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SUBMISSIONS

The Editorial Board of the Cork Online Law Review at University College Cork, Ireland, would like to invite submissions for the 22nd Edition. All submissions should be on a legal topic and be between 3,000 and 9,000 words in length. Articles are welcome in English, Irish or French. All interested parties should submit their articles and enquiries to:

The Editor-in-Chief
editor@corkonlinelawreview.com

Submissions are also invited for the Roundtable blogs section. Submissions should be on a topic of current legal relevance, whether domestic or international, and be between 800 and 1,500 words in length. All interested parties should submit their blogs and enquiries to:

The Blogs Editor
blogseditor@corkonlinelawreview.com

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ACKNOWLEDGEMENTS

On behalf of the Cork Online Law Review, I would like to extend our sincere gratitude to the UCC School of Law faculty. Their expertise, advice and assistance in the reviewing process was essential to the publication of this edition.

On behalf of the Editorial Board, I would like to extend our gratitude to the Hon. Ms Justice Isobel Kennedy for doing us the great honour of launching the 21st Edition.

The Editorial Board would like to thank the Dean of the Law School, Professor Mark Poustie, and the Deputy Dean of the Law School, Professor Conor O'Mahony, for all of their help and support. I would also like to thank the Executive Committee of the UCC Law Society who have been an invaluable source of support and advice over the past year.

We would also like to express our sincerest gratitude to our continued sponsors, Arthur Cox. Without their generous sponsorship and support, COLR would not be where it is today. In particular, I would like to thank Eimear Power for the help and assistance she has provided.

I would like to recognise the hard work and dedication of the Editorial Board members throughout the year. In particular, I wish to thank our Deputy Editor-in-Chief, Ruairi McIntyre. The quality of this publication is a testament to his diligence, work ethic and academic ability.

Finally, we would like to congratulate the authors of the exemplary contributions to the 21st Edition of COLR. Their interesting and varied contributions, exploring areas of Irish, EU and international law, are a welcome addition to the academic scholarship of COLR. My hope is that each of these articles will act as a vehicle for the further discussion and development of our laws and legal theory. We would also like to thank those who contributed to our Roundtable blogs section and Case Notes Competition. It has been a very worthwhile year for us and we really look forward to seeing what COLR produces in the years to come.

Is mise le meas,

Jack Kenny,

Editor-in-Chief of the 21st Edition.

FOREWORD TO THE 21ST EDITION

It is a true honour to be invited to provide the Foreword to the 21st Edition of the Cork Online Law Review, a most impressive, entirely student-run publication. The articles in this years' edition speak to the high standard of legal teaching, and indeed, legal thinking, present in University College Cork and beyond.

I remember fondly my own time at the Law School in University College, Cork; it is the place where I became in thrall to the law, the importance of justice and the rule of law. I am honoured to follow the previous authors of the foreword, the academics and members of the judiciary who filled this role before me. To name just three inspirational jurists; former Supreme Court Judge and former president of the Law Reform Commission; Catherine McGuinness, current Supreme Court Judges; Mr Justice Gerard Hogan and Ms Justice Marie Baker, all of whom epitomise for me the qualities of independence, justice, and fairness. Their contributions to Irish legal life are legendary.

Reading through this year's edition I was struck by the level of independent thinking that went into the articles and by their relevance to today's world. The contributors have chosen a mixture of topics, some of general appeal and others, with a more narrow focus. This allows the reader to learn of new developments in the law and be updated on others.

I was especially impressed to note two French language articles. In one of these articles, Francisco Hernández Fernández analyses the doctrine of evolutive interpretation as applied by the European Court of Human Rights and in another French language article, Dr Elise Lefeuvre accounts the impact of the 2008 Global Financial Crisis on Ireland, through the lens of the Dublin case.

This stream of high standard articles flowed throughout the rest of the Review; Giovanni Chiarini provides an interesting discussion on the increasingly-relevant crime of ecocide and a proposal to add ecocide as a new crime to the ICC Rome Statute. Peter Murphy addresses the Banking Union as set up in the aftermath of the Global Financial Crisis and puts forward proposals for its reform. Ciara Barbara O'Rourke deals with the potential impact of the proposed Digital Services Act on victims of image-based sexual abuse. Niall Prior bravely tackles the difficult issue of legislating for assisted suicide and the role disabled persons should have in that process and Margot Donze outlines the Rockall Fishing dispute between the UK

and Ireland, investigating these claims in light of international law, namely, customary international law, treaties and historic rights.

Each article in this year's review provokes thought and inspires discussion. Such attributes are the bedrock of the essential skills for legal writers. Each article is also the work of creative and independent thinkers, attributes which cannot be understated in legal circles.

In the case note section, Eoin Jackson examines the Google Shopping case and argues that the decision represents an important step forward for the ex-ante regulation of big tech. I was particularly pleased to see the inclusion of a case note in this year's review. Case notes allow students to dip their toes into the world of academic writing and get a feel for it. I can only hope that the Cork Online Law Review will continue to foster the upcoming generation of legal writers in this way.

This year's review is a true testament to the academic ability and diligence of Jack Kenny and the members of the Editorial Board of the 21st Edition and they must be commended and encouraged in this regard. The skills of editing and proofreading, quite like the skills of legal research and writing, are not so easily mastered but will no doubt stand to them in their future careers. The Cork Online Law Review has always stood at the forefront of legal scholarship and this latest edition allows the Review to continue down this path.

The Law School of University College, Cork, continues to be well served by these valuable academic works.

Isobel Kennedy,
Court of Appeal,
Criminal Courts of Justice,
Dublin 8

EDITORIAL BOARD OF THE 21st EDITION OF THE CORK ONLINE LAW REVIEW

ADVISORY BOARD OF THE 21st EDITION OF THE CORK ONLINE LAW REVIEW

ECOCIDE: FROM THE VIETNAM WAR TO INTERNATIONAL CRIMINAL JURISDICTION? PROCEDURAL ISSUES IN-BETWEEN ENVIRONMENTAL SCIENCE, CLIMATE CHANGE, AND LAW

*Giovanni Chiarini**

A INTRODUCTION – A 50 YEAR HISTORY OF ECOCIDE: BETWEEN POLITICS, WAR AND SCIENCE

The crime of 'ecocide' has been discussed for almost 50 years and is of increasing relevance. Starting as scientific and biological debates during the Vietnam War, ecocide arguments became foremost political and then juridical. Recently in 2021, the 'Stop Ecocide Foundation' proposed to add ecocide as a new crime to the International Criminal Court (ICC) Rome Statute (RS), recommending amendments regarding substantive law and the structure of the crime of ecocide. This paper does not argue against this proposal. On the contrary, following an examination of the history of the crime of ecocide, it puts forward an integrative proposal focused on procedural issues.

Ecocide can be considered as a neologism derived from the Greek *oikos* (house, home) and the Latin *caedere* (destroy, kill), which essentially means the wilful destruction of the environment. Contrary to what we generally tend to believe, its history is not so recent. The creation of this term – taking his cue from the UN Genocide Convention – is commonly attributable to Dr Arthur W Galston, an American botanist and bioethicist who was Director of the Division of Biological Sciences at Yale University.

Professor Galston described the appalling effects of the powerful defoliant 'Agent Orange', so-called for the orange stripe painted around the steel drums that contained it. During the Vietnam War, American troops released an estimated 20 million gallons of the chemical herbicide to destroy crops and expose the National Liberation Front of South Vietnam positions and routes of movement in the vast forests and territories of both Vietnam and Cambodia.[1] In 1969, in his

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Official Statement to the US Congress hearings, Galston observed that about 4 million acres of Vietnam were sprayed with about 100 million pounds of assorted herbicides, including other agents such as 'Agent White' and 'Agent Blue': approximately an area the size of the State of Massachusetts.[2] Galston expressly noted that the warfare usage of these chemicals and especially of 'Agent Orange,' was eliminating 'one of the most important ecological niches for the completion of the life cycle of certain shellfish and migratory fish'.[3] These revelations led President Richard Nixon to order a halt to its use.[4]

Later, in 1970, during the Conference on War and National Responsibility in Washington, Galston proposed a 'plea to ban ecocide',[5] also considered as 'a new international agreement to ban ecocide'.[6] Even though Galston's words on the Vietnam War are now history, the neologism and his enlightening tripartition of the above-described damage are still pertinent: 'One is ecological damage; the second would be inadvertent agricultural damage, and the third involves direct damage to people'.[7] His pioneering view constituted a breakthrough in the affirmation of the concept of ecocide. In the following years, various scientists dedicated their studies to this field, including jurists, and a part of the political community were drawn to the issue.

In 1972, at the UN Stockholm Conference on the Human Environment, the Swedish Prime Minister Olof Palme explicitly talked about ecocide in his keynote address, with specific attention paid to the Vietnam War.[8] The Stockholm Conference, which was a result of the so-

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also interned as a Law Clerk at the Supreme Court of the Extraordinary Chambers in the Courts of Cambodia, with the United Nations Assistance to the Khmer Rouge Trials (UNAKRT). Opinions expressed represents the author's view and not the institutions above mentioned. The author sincerely thanks Dr Doug Cubie and Jack Kenny for their enlightening reviews.

[1] 'In memoriam: Arthur Galston, Plant Biologist, Fought Use of Agent Orange' *YaleNews* (New Haven, Connecticut, 18 July 2008) <https://news.yale.edu/2008/07/18/memoriam-arthur-galston-plant-biologist-fought-use-agent-orange> accessed 24 March 2022.

[2] Arthur W Galston, 'Statement of Dr Arthur W Galston, Professor of Biology and Lecturer in Forestry, Yale University' (1970) in 'Chemical-Biological Warfare: US Policies and International Effects: Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, US House of Representatives Hearing, 91st Congress, 1st Session, 18, 20 November and 2, 9, 18 – 19 December 1969' (1970) US Government Printing Office 107.

[3] Galston (n 2) 108.

[4] *YaleNews* (n 1).

[5] '… and a Plea to Ban "Ecocide"' *The New York Times* (New York, 26 February 1970) <https://www.nytimes.com/1970/02/26/archives/and-a-plea-to-ban-ecocide.html> accessed 24 March 2022.

[6] Barry Weisberg, *Ecocide in Indochina: The Ecology of War* (Canfield Press 1970) 4.

[7] Galston (n 2) 108.

[8] Statement by Prime Minister Olof Palme in the Plenary Meeting (UN Conference on the Environment, Stockholm, 6 June 1972), 12 <http://www.olofpalme.org/wp-content/dokument/720606a_fn_miljo.pdf> accessed 24 March 2022. He stated that '[t]he air we breathe is not the property of any one nation – we share it. The big oceans are not divided by national frontiers – they are our common property …. In the field of human environment

called 'Swedish Initiative',[9] is considered the 'birth of the green generation',[10] as well as a ground-breaking achievement. Moreover, not only Olof Palme denounced the Vietnam War in human and environmental terms, but also other heads of state, including Indira Gandhi from India, the leader of the Chinese delegation Tang Ke, and delegates from Iceland, Tanzania, Romania, Algeria, and Libya.[11] Without any shadow of doubt, this gathering invigorated environmental movements all over the world, for a 'fierce political battle' and was a trailblazer for subsequent environmental international negotiations.[12] However, neither the Stockholm Declaration nor the Official Report of the Conference expressly mentioned the crime of ecocide.[13] Nevertheless, it was wisely observed by Professor John HE Fried that although not legally defined, the question was:

> Not whether 'ecocide' is forbidden by international law under the term 'ecocide.' In a purely formalistic sense, the world legal order has, because of the very enormity and novelty of the phenomenon, not yet included in its vocabulary. But to conclude from this that, therefore, the phenomena which it describes are beyond the pale of international law, or are therefore legal, would be as impermissible as to claim that Hitler's extermination camps were not illegal because the name of genocide was at that time not part of international law.[14]

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there is no individual future, neither for humans nor for nations. Our future is common. We must share it together. We must shape it together. ... The immense destruction brought about by indiscriminate bombing, by large scale use of bulldozers and pesticides is an outrage sometimes described as ecocide, which requires urgent international attention. It is shocking that only preliminary discussions of this matter have been possible so far in the United Nations and at the conferences of the International Committee of the Red Cross, where it has been taken up by my country and others. We fear that the active use of these methods is coupled by a passive resistance to discuss them'.

[9] Eric Paglia, 'The Swedish initiative and the 1972 Stockholm Conference: The Decisive Role of Science Diplomacy in the Emergence of Global Environmental Governance' (2021) 8(2) Humanities and Social Sciences Communications 1.

[10] Richard Black, 'Stockholm, Birth of the Green Generation' *BBC News* (London, 4 June 2012) <https://www.bbc.com/news/science-environment-18315205> accessed 24 March 2022.

[11] Tord Bjork, 'The Emergence of Popular Participation in World Politics: United Nations Conference on Human Environment 1972' (Seminar paper, University of Stockholm 1996) 1, 20 <http://www.folkrorelser.org/johannesburg/stockholm72.pdf> accessed 24 March 2022.

[12] Peter Willets, 'From Stockholm to Rio and Beyond: The Impact of the Environmental Movement on the United Nations Consultative Arrangements for NGOs' (1996) 22 Review of International Studies 57; Tony Brenton, *The Greening of Machiavelli: The Evolution of International Environmental Politics* (The Royal Institute of International Affairs Series, 1994). For the other negotiations: United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992); General Assembly Special Session on the Environment (New York, 21, 23-27 June 1997); World Summit on Sustainable Development (Johannesburg, 26 August - 4 September 2002); UN Conference on Sustainable Development (Rio de Janeiro, 20-22 June 2012); UN Sustainable Development Summit (New York, 25-27 September 2015).

[13] United Nations, 'Report of the United Nations Conference on the Human Environment – Stockholm, 5-16 June 1972' (New York, 1973) UN Doc A/CONF.48/14/Rev.1 <https://www.un.org/en/conferences/environment/stockholm1972> accessed 24 March 2022.

[14] John HE Fried, 'War by Ecocide: Some Legal Observations' (1972) 4(1) Bulletin of Peace Proposals 43, 43.

The first juridical approach, advanced soon after the conclusion of the Stockholm Conference, is to be found in the proposal of Professor Richard Anderson Falk.

I The Law is Coming: 1973 Richard A Falk's International Convention on the Crime of Ecocide

In 1973, starting from the environmental warfare in Indochina, Professor Falk urged the political and legal community to 'designate as a distinct crime those cumulative war effects that do not merely disrupt, but substantially and irreversibly destroy a distinct ecosystem'.[15] In order to take steps to strengthen and clarify international law as well as to stop and rectify the ecological devastation of the former Indochina, Falk proposed an 'International Convention on the Crime of Ecocide', together with other draft instruments such as the 'Draft Protocol on Environmental Warfare' and the 'Draft People's Petition of Redress on Ecocide and Environmental Warfare addressed to Governments and to the United Nations'.[16] For Falk, the variety of weapons including bombs, napalm, herbicides, and poisonous gases used principally and extensively by the United States in the course of waging war in Indochina caused extensive ecological and long-term damages.[17]

In article 2 of the Falk's Convention, 'ecocide' was so formulated:

> … ecocide means any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem:
>
> a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
> b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
> c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or the enhance the prospect of diseases dangerous to human beings, animals, or crops;
> d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
> e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
> f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.[18]

[15] Richard A Falk, 'Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals' (1973) 4(1) Bulletin of Peace Proposals 80, 91.
[16] ibid.
[17] ibid annex 4.
[18] ibid annex 1.

In article 3 Falk proposed that not only ecocide shall be punishable, but also: the conspiracy to commit ecocide; direct and public incitement to ecocide; attempts to commit ecocide; and complicity in ecocide. Regarding the sanctions to be imposed, article 4 stated that whoever committed ecocide or related crimes shall be punished, at least to the extent of being removed for a period of years from any position of leadership or public trust. Moreover, it was highlighted that constitutionally responsible rulers, public officials, military commanders, or private individuals may all be charged with and convicted of the crimes associated with ecocide as set forth in article 3. Falk proposed the establishment, by the United Nations, of a Commission for the Investigation of Ecocide, composed of fifteen experts on international law and assisted by a staff conversant with ecology, with the principal tasks to investigate allegations of ecocide and with a particular procedure, well-described in article 5. Article 6 of the draft required the contracting parties to enact the necessary legislation and to provide effective penalties for persons guilty of ecocide or any of the related crimes, and article 8 highlighted that ecocide shall not be considered as a political crime for the purpose of extradition and obligated states to pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force. It was not clear who should have tried the defendants, since article 7 left the door open to both possibilities: by a competent tribunal of the state in the territory of where the act was committed or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties that shall have accepted its jurisdiction. Moreover, article 10 inserted a special jurisdiction of the International Court of Justice at the request of any of the parties to a dispute between the parties relating to the interpretation, application, or fulfilment to the Convention.

In part B of the Convention, titled ‘Resolution relating to the study by the International Law Commission of the question of an international criminal jurisdiction’, the question raised was on the desirability and possibility of having persons charged with ecocide tried by a competent international tribunal. It was proposed that the UN General Assembly would invite the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with ecocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions. Lastly, it was proposed that the General Assembly would request the International Law Commission in carrying out this task to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice. This latter formulation is not clear, but probably the aim was to induce states to accept the Convention, regardless of determining at that stage whether or

not to establish a special international tribunal, or conversely to create a criminal chamber within the International Court of Justice.

For Falk, recognising that the world was living in a period of increasing danger of ecological collapse, acknowledging that humans have the power to consciously or unconsciously inflict irreparable damage to the environment, both in times of war and peace, was the first aim of the Convention; while procedural matters were relegated to subsequent stages of developing a new international legal regime. However, he was convinced , and expressively wrote in the preamble, that the pursuit of ecological quality requires international guidelines and procedures for cooperation and enforcement.[19] Falk's proposals were far-reaching and comprehensive, but how did the international community react to his planned Convention?

II The Tough Time of Politics: The 1978 and 1985 UN Special Rapporteurs' Studies to Introduce Ecocide into the 1948 Genocide Convention

Five years after Falk's draft, in 1978, the UN Special Rapporteur on the Prevention and Punishment of the Crime of Genocide, Nicodème Ruhashyankiko, prepared a 'Study of the Question of the Prevention and Punishment of the Crime of Genocide',[20] which was presented to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. In his report, Ruhashyankiko discussed the crime of ecocide as 'an international crime similar to genocide', on the basis of the Falk proposal.[21] The document underlined both support and resistance by states in the discussions of the previous years. In 1973, the government of Romania advanced a proposal to adopt supplementary conventions or the revision to the 1948 Genocide Convention,[22] and the Holy See stated in 1972 that 'serious consideration should be given to the matter of those acts which might be called "cultural genocide" or "ethnocide" or "ecocide"'.[23] Poland observed that the international measures adopted to date concerning the prevention and punishment of the crime of genocide did not prove effective, and therefore a new Convention should be sought.[24] Moreover, the view of the UN Sub-Commission was that any interference with the natural surroundings or the environment in which ethnic groups lived

[19] ibid.
[20] Nicodème Ruhashyankiko,'Study of the Question of the Prevention and Punishment of the Crime of Genocide' (31st Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Geneva, 4 July 1978) UN Doc E/CN.4/Sub.2/416 <https://digitallibrary.un.org/record/663583> accessed 24 March 2022.
[21] ibid paras 462-464.
[22] ibid para 465.
[23] ibid para 450.
[24] ibid para 426.

was in effect a form of ethnic genocide because 'such interference could prevent the people involved from following their own traditional way of life'.[25]

Other governments observed, more generally, that the 1948 Genocide Convention should not be revised. The government of the Union of Soviet Socialist Republics stated that:

> as far as proposals for revising this Convention or concluding a new one is concerned, given that only a third of the Members of the United Nations are parties to the 1948 Convention, there does not appear to be any great urgency about the matter. Attention should mainly be concentrated, it would seem, on measures which would encourage more [s]tates to become parties to the existing Convention.[26]

Similar views were expressed by the governments of both the Ukrainian and Byelorussian Soviet Socialist Republic.[27]

For Italy, 'the existing international measures concerning genocide seem to be sufficiently effective, provided that all Member States accede to them and fulfil their commitments',[28] and for Austria 'the effectiveness of existing international measures concerning genocide and of the provisions of the Convention of 1948 is rather limited considering that various kinds of genocidal actions continue to be perpetrated in various parts of the world', so 'steps to strengthen existing legal instruments should be given priority'.[29] The limited effectiveness of the existing law was also highlighted by other states such as Rwanda, Congo, Oman,[30] underlining that 'as long as an International Criminal Court has not been established, the Convention of 1948 will only have a limited scope'.[31] Finland highlighted that '[f]rom the point of view of criminal law, however, some of these concepts suggested so far to be taken into consideration in this respect may be somewhat too vague to be accurately defined as criminal acts. As much as they are to be deplored, they may be better combated by other means'.[32]

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[25] United Nations Economic and Social Council 'Report of the 6th session of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities to the Commission on Human Rights, New York, 4-29 January 1954' (New York, 1954) UN Doc E/CN.4/703 53; UN Doc E/CF.4/Sub.2/SR.658, 55 and UN Doc E/CN.4/Sub.2/SR.659, 65 as mentioned in Nicodème Ruhashyankiko, 'Study of the prevention and punishment of the crime of genocide' (Geneva, 1978) UN Doc E/CN.4/Sub.2/420 17, para 467 <https://digitallibrary.un.org/record/663583> accessed 24 March 2022.
[26] Nicodème Ruhashyankiko (n 20) para 420.
[27] ibid para 420.
[28] ibid para 421.
[29] ibid para 422.
[30] ibid paras 428-430.
[31] ibid.
[32] ibid para 452.

The position of the United Kingdom was probably the clearest:

> In the absence of any impartial assessment of allegations that genocide has been committed, it is impossible to comment on the effectiveness of the existing international measures for dealing with such situations. The possibility of taking further international action would appear to be a question which should be considered at a time when the existing international measures and machinery have been tested in practice. Until such time, the question of further international action must remain academic.[33]

Nicodème Ruhashyankiko proposed also – at paragraph (b) of his study – the inclusion of ecocide as a war crime, but without success either.[34] As can be seen from the above summary, the political discussions on ecocide in the late 1970s were far from easy.

The next step is to be found in 1985, in a revised and updated shorter report of the subsequent UN Special Rapporteur, Benjamin Whitaker, a British barrister and Labour Party politician.[35] In article 29(3), entitled 'Cultural genocide, ethnocide and ecocide' it was highlighted that adverse alterations, often irreparable, to the environment – for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest – which threaten the existence of entire populations, whether deliberately or with criminal negligence, should be criminalised.[36] Whitaker observed that the main victims of such actions are indigenous populations, but this notion of ecocide was far from the one that we know today.[37] He also highlighted the different definitions and understandings of ecocide and said that further consideration should be given to this question.[38]

Neither of the Ruhashyankiko or Whitaker proposals were developed further by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Indeed, in the subsequent 38th session report dated 5-30 August 1985, ecocide is just mentioned a few times

[33] ibid paras 424 and 468. Meanwhile, regarding ecocide, the UK Government noted that 'the term has been used in certain debates for the purposes of political propaganda and it would be inappropriate to attempt to make provisions in an international Convention for dealing with matters of this kind'.
[34] ibid paras 470-478.
[35] Benjamin Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide' (38th Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Geneva, 2 July 1985) UN Doc E/CN.4/Sub.2/1985/6 <https://digitallibrary.un.org/record/108352?ln=en> accessed 24 March 2022.
[36] ibid para 33.
[37] ibid. José R Martinez Cobo, 'Study of the Problem of Discrimination against Indigenous Populations' (New York, 1987) UN Doc E/CN.4/Sub.2/1983/21/Add.8 <https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH01a2/55590d02.dir/Martinez-Cobo-a-1.pdf> accessed 24 March 2022.
[38] Whitaker (n 35) para 33.

but without either a dedicated chapter or a dedicated paragraph.[39] Space was found for ecocide only in the chapters dedicated to '[o]ther matters'.[40] At the previous 36th meeting it was suggested that a fifth operative paragraph should be added which would read:

> 5 Recommends to the Commission on Human Rights to authorize the Sub-Commission to request its Special Rapporteur, Mr Benjamin Whitaker, to study the notions of 'cultural genocide', 'ethnocide' and 'ecocide' and to submit his report to the Sub-Commission at its fortieth session.[41]

Moreover, in Annex IX Mr Deschenes – a Canadian Quebec Superior Court judge – said that, at the time of consideration of Mr Whitaker's report, members had discussed the advisability, indeed the necessity, of studying the ecocide question. If the debate was to be recorded faithfully, those matters should be mentioned in the report, for example by inserting after paragraph 11 a new paragraph which would read: 'The questions of cultural genocide, ethnocide and ecocide were also raised, and the view was expressed that they deserved to be studied further'.[42] This was challenged by another attendee; Mr Chowdhury, from Bangladesh, said that the report should specify unambiguously whether 'one' member, 'some' members or 'several' members of the Sub-Commission had raised the questions of cultural genocide, ethnocide and ecocide. Chowdhury argued that the formulation of words being proposed implied that the proposal had come from the Sub-Commission as a whole, when it had in actual fact been the view of only a few of the members.[43] The Russian delegate, Mr Tchikvadze, put an end to the debates saying that it was impossible to include retrospectively in a report something which had not taken place during the work, and if the Sub-Commission decided to include all of the proposals already made, and more particularly the proposal by Mr Deschênes, he would be obliged in turn to propose an amendment.[44]

Following contentious exchanges such as these, the inclusion of a crime of ecocide in the Genocide Convention was ultimately not adopted or pursued further by the Sub-Commission.

[39] United Nations Economic and Social Council, 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 38th Session, Geneva, 5-30 August 1985' (Geneva, 4 November 1985) UN Doc E/CN.4/Sub.2/1985/57 <https://digitallibrary.un.org/record/116304> accessed 24 March 2022.
[40] ibid paras 51-73.
[41] ibid para 62.
[42] ibid annex IX, para 47.
[43] ibid annex IX, para 52.
[44] ibid annex IX, paras 54-55.

III Between Politics and Law: The International Law Commission and the Tortuous Road to the 1996 Draft Code of Crimes Against Peace and Security of Mankind

The International Law Commission (ILC), 'the successor of the 'Committee on the Progressive Development of International Law and its Codification', established by Resolution 94(I)', [45] is a creation of the United Nations by virtue of General Assembly Resolution 174(II) of 21st November 1948. It held its first session in New York in 1949.[46] The Commission was created as a 'subsidiary organ of the General Assembly, especially connected with its Sixth (Legal) Committee'.[47] The primary objective of the Commission, as indicated in article 1(1) of its Statute, is 'the promotion of the progressive development of international law and its codification', and to undertake the mandate of the Assembly, under article 13(1)(a) of the UN Charter to 'initiate studies and make recommendations for the purpose of … encouraging the progressive development of international law and its codification'. Since its establishment more than 70 years ago, the number of states in the world has almost tripled and it has recently been observed that 'today, the Commission faces numerous challenges that are different from those that existed at the time when the Commission was established'.[48]

Soon after its establishment in 1949, the ILC was charged with preparing the so-called 'Draft Code of Offences Against the Peace and Security of Mankind'. Indeed, in Resolution 95(I) sponsored by the United States,[49] the United Nations directed the ILC to: (i) formulate the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal; and (ii) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above.[50]

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[45] Cherif Bassiouni, 'The History of the Draft Code of Crimes Against the Peace and Security of Mankind' (1993) 27(1-2) Israel Law Review 247.

[46] For International Law Commission notes: United Nations, 'Report of the International Law Commission' (*UN-iLibrary*) <https://www.un-ilibrary.org/content/periodicals/2521621x> accessed 24 March 2022.

[47] Sompong Sucharitkul, 'The Role of the International Law Commission in the Decade of International Law' (1990) 3(15) Leiden Journal of International Law 18, 18; Luke T Lee, 'The International Law Commission Re-examined' (1965) 59(3) The American Journal of International Law 545.

[48] Danae Azaria, 'The Working Methods of the International Law Commission: Adherence to Methodology, Commentaries and Decision-Making' in United Nations (ed) *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill 2020) 172.

[49] United Nations 'Affirmation of the Principles of International Law Recognized by The Charter of The Nürnberg Tribunal, General Assembly Resolution 95(I)' (2008) United Nations Audiovisual Library of International Law <https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf> accessed 24 March 2022.

[50] The United States and the United Nations 'Report by the President to the Congress for the Year 1946' (1947) United States Government Printing Office 20. Following the words of US President Truman, contained in a letter to Justice Biddle (the US judge on the Nuremberg Tribunal), the code aims to reaffirm 'the principles of the Nuremberg Charter in the context of a general codification of offenses against the peace and security of mankind'.

A first draft code was submitted by Rapporteur Jean Spiropoulos in 1950,[51] but it was never formally approved.[52] More than 30 years later, on 10th December 1981, the General Assembly adopted Resolution 36/106 by which it requested the Commission to resume its work on the draft code. It has been observed that 'the period between 1984 and 1996 proved to be pivotal' as 'during this time there had been extensive engagement in the ILC about the inclusion of a law regarding extensive environmental damage in the Code'. [53]

Indeed, in 1984, the ILC considered inserting into the 'list of acts to be classified as offences against the peace and security of mankind' the 'acts causing serious damage to the environment' and considering those as international crimes.[54] Moreover, the qualification of these acts as 'crimes against humanity' was discussed.[55] Furthermore, in the 1984 ILC Report the environment itself acquired a global consideration. It was pointed out that many of the world's gravest environmental problems could not be reduced to simple equations, relating a measurable loss or injury within the territory or control of one state to an identified physical consequence of an activity within the territory or control of another state.[56]

In 1986, there was a subsequent debate regarding the concept of 'serious damage to the environment.' According to article 19(3)(d) of the draft articles on state responsibility, 'a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the

[51] Benjamin Ferencz, 'The Draft Code of Offences Against the Peace and Security of Mankind' (1981) 75(3) The American Journal of International Law 674; Jean Spiropoulos 'Draft Code of Offences Against the Peace and Security of Mankind' in United Nations, *Yearbook of the International Law Commission Volume II* (United Nations Publications 1950) UN Doc A/CN.4/25 <https://legal.un.org/ilc/documentation/english/a_cn4_25.pdf> accessed 24 March 2022.

[52] For a procedural history: Antonio Cassese, 'Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal General Assembly Resolution 95(I)' (2009) UN Audiovisual Library of International Law <https://legal.un.org/avl/ha/ga_95-I/ga_95-I.html> accessed 24 March 2022.

[53] Anja Gauger and others, 'Ecocide is the Missing 5th Crime Against Peace' (2012) Human Rights Consortium, School of Advanced Study, University of London, 9; Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Planet* (Shepheard-Walwyn Publishers Ltd 2010); Polly Higgins, *Earth is our Business: Changing the Rules of the Game* (Shepheard-Walwyn Publishers Ltd 2012). For the Higgins proposal: Polly Higgins, Damien Short, and Nigel South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59 Crime, Law and Social Change 251.

[54] 'Report of the International Law Commission on the Work of its 36th Session, 7 May – 27 July 1984, Official Records of the General Assembly, 39th Session, Supplement No 10' in United Nations, *Yearbook of the International Law Commission Volume II(2)* (United Nations Publications 1984) UN Doc A/39/10 11.

[55] ibid 16. It was observed that '[t]he question arises whether it should not in some cases be made a crime against humanity. Some members thought not. However, the Commission considered that, although just any damage to the environment could not constitute a crime against humanity, the development of technology and the considerable harm it sometimes did – for example, to the atmosphere and to water – might lead to certain kinds of damage to the human environment being regarded as crimes against humanity'.

[56] ibid 76.

atmosphere or of the seas' is an international crime against humanity.[57] It was also highlighted that '[i]t is not necessary to emphasize the growing importance of environmental problems today. The need to protect the environment would justify the inclusion of a specific provision in the draft code'.[58] In the same year, the Special Rapporteur suggested complementing the list of crimes against humanity with a provision making breaches of rules for the protection of the environment a punishable act. He proposed the draft of article 12 (acts constituting crimes against humanity) in his fourth report: 'The following constitute crimes against humanity: ... 4. Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment'.[59]

The Special Rapporteur therefore submitted new proposals at the 41st session of the Commission in 1989. Starting from the formulation he had previously used, he now suggested that in draft article 14 (crimes against humanity), which appears in his seventh report, crimes affecting the environment should be couched in the following terms: 'The following constitute crimes against humanity: ... 6. Any serious and intentional harm to a vital human asset, such as the human environment'.[60]

Following further discussions, article 26 of the text adopted on first reading in 1991 provides: 'An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced'. In the commentary to draft article 26 (wilful and severe damage to the environment), it was stated that the draft provision had borrowed most of its elements from article 55 of Additional Protocol I to the Geneva Conventions of 12 August 1949, but that its scope *ratione materiae* was larger in that it applied also in times of peace outside an armed conflict.[61] It was highlighted that this latter draft article applies when three elements are involved: firstly, there should be damage to 'the natural environment'; secondly, 'widespread, long-term and severe damage', and thirdly, the damage must be caused 'wilfully'.[62] It was also observed that the words 'natural environment' should be taken broadly to cover the environment of the human

[57] Doudou Thiam, 'Fourth report on the Draft Code of Offences against the Peace and Security of Mankind' (1986) UN Doc A/CN.4/398 61.
[58] ibid 61.
[59] United Nations, *Yearbook of the International Law Commission Volume II(1)* (United Nations Publications 1986) UN Doc A/CN.4/SER.A/1986/Add.l 86.
[60] United Nations, *Yearbook of the International Law Commission Volume II(1)* (United Nations Publications 1989) UN Doc A/CN.4/SER.A/1989/Add.l 85.
[61] United Nations, *Yearbook of the International Law Commission Volume II(2)* (United Nations Publications 1991) UN Doc A/CN.4/SER.A/1991/Add.l 107.
[62] ibid.

race and where the human race develops, as well as areas the preservation of which is of fundamental importance in protecting the environment, and the seas, the atmosphere, climate, forests and other plant cover, fauna, flora and other biological elements.[63] Numerous observations were received from governments.[64] This first manifestation of 'ecocide', despite its different name, was considered as one of the issues that required particular attention before the text could be finalised. The issue was whether causing damage to the environment should be included in the draft Code. Therefore, at its forty-seventh session, in 1995, the Commission decided to establish a working group that would meet at the beginning of the 48th session to examine the possibility of covering in the draft Code of Crimes against the peace and security of mankind the issue of wilful and severe damage to the environment. The 'document on crimes against the environment', dated 27th March 1996, prepared by Mr Christian Tomuschat, summarised all the issues discussed.[65]

As Polly Higgins and other scholars have highlighted, 'despite this document, none of his recommendations were followed up',[66] and the result was that the Drafting Committee was notified only to draft the far smaller remit of environmental damage in the context of war crimes, and not in the context of crimes against humanity.[67] It was noted in the thirteenth report by the Special Rapporteur Mr Doudou Thiam, that the 'draft articles on colonial domination … and wilful and severe damage to the environment were equally unpopular' and were strongly opposed.[68]

Indeed, on 5th July 1996, at its 48th session held from 6th May to 26th July 1996,[69] the work of the Commission resulted in its adoption of the 'Draft Code of Crimes against the Peace and Security of Mankind' and neither the crime of ecocide nor the article 26 draft found their

[63] ibid.
[64] Christian Tomuschat, 'Document on Crimes Against the Environment' UN Doc ILC(XLVIII)/DC/CRD.3, 18-19 <https://legal.un.org/ilc/documentation/english/ilc_xlviii_dc_crd3.pdf> accessed 24 March 2022.
[65] ibid.
[66] Gauger and others (n 53) 10.
[67] ibid.
[68] Doudou Thiam, 'Thirteenth Report on the Draft Code of Crimes Against the Peace and Security of Mankind' in United Nations, *Yearbook of the International Law Commission Volume II(1)* (United Nations Publications 1995) UN Doc A/CN.4/466 35.
[69] International Law Commission 48th Session (Geneva, 6 May – 26 July 1996) <https://legal.un.org/ilc/sessions/48/> accessed 24 March 2022.

room.[70] In other words, article 26 'was removed completely, and somewhat mysteriously, from the Code'.[71]

In the 1996 final Draft Code, submitted to the General Assembly, the article 20 entitled 'War Crimes' mentions the environment only in its paragraph (g).[72]

IV The Road to the 1998 Rome Statute

At its 49th session – in 1994 – the General Assembly, under the item entitled 'Report of the International Law Commission on the work of its 46th session',[73] decided to establish an ad hoc committee to review the major issues arising from the draft statute for an international criminal court prepared by the Commission, and to consider arrangements for the convening of an international conference of plenipotentiaries to conclude a convention on the establishment of such a court.[74] At its 50th session, the General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court.[75] In 1998, the Assembly held a diplomatic conference of plenipotentiaries during which it adopted the RS of the ICC and 'resolution F' of the final act of the conference, which established the Preparatory Commission for the ICC.[76] The Assembly continued its consideration of the item from its 52nd to 57th sessions.[77]

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[70] United Nations 'Draft Code of Crimes against the Peace and Security of Mankind' (1996) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf> accessed 24 March 2022; Martin C Ortega, 'The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind' (1997) 1 Max Planck Yearbook of United Nations Law 283; Jean Allain and John RWD Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind' (1997) 1 European Journal of International Law 100.

[71] Gauger and others (n 53) 11.

[72] 'Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale: … (g) necessity with the intent to cause widespread, long-term, and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs'.

[73] United Nations General Assembly Resolution 49/51 (17 February 1995) UN Doc A/RES/49/51 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/767/65/PDF/N9576765.pdf?OpenElement> accessed 24 March 2022.

[74] Philippe Kirsch and John T Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93(1) American Journal of International Law, 2.

[75] United Nations General Assembly Resolution 50/46 (18 December 1995) UN Doc A/RES/50/46 <https://research.un.org/en/docs/ga/quick/regular/50 > accessed 24 March 2022.

[76] For a beter understanding, see Christine Byron and others, 'The Preparatory Commission for the International Criminal Court' (2001) 50(2) The International and Comparative Law Quarterly 420; Philippe Kirsch and Valerie Oosterveld, 'The Preparatory Commission for the International Criminal Court' (2001) 25(3) Fordham International Law Journal 563; Richard Dicker, 'Issues Facing the International Criminal Court's Preparatory Commission' (1999) 32(3) Cornell International Law Journal 471.

[77] United Nations General Assembly Resolution 52/160 (28 January 1998) UN Doc A/RES/52/160; United Nations General Assembly Resolution 53/105 (26 January 1999) UN Doc A/RES/53/105; United Nations General Assembly Resolution 54/105 (25 January 2000) UN Doc A/RES/54/105; United Nations General Assembly

It is important to highlight that the RS – namely, the International Criminal Court's founding treaty, adopted on 17th July 1998 and which entered into force four years later on 1th July 2002,[78] mentions the environment only within the context of War Crimes, in its article 8(2)(b)(4).[79]

It has been observed that article 8 is 'the first "eco-centric" crime recognised by the international community'.[80] However, although 'the inclusion of a provision in the RS that recogni[s]es the environment, per se, as an object of international protection is praiseworthy', the limitation to the international armed conflict was not sufficient.[81] Moreover, it was stated that 'limiting such criminalization to "war crimes" makes no sense, because serious environmental damage takes place, primarily, during times of peace',[82] and the necessity to 'go beyond military conflict' since the 'correlation between environmental degradation and human rights' is internationally acknowledged.[83] Juridically speaking, this crime could be prosecuted only if it satisfies three elements: (i) the actus reus must be widespread, severe and causing long-term environmental damage; (ii) actus reus cannot have been committed as a part of concrete or direct military advantage; and (iii) mens rea must be intentional.[84]

Resolution 55/155 (19 January 2001) UN Doc A/RES/55/155; United Nations General Assembly Resolution 56/85 (18 January 2002) UN Doc A/RES/56/85; United Nations General Assembly Resolution 57/23 (3 February 2003) UN Doc A/RES/57/23 <https://research.un.org/en/docs/ga/quick/regular/50> accessed 24 March 2022.

[78] M Cherif Bassiouni and William A Schabas (eds), *The Legislative History of the International Criminal Court* (2nd edn, Brill 2016).

[79] '1 The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. 2 For the purpose of this Statute, '"war crimes" means: …(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:… (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

[80] Ryan Gilman, 'Expanding Environmental Justice after War: The Need for Universal Jurisdiction over Environmental War Crimes' (2011) 22(3) Colorado Journal of International Environmental Law and Policy 447, 453.

[81] Aurelie Lopez, 'Criminal Liability for Environmental Damage Occurring in Times of Non- International Armed Conflict: Rights and Remedies' (2007) 18(2) Fordham Environmental Law Review 231, 232; Matthew Gillett, 'Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict' in Carsten Stahn, Jens Iverson, and Jennifer S Easterday (eds) *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford University Press 2017) 220.

[82] Mohadmmed Saif-Alden Wattad, 'The Rome Statue and Captain Planet: What Lies Between "Climate Against Humanity" and the "Natural Environment"?' (2009) 19(2) 265, 268; Sailesh Mehta and Prisca Merz, 'Ecocide – A New Crime Against Peace?' (2015) 17(I) Environmental Law Review 3.

[83] Mark A Drumbl, 'Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes' (1998) 22(1), 122, 151; Aurelie Lopez, 'The Protection of Environmentally-Displaced Persons in International Law' (2007) 37(2) Environmental Law 365, 407.

[84] Jolie Apicella, 'The International Response to the Environmental Impacts of War: Afternoon Panel Accountability and Liability: Legal Tools Available to the International Community' (2005) 17(4) Georgetown

Following this brief overview of the development of the crime of ecocide in international law, this paper will not focus more on these substantive issues, since it is primarily intended to provide a deeper analysis of the procedural changes to the RS and the Rules of Procedure and Evidence (RPE) which are required to underpin any proposed amendment to the list of crimes found in the RS.

B THE 'OPEN CLAUSE' OF THE 2021 PROPOSAL TO AMEND THE ROME STATUTE

In late 2020 the Stop Ecocide Foundation convened an 'Independent Expert Panel for the Legal Definition of Ecocide' composed of twelve eminent lawyers with a balance of backgrounds and expertise in criminal, environmental and climate law.[85] To add ecocide as a new crime to the ICC RS, the panel recommended the following amendments:

> **Addition of a preambular paragraph 2 bis**
>
> Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural and human systems worldwide,
>
> **Addition to Article 5(1)**
>
> (e) The crime of ecocide
>
> **Addition of Article 8 ter**
>
> Article 8 ter Ecocide
>
> 1. For the purpose of this Statute, 'ecocide' means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.
>
> 2. …[86]

Environmental Law Review 616, 624 cited in Payal Patel, 'Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper expand the Court's Mandate to Prosecuting Environmental Crimes?' (2016) 14(2) Loyola University Chicago International Law Review 175, 178.

[85] Stop Ecocide Foundation, 'Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text' (2021) <https://www.stopecocide.earth/expert-drafting-panel> accessed 24 March 2022.

[86] For the purpose of paragraph 1:
a 'Wanton' means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
b 'Severe' means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
c 'Widespread' means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
d 'Long-term' means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;

The Panel itself clarified in the introduction that the proposed definition 'might serve as the basis of consideration for an amendment to the Rome Statute'. Moreover, they humbly highlight that 'consequential amendments may also be required for other provisions of the Rome Statute, such as article 9, and to the ICC RPE, and the Elements of Crimes'.[87] This 'open clause' means that the experts were conscious that their text may be integrated with other additional amendment proposals.

C THE MAIN PROCEDURAL AMENDMENTS TO PUT FORWARD A STRONGER AND PRACTICAL CONCEPT OF ECOCIDE

Due to this 'open clause', in this paper I will not comment on either the proposed definition of ecocide or the proposed addition of articles 5(1), 8 ter and preambular paragraph 2 bis. On the contrary, I will put forward additional amendments to the ICC legal framework, regarding procedural issues, in order to integrate it and fill the purely procedural gaps of the 2021 legal definition, enforcing a practical concept of ecocide.

The following amendment proposal is divided in seven parts, and the full textual proposals can be found in an annex to the paper.

I Jurisdiction *Ratione Temporis* and Withdrawal Process

The ICC's jurisdiction, in respect to the basic principles of criminal procedure, has 'four different facets':[88] (i) jurisdiction *ratione materiae* (subject-matter jurisdiction) set out in article 5 of the RS;[89] (ii) jurisdiction *ratione personae* (jurisdiction over persons) specified by articles 12 and 26;[90] (iii) jurisdiction *ratione loci* (territorial jurisdiction) pursuant to articles 12 and 13(b);[91] and (iv) jurisdiction *ratione temporis* (temporal jurisdiction), defined by articles 11 and 127 RS.

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e 'Environment' means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.

[87] Independent Expert Panel for the Legal Definition of Ecocide (n 85).

[88] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* [2006] ICC-01/04-01/06 [21]-[22] <https://www.icc-cpi.int/CourtRecords/CR2007_01307.PDF> accessed 24 March 2022; David Scheffer, 'The International Criminal Court: The Challenge of Jurisdiction' (1999) 93 American Society of International Law 68.

[89] Andreas Zimmermann, 'Article 5' in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of International Criminal Court: A Commentar*y (3rd edn, Hart 2015) 111; Alan Nissel, 'Continuing Crimes in the Rome Statute' (2004) 25(3) Michigan Journal of International Law 653.

[90] Micaela Frulli, 'Jurisdiction ratione personae' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 532.

[91] Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press 2014).

Jurisdiction *ratione materiae* has already been implicitly solved in the Stop Ecocide Foundation proposal, with the introduction of both article 5(1)(e) and 8 ter, and jurisdiction *ratione loci* as well as *ratione temporis* are not included – at least for now – in this additional proposal.

