The Position of International Law in Irish Municipal Law (I)

——The Reception of International Law in the Republic of Ireland——*

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"The generally recognised principles of international law are……carried into Irish national law to the extent set out in the provisions of Article 29.3 of the Constitution. By that provision Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states. The constitutional provision is in terms an express commitment on the part of the State. The courts can intervene to set aside any executive or legislative act which contravenes this or any other constitutional provision" (the Irish members of the Law Enforcement Commission, 1974).

It is admitted *prima facie* that this statement of the Irish Law Enforcement Commission is concerned with the position of international law in municipal law, especially with the interpretation of Article 29.3 of the Irish Constitution, in which it is provided that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States." Therefore, in the first place, it will be attempted to clarify Irish practice concerning the reception of international law into Irish municipal law by reference to both English and Irish decided cases. And then the statement will be critically evaluated.

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In English law,[1] an English judge is obliged to decide according to a statute or a rule of the common law even if they contradict an established rule of customary international law. But if English law is silent, i. e. if there is neither English statute nor rule of common law to be applied to the case concerned, an established rule of customary international law must be applied in English courts. This principle is established in *Triquet* v. *Bath* and *Buvot* v. *Barbuit* cases,[2] and it is usually described as the "incorporation" principle relating to the reception of customary international law. Although in *R.* v. *Keyn* (the *Franconia* case) the rule of jurisdiction in the three mile belt of territorial sea was not applied by Lord Cockburn in spite of the silence of English law, this does not affect the principle of incorporation. As H. Lauterpacht put it,[3] the main issue in the case was the existence and the extent of a customary international law relating to the territorial sea. The practical significance of this case is that, in case a rule of customary international law concerned is vague and equivocal, the silence of English law does not allow an English judge to apply that obscure rule of customary international law.

In contrast to the attitude of English law towards customary international law, its attitude towards treaties is narrow-minded and awkward. A treaty becomes effective in international law when it is ratified, but it has no effects in English law until an enabling Act of Parliament is passed to give effect to it.[4] This is so because in the United Kingdom the power to make or ratify treaties belongs to the Queen, acting on the advice of her ministers; Parliament plays no part in the making of treaties. And so, if a treaty were automatically effective in English law, the Queen could change English law

without the consent of Parliament; This would be contrary to the principle of English constitutional law. The principle that an enabling Act of Parliament must be passed to give effect to a treaty is generally referred to as the "transformation" principle concerning the reception of treaties. When the old rule of 'suspension of an alien enemy's rights of action during the war' was considered by the Court of Appeal (in *Porter* v. *Freudenberg*), it was suggested that a law of war like the Hague Regulations could be applied by English courts without an enabling Act of Parliament.[5] Like the case of prize courts, this category of law is also one of the exceptions to the principle that treaties have no effect in English law without enabling Acts of Parliament.

That is the gist of the attitudes of English law to customary and conventional international law. Then is it the case that Irish law also takes the same attitude towards international law? To use the way J. B. McCartney built up his argument,[6] 'what is the position in Ireland? Are these international provisions (i. e. The Universal Declaration of Human Rights, 1948; The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, etc.) part of the municipal law, either (a) because they are received into municipal law by virtue of a constitutional or general law provision, or (b) because being universally held concepts, they are already part of the common law?' It seems that Sir Humphrey Waldock takes a position to regard the rules of the European Convention on Human Rights as crystallised into part of customary international law because of the general adherence to these rules and the incorporation of such rules into municipal or constitutional laws,[7] but as far as the reception of these rules into domestic law is concerned, it is not so simple a question. It appears that McCartney

himself thinks of the judgment in re *Ó Laighléis* as decisive in this matter.

In re *Ó Laighléis*,(a) it is established that the conventional (treaty) rules, in principle, cannot of itself be applied in Irish courts. The case was concerned with the question whether or not the preventive detention of Ó Laighléis under the Offences Against the State Act (1939; Amendment 1940) was unlawful. When Judge Davitt of the High Court decided against the applicability of the 1950 European Convention on Human Rights in Irish courts, he made clear the position of Irish law.(8) In the first place, the rules of international law are not part of Irish law except in so far as they have been made so by legislation, judicial decision, or established usage (*R.* v. *Keyn* [Davitt's interpretation of this precedent is dubious, though; see above p. 96] and Article 29.6 of the Irish Constitution). It is quite clear that the Convention, even if ratified, cannot by itself in any way qualify or affect Irish domestic legislation. Secondly, where there is an irreconcilable conflict between an Irish statute and the principles of international law or the provisions of an international convention, the Irish courts administering Irish law must give effect to the statute.

