extent and by what procedure, appropriate provisions may be laid down' for air transport, including, therefore, for its external aspect. Drawing on and affirming its earlier jurisprudence, the Court asserted that the competence of the Community's institutions in the area of transport arises from the parallelism of internal and external rules and to the extent that common rules had come into being in relation to any aspect of transport, the competence of Member States to negotiate bilateral agreements was correspondingly attenuated. However, the Court pointed out that not all transport matters are covered by common rules and a correct identification of the internal rules in relation to air transport would, at the same time reveal the residual competences reserved to Member States.[22]

F EU TRANSPORT LEGISLATION

Reflecting the Community's aims of harmonising Member States' social and economic policies, Articles 74 to 84 of the Rome Treaty codify a framework to underpin the work of the Council in formulating rules applicable to international transport to or from the territory of a Member State and in specifying conditions may operate transport services. The paramount objective of the Treaty Articles, with respect to air transport in the Community, is to prohibit discrimination manifesting itself in the form of carriers charging different rates and imposing different conditions for the carriage of the same goods over the same transport links on grounds of the country of origin or of destination of the goods in question. EU air transport legislation today is a hybrid instrument sourced in a labyrinth of regulations, directives and court decisions and encompassing subject-areas as diverse as economic policy, air traffic management, environmental matters, passenger protection and safety and security. In addition to codifying a legislative and regulatory framework for the law-creating organs of the Community, Treaty Articles have also been invoked by the European Commission in support of claims against Member States operating in breach of the Community's air law provisions.

1 The Three Air Transport Packages

Before 1987 the aviation markets in the European Union were nationally regulated and designed to protect the Member States' indigenous aviation industries. Taking cognisance of the fact that the Treaty articles governing competition are

[22]*Commission of the European Communities v Republic of Austria* ECJ (5 November 2002) et al, Case C-466/98; Case C-467/98; Case C-468/98; Case C-469/98; Case C-471/98; Case C-472/98; Case C-475/98; Case-C 476/989.

applicable to air transport, the Council of the European Commission in the years between 1987 and 1993, adopted a series of 'packages' aimed at removing constraints on the development of the air transport sector. The first[23] and second[24] packages were introduced in 1987 and 1990 respectively, initiating various changes touching on, inter alia, air fares and capacity. The 'third package' of measures, introduced in 1993,[25] marked a high-water mark in the curve of economic liberalisation, intending to develop a bundle of freedoms equating to 'cabotage' rights. The package comprised three legislative measures, the most significant of which was Regulation No 2408/92 requiring Members States to grant access to Community carriers to intra-Community air routes falling within Member States' national boundaries. Freedom of air carriers to fix air fares, both in respect of chartered and scheduled flights, was introduced by Council Regulation 2409/92 eliminating the requirement on air carriers to secure approval for their air fare structures from the national regulatory authorities.

2 Competition Law / The 'Open Skies' Judgments

The Open Skies Judgments refer to a series of judgments handed down by the Court of Justice on 5 November 2002 arising from proceedings initiated by the European Commission against eight EU Member States, the effect of which was to invalidate certain provisions in bilateral air services agreements concluded by the eight States with the United States.[26] The Court of Justice ruled that the 'nationality' clauses in the eight air services agreements which accorded traffic rights solely on foot of the carrier's nationality constituted an infringement of Article 52 (now, after amendment, Article 43) of the EC Treaty which prohibits restrictions on the freedom of nationals of a Member State to become established in the territory of another Member State.

In the Commission's case against seven of the eight Member States,[27] the Court found that, by entering into international commitments concerning fares and rates to be charged by carriers of non-member countries on intra-Community routes, the States had encroached on the exclusive competence of the Community arising by Regulation No 2409/92 which prohibits air carriers of non-member countries which operate in the Community from introducing new products or fares lower than the one existing for identical products.

Similarly, the Court ruled that provisions in the 1995 Air Services Agreements of the same seven Member States with the United States in relation to the use by the United

[23] First package comprised three regulations Commission Regulation 2671/88; Commission Regulation 2672/88; Commission Regulation 2673/88.

[24] Second package comprise two directives Council Directive No 87/601/EEC (OJ 1987 L 374/12) and Council Decision No 87/602/EEC (OJ 1987 L 374/19).

[25] Third package comprised three regulations Commission Regulation 2407/92; Commission Regulation 2408/92; Commission Regulation 2409/92.

[26] Case C-466/98; Case C-467/98; Case C-468/98; Case C-469/98; Case C-471/98; Case C-472/98; Case C-475/98; Case-C 476/989.

[27] The United Kingdom was not found to have breached the exclusive external competence of the Community.

States of Computer Reservation Systems in those States had again infringed an exclusive competence of the Community arising by virtue of Regulation 2299/89,[28] which confers on the Community an exclusive competence to contract with non-member countries in relation to the use of CRSs in its territory.

The judgments of the Court of Justice have profound implications not only for the eight Member States involved in the 'Open Skies' litigation but also for all Member States who have negotiated bilateral air services agreements with third countries. Arising from Article 10 of the Treaty, which requires Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community, Member States upholding ASAs which infringe EU law are required to denounce the agreements in order to ensure compliance with the Judgments of the European Court. It is clear that Ireland's web of bilateral air services agreements, variously containing provisions touching on ground handling, price leadership and ownership and control, are repugnant to EU law, as clarified by the ECJ in the 'Open Skies' Judgment. Ireland is, therefore, necessarily, placed under an obligation to bring her ASAs into line with EU law.

G RELATIONS WITH THE UNITED STATES

In April 1995, the Commission sought a mandate from the Council to negotiate an air transport agreement with the United States.[29] In June 1996, the Council, on foot of the request, made a decision to grant the Community a limited mandate to negotiate with the United States in relation to defined issues, namely, competition rules, ownership and control of air carriers, CRSs, code-sharing, dispute resolution, leasing, environmental clauses and transitional measures.

On 22 March 2007, the European transport ministers unanimously endorsed a first stage air transport agreement between the EU and the United States of America. The EU-US aviation agreement is intended to create a new economic model for international

[28] Community Regulation 2299/89 introduced a code of conduct for computerized reservation systems.

[29] In the early 1990s, the Commission had launched a number of initiatives to secure mandates from the Council to negotiate air transport agreements with a view to replacing Member States' Air Services Agreements with EU/USA agreements. The first application for a negotiating mandate was lodged on 23rd February 1990 and was based on a proposal for a consultation and authorisation procedure for agreements in relation to commercial aviation relations between Member States and third countries. Reflecting the view of the Commission that the conclusion of international air transport agreements fell within the scope of commercial policy, the proposal was based on Article 113 of the EC Treaty (now, after amendment, Article 133 EC). A second request, based on a slightly modified proposal and, once again, framed with reference to Article 113, was lodged with the Council on 23 October 1992. Both applications were refused, the Council citing the following grounds for its decision: (i) Article 84(2) constituted the proper legal basis for the development of an external policy on aviation; (ii) Member States retained their full powers in relations with third countries in the aviation sector, subject to measures already adopted or to be adopted by the Council in that domain and (iii) negotiations at Community level with third countries could be conducted only if the Council deemed such an approach to be in accordance with the common interest, on the basis that they were likely to produce a better result for the Member States as a whole than the traditional system of bilateral agreements

aviation converting the aviation industry into a global enterprise responsive to normal economic forces. Entering into force on 30 March 2008 the Agreement will govern sixty per cent of world air traffic and will generate benefits for passengers, economies and airline operators.

The traffic rights exchanged between the US and the EU in the context of the Agreement include the right for airlines of the United States to perform air transportation from points behind the United States via the United States and intermediate points to any point or points in any Member State and beyond and for airlines of the European Community to perform air transportation from points behind the Member States via the Member States and intermediate points to any point or points in the United States and beyond. The parties are further empowered to operate flights in both directions, to combine different flight numbers within one aircraft operation, to serve behind intermediate and beyond points and points in the territories of the parties in any combination and in any order, to transfer traffic from any of its aircraft to any of its other aircraft at any point and to combine traffic on the same aircraft regardless of where such traffic originates. The Agreement, embodying conditions for exercise of the new freedoms, provides that each party must permit each airline to determine the frequency and capacity of the international air transportation it offers based upon market considerations and must, in consequence, refrain from unilaterally limiting the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other party.

H IMPLICATIONS OF EU MEMBERSHIP ON IRELAND'S REGULATION OF ITS AVIATION INDUSTRY

The impact of EU regulation on air transport in Ireland will be discussed under three headings; (1) fares, capacity and route access; (2) the removal of national ownership and control provisions in ASAs; and, (3) the EU/US Free Trade Area.

1 Fares, Capacity and Route Access

The EU liberalizing packages have promoted an open trading environment in which air carriers are now free to fix fares and to undercut competitors. The combined effect of the measures has been to force national flag carriers to reduce operating costs, resulting in lower prices for the consumer. The process of restructuring has put considerable pressure on Ireland's national flag carrier, Aer Lingus, forcing it to adopt a range of stringent economic measures in order to become competitive. However, the net effect of the reforms has proved beneficial for the airline as, in the absence of the restructuring measures it has been forced to implement, it is unlikely that the airline would have weathered the global recession which occurred in 2000-2002. It is significant that the Irish-based carrier, Ryanair, rose to prominence during the EU liberalisation process; the economic recession in 2002 affording it the opportunity to consolidate itself as a leading low cost carrier.

The liberalizing measures have, as predicted, fostered the formation of alliances between flag carriers, a development which poses a threat to competition principles potentially affecting airfare structures. However, the entry into the market of low cost carriers, facilitated by the liberalization process, has counteracted the effects of consolidation. Ryanair and Easyjet are diversifying Ireland's air services and have succeeded in deepening their penetration of the traditional markets of the flag carriers. Low cost carriers now account for over 50% of the air transport market in Europe.[30]

The combination of Ireland's increasing economic prosperity and the liberalising measures adopted by the European Union have facilitated a situation where passenger throughput at Irish airports rose exponentially after 1993, more than doubling in the period 1993-2002.[31] Additionally, in the period 1990 to 2002, the route structure of the Irish aviation industry expanded and diversified. In 1990, carriers from Dublin airport flew to 46 destinations; by 2002, the number had reached 67. Domestic flight destinations in Ireland jumped from three to nine. In the period 1992 to 2002, the number of flight destinations from Shannon Airport rose from 15 to 23.[32]

2 Effective Ownership and Control

The finding by the ECJ that the effective ownership and control provisions in ASAs infringed EU law (thereby necessitating their removal), has removed a major constraint which has impeded the development of international aviation. As Havel observes; '[t]his chauvinistic preference for national ownership has had a significant corollary that sets airlines apart from most other transnational economic enterprises: they have not become multinational corporations.'[33] The ownership/control provisions effectively precluded the possibility of cross-border investments, mergers and acquisitions. The ECJ judgement has created a new range of possibilities for the way in which airlines are owned and controlled. An example of how Ireland has benefitted from the new liberal regime is that Aer Lingus has, for the first time, established a base outside of Ireland. The airline announced in August 2007 that it intended to base three new aircraft at Belfast International Airport and launch eight new routes including Amsterdam, Rome, Geneva, Budapest and Malaga.

3 US/EU Open Aviation Area

The authors of the Brattle Report[34] summarised the economic benefits arising from a projected EU/US Open Aviation Area. The various points made by the authors are

[30] *Dukes & Sorensen* (n 1) 9.
[31] ibid 28.
[32] ibid.
[33] *Havel* (n 1) 63.
[34] The European Commission requested the Brattle Group to undertake a study into the effects of an Open Aviation Area which study was published in December 2002.

highlighted below followed by an analysis of how the open aviation market has enabled the Irish aviation industry to restructure and achieve expansion.

(a) More efficient airlines would replace less efficient ones, or less efficient airlines would adopt the practices of more efficient ones, leading to significant costs savings and industry efficiency.

It has already been noted that the EU liberalizing packages had forced Aer Lingus to restructure and become an efficient industry operator, developing itself into a cost-efficient point-to-point carrier. The airline company, in the intervening years expanded its route structure, developing 48 new routes, its unprecedented achievement prompting its decision to leave the One World Alliance (OAA), whose percentage of flights fell from 14% to 7% between 2002 and 2006. In the wake of the conclusion of the OAA, Aer Lingus in March 2007, announced its intention to introduce additional long-haul flights to the United States and later that year commenced flights to Orlando, San Francisco and Washington DC. As part of its ongoing commitment to reducing costs, Aer Lingus in 2008, embarked on a cost-saving programme to reduce its payroll by €50 million, the measures adopted included the laying off of 1500 workers, cutting back on expenditure on advertising, distribution, airport costs and professional fees and the outsourcing of ground operations, cargo and catering services.[35]

(b) Industry restructuring and consolidation would provide air carriers with opportunities to exploit size-related economies, leading to further efficiency gains.

Discussions on inter-carrier mergers and take-overs have already taken place, British Airways declaring an interest in acquiring KLM and Swissair expressed a similar interest in Sabena.[36] It has been predicted that the process of liberalisation will continue to fuel consolidation ultimately producing a scenario in which only five airlines will survive.[37] According to Dempsey,'bankruptcies, consolidations, and mergers. … [will arise resulting] in a highly concentrated group of multinational European megacarriers, all utilizing hub-and-spoke operations and linked to only a few sophisticated computer reservations systems.'[38] However, it is predicted that Ireland, arising from its geographical separateness and its small share of the air transport market will probably be able to insulate itself from the worst effects of consolidation. To brace itself for the increased competitive pressures, the Irish government decided to privatize Aer Lingus in 2006 and, on 2 October that year, the company was floated on both the Irish and London Stock Exchanges. The company quickly received an injection of equity in the order of half a billion euro strengthening its financial stability and enabling it to undertake its ambitious programme of expansion. It has been suggested that another possible method for combating consolidation is for Ireland to develop air freight services.