Jurisdiction *ratione temporis* deserves more attention.[92] Regarding the crime of ecocide, considering the long-term article 8 ter requirement, which means damage which is irreversible, or which cannot be redressed through natural recovery within a reasonable period of time, the attention falls on the jurisdiction *ratione temporis* and on the withdrawal process. Pursuant to article 11 RS, ICC has jurisdiction only with respect to crimes committed after the entry into force of the RS. If a state becomes a party to the RS after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the RS for that state, unless that state has made a declaration under article 12, paragraph 3. This, the principle of non-retroactivity, is an indispensable rule which prohibits the application of law to events that took place before the law was introduced.[93] It is recognised by the Universal Declaration of Human Rights which prohibits criminal convictions for any conduct which did not constitute a crime under national or international law at the time when it was committed. [94] It is also recognised in the International Covenant for Civil and Political Rights,[95] and the European Convention of Human Rights.[96]

Hence, this current proposal shall not change the non-retroactivity rule. Instead, what is required is an amendment of article 127 RS. Indeed, article 127 provides the possibility for a state party to withdraw from the RS by a written notification addressed to the UN Secretary-General. In this case, the withdrawal shall take effect one year after the date of receipt of the notification (unless the notification specifies a later date). Paragraph 2 of this norm underlines that a state shall not be discharged, by reason of its withdrawal, from the obligations arising

[92] For a general introduction, see Stéphane Bourgon, 'Jurisdiction ratione temporis', in Antonio Cassese, Paola Gaeta and John RWD Jones (n 90) 543; Julien Cazala, 'Compétence ratione temporis' in Julian Fernandez and Xavier Pacreau (eds), 'Statut de Rome de la Cour pénale internationale: Commentaire article par article' (2nd edn, Pedone 2012) 567.

[93] Yarik Kryvoi and Shaun Matos, 'Non-Retroactivity as a General Principle of Law'(2021) 17(1) Utrecht Law Review 46, 46; Talita de Souza Dias, 'The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem' (2018) 16 Journal of International Criminal Justice 65.

[94] Universal Declaration of Human Rights (adopted 10 December 1948) United Nations General Assembly Resolution 217 A(III) UN Doc A/RES/3/217A, article 11(2).

[95] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 article 15(1).

[96] European Convention on Human Rights, article 7. It provides that no one can be guilty of a criminal offence on the basis of any act or omission which did not constitute an offence at the time.

from the RS while it was a party, including any financial obligations which may have accrued. Moreover, the withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing state had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Nonetheless, the 1 year limit appears to be inadequate for a crime such as ecocide. Since the environment – namely the Earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space – are the preconditions for all life, and the formulation of article 8 ter requires 'severe and either widespread or long-term damage to the environment', the withdrawal procedures require careful consideration. Very serious adverse changes, disruption or harm to any element of the environment, beyond a limited geographic area, which crosses state boundaries, or is suffered by an entire ecosystem, species or a large number of human beings, and which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time, necessitates special procedural considerations within the RS.

For the reasons above, I would propose to amend article 127 RS, inserting a 5 year limit that could reinforce the effectiveness of the crime of ecocide, and would represent a compromise between the state's right to withdraw and the environmental protection exigence, as well as providing an element of both crime prevention and repression.

This amendment should be coordinated together with an amendment of article 121 RS. Paragraph 6 of this latter norm provides that if an amendment has been accepted by seven-eighths of states Parties, any state party which has not accepted the amendment may withdraw from the Statute with immediate effect, notwithstanding article 127(1), but subject to article 127(2), by giving notice no later than one year after the entry into force of such amendment.

Therefore, I would propose to amend article 121, inserting a paragraph 6 bis.

II Deferral of Investigation or Prosecution: Reducing the Power of Renewal Request by the UN Security Council

Due to the global and transboundary consequences of the crime of ecocide, I would put forward an article 16 bis, in order to reduce the UN Security Council's deferral powers contained in

article 16. Indeed, this latter norm provides that no investigation or prosecution may be commenced or proceeded with under the RS for a period of 12 months after the Security Council, in a resolution adopted under chapter VII of the UN Charter, has requested the Court to that effect. As per the current wording of article 16, a request for deferral may be renewed by the Council under the same conditions. In my proposal, I suggest a limit to the renovation of the renewal request to not more than one time.

Article 16 bis would consist of one paragraph and it could be entitled 'Deferral of investigation or prosecution of the crime of ecocide'.

III Aggravated Ecocide, and its Aggravating Circumstance of 'Substantial Impact on Greenhouse Gas Emissions or Climate Change'

The previous two amendments involve the 'ordinary' crime of ecocide, namely that proposed by article 8 ter of the Stop Ecocide Foundation proposal. However, certain actions or omissions by a state party may result in global impacts, in particular those which wilfully contribute to excessive greenhouse gas emissions or climate change.[97] In these specific and limited circumstances, I propose the concept of 'aggravated ecocide' in recognition of the long-lasting and cross-border harms such wilful actions or omissions will create. However, reflecting the more serious charges and penalties which a charge of aggravated ecocide would encompass, there needs to be a correspondingly comprehensive consideration of the procedural amendments which are required in the interests of justice to the accused and to the victims, which may constitute all living beings on the Earth.

Thereby, I would suggest amending the Stop Ecocide Foundation draft of article 8 ter RS, inserting a paragraph 3. Subsequently, I would propose to insert a paragraph 2(b)(vii) into rule 145 RPE.

As I will explain in the next paragraph, this 'substantial impact' on greenhouse gas emissions or climate change which characterises aggravated ecocide, will require to be proved by authoritative evidence, and could be deduced by UN environmental authorities' reports, such as the reports of the Intergovernmental Panel on Climate Change (IPCC), the Special

[97] Potential examples of such acts or omissions might include: undertaking or permitting massive deforestation, or excessive and on-going release of greenhouse gas emissions without meaningful actions aimed at reducing such emissions in the short- to medium term, as long as their impact on greenhouse gas emissions or climate change is supported by scientific evidence.

Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change or the Special Rapporteur on Human Rights and the Environment.

IV The Exercise of Jurisdiction in Case of Aggravated Ecocide, on the Basis of UN Environmental Authorities' Reports

Since determining the commission of the crime of ecocide or aggravated ecocide is primarily determined by science, I would propose a special exercise of jurisdiction based on UN environmental authorities' reports, such as the reports of the Intergovernmental Panel on Climate Change (IPCC), the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change,[98] or the Special Rapporteur on Human Rights and the Environment.

The IPCC is the UN body for assessing the science related to climate change. It is an organisation of governments that are members of the UN or World Meteorological Organisation (WMO) and it currently has 195 members.[99] It was established in 1988 by the WMO and the UN Environment Programme (UNEP).[100] Its objective is, essentially, to provide governments at all levels with scientific information that they can use to develop climate policies.[101] In the recent 'Working Group I contribution to the Sixth Assessment Report of the IPCC' published on 9th August 2021 consisting of almost 4,000 pages, [102] scientists

[98] Human Rights Council Resolution 48/14 (13 October 2021) <https://www.actu-environnement.com/media/pdf/news-38372-resolution-onu-rapporteur-impacts-changement-climatique-droits-homme.pdf> accessed 24 March 2022.

[99] The WMO was established by the Convention of the World Meteorological Organization (adopted 11 October 1947 and entered into force on 23 March 1950) 77 UNTS 143 <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280157e8e> accessed 24 March 2022.

[100] Intergovernmental Panel On Climate Change, 'History' <https://www.ipcc.ch/about/history/> accessed 24 March 2022; The United Nations Environmental Programme (UNEP) was founded in June 1972 as a result of the Stockholm Conference on the Human Environment. The UNEP is the coordinating body for the United Nations' environmental activities, see, <https://www.unep.org/about-un-environment> accessed 24 March 2022.

[101] 'About the IPCC' *IPCC* <https://www.ipcc.ch/about/> accessed 24 March 2022. 'Structure of the IPCC' *IPCC* and <https://www.ipcc.ch/about/structure/> accessed 24 March 2022. As observed on the website: 'Through its assessments, the IPCC identifies the strength of scientific agreement in different areas and indicates where further research is needed. The IPCC does not conduct its own research. … Representatives of IPCC member governments meet one or more times a year in Plenary Sessions of the Panel. They elect a Bureau of scientists for the duration of an assessment cycle. Governments and Observer Organisations nominate, and Bureau members select experts to prepare IPCC reports. They are supported by the IPCC Secretariat and the Technical Support Units of the Working Groups and Task Force'.

[102] Masson-Delmotte and others (eds), *Climate Change 2021: The Physical Science Basis: Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2021) <https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf> accessed 24 March 2022. The document is subject to final copy-editing and will be completed in 2022. For a criminological perspective: Rob White, 'Criminological Perspectives on Climate Change, Violence and Ecocide' (2017) 3 Current Climate Change Reports 243.

highlighted 'changes in the Earth's climate in every region and across the whole climate system' and 'many of the changes observed in the climate are unprecedented in thousands, if not hundreds of thousands of years, and some of the changes already set in motion, such as continued sea level rise, are irreversible over hundreds to thousands of years'.[103]

Even though the crime of ecocide is not only related to the impacts of climate change, the aggravated form of ecocide is specifically focused on greenhouse gas emissions and the harmful impacts of climate change. Therefore, the weight placed on scientific evidence that underlie this iteration of the crime must be taken into consideration. Reflecting the extensive and authoritative nature of the IPCC reporting procedures, it is reasonable to place a specific focus on these reports when considering the investigation and prosecution for the crime of aggravated ecocide.[104] Thereby I would suggest the amendment of articles 13 and 15 RS, with an addition of paragraph (e) into article 13, and an addition of paragraph 1 bis into article 15.

These modifications aim to bond the discretionary power and the 'political' role of the ICC prosecutor, and not reduce the defendants' guarantees.

V The Preliminary Examination and Investigation Requirements: A Brief Account

It is important to note from the outset that a preliminary examination is not an investigation,[105] although both phases could be considered as 'inherently connected'.[106] A preliminary examination is a legalistic process[107] that 'serves as a bridge between the documentation of

[103] 'Climate Change Widespread, Rapid, and Intensifying' *IPCC* <https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/> accessed 24 March 2022.

[104] However, the IPCC reports can and should be supplemented by more country-specific information which might be provided by other UN environmental experts, such as those in the UN Environment Programme or the UN human rights mechanisms, including the newly created position of Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change and the established Special Rapporteur on Human Rights and the Environment. Of note, the Special Rapporteur on Human Rights and the Environment submits an annual report to the UN Human Rights Council, as mandated by United Nations Human Rights Council Resolution 37/8 (22 March 2018). 'Annual Thematic Reports of the Special Rapporteur on Human Rights and the Environment' *United Nations Human Rights, Office of the High Commissioner* <https://www.ohchr.org/en/issues/environment/srenvironment/pages/annualreports.aspx> accessed 24 March 2022. For example, John H Knox 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (New York, 2018) UN Doc A/73/188 <https://digitallibrary.un.org/record/1639368> accessed 24 March 2022.

[105] Morten Bergsmo, Jelene Pejic and Dan Zhu, 'Article 15' in Kai Ambos and Otto Triffterer (eds), *The Rome Statute of the International Criminal Court: A Commentary* (CH Beck-Hart-Nomos 2015) 730.

[106] Carsten Stahn, 'From Preliminary Examination to Investigation: Rethinking the Connection' in Xabier Agirre and others (eds), *Quality Control in Criminal Investigation* (Torkel Opsahl Academic EPublisher 2020) 38.

[107] Matilde E Gawronski, 'The Legalistic Function of Preliminary Examinations: Quality Control as a Two-Way Street' in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination, volume 1* (Torkel Opsahl Academic EPublisher 2018) 222.

human rights violations and criminal investigation'[108] but which is also wrapped by 'magic, mystery and mayhem'.[109] It has been defined as an 'amorphous status',[110] a kind of 'pre-investigative process',[111] or, as stated by the Office of the Prosecutor (OTP) itself, a 'pre-investigative phase'[112] and a 'core activity' of the OTP.[113] At the preliminary examination stage, as highlighted in the OTP's Policy Paper on Preliminary Examination,[114] the OTP 'does not enjoy investigative powers, other than for the purpose of receiving testimony at the seat of the Court and cannot invoke the forms of cooperation specified in Part 9 of the Statute from States'. A preliminary examination may be initiated by the OTP taking into account any information on crimes within the jurisdiction of the Court.[115] Hence, a preliminary examination is essentially a phase of evaluation of the information available in order to understand if there is a 'reasonable basis' to proceed with an investigation. Although the Prosecutor has a formal 'legal duty' to proceed, in essence their role is based on discretion.[116] There is no temporal limit for the preliminary examination, and the Prosecutor must continue the examination 'until the information provides clarity on whether or not a reasonable basis for an investigation exists'.[117]

[108] Carsten Stahn, 'Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC' (2017) 15 Journal of International Criminal Justice 416.
[109] Carsten Stahn, Morten Bergsmo and Chan Icarus, 'On the Magic, Mystery and Mayhem of Preliminary Examinations' in Agirre and others (n 106) 32.
[110] Gregory S Gordon, 'Reconceptualizing the Birth of the International Criminal Case: Creating an Office of the Examining Magistrate' in Agirre and others (n 106) 255.
[111] Sara Wharton and Rosemary Grey, 'The Full Picture: Preliminary Examinations at the International Criminal Court' (2018) 56 Canadian Yearbook of International Law 1, 3.
[112] International Criminal Court: Office of the Prosecutor, 'Annex to the "Paper on Some Policy Issues before the Office of the Prosecutor": Referrals and Communications' (2003) 1, 4.
[113]International Criminal Court: Office of the Prosecutor, 'OTP Strategic Plan 2016-2018' (16 November 2018) para 55.
[114] International Criminal Court: Office of the Prosecutor, 'Policy Paper on Preliminary Examinations' (November 2013) para 85 <www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 24 March 2022. For the Policy Paper on case selection, see Ricardo Pereira, 'After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?' (2020) 31 Criminal Law Forum 179.
[115] International Criminal Court (n 114) para 4;. As indicated in an OTP Policy, the Office of the Prosecutor may receive information on crimes from multiple sources: '(a) information sent by individuals or groups, states, intergovernmental or non-governmental organisations; (b) a referral from a state Party or the Security Council; or (c) a declaration accepting the exercise of jurisdiction by the Court pursuant to article 12(3) lodged by a state which is not a Party to the Statute. But such communications do not automatically lead to the start of an investigation'.
[116] ibid para 2; *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* [2015] ICC-01/13, [13] <www.icc-cpi.int/CourtRecords/CR2015_13139.PDF> accessed 24 March 2022.
[117] ibid para 90. For a critical approach, Anni Pues, 'Towards the "Golden Hour"? A Critical Exploration of the Length of Preliminary Examinations' (2017) 15 Journal of International Criminal Justice 436.

To initiate an investigation, the Prosecutor needs to submit to the Pre-Trial Chamber a request for authorisation together with any supporting material collected.[118] Pursuant to articles 15(3) and 53(1), the standard proof for requesting this authorisation is a 'reasonable basis'. If, and only if, the OTP assesses a situation as necessitating the more formal preliminary examination, the OTP follows a so-called 'statutory-based approach'.[119] In practice, this means that the path from initial communication to preliminary examination to formal investigation is divided into four phases:[120]

> **Phase 1:** the initial assessment of all information related to potential crimes within the Court's jurisdiction implicated by any communication is submitted pursuant to article 15 in order to analyse and verify the gravity of the alleged crime and filter out information on crimes that are outside the jurisdiction of the Court or a *ne bis in idem.*[121]
>
> **Phase 2:** the formal commencement of a preliminary examination. This focuses on the "preconditions to the exercise of jurisdiction" contained in article 12. It is an assessment of the crimes allegedly committed, with a view to identifying potential cases falling within the jurisdiction of the ICC.
>
> **Phase 3:** Assessing the admissibility of potential cases in terms of 'complementarity' and 'gravity' pursuant to article 17.
>
> **Phase 4:** Consideration of whether the 'interests of justice' – a quasi-juridical and malleable concept contained in article 53(1)(c) – necessitate the request to initiate a formal investigation.[122]

However, is this legal framework suitable for the crime of ecocide? Here, I would suggest amending the norms on standard of proof, interest of justice, and complementarity.

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[118] On the Pre-Trial Chamber powers: *Request Under Regulation 46(3) of the Regulations of the Court* [2014] ICC-RoC46(3)-01/14 [7]-[8] <www.icc-cpi.int/CourtRecords/CR2014_07766.PDF> accessed 24 March 2022. See also: *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya* [2010] ICC-01/09/19-Corr-tENG [21] <www.icc-cpi.int/pages/record.aspx?uri=1051647> accessed 24 March 2022.

[119] Office of the Prosecutor (n 114) para 77. This requires the OTP to ascertain and affirm the following fundamental requirements for triggering the examination: the four-facets jurisdiction; admissibility (comports with 'complementarity' and 'gravity'); and the 'interests of justice'.

[120] ibid paras 78-92.

[121] Amy Khojasteh, 'The Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities' in Agirre and others (n 106) 223-256.

[122] On the interests of justice, Maria Varaki, 'Revisiting the "Interests of Justice" Policy Paper' (2017) 15 Journal of International Criminal Justice 455, 470; Bartłomiej Krzan, 'International Criminal Court Facing the Peace vs Justice Dilemma' (2016) 2 International Comparative Jurisprudence 81, 88; Talita De Souza Dias, 'Interests of Justice: Defining the scope of Prosecutorial discretion in article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court' (2017) 30 Leiden Journal of International Law 731, 751; For the jurisprudence, see *Situation in Isalmic Republic of Afghanistan* [2020] ICC-02/17 [35]-[42] <www.legal-tools.org/doc/x7kl12/pdf> accessed 24 March 2022. Corrigendum to *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire* [2011] ICC-02/11-14-Corr [207]-[212]<www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-14-Corr> accessed 24 March 2022.

(a) Changing the Standard of Proof in Cases of Aggravated Ecocide: From 'Reasonable Basis' to Proceed (and to Believe) to the 'Sufficient Basis'

Regarding the standard of proof, they are all predetermined by statutory law, and there are four in the ICC legal framework, namely: (i) a 'reasonable basis to proceed' for the preliminary examination and the 'reasonable basis to believe' for the investigative phase (arts 15 and 53 RS); (ii) a 'reasonable ground to believe' (art 58 RS) for the warrant of arrest; (iii) the 'substantial grounds to believe' (art 61 RS) for the confirmation of the charges; and (iv) the 'beyond reasonable doubt' (art 66 RS) for the judgment phase.

As set out below, I would propose to switch from the 'reasonable basis to proceed' to a 'sufficient basis to proceed', with an addition into paragraphs 3, 4 and 6 of article 15, paragraph 1 of article 18 and paragraph 1 of article 53, of the following statement: '– or a sufficient basis in case of article 8 ter paragraph 3 (aggravated ecocide) - '. As well as an amendment of paragraph 1(a) of article 53, from the 'reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed' to the 'sufficient basis'.

In making any such determinations, UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis. To ensure the rights of the accused are appropriately protected, I do not consider it necessary to introduce other changes in the standard of proof. Also, as noted earlier, these modifications aim to bond the discretionary power of the ICC Prosecutor and not reduce the defendants' guarantees. Therefore, an additional amendment to the Regulation 27 of the Regulation of the Prosecutor (RTP) should be put forward, inserting a paragraph (d), as well as inserting paragraph 3 bis into Regulation 29.

(b) Issues of Admissibility: Introducing a Presumption of Both 'Gravity' and 'Interests of Justice' in cases of Aggravated Ecocide

As indicated in article 53(1)(b) of the Statute (applied via Rule 48 of the RPE), in determining whether there is a 'reasonable basis to proceed' to an investigation the Prosecutor shall consider whether 'the case is or would be admissible under article 17'. The admissibility considerations set out in article 17 of the RS are: 'gravity' pursuant to article 17(1)(d), 'complementarity' pursuant to article 17(1)(a)-(c) and interests of justice contained in article 53(1)(c).

The 'gravity' assessment[123] is an evaluation of the following criteria: (i) scale of the crimes; (ii) nature of the crimes; (iii) manner of commission; and (iv) impact.[124]

The 'complementarity' is contained in paragraph 10 of the RS preamble, as well as in articles 1 and 17(1)(a)-(c). This principle is a cornerstone in the RS,[125] and seems to permeate its entire structure and is central to the intended role of the Court.[126] Pursuant to the RS, ICC jurisdiction is never primary, but always only complementary to national criminal jurisdiction.[127]

The 'interests of justice', as noted earlier, are a quasi-juridical and malleable concept contained in article 53(1)(c) – necessitate the request to initiate a formal investigation. Since the formulation of article 8 ter clearly requires that the damage must be 'severe', 'widespread' and with 'long-term' consequences, I would suggest amending in order to introduce a rebuttable presumption of 'gravity' and 'interests of justice' in case of ecocide, with an addition to a paragraph 1(e) to article 17, and 1(d) to article 53. Moreover, these amendments should be

[123] On the gravity, see Susana SáCouto and Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' (2007) 3(5) American University International Law Review 807, 854; Margaret M Deguzman, 'How Serious are International Crimes? The Gravity Problem in International Criminal Law' (2012) 51(18) Columbia Journal of Transnational Law 17, 68; Margaret M Deguzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32(5) Fordham International Law Journal 1400, 1465; Ghazia Popalzai and Hiba Thobani, 'The Complexities of the Gravity Threshold in the International Criminal Court: A Practical Necessity or an Insidious Pitfall?' (2017) 20(1) Max Planck Yearbook of United Nations Law Online 150, 169.

[124] For an example of the gravity assessment in the ICC, see Giovanni Chiarini, 'Human Rights vs Complementarity: the Iraq war, the UK, & the International Criminal Court' UCC Legal Research Papers Centre for Criminal Justice and Human Rights Working Paper 2021/14, 7.

[125] Jann K Kleffner, 'Complementarity in the Rome Statute and National Criminal Jurisdictions' (Oxford University Press 2008) 3; Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2007) 19 Criminal Law Forum 89.

[126] Fausto Pocar and Magali Maystre, 'The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?' in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher 2010) 301; Gregory S Gordon, 'Complementarity and Alternative Justice' (2009) 88 Oregon Law Review 101, 182; Linda E Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem' (2010) 8(1) Santa Clara Journal of International Law 165, 198; Carsten Stahn, 'Taking Complementarity Seriously' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) 282; Kevin Jon Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53(1) Harvard International Law Journal 86, 132.

[127] Consequently, pursuant to article 17, a case before the ICC is inadmissible whenever: (i) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution; (ii) the case has been investigated by a State which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute; or (iii) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20(3). The latter is essentially the *ne bis in idem* provision of the RS. For the ICC, 'to do otherwise would be to put the cart before the horse'; *Situation in The Democratic Republic of the Congo, The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* [2009] ICC-01/04-01/07 [78] <www.legal-tools.org/doc/ba82b5/pdf/> accessed 24 March 2022; It follows that in the case of inaction, the question of unwillingness or inability does not arise. Inaction on the part of a state having jurisdiction (that is, the fact that a state is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute.

coordinated with amending Regulations 29 of the Regulation of the Prosecutor with the addition of paragraph 2 bis, and inserting a new Regulation 31 bis.

VI The Exclusion to the So-Called Proceedings on an Admission of Guilt in cases of Aggravated Ecocide

Negotiated justice in international criminal law has been analysed by academics and practitioners on many occasions. For example, it has been observed that 'plea bargaining is seen to dilute the moral message that international courts aim to send – that the international community is outraged and will bring to justice those responsible for the crimes committed'.[128] In the International Criminal Tribunal for the former Yugoslavia, Judge Schomburg, in his dissenting opinion, compared charge bargains to 'de facto granting partial amnesty/impunity by the Prosecutor' and criticised them as 'conflicting with the Tribunals' mission to avoid impunity, to establish the truth, and to promote peace and reconciliation'.[129]

Since aggravated ecocide is a global crime with global effect, I would suggest excluding the accused of the crime of ecocide to the right to activate the so-called proceedings on an admission of guilt.[130] I would suggest amending article 64, with an additional paragraph 8(a-bis), a change into paragraph 1 of article 65 and a paragraph (3) into Rule 139 of RPE.

D CONCLUSION – MAKING THE CRIME OF ECOCIDE MORE CONCRETE THROUGH SPECIAL PROCEDURAL CHECKS AND BALANCES

In my humble opinion, the interconnected above-described amendments could strengthen the 2021 proposal launched by the Stop Ecocide Foundation. I am aware that the suggestions I put forward in this paper are perfectible. Furthermore, they are just a drop in the ICC procedural ocean. As a mere example, separate reasoning should be made on both issues of admissibility in terms of complementarity and to the role of the victims of ecocide as well as the Trust Fund for Victims.

[128] Jenia I Turner, 'Plea Bargaining' in Linda Carter and Fausto Pocar (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems* (Edward Edgar Publishing 2013) 56; Ralph Henham, 'The Ethics of Plea Bargaining in International Criminal Trials' (2005) 26 Liverpool Law Review, 210.
[129] *Prosecutor v Deronjic* [2004] IT-02-61-S dissenting opinion of Judge Schomburg, 6-7 cited in Jenia I Turner, 'Plea Bargaining and International Criminal Justice' (2017) 48 The University of the Pacific Law Review 229.
[130] For a comment on the first proceedings on an admission of guilt in the ICC, Giovanni Chiarini, 'Negotiated Justice in the ICC: Following the Al Mahdi Case, a Proposal to Enforce the Rights of the Accused' (2021) 5(13) PKI Global Justice Journal.

Regardless, let me hope that these reflections may provide a starting point on procedural debates as well as an integration into the initial proposal, in order to reinforce and advocate for the introduction of the crime of ecocide into the RS. To ensure the effectiveness of the investigation and prosecution of this new crime within the Statute, there needs to be a concrete delineation of the procedural checks and balances within the ICC legal framework, with the aim to make ecocide, and aggravated ecocide, become special crimes with a special procedure.

E ANNEX

ADDITIONAL AMENDMENTS TO THE 'STOP ECOCIDE FOUNDATION' PROPOSAL

This annex to the main paper entitled *'Ecocide: from the Vietnam War to International Criminal Jurisdiction? Procedural Issues In-Between Environmental Science, Climate Change, and Law'* contains the textual amendments I would propose to the Stop Ecocide Foundation's proposal to add ecocide as a new crime to the ICC Rome Statute (hereinafter 'RS'). The italic parts in the following paragraphs specify how this additional proposal to the International Criminal Court legal framework could be concretely put forward.

1) Jurisdiction Ratione Temporis and Withdrawal Process

Article 127. Withdrawal.

1. […]

1 bis. In the case of Article 8 ter (ecocide), the withdrawal shall take effect five years after the date of receipt of the notification, unless the notification specifies a later date.

2. […]

Article 121. Amendments.

[…]

6 bis. The paragraph 6 provisions – namely the state's right to withdraw from the Statute with immediate effect, notwithstanding article 127(1), but subject to article 127(2), by giving notice no later than one year after the entry into force of such amendment – are not valid if the Court has already authorised an investigation for the crime of ecocide (Article 8 ter) into the territory or actions of the state who asked to withdraw.

[…]

2) Deferral of Investigation or Prosecution: Reducing the Power of Renewal Request by the UN Security Council

Article 16 bis. Deferral of investigation or prosecution of the crime of ecocide.

If the investigation or prosecution concerns the crime of Article 8 ter (ecocide), the renewal request under Article 16 by the UN Security Council cannot be renewed more than one time.

3) Aggravated Ecocide, and its Aggravating Circumstance of 'Substantial Impact on Greenhouse Gas Emissions or Climate Change'

Article 8 ter Ecocide

[…]

3: Ecocide shall be considered aggravated if, as a result of wilful action or omission, it has, or has had, a substantial impact on greenhouse gas emissions or climate change.

Rule 145. Determination of sentence.

[…]

2 (b)(vii) In case of Article 8 ter paragraph 3 (aggravated ecocide), if, as a result of wilful action or omission, the crime has, or has had, a substantial impact on greenhouse gas emissions or climate change.

4) The Exercise of Jurisdiction, in case of Aggravated Ecocide, on the Basis of UN Environmental Authorities' Reports

Article 13. Exercise of jurisdiction.

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

[…]

(e) The Prosecutor has good reason to believe that the crime of Article 8 ter paragraph 3 (aggravated ecocide) appears to have been committed.

Article 15. Prosecutor.

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court

1 bis. Information on the crime of Article 8 ter paragraph 3 (aggravated ecocide) can be deduced by the UN environmental authorities' reports. These reports constitute a reasonable basis of information on the crime of ecocide.

5) Changing the Standard of Proof in Cases of Aggravated Ecocide: From 'Reasonable Basis' to Proceed (and to Believe) to the 'Sufficient Basis'

Article 15. Prosecutor.

[…]

3. If the Prosecutor concludes that there is a reasonable basis to proceed **–** *or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide)* **–** with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence**.** *UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.*

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed **–** *or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide)* **–** with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case. *UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.*

[…]

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis **–** *or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide)* **–** for an investigation, he or she shall inform those who provided the information […]. *UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.*

Article 18. Preliminary rulings regarding admissibility.

1. When a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation **–** *or a sufficient basis*

in case of Article 8 ter paragraph 3 (aggravated ecocide) –, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all states parties and those states which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. […]. *UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.*

Article 53. Initiation of an investigation.

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis – *or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide)* – to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis – *or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide)* – to believe that a crime within the jurisdiction of the Court has been or is being committed;

[…]

If the Prosecutor determines that there is no reasonable basis to proceed – *or a sufficient basis in case of Article 8 ter paragraph 3 (aggravated ecocide)* – and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

UN environmental authorities' reports, such as the IPCC, the Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment can form sufficient basis.

Regulation 27. Conduct of preliminary examination.

In the examination of information on crimes pursuant to article 15, paragraphs 1 and 2, the Office shall make a preliminary distinction between:

[…]

(d) Information based on UN environmental authorities' reports, such as the IPCC, Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change, or the Special Rapporteur on Human Rights and the Environment.

Regulation 29. Initiation of an investigation or prosecution.

[...]

3. Based on the report, the Prosecutor shall determine whether there is a reasonable basis to proceed with an investigation.

3 bis. In case of Article 8 ter paragraph 3 (aggravated ecocide), sufficient basis is enough to proceed.

6) Issues of Admissibility: Introducing a Presumption of Both 'Gravity' and 'Interests of Justice' in cases of Aggravated Ecocide

Article 17. Issues of admissibility.

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

[...]

(d) The case is not of sufficient gravity to justify further action by the Court.

(e) When the case is related to Article 8 ter paragraph 3 (aggravated ecocide), there will be a rebuttable presumption that the gravity and interests of justice requirements are satisfied.

Article 53. Initiation of an investigation.

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

[...]

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

(d) When the case is related to Article 8 ter paragraph 3 (aggravated ecocide), there will be a rebuttable presumption that the gravity and interests of justice requirements are satisfied.

Regulation 29. Initiation of an investigation or prosecution.

[...]

2. In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact.

2 bis. When the case is related to Article 8 ter paragraph 3 (aggravated ecocide), there will be a rebuttable presumption that the gravity requirement has been satisfied

Regulation 31 bis. Exception from Regulation 30 in case of Article 8 ter paragraph 3.

1. When the case is related to Article 8 ter paragraph 3 (aggravated ecocide), the provisions contained in Regulation 30 (Decision not to proceed in the interests of justice) shall not be applied, since there will be a rebuttable presumption that the interests of justice requirement has been satisfied.

7) The Exclusion to the So-Called Proceedings on an Admission of Guilt in cases of Aggravated Ecocide

Article 64. Functions and powers of the Trial Chamber.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty

8. (a-bis) The opportunity to make an admission of guilt in accordance with article 65 provided in the previous paragraph (8)(a) is excluded in the case of crime of Article 8 ter paragraph 3 (aggravated ecocide).

Article 65 Proceedings on an admission of guilt.

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a) – *with the exception provided in article 64, paragraph 8 (a-bis), namely the exclusion of the accused of crime of Article 8 ter paragraph 3 (aggravated ecocide), from the Article 65 proceedings –***,** the Trial Chamber shall determine whether: […]

Rule 139. Decision on admission of guilt.

[...]

2. The Trial Chamber shall then make its decision on the admission of guilt and shall give reasons for this decision, which shall be placed on the record.

3. Pursuant to Articles 64 (8)(a-bis) and 65 (1) of the Rome Statute, the Trial Chamber shall automatically reject any proposal on the admission of guilt submitted by an accused of the crime of Article 8 ter paragraph 3 (aggravated ecocide).

BANKING UNION AND THE RISK-CONTROL NEXUS: A GUIDING STAR

*Peter Murphy**

A INTRODUCTION

A rising tide may lift all boats, but, as the European Union (EU) discovered in painful fashion, it may also conceal submerged hazards. A long period of European growth and integration was thrown into reverse in the late 2000s as the Union was buffeted first by the Global Financial Crisis and later by the Eurozone Sovereign Debt Crisis. As the tide drained out, the instability of Europe's financial infrastructure was revealed: a system sufficiently integrated so as to allow the spread of contagion, yet not so integrated as to allow for the effective diversification of risk.

The EU is no stranger to catastrophe. The history of its construction is a story of crisis and repair, as befits a polity born from the ashes of post-war Europe. On this occasion, Europe's response was to call for the integration of the bloc's financial sector into 'a genuine economic and monetary union': a Banking Union.[1] Risk was to be diversified across borders, '[putting] an end to the era of massive bailouts paid by taxpayers and [helping to] restore financial stability'.[2] The nexus between bank and state would be shattered; no bank would be too big to fail. A stronger, more resilient European banking industry would emerge from the devastation of the crisis, capable of financing its own resolutions and providing the real economy with adequate credit without destabilising it.

This article submits that effective application of the new resolution procedures and the introduction of a common deposit insurance scheme – the incomplete elements of Banking Union – can only be achieved by recalibrating the project to take account of the risk-control nexus: risk must be spread equally between the economies of all Member States in return for the centralisation of control at European level. Whether by accident or design, this principle was at the heart of early successes, just as it was absent during reverses and stagnation.

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[1] Herman Van Rompuy, (European Council, 2012) EUCO 120/12, 4 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131201.pdf> accessed 24 March 2022.

[2] European Commission, 'Updated Version of First Memo Published on 15/04/2014 – Banking Union: Restoring Financial Stability in the Eurozone' (2015) MEMO 14/294.

Returning to the path illuminated by this guiding star will allow for the ultimate realisation of Banking Union.

Section B will explore the weaknesses in European financial infrastructure exposed by the Global Financial Crisis and Sovereign Debt Crisis, with a particular focus on those aspects of the regime to be patched up by common deposit insurance and harmonised resolution procedures. Section C will delineate the architecture of this new regime while introducing the concept of the risk-control nexus. Section D will illustrate that the effective operation and full implementation of Banking Union is undermined where risk and control are allocated inappropriately. Section E details how bilateral relations have come to supervene the Commission as a vehicle for reform and suggests that a renewed focus on the risk-control nexus could pave the way for agreement on resolution and deposit insurance.

B CRISIS

The trouble with European banks began with the Global Financial Crisis. The bursting of a localised bubble in the American housing market spread through the use of derivative instruments, the opacity of which rendered the ultimate magnitude and location of losses uncertain.[3] Uncertainty in the international financial system turned to panic with the collapse of Lehmann Brothers. Inter-bank money markets effectively shut down, causing a crisis of liquidity.[4] A corresponding reduction in lending deepened the contractionary forces dragging the wider economy down. National governments were faced with the unpalatable choice of allowing credit institutions to fail, risking further financial contagion, or injecting public money to save banks deemed 'too big to fail'. While some banks were allowed to go under, such as German lender WestLB, many were not.[5] At the high-water mark of 'too big to fail' thinking in late 2008, the European Council resolved to support major financial institutions with the requisite liquidity and capital to enable them to continue lending.[6]

Those states that opted to assume the liabilities of distressed institutions found their fate inextricably linked to that of their banking industry, giving rise to a 'bank-sovereign nexus'

[3] The de Larosiere Group, 'Report of the High Level Group on Financial Supervision in the EU' (Brussels, 25 February 2009) <https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf> accessed 24 March 2022.
[4] ibid.
[5] James Wilson, 'Brussels Backs WestLB Break-up Plan' *Financial Times* (Frankfurt, 20 December 2011) <https://www.ft.com/content/03985dda-2afb-11e1-8a38-00144feabdc0> accessed 24 March 2022.
[6] European Council, 'Presidency Conclusions – Brussels, 15 and 16 October 2008' (2008) 14368/08 <https://data.consilium.europa.eu/doc/document/ST-14368-2008-INIT/en/pdf> accessed 24 March 2022.

that operated to the detriment of both.[7] When markets lost confidence in the ability of these nations to meet repayments, a banking crisis developed into a sovereign debt crisis.[8] Discrepancies had developed in the funding of national deposit guarantee schemes, which guarantee the repayment of deposits to customers of participating institutions in the event of bank failure and are funded by the institutions themselves.[9] These discrepancies were cruelly exposed by deposit guarantee scheme arbitrage, with peripheral Member States that operated less well-funded schemes experiencing withdrawals of capital approaching bank run conditions. As governments are the backstop to deposit insurance, the bank-sovereign nexus operated to the disadvantage of both.

Faced with the seismic implications of sovereign default, the European Financial Stability Facility, the European Central Bank (ECB), and the International Monetary Fund elected to bail out the stricken nations, forcing them into economic adjustment programmes that heaped further misery on their hapless citizens.[10] While many factors conspired to bring these nations to ruin, three deserve specific attention: inadequate supervision; chaotic resolutions; and localised risk concentrations, particularly in deposit insurance.

C THE NEW REGIME

As the crisis receded, the Commission began to plot for deeper financial integration through a 'Banking Union' of Eurozone countries (plus Bulgaria and Croatia)[11] that would strengthen the credit sector and restore confidence in the euro.[12] At this stage, Europe's institutions provided all of the initiative for reform. The crux of these reforms was a wholesale transfer of banking policy from the national to the EU level. Supervisory authority was shifted from

[7] Martin Sandbu, 'Banking Union Will Transform Europe's Politics' *Financial Times* (London, 25 July 2017) <https://www.ft.com/content/984da184-711c-11e7-aca6-c6bd07df1a3c> accessed 24 March 2022.

[8] Fabio Panetta, 'The Impact of Sovereign Credit Risk on Bank Funding Conditions: Report Submitted by a Study Group Established by the Committee on the Global Financial System' (Bank for International Settlements, 2011) CGFS Papers: No 43 <https://www.bis.org/publ/cgfs43.html> accessed 24 March 2022.

[9] The operation of these schemes was mandatory in all EU Member States: Council Directive (EC) 94/19 of 30 May 1994 on Deposit-Guarantee Schemes [1994] OJ L 135/5.

[10] Commission Directorate-General for Economic and Financial Affairs, 'Economic Adjustment Programme for Ireland' (Occassional Papers 76, February 2011) <https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf> accessed 24 March 2022.

[11] Decision 2020/1015 of the European Central Bank on the establishment of close cooperation between the European Central Bank and Българска народна банка (Bulgarian National Bank) [2020] OJ L 224 I/1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020D1015> accessed 24 March 2022; Decision 2020/1016 of the European Central Bank on the establishment of close cooperation between the European Central Bank and Hrvatska Narodna Banka' [2020] OJ L 224 I/4 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D1016> accessed 24 March 2022.

[12] José Manuel Barroso, 'State of the Union 2012 Address' Speech/12/596 (Plenary Session of the European Parliament, Strasbourg, 12 September 2012) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596> accessed 24 March 2022.

national competent authorities to the ECB under a new centralised Single Supervisory Mechanism as quid pro quo for access to pan-European crisis funding under the Single Resolution Mechanism. The Bank Recovery and Resolution Directive established new rules designed to make public bailouts less frequent. A European Deposit Insurance Scheme was also proposed (revisited in Section D).

The Bank Recovery and Resolution Directive establishes a framework to guide competent authorities in their treatment of a failing bank. This was designed to remove Member States' discretion to offer ad hoc rescue packages of the kind that categorised the crisis years. Under this Directive, a bank certified as 'failing or likely to fail' will be wound up under normal national insolvency laws, unless it is determined that the bank provides critical functions essential for economic stability, such that resolution would be in the public interest.[13] In that case, liability for the costs of resolution is shifted away from taxpayers and onto the banking industry to the furthest extent possible.[14] In so far as possible, resolutions should be conducted by the private sector. A new 'bail-in' mechanism allows for indebted banks to continue as a going concern with minimal disruption to ordinary depositors through the write-down of liabilities and/or their conversion to equity.[15] Shareholders and large investors will be exposed to losses first, with deposits under €100,000 protected by the Deposit Guarantee Scheme Directive.[16]

The Single Resolution Mechanism has applied the Bank Recovery and Resolution Directive within the Eurozone since 2016.[17] The mechanism is operated by the Single Resolution Board, which consists of several permanent members and representatives of the relevant national resolution authorities, as well as the ECB. It handles the resolution of credit institutions in participating Member States that have been deemed 'failing or likely to fail' and whose resolution is determined to be in the public interest.[18] Where appropriate, the Single Resolution Board may use the emergency Single Resolution Fund to provide interim aid, such as guarantees or loans, to ensure functions critical to financial stability and the overall economy can continue. This fund is financed by contributions levied from the banking industry itself. It

[13] Council Directive (EU) 2014/59/EU of 15 May 2014 Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms [2014] OJ L 173/190.
[14] ibid.
[15] European Commission (n 2).
[16] Council Directive (EU) 2014/49/EU of 16 April 2014 on Deposit Guarantee Schemes [2014] OJ L 173/149.
[17] Council Regulation (EU) 806/2014 of 15 July 2014 Establishing Uniform Rules and a Uniform Procedure for the Resolution of Credit Institutions and Certain Investment Firms in the Framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L 225/1.
[18] ibid.

cannot be used to absorb the losses of an institution or to provide for its recapitalisation.[19] EU leaders struck an agreement on the introduction of a Common Backstop to the Single Resolution Fund late in 2020, doubling its emergency lending capacity and enhancing the credibility of its guarantees.[20]

The only bank resolved under the Single Resolution Mechanism thus far is Spain's Banco Popular, which was declared 'failing or likely to fail' as a result of liquidity issues on 6 June 2017 (revisited in Section D).[21] The Single Resolution Board and Spain's Autoridad de Resolución Ejecutiva (the national competent authority) moved rapidly to formulate a resolution scheme under which the bank's debt was converted to equity and sold to Banco Santander, a national rival, for €1. Customers were unaffected by the takeover, with Banco Popular operating under normal business conditions as a solvent and liquid member of the Santander Group the very next day.[22] No contagion was observed in debt and equities markets.[23] Crucially, taxpayers were not made liable for the bank's failure. The resolution was loudly trumpeted as a vindication of the Banking Union project.[24]

The Single Supervisory Mechanism became operational in 2014 with the passing of the Single Supervisory Mechanism Regulation.[25] In essence, the Single Supervisory Mechanism delegates the supervisory functions of national central banks to the ECB, which will impose a harmonised approach to supervision, unfettered by non-prudential considerations.[26] Specific tasks relating to prudential supervision of credit institutions, such as requiring credit institutions to maintain certain levels of capital or to limit their exposure to individual counterparties, are now vested in the ECB.[27] The most significant banks are supervised directly

[19] European Commission, 'A Single Resolution Mechanism for the Banking Union – Frequently Asked Questions' (2014) MEMO 14/295 <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_295> accessed 24 March 2022.
[20] European Council, 'Statement of the Eurogroup in Inclusive Format on the ESM Reform and the Early Introduction of the Backstop to the Single Resolution Fund' Press Release 839/20 (30 November 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/11/30/statement-of-the-eurogroup-in-inclusive-format-on-the-esm-reform-and-the-early-introduction-of-the-backstop-to-the-single-resolution-fund/> accessed 24 March 2022.
[21] Camille de Rede, 'The Single Resolution Board Adopts Resolution Decision for Banco Popular' (Brussels, 7 June 2017) <https://www.srb.europa.eu/en/node/315> accessed 24 March 2022.
[22] ibid.
[23] Alessia Giustiniano, 'How Banco Popular Failed' *Financial Times* (London, 4 July 2017) <https://www.ft.com/video/4b79ca83-9e35-483a-b2d6-357268a886be> accessed 24 March 2022.
[24] FT View, 'Banco Popular Process is a Model for Failing Banks' *Financial Times* (London, 08 June 2017) <https://www.ft.com/content/99a2e27c-4c48-11e7-919a-1e14ce4af89b> accessed 24 March 2022.
[25] Council Regulation (EC) 1024/2013 of 15 October 2013 Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions [2013] OJ L 287/63.
[26] ibid recital 12.
[27] ibid recital 23.

by the ECB, with the remainder subject to the supervision of their national central banks.[28] The operation of this mechanism could be observed in the ECB's direction that Irish banks reduce the level of non-performing loans on their balance sheets in 2018, which was deemed a risk to financial stability.[29]

When assessed as a constituent pillar of Banking Union, the true value of the Single Supervisory Mechanism becomes apparent. Supervisory harmonisation under this mechanism enables an historic mutualisation of risk under the Single Resolution Fund and European Deposit Insurance Scheme (considered further in Section D). Healthy credit institutions contributing to the resolution of a distressed bank can be satisfied that it was subject to equivalent rules and supervision, while national governments can cede supervisory power without remaining liable for bank failure.[30] The bank-sovereign nexus is weakened, as trigger-happy governments will no longer be so free to inject taxpayer money into struggling credit institutions. The elegance of this arrangement sidesteps the spectre of moral hazard: the fear that an entity will behave without regard to risk because it will not suffer any consequences. This is the central compromise of Banking Union: risk diversification in exchange for the centralisation of control at a European level.