This basic position of Irish law towards international law might be considered to be necessary consequence of the interpretation of Article 15.2.1°, Irish Constitution, in which it is provided that 'the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.' Without such an attitude towards international law, another legislative power contrary to the Constitution would be given to the Executive Government. That is why the Irish courts attach importance to Article 15.2.1°, Irish Constitution. After

all, to answer the question which McCartney formulated, it may be said the position in Ireland is that a conventional international law like the European Convention on Human Rights, even if ratified, is not *ipso facto* part of the Irish municipal law. It is not generally received into municipal law by virtue of provision of the Irish Constitution. It has not yet become part of the common law as a universally held concept. Both customary and conventional international laws can be part of Irish law only when they are determined so by some proper domestic authority. Customary international law may be applied in Irish courts only when it has become a rule of common law. Conventional international law may become part of domestic law of Ireland only when it is determined so by the Oireachtas. That is to say, in Irish law, unlike English law, the principle of "incorporation" concerning the reception of customary international law into domestic law is, in theory, renounced, and the principle of "transformation" prevails. But it seems that, in practice, there is no difference between Irish law and English law attitudes, for English courts tend to look to English judgments as the main evidence of customary international law, and so practice approximates to the "tranasformation" theory,(9) i. e. to the Irish practice.

Another point relevant to the reception of international law is involved in the *Ó Laighléis* case. In the Supreme Court, it is newly argued, among others, for Ó Laighléis that Article 29.3 of the Irish Constitution provides that the State in its external relations accepts the generally recognised principles of international law, and so a breach by the Government of an international convention such as the European Convention on Human Rights would constitute a breach of that article of the Constitution.(10) The judgment of the Supreme Court on this argument is as follows: "……[Clause] 3 of

Article 29 of the Constitution clearly refer[s] only to relations between states and confer[s] on rights no individuals;"[11] That is, Article 29.3 is surely significant as practice for international law but less significant for Irish domestic law. It might be looked upon as a sort of commitment or declaration towards other States.

This construction of Article 29.3 of the Constitution is supprted by Judge Davitt and Judge Henchy of the High Court in *the State (Jennings)* v. *Furlong, Governor of Mountjoy Prison.*[12] (b) The issue of the case is related to repugnancy of Part III of the Extradition Act (1965) to Article 29.3 of the Irish Constitution. For the prosecutor Jennings, it is argued that, since Part III (concerning the United Kingdom) of the Act does not include the "rule of speciality" which is provided in Part II (concerning the other States except the United Kingdom) of the same Act, it is repugnant to Article 29.3 of the Constitution and so it is null and void. The rule (or principle) of speciality is defined by D. P. O'Connell as 'A rule according to which a person has been extradited may not, without the consent of the requisitioned State, try a person extradited save for the offence for which he was extradited.[13] Judge Davitt observes on this point that "the principle of speciality had its origin……in extradition treaties and international conventions. It is not the product of the growth of customary international law. The right to decide to what alleged offenders this state will or will not give asylum is……an adjunct of national sovereignty and independence and is properly the subject of domestic legislation."[13]。 That is, the rule is not customary international law, and so the State's power as to extradition is not generally limited. Although Judge Davitt is of the same opinion upon the interpretation of Article 29.3 of the Constitution as in the *Ó Laighléis* case, he concludes in the case before him that Part III of

the Act is not repugnant to that Article because Part III does not purport to deal with the conduct of this state towards the United Kingdom, but it intends to deal with how certain authorities in this state will treat certain persons in respect of whom warrants have been issued by judicial authorities in the United Kingdom.[14]

Judge Henchy also considers that Article 29. 3 confers no rights upon individuals. According to him,[15] even if such construction of Article 29. 3 were incorrect, the rule of speciality should be proved by the prosecutor to be one of the generally recognised principles of international law, and Part III of the Act should be proved repugnant to it. But the prosecutor did not succeed to do so. As D. P. O' Connell pointed out,[16] it is safely believed that, although many extradition treaties embody that rule, the basis of the rule is the interest of the extraditing State which it can waive, and that the accused himself had no rights in the matter. It would seem that O'Connell regards the basis of the principle as comity. Moreover, Judge Henchy determines that Article 29. 3 was not enacted, and is not to be interpreted in Irish courts, as a statement of the absolute restriction of the legislative powers of the State by the generally recognised principles of international law because, as Irish version makes clear, Article 29. 3 merely provides that Ireland accepts the generally recognised principles of international law as a guide (*ina dtreoir*) in its relations with other states.[17]