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[35] See report at <http://archives.tcm.ie/irishexaminer/2008/10/08/story74236.asp> (9 July 2009).
[36] *Dukes & Sorensen* (n 1) 185.
[37] See *Dempsey* (n 1) 196 citing Jan Carlzon, former president of SAS.
[38] ibid 186.

(c) The dismantling of barriers to integration between EU and US carriers will promote inter-carrier cooperation resulting in price synergies on transatlantic interline routes. As the Brattle Group observes:

> Without coordination each carrier will set the fare for its leg of the flight without considering how it will affect demand for the other legs. If the same carriers are allowed to coordinate, each will have an incentive to set lower fares so as to increase combined profits.[39]

Aer Lingus currently operates codeshare agreements with Jetblue, American Airlines, KLM and British Airways and, in September 2008, it entered into a codeshare agreement with Aer Arann. The various codeshare agreements in place permit Ireland's feeder services and regional airlines link into a variety of hub and spoke systems thereby enabling Ireland' carriers achieve worldwide connectivity. On 8 April, Aer Lingus and United Airlines concluded a codeshare agreement which will give Aer Lingus access to over 200 destinations on United Airlines' route network in exchange for which United Airlines passengers have been granted access to Aer Lingus' Irish and European destinations.

(d) Output Expansion.

According to the Brattle Report, structural changes in markets would occur in an EU/US Open Aviation Area through a combination of three factors: costs savings, price reduction and removal of output restrictions[40] in bilateral agreements. Extrapolating from the data showing the effects of partial liberalisation of the EU-US market in the 1990s, Brattle estimates that a projected Open Aviation Area would result in an additional 2.2 million passengers travelling each year between the United States and the UK, Ireland, Greece and Spain. This result would inevitably promote competition and foster consumer welfare. This output expansion has already occurred in Ireland and has been noted above.

I RECESSIONARY TIMES

The recent downturn in the economy has resulted in job losses in the air transport industry and a significant reduction in passenger throughput in airports. Compounding the problems is the increase in oil prices. It is predicted that the current economic conditions are likely to accelerate the process towards consolidation in the aviation industry enabling airline companies to interlink their networks and achieve price

[39] European Commission Brattle Group Report *The Economic Impact of an EU-US Open Aviation Area December 2002* iv <http://www.brattle.com/_documents/UploadLibrary/ArticleReport2198.pdf > (8 July 2009).

[40] The US bilateral air services agreement with four EU states - the UK, Ireland Spain and Greece - are characterised by 'output restrictions', that is, they limit the volume of traffic passing between the two countries.

synergies. As noted, deregulation has forced Aer Lingus to undergo radical cost-restructuring and to develop code-share agreements with other airlines, thereby enabling it to become a competitive player in the European and international air transport market. EU law prohibits government from subsidising loss-making airlines, a factor which also certainly precipitated the decision of the Irish government to privatize Aer Lingus. The effects of the decision have produced beneficial effects for the airline. The massive injection of equity administered to Aer Lingus has enabled the airline to fulfil its expansionary objectives and to fortify itself against the effects of recession. Another factor auguring positively for the prospect of the survival of Irish airlines, is that, arising from the process of liberalization, Irish airlines are now permitted to provide transport services within other EU member states. This measure has enabled low-cost carriers such as Ryanair to expand and diversify their services. However, it is arguable that the current legal framework, predicated on principles of free trade and unfettered competition, is excessively rigid precluding a nuanced response on the part of government to the plight of smaller, regional airlines. Doubts have been expressed whether, in the absence of state aid, small, regional airlines such as Aer Arann will be able to survive the current recession, which is being compounded by rising oil prices and growing competition on its domestic routes from the low-cost carrier, Ryanair.[41]

J CONCLUSION

It has been demonstrated that EU assumption of competence in air transport law has, in fact, liberated the Irish state from the constraints imposed by the Bermuda bilateral order which, arising as an outgrowth of the failure of the Chicago Conference to create a regulatory framework for commercial aviation, forced the Irish air industry into a straitjacket inhibiting restructuring and growth. The dismantling of structures inimical to the development of Irish aviation in favour of a new open market regime in which the participating actors are permitted to regulate the economic incidents of commercial aviation has transformed Irish aviation, boosting trade, business and tourism. Augmenting the new liberal framework is the EU's competition law regime which ensures that, in relation to any type of consolidation in the aviation industry arising from inter-carrier alliances and mergers, the participants will be required to repudiate any type of restrictive practice or abuse of a dominant position which could threaten the operation of free market principles.

[41] 'Breen questions Aer Arann and Ryanair on their future plans for Shannon Airport' See exchanges of Pat Breen TD with CEO of Ryanair, Michael O'Leary, at meeting of Council of Europe 16 July 2008 <http://www.patbreen.ie/2008/07/16/302/> (8 July 2009).

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ACCESS TO JUSTICE AND THE IMPACT OF DELAY ON MIGRANT WORKERS IN IRELAND

Elaine Dewhurst *

A INTRODUCTION

An essential characteristic of any employment dispute resolution procedure is the assurance that the process will guarantee an adequate remedy to the affected party. The current structures of employment dispute resolution in Ireland provide for the remedies of compensation, reinstatement and reengagement, all of which could be considered to be adequate remedies for an afflicted worker.

However, the substantial delays in the employment dispute resolution procedures in Ireland has meant that many migrant workers,[1] whether from the EU or third countries, find that the remedies which they can be offered on the determination of their dispute are substantially reduced. As third country national migrant workers depend on the existence of the employment permit for their permission to remain in the State, the termination of their employment contract, and as a consequence their employment permit, inevitably means the termination of their residence in Ireland. Similarly, EU migrant workers also find that the termination of their employment contract can often signal the end of their stay in Ireland should they be unable to find alternative work. Due to the delay in hearing their case before the tribunals and other dispute resolution bodies and the lack of social welfare payments due to the habitual residence rule,[2] many migrant workers find that they will have returned to their sending state before the determination of the hearing and as such the only available remedy open to the tribunal is that of compensation.

This article explores some solutions to this particular problem in an effort to restore the concept of an adequate remedy back into the employment dispute resolution process. The article will examine the possibility of introducing interim measures to enable the migrant worker to remain in the State until the final hearing of their case and to ensure that other remedies are available to them. This is relevant to the situation of all migrant workers. However, the situation of third country nationals is more pressing in this context and so the article will also explore the benefits of bridging visas for such

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[1] In this article, a migrant worker is defined as any non-national who is in Ireland with the intention of partaking in employment. This includes EU, EEA (European Economic Area) and Swiss nationals, accession country nationals and third country nationals who are in Ireland on working permits such as employment permits, green card permits, intra-company transfer schemes, spousal/dependant permits and graduate schemes.

[2] Under the habitual residence rule, the Department of Social and Family Affairs are not liable to pay any social welfare entitlements to a person unless they have been resident in the State in the past and can show a prospect and expectation of residence in the future. The Social Welfare (Miscellaneous Provisions) Act 2004 section 17 and Schedule 1 which inserts section 208A into the Social Welfare (Consolidation) Act 1993 provides that a person must be present in the State or in the common travel area in the past two years in order to be considered habitually resident and entitled to certain benefits.

workers. It will be determined that while all these solutions are short term, a longer term solution such as the development of a fast-track procedure for employment disputes with adequate protections for employers would be a more effective solution.

B A BRIEF OVERVIEW OF EMPLOYMENT DISPUTE RESOLUTION IN IRELAND

The employment dispute resolution landscape in Ireland is relatively complicated. Depending on the employment dispute in issue an employee can make a complaint to one of the various employment rights bodies in existence in Ireland. Complainants face a difficult task in deciding which employment body they should address their concern to due not only to the wide variety of dispute resolution bodies but also to the different pieces of legislation covering various claims.

Complaints in relation to certain rights can be made to the Rights Commissioner Service.[3] This service can investigate the complaint and issue a non-binding recommendation or a decision depending on the legislation under which the complaint is made. An appeal is available either to the Employment Appeals Tribunal or the Labour Court depending on the legislation under which the complaint is made. If a complaint does not fall within the Rights Commissioner Service, a claim may lie to the Employment Appeals Tribunal.[4] Alternatively where a claim relates to alleged discrimination on any one of nine grounds listed in the Employment Equality Acts 1998 & 2004, in the course of employment or application for employment, a complaint can be made to the Equality Tribunal.

[3] Adoptive Leave Acts 1995-2005; Carers Leave Act 2001; Competition Acts 2002-2006; Employees (Information & Consultation) Act 2006; Employment Permits Act, 2006; Industrial Relations Acts 1969-1990; Industrial Relations (Miscellaneous Provisions) Act 2004; Maternity Protection Acts 1994-2004; National Minimum Wage Act 2000; Organisation of Working Time Act 1997; Parental Leave Act 1998; Payment of Wages Act 1991; Protection of Employees (Fixed-Term Work) Act 2003; Protection of Employees (Part – Time Work) Act 2001; Protection of Young Persons (Employment) Act 1996; Protections for Persons Reporting Child Abuse Act 1998; Safety, Health and Welfare at Work Act 2005; Terms of Employment (Information) Act 1994; Unfair Dismissals Acts 1977-2005; European Communities (Protection of Employment) Regulations 2000; European Communities (Safeguarding of Employees Rights on Transfer of Undertakings) Regulations 2003; European Communities (European PLC) (Employee Involvement) Regulations 2006.

[4] Redundancy Payments Acts 1967 to 2007; Minimum Notice and Terms of Employment Acts 1973 to 2001; Unfair Dismissals Acts 1977 to 2001; Protection of Employees (Employers' Insolvency) Acts 1984 to 2001; Organisation of Working Time Act 1997; Payment of Wages Act 1991; Terms of Employment (Information) Act 1994 and 2001; Maternity Protection Act 1994; Adoptive Leave Act 1995; Protection of Young Persons (Employment) Act 1996; Parental Leave Act 1998; Protections for Persons Reporting Child Abuse Act 1998; European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003; European Communities (Protection of Employment) Regulations 2000; Carer's Leave Act 2001; Competition Act 2002; The Civil Service Regulations (Amendment) Act 2005.

C DELAY IN THE EMPLOYMENT DISPUTE RESOLUTION PROCESS

One of the most significant deficiencies associated with the employment dispute resolution process in Ireland is the fact that the procedure, from the first complaint, to the final hearing is a very lengthy one that is subject to substantial delays. At present, applicants can expect to wait for up to eighteen months for the final determination of their case. The effect such delays can have on migrant workers, in particular those employed on employment permits or visas, is possibly best illustrated by examining the situation which arose in November 2000, when over 1000 Turkish workers employed by GAMA Construction Ireland Limited,[5] a subsidiary of GAMA International Building Contracting Incorporated, were found to have been subjected to illegal employment practices amounting to exploitation.[6]

After a strike that lasted seven weeks and an unsuccessful conciliation attempt by the Labour Relations Commission, the Labour Court exercised its jurisdiction under section 26(5) of the Industrial Relations Act 1990 to investigate the dispute. The strike was discontinued for the duration of the investigation. Both parties presented conflicting claims to the Labour Court.[7] The unions argued that the workers had worked in excess of 80 hours per week for a basic rate of €2.20 per hour, with hours in excess of 248 per month paid for at €3.00-€3.30 per hour, that a number of workers such as surveyors, canteen staff, cooks and van drivers were paid below the legal minimum rate and that the Turkish workers had neither a proper time recording or payslip system. The company refuted these allegations and argued that the workers in dispute were making 'grossly exaggerated claims of overtime,'[8] that non registered employment agreement workers were properly paid in accordance with their contracts of employment, and that regard must be had to accommodation and food provided by the company to the workers which was over and above their basic salary, plus travel costs paid on their behalf by the company and that the company had put in place a more comprehensive system for recording hours of work and ensuring that no further disputes similar to the current one could arise in relat ion to hours.

Due to this striking difference of opinion the Labour Court explored the possibility of embarking upon a full investigation of all factual matters in dispute or alternatively to seek to find an industrial relations solution to the issue without reaching a conclusion as to the veracity of each sides arguments in the case. For various reasons, the

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[5] Hereinafter referred to as 'GAMA'.

[6] O'Connor 'Migrant Workers suffer most because of a poorly resourced labour inspectorate' *SIPTU News Online* http://www.siptu.ie/print/PressRoom/NewsReleases/2004/Name,2014,en.html (14 July 2009); Newman 'GAMA workers await agreement confirmation' *Irish Times* (30 May 2005); Robinson 'Minister may survive "racist" kebab jibe' *Irish News* (20 May 2005). See also Dooley 'GAMA Staff Threaten Hunger Strike' *Irish Times* (25 May 2005); Fitzgerald 'GAMA workers reject offer to end strike' *Irish Times* (25 May 2005).