D FALLING SHORT

Conceptual elegance aside, the real-world application of Banking Union has been somewhat short of inspiring. Away from the offices of the Commission, national governments have demonstrated a stubborn tendency to resist the new diktats of non-intervention. Meanwhile, disagreement over the appropriate allocation of risk and control have frustrated efforts to implement the final pillar of Banking Union, the European Deposit Insurance Scheme.

The Italian government has proven singularly determined to resist the bail-in requirements under Bank Recovery and Resolution Directive, instead preferring to rely on a series of legal fudges to inject taxpayer money into struggling banks. This was particularly clear in the

[28] The ECB directly supervises 115 of the most significant banks in the eurozone, with inclusion depending on size, economic importance, cross-border activities, and previous applications for aid from the European Stability Mechanism/European Financial Stability Facility. A bank is also significant if it is one of the three most significant established banks in a country. All Irish banks are supervised directly by the ECB because of their economic importance to the country: European Central Bank, 'What Makes a Bank Significant?' (2022) <https://www.bankingsupervision.europa.eu/banking/list/criteria/html/index.en.html> accessed 24 March 2022.
[29] Arthur Beesley, 'Ireland's Banking Sector Steps Up Drive to Sell Soured Loans' *Financial Times* (Dublin, 22 August 2018) <https://www.ft.com/content/1899a8f4-a512-11e8-8ecf-a7ae1beff35b> accessed 24 March 2022.
[30] Aneta Spendzharova, 'Is More "Brussels" the Solution? New European Union Member States' Preferences About the European Financial Architecture' (2012) 50(2) Journal of Common Market Studies 315.

treatment of two Veneto based institutions, Banca Popolare di Vicenza and Veneto Banca, certified by the ECB as 'failing or likely to fail' just weeks after the resolution of Banco Popular.[31] The Single Resolution Board determined that resolution was not in the public interest, as the banks did not provide critical functions and their failure was not expected to have a significant adverse impact on financial stability.[32] Their liquidation was thus remitted back to the national authorities, who promptly activated a public interest clause to assume bad debts worth €17 billion. The best portions of both banks were sectioned off and sold to a well-capitalised national bank, Intesa Sanpaolo.[33] Deemed so insignificant as not to warrant rescue by the Single Resolution Board, these banks survived because of their particular importance to the Veneto region,[34] as well as the unusually high level of ownership of bank bonds among Italian retail investors.[35] The architects of Banking Union set out to end 'too big to fail'; they did not reckon with the pernicious effect of 'too small to fail'.[36]

Italy exhibited a similar attitude in its dealings with Banca Monte Paschi di Siena, the world's oldest bank, which was subject to a precautionary recapitalisation in 2017.[37] Precautionary recapitalisation is an extraordinary procedure that allows for a partial state bailout, without full bail-in, where a bank has been shown to be solvent but ill-prepared for adverse conditions.[38] The fruits of this €5.4 billion expenditure proved rotten; the government failed to divest itself of its shares in the bank ahead of the EU imposed deadline at the end of 2021.[39] The courted

[31] European Central Bank, 'ECB Deemed Veneto Banca and Banca Popolare di Vicenza Failing or Likely to Fail' (23 June 2017) <https://www.bankingsupervision.europa.eu/press/pr/date/2017/html/ssm.pr170623.en.html> accessed 24 March 2022.

[32] Sergio Dos Santos Bernardo E Amaro, 'The SRB Will Not Take Resolution Action in Relation to Banca Popolare di Vicenza and Veneto Banca' *Single Resolution Board* (23 June 2017) <https://www.srb.europa.eu/en/node/341> accessed 24 March 2022.

[33] FT Reporters, 'Why Italy's €17bn Bank Rescue Deal is Making Waves across Europe' *Financial Times* (London, 26 June 2017) <https://www.ft.com/content/03a1c7d0-5a61-11e7-b553-e2df1b0c3220> accessed 24 March 2022.

[34] Lucrezia Reichlin, 'The European Banking Union Falls Short in Italy' *Financial Times* (London, 27 June 2017) <https://www.ft.com/content/3b8bc570-5a7e-11e7-b553-e2df1b0c3220> accessed 24 March 2022.

[35] Italian retail investors owned approximately one-third of the €600 billion bank bonds in issuance in in 2016; International Monetary Fund, 'IMF Executive Board Concludes 2016 Article IV Consultation with Italy' IMF Country Report No 16/329 (July, 2016) <https://www.imf.org/external/pubs/ft/scr/2016/cr16222.pdf> accessed 24 March 2022.

[36] Angelo Messore, 'How State Aid Survived the Italian Banking Crisis' (*Lexology,* 20 September 2017) <https://www.lexology.com/library/detail.aspx?g=18229e16-c0b0-4523-96f1-18ff2f6069ab> accessed 24 March 2022.

[37] Alex Barker and Rachel Sanderson, 'Brussels and Rome Seal Rescue Deal for Monte dei Paschi' *Financial Times* (Brussels, Milan, 1 June 2017) <https://www.ft.com/content/3c6e3cb8-46ae-11e7-8519-9f94ee97d996> accessed 24 March 2022.

[38] European Central Bank, 'What is a Precautionary Recapitalisation and How Does it Work?' (27 December 20 16) <https://www.bankingsupervision.europa.eu/about/ssmexplained/html/precautionary_recapitalisation.en.html> accessed 24 March 2022.

[39] Davide Ghiglione, 'Italy, Unicredit Talks Over Sale of Monte dei Paschi Collapse' *Financial Times* (Milan, 24 October 2021) <https://www.ft.com/content/5446c2f2-4fed-4894-bf7f-7b1b884e9607> accessed 24 March 2022.

private buyer, UniCredit, appears to be holding out for the state to assume Monte Paschi's bad debts in exchange for its takeover of the healthy components of the bank, in line with the precedent set in the resolution of the Veneto banks.[40]

Outraged German commentators regarded Banking Union as having been discredited by this saga, and labelled the sorry affair 'a grave mistake'.[41] Their faith in the promises of peripheral Member States to embrace reform of their financial sectors was shaken, setting back efforts to complete financial integration and introduce a European Deposit Insurance Scheme.[42] The resolve of the Single Resolution Board and of the Commission to stand up to national governments and implement bail-in was called into question. The successful resolution of Banco Popular was no salve to the complaints of detractors; the presence of a willing and suitably well capitalised private buyer obviated the need for any contentious decisions regarding commitments made to senior bondholders and large depositors.[43]

The continued absence of a European Deposit Insurance Scheme – a mooted pan-European deposit guarantee scheme – represents another Banking Union failure. While the 2014 Deposit Guarantee Scheme Directive mandated a higher minimum threshold of deposit protection up to €100,000, the degree to which these schemes are funded continues to vary between Member States.[44] Recall that Section B outlined how these variances contributed to the toxic bank-sovereign nexus that dragged the economies of certain Member States into meltdown. Banks in peripheral Member States were effectively penalised for the delinquency of their colleagues, preventing them from competing on a level playing field.

The European Deposit Insurance Scheme, the third pillar of Banking Union, was designed to turn the page on this issue definitively. First proposed in 2010, and again in 2015, the Commission proved unable to calibrate a European Deposit Insurance Scheme in such a manner as to vanquish the spectre of moral hazard. Core Member States, particularly Germany,

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[40] Rachel Sanderson, 'No More Time for Extend and Pretend on Monte Paschi' *Bloomberg* (New York, 2 November 2021) <https://www.bloomberg.com/opinion/articles/2021-11-02/for-mario-draghi-and-europe-no-more-time-for-extend-and-pretend-on-monte-paschi> accessed 24 March 2022.

[41] Jim Brunsden, 'Berlin Leads Backlash against Italian Bank Rescue' *Financial Times* (Brussels, 26 June 2017) <https://www.ft.com/content/71ece778-5a53-11e7-9bc8-8055f264aa8b> accessed 24 March 2022.

[42] ibid.

[43] Reichlin (n 34).

[44] Deposit-Guarantee Schemes Directive (n 16); The Cypriot Σύστημα Εγγύησης των Καταθέσεων και Εξυγίανσης Πιστωτικών και Άλλων Ιδρυμάτων has the means to cover 0.29% of covered deposits, significantly below its target of 0.8%. By way of contrast, the corresponding figure Finland's Talletussuojarahasto was 0.87% in 2020, above its target of 0.8%; see European Banking Authority, 'Deposit Guarantee Schemes Data' <https://www.eba.europa.eu/regulation-and-policy/recovery-and-resolution/deposit-guarantee-schemes-data#collapse16-1> accessed 24 March 2022.

opposed a pan-European deposit guarantee scheme on the grounds of excessive risk taking and profligacy in those Member States likely to avail of a European Deposit Insurance Scheme.[45] Against intractable national opposition, Eurocrats had no answers. A decade born in the shadow of financial meltdown limped to a close without having implemented the reforms that might prevent the same.

E A PATH FORWARD

An article written in early 2017 labelled the looming confrontation between Italy and the EU as a 'make-or-break moment' for Banking Union.[46] The contemplated public bailouts of Italy's banks came to pass. Banking Union bent before it broke. While the strict application of 'bail-in' demanded by critics would have yielded a certain satisfaction, a more pragmatic view recognises that such a course of action would not have been to the advantage of financial convergence. In a region already prone to Euroscepticism, would providing a genuine example of European arbitrariness and inflexibility really have contributed to long-term integration?[47] Italy's actions should be understood in the context of a Banking Union that was not delivering on its central compromise with national governments. Control was exercised at the local level, in contravention of the spirit of the Bank Recovery and Resolution Directive, because risk was concentrated at the local level. The solution to inconsistent application of the rulebook is not less Banking Union, but more.

A revolutionary proposal by then German finance minister Olaf Scholz in late 2019 offered just such a solution. This diluted 'reinsurance' scheme would see depleted national schemes able to borrow from a European Deposit Insurance Scheme under the authorisation of the Single Resolution Board.[48] Any costs exceeding a certain threshold would have to be met by the Member State.[49] This concession in risk-diversification was linked to a control element:

[45] Commission, 'Proposal for a Directive on Deposit Guarantee Schemes' COM (2010) 0368 final; Commission, 'Proposal for a Regulation of the European Council and of the Council amending Regulation (EU) 806/2014 in Order to Establish a European Deposit Insurance Scheme' COM (2015) 0586 final; Jim Brunsden, 'Germany Warnson Eurozone Bank Deposit Plan' *Financial Times* (Brussels, 8 December 2015) <https://www.ft.com/content/76a651b8-9db8-11e5-b45d-4812f209f861> accessed 24 March 2022.

[46] Alex Barker, 'A Make-Or-Break Moment for Europe's Rules on Bank Crises' *Financial Times* (London, 11 January 2017) <https://www.ft.com/content/dc16c063-ab4a-302f-ba65-1426e357c59f> accessed 24 March 2022.

[47] The anti-euro Northern League was victorious in the 2015 Veneto regional election, see James Politi, 'Matteo Renzi Suffers Set Back in Italy's Regional Elections' *Financial Times* (Rome, 1 June 2015) <https://www.ft.com/content/26c65c08-0824-11e5-85de-00144feabdc0> accessed 24 March 2022.

[48] Olaf Scholz, 'Germany Will Consider EU-wide Bank Deposit Reinsurance' *Financial Times* (London, 5 November 2019) <https://www.ft.com/content/82624c98-ff14-11e9-a530-16c6c29e70ca> accessed 24 March 2022.

[49] ibid.

the harmonisation of insolvency procedures and the reduction of risk. The latter was to be achieved by increasing the risk-weighting of debt issued by one's own sovereign, which traditional accounting frameworks recognise as zero-risk.[50] These are sensible measures. Negative interest rates and tight controls on dividend payments have incentivised banks to purchase sovereign bonds.[51] Given the known proclivity of domestic institutions to exhibit a 'home bias' for the debt of their sovereign, such excess liquidity could result in risk concentrations giving rise to a fresh bank-sovereign doom-loop.[52]

These proposals were well received by commentators, but were rejected by Italy, which demanded either a 'eurobond' or some other alternative safe asset for its banks to hold.[53] Failure to reach an agreement on this occasion should not obscure the significance of this proposal. First, the ideological barrier to common deposit insurance was removed; second, national governments wrested the mantle of reform from Europe's institutions to become the primary actors shaping Banking Union. The path towards full implementation of Banking Union is now clear; all that is required is one last surge from Member States.

F CONCLUSION

Though Scholz's proposal was rejected in 2019, recent events have paved the way for a settlement. The Recovery and Resilience Facility allows for debt financed spending on a European level to the tune of €390 billion in grants to support recovery from the Covid-19 pandemic and aid climate transition.[54] This fund shattered an ideological glass-ceiling, paving the way for further financial integration. Bonds issued under this facility could break the deadlock on common deposit insurance by serving as an alternative safe asset for banks seeking to invest their reserves.[55]

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[50] ibid.

[51] Martin Arnold, 'Italian and French Banks Revive "Doom Loop" Fears with Bond Buying' *Financial Times* (Frankfurt, 6 April 2021) <https://www.ft.com/content/fde7833a-8283-45b8-97ae-9104e1c974cd> accessed 24 March 2022.

[52] European Central Bank, 'Home Bias in Bank Sovereign Bond Purchases and the Bank-Sovereign Nexus' (2016) Working Paper 1977 <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1977.en.pdf> accessed 24 March 2022.

[53] Rebecca Christie, 'Scholz's Improved Plan to Complete the Banking Union' *Bruegel Institute* (Brussels, 8 November 2019) <https://www.bruegel.org/2019/11/scholzs-improved-plan-to-complete-the-banking-union/> accessed 24 March 2022; Martin Sandbu, 'Italy Emerges as Biggest Obstacle to Eurozone Banking Union' *Financial Times* (London, 13 January 2020) <https://www.ft.com/content/b9dea3b6-3384-11ea-a329-0bcf87a328f2> accessed 24 March 2022.

[54] Editorial, 'A Chance to Press on with EU Banking Union' *Financial Times* (London, 2 December 2020) <https://www.ft.com/content/8f91f48f-ce5d-48d5-998d-b8d714dbdab7> accessed 24 March 2022.

[55] Martin Arnold, 'EU Recovery Fund Deal Revives Hopes for Eurozone Banking Union' *Financial Times* (Frankfurt, 24 July 2020) <https://www.ft.com/content/ba437551-d19c-4557-8920-2187549a615e> accessed 24 March 2022.

The realities of a shifting world order have prompted a renewed emphasis on the strategic autonomy of Europe, which demands that the bloc protect and disseminate its standards while ensuring that it is a capable guarantor of its own stability.[56] The EU is determined to strengthen its financial sector following Brexit, with European Commissioner for Financial Stability, Financial Services and the Capital Markets Union, Mairead McGuinness, speaking in terms of 'vulnerability' and of the EU's being 'captured' by a system it does not regulate or supervise.[57] Also of significance was Olaf Scholz's ascendance to the German Chancellery in late 2021. The new coalition's agreement for government contains a commitment to implement a European reinsurance scheme in line with his earlier proposals.[58] While this proposal may not diversify risk to the same extent as a full pan-European deposit insurance scheme, it would amount to a tangible achievement. Politics is, after all, the art of the possible. The fact that Banking Union is ultimately a political struggle, not a sandbox-like exercise in constructing a perfect financial architecture, was lost on the Commission; as the project began to tread on more contentious areas, a national backlash was inevitable. Settlements reached in the current phase of bilateral reform will ultimately be founded on the consent of constituent states, promising a more stable and effective Banking Union.

From conception to (partial) realisation, the life of Banking Union has been one of complexity and frustration. Belying this complexity, the project can ultimately be reduced to one central compromise: diversify risk away from individual Member States in exchange for governments relinquishing the levers of control over credit institutions. Whether by accident or design, the initial drive for Banking Union managed to strike an appropriate balance between these two considerations in implementing the Single Supervisory Mechanism and Single Resolution Mechanism. Failure to introduce common deposit insurance and other risk diversification policies prompted failure of the control element in Italy's application of the Bank Recovery and Resolution Directive. In turn, failure to link proposals for common deposit insurance to a satisfactory control element resulted in their defeat. Scholz's scheme marks a return to the risk-

[56] European Council, 'Strategic Autonomy for Europe - The Aim of Our Generation' (28 September 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/09/28/l-autonomie-strategique-europeenne-est-l-objectif-de-notre-generation-discours-du-president-charles-michel-au-groupe-de-reflexion-bruegel/> accessed 24 March 2022.

[57] Sam Fleming and Jim Brunsden, 'EU Cannot Be "Captured" by City of London, Warns Financial Services Chief' *Financial Times* (Brussels, 16 December 2020) <https://www.ft.com/content/5b706fd6-48b5-4b0f-8503-9c7423a93072> accessed 24 March 2022.

[58] Bündnis für Freiheit, Gereichtigkeit, Nachhaltigkeit, *Mehr Fortschritt Wagen* (Koalitionsvertrag 2021-2025) 168 <https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf> accessed 24 March 2022.

control principle. The ultimate realisation of Banking Union is within reach. The guiding star illuminates the way.

IMAGE-BASED SEXUAL ABUSE CONTENT AND HOW TO DELETE IT - FROM THE E-COMMERCE DIRECTIVE TO THE DIGITAL SERVICES ACT

*Ciara Barbara O'Rourke**

A INTRODUCTION

Using internet technology to perpetrate violence against women is a phenomenon referred to as 'Online Violence Against Women' (OVAW).[1] Image-based sexual abuse (IBSA) is one of several manifestations of OVAW.[2] IBSA is a gendered phenomenon commonly known as 'revenge porn'.[3]

There have been calls for stronger regulation of the companies which provide the online services (known as intermediaries) that are used to perpetrate IBSA.[4] The legal instrument regulating the liability of intermediaries for the content they host in the European Union (EU) is the E-Commerce Directive (ECD).[5] In December 2020, the European Commission (the Commission) published its proposal for a Digital Services Act (DSA), a regulation to amend the ECD.[6]

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[1] Kim Barker and Olga Jurasz, 'Online Violence Against Women as an Obstacle to Gender Equality: A Critical View from Europe' (2020) 1 European Equality Law Review 47.

[2] Other manifestations include inter alia online-harassment and cyber-stalking; see ibid 49.

[3] Clare McGlynn and Erika Rackley, 'Image Based Sexual Abuse' (2017) 37(3) Oxford Journal of Legal Studies 534, 534; Sophie Maddocks, 'From Non-Consensual Pornography to Image-Based Sexual Abuse: Charting the Course of a Problem with Many Names' (2018) 33(97) Australian Feminist Studies 345; Directorate-General for Justice and Consumers, '2021 Report on Gender Equality in the EU' (European Union, 2021) 10 <https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/annual_report_ge_2021_printable_en_0.pdf> accessed 24 March 2022; United Nations General Assembly, 'Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on Online Violence Against Women and Girls from a Human Rights Perspective' (Human Rights Council, 2018) UN Doc A/HRC/38/47 <https://undocs.org/A/HRC/38/47> accessed 24 March 2022; Council of Europe 'Cybercrime Convention Committee; Working Group on Cyberbullying and Other Forms of Online Violence, Especially Against Women and Children, Mapping Study on Cyberviolence' (2018) T-CY(2017)10, 7 <https://rm.coe.int/t-cy-2017-10-cbg-study-provisional/16808c4914> accessed 24 March 2022.

[4] United Nations General Assembly (n 3) paras 98, 99; Jennifer O'Connell, 'They Were Putting Up Photos of Girls Nude From the Neck Down, Insinuating it Was Me' *Irish Times* (Dublin, 17 April 2021) <https://www.irishtimes.com/life-and-style/people/they-were-putting-up-photos-of-girls-nude-from-the-neck-down-insinuating-it-was-me-1.4538353> accessed 24 March 2022.

[5] Council Directive (EC) 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive).

[6] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM (2020) 825 final 1.

Gender equality and non-discrimination on the basis of sex are core values enshrined in EU law,[7] and the Commission has consistently referred to the DSA as a legal instrument which will clarify what is expected of intermediaries in respect of OVAW (including IBSA), and thereby '[make] the internet safer for women'.[8] Notwithstanding these assertions, the EU is not known to have assessed how the current instrument for regulating online content, the ECD, functions in relation to IBSA.[9] Because new efforts to regulate online content will build on existing systems, it is important to understand those systems.[10] Further, it has been found that regardless of jurisdiction and without exception, removing their private sexual images (PSI) from the internet is IBSA victims' top priority.[11] Therefore, this article explores the accessibility and effectiveness of the content-removal mechanisms currently available to IBSA victims after an image has been posted online and how this might change under the proposed Digital Services Act.

Firstly, this article discusses IBSA and outlines the EU's current legal framework for intermediary liability. Secondly, the author examines whether IBSA victims can access content-removal mechanisms by fulfilling the personal, material, and territorial scopes of the ECD and analyses the mechanisms the ECD provides for removing IBSA content. Subsequently, the same issues are examined but applying the DSA rather than the ECD. Finally, this article discusses the findings emerging from the previous two sections.

B IMAGE-BASED SEXUAL ABUSE

Before addressing issues of intermediary liability, it is useful to understand the gendered nature of IBSA, the harm it causes and how it operates.

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[7] Consolidated Version of The Treaty on European Union [2012] OJ C326/13, article 2; Consolidated Version of The Treaty on the Functioning of the European Union [2012] OJ C326/47, article 8; Charter of Fundamental Rights of the European Union [2000] OJ C 364/1, articles 21, 23.

[8] Helena Dalli, 'Parliamentary Questions Answer on behalf of the Commission, Question Reference: E-002184/2020' (European Parliament, 13 August 2020) <https://www.europarl.europa.eu/doceo/document/E-9-2020-002184-ASW_EN.html> accessed 24 March 2022; European Commission, 'A Union of Equality: Gender Equality Strategy 2020 – 2025' COM (2020) 152 final, 5; Directorate-General for Justice and Consumers (n 3) 2, 10, 37.

[9] O'Connell and Bakina's article briefly examines removing IBSA through the ECD but focuses on identifying IBSA as a form of intellectual property and the full range of removal mechanisms available as a consequence thereof. See Aislinn O'Connell and Ksenia Bakina, 'Using IP Rights to Protect Human Rights: Copyright for 'Revenge Porn' Removal' (2020) 40 Legal Studies 442.

[10] Daphne Keller and Paddy Leersen, 'Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation' in Nathaniel Pesily and Joshua A Tucker (eds) , *Social Media and Democracy: The State of the Field, Prospects for Reform* (Cambridge University Press 2020) 220.

[11] Erika Rackley and others 'Seeking Justice and Redress for Victim-Survivors of Image-Based Sexual Abuse' (2021) 29(3) Feminist Legal Studies 293 <https://link.springer.com/article/10.1007/s10691-021-09460-8#citeas> accessed 24 March 2022; see also, O'Connell and Bakina (n 9) 449.

I Image-Based Sexual Abuse is Gendered

Organisations including the United Nations, the Commission and the Council of Europe recognise IBSA as a form of sexual and gender-based violence.[12] Literature overwhelmingly asserts that IBSA victims are mostly women while men are disproportionately the perpetrators.[13] A 2014 survey found that 20% of 18-29 year-old women in the EU have experienced sexual cyber-harassment.[14] In 2018, a study on cyber-violence and hate speech online against women in the EU identified IBSA as a threat to women.[15]

II Naming the Problem

IBSA was an internet phenomenon in the early 2000s,[16] but 'revenge porn' began attracting media and academic attention in 2010 following the creation of the notorious website 'isanyoneup.com' which encouraged users to non-consensually post PSI of former partners on the website in revenge for ending a relationship.[17] Twelve years later, IBSA still lacks an established, harmonised vocabulary. This complicates discussions on what exactly is at issue

[12] McGlynn and Rackley (n 3) 537; Directorate-General for Justice and Consumers (n 3) 10; United Nations General Assembly (n 3); Council of Europe (n 3) 7.

[13] Elena Sharrat, 'Intimate Image Abuse in Adults and Under 18s: A Comparative Analysis of Cases Dealt with by the Revenge Porn Helpline and Professionals Online Safety Helpline' (*South West Grid for Learning*, 2019) <https://swgfl.org.uk/assets/documents/intimate-image-abuse-in-adults-and-under-18s.pdf> accessed 24 March 2022; Zak Franklin, 'Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites' (2014) 102 California Law Review 1303, 1308; McGlynn and Rackley (n 3) 544; Mary C Franks, 'Drafting an Effective "Revenge Porn" Law: A Guide for Legislators' (2016) *Cyber Civil Rights Initiative.*<https://www.cybercivilrights.org/wp-content/uploads/2016/09/Guide-for-Legislators-9.16.pdf> accessed 24 March 2022; Sarah Bloom, 'No Vengeance for 'Revenge Porn' Victims: Unraveling Why this Latest Female-Centric, Intimate-Partner Offense is Still Legal, and Why We Should Criminalize It' (2014) 42 Fordham Urban Law Journal 233, 239. In contrast, one Australian study found a difference of 0.7% in victimisation rates between men and women: Anastasia Powell and others, 'Image-based sexual abuse: An International Study of Victims and Perpetrators: A Summary Report' (Royal Melbourne Institute of Technology , 2020) 5 <https://www.researchgate.net/publication/339488012_Image-based_sexual_abuse_An_international_study_of_victims_and_perpetrators> accessed 24 March 2022.

[14] European Union Agency for Fundamental Rights, 'Violence Against Women: An EU-wide Survey' (2014) 106 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf> accessed 24 March 2022.

[15] Adriane Van Der Wilk, 'Cyber Violence and Hate Speech Online Against Women' (2018) Study for the FEMM Committee (Policy Department for Citizens' Rights and Constitutional Affairs) 10 <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf > accessed 24 March 2022.

[16] Alexa Tsoulis-Reay, 'A Brief History of Revenge Porn' *New York Magazine* (New York, 19 July 2013) <https://nymag.com/news/features/sex/revenge-porn-2013-7/> accessed 24 March 2022.

[17] Antoinette Raffaela Huber, 'Women, Image Based Sexual Abuse and the Pursuit of Justice' (PhD Thesis, Liverpool John Moores University, 2020) 31 <http://researchonline.ljmu.ac.uk/id/eprint/12955/1/2020HuberPhD.pdf> accessed 24 March 2022; Alex Morris, 'Hunter Moore: The Most Hated Man on the Internet' *Rolling Stone* (New York, 13 November 2012) <https://www.rollingstone.com/culture/culture-news/hunter-moore-the-most-hated-man-on-the-internet-184668/> accessed 24 March 2022; Dave Lee, 'IsAnyoneUp's Hunter Moore: "The Net's Most Hated Man"' *BBC* (London, 20 April 2012) <https://www.bbc.com/news/technology-17784232 > accessed 24 March 2022.

and why it is a problem. [18] Despite the term's popularity, 'revenge pornography' is a misnomer. Firstly, motivations for IBSA are more diverse than revenge alone.[19] A sense of entitlement, sexual gratification, bonding with peers, financial gain, fun, blackmail and social notoriety also motivate this behaviour.[20] 'Revenge' does not capture how threats of IBSA are used to prevent victims of domestic and sexual abuse from reporting the abuse to law enforcement.[21] Secondly, framing IBSA as pornography is problematic because it focuses attention on the sexuality of the image, rather than the harmful actions of perpetrators.[22] Thirdly, 'revenge pornography' perpetuates the patriarchal perception that women should be punished for sexual behaviour.[23] Hence, this article adopts McGlynn and Rackley's term 'image-based sexual abuse'.[24]

III The Harms of Image-Based Sexual Abuse

IBSA's harms have been described as 'serious, multi-faceted and enduring'.[25] The harms IBSA causes are worse for women victims due to social-stigma, structural inequality, negative gender-stereotypes, 'slut shaming' and victim-blaming.[26] However, IBSA's harms are also intersectional, meaning that ways and the degree to which IBSA affects victims depend on inter alia their sexual orientation, whether the victim has disabilities, their religion, age, and race.[27]

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[18] Maddocks (n 3).
[19] Rackley and others (n 11) 13.
[20] Huber (n 17) 35; Nicola Henry and Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25(4) Social and Legal Studies 397, 403; Similar findings are made in the work of Clare McGlynn, Erica Rackley and Ruth Houghton, 'Beyond "Revenge Porn": The Continuum of Image-Based Sexual Abuse' (2017) 25(1) Feminist Legal Studies 25, 35; Eric Goldman and Angie Jin, 'Judicial Resolution of Nonconsensual Pornography Dissemination Cases' (2018) 14 I/S Journal of Law and Policy for the Information Society 283, 284; Walter S DeKeeseredy and Martin D Schwartz, 'Thinking Sociologically About Image-Based Sexual Abuse: The Contribution of Male Peer Support Theory' (2016) 2(4) Sexualization, Media, & Society 1, 2; Rackley and others (n 11) 13.
[21] Heather Douglas, Bridget A Harris and Molly Dragiewicz, 'Technology-Facilitated Domestic and Family Violence: Women's Experiences' (2019) 59 British Journal of Criminology 551, 558; McGlynn, Rackley and Houghton (n 20) 29; Danielle K Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2016) 49 Wake Forest Law Review 345, 351; Nicola Henry, Asher Flynn, and Anastasia Powell, 'Policing Image-Based Sexual Abuse: Stakeholder perspectives' (2018) 19(6) Police Practice and Research 565, 567.
[22] Maddocks (n 3) 347.
[23] Franklin (n 13) 1310; Erika Rackley and Clare McGlynn, 'The Law Must Focus on Consent When it Tackles Revenge Porn' (*The Conversation,* 23 July 2014) <https://theconversation.com/the-law-must-focus-on-consent-when-it-tackles-revenge-porn-29501> accessed 24 March 2022.
[24] McGlynn and Rackley (n 3).
[25] Rackley and others (n 11) 6.
[26] United Nations General Assembly (n 3) para 25; Rachel Hill, 'Cyber-Misogyny: Should "Revenge Porn" Be Regulated in Scotland, and if so, How?' (2015) 12 Scripted 118, 122 <https://script-ed.org/article/cyber-misogyny-should-revenge-porn-be-regulated-in-scotland-and-if-so-how-2/> accessed 24 March 2022.
[27] Rackley and others (n 11) 8; Clare McGlynn and others, 'Shattering Lives and Myths: A Report on Image-Based Sexual Abuse' (Royal Melbourne Institute of Technology, 2019) 7 <https://research.monash.edu/en/publications/image-based-sexual-abuse-an-international-study-of-victims-and-pe> accessed 24 March 2022; Powell and others (n 13) 5.

A medicalised trauma-based framework finds that IBSA can cause anxiety, insomnia, depression, agoraphobia, chronic pain, headaches, spasms, nausea and has resulted in suicide.[28] IBSA's harms are described as mirroring those caused by sexual assault and rape, and its long-term impacts have been likened to those seen in victims of child sexual abuse material.[29]

IBSA also causes significant and varied personal and social harms. McGlynn et al describe how IBSA radically disrupts every aspect of victims' lives, including their sense of self, bodily-integrity, and relationships.[30] IBSA causes economic damage because it can impact victims' ability to pursue education and/or employment.[31] Because the dissemination of images is beyond their control, victims report feeling that the abuse is relentless.[32] Victims also describe their perpetual vigilance because of the 'unnerving sense of fear, worry or uncertainty' of images resurfacing.[33] This results in victims spending hours scouring the internet for copies of their PSI in order to seek its removal.[34] Marques refers to this as IBSA's 'digital layer' of harm meaning that IBSA's technological nature creates unique harm which 'fundamentally exacerbates [victims'] trauma'.[35] IBSA causes victims to experience a breach of trust and sometimes judgment from family and friends which can cause them to withdraw from others.[36] This isolation also affects victims' digital lives because the enormous challenge of 'regaining control over one's online self' can cause victims to feel unsafe online and therefore to stay offline.[37] Because of the ubiquitous nature of the internet in modern society it is argued that

[28] Huber (n 17) 118; Rackley and others (n 11) Powell (n 13) 8; Damien LeLoup and Sofia Fischer 'Harcèlement sexuel: avec le confinement, le retour en force des comptes - fisha - sur les réseaux sociaux' *Le Monde* (Paris, 07 April 2020) <https://www.lemonde.fr/pixels/article/2020/04/07/harcelement-sexuel-avec-le-confinement-le-retour-en-force-des-comptes-fisha-sur-les-reseaux-sociaux_6035853_4408996.html> accessed 24 March 2022; Kitty Holland 'Dara Quigley's Family "Battling State" to Find Out Key Events Before Death' *Irish Times* (Dublin, 23 October 2019) <https://www.irishtimes.com/news/social-affairs/dara-quigley-s-family-battling-state-to-find-out-key-events-before-death-1.4060557> accessed 24 March 2022; Nicolas Suzor, Bryony Seignior and Jennifer Singleton, 'Non-Consensual Porn and the Responsibilities of Online Intermediaries' (2017) 40 Melbourne University Law Review 1057, 1061.

[29] Mudasir Kamal and William J Newman, 'Revenge Pornography: Mental Health Implications and Related Legislation' (2016) 44 Journal of the American Academy of Psychiatry and the Law 359, 361; McGlynn and others (n 27) 7; Huber (n 17) 169.

[30] Clare McGlynn and others, 'It's Torture for the Soul: The Harms of Image-Based Sexual abuse' (2021) 30(4) Social and Legal Studies 541, 550.

[31] John Schriner and Melody Lee Rood, 'The Internet never Forgets: Image-Based Sexual Abuse and the Workplace' in Leslie Ramos Salazar (ed), *Handbook of Research on Cyberbullying and Online Harassment in the Workplace* (IGI Global 2021) 114.

[32] McGlynn and others (n 30) 552.

[33] ibid 553.

[34] Van Der Wilk (n 15) 28; Suzor and others (n 28) 1060; Agence France-Presse, 'Women Sue Pornhub Over Alleged Child Sex Abuse Videos' *RTÉ News* (18 June 2021) <https://www.rte.ie/news/2021/0618/1228839-pornhub-case/> accessed 24 March 2022.

[35] Huber (n 17) 170.

[36] McGlynn and others (n 30) 554.

[37] ibid 15.

staying offline undermines women's freedom of expression (FoE) and digital inclusion and therefore hinders full participation in society.[38]

IV The Online Services Used to Perpetrate Image-Based Sexual Abuse

To understand the relationship between IBSA and online services, one must examine how the latter is used to perpetrate the former. There is a dearth of research on the online services used to perpetrate IBSA in the EU. However, qualitative research from the United Kingdom shows that IBSA is not perpetrated only on IBSA websites, but that PSI are disseminated multiple times and/or through multiple online services.[39]

The United Kingdom's Revenge Porn Helpline reported PSI being disseminated on social media, message boards, dating websites, chatrooms, and messaging applications.[40] Huber's research in the United Kingdom highlighted five channels for PSI dissemination including (in order of popularity): messaging platforms, social media networks, pornography websites, dating websites and IBSA websites.[41] These findings align with media reports showing that IBSA is increasingly associated with online messaging services such as Discord and Telegram which allow large numbers of users to join groups that are public or private and may require existing members' permission to join. For example, in November 2020 an IBSA scandal in Ireland involving the messaging service Discord concerned the dissemination of an estimated 140,000 PSI.[42] This is a phenomenon which has been reported in numerous EU Member States such as France, Italy and Portugal.[43]

[38] Van Der Wilk (n 15) 34; ibid 6.
[39] Huber (n 17) 105.
[40] ibid 32.
[41] ibid 105.
[42] Sylvia Pownall, 'Discord to Co-Operate with Gardai in Hunt for 500 Irish Men Who Downloaded Leaked Nude Images' *Irish Mirror* (Dublin, 22 November 2020) <https://www.irishmirror.ie/news/irish-news/discord-co-operate-gardai-hunt-23048815> accessed 24 March 2022.
[43] France: Yacha Hajzler , 'Comptes "Fisha": Comment un Groupe de Militantes Lutte Contre la Diffusion de Photos et Vidéos Intimes Volées' (*Franceinfo*, 18 April 2020) <https://france3-regions.francetvinfo.fr/centre-val-de-loire/comptes-fisha-comment-groupe-militantes-lutte-contre-diffusion-photos-videos-intimes-volees-1817854.html> accessed 24 March 2022; Italy: Simone Fontana, 'Dentro il più Grande Network Italiano di Revenge Porn, su Telegram' (*Wired.it*, 3 April 2020) https://www.wired.it/internet/web/2020/04/03/revenge-porn-network-telegram/?refresh_ce=> accessed 24 March 2022; Portugal: Maria Moreira Rato, 'Pussylga. O Grupo em que Mais de 9000 Membros DivulgamConteúdo Erótico de Forma não Consensual' (*JournalN*, 2 November 2020) <https://ionline.sapo.pt/artigo/713737/pussylga-o-grupo-em-que-mais-de-9000-membros-divulgam-conte-do-erotico-de-forma-nao-consensual-?seccao=Portugal_i> accessed 24 March 2022.

C INTERMEDIARY LIABILITY LAW IN THE EUROPEAN UNION

To contextualise the discussion on the ECD and DSA in relation to IBSA, it is necessary to briefly outline the background and key components of intermediary liability law in the EU.

I Background

The ECD was adopted in 2000 when 'online platforms were in their infancy'.[44] E-commerce's capacity for competition, economic growth, employment, and its existence in an ecosystem which is 'boundary and border agnostic' are reasons cited for its adoption.[45] The ECD has never been amended although it has been supplemented.[46] Intermediary liability laws balance three competing goals: preventing harm, protecting lawful online speech and information, and promoting innovation.[47]

The ECD adopts the 'country of origin' principle whereby the laws of the Member States in which the intermediary is established apply to the intermediary.[48] The ECD is an instrument of minimum harmonisation meaning that Member States can impose obligations on intermediaries established therein, of their own accord.[49] However, Member States cannot impose measures on intermediaries established in other Member States, if those measures exceed what is required by EU law.[50]

II Liability Exemption

The ECD establishes a liability exemption which protects intermediaries from liability for the illegal activities of their users. The liability exemption is available to intermediaries which are mere conduits, or which provide caching or hosting services.[51] The liability exemption has been justified on the basis that intermediaries are merely 'communication enablers', connecting

[44] Alexandre de Streel and Martin Husovec, 'The E-Commerce Directive as the Cornerstone of the Internal Market; Assessment and Options for Reform' (2020) Study requested by the IMCO Committee (Policy Department for Economic, Scientific and Quality of Life Policies), 8 <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648797/IPOL_STU(2020)648797_EN.pdf> accessed 24 March 2022.
[45] Graham Pearce and Nicholas Platten, 'Promoting the Information Society: The EU Directive on Electronic Commerce' (2000) 6 European Law Journal 363, 364; José van Dijck, 'Governing Digital Societies: Private Platforms, Public Values' (2020) 36 Computer Law and Security Review 105377, 2.
[46] de Streel and Husovec (n 44) 27.
[47] Keller and Leersen (n 10) 223.
[48] E-Commerce Directive (n 5), article 3(1).
[49] ibid article 1, recital 10 and recital 48; de Streel and Husovec (n 44) 14.
[50] Pearce and Platten (n 45) 370.
[51] E-Commerce Directive (n 5), s 4.

users with content and one another but without having any editorial role in respect of the content posted.[52] Therefore, the ECD harmonises the conditions under which the liability exemption is lost but it falls to national law to determine when intermediaries incur liability.[53]

The liability exemption is horizontal. It protects intermediaries from 'all forms of liability', and applies in respect of all forms of 'illegal activity or information' (illegal content).[54] The ECD does not define 'illegal activity or information', but Wilman interprets the concept as content which is illegal per se or content associated with illegal acts.[55] The EU has harmonised the illegality of child sexual abuse material,[56] terrorist propaganda,[57] particular content on audio-visual media services,[58] and intellectual property.[59] The legality of all other types of content depends on national law.

Hosting intermediaries are services which consist of information storage and therefore the content that is posted online.[60] Therefore, this article focuses on the application of the liability exemption to hosting intermediaries. There are two requirements hosting intermediaries must meet to benefit from the liability exemption. Firstly, the intermediary must be neutral. Neutrality means that the intermediary's activity is 'of a mere technical, automatic and passive nature' such that the intermediary does not have a role giving it knowledge of, or control over the content it hosts.[61]

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[52] van Dijck (n 45) 3.
[53] Joris van Hoboken, 'Hosting Intermediary Services and Illegal Content Online: An Analysis of the Scope of Article 14 ECD in Light of Developments in the Online Service Landscape' (Institute for Information Law, 2018) 29 <https://www.ivir.nl/publicaties/download/hosting_intermediary_services.pdf> accessed 24 March 2022.
[54] Case C-484/14 *McFadden v Sony Music Entertainment Germany* [2016] ECLI:EU:C:2016:170, Opinion of AG Spunzar, para 64; Christina Angelopoulos and Stijn Smet, 'Notice-and-Fair-Balance: How to Reach a Compromise Between Fundamental Rights in European Intermediary Liability' (2016) 8(2) Journal of Media Law 266.
[55] Folkert Wilman, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US* (Edward Edgar Publishing 2020) para 1.06.
[56] Council Directive (EU) 2011/03/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L335/1.
[57] Council Directive (EU) 2017/541/EU of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6.
[58] Council Directive (EU) Directive (EU) 2018/1808/EU of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L303/69.
[59] Council Directive (EC) 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16 European Parliament and Council Directive (EU) 2019/790/EU of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.
[60] E-Commerce Directive (n 5), article 14.
[61] ibid recital 42; Joined Cases C-236/08 to C-238/08 *Google France and Google* [2010] ECLI:EU:C:2010:159 para 113; Case C-291/13 *Papasavvas* [2014] ECLI:EU:C:2014:2209 para 40; *McFadden* (n 54) para 47; Joined Cases C-682/18 and C-683/18, *Youtube and Cyando* [2021] ECLI:EU:C:2021:503 para 106.

Secondly, the neutral hosting intermediary must not have actual knowledge of the illegal nature of the content it hosts.[62] Regarding claims for damages, intermediaries must not have 'awareness of facts or circumstances from which the illegal activity or information is apparent'.[63] Where an intermediary does have actual knowledge or awareness of content's illegal nature, it must expeditiously remove or disable access to that content.[64] Actual knowledge or awareness of content's illegal nature is deemed to exist when the illegality is specifically established or readily identifiable.[65] Intermediaries obtain awareness of content's illegality by virtue of facts or circumstances from which diligent economic operators would have identified illegality.[66] This includes intermediaries' own-initiative investigations regarding illegal content or where the intermediary is notified of such content (known as 'notice and takedown', discussed below).[67] However, hosting intermediaries are not required to 'actively look for facts or circumstances indicating illegal activity'.[68]

III Content-Removal Mechanism - Notice and Takedown

Notice and Takedown (NTD) is the process whereby users can notify intermediaries about items of content which the user believes to be illegal. The intermediary then reviews the content and decides whether the content is illegal. If the reported content is deemed to be illegal by the intermediary, the intermediary must expeditiously 'takedown' the content (remove or disable access to it).[69] Otherwise, the intermediary loses the liability exemption.[70] Notification alone does not automatically give rise to knowledge or awareness. Notifications must be sufficiently precise, adequately substantiated and contain sufficient information to satisfy the intermediary 'without a detailed legal examination, that the [content] is illegal and that removing that content is compatible with freedom of expression (FoE)'.[71] Because the ECD is a directive and not a regulation, the NTD procedure is not harmonised. Member States can, but are not required to,

[62] E-Commerce Directive (n 5), article 14(1)(a).
[63] ibid article 14(1)(a).
[64] ibid article 14(1)(b).
[65] *Youtube and Cyando* (n 61) para 113.
[66] Case C-324/09 *L'Oréal SA & Others v eBay International AG & Others* [2011] ECLI:EU:C:2011:474 para 120; *Youtube and Cyando* (n 61) para 115.
[67] *L'Oréal SA* (n 66) para 120; *Youtube and Cyando* (n 61) para 115.
[68] *Youtube and Cyando* (n 61) para 113.
[69] E-Commerce Directive (n 5), article 14(1)(b).
[70] Ibid; Aleksandra Kuczerawy, 'From "Notice and Take Down" to "Notice and Stay Down": Risks and Safeguards for Freedom of Expression' in Giancarlo Frosio (ed), *The Oxford Handbook of Intermediary Liability Online* (Oxford University Press 2020).
[71] E-Commerce Directive (n 5), recital 46; *L'Oréal SA* (n 66) para 116.

establish national procedures for NTD.[72] In the absence of procedures for NTD mandated by national law, intermediaries must self-regulate.

The ECD states that takedown must be 'expeditious' but does not define what constitutes expeditiousness. The CJEU understands the requirement to mean that national courts are satisfied that national NTD procedures do not delay the vindication of the aggrieved parties' rights to the extent that 'disproportionate damage' is caused to the right-holder.[73]

Under the ECD, NTD is used in respect of illegal content. However, intermediaries may elect to apply the same NTD procedure in respect of content which breaches their own Terms of Service.[74] This is discussed further in section D of this article.