In some other Irish cases before the *Ó Laighléis* and *the State* (*Jennings*) v. *Furlong* cases, interpretation of Article 29. 3 of the Irish Constitution was either not clearly put forward or misleading. *The State* (*Duggan*) v. *Tapley*[c] is concerned with the question [similar to that in *the State* (*Jennings*) v. *Furlong*] whether or not Section 29 of the Petty Sessions (Ireland) Act, 1851, is contrary to Article 29 of

the Irish Constitution (1937). Judge Gavan Duffy of the High Court, first of all, considers what is the test of inconsistency between the Act and the Constitution, and he regards it as convenient to set out the proposition that, if Article 29 of the Constitution was to cover the whole field of international relations, i. e. if it were exhaustive, then Section 29 of the Petty Sessiosn Act would be invalid, and that, if the former were not exhaustive, then the latter would not be invalid.(18) In consequence of the consideration from the view point of this test, Juge G. Duffy decides that Article 29 is not exhaustive, and that Section 29 of the Petty Sessions Act is not repugnant to Article 29 because that Article was not purported to supersede the Act concerned. He does not seem to have exactly interpreted Article 29 of the Constitution, with the result tha tthe meaning of that Article, especially its Clause 3, remains obscure. On the other hand, it is again argued in the Supreme Court for Duggan that Article 29. 3 of the Constitution confers the right on individuals to plead the generally recognised principles of international law in Irish courts, but Judge Maguire does not directly answer that argument and emphasises that the principle of non-extradition of political criminals is not the generally recognised principle of international law. It would seem to me that it would suffice to say that the crime concerned belongs to ordinary, extraditable crimes. (To be continued.)

NOTES ON IRISH CASES

(a) 'In re *Ó Laighléis,' The Irish Reports* [1960] pp. 93-135.

The applicant, Ó Laighléis, was arrested on the 11th July, 1957, in pursuance of a warrant issued under s. 30 of the Offences Against the State Act, 1939, and taken to, and detained in, the Bridewell. The said section authorised the detention for twenty-

four hours of a person arrested under its provisions, but provided that he could be detained for a further twenty-four hours if an officer of the Gárda Síochána (the police) not below the rank of Chief Superintendent so directed. On the 12th July, 1957, a Chief Superintendent directed the applicant's detention for a further period of twety-four hours expiring at 7: 45 p. m. on the 13th July, 1957. Early on the morning of the 13th July, 1957, the applicant was taken to Mountjoy prison, outside which a lorry was waiting and into which he was transferred and driven to the Military Detention Barracks at the Curragh, Co. Kildare. At about 11:00 a. m. he was handed the warrant of the Minister for Justice, dated the 12th July, 1957, made under s. 4 of the Offences Against the State (Amendment) Act, 1940, and in the warrant the Minister gave his opinion that the applicant was engaged in activities which, in his opinion, were prejudicial to the security of the State and ordered the arrest and detention of the applicant under s. 4 of the Act of 1940. The applicant, at the same time, was also given a copy of s. 8 of the Act of 1940, which informed him of his right to have the continuation of his detention inquired into by a commission appointed by the Government. The applicant, by his solicitor, on the 8th September, 1957, applied in writing to the Secretary to the Government to have his detention inquired into by the commission. The commission sat on the 17th September, 1957, and ruled that they had a discretion whether to sit *in camera* or in public and that they were not satisfied that they had power to take evidence on oath. They ruled that the proceedings should be held *in camera*. The commission further ruled that they were not bound by the rules of evidence; that they were not a judicial body; they would not divest themselves

of a file of papers marked "Secret and confidential" furnished to them and would, in all probability, read the file; that the commission reserved the right to receive evidence and documents without disclosing such evidence or the contents of such documents to the applicant or his legal advisers, and, also, to act on evidence which was undisclosed to the applicant or his legal advisers.

The commission stated that there was no covering letter to explain the origin of the file marked "Secret and confidential"; that the file contained, *inter alia*, carbon copies of certain documents, the originals of which were not attached; unsigned and anonymous reports from unspecified persons or undefined bodies, and at least one report or letter from the "Special Branch" of the Gárda Síochána, Dublin Castle, which was unsigned.

The applicant obtained in the High Court a conditional order of *habeas corpus* on the 18th September, 1957. On the 30th September, 1957, he served a notice of motion to have the said conditional order made absolute notwithstanding cause shown, in which he contended, *inter alia*, that his detention was unlawful as it contravened the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, to which the State was a party, and by which the State, it was claimed, was bound.

