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Résumé de l'article

Lorsqu'un tribunal international décide de garder certaines informations confidentielles et ordonne une interdiction de publication et de publicité, doit-il obéir aux impératifs de nécessité et de proportionnalité des restrictions imposées? Ces impératifs ont été établis par les différentes conventions relatives aux droits de la personne, ainsi que par la jurisprudence des différentes juridictions et organes des droits de la personne. Toutefois, pour l'évaluation des conditions de nécessité et de proportionnalité, les États disposent d'une certaine marge d'appréciation. Les tribunaux pénaux internationaux pourraient invoquer cette doctrine pour les mêmes raisons. Cet article explore donc d'abord la théorie de la marge d'appréciation reconnue aux États lors de l'évaluation d'une situation avant d'opérer une restriction de la liberté d'expression. Il expose ses justifications, les critiques qui lui ont été adressées et son champ d'application. Il est ainsi apparu qu'il s'agit d'une notion bien établie et reconnue, malgré ses inconvénients. La jurisprudence pertinente a également été étudiée afin de dégager une théorie quant à l'extension de la doctrine de la marge d'appréciation à la justice internationale. La recherche n'a pas abouti à un résultat concluant. Il y aurait peut-être un vide juridique à ce niveau-là. En tout état de cause, il semblerait que le droit international n'offre pas de protection aux droits des individus devant les juridictions pénales internationales. Le seul recours admis est de faire appel d'une décision jugée abusive devant le même tribunal. Il est clair que les mécanismes de limitation et d'équilibre des pouvoirs ne sont pas disponibles pour les organes de justice internationale pénale. Il existe des procédures internes qui permettraient aux individus de se protéger, et même de limiter les abus des États, ce qui n'est point le cas de la justice internationale. Ceci expliquerait peut-être le malaise vis-à-vis de la justice pénale internationale, malgré le soulagement de voir les crimes internationaux poursuivis et punis.

FREEDOM OF EXPRESSION AND THE “MARGIN OF APPRECIATION” OR “MARGIN OF DISCRETION” DOCTRINE

*Marie Ghantous**

When an international court decides to keep certain information confidential and orders a ban of any publicity upon them, does it have to abide by the requirements of necessity and proportionality? These requirements have been established by the different human rights conventions and by the jurisprudence of the human rights courts, and human rights bodies. However, for the evaluation of the requirements of necessity and proportionality, states dispose of certain margin of appreciation. International criminal courts might invoke the margin of appreciation doctrine for the same reasons. This paper explores the doctrine of the margin of appreciation recognized to states while assessing a situation before curtailing freedom of expression. After exploring the margin of appreciation doctrine, its justification, the criticism that it faces and the scope of its application, it appeared that it is a well-established and well-accepted doctrine, despite its disadvantages. The relevant case law was then studied in an attempt to come up with a theory concerning its extension to international criminal courts. However, the studied literature or case law was inconclusive. There could be a legal gap in this field. In any case, it seems that international law offers no protection of individuals' rights at this level in particular. The only recourse open is an appeal, but before the same court. It is clear that checks and balance procedures are not available in what concerns international criminal courts. If a state has a margin of discretion, at least we know that internal remedies and procedures are available, and that they hinder abuse attempts, which is not the case in international criminal courts. This is perhaps a weakness that makes peoples rather uncomfortable about international criminal justice despite the huge relief to see international crimes tried and punished.

Lorsqu'un tribunal international décide de garder certaines informations confidentielles et ordonne une interdiction de publication et de publicité, doit-il obéir aux impératifs de nécessité et de proportionnalité des restrictions imposées? Ces impératifs ont été établis par les différentes conventions relatives aux droits de la personne, ainsi que par la jurisprudence des différentes juridictions et organes des droits de la personne. Toutefois, pour l'évaluation des conditions de nécessité et de proportionnalité, les États disposent d'une certaine marge d'appréciation. Les tribunaux pénaux internationaux pourraient invoquer cette doctrine pour les mêmes raisons. Cet article explore donc d'abord la théorie de la marge d'appréciation reconnue aux États lors de l'évaluation d'une situation avant d'opérer une restriction de la liberté d'expression. Il expose ses justifications, les critiques qui lui ont été adressées et son champ d'application. Il est ainsi apparu qu'il s'agit d'une notion bien établie et reconnue, malgré ses inconvénients. La jurisprudence pertinente a également été étudiée afin de dégager une théorie quant à l'extension de la doctrine de la marge d'appréciation à la justice internationale. La recherche n'a pas abouti à un résultat concluant. Il y aurait peut-être un vide juridique à ce niveau-là. En tout état de cause, il semblerait que le droit international n'offre pas de protection aux droits des individus devant les juridictions pénales internationales. Le seul recours admis est de faire appel d'une décision jugée abusive devant le même tribunal. Il est clair que les mécanismes de limitation et d'équilibre des pouvoirs ne sont pas disponibles pour les organes de justice internationale pénale. Il existe des procédures internes qui permettraient aux individus de se protéger, et même de limiter les abus des États, ce qui n'est point le cas de la justice internationale. Ceci expliquerait peut-être le malaise vis-à-vis de la justice pénale internationale, malgré le soulagement de voir les crimes internationaux poursuivis et punis.