[7] CD/05/459 Recommendation No LRC18214 GAMA *Endustri v Services Industrial Professional Technical Union, Union of Construction, Allied Trades and Technicials Opatsi.*

[8] ibid.

parties chose the latter approach. The Labour Court held[9] that each of the workers should be paid a lump sum of €8000 in respect of each completed year of service with the Company and pro-rata in respect of part years. A minimum payment of €2000 should apply. This amount should be paid by the Company without admission of liability and should be accepted by the Union in full and final discharge of all claims by the Union in respect of alleged unpaid overtime. In addition each worker should receive an ex-gratia severance payment equal to one month's salary.[10] On acceptance of these proposals all industrial action should cease and there should be a full resumption of normal working. The workers accepted this recommendation, as did GAMA. However, there was a general consensus that this was an insufficient reward for the work that had been completed and efforts were made to appeal the decision through the courts. However, after the workers were advised that it would take almost eighteen months for the case to be heard before a court, it was decided that they would not pursue this particular option, given that their contracts were due to expire shortly and few of them would have the financial resources to return to Ireland for the hearing.

This particular case demonstrates very effectively the effect the current delays in the court system and in the employment tribunals can have on migrant workers. The Equality Authority has admitted that the assignment of Equality Officers to cases has in some circumstances taken up to three years.[11] The addition of cases of discriminatory dismissals to the remit of the Equality Tribunal in 2004[12] has only sought to heighten this problem, an issue that has also plagued employment tribunals in other countries to a similar extent. Morris has noted that in the UK the progressive extension of the jurisdiction of the employment tribunals has meant that there are now over seventy types of complaint that can be made to an employment tribunal bringing with it a commensurate increase in workload.[13]

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[9] ibid.

[10] ibid. The Labour Court also recommended that in the circumstances of this case the workers should be paid not less than the minimum General Operative rate for the industry and that workers whose rate of pay was less than that amount should be brought up to that rate back-dated to their commencement date subject to a maximum of 12 months retrospection. All workers employed by the Company, regardless of their nationality should clock in and out of work and be issued with pay slips each week which complied with the requirements of the Payment of Wages Act, 1991. There should be no distinction in these matters between workers of Irish or Turkish nationality.

[11] Equality Authority *Annual Report 2005* (Brunswick Press Ltd Dublin 2006) 22.

[12] Under s 46 of the Equality Act 2004 (Ireland) the Equality Tribunal now has jurisdiction to hear cases involving discriminatory dismissals. Prior to this Labour Court only had jurisdiction to deal with such cases.

[13] Morris 'Developments in Workplace Dispute Resolution: A Five Country Study: Britain: Britain's New Statutory Procedures: Routes to Resolution or Barriers to Justice?' (2004) 25 Comparative Labour Law and Policy Journal 477, 477-478.

D THE EFFECT OF DELAY

1 The Difficulties in Making out a Case

Many migrant workers, particularly those operating on employment permits and who have made claims for discriminatory dismissals, find that they are unable to attend their own case because they no longer have permission to reside in the state.[14] While the non-attendance of the complainant is not necessarily fatal to a case for discrimination, particularly where they have managed to secure representation on their behalf, it does make it more difficult for the Tribunal to determine whether or not the complainant has made out a *prima facie* case of discrimination.

2 The Reduction in the Remedies Available

The most significant effect of these delays is that there is a reduction in the remedies that will be available to a migrant worker. Even if a complainant is successful in having a case found in their favour in their absence, their remedies are restricted to compensation in the form of damages. Unfortunately, due to the fact that the worker is no longer available for reinstatement or re-engagement due to their absence from the State, the discretion of the tribunal in determining a suitable remedy for the employee is fettered. Remedies such as reinstatement and re-engagement are obsolete and any orders for the employer to provide equal treatment or payment would be ineffective. Therefore the only remedy available is compensation and while this may be appropriate in the circumstances, it could not be said to be adequate. It also means that the culture of compliance, which the equality legislation was developed to achieve, is being severely undermined.[15]

E COMPATIBILITY OF THE CURRENT SYSTEM WITH EU LAW

The current situation with its significant delays could be contrary to the provisions of EU equality law.[16] European equality legislation requires that remedies for discriminatory treatment must 'guarantee real and effective judicial protection, have a deterrent effect on the employer and must in any event be adequate in relation to the damage sustained.'[17] Article 7 of the Race Directive insists that Member States establish

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[14] *Ms Nkone Sarah Sapuru v Mount Carmel Hospital* DEC-E2004-021. The applicant was a theatre nurse who was dismissed from her position allegedly unfairly. Unfortunately she could not return from South Africa for the case so the union appeared on her behalf. Her claim, however, was unsuccessful. The Court noted that the claimant's failure to appear meant that she had '*failed to establish a primafacie claim of discrimination and victimisation*.' Similar events occurred in *Mr Omar v Aer Rianta* DEC-E2005-041.

[15] Equality Authority (n 11).

[16] ibid.

[17] Case C-180/95 *Nils Draehmpaehl v Urania Immobilienservice DHC* [1997] ECR I-02195 at para 25. This case involved the interpretation of Article 6 of Council Directive 76/207/EEC of the 9 February 1976

administrative and / or judicial procedures for the enforcement of obligations for persons who have suffered discrimination. The ECJ has stated that this guarantee 'acknowledges that [such persons] have rights of which they may avail themselves before the courts.'[18]

1 Is Compensation a Sufficient Remedy?

It is questionable therefore, whether compensation is a sufficient remedy for migrant workers who have been unfairly dismissed. There is authority in the UK for the proposition that compensation is an appropriate remedy for instances of discrimination but may not be appropriate in cases of unfair or discriminatory dismissal.[19] The process of employment dispute resolution should aim to compensate the worker for the loss of a job and this is why the remedies of reinstatement and re-engagement have been made available to them at a statutory level. It is doubtful whether compensation alone is sufficient to compensate the migrant for the loss, not only of a job, but a way of life in another country.

Morris would argue that compensation is the only appropriate remedy in the case of dismissals as in such cases, 'neither the employer nor the employee is usually interested in a continuation of the contract and the compensation or other remedies seem more appropriate than reemployment.'[20] However, it is arguable that this is an outmoded and unnecessary view of the employment relationship. The role of employer and employee has drastically changed in recent years and the traditional view of the employment relationship as being akin to that of a master and servant is no longer relevant in many professions.[21] For this reason, it is appropriate to examine other potential solutions to this problem.

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on the implementation of the principle of equal treatment for men and women, as regards access to employment, vocational training and promotion and working conditions (OJ 1976 L39, p 40). Article 6 of that Directive refers to the need for Member States to introduce into their national legal systems necessary measures to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process. This guarantee is repeated in other equal treatment directives such as Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (29/7/EEC) (OJ 1979 No L6/24); Council Directive of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (86/378/EEC)(OJ 1986 No L225/40)(as amended by corrigendum 1986 L283/27 and Directive 96/97 (OJ No L46/20 1997 L241/8); Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L303/16) Article 9. Most importantly from the perspective of migrant workers, the Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L180/22) states this in Article 7.

[18] Case 14/18 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 01891.

[19] *Bakersfield Entertainment Ltd v Church and Stuart* [2005] UK EAT/0523/05 ZT.

[20] *Morris (*n 13) 478-479.

[21] See Dickens 'Re-employment of Unfairly Dismissed Workers: The Lost Remedy' (1981) 10 Industrial Law Journal 161.

F THE POTENTIAL SOLUTIONS

It is evident that the serious delays at the employment tribunals present significant obstacles to migrant workers at the remedial stage of employment dispute resolution. One possible solution would be to prevent the termination of the contract of employment in the first instance by the use of interim relief. This next section examines the various ways in which this could be achieved.

1 Grant Interim Relief

The Equality Authority has suggested that interim hearings or interlocutory relief pending a full hearing of the case should be available to applicants to minimise the effects of the delays on proceedings.[22] In effect this would amount to the reinstatement, re-engagement or the continuation of a contract of employment pending the full hearing of the case before the tribunal.

(a) What is Interim Relief and when is it Granted?

Interim relief is essentially a remedy in the form of a court order addressed to a particular person that either prohibits him or her from doing or continuing to do a certain act[23] or orders him or her to carry out a certain act.[24] In a normal case before the civil courts, the applicant must make out a legal case in connection with the claim it has instituted and it must be shown that the balance of convenience favours the grant of the interim relief.[25] The essential aim of an interlocutory injunction in an employment law context would be to preserve the status quo between the parties to the dispute until the final determination by an employment tribunal so as to prevent the applicant suffering irreparable harm as a result of the delay in hearing the proceedings.[26]

The current use of interim relief in Ireland is alien to the employment dispute resolution process. Such remedies are normally granted in civil cases by the courts and are discretionary. Most importantly, it will not be granted where damages would be a sufficient remedy. It appears from the case law governing wrongful dismissal that the traditional relief at common law for unfair dismissal is a claim for damages and those other remedies, which may be sought, are in aid of this remedy and have no existence

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[22] Equality Authority (n 11).

[23] This is referred to as a prohibitory injunction.

[24] This is referred to as a mandatory injunction.

[25] *Campus Oil Ltd v Minister for Industry and Energy (No 2)* [1983] IR 88. Chief Justice O' Higgins, at 7, stated that 'the test to be applied is whether a fair bona fide question has been raised by the person seeking the relief. If such a question has been raised, it is not for the Court to determine that question on an interlocutory application; that remains to be decided at the trail. Once a fair question has been raised… then the Court should consider the other matters which are appropriate to the exercise of its discretion to grant interlocutory relief.' The Supreme Court in Ireland was following the decision of the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. These principles were applied by the Supreme Court in subsequent cases such as *Westman Holdings Ltd v McCormack* [1992] 1 IR 151.

[26] Delaney *Equity and the Law of Trusts in Ireland* (3rd edn Thomson Roundhall Dublin 2003) 468.

independent of it.[27] The difference, however, with a scheme which would be established in the employment tribunals would be that they are entitled under the legislation to order reinstatement, re-engagement or damages. As will be discussed below, in the case of migrant workers, damages would not adequately compensate third country national migrant workers were they to lose their permission to work in Ireland as this would effectively terminate their permission to remain in the country and any hope of establishing their case at a final hearing. Similarly workers from within the EU may not be able to afford to remain in Ireland pending the final determination of the Tribunal.

(b) Is there a Fair and *Bona Fide* Question to be Tried?

In considering whether to grant interim relief, the tribunal could firstly, insist that the applicant establish some legal grounds on which to institute proceedings, but not necessarily, that this would be successful at the final hearing.[28] This is the basis upon which interim relief is granted to employees in the UK by the employment tribunals.[29] Where an employee claims that they have been unfairly dismissed,[30] they then have seven days to apply to the employment tribunal for the application of interim relief pending trial.[31] Where the employment tribunal is satisfied, that on the final hearing it will most probably be established that the dismissal is unfair,[32] the tribunal will ask the employer whether or not they are willing to reinstate the employee, or in the alternative to re-engage that employee on the same terms and conditions as their previous contract of employment.[33] If the employer agrees to this, then the tribunal will order that such interim relief be granted.[34] If the employer refuses or does not attend this interim hearing, the tribunal will make an order that the employee's contract of employment will continue in operation pending the final hearing in the case.[35]

The employee also has a power of veto over the remedy granted[36] and where the employee refuses to accept either reinstatement or re-engagement pending trial and the tribunal considers this refusal reasonable,[37] the tribunal may order that the contract of employment be continued until the final hearing.[38] An order that the contract of employment be continued essentially means that the employee will continue to be paid until the final hearing and the time will be regarded as continuous employment with the employer.[39] Any sum paid by the employer to the employee during this time may go

[27] *Parsons v Iarnrod Eireann* [1997] ELR 203.
[28] *European Chemical Industries Ltd v Bell* [1986] ILRM 345.
[29] This is granted under the Employment Rights Act 1996 (UK) sections 128-132.
[30] Employment Rights Act 1996 (UK) section 128(1).
[31] Employment Rights Act 1996 (UK) section 128(2).
[32] This is very close to a determination that there is a fair and bona fide question to be tried. See Employment Rights Act 1996 (UK) section 129(1).
[33] Employment Rights Act 1996 (UK) section 129(3) (a) and (b).
[34] Employment Rights Act 1996 (UK) section 129(5) and (6).
[35] Employment Rights Act 1996 (UK) section 129(9).
[36] Employment Rights Act 1996 (UK) section 129(7).
[37] Employment Rights Act 1996 (UK) section 129(8) (a).
[38] Employment Rights Act 1996 (UK) section 129(8) (a).
[39] Employment Rights Act 1996 (UK) section 130(1) (a) and (b).

towards the discharge of any liability which may be found at the final hearing.[40] Provision is also made for variation or revocation of the order at any time by either party.[41]

(c) Does the Balance of Convenience Favour the Grant of the Interim Relief?

In Ireland, unlike the situation in the UK, the tribunal could be required to consider whether the balance of convenience favours the grant of the injunction as is required in civil proceedings. In this regard, the tribunal would be entitled to consider the situation which would arise were the injunction to be granted and later to find out that this decision was inappropriate or, on the other hand, what situation would arise were the injunction to be refused but at the final hearing the restriction is found to be valid.[42]

Where the case involves a migrant worker on an employment permit who has been or is about to be dismissed, it is difficult to determine where the balance of convenience would fall. If the injunction was granted and the applicant failed in the tribunal, the employer would have suffered undue prejudice as a result of the case. They would have incurred financial loss as a result of the decision of the court to force the employer to employ a worker who was lawfully dismissed and perhaps the good will and morale of the other employees would also be affected. Due to the fact that it is unlikely that an employment tribunal would expect an employee to give an undertaking as to damages,[43] there is no way in which the employer could be reimbursed with these costs. It could be possible to overcome this by following the example of the UK where some of the money paid out by the employer, goes towards discharging the final liability which the tribunal orders the employer to pay the employee.[44]

Where the injunction is not granted, there is also the significant danger that the court will be deciding the outcome of the case by inaction,[45] as any failure to grant an injunction would mean that the migrant worker would either not have permission to remain in the State or would not have the financial resources to remain and as such would be compelled to leave the State, would be unable to attend the final hearing of their case and even if the decision was made in their favour, they would no longer be able to enjoy the remedies of reinstatement or re-engagement.