IV Content-Removal Mechanism - Court ordered removal

The ECD provides that national courts can order intermediaries to remove illegal content.[75] Intermediaries must comply with court-ordered removals (CORs) even where the liability exemption applies.[76] The ECD does not set out a procedure for national courts to follow when issuing CORs. Article 18(1) ECD in conjunction with Recital 52 provides that court actions must be available in national law so that measures to stop the spread of illegal content can be adopted. These provisions acknowledge the necessity of such measures given the propensity for damage to arise from illegal content due its rapid spread and its geographical reach.[77] In the recent case of *Glawischnig-Piesczek*, the CJEU held that national courts can issue CORs which have worldwide effects.[78]

V Prohibition of General Monitoring

Member States are prohibited from imposing on intermediaries a general obligation to monitor the content they store or to 'actively seek facts and circumstances indicating illegal activity'.[79] Orders for monitoring 'in a specific case' are not prohibited.[80] In *Glawischnig-Piesczek*, the CJEU interpreted monitoring of a specific case to mean monitoring specific content which was

[72] ibid article 14(3).
[73] *L'Oréal SA* (n 66) para 141.
[74] Keller and Leersen (n 10) 221.
[75] E-Commerce Directive (n 5) article 14(3), recital 45.
[76] Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2019] ECLI:EU:C:2019:821 para 25.
[77] Clara Rauchegger and Aleksandra Kuczerawy, 'Injunctions to Remove Illegal Online Content under the Ecommerce Directive: Glawischnig-Piesczek' (2020) 57 Common Market Law Review 1495, 1506.
[78] *Eva Glawischnig-Piesczek* (n 76) para 50.
[79] E-Commerce Directive (n 5), article 15(1).
[80] ibid recital 47.

previously declared illegal by a national court, rather than monitoring specific *users* who post illegal content.[81] Monitoring orders can be imposed even if the liability exemption applies.[82]

Member States are prohibited from imposing requirements on intermediaries to filter user-generated content to prevent dissemination of illegal content because this would constitute general monitoring.[83] However, in specific cases, intermediaries can be ordered to use filtering technology and to remove content which is identical or equivalent to content previously declared to be illegal.[84] Equivalent content must be identifiable such that intermediaries need not independently assess the content beyond using filtering technology.[85]

D THE E-COMMERCE DIRECTIVE AND IMAGE-BASED SEXUAL ABUSE

This section examines the relationship between the ECD and IBSA, firstly by examining whether IBSA victims can fulfil the personal, material, and territorial scopes of the ECD thus enabling them to access the content-removal mechanisms that the ECD provides and secondly by examining how those mechanisms operate in relation to IBSA.

I Scope

(a) Personal Scope

An assessment of the ECD's personal scope refers to whether the online services used to perpetrate IBSA are neutral hosting services and therefore whether the ECD applies to them.

As discussed, IBSA is perpetrated through online services, many of which did not exist when the ECD was adopted. The neutrality of modern online services' conduct is contested.[86] Gillespie argues that intermediaries are not neutral because they 'invite, facilitate, amplify and

[81] *Eva Glawischnig-Piesczek* (n 76) paras 34 – 35.
[82] ibid paras 24 – 25.
[83] Case C-70/10 *Scarlet Extended SA* [2011] ECLI:EU:C:2011:771 paras 39 – 40; Case C-360/10 *SABAM v Netlog* [2010] ECLI:EU:C:2012:85 para 38.
[84] *Eva Glawischnig-Piesczek* (n 76) paras 37 – 41.
[85] ibid paras 45 – 46; Daphne Keller, 'Facebook Filters, Fundamental Rights, and the CJEU's Glawischnig-Piesczek Ruling' (2020) 69(6) GRUR International 616, 618.
[86] For detailed discussion on this point see Frank Pasquale, 'Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power' (2016) 17 Theoretical Inquiries in Law 487, 494 – 497.

exacerbate' illegal content.[87] Alternatively, it is argued that intermediaries merely convey information on behalf of others and derive profit from doing so.[88]

To date, the CJEU has classified social media networks as neutral hosting services.[89] However, there is confusion concerning messaging services which have been regarded as 'boundary cases' because despite their potential for spreading illegal content to large numbers of people, messaging services raise questions about the privacy of communications.[90]

Uncertainty surrounding which online services fulfil the ECD's personal scope is significant given that private sexual images (PSI) are said to be distributed upon multiple services. However, the CJEU's jurisprudence in this area is 'complex and case specific'.[91] Factors including whether the service at issue forms an integral part of an overall service, whether users could interact without the service and the control the intermediary has over the content it hosts are key considerations when the CJEU determines whether the ECD's personal scope is fulfilled.[92] If an online service is deemed to fall outside the ECD's personal scope, it cannot benefit from the ECD's liability exemption and is regulated by national law.[93] It is argued that the lack of clarity surrounding whether online services are within the ECD's personal scope fragments the application of the liability exemption and complicates matters for victims seeking remedies from intermediaries which hosted their IBSA content.

(b) Material Scope

For the ECD to apply, the content in question must constitute 'illegal content.' As stated, the ECD does not define 'illegal content.' The difficulty caused by the lack of definition is compounded by the inconsistent terminology and understanding of what specifically

[87] Tarleton Gillespie, 'Platforms Are Not Intermediaries' (2018) 2 Georgetown Law Technology Review 198, 200.
[88] Andrej Savin, 'The EU Digital Services Act: Toward a More Responsible Internet' (2021) 24 Journal of Internet Law 14, 15.
[89] *Youtube and Cyando* (n 61); *Eva Glawischnig-Piesczek* (n 76*)*; Case C360/10 *SABAM v Netlog* (n 83).
[90] Van Hoboken(n 53) 14.
[91] Tambiana Madiega, 'Reform of the EU Liability Regime for Online Intermediaries: Background on the forthcoming Digital Services Act' (2020) Paper drawn up by the Members' Research Service, within the Directorate-General for Parliamentary Research Services of the Secretariat of the European Parliament, 5 <https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf> accessed 24 March 2022.
[92] See for example Case C-434/15 *Asociación Profesional Élite Taxi* [2017] ECLI:EU:C:2017:981; Case C-390/18 *Air BnB Ireland* [2019] ECLI:EU:C:2019:1112.
[93] Institute for Information Law (n 53) 31.

constitutes IBSA. Because IBSA is not criminalised at EU level, whether IBSA constitutes 'illegal content' is determined by national law.[94]

There is a dearth of comprehensive research into the IBSA laws of all Member States. It is unclear how many Member States have criminalised IBSA.[95] Existing comparative reviews of Member States' criminal laws dealing with IBSA are limited, and yet still reveal a fragmented legal landscape. Member States diverge conceptually as to the category of criminal offence IBSA might be and the elements which constitute the offence. For example, in both German and French law IBSA is categorised as a criminal offence against privacy. French law requires that the image be sexual in nature.[96] However, in German law the image need not be sexual, but it must violate a person's 'intimate privacy.'[97] Irish law criminalises IBSA but requires that the perpetrator intends to or is reckless as to whether their act causes harm to the victim.[98] IBSA is a crime against privacy in Spanish and Slovene law. In Spain, IBSA is considered a minor offence,[99] whereas Slovenia treats IBSA as an offence against human rights.[100] Conversely, Italy classifies IBSA as a sexual offence.[101] In contrast, Romania does not criminalise IBSA.[102]

Where the criminal law does not frame IBSA as illegal content, victims may have recourse to civil law. IBSA could potentially be dealt with through inter alia legal actions in defamation, privacy laws, copyright violation and misuse of image-rights.[103] An advantage of taking civil action is that it can put victims 'back in control' of their image and can be easily won.[104] However, unlike criminal cases which are prosecuted and paid for by the state, civil actions are emotionally exhausting, expensive and given how rapidly illegal content spreads online and

[94] David Ryan, 'European Remedial Coherence in the Regulation of Non-Consensual Disclosures of Sexual Images' (2018) 34 Computer Law and Security Review 1053, 1066.
[95] See generally Miha Šepec, 'Revenge Pornography or Non-Consensual Dissemination of Sexually Explicit Material as a Sexual Offence or as a Privacy Violation Offence' (2019) 13 International Journal of Cyber Criminology 418; Ryan (n 94) 1066.
[96] *loi* no 2016-1321 du 7 octobre 2016 pour une République numérique (1), amending article 226-2-1 of the Code Pénal.
[97] German Criminal Code (Strafgesetzbuch), article 201a.
[98] Harassment, Harmful Communications and Related Offences Act 2020, s 2.
[99] Código Penal, article 197(7).
[100] Kazenski zakonik, article 143(6); Šepec (n 95) 432.
[101] Codice Penale, article 612.
[102] Mihaela Gidei, 'Revenge porn nu este incriminat în România. Proiectul de completare a Codului Penal a trecut de Senat, dar zace în sertar' *Aleph News* (Bucharest, 06 November 2020) <https://alephnews.ro/justitie/revenge-porn-nu-este-incriminat-in-romania-proiectul-de-completare-a-codului-penal-a-trecut-de-senat-dar-zace-in-sertar/> accessed 24 March 2022.
[103] Van Hoboken (n 53) 21; Aislinn O'Connell, 'Image Rights and Image Wrongs: Image-Based Sexual Abuse and Online Takedown' (2020) 15 Journal of Intellectual Property Law & Practice 55.
[104] Rackley and others (n 11) 22.

how time-consuming and slow litigation can be, seeking judicial determination of IBSA's illegality means the civil route will be unattractive and inaccessible to many.[105]

(c) Territorial Scope

The ECD's 'country of origin' principle is said to have resulted in 27 different sets of liability rules for intermediaries.[106] For intermediaries operating globally, this creates a 'complex variety of legal pressures'.[107] For IBSA victims McGlynn et al highlight how difficulties locating intermediaries' headquarters complicate and increase the cost of litigation.[108]

Another difficulty arises because intermediaries which are not established in the EU are not required to comply with the ECD even if their users are located in the EU.[109] Consequently, if IBSA content is disseminated using a service provided by an intermediary established outside the EU, victims do not have the protection of the ECD. This is so even if the victim and the perpetrator are EU based and the content illegal according to Member State law.

II Content-Removal Mechanisms in the ECD

(a) Notice and Takedown

The harms of IBSA can be minimised by quickly removing the victims' PSI from the internet and preventing their further distribution.[110] NTD is an important facility, not only because it enables the quick removal of content but also because by doing so successfully, victims need not take legal action seeking CORs. However, the NTD procedure is flawed.

A weakness of NTD for victims is that takedown is voluntary.[111] Failure to expeditiously takedown illegal content exposes the intermediary to the risk of liability, but does not result in liability.[112] The ECD seeks to balance the interests of intermediaries, service users and victims of illegal content and therefore stipulates that takedown of content must be done in observance of FoE.[113] The fact that takedown decisions are ultimately taken by private companies raises concerns that if intermediaries fear liability for not removing notified content, they will be

[105] Ryan (n 94) 1056.
[106] Angelopoulos and Smet (n 54) section V.
[107] Van Hoboken (n 53) 16.
[108] Rackley and others (n 11) 24.
[109] De Streel and Husovec (n 44) 39.
[110] O'Connell and Bakina (n 9) 449.
[111] Wilman (n 55) para 9.17.
[112] O'Connell (n 103) 64.
[113] E-Commerce Directive (n 5), recital 41 and 46.

overly cautious and remove content too easily.[114] It must be noted, however, that FoE is not an absolute right. It can be limited where limitations are proportionate, necessary and genuinely meet objectives of general interest.[115] Scheller describes IBSA as 'the latest arena where freedom of speech and invasion of privacy conflict'.[116] By balancing the rights that IBSA victims are seeking to protect with the type of speech IBSA perpetrators are trying to protect, Ryan observes that it is unlikely that an IBSA perpetrator's right to FoE outweighs victims' right to privacy, dignity and autonomy where a reasonable expectation of privacy exists.[117] Moreover, IBSA has been identified as a threat to victims' FoE because the trauma of IBSA forces them to stay offline.[118] Citron and Franks argue that potential chilling effects on perpetrators' FoE caused by regulating IBSA content can be avoided through careful and precise legal drafting.[119] CJEU jurisprudence on intermediary liability has largely developed through cases concerning intellectual property rights.[120] However, in a recent case considering the right not to be defamed, the CJEU gave greater weight to protecting victims of online defamation than intermediaries' commercial interests.[121] Although the case concerned CORs rather than NTD, it is relevant because it demonstrates the CJEU's willingness to consider the nature of victims' interest and give judicial protection proportionate to this.[122] This could be extended to IBSA victims when balancing privacy and FoE in NTDs.

The ECD does not harmonise the NTD regime. This causes 'considerable differences' in how NTD functions in different intermediaries.[123] As noted, PSI are frequently disseminated multiple times and/or through multiple online services.[124] This means that victims must submit takedown notices to each intermediary hosting their PSI, each of which can have different procedures and requirements for NTD to be put into effect. This is an onerous process for victims who are already distressed and seek the removal of their PSI as quickly as possible.[125]

[114] Van Hoboken (n 53) 27; Keller and Leersen (n 10) 222.
[115] Rauchegger and Kuczerawy (n 77) 1517.
[116] Samantha Scheller, 'A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn' (2015) 93 North Carolina Law Review 551, 554.
[117] Ryan (n 94) 1057; see further Barker and Jurasz (n 1) 56.
[118] Van Der Wilk (n 15) 34; McGlynn and others (n 30) 546.
[119] Citron and Franks (n 21) 386.
[120] Angelopoulos and Smet (n 54) section II B 1.
[121] *Eva Glawischnig-Piesczek* (n 76).
[122] Rauchegger and Kuczerawy (n 77) 1505.
[123] Madiega (n 91) 10.
[124] Huber (n 17) 105.
[125] Wilman (n 55) para 10.06.

This procedure has been described as contributing to re-victimisation and illustrates the challenges victims must overcome to lead a normal life again.[126]

The absence of a harmonised definition of 'expeditious removal' is another issue which further complicates NTD. There is no standardised timeframe in which intermediaries must determine whether content is illegal and must be removed. This is worsened where there are divergent requirements set by national law.[127]

Uncertainty exists regarding when intermediaries are deemed to have actual knowledge or awareness of illegal content. Notices must contain sufficient information to satisfy the intermediary, without a detailed legal examination, that content is illegal, and its removal is compatible with FoE rights.[128] Again, asking victims to submit notifications capable of meeting this standard is onerous.[129] Conversely, identifying illegal content from unsubstantiated notices is equally burdensome for intermediaries. This is an especially complex issue regarding IBSA content because the absence of consent to share the image will not be apparent from the image alone. Consequently, notification is only a factor for national courts to consider when determining if actual knowledge or awareness exists.[130]

A significant issue with NTD is that intermediaries can apply NTD procedures in respect of illegal content and content which breaches their terms of service (ToS). Each intermediary sets its own ToS. These can be based upon the intermediary's moral values, social norms, or business purposes.[131] Hence, an intermediary can remove non-illegal content that breaches what it, a private entity, deems acceptable. This control over what can and cannot be online places intermediary liability law at the 'intersection of state and private power'.[132] To this end, intermediaries are 'functional sovereigns' because they set and administer the rules for interactions between users and wider society.[133] As functional sovereigns, intermediaries can

[126] Schriner and Rood (n 31) 115; Van Der Wilk (n 15) 28.
[127] See European Commission, 'Recommendation of 1 March 2018 on Measures to Effectively Tackle Illegal Content Online' (Recommendation) COM (2018) 1177 final, para 35 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32018H0334> accessed 24 March 2022; Madiega (n 91) 9.
[128] *Youtube and Cyando* (n 61) para 116.
[129] Alexandre de Streel and others, 'Online Platforms' Moderation of Illegal Content Online; Law, Practices and Options for Reform' (2020) Study prepared for the IMCO Committee (Policy Department for Economic, Scientific and Quality of Life Policies) 51 <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652718/IPOL_STU(2020)652718_EN.pdf> accessed 24 March 2022.
[130] *Youtube and Cyando* (n 61) para 115; *L'Oréal SA* (n 66) para 122.
[131] Keller and Leersen (n 10) 221.
[132] Daphne Keller, 'The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation' (2018) 33 Berkeley Technology Law Journal 287, 296.
[133] Sofia Ranchordás and Catalina Goanta, 'The New City Regulators: Platform and Public Values in Smart and Sharing Cities' (2020) 36 Computer Law and Security Review 105375, 14.

prohibit IBSA in their ToS, and remove content which they consider to constitute IBSA. The ease with which intermediaries can administer takedown based on self-defined rules, coupled with their significant resources, means takedown can be fast and cost-free for victims.[134] Hence, for victims who cannot fulfil the ECD's material scope, ToS can fill a justice-gap and mitigate IBSA's harms in a manner un-matched by hard-law.[135] However, ToS can be politicised and lack certainty and transparency.[136] Relying on discretionary ToS rather than hard-law makes victims dependent on whether and how intermediaries address IBSA in their ToS. Further, in the absence of a universal definition of IBSA, intermediaries may struggle to define what exactly is prohibited. Thus, rather than banning IBSA outright, intermediaries may opt for vague terminology such as 'sexually explicit' content.[137] Ambiguous terminology can result in inconsistent and, regarding women's bodies, politicised application of ToS.[138] This could result in the over or under removal of content. Furthermore, the content different intermediaries seek to prohibit will naturally differ. While it might suit Facebook's values and business model to prohibit nudity, the same cannot be said for PornHub. Thus, ToS are not a silver bullet for victims who cannot fulfil the ECD's material scope but wish to access NTD.

Finally, the ECD is horizontal in respect of illegal content. All forms of illegal content are subject to the same takedown requirements in respect of priority and severity, regardless of whether pirated music, terrorist content or IBSA is at issue.[139] A vertical framework, wherein intermediaries' actions are determined by the type of content at issue, has been suggested as a more nuanced alternative to balance the rights at issue more evenly.[140] Angelopoulus and Smet

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[134] Daphne Keller, 'Intermediary Liability: Basics and Emerging Issues' (*Stanford Center for Internet and Society*, December 2019) <https://cyberlaw.stanford.edu/files/blogs/Intro-to-Intermediary-Liability.ppt> accessed 24 March 2022.

[135] This is based on Pasquale's characterisation of functional sovereigns filling gaps which emerge when states fail to address societal issues. See Frank Pasquale, 'From Territorial to Functional Sovereignty: The Case of Amazon' (*OpenDemocracy,* 5 January 2018) <https://www.opendemocracy.net/en/digitaliberties/from-territorial-to-functional-sovereignty-case-of-amazon/> accessed 24 March 2022; The efficiency and speed of notice and takedown regarding IBSA is also noted in recognised in O'Connell (n 101) 64.

[136] See Enguerrand Marique and Yseult Marique, 'Sanctions on Digital Platforms: Balancing Proportionality in a Modern Public Square' (2020) 36 Computer Law & Security Review 105372, 2; van Dijck (n 45) 3.

[137] For example, in August 2021, in a decision which would later be reversed, social media platform 'OnlyFans' said it would ban 'sexually explicit' content from its platform, but that nude content would still be permitted: Tanya Lorenz and Alyssa Lukpat, 'OnlyFans Says It Is Banning Sexually Explicit Content' *New York Times* (New York, 19 August 2021) <https://www.nytimes.com/2021/08/19/business/onlyfans-porn-ban.html> accessed 24 March 2022.

[138] Gretchen Faust, 'Hair, Blood and the Nipple. Instagram Censorship and the Female Body' in Urte Undine Frömming and others (eds), *Digital Environments: Ethnographic Perspectives Across Global Online and Offline Spaces* (Transcript Verlag 2017) 161.

[139] *McFadden* (n 54) Opinion of AG Spunzar para 64; Angelopoulos and Smet (n 54) section I.

[140] Sophie Stalla-Bourdillon, 'Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well...' in Mariarosaria Taddeo and Luciano Floridi (eds), *The Responsibilities of Online*

propose a model for vertical liability wherein the takedown action is determined by the seriousness of the harm posed by the alleged illegality and the ease with which the intermediary can verify the alleged illegality.[141] They suggest that actions could range from counter-notice for alleged breaches of copyright, to maintaining the existing takedown procedures for alleged hate speech,[142] to 'automatic takedown' (takedown of illegal content without any review or verification by the intermediary) in respect of child sexual abuse material.[143] Given the range of illegal content in existence and consequently the range in the severity of harms resulting from same, the current 'one-size-fits-all' approach to illegal content is unfair to IBSA victims and the extent of their suffering compared to victims of copyright violations.

(b) Court-Ordered Removal

In accordance with article 14(3) ECD, national courts can order intermediaries to remove illegal content, for example through injunctions.[144] The ECD does not harmonise the conditions, procedures and safeguards national courts must consider when issuing CORs.[145]

CORs are advantageous for IBSA victims because unlike NTDs, CORs are mandatory and apply irrespective of whether the intermediary has qualified for the liability exemption.[146] CORs facilitate greater balancing of rights than NTDs because judges in national courts administer and oversee CORs. Where victims are threatened with dissemination of PSI, the possibility of obtaining preventative CORs is vital. The ECD also provides that CORs must be available nationally.[147] National courts have broad discretion regarding the type of COR issued in each case.[148] IBSA's multi-faceted and sensitive nature means this flexibility is invaluable. However, an obvious disadvantage of CORs is the inherent requirement of initiating legal proceedings. As discussed, such proceedings are inaccessible for many.

As previously noted, even after removal, victims fear their PSI resurfacing. Notwithstanding the ECD's prohibition of general monitoring, in the recent ruling of *Glawischnig-Piesczek,* the

Service Providers (Springer 2017); Angelopoulos and Smet (n 54); Jan Bernd Nordemann, 'Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed?' (Directorate General for Internal Policies, 2018) IP/A/IMCO/201708 (PE614.207) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614207/IPOL_IDA(2017)614207_EN.pdf> accessed 24 March 2022; de Streel and Husovec (n 44) 34.

[141] Angelopoulos and Smet (n 54) section IV.

[142] ibid section IV B 3.

[143] ibid section IV B 1.

[144] E-Commerce Directive (n 5), recital 45.

[145] Wilman (n 55) paras 10.27 – 10.28.

[146] ibid para 10.30.

[147] E-Commerce Directive (n 5), article 18(1) and recital 52.

[148] *Eva Glawischnig-Piesczek* (n 76) para 29.

CJEU held that the ECD permits intermediaries to monitor, with a view towards removing, specific items of user-generated content (and equivalent content) which has previously been declared illegal by a national court.[149] By doing so, the CJEU prevented a highly inefficient situation whereby victims would have to bring multiple actions against multiple users regarding the same piece of illegal content.[150]

In *Glawischnig-Piesczek* the CJEU also ruled that because the ECD is silent on COR's territorial scope, national courts can issue CORs which have worldwide effects.[151] However, relevant international law must be considered.[152] Given IBSA's cross-border nature, the significance of the CORs potentially having worldwide effects cannot be over-stated. It means victims achieving worldwide removal of PSI without going further than national courts. However, Rauchegger and Kuczerawy criticise the CJEU for not considering the impact worldwide removal could have on FoE.[153] The lack of consideration results in a lack of guidance for national courts determining CORs' territorial scope.[154] Accordingly, it is argued that without effective guidance, the weight of the consequences of worldwide removal on FoE may deter national courts from issuing CORs with worldwide effects or could result in such CORs being issued too easily.

In *Glawischnig-Piesczek*, the CJEU held that CORs which impose obligations to monitor specific content with a view to removing that content, are not contrary to the ECD's prohibition on general monitoring.[155] However, Madiega argues that monitoring for specific content is difficult to do without monitoring all content and therefore engaging in general monitoring.[156] In *Glawischnig-Piesczek*, the CJEU stated that specific monitoring cannot be pursued if it places an excessive burden on intermediaries.[157] To that end, courts making orders for CORs must state specifically what content is prohibited and which elements of the content if copied, create 'equivalent content', so that assessment by means other than filtering-technology is not required.[158] This is understood as meaning that national courts cannot order intermediaries to

[149] Ibid paras 34 – 37.
[150] Rauchegger and Kuczerawy (n 77) 1511.
[151] *Eva Glawischnig-Piesczek* (n 76) para 50; Rauchegger and Kuczerawy (n 77) 1520.
[152] *Eva Glawischnig-Piesczek* (n 76) paras 51 – 52.
[153] Rauchegger and Kuczerawy (n 77) 1521.
[154] ibid.
[155] *Eva Glawischnig-Piesczek* (n 76) para 47.
[156] Madiega (n 91) 7.
[157] *Eva Glawischnig-Piesczek* (n 76) para 44.
[158] *Eva Glawischnig-Piesczek* (n 76) paras 45 – 46; Keller (n 85) 618.

conduct human reviews of content.[159] Although imperfect, filtering-technology for identifying duplicate images is well-developed, and better than that used for text-based content.[160] This is positive regarding IBSA content and its potential re-posting following removal. However, there remains uncertainty concerning how filtering text-based content will work and what implications it could have on FoE.[161] Because of the ECD's horizontal nature and the lack of distinction between different forms of illegal content, uncertainty regarding illegal text-based content could permeate into the application of filtering to other forms of illegal content, including image-based abuse. Keller's observation that the CJEU focused on the outcome of this case, without considering the means of implementation, is astute in this regard.[162]

E THE DIGITAL SERVICES ACT

Published in December 2020, the DSA is the Commission's proposal for a regulation to reform the ECD but preserve the central tenets of its liability regime and complement existing sector-specific legislation.[163] The EU's intermediary liability laws are not fundamentally changed by the DSA, but it introduces new provisions codifying the CJEU's previous interpretations of the ECD.[164] The DSA retains the prohibition of general monitoring.[165] The DSA introduces a defence for intermediaries, whereby intermediaries undertaking content moderation activities will not be considered to have knowledge or awareness of illegal content and are therefore not exposed to liability for their so-called 'Good Samaritan' activities.[166] This aligns EU law more closely with the United States' intermediary liability laws.[167]

I Scope

(a) Personal Scope

[159] Rauchegger and Kuczerawy (n 77) 1513; Keller (n 85) 616.
[160] Rauchegger and Kuczerawy (n 77) 1514; Keller (n 85) 619.
[161] Paolo Cavaliere, '*Glawischnig-Piesczek v Facebook* on the Expanding Scope of Internet Service Providers' Monitoring Obligations' (2019) 4 European Data Protection Law Review 573, 575; Keller (n 85) 623; Jennifer Daskal, 'A European Court Decision May Usher In Global Censorship' (*Slate,* 3 October 2019) <https://slate.com/technology/2019/10/european-court-justice-glawischnig-piesczek-facebook-censorship.html> accessed 24 March 2022; European Digital Rights, 'CJEU ruling on fighting defamation online could open the door for upload filters' (*European Digital Rights Initiative,* 4 October 2019) <https://edri.org/our-work/cjeu-ruling-on-fighting-defamation-online-could-open-the-door-for-upload-filters/> accessed 24 March 2022.
[162] Keller (n 85) 621.
[163] Digital Services Act explanatory memorandum 1 and 4.
[164] Caroline Cauffman and Catalina Goanta, 'A New Order: The Digital Services Act and Consumer Protection' (2021) 12(4) European Journal of Risk Regulation 1, 6.
[165] Digital Services Act, article 7.
[166] Digital Services Act, article 6.
[167] Communications Decency Act, s 230; Keller and Leersen (n 10) 224.

The DSA's personal scope is layered.[168] The first layer applies to all intermediaries (mere conduits, caching, and hosting services) and the DSA retains the ECD's definition of hosting services.[169] The second layer applies to hosting services including online platforms.[170] The third layer only applies to online platforms.[171] The final layer applies to very large online platforms (VLOPs).[172] VLOPs are online platforms which, on average, provide services to at least 45 million active users in the EU per month.[173]

The DSA's personal scope is designed so that each layer has cumulative due-diligence obligations which are proportionate to the intermediary at issue.[174] This prevents over-regulation of small intermediaries which is important for facilitating innovation.[175] However, Golunova and Regules note that this approach could drive disseminators of illegal content from VLOPs to smaller, less regulated platforms to escape scrutiny.[176] Moreover, the high threshold for qualifying as a VLOP means platforms which are extremely popular at national, but not EU level, escape the highest level of due-diligence obligations.[177]

'Online Platforms' are providers of hosting services which store and disseminate information to the public, unless storage and dissemination are minor, ancillary but necessary activities for the hosting service.[178] Disseminating information to the public means 'making information available, at the request of the recipient of the service who provided the information, to a potentially unlimited number of third parties'.[179] The concept of 'dissemination to the public' outlined in the DSA, is vague but becomes even more so within the context of IBSA.

'Interpersonal communication services' such as private messaging services are excluded from the DSA's personal scope.[180] The DSA's definition of interpersonal communication services is adopted from Directive 2018/1972/EU (the Directive), according to which interpersonal

[168] Folkert Wilman, 'Het voorstel voor de Digital Services Act' [2021] Nederlands tijdschrift voor Europees recht 27, 28.
[169] Digital Services Act, chapter III s 1 and article 2(f).
[170] ibid chapter III s 2.
[171] ibid chapter III s 3.
[172] ibid chapter III s 4.
[173] ibid article 25(1).
[174] ibid recital 35.
[175] Valentina Golunova and Juncal Montero Regules, 'The Digital Services Act and Freedom of Expression: Triumph or Failure?' (*Digital Society Blog,* 8 February 2021) <https://www.hiig.de/en/the-digital-services-act-and-freedom-of-expression-triumph-or-failure/amp/> accessed 24 March 2022.
[176] ibid.
[177] ibid.
[178] Digital Services Act, article 2(h).
[179] ibid article 2(i).
[180] ibid recital 14.

communication services means 'all types of emails, messaging services, or group chats'.[181] The definition of interpersonal communication services only applies to communications between a 'finite number' of persons who are determined by the sender.[182] 'Finite' means not a 'potentially unlimited' number of persons'.[183]

As discussed previously, IBSA is frequently linked with messaging services such as Discord and Telegram.[184] It is argued that the definition of interpersonal communication services adopted by the DSA does not reflect how messaging services are used in reality regarding the dissemination of illegal content such as IBSA because it fails to adequately consider inter alia messaging services operating at a large scale. Different messaging services have different upper limits on the number of persons who can join group chats. For example, as messaging services, Telegram and Discord are prima facie excluded from the DSA's personal scope. Both Telegram and Discord offer private group chats. Users can join private group chats on these services through 'invite links' or by being added by group chat administrators.[185] Private group chats on Telegram and Discord can have up to 200,000 members and 250,000 members, respectively.[186] On this basis, it is submitted that information disseminated on these group chats, which can be joined relatively easily (users can easily forward invite links meaning that the group administrator does not have to approve who joins), and by so many people, constitutes public rather than private dissemination of information. Accordingly, when used at this large scale, it is contended that services like Telegram and Discord are operating as online platforms rather than messaging services and should therefore be within the DSA's personal scope. These arguments do not seek to undermine the importance of confidential communications but to illustrate that if the DSA is to balance the goals of preventing the dissemination of IBSA and protecting FoE through confidential communications, it must define its personal scope in a clearer, more purposive manner.

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[181] Council Directive 2018/1972/EU of 11 December 2018 establishing the European Electronic Communications Code (Recast)Text with EEA relevance [2018] OJ L321/36, recital 17.
[182] ibid.
[183] ibid.
[184] Rato (n 43); Brad Esposito, 'Revenge Porn Facebook Page Returns As Private Facebook Group Chat' (*Buzzfeed,* 15 September 2016) <https://www.buzzfeed.com/bradesposito/mms-iii> accessed 24 March 2022; Fontana (n 43); Pownall (n 42); Katelyn Thomas, 'Montreal Women Protest After Nude Photos Allegedly Shared on Massive Group Chat' *Montreal Gazette* (Montreal, 4 May 2021) <https://montrealgazette.com/news/local-news/montreal-police-investigate-massive-group-chat-allegedly-sharing-nude-photos-of-women-without-consent> accessed 24 March 2022.
[185] 'Channels FAQ' (*Telegram*) <https://telegram.org/faq_channels> accessed 24 March 2022; Jordan Minor, 'What Is Discord and How Do You Use It?' (*PCMag,* 11 May 2020) <https://uk.pcmag.com/how-to-work-from-home/126914/what-is-discord-and-how-do-you-use-it> accessed 24 March 2022.
[186] ibid.

(b) Material Scope

The DSA defines illegal content as referring to information 'which, in itself or by its reference to an activity' does not comply with EU or national law, regardless of the law's subject matter or nature.[187]

Recital 12 DSA lists 'unlawful non-consensual sharing of private images' as an example of content which is illegal per se. Thus, the Commission apparently considered IBSA when defining 'illegal content'. Prefacing 'non-consensual sharing of private images' with 'unlawful' reflects that, as discussed in relation to the ECD's material scope, IBSA content is not necessarily illegal content. The 'unlawfulness' of IBSA still depends on national law. The DSA is not intended to overcome the potential for inequality between IBSA victims in different Member States. However, the DSA highlights its own inability to address IBSA fully in the absence of widespread legislation outlawing IBSA across Member States. Intermediaries' ToS and their position as functional sovereigns therefore retain a necessary role for IBSA victims under the DSA, notwithstanding the difficulties that come with relying on ToS as previously outlined. Therefore, aside from highlighting the important issue of ISBA, Recital 12 is unlikely to have significant practical consequences.

(c) Territorial Scope

In contrast to the ECD which only applies to intermediaries established in the EU, the DSA will apply to all intermediary services whose 'users' are established or resident in the EU, regardless of where in the world the intermediary is established.[188] Applying the DSA to all online services used in the EU rather than only those established in the EU, is a positive step in that it significantly and purposively expands the reach of the EU's intermediary liability rules. This reflects the borderless nature of the online services used for IBSA and means that victims' recourse to content-removal mechanisms is not dependent on where the intermediary in question is established.

[187] Digital Services Act, article 2(g).
[188] ibid article 1(3).

II Content-Removal Mechanisms in the DSA

(a) Notice and Action

'Notice and Takedown' is referred to as 'Notice and Action' (N&A) in the DSA.[189] The DSA provides that N&A must be accessible, user-friendly and make it possible to submit notices wholly electronically.[190]

As noted previously, the absence of NTD harmonisation in the ECD means victims submit multiple, differing takedown notices to intermediaries which contributes to re-victimisation. The DSA requires all hosting services to facilitate the submission of N&A notices and harmonises the relevant requirements for same.[191] Moreover, because the DSA will be a regulation rather than a directive, the requirements cannot diverge in different Member States. Therefore, although victims must still submit individual notices to each relevant intermediary, the information required for each notice to be considered 'sufficiently precise and adequately substantiated' no longer varies depending on the intermediary. This should significantly ease the administrative burden victims face.

As previously identified, there is a lack of clarity regarding when intermediaries are deemed to have actual knowledge or awareness of illegal content thereby triggering the requirement to takedown the content. Article 14(3) DSA provides that notices containing the requisite elements are to be considered sufficiently precise and adequately substantiated, give rise to actual knowledge or awareness. However, the wording of article 14(3) overlooks the possibility that a notice, albeit in good faith, incorrectly identifies legal content as illegal content. Therefore, article 14(3) currently suggests that knowledge or awareness exists before the intermediary has even assessed the content. This could provoke a fear of losing the liability exemption and consequently risks the over-removal of content.[192]

[189] ibid article 14(1).
[190] ibid article 14(1).
[191] Notices must contain the notifier's personal information, an explanation of why the content is considered illegal, the content's URL and a statement of good faith belief in the notice's accuracy and completeness: Digital Services Act, article 14(2).
[192] Maja Cappello, 'Unravelling the Digital Services Act Package' (2021) IRIS Special, European Audiovisual Observatory 24 <https://rm.coe.int/iris-special-2021-01en-dsa-package/1680a43e45> accessed 24 March 2022.

Like the ECD, the DSA does not define 'expeditious removal'. The relevant DSA provision is vague, providing only that notices of illegal content shall be processed and decisions will be made 'in a timely, diligent and objective manner.'[193]

The DSA retains a horizontal framework which treats all illegal content equally for N&A purposes. According to the Commission, this is because a vertical framework would not address regulatory gaps, provide sufficient procedural regulation, would have limited oversight mechanisms and the scope of sector-specific rules was considered too narrow for illegal content.[194] However, the decision not to opt for a vertical framework which tailors intermediaries' response to illegal content upon the type of illegality at issue, is disappointing. IBSA inflicts devastating harms on its victims which have been likened by experts to the harms caused by child sexual abuse material and sexual assault.[195] In EU law, child sexual abuse material is rightly subject to automatic takedown, such is the harm it causes. Conversely, EU law treats IBSA content in a manner identical to copyright violations, the harms of which are highly unlikely to be as severe as those of IBSA. On this basis it is submitted that the difference in harm caused by distinct types of illegal content should be reflected in laws governing intermediaries' response to it. Furthermore, as Cauffman and Goanta observe, the procedural issues the Commission uses to justify retaining the horizontal framework already exist. They note that EU legislation thus far has been sectoral, focused on partial harmonisation, responsive to specific market developments, and that the DSA does not remedy this.[196] Hence, retaining a horizontal framework will not prevent the need for further sectoral legislation.

The DSA establishes systems for internal complaints-handling and out-of-court dispute settlements.[197] These can be relied on by online-service users to contest intermediaries' decisions to takedown which the intermediary incorrectly deemed to be illegal content.[198] Notably, no equivalent procedures exist for victims of illegal content which intermediaries incorrectly chose not to remove. In this scenario, victims' only option is to sue the intermediary on the basis that the liability exemption no longer applies. Given the challenges associated with litigation described earlier in this article, the absence of out-of-court procedures for victims puts them at a disadvantage compared to users whose content was incorrectly taken down.

[193] Digital Services Act, article 14(6).
[194] ibid explanatory memorandum 5.
[195] Kamal and Newman (n 29) 361.
[196] Cauffman and Goanta (n 163) 3 – 4.
[197] Digital Services Act, article 17.
[198] ibid articles 17,18.

Finally, the DSA introduces a 'trusted flaggers' system. N&A notices submitted by trusted flaggers are prioritised and decided on 'without delay'.[199] Organisations eligible for trusted flagger status must meet all the following requirements: have expertise and competence dealing with illegal content, represent collective interests and be independent and be timely, diligent and objective in their activities.[200] Schwemer suggests that trusted flagger mechanisms are inherently problematic because trusted flaggers are presumed to know more than intermediaries which creates the risk of intermediaries taking down content notified by trusted flaggers without thoroughly analysing the content themselves.[201] However, victims spend hours scouring the internet to submit takedown notices regarding PSI. Delegating the task to trusted flaggers could reduce this burden and result in IBSA content being removed faster than it would be if intermediaries were notified by victims alone.

(b) Court-ordered removal

The DSA harmonises the issuing of CORs and the information CORs must contain.[202] CORs can be issued based on EU or national law.[203] Without undue delay, intermediaries issued with CORs must inform the issuing authority of the action taken on foot of the COR and when that action occurred.[204] The harmonisation of CORs should increase their efficiency and effectiveness.[205]

According to the DSA, the territorial scope of CORs must not exceed what is strictly necessary, the issuing authority should balance the rights and interests of all third parties potentially affected by the COR and authorities issuing CORs must take account of EU law, international law, and international comity.[206] The DSA is silent on whether CORs may be worldwide in effect and does not codify the *Glawischnig-Piesczek* jurisprudence which found that nothing in the ECD precludes CORs from having worldwide effect. Given that the finding in that case was based on the absence of a provision prohibiting CORs having worldwide effect, it is suggested that the absence of such codification in the DSA does not mean the DSA prohibits CORs with worldwide effects.

[199] ibid article 19(1).
[200] ibid article 19(2).
[201] Sebastian Felix Schwemer, 'Trusted Notifiers and the Privatization of Online Enforcement' (2019) 35(6) Computer Law and Security Review 105339, 8.
[202] Digital Services Act, article 8(2).
[203] ibid article 8(1).
[204] ibid.
[205] Wilman (n 167) 30.
[206] Digital Services Act, article 8(2)(b) and recital 31.

Recital 31 DSA provides that when issuing CORs with effects beyond their own Member State, authorities must consider whether the content at issue is likely to constitute illegal content in affected Member States. This is significant for IBSA because, as explained, where they exist - national laws concerning IBSA vary significantly throughout the EU. With this in mind, it is difficult to predict how Recital 31 could be interpreted regarding IBSA. The DSA does not provide national courts with detailed guidance on the threshold victims must reach to obtain CORs with supra-national effect which may make such CORs less accessible for victims.

Like article 15(1) ECD, article 7 DSA prohibits national courts from imposing upon intermediaries' obligations to generally monitor content or to proactively seek out illegal content. Recital 28 DSA codifies CJEU jurisprudence, by confirming that CORs ordering specific monitoring cannot be construed as an obligation to engage in general monitoring or as imposing fact-finding obligations.[207] However, the DSA does not clarify the practical issues identified in Section C of this article of how intermediaries can actively seek a specific item of illegal content, without generally monitoring all user generated content. Clarification of this issue would increase legal certainty for intermediaries.

F FINDINGS

(I) E-Commerce Directive

The ECD's personal scope is vague and outdated considering the range of online services used to perpetrate IBSA. Clarification of the status of messaging services within the ECD is needed. The ECD's material scope cannot guarantee that IBSA constitutes illegal content. This is determined by the criminal law of the victim's Member State or victims' ability to access civil actions. The ECD's narrow territorial scope excludes intermediaries not established in the EU even if they offer services to users in the EU. Therefore, this examination reveals that many victims will find that for reasons beyond their control, they cannot fulfil the personal, material, or territorial scopes of the ECD and therefore cannot access the content-removal mechanisms provided for therein.

For victims who can access them, the ECD's content-removal mechanisms are complex to navigate, and their effectiveness is hampered by their lack of harmonisation. For IBSA victims

[207] *Eva Glawischnig-Piesczek* (n 76).

already suffering IBSA's harms, navigating complex systems to have their PSI removed is likely to contribute to victims' fears of images never being removed.

NTD can be a fast and effective way to remove content when content is clearly illegal or breaches an intermediaries' ToS. However, the regime for NTDs lacks clarity regarding when content removal is expeditious and when specifically actual knowledge or awareness of illegal content is deemed to exist. Applying NTD to breaches of intermediaries' ToS is a manifestation of intermediaries' power as functional sovereigns. ToS can enable victims to access NTD where national law does not. However, compared to the clarity and transparency that comes with hard-law, ToS are a poor alternative for victims to rely on. Further, the ECD's horizontal approach to illegal content does little to facilitate the balancing of victims' rights with perpetrator's FoE and offers little to victims whose notices about IBSA content are afforded the same legal treatment as those submitted for copyright violations. Whether takedown applies to copies of the impugned content and the territorial scope of takedown are at the intermediaries' discretion. This means that NTD's effectiveness for victims is limited.

For victims to whom CORs are accessible, the ECD regime is beneficial because moving takedown from the realm of the intermediary to the courts means that it is mandatory, potentially preventative and issued by professionals capable of balancing the rights at issue and providing oversight. CORs' potential for removing not only specific items of content but also their copies, coupled with the potential for worldwide removal, could prove highly effective for removing IBSA content. This is a significant step forward for victims. However, because the *Glawischnig-Piesczek* decision does not provide thorough guidance to national courts issuing CORs, the implications of worldwide removal on FoE could deter national courts from issuing CORs with worldwide effects.

Finally, there is confusion surrounding the distinction between general and specific monitoring under the ECD and how filtering-technologies should operate. Although the confusion mainly concerns text-based content, because the liability regime does not distinguish between different types of illegal content, uncertainty is likely to affect how all types of illegal content, including IBSA content, are handled. Given the harm the risk of PSI being re-posted causes victims, clarification is required on how specific monitoring should work in practice.

(II) Digital Services Act

The DSA's layered personal scope contrasts greatly with that of its predecessor. It remains to be seen how attributing responsibilities to intermediaries based on their size will benefit innovation and whether or how it might change how illegal content, like IBSA content, is disseminated. The boundary between public and private dissemination of information (particularly for messaging services operating at large-scale) is unclear. In light of how large-scale and easily accessible messaging platforms are being used for disseminating IBSA content, this must be clarified. The statutory definition of illegal content does not help IBSA victims fulfil the DSA's material scope but is welcome for the sake of clarity. The broadening of the territorial scope for intermediary liability laws in the DSA is a purposive development which will enable EU-based victims to access the mechanisms for removing illegal content under the DSA, regardless of where the intermediary is located. Apart from its territorial scope, the DSA changes, but does little to improve, victims' access to content-removal mechanisms compared to the ECD.

A robust N&A system which effectively balances the rights at issue is essential for rapid removal of IBSA content. The DSA's harmonisation of N&A should increase legal certainty and decrease fragmentation. However, clarification regarding when actual knowledge or awareness arises from notices and the applicable timeframe for removing content remains absent from legislation. The DSA's retention of a horizontal framework for N&A is disappointing and poorly justified by the Commission. Takedown rules calibrated to the harms of specific content and the ease with which illegality can be verified would facilitate greater balancing of rights. Not all illegal content is created equally. Bespoke issues require bespoke solutions. Given its gendered nature, the specific harms IBSA causes and the DSA's continuation of a horizontal approach, it is submitted that if the Commission wishes to address IBSA effectively, further sectoral legislation, specifically addressing IBSA cannot be ruled out.

The DSA's harmonisation of CORs should streamline the process for obtaining CORs. This is positive. However, the DSA does not codify, nor review CJEU jurisprudence on the territorial scope of COR and would be improved if it enumerated what litigants must do to obtain a COR with supra-national effects.

By improving the existing mechanisms for removing illegal content in general through harmonising and clarifying N&A, CORs and codifying CJEU jurisprudence, the DSA will make the internet safer for women. However, should the Commission wish to fundamentally

improve mechanisms for victim-initiated removal of IBSA content, it must gain a deeper understanding of IBSA as a phenomenon and, on that basis, propose more ambitious and specific legislative reform.

Three further points are worth highlighting. Firstly, unfortunately, the DSA fails to recognise that, like internet users whose content is incorrectly removed, IBSA victims could also benefit from provisions for out-of-court dispute settlements. Secondly, the DSA's trusted flagger system could significantly benefit victims by aiding the N&A process, thereby mitigating some of IBSA's harmful impacts. However, its consequences for FoE will not be known until it is in operation. Finally, the DSA also does not solve the questions arising from the ECD and CJEU jurisprudence on how specific monitoring is to be put into effect.