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Cuando un tribunal internacional decide mantener la confidencialidad de cierta información y ordena la prohibición de publicarla, ¿debe cumplir con los requisitos de necesidad y proporcionalidad? Estos requisitos han sido establecidos por las diferentes convenciones de derechos humanos (DDHH) y por la jurisprudencia de los tribunales y órganos de DDHH. Sin embargo, para la evaluación de los requisitos de necesidad y proporcionalidad, los Estados disponen de cierto margen de apreciación. Los tribunales penales internacionales pueden invocar dicha doctrina por las mismas razones. Este artículo explora primero la teoría del margen de apreciación de la cual disponen los Estados para evaluar una situación antes de restringir el derecho a la libertad de expresión. Se exponen sus justificaciones, las críticas que le han sido dirigidas y el alcance de su aplicación. Dicha exposición revela que el margen de apreciación es una doctrina bien establecida y reconocida, a pesar de sus desventajas. Segundo, se estudia la jurisprudencia pertinente con el fin de elaborar una teoría de la extensión del margen de apreciación a la justicia internacional. Sin embargo, dicha investigación no es concluyente. Puede ser que exista un vacío jurídico en este campo. En todo caso, pareciera que el derecho internacional no protege los derechos individuales ante los tribunales penales internacionales. El único recurso posible es apelar una decisión considerada abusiva ante el mismo tribunal. Queda claro que los mecanismos de control y equilibrio no están disponibles en lo que concierne a los tribunales penales internacionales. Si bien existen recursos internos que permiten a los individuos protegerse y limitar los abusos estatales, lo mismo no es cierto en cuanto a la justicia internacional. Quizá esto explica el malestar hacia la justicia penal internacional, a pesar del gran alivio de ver los crímenes internacionales juzgados y castigados.

The term *Margin of Appreciation* cannot be found in any human rights international instruments. It is a judge-made doctrine taken from domestic civil systems such as the French *Conseil d'État* which uses the term *marge d'appréciation*, or the German theory of administrative discretion *Ermessensspielraum*.¹

The origins of the *Margin of Appreciation* doctrine can be traced back to the earliest days of the *European Convention* mechanism, and more precisely to the 1956 inter-State case taken by Greece against the United Kingdom over the troubled situation on the island of Cyprus.² The European Commission of Human Rights allowed to the colonial Government (of Cyprus) a certain measure of discretion to decide on the state of emergency.³

The existence of a *Margin of Appreciation* doctrine, its nature, its scope and its very content, still remain a controversial issue. And as professor Canizzaro says, "The very notion of discretion is not easily reconciled with the existence of international obligations, which, by nature, are designed to curtail the otherwise unfettered freedom of States to determine and to implement their course of action."⁴

However, this doctrine seems well integrated in certain sectors of international justice. The doctrine was first established by the European Court of Human Rights, and was shortly after being applied by the European Court of Justice, the World Trade Organization Dispute Settlement Body, and by other International Courts such as the International Tribunal for the Law of the Sea (ITLOS).⁵

The International Court of Justice (ICJ) jurisprudence concerning the *Margin of Appreciation* is however inconsistent. In the *Oil Platforms*⁶ and in the *Wall in the Occupied Palestinian Territory*⁷ cases, the Court rejected the doctrine, whereas in the *Avena*⁸ case the Court adopted a "more hospitable attitude towards its application".⁹ Later, the *Margin of Appreciation* doctrine has been expressly invoked in front of the

¹ The Lisbon Network, *The Margin of Appreciation*, January 2011, online: COE <www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp>.