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[40] Employment Rights Act 1996 (UK) section 130(5).

[41] Employment Rights Act 1996 (UK) section 131.

[42] Deakin 'Stopping or Preventing Industrial Action in Australia' (2000) 24 *Melbourne University Law Review* 310, notes at 329 that the balance of convenience requires the court to weigh up the risks and benefits of granting injunctive relief.

[43] Due to the fact that the procedure before the employment tribunals is maintained relatively cost-free so as to encourage employees to report unfair treatment, it is unlikely that any interim relief proposals would suggest that the employee should give an undertaking as to damages.

[44] Employment Rights Act 1996 (UK) section 130(5).

[45] The courts are particularly reluctant to do this. See *Dunne v Dun Laoighaire-Rathdown County Council* [2003] 2 ILRM 147 where the court noted that if no relief was granted the court would be effectively deciding the case by inaction since the action would have been completed by the time the case came to trial.

(d) What Kind of Order Could be Made?

The introduction of the provisions in the UK into this jurisdiction would be one possible solution to this issue. The employee could therefore be re-engaged or reinstated pending the final hearing in the case. In this way the migrant worker would not have their employment permit terminated and would continue to have permission to remain in the country. The problem with this form of remedy from a practical and legal perspective is that it is not generally appropriate to force persons to work together when the trust and confidence between the parties has been damaged.[46] The courts, in this jurisdiction, are also reluctant to grant an injunction, which involves an element of ongoing supervision, as such an injunction would require.[47]

The employment tribunals in this jurisdiction do not presently have the power to grant interlocutory relief pending the final hearing of the employment tribunal as they do in the UK. However, examples of how this could be achieved were the tribunals to have such power may be gleaned from the case law involving wrongful dismissal. The courts have been particularly conflicted in such cases. Often they have held that it is completely inappropriate to grant such an injunction, especially where the trust and confidence between the parties has been irreparably damaged.[48] However, in other cases the courts have held that exceptional circumstances existed which favoured the grant of the injunction.[49] It is possible that the tribunal would consider that where a migrant worker will lose or has lost their permission to remain in the State, this would be one of those exceptional cases in which it may be appropriate to order reinstatement or re-engagement of the employee. The courts may also have the jurisdiction to restrain the appointment of another person in place of the plaintiff[50] or to prevent the advertising of a plaintiff's post until the trial of action.[51]

One order which has also been granted in many cases, which is currently available in the UK and which would also be appropriate to migrant workers generally would be to

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[46] *Warren v Mendy* [1989] 1 WLR 853, 867.

[47] *Delaney* (n 26) 506-507. *Cf* the decision of Costello P in *Wanze Properties (Ireland) Ltd v Five Star Supermarket* High Court (24 October 1997) and Geoghegan J in *O'Murchu v Eircell Ltd* (2000) Supreme Court No 336 (21 February 2001).

[48] *Delaney* (n 26) 510.

[49] *Courtney v Radio 2000 Ltd* [1997] 4 ELR 198 (Laffoy J). The Plaintiff was employed as a broadcaster on the radio. Justice Laffoy held that the job was highly specific and did not require a great deal of interaction with the employer. See also *Martin v Nationwide Building Society* [2001] IR 228 where the plaintiff sought reinstatement as a branch manager pending the substantive trial of action. Despite the great deal of trust and confidence required to do the job, Macken J held that this was a case in which the grant of an injunction was appropriate. This was due to the fact that this involved a suspension, which had gone on for far too long, and the employee should be reinstated because of this delay. Similarly in *Howard v University College Cork* (2000) High Court No 3372 P (O' Donavan J.) (25 July 2000) the court held that an injunction was appropriate in a case where the damage to the reputation of the plaintiff would not be adequately compensated by damages were the final trail of action to be found in her favour. Justice O'Donavan noted that it would be extremely difficult if not impossible for the trial court to determine the damages which would adequately compensate the plaintiff were her dismissal found to be unlawful.

[50] *Lonergan v Salter-Townshend* [2000] ELR 15.

[51] *Harkins v Shannon Foynes Port Co* (2001) High Court No 433 P (O'Sullivan J) (29 January 2001).

order that a plaintiff's salary be paid while the trial of action is continuing.[52] Such orders are not confined to those plaintiffs who have established that they would be impoverished until the trial of action although such an assertion would obviously weigh heavily on the mind of the court.[53]

The use of interlocutory relief by the employment tribunals is one option, which would ameliorate the difficulties facing a migrant worker where they are faced with lengthy delays before their case will be heard. There are a number of significant issues, however, which would need consideration before any such scheme could be imposed. Firstly, it must be considered whether damages are an adequate remedy for migrant workers where they have been dismissed and for third country nationals who are forced to leave the State due to the termination of their permission to remain in the State. If it were considered that this is not appropriate, consideration would have to be given to the possible criteria, which should be established for the granting of interlocutory relief. Finally, it must be considered in what circumstances it is appropriate to grant injunctive relief to a migrant worker to be maintained in employment pending the hearing of their case. In this regard, the provisions currently in operation in the UK provide valuable guidance to the legislature in this country as to how such interim relief can be used to ameliorate the problems posed by delays in the employment dispute resolution process.

2 Introduction of Bridging Visas for Third Country National Migrant Workers

Bridging visas are temporary visas, the purpose of which are to bridge the time which elapses between the termination of a more substantive visa and the determination of a particular process. In Australia, they are utilised as temporary visas to bridge the time that passes while a more substantive visa is being processed or while arrangements are being made for a non-citizen to depart from the State.[54] It is possible that such visas could be granted to third country national migrant workers in Ireland who are awaiting the determination of a case before the Equality Tribunal or other employment body.

Such a visa would be of significant benefit to third country national migrant workers who have had their employment terminated, but who as a result of the fact that they no longer have an employer, have lost their employment permit and so are no longer entitled to remain in the State. The practice of the Department of Enterprise, Trade and Employment in Ireland, who are responsible for the issuing of employment permits, is generally to grant a second employment permit for the same employee once they have

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[52] *Fennelly v Azzicurazioni Generali* (1985) 3 ILT 73; *Shortt v Data Packaging Ltd.* [1994] ELR 251; *Boland v Phoenix Shannon plc* [1997] ELR 113; *Phelan v BIC (Ireland) Ltd.* [1997] ELR 208; *Lonergan v Salter-Townshend* [2000] ELR 15 and *Sheehy v Ryan* (2002) High Court No 10338P (Peart J) (29 August 2002). *Delaney* (n 26) 512.

[53] *Harte v Kelly* [1997] ELR 125, 130 (Laffoy J) See also *Phelan v BIC (Ireland) Ltd* [1997] ELR 208.

[54] Ss 37 Immigration Act 1958 (Australia). Taylor 'Protecting the Human Rights of Immigration Detainees in Australia: An Evaluation of Current Accountability Mechanisms' (2000) 22 *Sydney Law Review* 50, 51. See also Billings 'Recent Developments Federal Agency Focus: A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims' (2000) 52 *Administrative Law Review* 253, n 71 where the system of bridging visas while waiting for deportation is described.

found an alternative employer. However, where the migrant worker is unable to find work, they are not entitled to remain in the State and thus are unable to remain in the country to attend the final hearing of their case. A bridging visa, therefore, would be extremely beneficial to third country national migrant workers in cases either where they have found alternative work or where they have been unable to do so.

Naturally, the grant of a bridging visa would have to be subject to stringent regulation so that it is not granted to persons who do not require its assistance. In Australia where bridging visas are regularly used, they are either granted automatically[55] or where certain criteria have been met.[56] In the employment law context one of these criteria would be that there is a case pending before an employment law tribunal and that the applicant is required at the hearing in order to establish certain facts, which are relevant to the case.

There is a reasonable concern that workers who have their employment terminated would misuse the visa in this context. However, there is anecdotal evidence to suggest that at present the Department of Enterprise, Trade and Employment have a general practice whereby they will grant another employment permit for an employee where that employee finds alternative employment. This is equivalent to granting the migrant worker a bridging visa capable of granting that worker permission to remain in the country pending the final hearing as it allows the worker to remain in the State until the final determination and for some time after.

In fact, the bridging visa would ensure that workers who are unable to find alternative employment are free to remain in the State until the final determination and that all such workers will leave the state once their action has been heard, as they would no longer have permission to remain. It is therefore unlikely that a migrant worker would take a case to the Employment Tribunals in order to obtain such a visa as it could threaten their ability to remain in the State should the trial be determined in favour of their employer. Essentially the decision to grant such a visa would be in the hands of the Minister for Justice, Equality and Law Reform, but the development would put onto statutory footing the general practice of the Government in such cases.

Naturally, this solution will only affect third country national migrant workers and would be of no benefit to EU workers. With this in mind, it may be more appropriate to develop a system that is more inclusive of all migrant workers so that distinctions on grounds of nationality do not become an excuse for disparate treatment.

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[55] See discussion in *Taylor* (n 54) 51. This occurs where the applicant has been cleared by immigration and is waiting for a substantial visa. See also Nafziger who also discusses the issue of removal pending bridging visa. Nafziger, 'Protection or Persecution? The Detention of Unaccompanied Immigrant Children in the United States' (2006) 28 *Hamline Journal of Public Law and Policy* 357.

[56] *Taylor* (n 54) 51. Such conditions include that the applicant is under 18 or over 75 years, is unwell or traumatised, is a spouse of an Australian citizen, Australian permanent resident, eligible New Zealand citizen or family members of such citizens or have not received a primary protection visa order within six months.

3 Development of a Fast-Track Employment Dispute Process

One solution, which could be investigated as a possible solution to the lengthy dispute resolution process and which would be of benefit to all migrant workers in Ireland, is the introduction of a fast track procedure similar to that sought to be introduced in major planning and development judicial review cases.[57] Much can be learned from the development of a fast-track procedure capable of reducing the lengthy process of judicial review, which was often financially devastating to both parties in such cases.

In recent years the Commercial Court has subsumed some responsibility for certain planning and development cases[58] which has meant that the detrimental effect of the lengthy review process has been circumvented due to the adoption by the Commercial Court of fast-track hearings and special case management rules. However, this was never placed on a statutory footing and it has been recently proposed that there should be a statutorily designated planning judicial review court in the High Court to deal with such cases.[59] The Planning and Development (Strategic Infrastructure) Act 2006 (Ireland)[60] deals specifically with major developments, which have a 'strategic, economic or social importance'[61] on the State or on the region. The principles set out in the Act could be helpful in determining how a similar scheme could be established in the case of employment disputes.

The Act sets out a number of procedural issues, which must be established before a case will be fast-tracked. Some of the most relevant provisions, which could be utilised in the context of employment law, are considered here. Firstly, the Act provides that the court must give permission for the case to be heard by fast track procedure.[62] Applications for leave to appeal to the court can be made on an *ex parte* basis which circumvents the previous requirements whereby the applicant had to inform the other party of their intention to appeal and the grounds for such an appeal.[63] The Court will also be entitled to require the applicant to give an undertaking as to damages.[64] Despite

[57] See for example the Planning and Development (Strategic Infrastructure) Act 2006 (Ireland).
[58] The value of the development must be over 1 million euro.
[59] *Planning and Development* (n 57).
[60] Sections 1 – 51 are now all in force. See Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) Order 2006 SI No 525 of 2006 (Ireland); Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) (No 2) Order 2006 SI No 553 of 2006 (Ireland) and Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) (No 3) Order 2006 S I No 684 of 2006 (Ireland).
[61] *Planning and Development* (n 57) s 3 (2) (a) inserting s 37A into the Planning and Development Act 2000 (Ireland).
[62] ibid s 13 inserting s 50A into the Planning and Development Act 2000 (Ireland).
[63] ibid s 13 inserting s 50A (2) into the Planning and Development Act 2000 (Ireland).
[64] ibid s 13 inserting s 50A (6) into the Planning and Development Act 2000 (Ireland).

the fact that this latter requirement was criticised for the fact that it may become an insurmountable barrier to some applicants, it has been adopted in the final Act.[65]

(a) The Adoption of the Fast Track Procedure in the UK

In the UK, the Employment Bill 2008 (UK) envisages the development of a fast-track procedure for settling monetary disputes in certain limited jurisdictions. This arose out of a recommendation by Michael Gibbons in a Report compiled for the Department of Trade and Industry.[66] The Report recommended that the Government should 'encourage employment tribunals to engage in active, early case management and consistency of practice in order to maximise efficiency and direction throughout the system, and to increase user confidence in it.'[67] This is intended to operate without oral hearings. Each party will be required to submit documentation to the tribunal where both parties agree to it. This was provided for under the original Employment Tribunals Act 1996 (UK)[68] but it has never been used. Clause 4 of the Employment Bill 2008 provides that in such cases both parties must consent to the hearing or else must be given an opportunity to request a hearing instead of a decision based upon documentation.[69]

(b) A Designated Division and Criterion for a Fast Track Procedure in Ireland

A similar fast-track procedure could be developed within the present structure of the Equality Tribunal or the Employment Appeals Tribunal. It would require the development of a division of the Tribunals specially dedicated to dealing with fast tracked decisions and the development of certain criteria under which it could be considered feasible to fast track a case taking into account the positions of both the applicant and the respondent and the effect any such decision would have on either party. One such criterion could be that the applicant is a migrant worker, working on an employment permit, who is unlikely to be present in the State for the final determination of the case.