G CONCLUSION

The Commission has identified IBSA as a form of OVAW, a threat to gender equality in the EU and has asserted that the DSA will form part of the solution to this problem. IBSA has devastating impacts and spreads quickly online. Therefore, rapid removal of IBSA content is victims' priority. This article examined the content-removal mechanisms provided for in current intermediary liability laws, whether they are accessible to IBSA victims and how this could change under the proposed Digital Services Act.

The EU's regulatory approach to the internet, adopted over twenty years ago, has shaped the internet, fostered the growth of major intermediaries and arguably, changed society forever. However, the biggest difference between the ECD and the DSA is the online environment they seek to regulate. The notorious IBSA website 'isanyoneup.com' whose creation marked the beginning of popular culture's awareness of IBSA, was invented ten years after the ECD's adoption. Another twelve years have passed since then, therefore updating the laws which facilitate victims' removal of IBSA content is imperative.

Although it is currently just a legislative proposal, the DSA is significant because it illustrates the Commission's vision of what will become a 'digital constitution' for internet use in the EU. IBSA is part of the wider and inextricable problems of gender inequality and sexual violence. The ubiquity of the internet and the necessity of its use in modern society means that women should be able to use the internet without fear. The only way IBSA will cease is if IBSA perpetrators cease to perpetrate IBSA. This clearly cannot be achieved by the DSA. However, what the EU can do is regulate the online services used to perpetrate IBSA so that where IBSA

occurs, fast, effective, and legally transparent mechanisms to remove IBSA content are accessible to victims. By proposing more ambitious and tailored legislation which addresses the practical difficulties IBSA victims face, the EU can live up to its values of advancing gender equality and its ambition of tackling all forms of violence against women.

H ABBREVIATIONS

CJEU	Court of Justice of the European Union
COR	Court Ordered Removal
DSA	Digital Services Act
ECD	E-Commerce Directive
EU	European Union
FoE	Freedom of Expression
IBSA	Image Based Sexual Abuse
N&A	Notice and Action
NTD	Notice and Takedown
OVAW	Online Violence Against Women
PSI	Private Sexual Images
ToS	Terms of Service
VLOP	Very Large Online Platform

L'INTERPRÉTATION ÉVOLUTIVE DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: LA COUR DE STRASBOURG COMME CHERCHEUSE DES VALEURS COMMUNS

*Francisco Hernández Fernández**

A INTRODUCTION

La Cour européenne des droits de l'homme (CEDH) a développé au fil des années un critère d'interprétation évolutive qui permet d'appliquer la Convention de sauvegarde des droits de l'homme et libertés fondamentales (la Convention) soit à des situations non prévues expressément dans le traité soit de moderniser le sens de ses articles, malgré le fait que la Convention de Vienne sur le droit des traités de 1969 (CVDT) ne prévoie pas de manière expresse un tel critère d'interprétation. Selon la CEDH 'la Convention est un instrument vivant à interpréter à la lumière des conditions de vie actuelles'.[1] Cette interprétation pousse irrémédiablement à actualiser le contenu de la Convention au-delà de la conception qu'en avaient ses rédacteurs en 1950.

Toutefois, la volonté de la CEDH de mettre à jour la Convention peut être à l'encontre de toute limite inhérente aux traités internationaux. Après tout, la Convention de Rome de 1950 qui a configuré la CEDH est le résultat de la volonté exprimée par chacun des États parties au moment de la ratification de la Convention. Par conséquent, il faudra considérer d'une part l'intérêt de la Cour de garder l'esprit de la Convention en adaptant à des situations nouvelles logiquement non prévues à l'époque de la négociation et d'une autre part l'intérêt des États à ne pas voir leur consentement volontaire remplacé par celui des juges qui siègent à la Cour de Strasbourg.

L'objectif de cet article est d'analyser le concept d'interprétation évolutive selon la Cour de Strasbourg et de savoir s'il y a dans sa jurisprudence des limites à ce type d'interprétation. La structure de cet article est divisée en deux sections. Premièrement, on va aborder la question de l'interprétation évolutive dans le droit international. Il ne semble pas que la CVDT donne aux tribunaux internationaux une grande marge de manœuvre pour l'interprétation des traités. Deuxièmement, on analysera comment la CEDH a interprété la Convention de manière

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[1] *Affaire Tyrer c Royaume-Uni* Requête no 5856/72 (CtEDH, 25 avril 1978) [31].

dynamique ou évolutive, en prenant la jurisprudence des articles 2 et 3 de la Convention. Finalement, on envisagerait certaines limites implicites à cette interprétation évolutive, afin d'éviter la possibilité que la nature de la CEDH soit remplacée par une fonction législative en dehors de son mandat établi par la Convention.

B L'INTERPRÉTATION ÉVOLUTIVE EN DROIT INTERNATIONAL

La règle générale stipule qu'un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but conformément à l'article 31(1) CVDT. En tenant compte des limites inhérentes à la nature du langage et étant donné que les langues varient sans cesse et la signification des termes change avec le temps, il n'est pas toujours facile de trouver le sens ordinaire du mot pour pouvoir interpréter un traité.[2] L'interprétation n'a pas pour but de perfectionner un instrument, mais de l'adapter plus ou moins pour atteindre ce que l'on peut considérer comme l'objectif logiquement postulé, de mettre en lumière l'intention réelle des parties. Selon l'internationaliste Charles de Visscher l'interprétation qui ressort du sens naturel d'un texte accepté ne peut être écartée que par la preuve qu'elle ne répond pas aux intentions des parties.[3] Précisément, l'article 31(4) CVDT stipule qu'un terme sera entendu dans un sens particulier s'il est établi que telle était l'intention des signataires.

Néanmoins, la CVDT ne clarifie pas si le sens ordinaire se réfère au moment où le traité a été conclu ou au moment dans lequel il doit être interprété. Le silence de la CVDT est justifié selon certains auteurs[4] parce que les membres de la Commission du droit international voulait distinguer entre l'interprétation et la modification des traités internationaux. La Cour International de Justice (CIJ) avait soutenu tout d'abord un principe de contemporanéité pour interpréter les traités.[5] Autrement dit, on doit se placer dans le contexte historique pour tenir compte de la manière dont cette notion était comprise pour pouvoir interpréter le texte. Il fallait interpréter un instrument conformément aux intentions qu'ont eu les parties lors de sa conclusion.[6] Cette façon d'interprétation qu'on appelle de 'renvoi fixe' ou 'originaliste'

[2] Herbert LA Hart, *Le Concept de Droit* (Presses de l'Université Saint-Louis 1976) 123.
[3] Charles de Visscher, *Théories et Réalités En Droit International Public* (3ème édn, A Pedone 1960) 320.
[4] Francisco Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties* (Brill Nijhoff 2019) 79.
[5] *Sud-Ouest Africain (Éthiopie c Afrique du Sud)* [1966] CIJ recueil 6, 23.
[6] *Conséquences Juridiques pour les États de la Présence Continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) Nonobstant la Résolution 276 (1970) du Conseil de Sécurité* (Avis Consultatif) [1971] CIJ recueil 16, [53].

soutient que l'interprétation doit être isolée de l'évolution.[7] Cela implique que les traités une fois, ils sont ratifiés, ils ont une tendance à devenir statique, à se solidifier.

Dans le domaine du droit international, l'interprétation doit être plus restrictive qu'au niveau national, car le consentement des états est une limite implicite à l'interprétation tandis que la seule limite au droit national à l'interprétation de la norme est le cadre juridique en vigueur. Les tribunaux internationaux sont limités donc par la souveraineté des États en vertu de laquelle découle sa légitimité puisqu'ils ont assumé les obligations incluses dans les traités et ils ont accepté à respecter leurs décisions. Ainsi, la Cour Permanente de Justice Internationale (CPJI) avait reconnu que si le texte d'une disposition conventionnelle n'est pas clair et qu'il y a plusieurs interprétations possibles, on doit retenir celle qui comporte le minimum d'obligations pour les parties. [8] Aujourd'hui, ce principe d'interprétation restrictive en faveur de la souveraineté a été dépassé selon quelques auteurs par une interprétation axée sur les valeurs encapsulées dans les dispositions du traité.[9]

Cependant, la CIJ a aussi noté quelques années plus tard à l'occasion de son avis consultatif rendu sur la présence d'Afrique du Sud à Namibie conformément au mandat donné par la Société des Nations que les notions consacrées par l'article 22 du Pacte de la Société des Nations comme 'conditions particulièrement difficiles du monde moderne' et le bien-être et le développement des peuples intéressés:

> [N]'étaient pas statiques, mais par définition évolutives … on doit donc admettre que les parties au Pacte les ont acceptées comme telles … et la Cour doit prendre en considération les transformations survenues dans le demi-siècle qui a suivi et son interprétation ne peut manquer de tenir compte de l'évolution que le droit a ultérieurement connue grâce à la Charte des Nations unies et à la coutume.

Pour certains, comme le juge de la CIJ Mohammed Bedjaoui l'avis de la CIJ sur le Namibie s'agissait d'une situation bien 'particulière … et la méthode du renvoi mobile, c'est-à-dire du renvoi au droit nouveau contemporain, était tout à fait indiquée pour une interprétation soucieuse d'éviter des archaïsmes, conforme aux temps présents'.[10]

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[7] George Letsas, 'Intentionalism, Textualism, and Evolutive Interpretation' in George Letsas (ed), *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 69.
[8] *L'Interprétation de l'Article 3, Paragraphe 2, du Traité de Lausanne (Frontière entre la Turquie et l'Irak)* Avis Consultatif [1925] CPIJ Séries B- No 12, 25.
[9] Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21(3) The European Journal of International Law 681, 698.
[10] *Opinion Individuelle de M Bedjaoui dans l'Affaire Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie)* (1997) CIJ recueil 120, [9]–[10].

Mais, en effet, la CVDT indique aussi que tout accord ultérieur intervenu entre les parties (article 31(3)(a)), pratique ultérieure des parties (article 31(3)(b)) et toute règle pertinente de droit international applicable dans les relations entre les parties (article 31(3)(c)) pourrait faire évoluer l'interprétation d'un traité. Dans ce sens la résolution adoptée par l'Assemblé Général des Nations Unies en 2018 reconnaît dans sa conclusion no 13 que le prononcé d'un organe conventionnel d'experts peut donner naissance à un accord ultérieur ou à une pratique ultérieure des parties au sens de l'article 31(3) de la CVDT. En outre, dans sa conclusion no 8 du projet de conclusions sur les accords et la pratique ultérieurs dans le contexte de l'interprétation des traités, la Commission du droit international a indiqué que 'les accords ultérieurs peuvent aider à déterminer si l'intention présumée des parties lors de la conclusion du traité était ou de non d'attribuer à un terme un sens susceptible d'évolution dans le temps'.

D'autre part, la CIJ a souligné que 'tout instrument international doit être interprété et appliqué dans le cadre de l'ensemble du système juridique en vigueur au moment où l'interprétation a lieu'.[11] Ainsi, la CIJ a relativisé dans sa jurisprudence postérieure sur la solidification des traités si les parties avaient inséré notions évolutives ou formules génériques qui reconnut la nécessité d'adapter son interprétation avec l'évolution du droit.[12] En 1997, la CIJ a dû interpréter dans l'affaire concernant le projet hydroélectrique *Gabčíkovo-Nagymaros* les termes d'un traité bilatéral conclu 20 ans avant entre la Slovaquie et la Hongrie.[13] La Cour a observé à propos du traité bilatéral que la pratique ultérieure des parties démontrait que les termes de l'instrument étaient ouverts.

Plus récemment, en 2009 et en 2010, la CIJ a réaffirmé sa position sur l'interprétation évolutive dans l'affaire *Costa Rica c Nicaragua* et dans l'affaire relative à des usines de pâte à papier sur le fleuve Uruguay (Argentine c Uruguay).[14] Dans le premier cas, la CIJ a statué sur la signification du terme 'comercio' (commerce) dans le traité de limitation de 1858 entre le Costa Rica et le Nicaragua.[15] En revanche, il faut prendre en compte de la pratique ultérieure des parties pour éventuellement s'écarter de l'intention originaire sur la base d'un accord tacite entre les parties. La CIJ a aussi indiqué dans son jugement deux conditions pour constater une

[11] *Conséquences Juridiques pour les États de la Présence Continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) Nonobstant la Résolution 276 (1970) du Conseil de Sécurité* (n 6) [53].
[12] *Plateau Continental de la Mer Egée (Grèce c Turquie)* [1978] CIJ recueil 3, [77].
[13] *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie)* [1997] CIJ recueil 7, [112].
[14] *Différend Relatif à des Droits de Navigation et des Droits Connexes (Costa Rica c Nicaragua)* [2009] CIJ recueil 213; *Affaire Relative à des Usines de Pâte à Papier sur le Fleuve Uruguay (Argentine c Uruguay)* [2010] CIJ recueil 14.
[15] *Costa Rica c Nicaragua* (n 14) [63]–[64].

intention évolutive des parties.[16] Premièrement, si les parties ont employé dans un traité certains termes de nature générique, dont elles ne pouvaient pas ignorer que le sens était susceptible d'évoluer avec le temps. Deuxièmement, si le traité en cause a été conclu pour une très longue période ou 'sans limite de durée', les parties doivent être présumées, en règle générale, avoir eu l'intention de conférer aux termes en cause un sens évolutif. Finalement, dans l'affaire relative à des usines de pâte à papier sur le fleuve Uruguay (*Argentine c Uruguay*) la CIJ a répété la même interprétation déjà faite l'année dernière dans l'affaire Costa Rica contre Nicaragua.[17]

C L'INTERPRÉTATION ÉVOLUTIVE DANS LA CEDH ET SES LIMITES

I Base Juridique, Dénomination et Application

La CEDH interprète de manière évolutive la Convention afin de garantir la pertinence du texte et continuer à 'protéger des droits non pas théoriques ou illusoires, mais concrets et effectifs', même si les limitations de l'indépendance des États ne se présument pas.[18] La base juridique de la CEDH pour concevoir l'interprétation évolutive est double et conforme avec la CVDT.[19] D'abord, l'article 31(1) de la CVDT consacre la méthode d'interprétation finaliste-téléologique qui donne priorité à l'objet et au but des traités. D'autre part, en vertu de l'article 31(2) de la CVDT le préambule d'un traité forme partie intégrante du contexte aux fins de l'interprétation, donc la CEDH peut le prendre en compte pour résoudre une affaire. Dans le cas particulier, le préambule de la Convention évoque non seulement la sauvegarde, mais aussi le développement des droits de l'homme. Cependant, selon quelques auteurs la base juridique pour l'application évolutive de la Convention: soit elle est fondée sur l'intention évolutive initiale des États parties en vertu de l'article 31(1) CVDT, soit sur la pratique ultérieure reflétée dans l'article 31(3) CVDT.[20]

La CEDH, a utilisé dans sa jurisprudence indistinctement le terme interprétation dynamique et interprétation évolutive pour désigner le même concept. Selon la plupart des internationalistes

[16] ibid [66].
[17] *Argentine c Uruguay* (n 14) [204].
[18] *Affaire Airey c Irlande* Requête no 6289/73 (CtEDH, 6 février 1981) [24]; *Affaire du 'Lotus'* [1927] CPIJ Séries A No 10, 18.
[19] Françoise Tulkens, 'Quelles Sont Les Limites à l'Interprétation Évolutive de La Convention ?', (Conseil de l'Europe 2011) 6–7 <https://www.echr.coe.int/Documents/Dialogue_2011_FRA.pdf> accédé le 24 mars 2022.
[20] Geir Ulfstein, 'Evolutive Interpretation in the Light of Other International Instruments' dans Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 93.

les deux notions sont synonymes et c'est la raison pour laquelle dans cet article je vais utiliser uniquement le terme interprétation évolutive .[21] Cependant, pour autres spécialistes, malgré si aucune de ces notions est extrêmement précise ou rigide chaque notion a des connotations légèrement différentes.[22] Tandis que le terme dynamique renvoie à la situation dans laquelle la Cour donne de nouvelles réponses à des faits anciens. Le terme évolutif désigne la situation dans laquelle la Cour donne des réponses à des faits nouveaux où examine à la lumière des conditions de vie actuelles des notions variables et changeantes déjà contenues dans la Convention.[23]

Dans la jurisprudence de la CEDH il y a plusieurs exemples d'interprétation évolutive. Afin de pouvoir analyser de manière globale et non-exhaustive l'évolution jurisprudentielle de la Cour on va examiner les articles 2 et 3 de la Convention. Avant de commencer, c'est aussi important de savoir que l'interprétation évolutive ne se limite pas seulement à l'interprétation des droits protégés par la Convention, mais elle peut également concerner des éléments procéduraux et imposer une réforme institutionnelle.[24] C'est ce que la Cour a fait dans l'affaire *Mamatkulov et Askarov c Turquie* dans laquelle elle a estimé que le non-respect des mesures provisoires par un État contractant emportait une violation de la Convention car 'met en péril l'efficacité du droit de recours individuel, tel que garanti par l'article 34'.[25]

En premier lieu, l'article 3 de la Convention qui interdit la torture et les peines ou traitements inhumains ou dégradants, est un des articles les plus brefs de toute la Convention et pourtant est celui qui a montré la meilleure capacité d'adaptation aux changements. En 1978, la CEDH dans l'affaire *Tyrer* a résolu que la peine de trois coups de verge sur le derrière nu est une peine humiliante qui atteignait le niveau de peine dégradante interdit par la Convention.[26] Le raisonnement suivi par la CEDH était fondé sur l'évolution et des normes communément acceptées de la politique pénale des États membres du Conseil de l'Europe. Ainsi la Cour a

[21] Oliver Dörr, 'The Strasbourg Approach to Evolutionary Interpretation' dans Georges Abi-Saab, Kenneth Keith and Clément Marquet (eds), *Evolutionary Interpretation and International Law* (Hart Publishing 2019) 115; Pierre-Marie Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy' dans Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 124.
[22] Jan Erik Helgesen, 'Quelles Sont les Limites à l'Interprétation Évolutive de la Convention ?' (*Conseil de l'Europe* 2011) 21 <https://www.echr.coe.int/Documents/Dialogue_2011_FRA.pdf> accédé le 24 mars 2022.
[23] *Affaire Feldbrugge c Pays-Bas, opinion dissidente commune à M Ryssadal, Mme Bindschedler-Robert, M Lagergren, M Matscher, Sir Vicent Evans, M Bernhardt et M Gersing* Requête no 8562/79 (CtEDH, 27 juillet 1987) 24.
[24] Rick Lawson, 'La Convention Européenne Des Droits de l'Homme : Un Instrument Vivant de 70 Ans', (*Conseil de l'Europe* 2020)10 <https://echr.coe.int/Documents/Dialogue_2020_FRA.pdf> accédé le 24 mars 2022.
[25] *Affaire Mamatkoulov et Askarov c Turquie* Requête no 46827/99 et 46951/99 (CtEDH, 4 février 2005) 125.
[26] *Affaire Tyrer c Royaume-Uni* (n 1) [35].

admis que certains actes qualifiés de traitements inhumains et dégradants, pourraient recevoir une qualification différente à l'avenir.[27] Dans ce cas l'application évolutive est basée sur le consentement implicite des États parties qui ont accepté un article de nature générique susceptible d'évoluer avec le temps.

Néanmoins, par rapport à la peine de mort la CEDH a adopté une approche diffèrent car elle a basé son interprétation évolutive sur la pratique ultérieure des États. D'une part la Convention stipule dans l'article 2 que la mort dans certaines conditions n'est pas considérée comme infligée en violation de cet article. Mais lorsque la Convention a été adoptée plusieurs pays européennes employait encore la peine capitale pour certains crimes. Aujourd'hui, la plupart des membres du Conseil de l'Europe ont soit aboli la peine de mort soit celle-ci n'est plus en usage. En 1989, la CEDH a tranché l'affaire *Soering* qui a servi de base pour une évolution progressive du contenu de la Convention.[28] Peu après l'entrée en vigueur en 1985 du Protocol No 6 à la Convention qui abolit la peine de mort seulement en temps de paix, la CEDH a reconnu qu'une 'pratique ultérieure en matière de politique pénale nationale, sous la forme d'une abolition généralisée de la peine capitale, pourrait témoigner de l'accord des États contractants pour abroger l'exception ménagée par l'article 2'.[29] Cependant, dans ce cas la CEDH n'a pas osé à aller plus loin en affirmant une modification de la Convention. En revanche, elle a conclu que l'extradition du requérant vers les États-Unis ou il risquait de se voir condamner à la peine capitale lui exposerait à un risque réel de traitement inhumain ou dégradants. Finalement après entrée en vigueur en 2003 du Protocol No 13 à la Convention abolissant la peine de mort en toutes circonstances, qui avait était signé par tous les États Membres, la CEDH a relevé que la peine de mort en temps de paix avait devenu en Europe une forme de sanction inacceptable. Toutefois, elle n'a formulé aucune conclusion définitive sur le point de savoir si les états parties avaient une pratique établie de considérer l'exécution de la peine de mort comme un traitement inhumain et dégradant contraire à l'article 3 de la Convention.[30] Cependant, la CEDH a jugé qu'il serait contraire à l'article 2 de la Convention d'appliquer la peine de mort à une personne n'ayant pas bénéficié d'un procès équitable.[31] Quelques années plus tard, la CEDH a reconnu que:

[27] *Affaire Selmouni c France* Requête no 25803/94 (CtEDH, 28 juillet 1999) [101].
[28] *Affaire Soering c Royaume-Uni* Requête no 14038/88 (CtEDH 7 juillet 1989).
[29] ibid [103].
[30] *Affaire Öcalan c Turquie* Requête no 46221/99 (CtEDH, 12 mars 2003) [162].
[31] ibid [166].

> [L]e libellé de la deuxième phrase du paragraphe 1 de l'article 2 n'interdit plus d'interpréter les mots 'peine ou traitement inhumain ou dégradant' de l'article 3 comme s'appliquant à la peine de mort'.[32]

Finalement, en 2010, la CEDH a reconnu que pour tous les États Membres du Conseil de l'Europe sauf trois, l'article 2 de la Convention avait été modifié via la pratique ultérieure des états de telle manière qu'il interdit la peine capitale en toutes circonstances.[33] La Convention a été modifié de telle manière malgré que le texte de la Convention reste le même.

II Les Limites de l'Interprétation Évolutive à Strasbourg

(a) Compatibilité avec l'Objet et au But de la Convention

Cependant, l'opinion concordante du juge Sicilianos à laquelle se rallie le juge Raimondi dans l'affaire *Magyar Helsinki Bizottság c Hongrie* admit certaines limites à appliquer une interprétation évolutive.[34] Premièrement, cette approche ne devrait pas conduire à une interprétation *contra legem* ou contraire au texte écrit de la Convention. Dans ce sens, la Cour de Strasbourg a admis que 'la CEDH ne saurait en dégager, au moyen d'une interprétation évolutive, un droit qui n'y a pas été inséré au départ'.[35] Deuxièmement, l'interprétation proposée doit être conforme à l'objet et au but de la Convention en général et de la disposition à interpréter en particulier. La base d'une méthode d'interprétation évolutive se trouverait plutôt dans le constat fait par la CEDH que l'objectif de son interprétation était d'atteindre 'le but à réaliser l'objet de la Convention et non celle qui donnerait l'étendue la plus limitée aux engagements des Parties'.[36] À différence des traités internationaux de type classique, la Convention déborde le cadre de la simple réciprocité entre états contractants et oblige à élargir les critères d'interprétation traditionnels et à écarter la possibilité d'interpréter de manière restrictive la Convention.[37] Troisièmement, l'interprétation devrait refléter les conditions de vie 'actuelles' et non celles qui pourraient prévaloir dans le futur. En principe, la CVDT interdit dans l'article 28 l'application rétroactive des traités sauf si une intention différente ressorte du traité ou bien ça a été établie par ailleurs. Toutefois, la CVDT n'interdit pas l'interprétation rétroactive des traités.[38] En effet, la Cour permanente de Justice internationale avait constaté

[32] *Affaire Al-Saadoon et Mufdhi c Royaume-Uni* Requête no 61498/08 (CtEDH, 2 mars 2010) [120].
[33] ibid [118].
[34] *Affaire Magyar Helsinki Bizottság c Hongrie* Requête no 18030/11 (CtEDH, 8 novembre 2016) [75].
[35] *Affaire Johnston et autres c Irlande* Requête no 9697/82 (CtEDH, 18 décembre 1986) [53].
[36] *Affaire Wemhoff c Allemagne* Requête no 2122/64 (CtEDH, 27 juin 1986) [20].
[37] *Affaire Irlande c Royaume-Uni* Requête no 5310/71 (CtEDH, 18 janvier 1978) [239].
[38] Sondre Torp Helmersen, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6(1) European Journal of Legal Studies 161, 173.

que conformément aux règles du droit, l'interprétation donnée par la Cour a bien un effet rétroactif dans le sens que ce traité doit être réputé avoir toujours eu le sens résultant de cette interprétation.[39] Du même la CEDH a affirmé que 'si les événements du passé doivent être jugés selon la jurisprudence prévalant au moment où les événements se sont produits, pratiquement aucun changement de jurisprudence ne serait possible'.[40]

(b) Valeurs Communes, Principe de Subsidiarité et Rétroactivité

Néanmoins, on pourrait envisager des autres limites implicites à l'interprétation évolutive à partir de la jurisprudence de la CEDH. Premièrement, l'existence du consensus européen peut être considérée comme une limite à l'interprétation expansive de la CEDH. Normalement, les interprétations évolutives sont rendues possibles par l'évolution linguistique du terme interprété. Toutefois, comme nous avons indiqué ci-dessus, la CEDH a fondé son interprétation évolutive sur le 'consensus européen'.[41] Le concept de 'consensus européen' fait référence au niveau d'uniformité présent dans les cadres juridiques des États Membres du Conseil de l'Europe sur un sujet particulier. Le texte de la Convention ne fournit ni la définition ni les critères de son utilisation. Il a été développé par la jurisprudence et ne peut être défini qu'à la suite d'une analyse des cas dans lesquels il a été utilisé. Pour l'instant, la Cour n'a jamais explicitement clarifié qu'est-ce que cela signifie. La CEDH a employée différents termes lorsqu'elle s'agit du consensus européen. Ainsi, par exemple, elle a utilisé l'expression 'consensus international entre les états contractants du Conseil de l'Europe', [42] 'norme commune précis au sein des États Membres du Conseil de l'Europe',[43] 'l'émergence d'un consensus au sein des états contractants' o même 'au moins une certaine tendance parmi les États Membres'.[44] Ces variations terminologiques n'ont aucune incidence sur le fond même. Toutefois, il existe une légère tendance à identifier le terme consensus avec 'norme commune précis', étant donné que le 'consensus' ne peut pas impliquer, du point de vue linguistique, un avis identique commun entre toutes les états.[45]

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[39] *L'Accès aux Écoles Minoritaires Allemandes en Haute-Silésie* (Avis Consultatif) [1931] CPIJ Séries AB No 40, 19.
[40] *Affaire Lucky Dev c la Suède* Requête no 7356/10 (CtEDH, 7 juin 2016) [50].
[41] Ineta Ziemele, 'European Consensus and International Law' dans Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 23.
[42] *Affaire Lee c Royaume-Uni* Requête no 25289/94 (CtEDH, 18 janvier 2001) [95].
[43] *Affaire T c Royaume-Uni* Requête no 24724/94 (CtEDH, 16 décembre 1999) [84].
[44] *Affaire Magyar Helsinki Bizottság c Hongrie* (n 34) [138]; *Affaire Näit-Liman c Suisse* Requête no 51357/07 (CtEDH, 18 novembre 2008) [175].
[45] Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68(1) International and Comparative Law Quarterly 91, 108.

Malheureusement, la CEDH n'a pas été en mesure de développer une conception cohérente et non arbitraire de la manière de déterminer l'existence d'un consensus.[46] La CEDH a souvent utilisé l'évolution de la régulation juridique dans l'état défendeur et dans les états contractants en général pour estimer qu'il y a eu une modification de la Convention.[47] En même temps, la CEDH a souligné qu'elle peut:

> [P]rendre en considération les instruments et rapports internationaux pertinents, en particulier ceux d'autres organes du Conseil de l'Europe, pour interpréter les garanties offertes par la Convention et déterminer s'il existe dans le domaine concerné une norme européenne commune.[48]

Cette façon d'éviter de clarifier le terme consensus peut être critiquée, mais sans doute tombe dans la marge de manœuvre qui appartient à la Cour pour trancher les affaires pour lesquelles elle est saisie de façon créative en fonction de la latitude de son traité constitutif.[49] La tradition classique a soutenu qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation, en latin *in claris non fit interpretatio.* 'Quand un acte est conçu en termes clairs et précis, quand le sens en est manifeste et ne conduit à rien d'absurde, on n'a aucune raison de se refuser au sens que cet acte présente naturellement'.[50] Selon cette conception le juge joue un rôle passif qui doit se conformer à l'état actuel du droit et qui devra de s'abstenir d'imposer sa propre notion juridique de la société à travers de son interprétation. Au contraire, Kelsen avait affirmé que 'toutes les normes juridiques appellent une interprétation en tant qu'elles doivent être appliquées'.[51] En d'autres termes, avant d'appliquer les normes, il faut les interpréter. La Convention a suivi plutôt cette conception 'kelsenienne' du juge et indique dans son article 32 que 'la compétence de la Cour s'étend à toutes les questions concernant l'interprétation et l'application de la Convention et de ses protocoles'. Cette approche est justifiée parce qu'en droit des traités, notamment, les conflits entre la pratique applicative et la pratique interprétative sont véritablement ténus.[52]

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[46] Paweł Łącki, 'Consensus as a Basis for Dynamic Interpretation of the ECHR—A Critical Assessment' (2021) 21(1) Human Rights Law Review 186, 187.
[47] *Affaire Scoppola c Italie* Requête no 126/05 (CtEDH, 22 mai 2012) [94].
[48] *Affaire Tănase c Moldova* Requête no 7/08 (CtEDH, 18 novembre 2008) [176].
[49] 'Part V Institutions and Actors, Ch.27 The Role of International Tribunals: Law-Making or Creative Interpretation?' dans Medina Cecilia, *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 665.
[50] Emer de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle Appliqués à la Conduite et Aux Affaires des Nations et Souverains, Volume 2* (Guillaumin 1863) [263].
[51] Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 348.
[52] Giovanni Distefano, 'La Pratique Subséquente des États Parties à un Traité' (1994) 40 Annuaire français de droit international 41, 44.

La CEDH n'assume pas un rôle de législateur même si selon le cas le consensus européen pourrait être considéré comme naissant ou faible. Le but de la CEDH reste encore de trouver un consensus au sein du pays membres du Conseil de l'Europe est d'établir un dénominateur commun des valeurs dans les sociétés du pays membres En revanche, l'interprétation évolutive est inexorablement liée à l'intention objectivée des parties.[53] Pour certains auteurs, quand la CEDH a introduit la notion 'conceptions prévalant de nos jours', elle a fixé un nouveau critère pour déterminer un consensus parmi les États Membres au-delà d'analyser son système juridique ou les traités internationaux ratifiés par les pays partis de la Convention.[54] Dorénavant l'existence des idées ou des valeurs communes acceptées par les sociétés démocratiques permettait de constater une évolution dans le cadre juridique de la Convention conçu en tant 'qu'instrument constitutionnel de l'ordre public européen'.[55] Dans le processus d'interpréter la Convention, la CEDH ne devient pas une cour constitutionnelle européenne, mais elle se transforme en chercheur des valeurs communes ou de standards de protection. Pour certains:

> [L]a formulation du consensus européen dans l'affaire *Tyrer* émane la vision d'une démocratie internationale délibérante, dans laquelle la majorité ou une proportion représentative des États parties à la Convention est considérée comme s'exprimant au nom de tous et ainsi habilitée à imposer sa volonté aux autres parties. En tant que principe constitutionnel structurant du Conseil de l'Europe, le consensus est découplé de l'unanimité. Il peut exister comme volonté générale même si toutes les parties n'ont pas la même lecture de la Convention.[56]

Mais pour certains auteurs la CEDH n'est pas toujours aussi stricte que ces arrêts semblent indiquer.[57] D'autre part, autres experts estiment aussi que le consensus européen peut aussi empêcher la CEDH d'appliquer un critère d'interprétation évolutive de manière arbitraire.[58] L'établissement d'un consensus justifie une interprétation évolutive qui permettra élargir le champ d'application de la CEDH, tandis que son absence devient un motif pour la CEDH pour ne pas le faire. Par exemple, la Cour a relevé qu'il n'y avait pas de consensus au sein des États Membres quant au droit d'un individu de décider de quelle manière et à quel moment sa vie doit prendre fin.[59] La grande majorité des États Membres du Conseil de l'Europe donne plus

[53] Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014) 139.
[54] Łącki (n 46) 190.
[55] *Affaire Loizidou c Turquie (Exceptions Préliminaires)* Requête no 15318/89 (CtEDH, 18 décembre 1996) [75].
[56] *Muršić c Croatie*, *Opinion en partie dissidente du juge Pinto de Albuquerque* Requête no 7334/13 (CtEDH, 20 octobre 2016) [20].
[57] Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) 57.
[58] Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12(10) German Law Journal 1730, 1736.
[59] *Affaire Lambert et autres c France* Requête no 46043/14 (CtEDH, 5 juin 2015) [145].

de poids à la protection de la vie de l'individu qu'à son droit d'y mettre fin et la CEDH a conclu que la marge d'appréciation des états dans ce domaine était considérable.[60]

À ce stade, est-ce qu'un abus de l'interprétation évolutive sans limites pourrait donner lieu à ce que cette interprétation essaye d'éviter, cela veut dire rendre la Convention trop ouverte aux changements sociaux sous la forme du consensus européen? Est-ce que les sociétés même démocratiques pourraient être tentés d'évoluer en arrière et de mettre en question des droits qui sont encore en processus de formation? Par exemple: la gestation pour autrui que pour l'instant selon la CEDH exige seulement au droit interne une possibilité de reconnaissance d'un lien de filiation entre cet enfant et la mère d'intention ou le droit à l'identité de genre qui permettre de dissocier le sexe à des critères purement biologiques.[61] Selon des récentes études la Grande Chambre de la CEDH n'a jamais suivi une pratique de 'dévolution', ça veut dire elle n'a pas renversé un arrêt antérieur en appliquant une interprétation restrictive des droits.[62] On pourrait affirmer qu'au niveau européen, il y a un acquis de droits de l'homme ou au moins la Cour ne devrait pas s'écarter sans motif valable de ses propres précédents.[63]

Deuxièmement, le principe de subsidiarité très liée avec le consensus européen pourrait devenir une limite à l'interprétation évolutive. À partir de l'entrée en vigueur du Protocol 15 portant amendement à la CEDH le 1er août 2021 le préambule de la Convention stipule:

> [Q]u'il incombe au premier chef aux Hautes Parties contractantes, conformément au principe de subsidiarité, de garantir le respect des droits et libertés définis dans la présente Convention et ses protocoles, et que, ce faisant, elles jouissent d'une marge d'appréciation, sous le contrôle de la CEDH instituée par la présente Convention.

Cela veut dire que désormais la marge d'appréciations des États par rapport à la morale ou la religion doit être respectée par l'interprétation de la CEDH. Cependant la Cour de Strasbourg a développé au fil du temps un *principe de subsidiarité raisonnable* dans certains domaines comme le respect de la vie privée et familiale établit dans l'article 8 de la Convention. Par exemple, même si les états ont une marge d'appréciation en ce qui concerne la reconnaissance

[60] *Affaire Haas c Suisse* Requête no 31322/07 (CtEDH, 20 janvier 2011) [55].
[61] *Reconnaissance en Droit Interne d'un Lien de Filiation entre un Enfant né d'une Gestation pour autrui Pratiquée à l'Étranger et la Mère d'Intention, Demandé par la Cour de Cassation Française* (Avis Consultatif) Requête no P16-2018-001 (CtEDH, 10 avril 2019) [13]; *Affaire Christine Goodwin c Royaume-Uni* Requête no 28957/95 (CtEDH, 11 juillet 2002) [100].
[62] Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) European Journal of International Law 797, 804; Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge University Press 2016) 309.
[63] *Affaire Mamatkoulov et Askarov c Turquie* (n 25) [121].

juridique des couples homosexuelles,[64] ils doivent prendre compte de l'évolution de la société ainsi que des changements qui se font jour sur l'état civil et offrir au moins l'accès à la reconnaissance formelle au statut de couple sous une forme autre que le mariage.[65] Ce principe de subsidiarité raisonnable pourrait trouver son fondement juridique dans l'article 17 de la Convention qui interdit qu'un état, un groupement ou un individu interprète aucune de ces dispositions de manière abusive visant à la destruction des droits ou libertés reconnus.

Troisièmement, l'interprétation évolutive pourrait être aussi limitée par l'interdiction de la rétroactivité. Même si la CEDH a souvent rappelé que ses arrêts 'servent non seulement à trancher les cas dont elle est saisie, mais plus largement à clarifier, sauvegarder et développer les normes de la Convention'.[66] Toutefois, la CEDH ne peut pas, par exemple, renverser directement une règle nationale problématique ou annuler une décision de justice définitive beaucoup moins demander à l'état de réviser de manière rétroactive les affaires rendues sur une question similaire à celui tranché par la CEDH.[67] En principe, les États sont libres de choisir les moyens de s'acquitter de l'obligation à se conformer aux arrêts définitifs de la CEDH. L'article 46 de la Convention n'impose aux États aucune type d'obligation à la manière dont ils doivent implémenter une affaire rendue par la CEDH auxquels ils sont parties. Pour cette raison, une jurisprudence constante a relevé que 'la Convention ne garantit par exemple la réouverture d'une procédure ou à d'autres formes de recours permettant d'annuler ou de réviser des décisions de justice définitive'.[68] Ça veut dire que même si la CEDH adopte une interprétation évolutive d'un des articles de la Convention, on ne pourrait pas l'appliquer de manière rétroactive à des affaires rendues par les autorités nationales dans le passé. Même si c'est indéniable que les jugements de la CEDH ont une valeur de *res interpretata* (chose interprétée) dans plusieurs pays du Conseil de l'Europe.[69] Cependant l'interprétation de la CEDH ne peut pas aller à l'encontre de la chose jugée (*res judicata*). La CEDH a été toujours très réticente à demander aux États de remettre en cause des actes ou situations juridiques

[64] *Affaire Schalk et Kopf c Autriche* Requête no 30141/04 (CtEDH, 24 juin 2010) [105].
[65] *Affaire Vallianatos et autres c Grèce* Requête no 29381/09 et 32684/09 (CtEDH, 7 novembre 2013) [84]; *Affaire Fedotova et autres c Russie* Requête no 40792/10, 30538/14 et 43439/14 (CtEDH, 13 juillet 2021) [56].
[66] *Affaire Karner c Autriche* Requête 40016/98 (CtEDH, 24 juillet 2003) [26]; *Affaire Rantsev c Chypre et la Russie* Requête no 25965/04 (CtEDH 7 janvier 2010) [197].
[67] Ramón Prieto Suárez, 'La Ejecución de las Sentencias Dictadas por el Tribunal Europeo de Derechos Humanos' dans María Elósegui Itxaso and others (eds), *Construyendo los derechos humanos en Estrasburgo: El Tribunal Europeo de Derechos Humanos y el Consejo de Europa: La Organización Internacional Explicada por sus Funcionarios Españoles con Ocasión del 60 Aniversario del TEDH y 70 del COE* (Tirant lo Blanch 2020) 204.
[68] *Affaire Moreira Ferreira c Portugal (No 2)* Requête no 19867/12 (CtEDH, 11 juillet 2017) [91].
[69] Christos Giannopoulos, 'The Reception by Domestic Courts of the Res Interpretata Effect of Jurisprudence of the European Court of Human Rights' (2019) 19(3) Human Rights Law Review 537.

antérieurs au prononcé de son l'arrêt. Ainsi dans l'arrêt *Marckx c Belgique* la Cour a expressément dispensé l'État belge de le faire.[70] Dans une affaire plus récente dans laquelle la validité des jugements rendus par des juges islandais a été mise en question par le demandeur la Cour a rappelé que 'le principe de la sécurité juridique présuppose, de manière générale, le respect du principe de l'autorité de la chose jugée qui, en ce sens qu'il préserve le caractère définitif des jugements et les droits des parties à la procédure'.[71]

Dans le cas particulier de la Convention, le respect de l'interdiction de la rétroactivité serait imposé non comme une obligation découlant d'un principe général du droit mais plutôt à cause de la répartition des compétences établie dans la Convention. Dans ce sens, il faut noter 'qu'il appartient en premier lieu aux autorités nationales de redresser une violation alléguée de la Convention'.[72] Compte tenu de la marge d'appréciation dont jouissent les autorités nationales d'exécuter les arrêts de la CEDH sous le contrôle du Comité des Ministres qui est responsable de surveiller l'exécution, pour autant que ces moyens soient compatibles avec les conclusions contenues dans l'arrêt de la Cour.[73]

D CONCLUSION

La nature juridique *sui generis* de la CEDH permet de franchir la frontière stricte des critères d'interprétations classiques du droit international réglé par la CVDT. Cela a permis que la CEDH amène une interprétation évolutive des articles de la Convention. À l'heure actuelle, cette tendance n'est pas systématique et est conditionnée par la pluralité des situations qui se présentent dans chaque cas en particulier. Toutefois on peut apercevoir l'intention claire de la CEDH de prévenir le vieillissement de la Convention qui pourrait mettre en péril tout le système européen de protection des droits humains. Afin d'éviter que la Convention devienne obsolète et dépassée par les événements, la CEDH est devenue un chercheur des valeurs communes et avec les nouveaux protocoles incorporés à la Convention innovent son contenu et permettent d'élargir son champ d'application.

La CEDH a modifié le sens traditionnel des articles de la Convention par son interprétation. En particulier, les articles 2, et 3 ont évolué à cause de la pratique ultérieure des États et grâce

[70] *Affaire Marckx c Belgique* Requête no 6833/74 (CtEDH, 13 juin 1979) [58].
[71] *Affaire Guðmundur Andri Ástráðsson c Islande* Requête no 26374/18 (CtEDH, 1 décembre 2020) [238].
[72] *Affaire Kontalexis c Grèce (No 2)* Requête no 29321/13 (CtEDH, 6 décembre 2018) [42].
[73] *Procédure Fondée sur l'article 46(4) dans l'Affaire Ilgar Mammadov c Azerbaïdjan* Requête no 15172/13 (CtEDH, 22 mai 2014) [148].

à la jurisprudence de la Cour de Strasbourg. Cependant, la CEDH devrait établir dans quelles circonstances une interprétation évolutive est justifiée et établir des limites claires pour appliquer une telle approche dans son interprétation de la Convention. À l'heure actuelle l'interprétation de la CEDH pourrait en théorie faire évoluer *ad infinitum* la Convention, sans le consentement des états parties. Cela pourrait contrevenir les bases mêmes du droit international général et dans le long terme pourrait mette en danger l'existence même de la Convention.

Pour cette raison, il serait donc souhaitable qu'un nouveaux Protocole à la Convention européenne des droits de l'homme soit négocié pour pouvoir incorporer les critères d'interprétation développés par la jurisprudence de la CEDH. De cette façon, la Cour de Strasbourg pourrait s'émanciper des critères d'interprétation imposé par la CVDT qui ne reflètent pas l'interprétation évolutive de la CEDH même s'ils ont une valeur coutumière en droit international. Actuellement, comme il a été exposé, ce n'est que dans des cas isolés, dans l'opinion concordante du juge Sicilianos à laquelle se rallie le juge Raimondi dans l'affaire *Magyar Helsinki Bizottság c Hongrie* et dans certaines constructions doctrinales, qu'est possible d'entrevoir l'existence de limites à une interprétation évolutive de la CEDH.[74] Le respect avec l'objet et but de la Convention ou la recherche d'un consensus européen, souvent diffus et difficile à justifier ne suffira pas à préserver le consentement originaire des États sans empêcher l'évolution continue des faits sociaux à protéger.

[74] *Magyar Helsinki Bizottság c Hongrie* (n 34).

LE CAS DE DUBLIN: LEÇONS DE LA GESTION DE LA CRISE FINANCIERE DE 2008 EN IRLANDE POUR LA RESOLUTION BANCAIRE EUROPÉENNE

*Dr Elise Lefeuvre**

A INTRODUCTION

En réponse à la crise financière de 2008 qui avait frappé la quasi-totalité des banques de l'Eurozone, les gouvernements européens avaient mis en place un ensemble de mesures inédites de résolution bancaire pour venir en aide aux banques.[1] À la suite de cette crise, l'Union européenne s'est dotée d'un arsenal législatif,[2] et institutionnel pour établir un système de résolution bancaire unique européen.[3] Le cas de l'Irlande est particulièrement intéressant pour évaluer ce système, car c'est le seul État Membre qui a utilisé l'ensemble des outils de résolution bancaire dorénavant présents dans l'arsenal européen.[4] Le 'cas de Dublin' démontre qu'un régime de résolution bancaire efficient se doit d'être flexible (composé de plusieurs outils pour adapter la stratégie de résolution), réactif et robuste (cadre juridique clair et anticipation des coûts de résolution).

En 2008, l'Irlande a connu une crise financière très sévère durant laquelle les banques principales du pays ont traversé en même temps une grave crise de confiance (chute du prix de l'action) et de solvabilité. De 2008 à 2013, le gouvernement irlandais a pris un ensemble de mesures drastiques pour venir au secours des banques irlandaises, sous la tutelle de la

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[1] Ces mesures étaient inédites car la crise financière de 2008 n'avait pas connu de précédent dans l'histoire récente de la finance moderne et parce que les autorités publiques n'en avaient pas anticipé l'éventualité.