Held by the Supreme Court (Maguire C. J., Lavery, Kingsmill Moore, O'Daly and Maguire JJ.) affirming the High Court:

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1. The Convention of Human Rights and Fundamental Freedoms was not part of the domestic law of the State and, under Article 29 of the Constitution, it could not be so.

2. The Court could not accept that the primacy of domestic legislation was displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms, nor was the executive in the domestic forum in any way estopped from relying on the domestic law.

3. Sect. 3 of the Offences Against the State (Amendment) Act, 1940, clearly authorised the making of a proclamation if and when the Government considered such a course necessary, and the proclamation made by the Government was, therefore, in accordance with law.

4. The applicant was not entitled to be released from custody after the expiration of the forty-eight hours authorised by s. 30 of the Offences Against the State Act, 1939, as before that forty-eight hours had expired he was lawfully detained in pursuance of the Minister's warrant under s. 4 of the Offences Against the State (Amendment) Act, 1940.

Accordingly, the applicant's appeal failed; the cause shown was allowed and the conditional order of *habeas corpus* was discharged.

(b) 'The State (Jennings) v. Furlong, Governor of Mountjoy Prison,' The Irish Reports (1966) pp. 183—191.

Pursuant to the provisions contained in part III of the Extradition Act, 1965, the Prosecutor, P, S. Jennings, was arrested and remanded in custody in Ireland on foot of a warrant which had been issued by a judicial authority in England for the purpose of having the prosecutor conveyed to that country. The prosecutor obtained a conditional order of *habeas corpus* on the ground, in effect, that Part III of the said Act was repugnant to the terms of section 3 of Article 29 of the Constitution as that

Part of the Act did not implement a generally recognised principle of international law, namely, the rule of speciality. The prosecutor applied to the High Court for an order making the conditional order absolute notwithstanding the cause shown by the respondents. At the hearing of that application it was submitted on behalf of the prosecutor that the rule of speciality was a generally recognised principle of international law and, as such, was accepted in Ireland by the express terms of section 3 of Article 29 of the Constitution as a rule of conduct in Ireland's relations with other states and that, accordingly, the failure of Part III of the Act to implement that rule rendered the provisions of that Part of the Act repugnant to the terms of section 3 of Article 29 of the Constitution.

Held by the High Court (Davitt P., Teevan and Henchy JJ.), that even if it be assumed that the rule of speciality (as stated in Article 14 of the European Convenion on Extradition) is a generally recognised principle of international law, the ommission from the enactments contained in Part III of the Extradition Act, 1965, of a provision giving effect to that rule does not make those enactments repugnant to the terms of section 3 of Article 29 of the Constitution since that rule does not form part of the domestic law of Ireland and the terms of section 3 of the said Article do not confer any rights upon individuals.

In re Ó Laighléis, [1960] *I. R.* applied.

Accordingly, the cause shown against the conditional order was allowed and the said order was discharged.

(c) 'The State (Duggan) v. Tapley,' *The Irish Reports* [1952] pp. 62–85.

Sect. 29 of the Petty Sessions (Ireland) Act, 1851, as adapted by the Petty Sessions (Ireland) Act, 1851, Adaptation Order, 1938, provides *inter alia* that whenever any person against whom any warrant shall be issued by any Justice in England for any crime or offence, shall reside or be in Ireland, it shall be lawful for the Commissioner or a Deputy Commissioner of the Gárda Síochána or for any Justice (in Ireland) to endorse the warrant authorising its execution within his jurisdiction.

On the 28th October, 1950, the prosecutor, J. J. Duggan, was taken into custody by a member of the Gárda Síochána on a warrant issued by a magistrate of the London Metropolitan Police Courts and duly endorsed for execution in Ireland by a Deputy Commissioner of the Gárda Síochána. The prosecutor was brought to, and detained in, the Bridewell, in Dublin, for the purpose of being handed over to the British police authorities. The prosecutor obtained a conditional order of *habeas corpus ad subjiciendum*, directed to the Station Sergeant of the Bridewell, and, on the application to make absolute the said conditional order, it was

Held by the Supreme Court (affirming the order of the Hign Court) that the cause shown should be allowed and the conditional order discharged.

Held further, by the Supreme Court, that there is no generally recognised principle of internationl law which forbids the surrender in accordnce with the Petty Sessions (Ireland) Act, 1851, s. 29, to Great Britain of persons, whether they are Irish citizens or others, to answer a charge of a criminal offence.