(c) Early Investigations and Hearings

At present, in a case under the Equality Acts 1998-2004, the applicant submits a complaint form to the relevant body on an *ex parte* basis but in the interests of natural justice the respondent is sent a copy of this form, which contains detailed information of the complaint. After this, where mediation is either refused or unsuccessful, the Equality Officer conducts an investigation of the complaint by requesting detailed written

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[65] Flynn 'The Planning and Development (Strategic Infrastructure) Bill 2006 – A Critical Analysis of its Implications for Environmental Law' *Paper for Delivery at the Fourth Law and Environment Conference* Faculty of Law University College Cork (27 April 2006).

[66] Gibbons *Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain* (Department of Trade and Industry (now the Department of Business, Enterprise and Regulatory Reform) London March 2007).

[67] ibid 50.

[68] Section 7(3A) (UK).

[69] Clause 4 Employment Bill 2008 (UK) which will insert section 7(3AA) into the Employment Tribunals Act 1996 (UK).

submissions from both parties and by carrying out a joint hearing of the complaint. This process can take up to eighteen months to complete. In a fast-track process, this whole procedure could be made more efficient by early investigation and hearings. The employer could be adequately protected against any unfairness by the development of strict time frames, which both parties would have to adhere to in submitting their written evidence.

(d) No Undertaking as to Damages

Finally, it is submitted that the inclusion of a provision requiring the applicant to make an undertaking as to damages so as to protect the respondent would be unnecessary, contrary to the spirit of the employment resolution process and would act as a deterrent to employees to assert their employment rights. This is perhaps best displayed in the fact that the employment tribunals do not award costs to the employer in disputes, as this would deter employees from seeking to assert their employment rights. There are already adequate protections in place, such as time frames and service requirements that seek to shield the employer against financial loss. The fast track procedure in fact, may actually be more favourable to the employer as the case would be dealt with expeditiously, minimising any financial loss to the employer and any negative publicity that may adhere to the case.

G CONCLUSION

This Article has explored in depth the situation of migrant workers in Ireland who are engaged in the employment dispute resolution process. The effect of the substantial delays currently found in the employment dispute resolution processes cannot be underestimated. Migrant workers regularly find themselves unable to remain in the State until the determination of the hearing for financial or legal reasons relating to their right of residency. This means that the only remedy available to them is that of compensation. A discussion of the adequacy of this remedy in cases of dismissal was undertaken; the conclusion being that such a remedy did not adequately reimburse the migrant worker for the effect of that dismissal.

Solutions to this problem are therefore necessary. Drawing on experience from the UK many suitable options were debated. These included the introduction of interim measures, bridging visas and fast track procedures. It became clear that the development of a solution that would benefit all migrant workers would be the most practical and sensible solution.

(2009) COLR

PUNISHMENT IN MODERN DAY IRELAND

John Cronin*

A INTRODUCTION

The Irish Criminal Justice system is a topic never far from the headlines. Everyone has an opinion about it and the media are happy to fill page after page to discuss in great detail the criminal issues of the day. Politicians too are more than happy to offer their two cents as they are well aware that voters see crime as a key issue.[1] But has this resulted in a new way in which we view the offender and the way we seek to punish them? Have we moved on from Garland's 'Modern Penal Welfare Complex' to Garland's 'Culture of Control'?[2] Is there evidence to suggest in Ireland that we have returned to a Victorian view of the criminal? Is there conflict between the legislature and the judiciary?

B INDIVIDUALISM AND INDIVIDUATED JUSTICE

Two terms that are central to this article should be defined from the outset to help put the arguments in context. The first is individualism. Individualism refers to the individuals faculties of will and freedom; an individual is in control of his/her destiny. If this idea is applied to criminal law then the commission of crime is a choice. The second idea that needs to be looked at is that of individuated justice. Punishment 'is to be determined not by the material gravity of the crime, not by the injury done, but by the nature of the criminal.'[3] Individualism is only concerned with what you have done, individualisation and individuated justice requires the system to look at who you are. So unlike individualism, individuated justice takes, arguably, a fairer approach to those who come into contact with the justice system.

C HISTORICAL OVERVIEW OF PUNISHMENT

To determine how we punish in modern Ireland it is necessary to first examine briefly how we have punished in the past. Garland would locate the formation of the 'Modern Penal Welfare Complex' in the brief period between the Gladstone Committee Report of 1895 and the beginning of World War One in 1914.[4] Other writers offer differing opinions on when this transformation occurred[5] but the introduction of a new

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[1] S Kilcommins et al *Crime Punishment and the Search for Order in Ireland* (Institute of Public Administration Dublin 2004)133-136.

[2] D Garland *The Culture of Control* (Oxford University Press Oxford 2001).

[3] R Saleilles *The Individualisation of Punishment* (Little Brown and Company Boston 1911) 8-9.

[4] D Garland *Punishment and Welfare: A History of Penal Strategies* (Aldershot Gower 1985) 5.

[5] Foucault for example locates the origin of this modern system at the beginnings of industrialised society. M Foucault *Discipline and Punish: The Birth of the Prison* (Harmondsworth Penguin 1991) 19.

form of penal sanctioning and institutions amounted to a new structure of penality. During the Victorian age there had been a great reliance upon incarceration as the Criminal Justice system sought to strike at the soul rather than the body of the criminal.[6] The major alternative to imprisonment was a fine, which Garland pointed out often had the same effect, as many people could not afford to pay these fines and so served a sentence in lieu.[7] The prison regime of the day enforced an intense form of obedience through a number of uniformly distributed conditions and procedures. Each inmate would receive the same amount of food, carry out the same amount of work and have the exact same size of bed. Garland quotes Ruggles-Brise as saying that it was ' … as if the weight of the body were a greater concern … than the saving of the soul.'[8] The criminals were largely illiterate and unemployed. They tended to be drawn from the same families and neighbourhoods and were prone to recidivism.[9]

It was a system of individualism that recognised individuals, but not individuality. Each individual possessed the faculties of will and freedom, and could choose his/her destiny. The commission of crime was seen as a choice. The concepts of economic liberalism were transferred into the realms of punishment. The twin doctrines of individual responsibility and presumed rationality formed the realm of guilt.[10] All individuals who came before the courts were seen as free, equal and rational individuals. Laissez-faire individualism was the chosen philosophy of the day and suited the economic and political life in Britain. Not everyone benefited from this liberty, but anyone who did not benefit from it was viewed as an individual failure.[11]

This was soon to change at the turn of the century following the publication of the 1895 Report from the Departmental Committee on Prisons or the 'Gladstone Report' as it became known.[12] The Committee believed that, 'the system should become more elastic, more capable of being adopted to the special cases of the prisoners.'[13] The report led to widespread reform and the introduction of a number of welfare sanctions[14] which

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[6] Capital and corporal punishment were also in decline and transportation was also coming to an end.
[7] *D Garland* (n 4) 8.
[8] Evelyn Rugles-Brise *Prison Reform at Home and Abroad* (Appleton Company York 1924) 10.
[9] Bacik and O'Connell *Crime and Poverty in Ireland* (Round Hall Dublin 1998) iv.
[10] *D Garland* (n 4) 17.
[11] ibid 45.
[12] There were other phenomena which resulted in this change such as the emergence of cartels, which by seeking to control the markets rejected laissez-faire individualism. There was great pressure on the working classes and this provoked unity between them. Trade unions recorded large increases in membership giving a voice for the lower classes. Lombroso had also rejected concepts such as personal responsibility and punishment proportionate to the offence in his 1876 book *L'Uome Delinquente* and these beliefs found a supportive audience.
[13] *Report from the Departmental Committee on Prisons* (1895) 8. The report also highlighted how short sentences were a non-deterrent for habitual defenders but any form of sentence could be detrimental to first time offenders, thus highlighting the need for a proper classification of offenders and a fuller understanding of their backgrounds.
[14] According to Garland in 'The Birth of the Welfare Sanction' (1981) 8 (1) British Journal of Law Society 'What these developments describe is the birth of the welfare sanction – a sanction which takes as its object not a citizen but a client, activated not by guilt but by normality, establishing a relation which is not punitive but normalising.'

offered alternatives to imprisonment and also removed a large number of people from prisons who were better suited elsewhere. Examples included probation,[15] borstal training and detention in an inebriate or mentally deficient institution. The consequence of this according to Garland was that the prison was decentred; it became one institution among many in an extended grid of penal sanctions.[16]

This new system saw a shift from the individualism of the Victorian era to the recognition of individualisation and individuated justice. Ruggles-Brise stated that, '[e]ach man convicted of crime is to be regarded as an individual.'[17] An inquiry takes place in this modern penal complex into who you are. The judge seeks the help of non-judicial personnel to get a fuller picture of the offender and their circumstances. Saleilles believed that '[p]unishment is to be determined not by the material gravity of the crime, not by the injury done, but by the nature of the criminal.'[18] Garland suggests that penality goes from being blind and repressive to a more knowledgeable form of regulation.[19] Also under this transformation, the relationship between the state and offender is no longer presented as a contractual obligation to punish, but as a positive attempt to reform. The state relates to the individual not as an equal but as a benefactor.[20]

Victorian penality had been concentrated on the normality and autonomy of its criminal, and its reliance on conceptions such as disciplinary rationalisation, uniformity, certainty and cellular confinement. This modern penality embodied an ideological form directed more at normalisation, regulation, intervention and individualisation.[21] An example of this transformation in practice is the ideological shift from drunkenness viewed as a moral perversion and punished as a free-willed act, to drunkenness perceived as a disease treated as a non-voluntary action.[22] Garland would suggest that this transformation has resulted in a system of penality that has dominated the industrialised western world during the 20th century.[23] This 'Modern Penal Complex' penetrated Ireland to a varying degree. Due to time constraints it is not possible to give a detailed analysis of this. But needless to say Ireland did not have a proper probation service until the 1970s, the Government's idea of prison reform was to have spring beds instead of wooden ones,[24] and Borstals were used as a disciplinary substitute for prisons for many years.

The welfare sanctions were eventually absorbed into our criminal justice system, albeit at a much slower rate than our British counterparts. Our judiciary appear to have

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[15] 1907 Probation Act.
[16] *Garland* (n 4) 23.
[17] *Report from the Departmental Committee on Prisons* (1911) 11.
[18] *Saleilles* (n 3) 8-9.
[19] *Garland* (n 4) 30.
[20] ibid 31.
[21] S Kilcommins 'Reconstructing the Image of the Habitual Drunkard' in Kilcommins and O' Donnell *Alcohol, Law and Society* (Barry Rose Law Publishers Chichester 2003) 60.
[22] *Kilcommins* (n 21) 61. For a more detailed discussion on this see chapter three.
[23] *Garland* (n 4) 30.
[24] Oscar Traynor Dáil Debates 9 April 1959.

happily accepted this idea of individuated justice. To highlight this fact we can look at a few examples. Justice Henchy noted in the *State (Healy) v Donoghue*[25] that the constitutional provisions in due process and personal liberty,

> [a]t the very least ... guarantee that a citizen shall not be deprived of his liberty as a result of a criminal trial conducted in a manner, or in circumstances, calculated to shut him out from a reasonable opportunity of establishing his innocence: or, where the guilt has been established or admitted, *of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances*.[26] (emphasis added).

A further example of the judicial embracement of individuated justice is the *People (DPP) v WC.*[27] Justice Flood noted that ' … the imposition of a particular sentence must strike a balance between the particular circumstances of the commission of the relevant offence and the relevant personal circumstances of the person accused.'[28]

D CHANGING TIMES?

Is this the view that remains at a time in Ireland when crime has become such a contentious issue? Do we still care about the offender so much? According to Garland, we do not. He would argue that in the UK and the USA at the present time, the field of crime control exhibits two new and distinct lines of governmental action: an *adaptive strategy* stressing crime prevention and partnership and a *sovereign state strategy* stressing enhanced control and expressive punishment. He would refer to these strategies for convenience sake as preventive partnership and punitive segregation. These strategies-which are quite different from the penal-welfare politics that preceded them were formed in response to a new predicament faced by the governments of many late-modern societies. This predicament arose because at a certain historical point high rates of crime became a normal social fact, penal-welfare solutions fell into disrepute, and the modern differentiated, criminal justice state was perceived as failing to deliver adequate levels of security.[29] This strategy of punitive segregation is effectively a call for harsher sentencing and the increased use of imprisonment, as well as making the whole system much tougher on offenders. Garland would say that the new penal ideal is that the public be protected and its sentiments are expressed. Punitive segregation is increasingly the penal strategy of choice.[30] On the face of it, it would be observed by many that this shift from penal-welfare to punitive segregation is a product of blanket media coverage and political rhetoric, but it goes slightly deeper than this.

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[25] [1976] IR 325.
[26] ibid 353.
[27] [1994] ILRM 321.
[28] ibid 325.
[29] *Garland* (n 14) 348.
[30] ibid 350.

It was the professional middle classes who stood to gain the most from penal-welfare according to Perkin.[31] This group of professionals had much more to gain than the poor with the new jobs on offer and with the expansion of the public service state. The middle class also took a more civilised attitude towards crime and would sooner point out the offenders' social circumstances as a reason for committing crime rather than their individual responsibility. The middle class also had the money to live away from crime hotspots and so remained largely removed from crime. Crime at the time mainly affected the poor but increasingly the middle classes were finding themselves as targets of crime. Their cars were being stolen, they were being robbed on the train to work, and they were being assaulted on the streets. There were an increasing number of women entering the work place, leaving their houses empty by day, full of possessions and obvious targets for burglars. Crime was no longer something the middle classes read about in the margins in society, it had come to their doorsteps.