[2] La Directive du Conseil (UE) 2014/59 du 15 mai 2014 établissant un cadre pour le redressement et la résolution des établissements de crédit et des entreprises d'investissement [2014] OJ L173/190; la Directive du Conseil (UE) 2019/879 du 20 mai 2019 modifiant la directive 2014/59 (UE) en ce qui concerne la capacité d'absorption des pertes et de recapitalisation des établissements de crédit et des entreprises d'investissement et la directive 98/26/CE [2019] OJ L150/296.

[3] Le Règlement du Conseil (UE) 806/2014 du 15 juillet 2014 établissant une procédure et des règles uniformes pour la résolution des établissements de crédit et de certaines entreprises d'investissement dans le cadre d'un mécanisme de résolution unique et d'un Fonds de résolution bancaire unique et modifiant le règlement 1093/2010 (UE) [2014] OJ L 225/1

[4] Créé en 2014, le système de résolution unique compte six outils de résolution. De 2008 à 2013, le gouvernement irlandais a utilisé cinq outils de résolution. L'outil non utilisé par le gouvernement irlandais est une nouveauté de la Directive du Conseil (UE) 2014/59 (n 2) et instauré en 2014, c'est le sauvetage interne ou recapitalisation privée des banques, c'est-à-dire par les actionnaires et les créditeurs. A ce jour, l'existence de cet outil reste relativement théorique et n'a pas encore été utilisé lors d'un plan de sauvetage d'ampleur. Le sauvetage interne n'a été utilisé de par deux fois et de manière limitée pour sauver des banques chypriotes. Voir par exemple 'Recapitalisation through Bail-In and Resolution Exit of Bank of Cyprus Announcement' (*Banque de Chypre*, 2013) <https://www.bankofcyprus.com/en-GB/Start/News_Archive/Recapitalisation-through-Bail-in-and-Resolution-Exit-Bank-of-Cyprus-Announcement/> accédé le 24 mars 2022.

Commission européenne et de la Banque Centrale européenne qui coordonnaient la gestion de la crise financière au niveau européen. Le gouvernement irlandais a particulièrement bien géré son programme de résolution bancaire, affichant le sauvetage de l'essentiel des banques sujettes aux mesures de redressement et la liquidation de la troisième banque du pays sans créer d'importants dommages collatéraux. Il convient bien de noter d'emblée que cette résolution bancaire a eu coût exorbitant pour l'Irlande et les Irlandais,[5] qui ont par ailleurs vu d'importantes coupes dans leurs dépenses publiques pour maintenir à niveau le budget de l'État.[6] Il n'en reste pas moins que le gouvernement irlandais a sauvé les banques locales, certes au prix fort, et que les mesures de redressement prises se doivent en conséquence de servir d'exemple.

Cet article propose donc de tirer les leçons du 'cas de Dublin' afin de pouvoir élaborer des outils de résolution bancaire performants au niveau européen. L'objectif est ainsi d'apprécier l'efficacité tant financière (ou comptable) que législative des différents outils de résolution bancaire utilisés en Irlande de 2008 à 2013 et désormais inclus dans l'arsenal législatif et institutionnel européen.

L'article commence par une présentation du secteur bancaire irlandais et de la manière dont ce secteur est entré en crise en 2008. L'article présente ensuite successivement les mesures de résolution, c'est-à-dire les plans de recapitalisation de 2008 pour faire face aux menaces de banqueroute, puis la création d'une structure de défaisance en 2009 pour contrer la crise des crédits, ensuite les mesures de fusion et acquisition de 2009 à 2010 pour réorganiser le secteur bancaire et optimiser les plans de sauvetage, et enfin la liquidation d'une banque en 2013. Pour finir, l'article résume les principaux enseignements de cette résolution irlandaise dans sa dernière partie.[7]

[5] Comité Parlementaire d'Enquête sur la Crise Bancaire (Committee of Inquiry into the Banking Crisis), *Report of the Joint Committee of Inquiry into the Banking Crisis, Volume 1* (Parlement de la République d'Irlande, 2016): L'estimation finale du coût total est €64.2 milliards, dont l'essentiel de ce montant provient des plans de recapitalisation.

[6] Par exemple, les Financial Emergency Measures in the Public Interest Acts 2009, 2010 et 2013 ont opéré des coupes importantes dans les salaires des fonctionnaires et dans les dépenses de l'État providence.

[7] Cet article expose les principales conclusions de la thèse doctorale de l'auteur présentée à la faculté de Droit de l'University College Cork en 2021 intitulée 'A Critical Evaluation of Banking Resolution Measures in a Context of Crisis – Lessons from the Resolution of Anglo Irish Bank during the 2008 Financial Crisis' (5 Janvier 2021) <https://cora.ucc.ie/handle/10468/11947> accédé le 24 mars 2022.

B LA CRISE FINANCIÈRE DE 2008 EN IRLANDE: BANQUES EN FAILLITE ET EXPLOSION DE LA BULLE IMMOBILIÈRE

La crise financière de 2008 a mis fin à une période de croissance faste en Irlande, connue sous le nom de 'Tigre Celtique', qui courait depuis la décennie 1980. Durant cette période de croissance, les banques irlandaises avaient démultiplié des pratiques commerciales à risque, notamment en prêtant massivement aux promoteurs immobiliers de l'île,[8] et en faisant peu de cas des capacités de repaiement des débiteurs.[9] Le secteur immobilier, étant quant à lui en plein essor, lançait frénétiquement de nouveaux projets sur l'ensemble de l'île. L'effondrement des marchés financiers étatsuniens en 2007 et 2008 a engendré un mouvement de panique sur les marchés irlandais et un retrait de confiance dans les banques irlandaises, qui s'est matérialisé par la chute des prix des actions.[10] En septembre 2008, les six principales banques irlandaises atteignaient leurs prix d'action les plus bas et de graves problèmes de solvabilité.[11] Au même moment, la bulle immobilière explosait laissant les banques, surexposées à ce secteur, avec des débiteurs dans l'incapacité de repayer leurs dettes dans les temps. Le gouvernement irlandais s'est donc retrouvé au pied du mur et dans l'obligation de sauver les banques en détresse afin de sauvegarder le système financier et économique national.

Avant de prolonger l'étude de la crise financière, il convient de présenter le secteur bancaire irlandais et les six banques qui ont bénéficié des plans de sauvetage. Le système bancaire irlandais d'avant 2008 était principalement composé de banques irlandaises, les banques étrangères n'ayant qu'une faible part de marché. Six banques se partageaient l'essentiel du marché, et ce sont elles qui ont été couvertes par les plans de résolution. Les plus grandes de ces banques, ou banques tier 1, étaient Allied Irish Bank, Bank of Ireland, et Anglo Irish

[8] Comité Parlementaire d'Enquête sur la Crise Bancaire (n 5): La banque Anglo Irish Bank avait, plus que les autres banques irlandaises, pris des positions risquées vis-à-vis du secteur immobilier, se retrouvant à la veille de la crise financière avec un portefeuille quasiment exclusivement exposé à l'immobilier.

[9] Plusieurs rapports officiels ont enquêté sur les causes de la crise bancaire, par exemple Klaus Regling et Max Watson, *Preliminary Report on the Sources of Ireland's Banking Crisis* (Publications Officielles du Gouvernement de la République d'Irlande 2010) ; Comité Parlementaire d'Enquête sur la Crise Bancaire (n 5); Commission of Investigation into the Banking Sector in Ireland, *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland* (Parlement de la République d'Irlande, 2011); et Governor of the Central Bank of Ireland, *The Irish Banking Crisis: Regulatory and Financial Stability Policy 2003–2008* (2010).

[10] L'indice boursier irlandais, ISEQ, a plongé à partir de l'été 2008 et atteint son point le plus bas en février 2009 avant d'entamer une remontée progressive à partir de 2012. Voir données boursières sur *Trading Economics* <https://tradingeconomics.com/ireland/stock-market> accédé le 24 mars 2022.

[11] Le prix de l'action d'Anglo Irish Bank était €0.22 à son point le plus bas. Voir données boursières sur *MarketScreener* <https://www.marketscreener.com/quote/stock/ANGLO-IRISH-BANK-1412358/> accédé le 24 mars 2022.

Bank.[12] De la crise financière de 2008 n'ont survécu que Allied Irish Bank et Bank of Ireland, et elles demeurent encore aujourd'hui les deux premières banques du pays. Anglo Irish Bank est la banque qui a été liquidée durant la crise et qui a été sujette au plus grand plan de résolution bancaire de toute l'Union européenne, usant de cinq mesures de résolution. Ces mesures constituent l'essentiel du 'cas de Dublin', qui de ce fait pourrait tout aussi bien s'appeler le 'cas Anglo Irish Bank'. Il convient d'ores et déjà de noter la place particulière occupée par Anglo Irish Bank dans le paysage bancaire irlandais. Anglo Irish Bank se plaçait dans un marché de niche, ne s'occupant presque exclusivement que du financement immobilier et jouant donc qu'une part assez minime de banque universelle.[13]

Trois autres banques de taille moyenne, ou banques tier 2, étaient également présentes, Educational Building Society, Permanent TSB et Irish Nationwide Building Society. D'importance nettement mineure comparées aux banques tier 1, elles ont aussi subi le revers de la crise financière de 2008 et ont également bénéficié des plans de sauvetage. Deux d'entre elles ont survécu à la crise, Educational Building Society et Permanent TSB. Irish Nationwide Building Society a été liquidée en même temps qu'Anglo Irish Bank à la suite de sa fusion avec elle ordonnée par le gouvernement irlandais.[14]

Cette présentation du secteur irlandais et le décompte de ses banques avant et après la crise permettent déjà de tirer une première conclusion du plan de sauvetage. Le gouvernement irlandais a pu maintenir à flots l'essentiel des banques locales, dont les deux premières banques, et ainsi préserver l'indépendance bancaire de l'Irlande.

C RECAPITALISATION DES BANQUES: UNE MESURE AUSSI EFFICACE QUE CHÈRE

A l'automne 2008, les marchés financiers entrent dans une période de panique accélérée par la débâcle ayant cours aux États-Unis. Les prix des actions des banques chutent pour atteindre leur niveau historique le plus bas. Au soir du 29 septembre 2008, le ministère des Finances irlandais doit se réunir d'urgence pour trouver une mesure rapide et efficace qui puisse éviter

[12] Pour l'exercice 2007, soit celui donnant une vue sur le secteur bancaire irlandais avant son entrée dans la crise, Allied Irish Bank totalisait €2.5 milliards de profit avant taxes, Bank of Ireland affichait €1.8 milliards, et Anglo Irish Bank €1.2 milliards. Voir rapports annuels de ces banques pour l'exercice 2007.
[13] Comité parlementaire d'enquête sur la crise bancaire (n 5) 20-30; Comité d'Enquête sur le Secteur Bancaire en Irlande (2011) (n 8) para 2.
[14] Ce point sera traité un peu plus loin dans cet article.

la faillite imminente des banques.[15] Les réunions qui ont lieu dans la nuit du 29 au 30 septembre débouchent sur la décision de recapitaliser les banques au moyen d'un système de garantie et d'injection de capital. Cette décision a donné lieu à une loi votée en urgence au Parlement, la loi de 2008 relative au soutien financier pour les institutions de crédit.[16] Les plans de recapitalisation se sont étalonnés entre septembre 2008 et mars 2009, et ont coûté un total d'environ €62.4 milliards. La recapitalisation bancaire est donc une mesure extrêmement onéreuse, et cela a causé une vague de mécontentement tant politique que sociale. Cette polémique s'est aussi matérialisée dans des procès intentés par des personnalités politiques.

Quatre affaires ont été portées devant les cours de justice irlandaises par des députés.[17] Ces derniers ont tenté de mettre à l'épreuve le bien-fondé juridique des programmes de recapitalisation, en prenant pour base le droit constitutionnel irlandais et le droit européen. Les affaires Pringle, Hall, et Collins ont questionné la validité constitutionnelle de la recapitalisation, à savoir si elle violait la souveraineté économique de l'Irlande (la solution de recapitalisation venant de Bruxelles)[18] et si elle permettait au ministre des Finances d'agir *extra vires* (et donc anticonstitutionnellement).[19] Les affaires Pringle et Doherty ont interrogé la légalité de la recapitalisation vis-à-vis du Droit européen, respectivement le Droit des aides d'État,[20] et les limites imposées quant au déficit public.[21] Dans ces affaires, les cours de justice ont finalement donné raison au gouvernement irlandais, en arguant notamment que ces mesures étaient exceptionnelles pour faire face à une crise d'ampleur et la stabilité financière du pays en dépendait. Même si ces procès ont finalement confirmé la légalité des programmes de recapitalisation, ils n'ont pas moins souligné leur propension à être mis en cause sur le terrain juridique. Cela démontre l'importance d'avoir un cadre juridique clair et stable pour encadrer les programmes de recapitalisation.

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[15] Comité Parlementaire d'Enquête sur la Crise Bancaire (n 5). La chronologie de cette nuit est très amplement détaillée dans le rapport du Comité parlementaire en se basant notamment sur des entretiens avec les participants aux réunions nocturnes.

[16] Ensuite complétée par le plan de 2008 pour le soutien financier aux institutions de crédit: Credit Institutions (Financial Support) Scheme 2008, SI 2008/411.

[17] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296, [2012] 7 JIC 1703; *Pringle v The Government of Ireland and Ors* [2012] IESC 47, [2013] 3 IR 1; Case C-370/12 *Pringle v Government of Ireland* [2012] ECLI:EU:C:2012:756; *Doherty v The Referendum Commission* [2012] IEHC 211, [2012] 6 JIC 0601; *David Hall v Minister for Finance & Ors* [2013] IEHC 39, [2013] 1 IR 620; *David Hall v Minister for Finance & Ors* [2013] IESC 10, [2013] 2 JIC 2001; *Collins v Minister for Finance & ors* [2013] IEHC 530, [2013] 4 IR 522; *Collins v Minister for Finance & ors* [2016] IESC 73, [2017] 3 IR 99.

[18] [2012] IESC 47 (n 17) [26].

[19] [2013] IEHC 39 (n 17); [2013] IESC 10 (n 17) paragraphes non numérotés; [2013] IEHC 530 (n 17) [31].

[20] [2012] IEHC 296 (n 17), [2012] IESC 47 (n 17), Case C-370/12 (n 17).

[21] Versions Consolidées du Traité sur le Fonctionnement de l'Union européenne [2012] OJ C326/47, article 136; [2012] IEHC 211 (n 17) [50] – [54].

Étant donné son coût financier et politique, la recapitalisation a tout d'abord été bannie politiquement et juridiquement après la crise. En effet, la directive relative au redressement des banques et à la résolution de leurs défaillances, votée en 2014 et instaurant un régime de résolution bancaire unique, a commencé par interdire l'usage de la recapitalisation, et l'a reléguée en mesure de dernier ressort obéissant à des conditions strictes.[22] C'est-à-dire que la recapitalisation ne pouvait plus être une mesure d'urgence, comme il en fut le cas lors de la crise de 2008. La recapitalisation est par nature une mesure d'urgence, par conséquent la reléguer en mesure de dernier ressort représente peu d'intérêt et lui ôte toute sa force de frappe. Toutefois, cette décision a été ensuite révisée et un retour a été opéré en 2017 par la Commission pour autoriser à nouveau l'usage de la recapitalisation en mesure de précaution, soit en première mesure comme en 2008.[23]

La recapitalisation comporte de nombreux avantages, malgré son coût financier. Elle est, à ce jour, la seule mesure capable de restaurer la solvabilité d'une banque dans l'urgence. Le critère de rapidité est très important en finance car une faillite peut être soudaine, surtout dans un contexte de crise avec une forte instabilité des marchés. Elle permet aussi de faire gagner du temps aux autorités pour analyser la situation et adopter un plan de résolution adéquat. En effet, dans le cas de la crise de 2008, le gouvernement irlandais a gagné un trimestre grâce aux programmes de recapitalisation pour stabiliser les banques et les marchés, et prendre ensuite d'autres mesures de résolution nécessitant plus de temps et d'organisation pour leur mise en œuvre.[24]

En plus de problèmes de liquidité, les banques irlandaises faisaient face à des problèmes de prêts. En effet, durant la période du Tigre celtique, les banques avaient contracté un important volume de prêts immobiliers auprès de promoteurs. Avec l'explosion de la bulle immobilière, les banques se sont donc retrouvées avec des prêts sous performants dans leurs livres. Cela a plombé leur profitabilité et leur capacité à émettre de nouveaux prêts.

[22] La Directive du Conseil (UE) 2014/59 (n 2) article 56.
[23] Nicolas Veron, 'Precautionary Recapitalisations: Time for a Review: In-Depth Analysis' (2017) Direction Générale pour les Politiques Internes du Parlement européen <https://data.europa.eu/doi/10.2861/905319> accédé le 24 mars 2022.
[24] Les programmes de recapitalisation ont été décidés en septembre 2008, et les mesures suivantes ont pu être prise plusieurs mois plus tard donnant ainsi le temps de la réflexion au gouvernement irlandais (nationalisation d'Anglo Irish Bank en janvier 2009, puis décision de créer une structure de défaisance dont la loi a été votée en décembre 2009). Comité Parlementaire d'Enquête sur la Crise Bancaire (n 5).

D STRUCTURE DE DÉFAISANCE: NETTOYAGE DES BILANS COMPTABLES

Une structure de défaisance, ou plus communément appelée en Anglais 'bad bank', est une entité privée ou publique qui prends les actifs financiers dévalués d'une banque difficulté afin de limiter les pertes de celle-ci. Sa mission est de gérer les actifs, soit en les vendant soit en les conduisant jusqu'à maturité (c'est-à-dire expiration).[25]

La crise des prêts immobiliers était inédite dans la finance moderne, et pour y faire face le gouvernement irlandais a utilisé une solution de résolution bancaire très peu usitée jusqu'alors. L'usage de cette solution, la structure de défaisance, a été accordé au niveau européen, en effet plusieurs États Membres, dont le Royaume d'Espagne, étaient dans la même situation, soit l'éclatement de la bulle immobilière mettant en difficulté les banques faisant déjà face à la crise financière. Au total, sept structures de défaisance ont été créées dans l'Union européenne lors de la crise financière de 2008.[26]

En 2009, au terme d'un processus législatif de plusieurs mois, le Parlement irlandais a voté la loi de 2009 relative à la National Asset Management Agency (NAMA), créant ainsi une structure publique ex nihilo ayant pour mission de récupérer les prêts sous performants des banques irlandaises. NAMA a perçu un portefeuille d'une valeur de €74 milliards, dont l'essentiel provenait d'Anglo Irish Bank (61%), et a ainsi été la deuxième plus grande structure de défaisance en opération dans l'Union européenne durant la crise financière de 2008.[27] NAMA doit être perçue comme un complément au programme de recapitalisation, dans la mesure où les prêts perçus ont été achetés aux banques à un prix au-dessus du marché, opérant ainsi une aide d'État.[28]

Du point de vue purement comptable et financier, NAMA a réussi sa mission qui était double, à savoir liquider les prêts perçus et rembourser autant que faire se peut les coûts de résolution engagés par l'État irlandais.[29] Aux états financiers de 2021, NAMA avait liquidé 99% de son

[25] 'Défaisance' (*Alternatives Economiques*) <https://www.alternatives-economiques.fr/dictionnaire/definition/907012> accédé le 24 mars 2022.
[26] National Asset Management Agency en Irlande, FMS-Wertmanagement en Allemagne, Sareb en Espagne, Landmark Mortgages et UK Asset Resolution au Royaume-Uni, Družba za Upravljanje Terajatev Bank en Slovénie, et Finansiel Stabilitet au Danemark.
[27] La première étant la structure défaisance allemande, FMS-Wertmanagement, totalisant un portefeuille de €175.2 milliards.
[28] NAMA a payé €31.8 milliards, alors que leur valeur de marche était €26.2 milliards, offrant ainsi une aide d'État de €5,6 milliards: National Asset Management Agency 'Annual Report 2020' (Dublin, 10 juin 2021) 10 <https://www.nama.ie/uploads/documents/Final-NAMA-Annual-Report-2020.pdf> accédé le 24 mars 2022.
[29] National Asset Management Agency Act 2009, article 10.

portefeuille initial et versé au trésor public un total cumulé de €3.15 milliards, en prenant en compte les versements ponctuels et les taxes.[30] Cela permet de tirer deux constats sur les structures de défaisance. Elles permettent de liquider efficacement les prêts sous performants, en plus de quoi leurs gains permettent un remboursement des frais de résolution. Ce dernier point est important dans la mesure où les résolutions bancaires engagent généralement la mise en œuvre de plusieurs outils, dans le cas présent une recapitalisation suivie d'une structure de défaisance. NAMA a donc contribué au succès des programmes de recapitalisation en poursuivant l'aide aux banques en détresse et en les finançant rétroactivement et partiellement.

Du point de vue juridique, l'impact de NAMA a été plus contesté, principalement par les emprunteurs. En effet, ceux-ci ont fait face à la décision unilatérale de voir leurs créanciers changer en cours de contrat. Les tensions avec plusieurs emprunteurs ont donné lieu à des procès, dont un en particulier a été porte devant la Cour suprême. Dans l'affaire *Dellway*,[31] la Cour suprême a rappelé à NAMA son obligation de respecter le droit de bénéficier de procédures équitables (*right to fair procedures*), qui est un droit constitutionnel.[32] Autrement dit, bien que NAMA agisse dans l'urgence, dans l'intérêt de l'État, et de manière unilatérale, NAMA n'est nullement dispensée de respecter la primauté de la loi et les droits des citoyens tels que définis par la Constitution de 1937.[33] En plus des conflits avec les emprunteurs, NAMA a aussi fait face à une autre affaire portée devant la Cour suprême concernant ses devoirs de communication et de transparence. Dans l'affaire Commissaire pour l'Information,[34] la Cour suprême a reconnu le statut d'institution publique à NAMA et l'a par conséquent astreinte aux obligations d'information et de communication incombant à ce statut.[35] Ces affaires montrent que l'action des structures de défaisance peut avoir un impact

[30] National Asset Management Agency, 'NAMA Quarterly Reports and Accounts (Section 55 NAMA Act 2009)' (Dublin, 30 juin 2021) <https://www.nama.ie/uploads/documents/Q2-S55-Accounts-for-Minister.pdf> accédé le 24 mars 2022.

[31] *Dellway Investment Ltd & Ors v National Asset Management Agency & Ors* [2011] IESC 4, [2011] 4 IR 1; *Dellway Investment Ltd & Ors v National Asset Management Agency & Ors* [2011] IESC 13.

[32] Pour une analyse en détails de l'affaire Dellway: Mary Donnelly, *The Law of Credit and Security* (2nd édn, Roundhall 2015) paras 4.73-4.78.

[33] L'affaire Dellway a ensuite servi d'autorité pour juger une autre affaire impliquant NAMA et un de ses emprunteurs, *Treasury Holdings v NAMA & Ors* [2012] IEHC 66, [2012] 3 JIC 2703; *Treasury Holdings v NAMA & Ors* [2012] IEHC 297, [2012] 7 JIC 3102.

[34] *National Asset Management Agency v Commissioner for Environmental Information* [2013] IEHC 86, [2013] 2 JIC 2703; *National Asset Management Agency v Commissioner for Environmental Information* [2013] IEHC 116, [2013] 1 IR 393; *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51, [2015] 4 IR 626.

[35] Comme défini dans la Directive du Conseil 90/313/CEE du 7 juin 1990 concernant la liberté d'accès à l'information en matière d'environnent [1990] OJ L158/56; la Directive du Parlement européen et du Conseil 2003/4/CE du 28 janvier 2003 concernant l'accès du public à l'information en matière d'environnement et

juridique sur les relations avec les clients des banques, comme sur la société civile. Ces deux aspects sont donc à anticiper dans l'établissement de modèles pour les structures de défaisance.

E FUSION ET ACQUISITION: UTILISATION D'UNE MÉTHODE PRIVÉE POUR OPTIMISER LES PLANS DE SAUVETAGE

Les fusions et acquisitions sont une méthode commune dans le monde entrepreneurial pour favoriser la croissance (achat) ou bien restructurer (vente). Dans le cas étudié, le gouvernement irlandais a utilisé l'acquisition et la fusion comme des méthodes de résolution bancaire. En 2009, le gouvernement a fait l'acquisition d'Anglo Irish Bank, soit une nationalisation. En 2010, le gouvernement a fusionné Anglo Irish Bank avec INBS en vue de leur liquidation conjointe. Par ces mesures, le gouvernement irlandais a contribué à démontrer la pertinence de l'application de mesures privées à des fins de résolution publique.

La nationalisation d'Anglo Irish Bank en 2009 a fait suite aux plans de recapitalisation, ces derniers n'ayant pas suffi à restaurer la solvabilité de la banque. Le gouvernement a fait face au choix soit de continuer à recapitaliser, ce qui aurait conduit à une nationalisation de fait car l'argent public devenait majoritaire dans la trésorerie de la banque, soit de procéder à une nationalisation.[36] C'est la dernière option qui a été choisie, moins coûteuse et permettant de prendre le contrôle total sur la banque pour continuer sa résolution. L'Irlande n'avait pas encore fait face à des cas de nationalisation pour motif de sauvetage depuis sa sécession du Royaume-Uni en 1922, et n'avait donc pas de loi pour permettre une telle mesure. Le gouvernement et le Parlement se sont retrouvés dans la nécessité de voter une loi de nationalisation *ad hoc*, c'est la loi de 2009 relative à Anglo Irish Bank. La loi dispose une nationalisation par transfert des actions d'Anglo Irish Bank au ministère des Finances.[37] Cette décision n'a pas causée de contestation, du moins publique ou juridiquement formalisée, de la part des actionnaires.[38] En effet, l'action d'Anglo Irish Bank avait subi une claire chute depuis le début de la crise

abrogeant la Directive du Conseil 90/313/CEE [2003] OJ L41/26; les Régulations européennes de 2007 relatives à l'accès à l'information et implémentées en Irlande par SI No 133/2007; Freedom of Information Act 2014; [2015] IESC 51 (n 34) [50].

[36] Du fait des plans de recapitalisation passés, le gouvernement irlandais possédait déjà 75% d'Anglo Irish Bank. Le plan en discussion pour une recapitalisation à hauteur de €1.5 milliards aurait donc conduit à une nationalisation de fait. Ministère des Finances 'Speech by Minister for Finance at second stage of Anglo Irish Bank Corporation Bill' (2009) Gouvernement d'Irlande.

[37] Anglo Irish Bank Corporation Act 2009, section 5(1) (2009 Act).

[38] L'affaire Quinn, actionnaire majoritaire et ayant donné lieu à de nombreux procès, serait à traiter à part. En effet, cette affaire se réfère plutôt à la légalité des transactions conclues entre Anglo Irish Bank et la famille Quinn.

financière et l'action avait une valeur proche de zéro.[39] La loi de 2009 a toutefois été dotée d'une provision pour évaluer la valeur des actions et indemniser les actionnaires le cas échéant.[40] Cette procédure a été réalisée en 2020 et a conclu à une valeur nulle ne conduisant donc pas à une indemnisation.[41] L'absence de contestation par les actionnaires est plutôt conjoncturelle, c'est-à-dire une action déjà en chute, une banque déjà fortement recapitalisée, et un gouvernement opérant une nationalisation comme tentative ultime de sauvetage. Ailleurs dans l'Union européenne, certaines nationalisations ont connu une conjoncture un peu différente, et dans ces cas-ci, certains actionnaires ont porté leur demande d'indemnisation devant les tribunaux.[42]

La fusion d'Anglo Irish Bank et INBS a été juridiquement ordonnée par le tribunal en juillet 2011,[43] en prenant pour fondement la loi de 2010 relative à la stabilisation bancaire en son article 34 autorisant les ordres de transfert. Les actifs avec de la valeur ont été transférés à Allied Irish Bank et Bank of Ireland, tandis que les actifs dépréciés ont été transférés dans la nouvelle entité créée, Irish Bank Resolution Corporation, en vue d'une liquidation. L'ordre de transfert a également eu des dispositions relatives au personnel des banques, soit la reprise de contingents par Allied Irish Bank et Bank of Ireland. Cette mesure n'a pas fait l'objet de contestation, en effet elle était plutôt une mesure d'organisation de pré-liquidation et elle était accommodante pour les clients comme pour le personnel.[44]

L'usage de la fusion et de l'acquisition à des fins de résolution bancaire représente un moyen efficace pour réorganiser le secteur sous résolution en séparant les bons actifs (déplacés dans des banques viables) des mauvais actifs (déplacés dans une structure pour liquidation). Ces

[39] A sa dernière capitalisation, la valeur de l'action d'Anglo Irish Bank était de €0.22 euros. Voir données boursières sur *MarketScreener* <https://www.marketscreener.com/quote/stock/ANGLO-IRISH-BANK-1412358/> accédé le 24 mars 2022.

[40] 2009 Act (n 37) section 28.

[41] David Tynan, *Determination of Value of Shares Transferred to the Minister for Finance and Rights Extinguished under the Anglo Irish Bank Corporation Act 2009* (Anglo Irish Bank Corporation, 2020), paras 6.7 et 6.8 <https://www.gov.ie/en/press-release/fb6a57-minister-donohoe-publishes-final-report-of-the-anglo-irish-bank-asse/> accédé le 24 mars 2022.

[42] Par exemple, en Allemagne, un actionnaire allemand de SNS Reaal avait déclaré avoir été exproprié par le transfert de ses actions au gouvernement néerlandais au titre de la nationalisation, ce à quoi la Cour d'Heilbronn n'a pas accédé, l'État néerlandais bénéficiant de l'immunité (Cour d'Heilbronn (28/02/2014) 4 O 69/13 Ko).

[43] Haute Cour 2011 No 29 MCA paragraphe A.

[44] La nationalisation d'Anglo Irish Bank a certainement œuvré en ce sens. En effet, le gouvernement irlandais s'est retrouvé seul actionnaire de la banque et donc libre dans ses mesures, y compris les plus drastiques. A contrario, en Belgique, les actionnaires de la Fortis ont porté leur mécontentement devant le tribunal de commerce quant à la fusion de Fortis avec BNP Paribas. RTBF 'Actionnaires Fortis au tribunal de commerce de Bruxelles' *RTBF* (Bruxelles, 29 septembre 2019) <https://www.rtbf.be/article/actionnaires-fortis-au-tribunal-de-commerce-de-bruxelles-5291653> accédé le 24 mars 2022.

moyens offrent aussi une possibilité de réembauche pour le personnel, limitant ainsi le chômage et l'impact sur la vie des gens (tant financier que moral).

F LIQUIDATION: SORTIE D'UNE BANQUE EN SÉCURITÉ

La liquidation des banques est communément perçue tant par le secteur financier que par les décideurs politiques et les banques centrales comme une mesure néfaste pour le marché. La liquidation d'Anglo Irish Bank vient prouver le contraire. Anglo Irish Bank, troisième banque du pays, a pu être liquidée de manière sécurisée sans affecter le marché irlandais alors en reconstruction après la crise de 2008.

Tout comme la nationalisation d'Anglo Irish Bank, sa liquidation a aussi nécessité une loi particulière. Dans ce cas, le Droit des affaires irlandais avait bien entendu des provisions pour effectuer des liquidations, mais ces provisions ont été jugées par le gouvernement comme inadéquates pour liquider une banque.[45] En effet, l'Irlande n'avait, depuis sa sécession du Royaume-Uni, pas eu de cas de liquidation dans le secteur financier, le cas d'Anglo Irish Bank faisant à nouveau office de première occurrence. La loi de 2013 relative à la liquidation de l'Irish Bank Resolution Corporation dispose une procédure de liquidation spéciale devant être profitable pour l'État et étant conduite sous l'égide du ministre des Finances.[46] L'État irlandais et la banque centrale irlandaise étant les principaux créanciers de la banque en liquidation et celle-ci n'ayant qu'un portefeuille résiduel,[47] la liquidation s'est passée sans accros majeurs.

Une affaire mérite toutefois d'être mentionnée car elle aborde la question des droits et des intérêts, c'est l'affaire *Dagenham Yank.*[48] Prenant autorité sur l'affaire *Dellway,* la partie demanderesse s'était plainte de ne pas avoir vu respectés ses droits d'être entendue et d'être informée lors de la vente de ses prêts dans le cadre de la liquidation. Contrairement à l'affaire *Dellway*, la Haute Cour n'a pas accédé à la demande, d'une part parce que la plainte avait été soumise trop tard au tribunal, et d'autre part parce que la solution trouvée pour les prêts était finalement acceptable (*fair*).[49] Qui plus est, la Haute Cour a rappelé que la liquidation rapide

[45] Irish Bank Resolution Corporation a créé un régime spécial de liquidation pour Anglo Irish Bank (désormais IBRC depuis la fusion en 2011 avec INBS) vis-à-vis des lois de 1963 relatives aux entreprises.
[46] Articles 3 et 4 de la loi de 2013 relative à la liquidation de l'Irish Bank Resolution Corporation.
[47] Surtout grâce aux transferts vers NAMA, et aussi grâce aux transferts vers Allied Irish Banks et Bank of Ireland lors de la fusion de 2011.
[48] *Dagenham Yank Limited & Ors v Irish Bank Corporation Limited* [2014] IEHC 192.
[49] ibid [60].

d'IBRC était dans l'intérêt public.[50] C'est-à-dire, les intérêts privés, pourvu qu'il n'y ait de violation manifeste et grave des droits, sont subordonnés à l'intérêt public.

Le « cas de Dublin » démontre qu'il est possible de sortir une banque de taille importante en toute sécurité, mais cela nécessite des mesures préalables (comme une nationalisation et un transfert de certains actifs à d'autres banques ou structure de défaisance) et un cadre juridique robuste. C'est donc une vaste organisation comptable et juridique qu'il vaut mieux anticiper en définissant un plan de résolution bancaire. Ce point est abordé dans la dernière partie qui tire les leçons du « cas de Dublin » pour le régime de résolution bancaire européen.

G LEÇONS DU 'CAS DE DUBLIN' POUR LE RÉGIME DE RÉSOLUTION BANCAIRE EUROPEEN

Le 'cas de Dublin' permet de tirer deux leçons majeures, tout d'abord ce qui définit un bon régime de résolution bancaire et ensuite quelles mesures de résolution fonctionnent légalement et financièrement, et comment.

Un bon régime de résolution bancaire se doit d'être public, et ce étant donné le rôle important joué par les banques pour financer l'économie. En effet, en prenant des mesures de résolution, l'État agit dans l'intérêt public et dans le meilleur intérêt pour l'ensemble des entreprises et des consommateurs.[51] Le régime européen de résolution unique va en ce sens car la gestion est confiée à une agence européenne et aux autorités de résolution nationales, que sont les banques centrales.[52] Un régime de résolution bancaire doit aussi d'avoir un fondement juridique solide, ainsi les mesures de résolution sont prêtes à l'usage et connues de tous. Cela rend a priori leur contestation plus difficile en cas de mise en œuvre. Un régime de résolution est cher, en effet certains des outils, – en particulier la recapitalisation et la structure de défaisance – ont un coût

[50] ibid; la Haute Cour se réfère aux articles 3 et 8(1) de la loi de 2013 (n 45).
[51] Les lois qui ont créé les mesures de résolution se sont toutes référées dans la notion d'intérêt public: Credit Institutions (Financial Support) Act 2008, préambule et section 2(1); Credit Institutions (Stabilisation) Act 2010, préambule; 2009 Act (n 37), préambule et section 2(1); 2009 Act (n 37), section 2; 2013 Act (n 45), préambule. L'intérêt public est aussi mentionné dans le préambule de la Directive (UE) 2014/59 (n 2).
[52] Le Conseil résolution unique siège à Bruxelles et a été créé en 2015, faisant suite au Règlement (UE) 806/2014 établissant des règles et une procédure uniforme pour la résolution des établissements de crédit et de certaines entreprises d'investissement dans le cadre d'un mécanisme de résolution unique et d'un Fonds de résolution bancaire unique [2014] OJ L225/1.

(très) élevé. Cela implique donc une bonne anticipation financière tant que juridique et politique.[53]

Un régime de résolution bancaire se doit aussi d'être composé de plusieurs outils afin de répondre à différents types de problèmes financiers, et donc d'être flexible pour résoudre une crise financière pouvant affecter différentes activités et évoluer dans le temps.[54] La recapitalisation permet de résoudre les problèmes de solvabilité, et ce dans l'urgence.[55] Les structures de défaisance résolvent les problèmes de crédit en prenant les prêts sous performants. Les fusions et acquisitions permettent une réorganisation des activités bancaires pour assurer leur continuité ou pour faciliter la liquidation.[56] La liquidation permet de sortir en sécurité les activités sous performantes.[57]

Le 'cas du Dublin' démontre aussi les raisons du bon fonctionnement de la stratégie de résolution. La stratégie irlandaise a fonctionné car le gouvernement a pu ajuster sa stratégie au fur et à mesure des évènements grâce à la mise en œuvre successive et conjointe de différents instruments de résolution. La stratégie a fonctionné car le gouvernement a lancé des politiques

[53] C'est la mission du Fonds de résolution unique, qui collecte les contributions des banques dans un fonds devant servir à financier les résolutions. Le Fonds a pour objectif de totaliser €60 milliards, soit 1% des dépôts garantis dans les banques de l'Union bancaire. Conseil de Résolution Unique 'Fonds de résolution unique - Fiche descriptive, Période de Contribution 2020' (Bruxelles, 17 juin 2020) <https://www.srb.europa.eu/system/files/media/document/2020_fact_sheet_fr.pdf> accédé le 24 mars 2022.

[54] Le cas irlandais est donc particulièrement intéressant car il permet d'étudier l'ensemble d'un programme de résolution et comment ces mesures interagissent ensemble. En effet, la littérature académique existante s'applique plus à étudier les mesures de résolution individuellement et donc avec moins de mise en perspective. La mesure qui bénéficie le plus des analyses individuelles est le sauvetage interne, notamment car c'est l'innovation de la Directive (UE) 2014/59. Par exemple, Alissa Kleinnijenhuis, Charles AE Goodhart et J Doyne Farmer, 'Systemic Implications of the Bail-In Design' (2021) Institute of New Economic Thinking Oxford Working Paper No 2021-21 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3928820#> accédé le 24 mars 2022; Tobias H Troeger 'Too complex to work: a critical assessment of the bail-in tool under the European Bank Recovery and Resolution Regime' (2018) 4 Journal of Financial Regulation 35.

[55] Cet aspect a été occulte lors de la création du sauvetage interne dans la directive (UE) 2014/59 en son article 43. La notion d'urgence est réapparue plus tard et a justifié en 2017 l'autorisation par la Commission de conduire des recapitalisations publiques par mesure de précaution: Veron (n 23).

[56] Un cas d'acquisition comme mesure de résolution a déjà eu lieu sous le mandat du Conseil de résolution unique. En 2017, le Conseil de résolution a ordonné l'acquisition de Banco Popular Español, qui était alors en situation de faillite, à Santander SA, l'une des deux banques tier 1 espagnoles: Camille De Rede, 'The Single Resolution Board adopts resolution decision for Banco Popular' *Communiqué de Presse de Conseil de Résolution Unique* (Bruxelles, 7 juillet 2017) <https://www.srb.europa.eu/en/node/315> accédé le 24 mars 2022.

[57] Un des cas récents est la liquidation en 2017 des actifs sous performants des banques régionales italiennes, Banco Popolare di Vicenza et Veneto Banca. Les actifs performants avaient été vendus à Intesa Sanpaolo, qui est une des banques tier-1 italiennes. Les procédures avaient été conduites localement et selon le Droit italien, en effet les procédures de liquidation, bien que parties de l'arsenal européen de résolution, sont conduites au niveau national pour des raisons légales: Benoit Mesnard, Alienor Margerit et Marcel Magnus, 'The Orderly Liquidation of Veneto Banca and Banca Popolare di Vicenza' (2017); Bank centrale d'Italie, 'La ricapitalizzazione precauzionale di MPS: domande e risposte' (undated) <https://www.bancaditalia.it/media/approfondimenti/2017/ricapitalizzazione-precauzionale-mps/index.html> accédé le 24 mars 2022.

contre cycliques (à savoir investissement public en temps de crise), et a pris des mesures interventionnistes fortes, telles que la nationalisation et la liquidation. Du point de vue juridique et politique, le régime de résolution a pu fonctionner car la Commission européenne, la Banque Centrale européenne, le gouvernement irlandais et la Banque Centrale d'Irlande ont créé et soutenu les plans de restructuration (ici principalement la recapitalisation des banques), et ont autorisé un régime d'exception au Droit des aides d'État.[58] Au niveau national, les cours irlandaises ont confirmé la légalité des lois relatives à la résolution, mais ont aussi imposé le devoir de respecter la primauté de la loi.

Le gouvernement irlandais a donc créé un important précédent, démontrant par l'expérience et dans un scénario particulièrement difficile comment un régime de résolution doit fonctionner financièrement et légalement. Il serait donc bien avisé que les leçons du 'cas de Dublin' puissent servir de base à l'élaboration du régime de résolution unique européen actuellement en cours auprès du Conseil de résolution unique.

H CONCLUSION

L'Irlande est sortie financièrement et politiquement exsangue, mais finalement gagnante, de son sauvetage des banques. Dublin a créé un important précédent tant financier que législatif pour la résolution bancaire, usant de presque tous les outils désormais présents dans le système de résolution bancaire européen (soit cinq sur les six en vigueur, l'élément non couvert étant le sauvetage privé). Par conséquent, il serait intéressant que le Conseil de résolution unique intègre les leçons du cas pratique donné par la résolution des banques irlandaises, et en particulier d'Anglo Irish Bank, dans son développement d'un système de résolution européen.

Du point de vue juridique, le 'cas de Dublin' est particulièrement pertinent. En effet, les gouvernement et Parlement ont passé rapidement et successivement un ensemble de mesures très chères, hautement interventionnistes, et en rupture avec les lois existantes (notamment le Droit européen des aides d'État). C'est sur ce dernier aspect que les procès intentés contre certaines mesures de résolution, et particulièrement contre la recapitalisation, se sont fondés. Ces procès ont indiqué que le caractère exceptionnel des mesures de résolution n'est pas viable

[58] Le régime d'exception au droit des aides d'État a été le point de départ des programmes publics pour le sauvetage des banques, et a été octroyé par la Commission au début de la crise en octobre 2008: 'Informations Provenant des Institutions et Organes de l'Union Européenne' (2008) 51 Journal Officiel de l'Union Européenne C270 8, 8. En Droit européen, les aides d'État sont prohibées afin de ne pas fausser le jeu de la concurrence: Traité Instituant la Communauté européenne (Version Consolidée) [2002] OJ C325/33, article 87(3)(b) Le traité dispose de plusieurs exceptions à cette règle, dont 'une perturbation grave de l'économie d'un État membre'. C'est cette règle qui a été invoquée pour autoriser le sauvetage des banques.

car il peut aisément être mis en cause. En ce sens, la création d'un cadre légal permanent par la Directive 2014/59 donne la stabilité légale nécessaire pour conduire des résolutions bancaires, potentiellement de grande envergure, dans le futur.

Du point de vue politique, le 'cas de Dublin' permet également de rétablir l'Irlande dans sa gestion de la crise financière de 2008. Franchement pointée du doigt, au même titre que la Grèce, l'Italie et l'Espagne, par certains de ses pairs européens pour sa débâcle et son endettement public au moment de la crise, voir même tombée en disgrâce, l'Irlande peut désormais apporter des leçons majeures de résolution bancaire à ses pairs et éclairer de son expertise les futurs plans de sauvetage.

THE NEED TO EMPLOY DISABILITY AS A COMPASS IN THE DRAFTING OF SAFEGUARDS SURROUNDING LEGISLATION FOR ASSISTED SUICIDE

*Niall Prior**

A INTRODUCTION

In *Fleming v Ireland and Others*, the Supreme Court took the view that while there was 'no constitutional right to commit suicide or to arrange for the determination of one's life at a time of one's choosing', assisted suicide was nonetheless a complex issue of policy that the State would be entitled to legislate for.[1] Seven years later, the Dying with Dignity Bill 2020 (The Bill) was introduced.[2] Section 12(2) of the Bill therein proposed to lift the prohibition on aiding, abetting, counselling, or procuring the suicide of another contained in section 2(2) of the Criminal Law (Suicide) Act 1993 (1993 Act).[3] While the Bill has failed to progress through Dáil Éireann, its initial introduction indicates two things. Firstly, that Ireland may be in the process of falling in line with the 'limited but growing number of jurisdictions across the world where assisted dying is permitted'.[4] Secondly, that legislating for assisted suicide is a delicate and complex process both as a matter of principle and practicality. To demonstrate, significant backlash to the Bill arose from the medical profession, who argued that '[m]ost people in Ireland [already] die with dignity', and that a lack of adequate safeguards in the Bill put those most vulnerable in society at risk of 'being pressurised into seeking assisted suicide'.[5] The views of such medical professionals, however, are but one consideration. Legislating for assisted suicide demands cognisance of the fundamental constitutional rights of the individual, of conflicting ethical conceptions, and ultimately, of questions surrounding practical oversight and implementation.[6]

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[1] *Fleming v Ireland and Others* [2013] IESC 19 [137], [108].

[2] The Dying with Dignity Bill 2020 (The Bill).

[3] The Criminal Law (Suicide) Act 1993.