² EC, *Commission Decision 176/56/EC of 28 May 1958 concerning the Government of the Kingdom of Greece against the Government of the United Kingdom of Great Britain and Northern Ireland*, [1958] OJ, L/ 56/182 at 348.

³ *Ibid* at 152.

⁴ Enzo Cannizzaro, *Margin of Appreciation And Reasonableness in the ICJ's Decision in the Whaling Case*, 17 November 2014, at 449, online: LIDRIN <www.cannizzaro-sapienza.eu/sites/default/files/publicazione_allegato/TAP%20CANNIZZARO.pdf>.

⁵ Yuval Shany, "Towards a General Margin of Appreciation Doctrine in International Law?" (2006) 16:5 EJIL 907.

⁶ International Court of Justice, *Reports of judgments, Advisory Opinions and Orders: Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 6 November 2003, at 90, online: ICJ <<https://www.icj-cij.org/files/case-related/90/090-20031106-JUD-01-00-EN.pdf>>.

⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) Advisory Opinion, PCIJ (Ser A/B) No 131.

⁸ International Court of Justice, *Reports of judgments, Advisory Opinions and Orders: Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, 31 March 2004, online: ICJ <<https://www.icj-cij.org/files/case-related/128/128-20040331-JUD-01-00-EN.pdf>>.

⁹ Shany, *supra* note 5 at 908.

ICJ by Japan in its dispute with Australia on the Whaling in the Antarctic.¹⁰ Japan contended that it possessed the exclusive competence to issue a special permit to kill, take and treat whales for purposes of scientific research under Article VIII, para 1 of the *International Convention for the Regulation of Whaling (ICRW)*.¹¹ Allegedly, this competence was based on the existence of a “margin of appreciation”, recognized to every state party to that *convention*, to determine the meaning of the notion of “scientific research” and the activities related to that purpose. The Court held that the determination of the terms “for purposes of scientific research” is part of the interpretation of Art. VIII of the *ICRW* and, therefore, cannot be left, in its entirety, to the unilateral determination of one of its parties, that “whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State’s perception.”¹²

I. Introducing the Margin of Appreciation doctrine

A. Definition

The *Margin of Appreciation* is a doctrine that the European Court of Human Rights has developed when considering whether a member state has breached the *Convention*. The term refers to “the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the *European Convention on Human Rights*”,¹³ or “the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation from the *Convention*, or restriction or limitation upon a right guaranteed by the *Convention*, to constitute a violation of one of the *Convention*’s substantive guarantees”.¹⁴

For some authors, the notion refers to the power of contracting States in assessing the factual circumstances, and in applying the provisions set by the international human rights instruments.¹⁵ Other authors see in the doctrine a “methodology for scrutiny by international courts of the decisions of national authorities – i.e. national governments, national courts, and other national actors”.¹⁶ It

¹⁰ *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)*, (2014) PCIJ (Ser A/B) No 148.

¹¹ *Ibid* at para 49.

¹² *Ibid* at para 61.

¹³ Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, July 2000, at 5, online: ECHR <[https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf)>; Émilie Conway, “De quelques apports de la doctrine de la marge d’appréciation à l’interprétation de l’exception de moralité publique en droit de l’Organisation mondiale du commerce (OMC)” (2013) 54:4 *Les Cahiers de Dr* 731 at 765.

¹⁴ Howard Charles Yourow, “Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence” (1996) 28:1 *Intl S in Human R* 1 at 13.

¹⁵ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Cambridge: Intersentia, 2002); Onder Bakircioglu, “The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases” (2007) 8:7 *German LJ* 711.

¹⁶ Shany, *supra* note 5 at 908.

could be defined as « *un procédé initialement développé dans la jurisprudence de la CEDH, qui consiste en l'octroi d'une certaine marge de manœuvre aux États dans l'appréciation de leurs obligations en vertu de la Convention* ». ¹⁷

The *ECHR* has, hence, given states a margin of appreciation to decide if a limitation is “necessary” or not, and if it respects legitimate aims or not.

B. Justification of the doctrine

The doctrine provides a methodology for scrutinizing the decisions of international courts while evaluating the decisions of national authorities. There are many reasons why it has been adopted, but mainly, some reasons appear clearly:

1) Judicial deference. International courts must show some deference to domestic courts or authorities, and some respect for the way they execute their international obligations. ¹⁸ Domestic courts are more aware than international courts about the issues at stakes and factual issues.