1 Examples of Change in Ireland

Both politicians and the media have tapped into people's fears. This is certainly true if one examines these fears from an Irish perspective. Back in 1983 according to Garda statistics there were 102,287 indictable crimes committed in Ireland and yet it was not even in the top ten issues of concern amongst the voting public.[32] But in 1996 following the horrific murder of crime journalist Veronica Guerin, crime became the number one concern of Irish citizens virtually overnight.[33] John Meade referred to this as a 'moral panic.'[34] Cohen states that a moral panic occurs when '[a] condition, episode, person, or group of persons emerges to become defined as a threat to societal values and interests.'[35] Meade argues that unlike other countries such as the USA and Italy, organised crime has never been an issue in this country and yet following the murder the Irish State seemed on the verge of declaring a state of emergency.

The role played by the politicians and the media in the aftermath of the Guerin assassination was crucial to the enactment of the *Proceeds of Crime Act 1996*. The public, in turn, passively accepted the diagnosis of the politicians, as reported in the media that organised crime had suddenly become a real threat to the Irish State.[36] For an example of the type of language used it is interesting to note some of the phrases used by Bertie Ahern, then leader of the opposition. He spoke of 'drug barons,' 'mobsters' and appeared to argue that the country was awash with Al Capone type characters.[37] These were the perfect sound bites for the various media groups and led to headlines such as,

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[31] H Perkin *The Rise of Professional Society* (Routledge London 1989).
[32] *S Kilcommins* (n 1) 133-136.
[33] ibid.
[34] J Meade 'Organised Crime, Moral Panic and Law Reform' (2000) Irish Criminal Law Journal 11.
[35] S Cohen *Folk Devils and Moral Panics* (St Albans Paladin 1973) 9. Moral panics have a number of distinct features, namely, concern, hostility, consensus, disproportionality and volatility. For a detailed discussion on moral panics see generally Cohen *Folk Devils and Moral Panics.*
[36] *J Meade* (n 34) 12.
[37] Parliamentary Debates of Dáil Eireann 2 July 1996 Vol 467, no 7.

'Fear City' and 'Reign of Terror on the Streets.' These were not accurate reflections of what was really going on. But through a combination of people's fear, the politicians attempts to act on these fears and the media's sensationalising of the situation; crime became the number one issue for Irish citizens and has stayed consistently high as a concern.[38]

In 1996 the Law Reform Commission published a report on sentencing which recommended a sentencing policy based on just deserts. It was recommended to have sentences that are proportional to the severity of the crime.[39] The seriousness of the offence would be determined by two factors, the level of harm caused by the offender and his/her culpability.[40]

The general public seem quite happy to return to Victorian style punishment. They do not care as much anymore who these criminals are. They wish to go back to a time of individualism where the commission of crime was seen to be an act that was rational and a result of the execution of free will. They want to see these criminals locked up at all costs. The media carry the opinions of the people and politicians are more than happy to speak out against crime and the system as there are many votes at stake. One may argue that Fine Gael lost the last election after running a strong anti-crime campaign but Fianna Fáil also ran a shrewd campaign in this regard. In fact a regular complaint amongst floating voters at the time was that there was so little to choose between the main parties on issues of importance. Every time there is a shocking murder the whole system is ridiculed and splashed across the front pages of our national papers.[41] Policy measures are constructed in ways that privilege public opinion over the views of criminal justice experts and professional elites. The professional groups who until recently formed the policy-making community are now increasingly becoming disenfranchised. Policy is formed by political action committees and political advisers – not by researchers and civil servants.[42]

The majority of criminal legislation that has been brought in since 1996 has been targeted at criminal gangs to make a worried public feel safer.[43] But the reality of the situation is that the majority of murders carried out each year are gangland related and the general public should realistically have nothing to fear. For example, in the last ten years there have been 167 gun murders in this jurisdiction with the Minister for Justice admitting that these murders were carried out mostly as a result of "gangland activities."[44] This gangland activity itself is concentrated mainly in two areas, namely

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[38] *S Kilcommins* (n 1) 133-6.
[39] Law Reform Commission *Report on Sentencing* (1996) 65.
[40] ibid.
[41] 'Killing of Drug Baron Sparks Fear of Gang War' *Irish Examiner* (13 December 2006). Crime boss Marlo Hyland was gunned down at his home and Anthony Campbell was an innocent victim killed simply because he witnessed the murder, although he had no criminal connections.
[42] D Garland 'The Culture of High Crime Societies' (2000) 40 British Journal of Criminology 350.
[43] See for example *Proceeds of Crime Act 1996, Criminal Justice Act 1999, Criminal Justice Act 2006 and Criminal Justice Act 2007.*
[44] D Ahern 'Difficult to Solve Gun Murders' *Irish Examiner* (4 March 2009). For a detailed breakdown of homicide statistics in the jurisdictions see http://www.cso.ie.

North County Dublin and parts of Limerick. The death of Anthony Campbell and, more recently the murder of Shane Geoghegan in a case of mistaken identity, provoked huge public outrage. Although these deaths were tragic, these types of murders are isolated and rare in this jurisdiction. The *Criminal Justice Act 2007* was seen to be a response to the publics fear and contained many new provisions to allow for stricter bail laws, heavier sentencing and inferences to be drawn in a variety of situations.

With all the recent additions to the criminal justice legislation, nobody is posing the all important question of whether or not they are working. The number of indictable crimes in Ireland has remained over 100,000 per annum. When a new *moral panic* arises amongst the population the simple answer is more legislation, longer sentences, and further restrictions on the accused's rights. Nobody is looking back at recently introduced legislation to examine its shortcomings.

2 Judicial Resistance to Change

The legislators have however come up against much judicial resistance. The judiciary are more than happy to hang onto the individuated justice that has served them well since the welfare sanction first found favour in Ireland. As outlined from the outset individuated justice refers to an inquiry into who you are rather than simply punish you for a crime you have carried out. If any stranger walked in off the street into our courts he would be perhaps surprised at the reality of how the system works. A judge will generally look for all available probation and medical reports on the criminal before the sentencing stage of the process. He seeks to give the offender every opportunity available to him to mend his ways. This may involve sending the offender to a facility to deal with an alcohol or drug addiction, attending counselling or simply adjourning the matter for a specified period to see can the offender stay out of trouble. Unlike the general public and the legislators, judges try and avoid sending people to jail at all costs. The more cynical would point to the lack of prison places in our system, which effectively ties the judges' hands in many respects. But the judges do genuinely seem to wish to give the offenders every chance.

A relatively recent, controversial example of the judiciary's continued use of individuated justice is that of Tim Allen.[45] The defendant, a celebrity chef, had pleaded guilty to the possession of obnoxious images of naked children. Judge Michael Patwell said a frenzy of pre-trial publicity coupled with Allen's guilty plea, influenced the court's decision to substitute 240 hours of community service for a nine month prison sentence. He was also ordered to donate €40,000 to a children's charity. The judge stated the media had already punished the defendant in its pre-trial feeding frenzy.

The issue of individuated justice arose again in late 2007. During the sentencing of an accused for a variety of offences including rape and false imprisonment, Mr. Justice Carney made several comments that were held by the Court of Criminal Appeal to be 'inappropriate.'[46] Mr. Justice Hardiman agreed with defence counsel that the trial

[45] 'Allen Escapes Jail Over Child Porn' *Irish Examiner* (17 January 2003).
[46] 'Appeal Sees Sentence Reduced Because of Judge's Comments' *Irish Examiner* (23 November 2007).

judge's comments amounted to an error in principle. A neutral observer may have been led to believe that there was bias in the sentence.

Of course there are many instances when a custodial sentence is unavoidable. In theses circumstances the judge will take into account all material factors relating to the offender's background and their previous record. But increasingly the legislators have tried to take sentencing power out of the hands of the judiciary. For example in the *Criminal Justice Act 1999* a mandatory sentence of ten years imprisonment is to be imposed on offenders found with over €13,000 in drugs for the purpose of sale and supply.[47] There are a few exceptions to this mandatory sentence and anecdotally it is believed that in the first 130 cases of this nature before the courts, the mandatory sentence was only applied on five occasions. The judicial approach of mandatory sentencing was strongly criticised by the former Minister for Justice Michael McDowell, who claimed judges were far too lenient in their approach to mandatory sentencing.[48] The dispute between the judges and the legislators all point towards a restriction on judges to apply individuated justice and a return to individualism.

E THE EXISTENCE OF RISK MANAGEMENT

Our new penology would be described in some quarters as a form of risk management.[49] Feeley and Simon would say that we are:

> [m]arkedly less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather, it is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness.[50]

According to Rose this risk management is concerned with:

> [b]ringing possible future undesired events into calculations in the present, making their avoidance the central object of decision making processes, and administering individuals, institutions, expertise and resources in the service of that ambition.[51]

Rose goes on to make the point that various different agencies should share all available information so as to get the fullest picture available of a person, hence making risk management a more workable idea.[52] Custodial institutions are seen not as an

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[47] *Criminal Justice Act 1999* s 5 (3b).
[48] 'McDowell Urges Judges to Apply the Full Force of the Law' *Irish Times* (16 December 2006).
[49] For a more detailed discussion on risk management see Hudson *Risk and the Politics of Society: Justice Endangered* (Sage Publications 2003).
[50] M Feeley and J Simon 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications' (1992) 39 Criminology 452.
[51] Nikolas Rose 'Government and Control' (2000) 40 British Journal of Criminology 40 322.
[52] ibid 333.

opportunity to reform, they are simply for containing risk. According to the Governor of Cork Prison, if one's sole aim is to remove dangerous people from society for a fixed period, then prison works.[53] For the habitual criminal and those deemed to be too risky to be on the outside, harsh prison sentences are required. Rose concludes by saying that it appears that the conventions of the 'rule of law' must be waived for the protection of the community against a growing number of predators. This is apparent in Ireland if one views the legislation brought in to tackle organised crime and drug trafficking offences.[54]

F THE ROLE OF THE VICTIM

A final issue that must be addressed when examining how our criminal justice system has changed is the position of victims. Most people would welcome the fact that they are finally being accommodated in our system. Since 1993 victims and their families can make victim impact statements to reveal how a crime has impacted upon them.[55] Their stories are highlighted in the media. Organisations have also been formed and these act as rallying points for change. The President of the Association of Garda Sergeants and Inspectors, Joe Dirwan, said in 2003 that, 'the criminal justice system has swung off balance to such an extent that the rules are now heavily in favour of the criminal ... At the same time, the system is oppressive to the victim.'[56] Society now identifies itself with the victim and so when a victim cries out for change, society will cry out with them. The new imperative is that victims must be protected, their voices heard, their memory honoured, their anger expressed and their fears addressed.[57]

Dirwan was right when he pointed out the system favoured the accused for too long, but this has all turned on its head where the system is eroding or de-prioritising accuseds rights.[58] The judges, however, are still willing to uphold due process values. For example if one looks at the case of Judge Brian Curtin, the DPP sought to bring a prosecution for the possession of child pornography. The defendant's computer was seized in an unconstitutional manner and so the DPP had insufficient evidence to bring a prosecution.[59] Although this decision may have been controversial it shows that the judiciary are still willing to stand up for the accused's rights.

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[53] These comments were made during a question and answer session with the Governor at the prison on 10 November 2007. It's interesting to contrast this point with Foucault who believed that prison was a failure from day one. But once prison contains offenders for the specified period they have done their job. Prisoners may avail of many programmes within the prison system in a bid to improve their qualifications. Reform is now something to be hoped for, but is not expected.

[54] See *Proceeds of Crime Act 1996, Criminal Justice Act 1999, Criminal Justice Act 2006, Criminal Justice Act 2007.*

[55] Criminal Justice Act 1993 s 5 (1).

[56] *Joint Committee on Justice, Equality, Defence and Women's Rights* 8 December 2003.

[57] *D Garland* (n 42) 351.

[58] For a detailed discussion of this in a sexual offences context see Fennell 'The Culture of Decision-Making' (2001) Judicial Studies Institute Journal 25.

[59] 'Trial of Judge Curtin Collapses' *Irish Examiner* (23 April 2004).

G CONCLUSION

In conclusion, our criminal justice system has experienced great change in the last decade or so. There appears to be a return to individualism and the concept of individual responsibility which were popular in Victorian times. The pervasive image of the perpetrator of crime is not one of the juridical subject of the rule of law, nor that of the social and psychological subject of criminology, but of the individual who has failed to accept his or her responsibilities as a subject of the moral community.[60] Between the peoples' fear, the media and the politicians, much legislation has been enacted in a bid to stamp out organised crime. A conflict has occurred between the legislators and the judiciary, who wish to continue with individuated justice. The judiciary have been relieved of some of their power through new legislation that requires mandatory sentencing for certain offences.

Our criminal justice system is more and more about risk management and has become increasingly victim centred. Because society positions itself alongside the victim, the accused's rights are being eroded by legislation. But again judges have sought to uphold due process values and continue to give the accused every available opportunity to mount the best defence possible. Garland has said that the prospect of reintegrating the offender is more and more viewed as unrealistic and over time, seems less morally compelling.[61] This would be the accepted view of our criminal justice system by many.

The next few years will no doubt see the continued introduction of legislation to tackle gangs and drug pushers. A point that has already been mentioned is that nobody seems to question whether any of these laws are working when the rates of crime are remaining consistently over 100,000 indictable crimes per annum. No doubt the legislature will continue to introduce mandatory sentences in more areas in a bid to wrestle the discretion away from the judiciary. This may satisfy popular opinion, but that does not mean it is the proper course of action.