[4] Irish Hospice Foundation, 'The International Experience of Assisted Dying' (January 2021) 5 <https://hospicefoundation.ie/wp-content/uploads/2021/02/Paper-on-International-Experiences-of-Assisted-Dying-January-2021.pdf> accessed 24 March 2022.

[5] Sorcha Pollak and Jennifer O'Connell, 'Palliative Care Experts Warn of "Deeply Flawed" Assisted Dying Bill', *The Irish Times* (Dublin, 15 February 2021) <https://www.irishtimes.com/news/social-affairs/palliative-care-experts-warn-of-deeply-flawed-assisted-dying-bill-1.4484688> accessed 24 March 2022.

[6] Fundamental constitutional rights of the individual such as '[t]he right to life, respect for human dignity, personal autonomy and the protection of certain at risk groups'; Irish Human Rights and Equality Commission, 'Submission to the Committee on Justice on the Dying with Dignity Bill 2020' (January 2021) 3.

Here, I argue that policy, having recently failed to do so, should now be guided at the outset by concern for the group most likely to be adversely affected by a poorly-safeguarded assisted suicide scheme. That is, disabled people. An overwhelming amount of the opposition to assisted suicide results from disability advocacy groups, who regard issues of assisted suicide as constituting, in essence, issues of disability.[7] Seeing as it has been criticised extensively for its non-compliance with the United Nations Convention on the Rights of Persons with Disabilities (CRPD), this point is particularly pertinent in respect of the Dying with Dignity Bill 2020.[8] The purpose of this article, then, is to emphasise that policymakers, going forth, must employ disability as a compass in the drafting of safeguards surrounding legislation for assisted suicide.

To that extent, the article is divided into two sections. The first outlines the current constitutional position, and the approach advocated for by the Bill. The second analyses the failure of the Bill to comply with the current constitutional position, as well as the requirements of the CRPD, and uses this analysis to make recommendations as to the drafting of safeguards surrounding legislation for assisted suicide in future.

B THE CURRENT POSITION

While section 2(1) of the Criminal Law (Suicide) Act 1993 does not criminalise suicide itself, section 2(2) of the 1993 Act has the effect that the aiding, abetting, counselling or procuring of the suicide, or the attempt to commit suicide, of another person, gives rise to a punishable offence. This provision was challenged in *Fleming v Ireland and Others*.[9] At the time of the High Court proceedings, Ms Fleming, who was fifty-nine years of age, was in the final stages of multiple sclerosis. Her claim was that section 2(2) of the 1993 Act was invalid due to its incompatibility with the protection of the person contained in Article 40.3.2° of the Irish Constitution.[10] The High Court took the view that while the decision of Ms Fleming to end her own life was 'in principle engaged by the right to personal autonomy which lies at the core of the protection of the person by Article 40.3.2°', and while a complete statutory ban interfering

<https://www.ihrec.ie/app/uploads/2021/02/IHREC-Submission-on-Dying-with-Dignity-Bill-Final-PDF-03022021.pdf> accessed 24 March 2022.

[7] For example: Independent Living Movement Ireland, 'Independent Living Movement Ireland Submission in relation to Dying with Dignity Bill' (January 2021) 2 <https://ilmi.ie/wp-content/uploads/2021/01/ILMI-Submission-on-the-Dying-With-Dignity-Bill.pdf> accessed 24 March 2022.

[8] Irish Human Rights and Equality Commission (n 6) 15; Convention on the Rights of Persons with Disabilities (CPRD) (adopted 13 December 2006, entered into force 19 April 2018) UNTS 2515 3.

[9] *Fleming v Ireland and Others* [2013] IEHC 2, [2013] 1 JIC 1001.

[10] ibid [49].

with a constitutional right requires a 'compelling justification', here the limitation on her rights was proportionate.[11] This was due not only to its rational connection to the 'fundamental objective of protecting life', but also due to the fact that in the absence of sufficient safeguards, a loosening of the prohibition on assisted suicide would lead the vulnerable to 'elect to hasten death so as to avoid a sense of being a burden on family and society'.[12]

The Supreme Court reached the same conclusion as the High Court. However, its analysis differed insofar as it found no constitutional right to end one's life. The concern of the Court was that such a right 'would necessarily extend to a right to have life terminated, and would therefore impose correlative duties on the state and on individuals'.[13] Perhaps in light of this concern, the Court went so far as to suggest that as part of its obligation to vindicate the right to life, it may well be that 'the state is required to seek to discourage suicide generally and to adopt measures designed to that end'.[14] Nonetheless, Denham CJ was keen to clarify that if the Oireachtas 'were satisfied that measures with appropriate safeguards could be introduced' the state would be entitled to legislate for assisted suicide.[15] Denham CJ did not specify what, exactly, 'appropriate' must mean. However, Kearns P, in the High Court, did suggest that any measures should not be vulnerable to 'laxity and complacency', and should not have the effect of coercing, amongst others, 'the aged, the disabled ... the financially compromised' into electing for assisted suicide. [16] Kearns P ventured to state that any safeguards 'might well prove difficult or even impossible to police adequately'.[17]

One can draw two conclusions as to the constitutional position. The first is that while there is no constitutional basis for a right to end one's life, to provide assistance in the suicide of another person is not necessarily unconstitutional and can be legislated for. The second is that a high value has been placed by the Courts on the preservation of life. This value, at its extreme, may oblige the state to actively discourage suicide. In light of this, we can presume that if the state were to go on to legislate for assisted suicide, the safeguards surrounding the proposed measures would have to meet a very high threshold of adequacy. That threshold, broadly interpreted, may have to eliminate the threat that any individuals will lose their lives through coercion. As for the proposed legislative position, the Dying with Dignity Bill provided that 'it

[11] ibid [52], [72].
[12] ibid [75]; ibid [76].
[13] Simon Mills and Andrea Mulligan, *Medical Law in Ireland* (3rd edn, Bloomsbury Professional 2017) para 15.70.
[14] *Fleming* (n 1) [107].
[15] ibid [108].
[16] *Fleming* (n 9) [76].
[17] ibid.

shall be lawful for a medical practitioner to provide assistance to a qualifying person to end his or her own life'.[18] A 'qualifying person' was to be a capacitous, terminally ill person who had a clear and settled intention to end his or her own life, and who had made a declaration to that effect.[19] A person was to be considered terminally ill where they had been 'diagnosed by a registered medical practitioner as having an incurable and progressive illness which cannot be reversed by treatment, and the person is likely to die as a result of that illness or complications relating thereto'.[20]

C NON-COMPLIANCE WITH THE CRPD

I Terminal Illness

There are three issues with the definition of terminal illness contained in the Bill. The first is that whereas a terminally ill person can indeed be described as having an incurable, progressive illness which cannot be reversed by treatment and is likely to kill them, this description is equally applicable to someone who suffers from a severe and profound disability such as dementia or Parkinson's disease.[21] In recognition of this blurred line, advocacy groups note that '[m]any people who are terminally ill are disabled people but not all disabled people are terminally ill'.[22] The danger associated with this line-blurring is that it had the potential to widen the scope of the Bill in a manner which, with respect, may not have been anticipated by its drafters. Two related issues of ambiguity were highlighted by the Law Society of Ireland. The first was that no link had been made with temporal proximity to death such that the Bill applied equally to a person who had many years to live, and a person with a very short life expectancy.[23] The second was that no distinction had been drawn between a person experiencing a significant loss of quality of life, and a person not.[24] Applying these observations to our purposes, what we can say is that where the Bill threw up increased ambiguity as to its intended addressees, it moved yet further away from explicitly excluding disabled people. To demonstrate, even where the Bill defined terminal illness as an incurable, progressive illness irreversible by treatment that the sufferer was likely to die of, this did not

[18] The Bill (n 2) s 6(1).
[19] ibid ss 7, 10.
[20] ibid s 8(a).
[21] Irish Human Rights and Equality Commission (n 6) 21.
[22] Independent Living Movement Ireland (n 7) 2.
[23] The Law Society of Ireland, 'Dying With Dignity Bill 2020: Submission to the Joint Oireachtas Committee on Justice' (29 January 2021) 6 <https://www.lawsociety.ie/globalassets/documents/submissions/2021-dying-with-dignity-bill.pdf> accessed 24 March 2022.
[24] ibid.

technically exclude, for example, a disabled person with a long life expectancy and a high quality of life.

The second issue is linked to the first. If it is true that an unanticipated category of disabled people would have come within the remit of the Bill, and if it is true, as the Court warned in *Fleming*, that such people may feel like burdens on their family or society, it may well have resulted that such persons would 'be coerced into choosing to end their lives'.[25] Section 9(3)(c) of the Bill attempted to avoid this harm. That section provided:

> Before countersigning a person's declaration under subsection (1), the attending medical practitioner and the independent medical practitioner, having separately examined the person and the person's medical records and each acting independently of the other, must be satisfied that the person ... has a clear and settled intention to end his or her own life which has been reached voluntarily, on an informed basis and without coercion or duress.[26]

This provision, on its surface, represented an adequate safeguard. Where the attending and independent medical practitioners satisfied themselves that a person was not electing for assisted suicide by reason of coercion, part of this satisfaction presumptively related to assuring that the relevant person was not electing for assisted suicide because their disability caused them to feel like a burden. In light of this, it could be said that the mere fact of coming within the scope of the Bill would not have been enough, in and of itself, to amount to coercion. The difficulty is that this is only true on the surface level. Two points of emphasis made by Kearns P in *Fleming* can be applied to section 9(3)(c) so as to reveal its inadequacy. The first relates to the inability of 'even the most rigorous system of legislative checks and balances' to ensure that disabled people would not 'disguise their own personal preferences and elect to hasten death so as to avoid a sense of being a burden'.[27] The second relates to the idea that if assisted suicide were permitted, this 'might well send out a subliminal message to ... the disabled ... that in order to avoid consuming scarce resources in an era of shrinking public funds ... assisted suicide is a "normal" option'.[28]

Applying the first point, what we can say is that even if section 9(3)(c) may have prevented a disabled person from seeking assisted suicide because they felt like a burden on society, it

[25] Andrew I Batavia, 'Disability Rights in the Third Stage of the Independent Living Movement: Disability Community Consensus, Dissention, and the Future of Disability Policy' (2003) 14(2) Stanford Law and Policy Review 347, 350.
[26] The Bill (n 2) s 9(3)(c).
[27] *Fleming* (n 9) [76].
[28] ibid [68].

remained readily possible that such a person could represent to the relevant medical practitioners that they were electing for assisted suicide owing solely to the suffering caused by the disability itself. The likeliness of this occurring becomes clear upon the application of Kearns P's second point. Where the mere fact of coming within the scope of the Bill would have signalled to disabled people that assisted suicide was something 'normal' for them to seek so that they might become less of a burden on society, the chance that they would elect for this option would have intensified. This article addresses how situations such as this can be avoided below. What is relevant to state, for now, is that where section 9(3)(c) was demonstrably inadequate to prevent the Bill from having an inherently coercive effect, the Bill blatantly failed to preserve the right to life so highly valued by the Supreme Court in *Fleming*.

The third issue with the definition of terminal illness contained in the Bill pertains to a slippery slope argument often made by disability advocates. This argument suggests that if a large number of disabled people fall within the scope of assisted suicide legislation, and if such people feel coerced into ending their lives, then access to assisted suicide 'will inevitably be expanded to competent individuals with non-terminal disabilities, to incompetent individuals, and ultimately to euthanizing people with disabilities against their wills'.[29]

The Netherlands is a purported example of this. Described by one group as a 'Pandora's Box', the Netherlands has graduated from permitting the terminally ill to avail of assisted suicide, to allowing those suffering from pure psychiatric illness to undergo physician-assisted suicide.[30] More specifically, in 2018, a young woman named Aurelia Brouwers, who suffered from Borderline Personality Disorder (BPD) and chronic depression, was permitted under Dutch law to voluntarily undergo physician-assisted suicide.[31] This was much to the dismay of 'right to life' groups, who described the situation as 'state-sanctioned killing of people struggling with mental illness'.[32] However, while the further development of the slippery slope in the Netherlands has been described as a 'possibility', policymakers must be aware that some commentators view the provision of assisted dying to the purely psychiatrically ill as doing nothing more than furthering the cause of equal treatment between the physically and mentally

[29] Batavia (n 25).
[30] Disability Rights and Education Fund, 'Why Assisted Suicide Must Not Be Legalized' (2005) s 1(B) <https://dredf.org/public-policy/assisted-suicide/why-assisted-suicide-must-not-be-legalized/#few-helped> accessed 24 March 2022.
[31] Linda Pressly, 'The Troubled 29-year-old Helped to Die by Dutch Doctors' *BBC News* (London, 9 August 2018) <https://www.bbc.com/news/stories-45117163> accessed 24 March 2022.
[32] 'Shocking: 29 year old Woman Killed because She Struggled With Mental Illness' (*Texas Right to Life,* 1 November 2018) <https://www.texasrighttolife.com/shocking-29-year-old-woman-killed-because-she-struggled-with-mental-illness/> accessed 24 March 2022.

ill in society.[33] A liberal view, for example, might characterise Aurelia Brouwers' BPD and chronic depression as 'terminal' in the exact same manner as, say, multiple sclerosis. That is, insofar as mental illness can cause one to suffer 'unbearably, enduringly and without prospect of relief'.[34] Some have gone so far as to argue that if mental illness can render one's life 'permanently not worth living to them', it is actively discriminatory against mentally ill people to limit access to assisted suicide to the physically ill.[35]

One might raise the counterargument that the mere fact of being mentally ill inherently clouds one's judgment such as to render them incapacitous for the purposes of availing of assisted suicide. Or, that before mental illness is allowed as grounds for assisted suicide, a given country must first have maximised its mental health provision and eliminated any stigma against mental illness generally. While these arguments can be responded to in many ways, it is beyond the scope of this article to do so. What is relevant to say is that the decision to characterise access to assisted suicide on the grounds of mental illness as positive or not is a policy decision in and of itself. That is because, on the one hand, allowing access to assisted suicide on the grounds of mental illness can be seen as a liberal development tending to further equal treatment in society, whereas on the other, it can be seen as a regressive shift tending to threaten the right to life of an increasing number of vulnerable people.

On the surface, it seems obvious that policymakers in Ireland would prefer to adopt the latter conception. This owes to the fact that it is difficult to envision Irish society as having such a liberal approach to mental illness that it is prepared to conceptualise 'terminal' as applying equally to mental as physical conditions. However, the issue is that the Bill did not specify that 'terminal' must relate solely to physical conditions. Section 8 therein provided only the following definition:

> For the purposes of this Act, a person is terminally ill if that person –
> (a) has been diagnosed by a registered medical practitioner as having an incurable and progressive illness which cannot be reversed by treatment, and the person is likely to die as a result of that illness or complications relating thereto ('a terminal illness'), and

[33] Kant Patel, 'Euthanasia and Physician-Assisted Suicide Policy in the Netherlands and Oregon: A Comparative Analysis' (2004) 19(1) Journal of Health & Social Policy 37, 52.
[34] Ron Berghmans, Guy Widdershoven and Ineke Widdershoven, 'Physician-Assisted Suicide in Psychiatry and Loss of Hope' (2013) 36(5-6) International Journal of Law and Psychiatry 436.
[35] Udo Schuklenk and Suzanne van de Vathorst, 'Treatment-Resistant Major Depressive Disorder and Assisted Dying' (2015) 41 Journal of Medical Ethics 577.

> (b) treatment which only relieves the symptoms of an inevitably progressive condition temporarily is not to be regarded for the purposes of paragraph (a) as treatment which can reverse that condition.[36]

Insofar as it failed to specify that 'illness' must relate solely to physical conditions, this definition effectually drew mental conditions within its scope. As such, a situation resulted wherein non-terminal, but severe, disability and mental illness both constituted, in and of themselves, grounds for assisted suicide. As such, a situation resulted wherein non-terminal, but severe, disability and mental illness both constituted, in and of themselves, grounds for assisted suicide. The CRPD Committee has commented that it is 'concerned about the adoption of legislation that provides for medical assistance in dying, including on the grounds of disability'. [37] Similarly, the Irish Human Rights and Equality Commission (IHREC) recommended that the Bill 'expressly state that no person should qualify solely on the ground of disability'.[38] This article agrees. If the distinction between disability and terminal illness is at worst a 'myth', and at best imprecise, it must be concluded that the Dying with Dignity Bill failed to be guided by this realisation, bringing within its remit the exact vulnerable groups that the Court in *Fleming* warned must be adequately protected.[39] In so doing, the Bill spawned an issue of principle. Namely, by giving rise to the implicit suggestion that disabled or mentally ill life is inherently undignified and not worth living.

The frequency with which this suggestion arises in regimes that take a permissive approach to assisted suicide is underappreciated. Two examples prove as much. The first is the 'Oregon' model. Introduced in the US state of Oregon in 1997, this model permits self-administered assisted dying to capacitous, terminally ill people with a maximum of six months left to live.[40] As of 2020, the four most frequently reported end-of-life concerns in Oregon were decreasing ability to participate in activities that made life enjoyable, loss of autonomy, loss of dignity, and the sense of being a burden on family, friends, or caregivers.[41] The second example relates to the Benelux countries (Belgium, Luxembourg, the Netherlands), which permit both voluntary euthanasia and self-administered assisted dying. In order to qualify, patients in these countries must be suffering unbearably, and there must be no other alternative to ease the

[36] The Bill (n 2) s 8.
[37] UN Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Canada' CRPD/C/CAN/CO/1 (8 May 2017) para 23.
[38] Irish Human Rights and Equality Commission (n 6) 22.
[39] Independent Living Movement Ireland (n 7) 2.
[40] Irish Human Rights and Equality Commission (n 6) 8.
[41] Public Health Division, 'Oregon Death With Dignity Act: 2020 Data Summary' (Oregon Health Authority, 26 February 2021) 12 <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Documents/year23.pdf> accessed 24 March 2022.

suffering, which may be of physical or psychological character. There is no requirement that the patient be at the end of their life.[42]

Where policymakers present assisted suicide as being a solution to harms such as loss of autonomy, loss of dignity, and unbearable suffering that is occurring not necessarily at the end of life, this inherently signals that a disabled or mentally ill life carrying the same traits is not worth living. A practical harm may follow from this. That is, even where policymakers explicitly exclude disability as grounds for assisted suicide, the similarity in criteria could 'lead to a decrease in society's will to invest resources in the maintenance of a good quality of life for people who are sick or disabled'.[43] In other words, where models such as the Benelux model require patients to be suffering unbearably, and without alternative, the danger is that policymakers may gradually neglect the fact that there is always a broader alternative to be worked on – the improvement of provision for, and the adaptation of society to, those suffering losses of dignity and autonomy as a result of disability in general.

For this reason, one must, one the one hand, be slow to characterise permissive, liberal regimes as so desirably compassionately progressive that they must be followed. While they may indeed be compassionately progressive as regards the dignity and autonomy issues faced by terminally ill people, a closer analysis reveals that this may come at the gradual expense of obtaining greater dignity and autonomy for other categories of people, such as disabled people. On the other hand, this revelation should not encourage policymakers to take the position that assisted suicide regimes should never be permitted. It is overreactive to say that the concerns of terminally people, and disabled people, can never be reconciled. Indeed, one must recall that the applicant in *Fleming* was not under coercion. Her claim centred around a desire to arrange to end her life in a manner which she considered to be dignified. Viewed in such a light, legislating for assisted suicide can have a legitimate vindicatory effect, and the answer to the concerns of the disability advocates need not be to prima facie prohibit all assisted suicide schemes. Rather, in order to make provision for genuine, uncoerced cases, legislation must be able to distinguish very rigidly, and very adequately, between those who are disabled or mentally ill and coerced, and those who are terminally ill and not coerced. This, as will be seen, can be brought about by maximising the decision-making capacity of those concerned, namely

[42] Irish Human Rights and Equality Commission (n 6) 8.
[43] The Swedish National Council on Medical Ethics, 'Assisted Dying: A State of Knowledge Report' (Stockholm, September 2018) 124 <https://www.smer.se/wp-content/uploads/2017/11/Smer-2017.2-Assisted-dying.pdf> accessed 24 March 2022.

by bringing legislation such as the Dying with Dignity Bill 2020 in line with the social model of disability, to which I now turn.

II Decision-making Capacity and the Social Model of Disability

Whereas before, the medical model of disability 'situated the problematic aspects of disability firmly within the individual, and perpetuated the illusion that the state or society had no role in this', the social model now demands the focus be shifted to 'the barriers that prevent persons with disabilities from exercising their legal capacity and living in the community'.[44] This model is embodied in article 3(1) of the CRPD, which espouses as a general principle '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons'.[45] Article 12(3) further requires states Parties to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.[46] This contrasts starkly with the 'wholly ... substituted-decision making model' currently in force in Ireland.[47] That is to say, the wardship model. According to section 15 of the Lunacy Regulation (Ireland) Act 1871, which governs wardship, a ward is a person who is 'of unsound mind, and incapable of managing his person or property'.[48] Under section 9(1) of the Courts (Supplemental Provisions) Act 1961, the High Court is vested with jurisdiction in 'lunacy' matters, meaning that where a person is made a ward, the Court is vested with jurisdiction over all matters relating to his person and estate.[49]

It is intended that the Assisted Decision Making (Capacity) Act 2015 (2015 Act) will overhaul the wardship system.[50] Section 3 therein embodies a functional test for the assessment of capacity.[51] The test is derived from *Fitzpatrick v FK*,[52] and relates to:

> whether the patient's cognitive ability has been impaired to the extent that he or she does not sufficiently understand the nature, purpose and effect of the proffered treatment and the consequences of accepting or rejecting it in the

[44] Beverley Clough, '"People Like That": Realising the Social Model in Mental Capacity Jurisprudence' (2014) 23(1) Medical Law Review 53, 54; Charles O'Mahony, 'Legal Capacity and Detention: Implications of the UN Disability Convention for the Inspection Standards of Human Rights Monitoring Bodies' (2012) 16(6) International Journal of Human Rights 883, 884.
[45] CRPD (n 8).
[46] ibid.
[47] Irish Human Rights and Equality Commission (n 6) 15.
[48] The Lunacy Regulation (Ireland) Act 1871.
[49] The Courts (Supplemental Provisions) Act 1961; Mills and Mulligan (n 13) para 6.03.
[50] The Assisted Decision Making (Capacity) Act 2015.
[51] ibid s 3.
[52] *Fitzpatrick v FK and Other* [2008] IEHC 104, [2009] 2 IR 7.

> context of the choices available (including any alternative treatment) *at the time* the decision is made.[53]

The functional test ultimately requires 'that a person's capacity must be assessed in relation to a particular decision, at a particular time, in a particular context'.[54] This contrasts with the current regime, which 'does not allow for different degrees of incapacity', and as such, paints all those incapacitous with same brush, denying decision-making capacity in an absolute manner from the outset.[55] While the functional test aligns much more appropriately with the autonomy-maximising principles espoused by the social model and the CRPD, the difficulty is that section 3 of the 2015 Act has not yet been enacted, resulting in a situation wherein '[m]any people with disabilities simply do not enjoy the right to personal autonomy on an equal basis to non-disabled people'.[56] Granted, section 10(1) of the Bill did embody a functional test for the assessment of capacity.[57] However, it was unclear how, in the absence of the enactment of the 2015 Act, this was to include certain categories of individual that the CRPD may require. For example, a physically terminally ill individual whose decision-making capacity had been entirely supplanted under the existing regime, and who had a mental disability which rendered them at times incapacitous, would not have had the decision-making power to avail of assisted suicide if they made a genuine, uncoerced wish to do so during a period in which they were capacitous. This stands in contrast to statements of the CRPD Committee to the effect that '[d]enial of legal capacity must not be based on a personal trait such as gender, race, or disability, or have the purpose or effect of treating the person differently'.[58]

It is clear that the prevalence of the substituted-decision making model casts a wide net. Firstly, because disabled people stand at greater risk of coercion. Secondly, because in the absence of the enactment of the functional test, it is possible that a terminally ill individual's mental capacity could be relied on as a basis for the denial of legal capacity, and as such, access to assisted suicide. That is, even where such an individual has made a genuine, uncoerced wish to elect for assisted suicide during a period in which they were capacitous. One might argue,

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[53] ibid [124] (emphasis added).
[54] The National Safeguarding Committee, 'Review of Current Practice in the Use of Wardship for Adults in Ireland' (December 2017) 46 <https://www.sageadvocacy.ie/media/1153/review-of-current-practice-in-the-use-of-wardship_dec-2017.pdf> accessed 24 March 2022.
[55] ibid 20.
[56] New Zealand Human Rights Commission, 'Submission of The Disability Rights Commissioner on the End of Life Choice Bill' (29 January 2016) 5 <https://www.hrc.co.nz/files/9115/2037/7477/DRC_End_of_Life_Choice_Submission_for_Select_Committee.pdf> accessed 24 March 2022.
[57] The Bill (n 2) s 10(1), '[a] person's capacity shall be assessed on the basis of his or her ability to understand the nature and consequences of a decision ... at the time the decision is made'.
[58] UN Committee on the Rights of Persons with Disabilities, 'General Comment No 1 (2014) Article 12: Equal Recognition Before the Law' CRPD/C/GC/1 (19 May 2014) para 32.

then, that before the Assisted Decision Making (Capacity) Act 2015 is fully enacted, it is in fact impossible for safeguards to be established that are adequate to protect the right to life so valued by the Court in *Fleming*, and to meet the varying requirements of the CRPD.

D CONCLUSION

This article sought to establish that legislation concerning assisted suicide must be guided by concern for the group most likely to be adversely affected by a poorly-safeguarded assisted suicide scheme. Namely, disabled people. The need to emphasise as much arises from the fact that shortcomings in legislation proposed to date, combined with the prevalence of the substituted decision-making system in Ireland, present demonstrably significant threats to disabled people, in specific. Whereas the Oireachtas has a genuine interest in vindicating the wishes of terminally ill individuals, this interest simply cannot be served in the absence of safeguards adequate to satisfy the value placed on life by the Court in *Fleming*, and the requirements of the CRPD. With respect, the drafters of the Dying with Dignity Bill 2020 evidently failed to be guided by this realisation. Policymakers, going forth, must now employ disability as a compass in the drafting of safeguards surrounding legislation for assisted suicide.[59]

[59] 'Joint Committee on Justice Recommends Special Oireachtas Committee Examines Topic of Assisted Dying Following Scrutiny of Dying with Dignity Bill 2020' (*Houses of the Oireachtas,* 21 July 2021) <https://www.oireachtas.ie/en/press-centre/press-releases/20210721-joint-committee-on-justice-recommends-special-oireachtas-committee-examines-topic-of-assisted-dying-following-scrutiny-of-dying-with-dignity-bill-2020/> accessed 24 March 2022.

THE ROCKALL FISHING DISPUTE BETWEEN THE UNITED KINGDOM AND IRELAND: ASSESSMENT OF CLAIMS IN LIGHT OF INTERNATIONAL LAW

*Margot Donzé**

A INTRODUCTION

The Rockall islet, a 21-metre-high rock with a 91-metre circumference, standing in the North Atlantic Ocean, is at the centre of an ongoing dispute [1] It is fifty-two million years old.[2] Despite this, the islet at the core of a dispute between Scotland and Ireland.[3] These states both have competing claims on the Rockall, claims that will be analysed in this article. Both states desire the islet as part of their territory, the reason being that the waters surrounding it are rich in oil, gas and particularly fish.[4] This fishing dispute has been going on for centuries, as both have been exploring and fishing around Rockall since at least the 16th century.[5] However, it was overlooked as long as the United Kingdom of Great Britain and Northern Ireland (UK) was part of the European Union (EU). Indeed, the Common Fisheries Policy (CFP) applied in all European waters, and therefore both states could fish there. Yet, since Brexit, the issue was uncovered.

In 2019, Fiona Hyslop, Scotland's External Affairs Minister, warned Ireland that she would deploy Scottish vessels with the aim of protecting Scotland's fishing rights around Rockall.[6] Thereby, the Scottish minister for External Affairs raised the matter again: to whom does the Rockall islet belong?

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[1] The Editors of Encyclopaedia Britannica, 'Rockall', *Encyclopaedia Britannica* (2017) <https://www.britannica.com/place/Rockall/additional-info#history> accessed 24 March 2022.

[2] Greg Noone, 'This Tiny, Uninhabitable Islet in the North Atlantic Has Attracted Fishermen and Adventurers for Decades' *Smithsonian Magazine* (Washington DC, 29 October 2019) <https://www.smithsonianmag.com/travel/this-tiny-uninhabitable-islet-north-atlantic-has-been-attracting-fisherman-adventurers-decades-180973420/> accessed 24 March 2022.

[3] Iceland and Denmark have also made claims to Rockall, but this article will focus on the dispute between Ireland and Scotland.

[4] 'Rockall Dispute: Iceland Stakes Claim to Fishing Waters' *BBC News* (London, 21 June 2019) <https://www.bbc.com/news/world-europe-48724832> accessed 24 March 2022.

[5] Noone (n 2).

[6] 'Who Owns Rockall? A History of Disputes over a Tiny Atlantic Island' *The Irish Times* (Dublin, 8 June 2019) <https://www.irishtimes.com/news/politics/who-owns-rockall-a-history-of-disputes-over-a-tiny-atlantic-island-1.3919668> accessed 24 March 2022.

This article will assess the different claims that Ireland and the UK, on behalf of Scotland, have raised and could raise, in light of international law, to affirm that Rockall is 'theirs'. First, the issue at hand and what the 1982 Law of the Sea Convention (LOSC) says about islands, and more precisely uninhabited islands, will be presented.[7] Second, it will assess the different claims that could be used by both sides, namely claims based on customary international law, on treaties, and historic claims.

B THE ISSUE OF THE RELEVANT MARTIME AREA

The first issue is whether the Rockall islet has an Exclusive Economic Zone (EEZ), a territorial sea, or any other type of 'maritime area under national jurisdiction' that could be disputed.[8] If it is not the case and the rock is only surrounded by the High Sea, there is no legal dispute. Indeed, article 89 of the LOSC states the following: '[n]o state may validly purport to subject any part of the high seas to its sovereignty'. Does Rockall possess a maritime area? Part VIII of the LOSC regulates islands and their regime. Article 121(3) of the LOSC provides that '[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. However, Rockall cannot sustain human habitation. Attempts have been made to stay as long as possible at the top of the islet and the current world record is held by English explorer Nick Hancock. In 2014, he lived, or rather survived, on the rock for approximately forty days.[9] Therefore, under article 121(3) of the LOSC, the Rockall islet has neither an EEZ, nor a continental shelf of its own. However, article 121(2) of the LOSC on the Regime of Islands mentions '… the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island …' but article 121(3) of the LOSC only considers the EEZ and the continental shelf. We can hence deduce from article 121(3) of the LOSC, considered with article 121(2) of the LOSC, that those types of rocks, which cannot sustain human habitation, do have a territorial sea. According to article 3 of the LOSC, the breadth of the territorial sea of a state can measure up to 12 nautical miles.

[7] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC).

[8] ibid art 55: '[t]he exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal state and the rights and freedoms of other states are governed by the relevant provisions of this Convention'; ibid art 3: 'Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention'.

[9] 'Adventurer Breaks the Record for Occupying Rockall' *BBC News* (London, 16 July 2014) <https://www.bbc.com/news/uk-scotland-highlands-islands-28335886> accessed 24 March 2022; Noone (n 2).

Consequently, only this breadth (approximately 22 kilometres) around Rockall can be the subject of a dispute between Ireland and Scotland.

This article will show the competing claims of both sides but, to this day, only Scotland has officially made claims towards Rockall. Ireland has not made any of its own but has, however, opposed Scotland's several times.

C THE CLAIMS

The claims of Scotland and Ireland regarding Rockall, or rather lack thereof in the case of the latter, are very different in nature. Indeed, one side has been explicitly making claims while the other has refused to recognize those claims whilst not making any of its own. In 2019, Leo Varadkar, Taoiseach from 2017 to 2020, declared: '[w]e don't have a claim on it. We don't accept any other sovereign claim on it'.[10] As this article will try to demonstrate, Ireland has not made any official claim on Rockall but has not recognised Scotland's claims either. On the contrary, they contested the latter numerous times. Scotland did make multiple claims, on multiple occasions, regarding Rockall. What are the Scottish claims? Could Ireland also claim Rockall?

I Establishment of Territorial Sovereignty Based on Customary International Law

(a) The Doctrine of *Res Nullius*

First, a claim that the UK could raise, and that Ireland could oppose, is one based on customary international law, and more specifically the doctrine of *res nullius*. This theory reflects the idea that sovereignty over territory can be acquired as the consequence of the occupation by a state of that territory.[11] The possession of the territory must be shown through 'effective occupation', which must be done 'à titre de souverain'.[12] In his book 'The Law of Nations', de Vattel, formulates this idea as follows:

[10] Constitution of Ireland, Article 28.5.1°: 'The head of the Government, or Prime Minister, shall be called, and is in this Constitution referred to as, the Taoiseach'; Department of Enterprise, Trade and Employment, 'Leo Varadkar' *Department of Enterprise, Trade and Employment* (27 June 2020) <https://www.gov.ie/en/biography/1a42d-leo-varadkar/> accessed 24 March 2022; 'Rockall Q&A: Fishing Dispute between Scotland and Ireland' *BBC News* (London, 15 June 2019) <https://www.bbc.com/news/world-europe-48580227> accessed 24 March 2022.

[11] John Macdonell, 'Occupation and "Res Nullius"' (1899) 1 Journal of the Society of Comparative Legislation 276, 279.

[12] 'À titre de souverain' translates to 'as a sovereign'; Marcelo G Kohen, *Possession Contestée et Souveraineté Territoriale* (Graduate Institute Publications 1997) 19.

> When a nation takes possession of a country to which no prior owner can lay claim, it is considered as acquiring the empire or sovereignty of it, at the same time with the domain.[13]

In the case of the Rockall islet, it can be presumed that it was *terra nullius* before 1955. In effect, on the 18th of September 1955, the British Royal Navy, landing from the HMS Vidal, raised a flag and put a ceremonial plaque on it.[14] By this act, the UK wanted to prove their effective occupation of the rock and thus show that they acquired a title of sovereignty over it. This was reaffirmed in December 1971, during a debate held at the House of Commons. On that occasion, Mr Laurence Reed commented that '[t]he first recorded landing on this rock was achieved in 1811, and since we took formal possession of this islet in 1955 there has been no dispute whatever as to the sovereignty over it'.[15] This debate was followed by the adoption, in 1972, of the Island of Rockall Act, by which Scotland officially incorporated the Rock into its legislation.[16] This was presumed to be a clear demonstration of effectivity '*à titre de souverain*'. Through this Act, the Scottish showed their conviction that the Rockall islet was under their jurisdiction. Furthermore, they installed a warning beacon at its top.[17] Argument would be that all those actions amounted to and proved that the UK, through Scotland, exercised and still exercises effective occupation over Rockall.

Some authors have contended that Ireland, by not making an opposing claim to Rockall, has acquiesced to this title, which is based on the idea that the rock was *terra nullius* before 1955, and that the following actions by the UK amounted to effective occupation '*à titre de souverain*'. This is the view taken, for instance, by Richard Collins, who wrote that: '[t]he UK's actions in 1955 amounted to a clear symbolic annexation'.[18] However, Ireland has rejected UK's claim to Rockall on multiple occasions, denying that the UK has sovereignty

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[13] Emmerich de Vattel, 'CHAP XVIII - Establishment of a Nation in a Country' in Joseph Chitty (ed), *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Cambridge University Press 2011) para 205.

[14] James Harrison, 'Unpacking the Legal Disputes over Rockall' (*SPICe Spotlight*, 18 June 2019) <https://spice-spotlight.scot/2019/06/18/guest-blog-unpacking-the-legal-disputes-over-rockall/> accessed 24 March 2022; 'On This Day 18 September 1955' (*Fleet Air Arm Officers Association*, 18 September 2014) <https://www.fleetairarmoa.org/news/on-this-day-18-september-1955> accessed 24 March 2022; Rían Derrig, 'An Irish Claim to Rockall' (*EJIL: Talk!*, 14 January 2021) <https://www.ejiltalk.org/an-irish-claim-to-rockall/> accessed 24 March 2022.

[15] House of Commons Deb 13 December 1971, vol 828, col 192 <https://hansard.parliament.uk/Commons/1971-12-13/debates/3906978f-4533-4b3f-ba7b-c6322283390b/IslandOfRockallBillLords> accessed 24 March 2022.

[16] Island of Rockall Act 1972; Harrison (n 14).

[17] Island of Rockall Act (n 16).

[18] Richard Collins, 'Sovereignty Has "Rock-All" to Do with It… or Has It? What's at Stake in the Recent Diplomatic Spat between Scotland and Ireland?' (*EJIL: Talk!*, 8 July 2019) <https://www.ejiltalk.org/sovereignty-has-rock-all-to-do-with-it-or-has-it-whats-at-stake-in-the-recent-diplomatic-spat-between-scotland-and-ireland/> accessed 24 March 2022.

over it.[19] Therefore, the contrary, namely that by this flag-raising act in 1955 the British Royal Navy did not annex that islet, is also a possible argument.

Since the 16th century, the Rockall islet has been exploited by Irish, Scottish, Norwegian, Dutch, and Baltic fishing and trading communities. Furthermore, it has a place in both Irish and Scottish mythologies.[20] Thus, the assertion that Rockall was *terra nullius* before 1955 should be considered with care. Both views can be maintained as there is no unified doctrine regarding the *res nullius* theory, according to Professor Andrew Fitzmaurice.[21] Therefore, there is not one single possibility for argumentation. The historic fishing rights of both states will be examined in a later section.[22]

To summarise, the doctrine of *res nullius* could be argued both ways. On the one hand, it could be asserted that the Rockall islet was indeed *terra nullius* before the HMS Vidal came and the British Royal Navy raised the flag. Thus, this act and the subsequent actions would prove that Rockall has been acquired by the UK. On the other hand, Ireland could use historic facts and evidence of prior exploitation of the Rock to contend that it was not *terra nullius* and that the acquisition had no legal effect. Ireland could profit from the 1971 UK House of Lords Debate on the Island of Rockall Act to affirm its position.[23] During that debate, even if members of the House of Lords were convinced that the rock had been annexed, others had doubts that the islet was under Scottish sovereignty and, therefore, that the territory was *terra nullius* before 1955.[24] During the Island of Rockall Bill, Mr William Ross (Kilmarnock) stated:

> What about the Irish? Have they a claim to it? It is not all that far from Ireland. I reckon it is nearer Londonderry and the Bloody Foreland than it is part of the mainland of Scotland. We may well have trouble in controlling the area.[25]

In conclusion, the UK seems to have a chance at using the doctrine of *res nullius* to claim Rockall, which it has in fact already done. This is the view of many authors, such as Collins,

[19] Dáil Éireann Deb 18 June 2019, vol 983, no 7; Deputy Simon Coveney: 'As the Deputy is aware, Ireland has never made any claims to Rockall, nor have we recognised British claim to sovereignty over it' (*Houses of the Oireachtais,* 18 June 2019) <https://www.oireachtas.ie/en/debates/question/2019-06-18/34/> accessed 24 March 2022.
[20] Derrig (n 14).
[21] Rían Derrig, 'Was Rockall Conquered? An Application of the Law of Territory to a Rock in the North Atlantic Ocean' in Fiona De Londras and Siobhán Mullally (eds), *The Irish Yearbook of International Law, Volume 14* (Hart Publishing 2019) 61.
[22] See 'Establishment of Historic Rights or Historic Title'.
[23] Which was ultimately adopted in 1972.
[24] See what Mr Laurance Reed said during House of Commons Debate (n 15); Derrig (n 21) 61.
[25] Island of Rockall Bill Lords: House of Commons Deb (n 15) col 199.

Symmons, and Harrison.[26] However, would this dispute come in front of a dispute settlement mechanism, Ireland might also have a chance at arguing that Rockall was not *terra nullius* before 1955 and that, therefore, the acquisition was null and void.

(b) The Prescription Doctrine

Second, in the case of the *res nullius* argument being dismissed, another basis that could be used to make a claim to Rockall would be prescriptive acquisition. It is, however, a rather controversial doctrine. Indeed, prescription starts with the illegal occupation of another state's territory; thus, it being a disputed title. According to certain authors, such as Kohen, prescription can happen in three different ways. First, it can happen by a treaty of cession of territory. Second, it can happen by the acquiescence of the state who possesses the title over that territory. In that case, there is no need for a certain passage of time before the prescription title becomes effective. Third, it can happen by the passage of time if a state occupies effectively another state's territory. The question is then if this 'illegal occupation' is sufficient for the title to be established.[27] The third possibility of prescriptive acquisition is potentially applicable in the case of the Rockall islet.

Prescription can be described as 'the result of the peaceable exercise of de facto sovereignty for a very long period over territory subject to the sovereignty of another'.[28] In other words, prescription is the shift of sovereignty over a territory from one state to another. The acquisition of territory based on prescription depends on two elements: the state's conduct and the reaction of the other states to that conduct. The state must 'sufficiently demonstrate its intention to act as a sovereign over [that] particular territory'.[29] Hence, the conditions to acquire a title based on prescription are the following: (i) the state acted as a sovereign on the territory, (ii) the possession was peaceful and uninterrupted, (iii) the possession is public, and (iv) the possession has endured a certain period of time.[30] In the present case, the relevant question is whether the British government successfully acquired a title based on prescription by accomplishing various acts on Rockall since 1955.[31]

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[26] Derrig (n 14).
[27] Kohen (n 12); This approach of the establishment of a title is the one taken by Professor Marcelo G Kohen throughout his doctoral thesis. However, different authors have different views on the question.
[28] Joseph G Starke and Ivan A Shearer, *Starke's International Law* (11th ed, Butterworths 1994) 153.
[29] Derrig (n 21) 63.
[30] Jan Wouters and Sten Verhoeven, 'Prescription' *Max Planck Encyclopedia of Public International Law* (2008) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e862?print=pdf> accessed 24 March 2022.
[31] Derrig (n 21) 63-64.

The critical date regarding the eventual prescription title chosen in this article is one proposed by Derrig, namely the 18th of September 1955.[32] Such a date can be useful since it represents the 'date after which the actions of the parties can no longer affect the issue', as defined by Fitzgerald.[33] Indeed, in many cases, including the *Eastern Greenland Case* or the *Clipperton Island Case*, moments such as flag-raising or other ceremonial acts were 'identified as critical to the determination of the legal issue'.[34]

The first condition can be demonstrated without great difficulty, as the UK has done multiple actions on the rock since 1955 that could amount to 'acting as a sovereign'.[35] For instance, this would be the case of the raising of the flag, the cementing of the plaque, or the adoption of the Island of Rockall Act in 1972.

The second condition is rather disputed. Indeed, the possession should be 'peaceful and interrupted'. However, what does this mean? What happens if a state opposes the possession of the territory? Opposition can preclude a title by prescription to come to existence, but there exist different views amongst legal scholars as to what form of opposition is required. According to some, a mere protest is not sufficient, as this kind of opposition would only postpone the existence of the title.[36] However, in the *Chamizal Case*, the plea of prescription was dismissed on the basis that the possession and control exercised by the United States (US) 'have been challenged and questioned by the Republic of Mexico'.[37] This case is helpful in asserting whether Scotland could raise a prescription claim on the same basis as the US in 1911, namely an 'undisturbed, uninterrupted and unchallenged possession' of the territory.[38] The protests of Mexico and Ireland are somewhat similar and comparable, as both were constant and made by diplomatic agents or members of the government.[39] Here, Ireland has 'merely' protested against the sovereignty of the UK over Rockall. However, this protest has been made by successive Irish governments and is a categorical rejection of British claims.[40] Indeed, this was persistently the case, for example, in May 2010 during the Dáil Éireann Debate, where Deputy Micheál Martin, then Minister for Foreign Affairs of Ireland, stated that:

[32] ibid 64.
[33] ibid 64.
[34] ibid 64-65.
[35] Kohen (n 12) 19.
[36] Wouters and Verhoeven (n 30).
[37] *The Chamizal Case (Mexico v United States)* (International Boundary Commission, 15 June 1911) in United Nations, *Reports of International Arbitral Awards, Volume XI* (1961) 309, 328-329.
[38] ibid 328.
[39] ibid.
[40] Derrig (n 14).

'[w]hile Ireland has not recognised British sovereignty over Rockall, it has never sought to claim sovereignty for itself'.[41]

If one follows the opinion of the International Boundary Commission in the *Chamizal Case*, those protests are sufficient to dismiss the acquisition of the title based on prescription.[42] In response, it could also be said that those mere protests are not enough, and that, since Ireland has not made a claim of its own, the title by prescription has been established.[43] According to the reasoning put forward in this article, which is similar to the one taken in the *Chamizal Case*, the protests of Ireland against Scottish sovereignty, which have happened repeatedly, are sufficient to dismiss the title by prescription.

The third condition, namely that the possession must be conducted in public, is necessary.[44] It gives the opportunity to other states to acquiesce, or on the contrary not to acquiesce, to that possession. Ireland, as well as Denmark and Iceland, have made competing claims to Rockall.[45] The position taken in this article is that those claims do not equal to public acquiescence, therefore, this condition is not fulfilled.