2) The doctrine provides “normative flexibility” in the interpretation of the law. Indeed, domestic standards can vary from a state to another, and standardization of cultures or beliefs is not adequate to our modern life. ¹⁹ The same principle was applied in the transsexual case *X, Y and Z. The United Kingdom* ²⁰ concerning the refusal to register post-operative transsexual as a father of a child born to partner by artificial insemination by a donor. The Court stated that, in this case, UK had a wide margin of appreciation since there was no common European standard with regard to granting of parental rights to transsexuals or manner in which social relationship between child conceived by AIDS and person performing the social role of a father should be reflected in law.

In addition, it has not been established before the Court that there exists any generally shared approach amongst the high contracting parties with regard to the manner in which the social relationship between a child conceived by AID and the person who performs the role of the father should be reflected in law. The UK had therefore acted correctly within its margin of appreciation and the rights of X, Y, and Z had not been infringed on.

3) A third point is the link between margin of appreciation and the principle of “sovereignty”. This foundation does not seem unanimously accepted by all HR Courts and bodies.

¹⁷ Conway, *supra* note 13 at 765.

¹⁸ Shany, *supra* note 5 at 910.

¹⁹ *Hertzberg v Finland*, HRC Dec 61/1979, UNHCR, 15th Sess, Supp No 40, UN Doc A/37/40 (1982) at para 10.3: “[P]ublic morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.”

²⁰ *X, Y and Z v The United Kingdom* (1997), 93 ECHR (Ser A) 1, 24 EHRR 143.

For the Inter-American Court for Human Rights, the principle of *Margin of Appreciation* is closely linked to the principle of *Sovereignty* and reminds us also of the *domaine réservé* doctrine. Reference to this doctrine was made by the Inter-American Court for Human Rights in a case involving the right to nationality and discrimination, when it stated that:

The Court is fully mindful of the margin of appreciation which is reserved to states when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with.²¹

However, for the Human Rights Commission, and even if it recognizes “a certain margin of discretion [that] must be accorded to the responsible national authorities” in deciding whether to broadcast discussions related to homosexual relations in national media.²²

In another case which addressed Finnish development plans in an area used by the Sami minority, the HRC emphasized that its decision was not based on reference to a margin of appreciation.²³

C. Criticism addressed to this doctrine

The *Margin of Appreciation* doctrine has stirred much of controversy among the publicists. The *à* doctrine is criticized for its inconsistent and opaque modality of operation. The proponents of the certainty of legal rules charge the doctrine for vitiating the normative guidance of substantive rights provisions of the *ECHR*²⁴ and fostering normative ambiguity.

Another criticism is that the application of the doctrine introduces subjective, and relativist standards into treaty provisions of human rights treaties, formal sources of international law. For many authors, such tendency could generate judicial double standard,²⁵ unfairness²⁶ or bias²⁷.

The application of the *Margin of Appreciation* doctrine is considered handicapping the development of judge-made law, constituting an obstacle to elaborating international human rights norms.²⁸

²¹ *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* (1984), Inter-Am Ct HR (Ser A) No 4, at para 62, *Annual Report of the Inter-American Commission on Human Rights: 1984*, OEA/Ser.L/V/II.63/Doc.10 (1984).

²² *Hertzberg v Finland*, *supra* note **Erreur ! Signet non défini.** at para 10.3.

²³ *Länsman et al. v Finland*, HRC Dec 671/1995, UNHCR, 58th Sess, UN Doc CCPR/C/58/D/671/1995 (1996).

²⁴ Shany, *supra* note 5 at 937.

²⁵ Eyal Benvenisti, “Margin of Appreciation, Consensus, and Universal Standards” (1999) 31:4 NYUJ Intl L & Pol 843 at 844; Fionnuala Ni Aolain, “The Emergence of Diversity: Differences in Human Rights Jurisprudence” (1995) 19:1 Fordham Intl L J 101 at 119.

²⁶ Shany, *supra* note 5 at 912.

²⁷ Benvenisti, *supra* note 25 at 923-24.

²⁸ Shany, *supra* note 5 at 922, 923.

Despite all the critics, one can ask the following question: what would remain of a state if one takes away its margin of appreciation? No human rights violation should be tolerated without strong justification, but using its margin of appreciation is not equivalent to escaping from the obligation of justification. Using the *margin of appreciation* is as good as good governance. Abuses are not tolerated, but responsible governments are exactly what citizens are looking for. This balance is necessary, even vital, for states, so they can always find this balance between opposed rights.