[60] *Nikolas Rose* (n 51) 337.
[61] *D Garland* (n 42) 368.

(2009) COLR

AS I STAND BEFORE YOU: THE EMERGENCE AND EXISTENCE OF INDIVIDUAL JUSTICE

Siobhan Drislane *

A INTRODUCTION

This article seeks to explain the concept of individual justice which has been identified in theories of penology. It will begin by setting out the historical practices of punishment and then move on to trace the changing attitudes which led to the recognition of individuality by the criminal justice system. Finally the application of the concept will be noted in the context of contemporary Ireland.

B PUNISHMENT IN THE PAST

Prior to the nineteenth century persons guilty of a serious offence were typically subjected to harsh physical punishment, which could include torture, branding or even dismembering of their body. Various structural elements were devised to assist with these punishments, such as the stake, the wheel or the scaffold for hanging. Foucault notes that the tortures used were often symbolic in nature; that is the form of the punishment referred to the crime itself. He notes, for example, that the 'tongues of blasphemers were pierced, the impure were burnt, the right hand of murderers was cut off.'[1] Furthermore, even where the primary punishment was non-corporal, such as banishment or the payment of a fine, a 'degree of torture' might also be included in the penalty.[2] Thus banishment might be preceded by public exhibition or branding, while the payment of a fine could be accompanied by a flogging. These horrific acts were carried out for several reasons. The first was so that the crime of the offender was acknowledged, both by himself and by society. Therefore, the body of the offender was used to proclaim that a crime had been committed, acknowledged and now condemned. The physical punishment (or death) was essentially a moment of truth and confession.[3] Secondly, the punishment was a public display of the power of the sovereign. As the law was the will of the sovereign, by committing the crime the offender had not only offended society, but also the sovereign himself. The public punishment of the offender was not only retribution for the offence, but it also reasserted the power of the sovereign. The act of the punishment was a clear message to all that it was the sovereign who held the ultimate power, and that this power would be used to punish those who offended the sovereign. The fact that painful methods were used to punish the offender may also have served to convey that the sovereign was a far greater force that any individual, it was stronger and more resilient and so could inflict suffering in a way that no other could. Thirdly, the public spectacle of punishing an offender was a means of public deterrence. By carrying out

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[1] Foucault *Discipline and Punish: The Birth of the Prison* (Gallimard France 1975) 45.

[2] ibid 33.

[3] *Foucault* (n 1) 43.

these punishments in public, it was a message to the all that the same fate would befall them if they were to commit a crime. As Foucault puts it, punishment by torture and execution had to be ' … spectacular, it must be seen by all as [the law's] triumph.'[4]

C PUNISHMENT AND THE NINETEENTH CENTURY

However, as the 1900's dawned Victorian society adopted a more humane sensibility in respect of criminal retribution. This appeared to be the result of society becoming more 'civilized' and refined.[5] People no longer wanted to be spectators to the gory results of punishment. Foucault has commented that '[p]unishment had gradually ceased to be a spectacle ... It was as if the punishment was thought to equal, if not to exceed, in savagery the crime itself.'[6] Garland observes that the range of capital offences had been greatly reduced by the beginning of the nineteenth century and that corporal punishment was also a rarely used sanction by this time.[7] When punishment was to be carried out, it was now removed to a far more private realm. Thus executions were done behind closed doors, while offenders guilty of crimes not so serious as to warrant execution were generally removed from the view of society by incarceration. This change in attitude was further fuelled by the market economy which had emerged with the birth of industrialisation. The concept of freedom was now core to Victorian society - freedom of choice, freedom to trade, to work, to earn money and most of all freedom to be successful within the market. Garland has observed that this society 'effectively transferred the concepts of economic liberalism into the realm of punishment.'[8] Two things followed from this. Firstly was the concept that Garland refers to as the 'social contract.' This contract was believed to exist between the State and each citizen, and conferred rights and duties upon them. Just like a market trading contract, if its terms were breached, that is if the citizen did not comply with his obligation not to offend the State, repercussions would follow. Second, the concepts of *individual responsibility* and *presumed rationality*, which were greatly valued within the market, were also applied to the criminal offender. Thus when a breach of the social contract did occur, it was held that the individual himself was solely to blame. The idea was that the individual was in total control of his own destiny - he was a rational actor who was responsible for his own behaviour. In comparing the criminal actor with 'his

[4] *Foucault* (n 1) 34.

[5] In this respect one might look to the thesis of Norbert Elias, who observed that social attitudes changed at this time so that things which had once been openly carried out and accepted were now moved into private areas, no longer to be observed by the public. For example, Elias noted that such privatisation emerged in respect of bodily functions and sexual behaviour. Meanwhile standards and expectations developed in respect of table manners and speech. In addition, violent behaviour became lass acceptable and more shameful. See generally Elias and E Jephcott (tr) *The Civilizing Process: The History of Manners* (Blackwell Oxford 1978); *The civilizing process: state formation and civilization* (Blackwell Oxford 1982).

[6] *Foucault* (n 1) 9.

[7] Garland notes that the reduction in the use of corporal punishment was more concerned with adults; children were still subjected to birching and other such physical punishment. See Garland *Punishment and Welfare: A History of Penal Strategies* (Gower Aldershot 1985) 6-7.

[8] ibid 17.

economic counterpart' in the free market society, 'illegality, like poverty, [became] an effect of individual choice.'[9]

This newly adopted market mentality also resulted in a change of the type of punishment which was enforced. There was now a far greater concern for the moral being of the person and so a substitution of the object to be punished came about. As Foucault puts it '[t]he expiation that once rained down upon the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations.'[10] He goes on to say that 'punitive justice [would] now bite into [the] bodiless reality'[11] of the soul. Thus instead of inflicting punishment on the physical being, retribution was intended to offer the offender the opportunity to look inward, to contemplate the wrongdoing and, ideally, to readjust their moral being. On this point Garland has observed that prison architecture,[12] the use of solitary confinement and the existence of a rigorous silence, 'interrupted only by the softly spoken exhortations of governors, chaplains and philanthropic visitations' offered the offender the ideal setting for this self-assessment and contemplation. This approach would then 'allow [the offender's] essential reason to prevail.'[13] Furthermore, considering how freedom was held in the highest esteem by Victorian society, it seemed fitting that punishment be struck at the essence of the free subject and that the offender be reprimanded by the removal of much of his liberty.[14] Therefore the ideal solution to encompass these new ideas was the prison system and it soon became the central method of punishment at this time. Essentially the prison offered the ideal opportunity for control of the individual - this was achieved by uniform treatment of all prisoners, who were placed in standard cells, offered a controlled amount of food and treated in a consistent way with schedules for meal times, labour and sleep.[15]

D BIRTH OF THE 'WELFARE STATE'

With the dawning of the twentieth century came even greater change. This transition involved the breakdown of the free market form of social organisation and the birth of the welfare complex. Garland has greatly credited the emergence of new human sciences and discourse as being the primary cause for this shift.[16] Disciples such as psychiatry, medicine and science all presented methods of evaluation in respect of the true character of an individual. What resulted then was a move away from the one-dimensional examination of the person; which was in terms of physical characteristics

[9] Garland 'The Birth of the Welfare Sanction' (1981) 8(1) British Journal of Law and Society 29 31.
[10] *Foucault* (n 1) 16.
[11] ibid 17.
[12] That is, singular cells which were basic in nature and contained no distracting features.
[13] *Garland* (n 9) 31. See also generally Garland (n 7) 12-15.
[14] Garland has commented that in its 'deprivation of liberty the prison struck directly at the essence of the free subject and thus repeated that this liberty was after all contingent upon a tenuous social bond. *Garland* (n 7) 31.
[15] See generally *Foucault* (n 1) 16-17.
[16] See also *Garland* (n 9) 38.

one's age or sex; to a much deeper three-dimensional evaluation. As Foucault explains, a 'whole set of assessing, diagnostic, pronognostic, normative judgments' concerning the offender became 'lodged in the framework of the penal judgment.'[17] This contrasted greatly with the nineteenth century approach of penality which was 'an exclusively legal event [when] the crime, its causes, its trial and punishment were all established and understood entirely within the categories of the law.'[18] Society now began to look at the conditions and surrounding circumstances of the individual's life and sought to address these.[19] This led to the emergence of the welfarist approach and a number of consequences may be noted.

One such consequence was the development of the 'interventionist welfare state,' whereby the State now became involved in the private lives of persons in need by providing housing, pensions and other such assistance. Essentially what came about was the State taking on the role of provision, which during the free market era had been left to the individual himself. As society now looked at all persons as individuals, considering their personal needs, weaknesses and inabilities, it sought to offer assistance and support. Garland takes the view that in the new system 'there no longer exists a universe of free and equal subjects … Now there are categories which pose exceptions to the rule, classes which exhibit only limited degrees of freedom and a large population of "special cases."'[20] Therefore greater protection, support and assistance were offered to those who had previously suffered their misfortune alone as 'free subjects.'

A second consequence was greater categorisation of individuals. Where society had once simply tagged the individual who did not conform as 'bad,' the new mentality of assessing the entire structure of the individual led to the identification of other issues which caused the individual's 'undesirable' behaviour. By identifying these issues, the State was enabled to categorise individuals accordingly. Kilcommins has noted that now 'emphasis was placed on discriminating between different categories ... and prescribing bespoke treatment for the various types.'[21] Thus the criminal structure was no longer used as a hold-all for any person who failed to conform; rather specific categories of individuals were moved into alternative structures and facilities.[22] Garland has commented that:

> the penal realm was extended to provide facilities for those whose "irregular mode of life" invite[d] administrative intervention and

[17] *Foucault* (n 1) 19.
[18] *Garland* (n 7) 18.
[19] O'Dea has referred to this as 'an eclectic theoretical approach.' See O'Dea 'The Probation and Welfare Service: Its Role in Criminal Justice' in O'Mahony (ed) *Criminal Justice In Ireland* (Institute of Public Administration Dublin 2002) 638.
[20] *Garland* (n 7) 25. See also generally *Garland* (n 9) 35.
[21] Kilcommins O'Donnell O'Sullivan & Vaughan *Crime, Punishment and the Search for Order in Ireland* (Institute of Public Administration Dublin 2004) 9.
[22] Garland has commented that the prison became decentred; it was 'shifted from its position as the central and predominant sanction to become one institution in among many in an extended grid of sanctions.' *Garland* (n 7) 23.

> segregation – for the inebriate, the vagrant, the feeble minded, as well as the habitual criminal. In a matter of a few years the punitive regime was transformed into a complex apparatus which produced normative regulation, supervision and administrative segregation in addition to the punishment of offences.[23]

Particular institutions then emerged and came to be relied upon as a result of this new categorisation, such as inebriate reformatories; which under the Inebriates Act 1898 could be a substitution for imprisonment in cases of drunkenness and alcohol related crime;[24] borstals and reformatory schools to deal with young people, lunatic asylums and mental hospitals, mother and baby homes for unmarried mothers and Magdalen asylums for so-called 'fallen' women.[25]

A third consequence was the succession of moralism by causalism. Davies has provided a useful summary on this matter in stating that 'moral responses to criminal acts were now outdated. The scientific professionals were the new priests, dispensing knowledge, not morality.'[26] Other commentators have also noted this change. Pound has stated that '[w]hat the past left to the home and to the church, we [were] compelled more and more to commit to the law and to the courts.'[27] While Kilcommins has noted that by this time 'criminal behaviour was seen less as a product of sin, and more as a result of natural causes which could be discerned by scientific observation and then corrected.'[28] Essentially the change that came about was that the criminal justice system began to look beyond the offence to observe the offender.[29] The question of 'what did the offender do?' was replaced by the question 'why did the offender commit the act?' Thus offenders were no longer to be seen purely as bad and immoral criminals but rather as persons with fundamental character defects which caused, or at least contributed to, their wrongdoings. Regard was also had under the welfare system for circumstances such as poverty, lack of education, poor health and inadequate housing. Therefore, instead of focusing on the moral aspects of a crime, or offensive behaviour, there was now a concern to look to the circumstances which were thought to have led to or caused the individual to behave in the

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[23] *Garland* (n 9) 40.
[24] *Kilcommins* (n 21*)* 21.
[25] See generally *Kilcommins* (n 21) 21-22 38-41.
[26] Davies *Punishing Criminals. Developing Community Based Intermediate Sanctions* (Greenwood Press USA 1993) 30.
[27] Pound 'The Administration of Justice in the Modern City' (1912-1913) 26 Harvard Law Review 302, 321.
[28] *Kilcommins* (n 21) 8. They note that the, since discredited, sciences of eugenics (the investigation of human breeding) and phrenology (the study of skulls as an indicator of character) formed part of the non-legal discourses which emerged at that time for the examination of individual factors. Kilcommins has elsewhere commented that '[t]he human being was increasingly viewed as a product of natural phenomena as opposed to the sacrosanct will of God.' See Kilcommins 'Reconstructing the Image of the Habitual Drunkard' in Kilcommins and O'Donnell (eds) *Alcohol, Law and Society* (Barry Rose Law Publishers Chichester 2003) 71.
[29] O'Malley has commented that the crime itself was no longer seen as the 'dominant consideration.' O'Malley *Sentencing, Law and Practice* (2nd edn Thompson Roundhall Dublin 2006) 19.

way he did. This was certainly a more practical approach, as the State sought to address the casual factors with a view to preventing further offences by the individual.