Lastly, the condition on the time aspect of the possession is most likely satisfied, as the alleged 'acquisition' of the Rockall islet by the UK was made in 1955, almost seventy years ago.[46] As a comparison, some authors accept that thirty years is sufficient.[47]

In conclusion, similarly to the claim based on the doctrine of *res nullius*, both views could be defended. This article will however take the side of the dismiss of this claim, due to the multiple statements of successive Irish governments against the acquisition of the Rockall islet by the UK. Therefore, it seems rather difficult to argue that there is 'acquiescence' or 'peaceful possession'. This is particularly true when adhering to the position of certain scholars, such as Kohen and Hébié, as well as the International Court of Justice (ICJ) in *Malaysia v Singapore*,

[41] Dáil Éireann Deb, 19 May 2010, vol 709, col 3 <https://www.oireachtas.ie/en/debates/debate/dail/2010-05-19/39/#s140> accessed 24 March 2022.
[42] *The Chamizal Case* (n 37).
[43] Dáil Éireann Deb (n 41). Deputy Micheál Martin affirmed that: '[w]hile Ireland has not recognised British sovereignty over Rockall, it has never sought to claim sovereignty for itself'.
[44] Wouters and Verhoeven (n 30).
[45] Derrig (n 14).
[46] Wouters and Verhoeven (n 30).
[47] ibid.

according to which '… acquiescence should not be presumed lightly'.[48] The main similarities between this ICJ case and the one at hand are that the prescription doctrine is or could be used as a substitute to the *res nullius* doctrine.[49] However, in the *Malaysia v Singapore* case, the Court found that the possession was a 'continuous and peaceful display of territorial sovereignty'.[50]

(c) The Doctrine of the Persistent Objector

Third, this doctrine is an element that Ireland might use to oppose the previously mentioned arguments that were put forward by the UK. Indeed, according to customary international law, once a rule of custom has been created, no state can 'exempt itself unilaterally from the obligations imposed by that rule'.[51] The doctrine of the persistent objector comes into play for states that do not want to be bound by the new rule of customary international law. In theory, 'a state which persistently objects to a rule of customary international law during the formative stages of that rule will not be bound by it when it comes into existence'.[52] This doctrine is seen as a consequence of the nature of customary international law. Indeed, customary rules emerge from the will of states, and from the *opinio juris* of states, which can be described as 'the belief that such behaviour depends on a legal obligation'.[53] In the Rockall dispute, the question at hand is whether Ireland could counter-argue Scottish claims by using the persistent objector argument. The British government has in the last half-century justified its action as an 'occupation of a territory *res nullius*'.[54] Nonetheless, even if the Irish government has never

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[48] Kate Parlett, 'State Conduct in Territorial Disputes Beyond Effectivités: Recognition, Acquiescence, Renunciation and Estoppel' in Marcelo G Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing 2018) 180: 'Crucial for a transfer of title to be effected by acquiescence is the manifestation of a clear intention'; Nuno Sérgio Marques Antunes, 'Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement' in Rachael Bradley and Clive Schofield (eds), 'Boundary and Territory Briefing' (2000) 2(8) International Boundaries Research Unit 3: 'Juridically, however, its meaning is much stricter. The "*absence of opposition per se [does] not necessarily or always imply*" consent'; Marcelo G Kohen and Mamadou Hébié, 'Territory, Acquisition', *Max Planck Encyclopaedias of International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1118?print=pdf> accessed 24 March 2022; *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* [2008] ICJ Rep 12; Kohen and Hébié (n 48).

[49] *Malaysia v Singapore* (n 48) [123].

[50] ibid [68] and [123].

[51] Elias Olufemi, 'Persistent Objector', *Max Planck Encyclopedia of Public International Law* (2006) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1455?print=pdf> accessed 24 March 2022.

[52] ibid.

[53] Tullio Treves, 'Customary International Law', *Max Planck Encyclopedia of Public International Law* (2006) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?print=pdf> accessed 24 March 2022.

[54] Derrig (n 14).

made a claim for itself, '[t]he position of successive Irish governments has been to categorically reject the UK territorial claim'.[55] Would those continuous rejections of the UK's claims amount to the 'persistent objection' needed in order not to be bound by a rule of customary international law? And in this case not recognize Scotland as the sovereign on the islet?

A possible view is that this theory is logical, and that Ireland can use the doctrine of the persistent objector to counter British claims. However, it is worth mentioning that the persistent objector theory is, as the name suggests, only a theory. Despite its existence being recognized by the International Law Commission (ILC) in the 2018 Draft Conclusion on Identification of Customary International Law, it has, in practice, never been used to prevent a rule from being applied to a state:[56]

> [U]p to now, it seems that the persistent and continued opposition by a state to the formation of a customary rule since its inception has never been recognized as apt to prevent the application of that rule to the persisting objecting state. The doctrine has therefore been correctly described as a myth.[57]

In conclusion, if one follows the ILC's approach and thus decides that the doctrine of the persistent objector can be used by a state to unilaterally exempt itself from the obligations resulting from the creation of a rule of customary international law, then Ireland might have a chance at opposing Scottish claims. However, as mentioned before, this theory has thus far never been applied by a Court, and, if one follows Gaeta's opinion, it might be unlikely that a dispute settlement mechanism would accept this argument.[58] However, it is worth mentioning that it was referenced in passing in two ICJ decisions, the *Asylum Case (Colombia v Peru)* and the *Fisheries Case (United Kingdom v Norway)*.[59] Therefore, it remains to be seen whether this theory is only a myth or a functioning legal argument.

[55] ibid.
[56] Paola Gaeta, Jorge E Viñuales and Salvatore Zappalà, 'Law-Making Processes' in Paola Gaeta, Jorge E Viñuales and Salvatore Zappalà (eds), *Cassese's International Law* (3rd edn, Oxford University Press 2020) 189.
[57] ibid 189.
[58] Gaeta, Viñuales and Zappalà (n 56) 189.
[59] *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 277-278; *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 131.

II Establishment of Territorial Sovereignty based on Treaties

(a) The United Nations Convention on the Law of the Sea (LOSC)

It is worth mentioning, before going into details about the LOSC and its provisions, that both states are parties to the Convention. Ireland became a party to it in 1996 and the UK joined the LOSC a year later, in 1997.[60] Therefore, the Convention is applicable between the two parties.

As previously mentioned, the Rockall islet falls under the category described in article 121(3) of the LOSC; a 'rock which cannot sustain human habitation'.[61] Under this treaty, the sovereign state can claim the territorial sea, 12 nautical miles, around Rockall.[62] During the third UN Conference of the Law of the Sea (UNCLOS III), Ireland lobbied for the non-generation of an EEZ for uninhabitable rocks such as Rockall.[63] The position taken by Ireland in the 1970s is comparable to the one it takes today. During the Dáil Éireann debate, Deputy Micheál Martin stated:

> The consistent position of successive Irish Governments has been that Rockall and similar rocks and skerries have no significance for establishing legal claims to mineral rights in the adjacent seabed and to fishing rights in the surrounding seas.[64]

However, despite Ireland's position on the matter, 'the law is law'.[65] Consequently, Rockall gives rise to a territorial sea.[66]

Article 62(3) of the LOSC is a possible basis for Ireland's vindication. Under this article, regardless of which of the two states possesses Rockall, Ireland could potentially fish in the territorial sea surrounding the islet. This provision provides that:

> [i]n giving access to other states to its exclusive economic zone under this article, the coastal state shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal state concerned and its other national interests, … and the need to minimize economic dislocation in states whose nationals have habitually fished

[60] Clive R Symmons, 'Ireland and the Rockall Dispute: An Analysis of Recent Developments' (1998) 6 International Boundaries Research Unity Boundary and Security Bulletin 78, 81; ibid 83.
[61] LOSC (n 7) art 121(3): 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'.
[62] ibid article 3.
[63] Derrig (n 14).
[64] Dáil Éireann Deb (n 41).
[65] Translation of the author; Gustav Radbruch, 'Gesetzliches Unrecht Und Übergesetzliches Recht, 1' (1946) 1 Süddeutsche Juristen-Zeitung 105, 107: 'Gesetz is Gesetz'.
[66] Collins (n 18).

> in the zone or which have made substantial efforts in research and identification of stocks.[67]

This article refers to the EEZ of a state, not to its territorial sea. Could the idea contained in this article be applied, perhaps by analogy, to the territorial sea of Rockall?

The 1951 *Fisheries Case (United Kingdom v Norway)* provides that:

> [T]here is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.[68]

Moreover, two decades later, in the *Fisheries Jurisdiction Case (United Kingdom v Iceland)*, the ICJ further states that:

> It should be observed in this connection … the exceptional dependence of Iceland on its fisheries for its subsistence and economic development …. The Court further stated that 'from this point of view account must be taken of the need for the conservation of fish stocks in the Iceland area'.[69]

Those two cases demonstrate the importance of considering economic interests when fisheries disputes arise. It is not only purely legal or geographical problems but also human, as people and communities' lives and incomes are at stake.[70]

In Ireland, the largest fishing port is in Killybegs and a considerable amount of the catches arriving in this port comes from the surroundings of Rockall. For the Killybegs fishermen, not being allowed to fish in the territorial sea of the islet could have disastrous economic consequences.[71] Even if article 62 (3) of the LOSC only mentions economic dislocation in the case of fishing restrictions in the EEZ, it is potentially defensible that previous ICJ cases could be used to prove that a custom has emerged and that the economic dependence of a region on fishing catches must be taken into account when a dispute arises, as in the case of the Rockall islet. However, this would require a dubious reading of the LOSC as, under article 17 of this convention, the only right of foreign vessels in the territorial sea of a state is one of innocent

[67] LOSC (n 7)
[68] *Fisheries Case (United Kingdom v Norway)* (n 59) [133].
[69] *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)* [1973] ICJ Rep 3 [41].
[70] ibid [66]; *Fisheries Case (United Kingdom v Norway)* (n 59) [133].
[71] Noone (n 2).

passage.[72] It might thus be hardly conceivable for a vessel to stop in the territorial sea of another state, and even less plausible to fish in those waters.[73]

(b) The London Fisheries Convention (LFC)

The 1964 London Fisheries Convention (LFC) provides, under its article 2, that: '[t]he coastal state has the exclusive right to fish and exclusive jurisdiction in matters of fisheries within the belt of six miles measured from the baseline of its territorial sea'.[74] Article 3 of the LFC then states that:

> [w]ithin the belt between six and twelve miles measured from the baseline of the territorial sea, the right to fish shall be exercised only by the coastal state and by such other Contracting Parties, the fishing vessels of which have habitually fished in that belt between 1st January 1953 and 31st December 1962.[75]

This idea resembles one of historic fishing rights, which will be examined later.

Under that convention, vessels who have fished within six to twelve nautical miles of Rockall in the thirteen years prior to the adoption of that Convention, would still be permitted to fish in those waters. If this convention applies, it could mean that the state to whom Rockall belongs could only have exclusive fishing rights and exclusive jurisdiction in the 6 nautical miles around the Rock, instead of the 12 nautical miles mentioned in the LOSC. It would also mean that there would be a restriction on which vessel can fish in the 6 to 12 nautical miles surrounding the rock. The LFC could still be in force and be subsidiary to the CFP. In other words, since the UK left the CFP by leaving the EU, there is a possibility that the LFC can apply. Indeed, the legal principle *lex specialis derogat legi generali*, under which a more specific law overrides a general one, would not apply in this situation, as the CFP, the most specific law in this case, is, since Brexit, not applicable to the UK. According to some: '[the CFP] would … have been revived'.[76]

However, since the LOSC came into force later than the LFC, the principle *lex posterior derogat legi priori*, according to which the most recent law should be prioritised, would apply.

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[72] LOSC (n 7) article 17: 'Subject to this Convention, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea'.
[73] ibid 18(2), according to which the passage must be continuous and expeditious: 'Passage shall be continuous and expeditious …' .
[74] London Fisheries Convention (adopted 11 September 1964, entered into force 15 March 1966) TS No 35 (LFC).
[75] ibid.
[76] Collins (n 18) see the comments section, in particular Valentin Schatz's comments.

Accordingly, the exclusive jurisdiction area around the rock would be 12 nautical miles rather than 6. For this reason, the LFC does not seem to be a possible basis for a claim to fish around the Rockall.

(c) The Island of Rockall Act

The Island of Rockall Act's purpose, adopted on the 10th of February 1972, was to integrate Rockall into Scottish legislation, as part of the County of Inverness, in order to allow Scotland to have jurisdiction over it. It is not in itself a treaty, but it is a legal instrument that can help ascertain to whom the Rockall belongs. The original version reads as follows:

> 1. As from the date of the passing of this Act, the Island of Rockall (of which possession was formally taken in the name of Her Majesty on 18th September 1955 in pursuance of a Royal Warrant dated 14th September 1955 addressed to the Captain of Her Majesty's Ship Vidal) shall be incorporated into that part of the United Kingdom known as Scotland and shall form part of the District of Harris in the County of Inverness, and the law of Scotland shall apply accordingly.
>
> 2. This Act may be cited as the Island of Rockall Act 1972.[77]

Therefore, as a result of this Act, the law of Scotland applies to the Rockall islet. It is worth mentioning that the Act was then amended by the Local Government (Scotland) Act of 1973.[78] This Act does not constitute a basis for a claim of territoriality over Rockall. However, as mentioned in previous sections, it can be used as a sign of *effectivité* and administrative control over Rockall, elements that are needed to establish who holds the title of sovereignty.[79] As argued hitherto in this article, the Island of Rockall Act is one of the factors that give substance to the Irish Government's claims when assessing those of Scotland and Ireland in light of international law.

III Establishment of Historic Rights or Historic Title

Both Ireland and Scotland have fished in and exploited the waters around the Rockall islet for centuries. The legend says that as early as the 6th century, Rockall had been described by the Irish monk St Brendan, who was famed for his Atlantic voyages.[80] The first possible

[77] Island of Rockall Act 1972.
[78] Local Government (Scotland) Act 1973 (c 65), s 214 (2), sch 27 para 202: 'In section 1, for the words from "District" to "Inverness" there shall be substituted the words "Western Isles"'.
[79] Compare the sections above on *the doctrine of res nullius* and *the prescription doctrine*; *'effectivité'* is used to describe effective control and/or effective occupation.
[80] 'Rockall Q&A: Fishing Dispute between Scotland and Ireland' (n 10).

appearance of the islet on a navigational chart could be around 1550, as 'Rochol'.[81] However, the earliest confirmed appearance of it on a navigational chart was in 1606, under the designation 'Rocol'.[82] The first authentic landing was presumably made by HMS Endymion – a vessel from the British Royal Navy, in 1811 and, since then, the name 'Rockall' has been generally accepted.[83] Why are those historical facts useful for this article? In 2016, the Permanent Court of Arbitration (PCA) decided on a case, the *South China Sea Arbitration.*[84] In this case, the Tribunal distinguishes the notion of 'historic rights' from the one of 'historic title':

> The term 'historic rights' is general in nature and can describe any rights that a state may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. 'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas.[85]

The Tribunal is of the view that historic titles refer to 'claims of sovereignty over maritime areas derived from historical circumstances'.[86] The question at hand is whether Ireland or Scotland could make a claim based on historic fishing rights or historic title. As raised by Kopela, '[d]espite the fact that international courts and tribunals have not accepted the existence of such rights due to lack of evidence, they have not precluded their possibility – though they have applied a high evidentiary threshold'.[87] Accordingly, the possibility for Ireland and Scotland to use those rights as the basis for a claim is not excluded.

The PCA explains that the process for the formation of historic rights 'requires the continuous exercise of the claimed right by the state asserting the claim and acquiescence on the part of other affected states'.[88] The Tribunal continues by stating that '[a]ccordingly, the scope of a

[81] GS Holland and RA Gardiner, 'The First Map of Rockall' (1975) 141 The Geographical Journal 94, 95.
[82] Noone (n 2); Holland and Gardiner (n 81), 95.
[83] ibid 95.
[84] *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* [2016] PCA Case no 2013-19.
[85] ibid [225].
[86] ibid [226].
[87] Sophia Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration' (2017) 48 Ocean Development and International Law 181, 190.
[88] *The South China Sea Arbitration* (n 84) [265].

claim to historic rights depends upon the scope of the acts that are carried out as the exercise of the claimed right'.[89]

For the time being, the strongest possible claim for Ireland to Rockall, and thus to its fishing rights in the 12 nautical miles surrounding it, would be to prove the existence of Irish historic right to fish in these waters.[90] Leonardo Bernard, referring to the *Fisheries Jurisdiction Case*, notes that the requirement needed to establish the existence of historic rights are (i) 'long-established activities' and (ii) 'the continuous exercise of these activities that are recognized by other states', as well as, as mentioned in the *South China Sea Arbitration*, (iii) acquiescence on the part of other affected states.[91] In other words, as the UN Study on Historic Waters explicates, it must be the 'continuous exercise of the claimed right by the state asserting the claim and acquiescence on the part of other affected states'.

First, the activities must be 'long-established'. Both states have been fishing in the waters around the Rockall islet for decades, if not centuries. In fact, 'Irish vessels have operated unhindered in the Rockall zone for many decades fishing haddock, squid, and other species'.[92] Michael Creed, Irish Minister for Agriculture, Food and the Marine stated in June 2019:

> The Tánaiste and I have worked very closely to avoid a situation whereby Irish fishing vessels who have been and continue to fish for haddock, squid and other species in the 12 miles area around Rockall, …[93]

The Minister for Foreign Affairs and Trade, Simon Coveney, added that '[t]he longstanding position of the Irish Government is that Irish vessels are entitled to access to Rockall waters'.[94]

On the other side, British vessels have fished there for decades as well. There are two reasons for this. Firstly, considering that they have included Rockall in Scotland's legislation by the Island of Rockall Act in 1972, they believe that they are sovereign over the rock and thus, that they are legitimately fishing in those waters. Secondly, they trust that they can fish there, as

[89] ibid [266].
[90] Collins (n 18).
[91] *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v Iceland) (merits)* [1974] ICJ Rep 3; Leonardo Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation' (LOSI-KIOST Conference on Securing the Ocean for the Next Generation, May 2012) 4; *The South China Sea Arbitration* (n 84) [265].
[92] Department of Agriculture, Food and the Marine, 'Coveney and Creed Reject Scottish Government's Unilateral Threat of Enforcement Action against Irish Fishing Vessels Fishing Within 12 Miles of Rockall' (Press Release 7 June 2019) <https://www.gov.ie/en/press-release/1cf306-coveney-and-creed-reject-scottish-governments-unilateral-threat-of-e/> accessed 24 March 2022
[93] The Tánaiste referred to at the time was Simon Coveney; ibid.
[94] ibid.

Rockall was included in the British EEZ in 2013.[95] Therefore, both states could argue that their activities around Rockall have been 'long-established'. However, if one considered not only fishing activities but also activities on the rock, Scotland would have more elements to balance its rights with Ireland's rights. Fundamentally, a crucial element in determining whether the activities are 'long-established' is the practice of the states. In what way did they act before the situation became disputed? Should that practice be decisive when a disagreement arises? This is the position defended by the ICJ in the case *Right of Passage over Indian Territory case.*[96] Indeed, the Court stated:

> Where therefore the Court finds a practice clearly established between two states which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.[97]

Second, there should be a continuous exercise of these activities and those should be recognized by other states. Once more, both sides could be defended. Irish vessels, as previously mentioned, have been fishing around Rockall for decades, without the UK prohibiting them to do so. John O'Kane, member of the Greencastle Fishermen's Co-Operative, stated in June 2019 that '[Irish boats] have been fishing there for the last five months this year and for the last 30 years. Our co-op has been in existence for 30 years and during that period of time we have had boats off Rockall every single year'.[98] This certainly amounts to a 'continuous exercise'. During those thirty years, Scotland did not combat those activities. However, the above-mentioned can also be presumed for Scotland's fishing vessels, who have been fishing in those waters for as long as Irish vessels. This is probably the result of the CFP, under which both states might not have felt the need to fight for this rock. Wherefore, under the CFP, the access to EU waters, and to the resources contained in them, was equal to all EU Member states.[99]

Third, other affected states must acquiesce to the historic rights. In the present case, affected states are certainly Ireland and the UK, and additionally Denmark, on behalf of the Faroe

[95] 'Rockall Limits Row' *Fishing News* (18 June 2019) <https://fishingnews.co.uk/news/rockall-limits-row/> accessed 24 March 2022.
[96] *Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 6.
[97] ibid 44.
[98] Andy Strangeway, 'Irish Fishermen Defy Rockall Warning from Scottish Government' *BBC News* (9 June 2019) <https://www.bbc.com/news/uk-scotland-48572774> accessed 24 March 2022.
[99] 'Rockall Q&A: Fishing Dispute between Scotland and Ireland' (n 10).

Islands, as well as Iceland.[100] None of the four states ever really acquiesced to the rights of the others. Nevertheless, in the last half-century, they did not prevent the other states from fishing or exploiting the seabed of the Rockall Plateau. However, it remained an 'extremely live and ongoing dispute'.[101] Once again, the debate amongst legal scholars of the meaning of 'acquiescence' is important. Is a 'mere protest' sufficient or must acquiescence, or rather non-acquiescence, take the form of concrete actions?[102] This article contends that in a case such as this one, in which four states have concurring claims over a rock and its surroundings, it would most likely be impossible, or at least very difficult, to imagine a situation where three of the four states involved would explicitly acquiesce to the fourth state's rights. For this reason, the absence of actions, which would prevent the claimant state from fishing and thus expressing its alleged 'historic right', could amount to acquiescence. Under this view, this condition to historic rights would be fulfilled for both Ireland and Scotland.

According to the UN Study on historic waters, '[t]here is doubt that there is abundant authority for the view that the burden of proof lies upon the claimant state'.[103] Ireland, which would most likely use historic rights as a basis for making a claim to Rockall, would perhaps not necessarily hold the burden of proof. Indeed, it seems unlikely that the UK would base its claim on historic rights, as tribunals have not clearly accepted the existence of such rights.[104] The UK's claims would have noticeably more chance of being successful if they were based on the doctrine of *res nullius* or even on the prescription doctrine. As stated by Dr Harrison, '[i]n order to qualify as a historical right, … it would be incumbent on Ireland to demonstrate that such a practice had endured for a significant period, dating back at least to the UK's claims to establish a territorial sea around Rockall'.[105]

In conclusion, Ireland could have a chance at claiming those historic rights, especially if one follows the position taken by the ICJ in the *Right of Passage over Indian Territory* case, as the practice before the Brexit was that Irish fishing vessels could fish in the territorial sea around Rockall.[106] Indeed, according to some authors, '[a]s such, the strongest argument that Ireland

[100] Derrig (n 14).
[101] Symmons (n 60) 88.
[102] Wouters and Verhoeven (n 30).
[103] United Nations Secretariat, 'Juridical Regime of Historic Waters Including Historic Bays Doc A/CN.4/143' in United Nations, *Yearbook of the International Law Commission Volume II* (United Nations Publications 1962) 22.
[104] Kopela (n 87) 190.
[105] Harrison (n 14).
[106] *Right of Passage over Indian Territory* (n 96).

may seek to rely upon would be a "historical" right to fish in these waters'.[107] However, even if succeeding, some authors and judges believe that '… historic rights claims do not amount to a sovereignty claim.[108] Historic rights merely give the claiming state fishing rights by long usage'.[109] Furthermore, 'an historic rights claim is not exclusive', meaning that a claim based on historic fishing rights would not give Ireland sovereignty over the rock, but only allow Irish vessels to fish in the 12 nautical miles surrounding Rockall, namely its territorial sea.[110] Nevertheless, at the minimum, Scotland could not prohibit Irish fishermen from fishing in the 12 nautical miles belt surrounding the islet.[111]

D CONCLUSION

After the 2019 announcement, made by Scotland's External Affairs Minister, that she would protect the area around Rockall and thus prohibit Irish fishing vessels from fishing there, the decades-long dispute resurfaced. This article assessed the different claims that Ireland and Scotland could raise to defend their side and continue fishing in the 12 nautical miles surrounding the islet.

The first section of this article looked at the possible claims based on customary international law and found three possible approaches to this issue. First, the United Kingdom seems to have made the most claims and above all the most actions to defend its view, namely that it rightfully acquired Rockall in 1955, on the basis that it was before this *terra nullius*. Second, this article further argued that Scotland could try to, if the *res nullius* argument was proven unsuccessful and thus dismissed, use the title by prescription argument. However, this claim seems unlikely to be successful, as Ireland opposed the fact that the rock was under Scottish jurisdiction. Therefore, the possession was neither 'peaceful', nor did Ireland seem to have 'acquiesced to this title'. Third, Ireland could use the persistent objector theory to oppose the two previous Scottish claims, as the Irish Government have repeatedly and firmly objected to the claims made by the UK regarding Rockall.

The second section of this article looked at the possible claims that Ireland and Scotland could make based on the text of treaties. The only LOSC based argument to this dispute could be an 'economic' one, in other words, one based on the economic importance for the region around

[107] Collins (n 18).
[108] See separate opinion of Judge De Castro in *Fisheries Jurisdiction Case* (n 69).
[109] Bernard (n 91) 4.
[110] LOSC (n 7), art 3.
[111] 'Rockall Q&A: Fishing Dispute between Scotland and Ireland' (n 10).

Killybegs to fish in those waters, and thus the need to prevent economic dislocation. However, the relevant provision of the LOSC, article 62(3), concerns the EEZ and not the territorial sea. Yet, the ICJ case law might reflect, at least to some extent, a norm of customary international law and thus there is the possibility that economic dislocation could be expanded to the territorial sea. Furthermore, this article argued that the LFC is not applicable. Finally, the Island of Rockall Act, adopted in 1972, is presumably the most concrete basis to make a claim, as it incorporates the Rockall islet into Scottish jurisdiction. However, this is an instrument of Scottish domestic law, and Ireland is not bound by it in any event.

The final section of this article examined the possibility to base a claim on a historic title, or historic rights. As many authors suggested, as well as, as this article advocates, this option is the only one on which Ireland could rely upon to make a claim.[112] Nevertheless, Scotland could make an identical claim.

As shown throughout this article, the fact that Scotland has raised multiple claims, taken actions on the islet by raising a flag, as well as passed legislation incorporating the Rockall islet within its jurisdiction, tips the scale in its favour. However, Ireland has always opposed such claims, which may give it a slight chance in the case of the two states deciding to go before a dispute settlement mechanism. This is especially true as most of the aforementioned bases to a claim need some kind of acquiescence from the other states in order for all the conditions to be fulfilled.

Unfortunately, if one of the states wants to solve this complex issue in front of a Court, the ICJ would not have jurisdiction. Under article 36(2) of the ICJ Statute, the UK made on the 22nd of February 2017 a declaration recognizing the jurisdiction of the Court as compulsory, except in some cases, such as the case of 'any dispute with the government of any other country which is or has been a Member of the Commonwealth'.[113] Indeed, Ireland was a member of the Commonwealth until its secession in 1949.[114] Therefore, Ireland is a country that has been a Member of the Commonwealth and the ICJ would not be competent to solve this dispute. Thus,

[112] Collins (n 18); Harrison (n 14).
[113] Statute of the International Court of Justice (entered into force 24 October 1945) TS no 993, art 36(2) provides: 'The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court …'; Declarations Recognizing the Jurisdiction of the Court as Compulsory (United Kingdom of Great Britain and Northern Ireland) (adopted 22 February 2017) para 1(ii) <https://www.icj-cij.org/en/declarations/gb> accessed 24 March 2022.
[114] Nicholas Mansergh, 'Ireland: The Republic Outside the Commonwealth' 28 International Affairs 277, 277.

the most likely dispute settlement mechanism would be arbitration.[115] This possibility would mean that both states give their consent, which might be difficult to obtain.

To conclude on this fishing dispute, which may seem difficult considering the fact the two states have been quarrelling for decades over the islet in the North Atlantic Ocean, one possible, and probable, outcome would be that Ireland 'cedes' Rockall to the UK.[116] Interestingly, this almost happened last year.[117] On the 14th of July 2021, Pádraig Mac Lochlainn announced that the Maritime Jurisdiction Bill would formally cede Rockall to Britain.[118] However, during the Dáil Éireann debates, many deputies objected to this. Among other things, Deputy John Brady stated that:

> It is about doing something this state has failed to do, which is to lay claim to a critical piece of our heritage, an important piece of our seas and our territory, namely, Rockall. This is an attempt to disguise the Government's intent to put its 2014 betrayal of Ireland's interests into law under this Bill.[119]

Under the many protests from both the deputies and the Irish people, in the Maritime Jurisdiction Act, adopted on the 22nd of July 2021, no mention of Rockall or any cession of the rock was made.[120] This issue might be brought up again, either in Irish debates or in the case of this issue being taken to international arbitration. It might seem to you that this dispute is a never-ending, decades-lasting, and despairing one, which is, to some extent, not inaccurate. Indeed, even over fifty years ago, politicians realised that Rockall was completely isolated. As a conclusion, one could mention what Lord Kennet declared in 1971, regarding Rockall: '[T]here can be no place more desolate, more despairing, more awful to see in the world.'[121]

[115] Derrig (n 21) 70.
[116] In fact, there are four states which have been quarrelling as Denmark and Iceland also have claims to Rockall.
[117] Collins (n 18).
[118] Dáil Éireann Deb 14 July 2021, vol 1010, col 5 <https://www.oireachtas.ie/en/debates/debate/dail/2021-07-14/30/> accessed 24 March 2022.
[119] ibid.
[120] Maritime Jurisdiction Act 2021.
[121] Collins (n 18).

GOOGLE AND ALPHABET V COMMISSION (GOOGLE SHOPPING) - SHOPPING FOR A NEW *EX-ANTE* APPROACH?

Eoin Jackson*

A INTRODUCTION

This case note will examine the decision of the General Court of the European Union to uphold the finding of the European Commission ('The Commission') that Google had abused its dominant position in the market for online search services within the EU.[1] The decision will be examined in the context of the broader campaign to regulate digital platforms,[2] to assess whether its findings align with the EU's attempts to introduce sector-specific ex ante regulation of 'Big Tech'.[3] This context will be used to demonstrate that the decision represents an important step forward in the effort to introduce and enforce the Digital Markets Act.[4]

B FACTS

In 2017, the Commission fined Google €2.42 billion.[5] This was on the basis that Google had systematically given preferential treatment to its 'Google Shopping' service in search options over that of its competitors.[6] The Commission determined that this self-preferential treatment was in breach of article 102 of the Treaty on the Functioning of the European Union (TFEU),[7] and accordingly calculated a fine using the revenue figures of Google from 2008-2017, when the practice was alleged to have been initiated.[8]

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[1] Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* [2022] OJ C24/25.

[2] Dipayan Ghosh, 'Are we Entering a New Era of Social Media Regulation' *Harvard Business Review* (Brighton, Massachusetts, 14 January 2021).

[3] Eline Chivot, 'The New EU Rulebook for Online Platforms: How to get it right, who will it impact and what else is needed?' (2021) 20(2) European View 121.

[4] European Commission, 'Proposal for a Regulation of The European Parliament and of the Council on Contestable and Fair Markets in The Digital Sector (Digital Markets Act)' COM (2020) 842 final.

[5] *Google Search (Shopping)* (Case AT.39740) Commission Decision C (2017) 4444 final [2018] OJ C 9/11.

[6] Penelope A Bergkamp, 'The European Commission's *Google Shopping* decision: Could bias have anything to do with it?' (2019) 26(4) Maastricht Journal of European and Comparative Law 524.

[7] Agustin Reyna and David Martin, 'Online Gatekeeping and the Google Shopping Antitrust Decision: The Beginning of the End or the End of the Beginning?' (2017) 1(3) European Competition and Regulatory Law Review 204.

[8] Eduardo Aguilera Valdivia, 'The Scope of the "Special Responsibility" upon Vertically Integrated Dominant Firms after the Google Shopping Case' (2018) 41(1) World Competition Law and Economics Review 1.

C DECISION

The General Court largely upheld the decision of the Commission. It found that, while Google's dominant position in the market was not in itself justification for a penalty,[9] the use of algorithms to favour Google's own shopping service 'departed from competition on the merits'.[10] This was identified as being harmful to consumers,[11] with there being no objective justification,[12] such as a potential increase in efficiency gains,[13] that would allow for the practice to be tolerated.[14] The Court did not however recognise that anti-competitive behaviour had occurred in the context of general search services.[15] The scale of the fine was determined to reflect the seriousness of the abuse.[16]

D ANALYSIS

I Digital Jurisprudence for a Digital Economy

The decision should be commended for its recognition of the unique challenges posed by the digital economy for competition authorities.[17] In particular, the Court's recognition of self-preferencing as a potential form of 'leveraging' - a practice whereby an undertaking uses power in one market to strengthen a position in another market,[18] is a much-needed strengthening of article 102's application to digital platforms. This is due to the fact that platforms such as Google command significant leveraging power as a result of their role as intermediaries between various sides of the market.[19] The determination that self-preferencing in this context did not constitute 'competition on the merits' recognises the capacity of algorithms to cause 'abnormal' leveraging of parallel markets.[20] This digitisation of the concept of abuse is a much

[9] *Google Shopping* (n 1) para 160.
[10] ibid para 263.
[11] ibid para 451.
[12] ibid para 572.
[13] ibid para 590.
[14] ibid para 592.
[15] ibid.
[16] ibid para 698.
[17] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzert, 'Competition Policy for the Digital Era' (Publications Office of the European Union 2019).
[18] *Google Shopping* (n 1) 240; Jurian Langer, 'Tying and Bundling as a Leveraging Concern under EC Competition Law' Law' (2009) 32(1) World Competition Law and Economics Review 144.
[19] Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 Yearbook of European Law 448.
[20] *Google Shopping* (n 1) para 616; 'Abuse of Dominance in Digital Markets' OECD (2020) <www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf> accessed 24 March 2022.

needed development in the context of the wider difficulties with regulating the digital economy.[21]

Additionally, the refusal to recognise merchant platforms as a direct competitor of Google represents a vindication of the Commission's definition of the relevant market.[22] While these merchant platforms do provide some form of search engine service, the Court correctly asserts that 'a direct purchase functionality distinguishes merchant platforms from comparison shopping services, from the perspective both of internet users and of sellers'.[23] The distinction made between a general search engine and a merchant platform allows for a narrow definition of particular markets.[24] This is conducive to a strengthening of the Commission's hand when challenging dominant digital platforms,[25] and may encourage further investigation into potential anti-competitive practices embedded within the digital economy.[26]

II The Demise of the Essential Facilities Doctrine

The judgment also represents a shift from the use of the essential facilities doctrine, which has been suggested by some as a key tool in the effort to regulate digital platforms.[27] The *Bronner* case determined that, in order for a service to be deemed an essential facility, access to the service must be 'indispensable' for the competition.[28] Meeting this criteria would have made the Commission's case much more difficult to prove, in that other search engines do at least theoretically provide similar access to that desired by competitors.[29]

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[21] Carmelo Cennamo, 'Competing in Digital Markets: A Platform-Based Perspective' (2021) 35(2) Journal of Academy and Management 265.
[22] *Google Shopping* (n 1) para 52.
[23] ibid para 350.
[24] Florian Wagner-Von Papp, 'Should Google's Secret Sauce Be Organic?' (2015) 16(2) Melbourne Journal of International Law 608.
[25] David Evans and Richard Schmalensee, 'Why Winner-Takes-All Thinking Doesn't Apply to the Platform Economy' *Harvard Business Review* (Brighton, Massachusetts, 4 May 2016).
[26] Francois Aulner and Foo Yun Chee, 'Google loses Challenge against EU Antitrust Ruling, $2.8-bln Fine' *Reuters* (Luxembourg, 10th November 2021). <https://www.reuters.com/technology/eu-court-upholds-eu-antitrust-ruling-against-google-2021-11-10/> accessed 24 March 2022; Doris Mendoza, 'Antitrust in The New Economy Case Google Inc Against Economic Competition on Web' (2016) 18(2) Mexican Law Review 79.
[27] Nikolas Guggenberger, 'Essential Platforms' (2020) 24 Stanford Technology Law Review 237; Chris Riley, 'Unpacking Interoperability in Competition' (2020) 5(1) Journal of Cyber Policy 94.
[28] Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG* [1998] ECR I-07791; Albertina Albors-Llorens, 'The "Essential Facilities" Doctrine in EC Competition Law' (1999) 58(3) Cambridge Law Journal 490.
[29] Marina Lao, 'Networks, Access, and Essential Facilities: From Terminal Railroad to Microsoft' (2009) 62 Southern Methodist University Law Review 557.

To circumvent this, the Court stated that 'not every issue of, or partly of, access, like that in the present case, necessarily means that the conditions set out in the judgment of Bronner relating to the refusal to supply must be applied'.[30] Here, the key issue was the practice of 'leveraging', which the Court regarded as an independent form of abuse that did not need to meet the *Bronner* criteria.[31] This was due to the presence of 'active' positive acts of discrimination in contrast to a 'passive' refusal to provide access.[32] Graef has suggested that there is perhaps a degree of judicial originality being utilized in adopting this distinction.[33] What could be construed as 'active' behaviour could also arguably be viewed as a refusal of Google to grant access to prominent positions within search results. This would render the difference between 'active' and 'passive' behaviour irrelevant, given the issue was fundamentally one of access.[34] When viewed in this light, the *Bronner* criteria would have arguably needed to be applied.[35] A shift from utilizing the essential facilities doctrine in this manner, allowed the Court to find in favour of the Commission, while leaving the door open to the same approach in similar cases involving the digital economy.[36] Viewing leveraging as an independent form of abuse widens the capacity for the Commission to litigate successful cases, given its prevalence in the digital economy.[37] It therefore appears that the Court may have side-stepped the essential facilities doctrine in favour of a more interventionist approach in the context of digital platforms.[38]

It is also interesting to note that, even if the *Bronner* criteria had been applied and Google deemed to be indispensable, the remedy - equal treatment of competitors of its shopping service,[39] would have been the same as in the current judgment. Consequently, there is a risk that a relaxation of the essential facilities doctrine may not be accompanied by appropriate safeguards designed to prevent an overly stringent enforcement of competition policy.[40] The

[30] *Google Shopping* (n 1) para 230.
[31] ibid para 513.
[32] ibid paras 212 and 244.
[33] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) 53(1) Revue juridique Thémis de l'Université de Montréal 33.
[34]Federal Economic Competition Commission, 'Rethinking Competition in the Digital Economy' (1 March 2018).
[35] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Wolters Kluwer 2016).
[36] Angela Daly, 'Beyond "Hipster Antitrust": A critical perspective on the European Commission's Google decision' (2017) 1(3) European Competition and Regulatory Law Review 188.
[37] Daniel Mandrescu, 'Tying and bundling by online platforms – Distinguishing between lawful expansion strategies and anti-competitive practices' (2021) 40 Computer Law and Security Review.
[38] Andrea Renda, 'Searching for harm or harming search? A look at the European Commission's antitrust investigation against Google' (Centre for European Policy Studies, 2015) 118.
[39] *Google Shopping* (n 1) para 592.
[40] Pinar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law' (2017) 2 University of Illinois Journal of Law, Technology and Policy 301.

latter approach could arguably lead to a punishment of 'big' companies simply for expanding in the market as a result of their own success.[41] This is due to the fact a relaxed approach to the essential facilities doctrine could render larger companies, with a wider pool of resources, obligated to grant access to their facilities even where such access is not indispensable for smaller companies to enter the market. Such an approach would represent a significant departure from the traditional principles of European competition law.[42] However, as will be discussed in greater detail below, the case may simply be aligning itself with the legislative reform that is to come.[43]

III Future Consequences - Laying the Foundations for DMA Enforcement?

The Commission is attempting to introduce ex-ante regulation of the digital economy through the passing of the Digital Markets Act (DMA).[44] The DMA will codify several of the approaches taken to the regulation of Google in this instance. For example, the Court recognised that Google occupies a 'super dominant' position in the market.[45] This was a result of the 'very high barriers to entry' to the search engine market.[46] Thus Google 'was under a stronger obligation not to allow its behaviour to impair genuine, undistorted competition on the related market for specialised comparison'.[47] It is noticeable that this concept of super dominance can be linked to the proposal of the DMA to label certain digital service providers as 'gatekeepers'.[48] As with super dominance, a gatekeeper would face additional obligations, though such obligations would be imposed on an ex-ante basis.[49] The Court's recognition of

[41] Renato Nazzini, '*Google* and the (Ever-stretching) Boundaries of Article 102 TFEU' (2021) 6(5) Journal of European Competition Law and Practice 301.
[42] Geoffrey Manne, 'Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google' (2011) 34(1) Harvard Journal of Law and Public Policy 171.
[43] Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms' (2020) Robert Schuman Centre for Advanced Studies Research Paper 2020/14.
[44] European Commission (n 4).
[45] *Google Shopping* (n 1) para 182.
[46] Ibid; Wolf Sauter, 'A Duty of Care to Prevent Online Exploitation of Consumers? Digital Dominance and Special Responsibility in EU Competition Law' (2020) 8(2) Journal of Antitrust Enforcement 406.
[47] *Google Shopping* (n 1) para 183; Munyai Phumudzo, 'Competition Law and Corporate Social Responsibility: A Review of The Special Responsibility of Dominant Firms in Competition Law' (2020) 53(1) De Jure Law Journal 267.
[48] European Commission (n 4), articles 5 and 6.
[49] William Leslie, 'The European Commission's Digital Markets Act Proposal: Regulating Systemically important Digital Platforms' (*Linklaters,* 18 December 2021) <https://www.linklaters.com/en/insights/publications/2020/december/european-commissions-digital-markets-act-proposal-regulating-systemically-important-digital> accessed 24 March 2022.

this concept will arguably bolster efforts to formalise the designation of certain platforms as gatekeepers via the DMA.[50]

In this regard, particular attention should be drawn to the Court's conclusion that the Commission did not have to show that Google's behaviour had actual anti-competitive results. Instead 'at least potential' evidence of anti-competitive effects on the market was all that was required to be demonstrated by the Commission.[51] This focus on the hypothetical is controversial.[52] It could potentially stifle innovation, should firms feel they may face significant penalties for behaviour that might be considered anti-competitive.[53] It also demonstrates a shift towards an ex ante approach in the sense that evidence does not need to be provided once such a practice has been identified..[54] It is noticeable that this would align to the broader principles of the DMA,[55] which intend to allow for focus on the potential negative effects of gatekeepers.[56] The challenge for the Court will therefore be balancing the uncertainty caused by allowing 'hypothetical' evidence with the positive competitive outcomes that could occur from pre-empting anti-competitive practices.[57]

More broadly, there is the question of whether the judgment renders all forms of self-preferencing prohibited by article 102. Some commentators have argued that the Court's reliance on the super dominant position of Google means that other firms may not experience the same prohibition, provided they occupy an 'ordinary' position of dominance.[58] This is likely to be correct in that an extreme application of this prohibition could prevent smaller firms from engaging in competition on the merits. For example, an extreme application would make it difficult for a smaller tech company to develop algorithms that favour their own products,

[50] Pieter Van Cleynebrugel, 'Digital Markets Act: beware of procedural fairness and judicial review booby-traps!' (*European Law Blog* , 24 June 2021) <https://europeanlawblog.eu/2021/06/24/digital-markets-act-beware-of-procedural-fairness-and-judicial-review-booby-traps/> accessed 24 March 2022.
[51] *Google Shopping* (n 1) para 441, 459.
[52] Ibid;Wolfgang Kerber and Heike Schweitzer, 'Interoperability in the Digital Economy' (2017) 8(1) Journal of Intellectual Property, Information Technology and E-Commerce Law 39.
[53] Rob Friedan, 'Ex Ante Versus Ex Post Approaches to Network Neutrality: A Comparative Assessment' (2015) 30(2) Berkeley Technology Law Journal 1561.
[54]Ian Dobbs, 'Defining Markets for Ex Ante Regulation using the Hypothetical Monopoly Test' (2006) 13(1) International Journal of the Economics of Business 83.
[55] Luís Cabral and others, *The EU Digital Markets Act: A Report from a Panel of Economic Experts* (Publications Office of the European Union, 2021).
[56] Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (2021) 12(7) Journal of European Competition Law and Practice 529.
[57] Christian Ahlborn, 'The Microsoft judgment and its Implications for Competition Policy Towards Dominant Firms in Europe' (2009) 75(3) Antitrust Law Journal 887.
[58] 'The Google Shopping European Court judgment and its Wider Implications' *Clifford Chance Policy Brief* (November 2021) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/11/google-shopping-client-alerter.pdf> accessed 24 March 2022.

even where such algorithms challenge the dominance of existing gatekeepers. However, it should be noted that the DMA proposes that gatekeepers 'should not engage in preferential or differential treatment'.[59] Thus the prohibition itself is gaining greater prominence as the EU moves towards a structuralist approach to the regulation of the digital economy.[60] The case may therefore serve as a political tool for the justification of such a prohibition, though it is likely future jurisprudence will be required to assess how far-reaching the scope of this prohibition will be.[61]

E CONCLUSION

In conclusion, the *Google* judgment represents a progressive outcome within the current parameters of EU competition regulation. However, it also represents an interesting departure from the essential facilities doctrine that could have harmful ramifications for innovation, should appropriate safeguards not be implemented. Whether these safeguards will be put in place will be dependent upon the final version of the DMA. The ruling lays the foundation for the enforcement of the DMA and is conducive to sector-specific ex-ante regulation of the digital economy.

[59] European Commission (n 4), article 49.
[60] Lina Khan, 'The Separation of Platforms and Commerce' (2019) 119(4) Columbia Law Review 973.
[61] Joyce Verhaert, 'The Challenges involved with the Application of Article 102 TFEU to the Market for Search Engines as part of the New Economy' (Master thesis, University of Leuven 2013) <https://deliverypdf.ssrn.com/delivery.php?ID=338006067086065011012005108076104010056016063065052016092088101076070017014026001097026052001024039049007019028126000072101010051040007073093007072021096013110100066046086071092108080014015110086083095030090091100114005109075072028071087085022090066068&EXT=pdf&INDEX=TRUE> accessed 24 March 2022.