Held further, by the Supreme Court, that reciprocity is not a condition of a valid law of extradition and the operation of s. 29 of the Petty Sessions (Ireland) Act, 1851, is not dependent on

the existence of similar legislation in Great Britain.

CONSTITUTION OF IRELAND (extracts)

(Enacted by the People 1st July, 1937. In operation as from 29th December, 1937.)

THE NATION.

Article 1.

The Irish nation hereby affirms its inalienble, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.

Article 2.

The national territory consists of the whole island of Ireland, its islands and the territorial seas.

Article 3.

Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliamcnt shall have the like area and extent of application as the laws of Saorstát Èireann and the like extra-territorial effect.

THE STATE.

Article 4.

The name of the State is Éire, or in the English language, *Ireland.*

THE NATIONAL PARLIAMENT.

Constitution and Powers.

Article 15.

1. 1° The National Parliament shall be called and known, and is in this Constitution generally referred to, as the Oireachtas.

2° The Oireachtas shall consist of the President and two Houses, viz.: a House of Representatives to be called Dáil Éireann and a Senate to be called Seanad Èireann.

3° The Houses of the Oireachtas shall sit in or near the City of Dublin or in such other place as they may from time to time determine.

2. 1° The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

Reference of Bills to the Supreme Court.

Article 26.

This Article applies to any Bill passed or deemed to have been passed by both Houses of the Oireachtas other than a Money Bill, or a Bill expressed to be a Bill containing a proposal to amend the Constituton, or a Bill the time for the consideration of which by Seanad Éireann shall have been abridged under Article 24 of this Constitution.

1. 1° The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.

2° Every such reference shall be made not later than the seventh day after the date on which such Bill shall have been presented by the Taoiseach (= Prime Minister) to the President for his signature.

3° The President shall not sign any Bill the subject of a reference to the Supreme Court under this Article pending the pronouncement of the decision of the Court.

2. 1° The Supreme Court consisting of not less than five judges shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.

2° The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.

3. 1° In every case in which the Supreme Court decides that any provision of a Bill the subject of a reference to the Supreme Court under this Article

is repugnant to this Constitution or to any provision thereof, the President shall decline to sign such Bill.

2° If, in the case of a Bill to which Aricle 27 of this Constitution applies, a petition has been addressed to the President under that Article, that Article shall be complied with.

3° In every other case the President shall sign the Bill as soon as may be after the date on which the decision of the Supreme Court shall have been pronounced.

INTERNATIONAL RELATIONS.

Article 29.

1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.
2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.
3. Ireland accepts the generally recognised principles of international law as its rule rule of conduct in its relations with other States.
4. 1° The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.

2° For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.

3° The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.

5. 1° Every international agreement to which the State becomes a party shall be laid before Dáil Éireann,

2° The State shall not be bound by any international agreement involving a charge upon public funds unless the terns of the agreement shall have been approved by Dáil Èireann.

3° This section shall not apply to agreements or conventions of a technical and administrative character.

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

NOTES

(1) p. 66 Notes, D. J. Harris, *Cases and Materials on International Law* (2 nd ed.)

(2) Lord Talbot declared in the *Buvot v. Barbuit* that "the law of nations, in its full extent was part of the law of England."

(3) H. Lauterpacht, *Private Law Sources and Analogies of International Law,* p. 76 note.

(4) M. Akehurst, *A Modern Introduction to International Law,* (2 nd ed.) p. 64.

(5) Harris, *op. cit.* p. 76. Notes 2 ; Akehurst, *op. cit.* p. 63.

(6) J. B. McCartney, "Strike Law and the Constitution," *The Irish Jurist,* [1964] p. 60-61.

(7) *ibid.* p. 61 note (ii).

(8) 'In re Ó Laighléis,' *The Irish Reports* [1960] p. 103.

(9) Akehurst, *op. cit.* p. 65.

(10) *The Irish Reports* [1960] p. 112.

(11) *ibid.* p. 124.

(12) 'The State (Jennings) v. Furlong, Governor of Mountjoy Prison,' *The Irish Reports* [1966] p. 186.

(13) D. P. O'Connell, *International Law for Students,* p. 294.

(13)° *The Irish Reports* [1966] pp. 185-186.

(14) *ibid.* p. 187.

(15) *ibid.* p. 190.

(16) O'Connell, *op. cit.* p. 294.

(17) *The Irish Reports* [1966] p. 190.

(18) 'The State (Duggan) v. Tapley,' *The Irish Reports* [1952] p. 67.