E TWENTY-FIRST CENTURY POSITION

Although the fundamental values of the welfare complex continued to be recognised towards the end of the twentieth century and in the beginning of the twenty-first century, there has been further development and a branching off from the traditional welfarist approach. It may be contended that the contemporary approach is one of reform and restorative justice. As the word 'reform' would suggest, this approach seeks to help an individual to overcome certain factors so that he himself can change as a person, and hopefully no longer offend society by his behaviour. Rather than merely identifying and accepting an individual's so-called flaws, there has been a move towards providing rehabilitative treatment so that the individual will overcome these personal challenges. Of course this approach is not suitable for all individuals. There are certainly many cases whereby the individual experiences particular inherent conditions which cannot simply be remedied away. However, in situations where treatments exist which can eradicate or, at least, ease these challenges, the criminal justice system quite often turns to these for assistance in addressing the individual's needs.[30] As regards the restorative approach; this essentially involves the individual accepting responsibility for his conduct and making amends. Sharpe explains that 'the values ascribed to restorative justice tend to cluster around concepts like inclusion, democracy, responsibility, reparation, safety, healing and reintegration.'[31] Meanwhile Zehr comments that the core underlying value is that of respect.[32] This would essentially be respect for society, the law, for others and for oneself.

It can be seen that the Irish criminal justice system has been seeking to deal with the individual with a view to reformatory and restorative justice. For example, probation orders are used to offer the offender an opportunity to remain out of prison so long as he is of good behaviour. He may also have to comply with other conditions which seek to address his character, for example treatment for addiction or counselling.[33] A Community Service Order may also be ordered by a court in place of a custodial sentence.[34] Here the offender is obliged to carry out a certain number of hours of voluntary work within the community. This essentially requires the individual to give something back to the community as a form of apology for his offending conduct.[35] In respect of youth justice, the Children Act 2001 put the Garda Siochána Juvenile Diversion Scheme on a statutory footing. Under this scheme a child (a person under 18

[30] For example counselling or treatment for substance abuse and/or dependency.
[31] Sharpe 'How Large Should the Restorative 'Tent' Be?' in Zehr and Toews (eds) *Critical Issues in Restorative Justice* (Criminal Justice Press 2004) 19.
[32] Zehr 'Evaluation and Restorative Justice Principles' in Elliott and Gordon (eds) *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Cullompton Willan 2005) 302.
[33] See generally Vaughan *Toward a Model Penal System* (Irish Penal Reform Trust Dublin 2001) 74.
[34] Community Service Orders were introduced in Ireland in 1983.
[35] See *Vaughan* (n 33) 75.

years of age) may be cautioned in place of being prosecuted by the Children Court. The child will then generally be monitored and mentored by a Juvenile Liaison Officer (JLO), who is a specially appointed member of the Garda Siochána. The scheme may also involve a conference, whereby the child, members of his family, the JLO and any other relevant individual meet to discuss the child's conduct and how to help the child so that he does not re-offend. A restorative forum may also be used under this scheme whereby the child meets with the victim(s) of his conduct to discuss the offense and offer an apology.[36] Meanwhile within the prison system drug rehabilitation programmes have been put in place, psychological treatment is offered to prisoners and various educational schemes are available, thus prisoners can be assisted within the scope of these areas.[37]

1 Popular Opinion in the Twenty–First Century

Although the contemporary systems and approaches that are in place support the recognition of individual justice, some dissatisfaction with the concept may be found within popular opinion. Towards the end of the twentieth century changes in society itself led to a lack of faith in the therapeutic approach and the re-emergence of the 'lock 'em up' attitude, rather than the assessment of individual needs and circumstances. Matters of criminal justice could certainly be said to have fuelled this turnabout. For example, the murders of journalist Veronica Guerin and Detective Garda Jerry McCabe, both in June 1996; the recognition of the existence of 'gangland' crime in Irish society; greater media coverage of criminal activity; and a general increase in the number of serious offences being committed. Events outside the direct scope of the criminal hand of the law made further contribution. The founding of various victim support services and programmes, such as 'community watch' at local level, served to remind people that offences could be committed right within their own communities and homes, something which was perhaps quite unsettling. While various scandals involving members of the clergy, the huge debate surrounding the X case and the general move away from traditional Irish notions of family life and the teachings of the Catholic church sparked fears that the 'Island of saints and scholars' was now one of dangerous and immoral sinners. Something of a moral panic spread through the State due to the heightened concern about crime and a lack of order at this time. Kilcommins has noted that during the general election campaign in 1997, law and order gained primacy of place as a relevant issue to the campaign in opinion polls. 41% of people now held this to be the main issue for concern; in 1992 crime, law and order was the most important issue for just 8% of those polled, while in 1989 this stood at just 6%.[38]

What appeared to emerge then was a discourse of 'us' versus 'them.' The concept of the 'criminal' as an evil and dangerous force was now very much in vogue, in place of the idea that he was an individual who committed an offence due to various causes. Calls

[36] See generally Kilkelly *Children's Rights in Ireland: Law, Policy and Practice* (Tottel Publishing England 2008) 538-539.
[37] See generally *Irish Prison Service Annual Report 2007* 18-24.
[38] *Kilcommins* (n 21) 137.

for a tougher criminal justice system could be found in the media, public debate and in politics, fuelled by the desire to stand up to the criminals in our society and to put a stop to their activities. A number of developments came about which conveyed that society was serious about fighting back. By the end of 1996 a package of criminal legislation had been enacted. The Criminal Assets Bureau Act 1996 and the Proceeds of Crime Act 1996 sought to strike at the profits which were gained by crime. The Criminal Justice (Drug Trafficking) Act 1996 provided for a maximum period of seven days detention without charge for a person arrested under the Act and permitted inferences to be drawn from silence where a person was questioned under the Act and also empowered members of the Garda Siochána, not below the rank of Superintendent, to issue search warrants under the Act where they believed such to be necessary to properly investigate an offence. In November 1996, a Constitutional referendum to widen the grounds on which bail could be refused was successful. This was followed by the enactment of the Bail Act 1997. These developments afforded greater power for the investigation of crime and greater interference with the liberty of an accused individual. It seemed that society was so caught up with the fight against crime that it condoned broad measures without regard for the case of the individual.

F INDIVIDUAL JUSTICE AND THE CRIMINAL JUSTICE SYSTEM

While public opinion may influence policy and procedure, matters of law enforcement are, however, left to specialised agencies, and sentencing offenders remains a power exercised exclusively by the judiciary.[39] While the concept of the 'criminal,' and not the individual, appeared to be a core consideration for society in general, the functioning of our criminal justice system was not so swayed. Dealing with each individual has remained the focal point for the system.[40] The existence of judicial discretion within the Irish criminal justice system greatly enables the application of individualised justice to the sentencing process. According to O'Malley, the highly discretionary system in Ireland 'has the advantage of allowing the particular circumstances of each case to inform the choice of sentence.'[41] He also asserts that while the Irish sentencing system may have its critics at home, ' … abroad it has some admirers who approve of the authority still vested in our judges to consider the circumstances of

[39] Bacik points out that the exclusivity of the judicial role in sentencing is 'implicit' in Article 34 of the Constitution. Bacik 'The Practice of Sentencing in the Irish Courts' in O'Mahony (ed) *Criminal Justice In Ireland* (Institute of Public Administration Dublin 2002) 352. On the same point, it has been noted by O'Dalaigh CJ that '… the selection of punishment is an integral part of the administration of justice.' He went on to note that as our Constitution is so 'broadly based [upon] the doctrine of the separation of powers' it would be 'inconceivable' to think that administration of justice may be carried out by a branch other than the judiciary. *Deaton v Attorney General and Revenue Commission* [1963] IR 170 (SC) 183.

[40] O'Flaherty has commented that the 'principal aspects to be assessed in any individual case will be the seriousness of the offence, the background and record of the accused person' and whether the accused pleaded guilty. O'Flaherty 'Punishment and the Popular Mind: How Much is Enough?' in O'Mahony (ed) *Criminal Justice in Ireland* (Institute of Public Administration Dublin 2002) 376.

[41] O'Malley 'Principled Discretion: Towards the Development of a Sentencing Cannon' (2002) 7(3) Bar Review 135.

the offender as well as the nature of the offence' when sentencing.[42] This situation has not, however, come about by virtue of chance but rather 'flows naturally' from our statutory framework.[43] Upon examination it is notable that it is common practice for the Irish Legislature to stipulate maximum rather than mandatory sentences.[44] What follows from this, therefore, is that while judges are contained by the set maximum periods, they are generally not obliged to apply a specifically set sanction to any offence which falls under an umbrella definition.[45] The 1996 Law Reform Commission Report on Sentencing expressly stated that 'the most important element of sentencing' was that of judicial determination[46] and opined that a statutory scheme of sentencing should not be introduced.[47]

Therefore, under the Irish criminal justice system, judges have the function of determining the appropriate sanction for each offender who comes before the court. In the High Court case of *The State (Healy) v Donoghue*[48] it was stated by O'Higgins CJ, that in imposing a sentence which is both fair and just in nature, regard should be had for 'the seriousness of the charge brought against the person and the consequences involved for him.'[49] In that same case Mr. Justice Henchy noted that where guilt has been established or admitted to, the accused should receive a sentence 'appropriate to his degree of guilt and his relevant personal circumstances.'[50] In *The People (DPP) v Tiernan*[51] Finlay CJ referred to the 'fundamental necessity for judges in sentencing in any form of criminal case to impose a sentence which in their discretion appropriately meets all the particular circumstances of the case.'[52] The Chief Justice further noted that very few criminal cases are particularly similar[53] thus conveying that offenders, even though they may have committed the same crime in title, will tend to have different factors and surrounding

[42] ibid 135.
[43] *O'Malley* (n 29) 16.
[44] Particularly serious offences tend to be the exception to this rule. A minimum mandatory sentence is set out for both murder and attempted murder in section 4 of the Criminal Justice Act 1990. Section 5 of the Criminal Justice Act 1999, amending the penalty provision of the Misuse of Drugs Act 1997 in respect of an offence under section 15 of the 1977 Act, sets out that a minimum period of 10 years imprisonment shall apply. Section 35 of the Criminal Justice Act 2007, amending section 15 of the Firearms Act 1925, states that the minimum sentence shall be 10 years imprisonment for a person found guilty under that section.
[45] On this point *O'Malley* (n 29) refers the offence of theft- the unlawful taking of something without the owner's permission. He notes that under a strict definition any theft would simply be treated in a uniform manner. However he goes onto compare examples of the theft of a bar of chocolate to the theft of a valuable painting to illustrate that in reality offences can often be quite different. *O'Malley* (n 29).
[46] The Law Reform Commission *Report on Sentencing* (LRC53-1996) ch 1, para 1.
[47]ibid ch 2, para 11. The report also showed its continued support for the principle of proportionality in sentencing (ch 2), as well as recommending that a 'sentence of imprisonment should be regarded as a sanction of last resort' (ch 1).
[48] [1976] IR 325.
[49] ibid 350.
[50] *Donoghue* (n 48) 353.
[51] [1988] IR 250.
[52] ibid.
[53] *Tiernan* (n 51) 254.

circumstances to be considered as part of their case. In *The People (DPP) v M* Denham J noted that:

> sentencing is a complex matter in which principles, sometimes being in conflict, must be considered as part of the total situation. Thus, while on the one hand a grave crime should be reflected by a long sentence, attention must also be paid to individual factors, which include remorse and rehabilitation, often expressed *inter alia* in a plea of guilty, which in principle reduce the sentence. [54]

More recent cases serve to illustrate that this judicial attitude has continued. In *The People (DPP) v McCormack*[55] Mr. Justice Barron quite strongly supported the concept of individual justice. He stated that '[e]ach case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also on the personal circumstances of the accused.'[56] While in *The People (DPP) v Kelly*[57] the Court of Criminal Appeal noted that under the Irish sentencing regime sentences must be proportionate not only to the crime but to the individual offender. Therefore, while support for the individualised approach may be somewhat lacking amongst the public it has certainly not been abandoned by those who are entrusted with the task of deciding on how to punish offenders within our society.

G CONCLUSION

Penality has certainly evolved over time. In the eighteenth century penality was concerned with physical punishment, which generally amounted to torture. During the Victorian era punishment by torture was abandoned in favour of punishment which took the offender out of common society and placed him within the confines of the prison. This system sought to encourage him to focus on his moral being so that he would repent and reform his character. With the twentieth century came the emergence of the 'Welfare State,' where it was recognised that persons should be treated according to their own individual circumstances. A whole grid of institutions and agencies developed which aimed to address the needs of various individuals. By the twenty-first century the welfarist approach was supplemented by the rehabilitative approach, as the desire to 'fix' people appeared to gain strength. However, some divergence has emerged. A heightened awareness of crime and disorder led to a notable public desire to treat criminals as criminals, to discover their activities, to limit their rights and to take away their power. Thus it seemed that support for the concept of the individual in need of rehabilitation was lost, at least to a certain degree, within the public domain as favour was shown for

[54] [1994] 3 IR 306.
[55][2000] 4 IR 356.
[56] ibid 359. Justice Barron went on to say that the sentence to be imposed 'is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused.'
[57][2005] 1 ILRM 19.

harsher punishments of those who offended society. Yet, it is the criminal justice system itself which determines how offenders should be dealt with. The judiciary continue to confirm that the assessment of each individual case is a fundamental aspect of our criminal justice system. Therefore, while popular opinion may not have faith in the concept of individualised justice, it nonetheless seems to be well established within our contemporary penal approach. What remains to be seen is whether society as whole will come full circle in its attitude towards the offender so that it may once again accept that individual justice is essential for a truly just and effective penal system.