D. Scope of application of the doctrine

The doctrine is applied differently depending on the nature of the rights at stake. For this assessment, one has to go back to the primary notion of absolute and non-absolute rights.

Hence, the rights protected by Article 2 and Article 3 of the *ECHR*, and article 2, 3 or 6 of the *ICCPR* are absolute rights, generating obligations for Member States which cannot be balanced either against other rights or against the pursuit of any legitimate interest. However, the lack of consensus among European Union Member States may influence the Court's opinion that the matter is best left to individual States. In cases where racial or ethnic discrimination is implicated, or when an "intimate aspect of private life" is at stake under Article 8 of the *ECHR*, for example, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate.

But also as the ECtHR has noted in *Schalk & Kopf v. Austria*, "the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background."²⁹

While undergoing proportionality reviews and, in particular, *ad hoc* judicial balancing of competing rights and interests, states are given only a narrow margin of appreciation in cases where a particularly important aspect of an individual's identity or existence is at stake, such as the right to family life³⁰ or where the justification for a restriction is the protection of the authority of the judiciary, especially when similar standards are applied by most of state parties to the *ECHR*.³¹

States' margin of appreciation is potentially wider in cases of public

²⁹ *Schalk and Kopf v Austria*, No 30141/04, [2010] IV ECHR 409 at 498.

³⁰ *Evans v UK*, No 6339/05 (7 March 2006); the Court stated that the right to a family life, enshrined in article 8 of the *ECHR*, could not override the husband's withdrawal of consent to keep fertilized embryos. The Court also ruled unanimously that the issue of the right to life "comes within the margin of appreciation which the Court generally considers that states should enjoy in this sphere", and thus rejected the claim that embryo's right to life was being threatened.

³¹ *Sunday Times v the United Kingdom* (1979), 1 ECHR (Ser A) 30, 2 EHRR 245; in that case, the Court held that "the domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area".

emergency,³² cases involving national security,³³ or involving the “protection of morals”,³⁴ cases involving legislative implementation of social and economic policies,³⁵ cases where there is no consensus within the Member States of the Council of Europe, particularly where the case raises sensitive moral or ethical issues,³⁶ cases where the state is required to strike a balance between competing interests or convention rights.³⁷

II. Margin of Appreciation doctrine in the jurisprudence

Margin of appreciation is in fact a margin of discretion granted to states in certain conditions. We will try to frame this notion before studying its content according to the case law of human rights courts, in particular the European Court for Human Rights (ECtHR) and the ICCPR Committee (HCR) since the two bodies are relevant for our paper.

A. Margin of discretion before other Human Rights Courts

Human rights courts other than the ECtHR have usually refrained from adopting an explicit *Margin of Appreciation* vocabulary.³⁸ However, few exceptional decisions approved the doctrine. For example, the Inter-American Court of Human Rights has in one of its first Advisory Opinions accepted the doctrine in the context of the right of member states to regulate naturalization procedures.³⁹ “One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them.”⁴⁰

Further, many other decisions reveal methodological choices which are consistent with the doctrine – i.e., they provide governments with latitude in the implementation of the relevant treaty norms – without explicitly invoking it.⁴¹ This

³² *Brannigan & McBride v the United Kingdom* (1993), 43 ECHR (Ser A) 21, 17 EHRR 539 at 43, 57-60; the decision to derogate from the *Convention* in “times of war or other public emergency threatening the life of the nation” is justiciable at the Court but subject to a wide margin of appreciation.

³³ *Klass v Germany* (1978), 28 ECHR (Ser A) 32, 2 EHRR 214; in this case, the Court granted German authorities a measure of discretion in preparing a system of secret surveillance in the fight against terrorism, which was necessary in a democratic society in the interests of national security and crime prevention (Mainly at 39-60 of the Judgment).

³⁴ *Handyside v the United Kingdom* (1976), 72 EHCR (Ser A) 5, 1 EHRR 737.

³⁵ *Hatton and Others v the United Kingdom*, No 36022/97, [2003] VIII ECHR 189, 37 EHRR 611.

³⁶ *Evans v the United Kingdom*, No 6339/05, [2007] I ECHR 393, 46 EHRR 34; ECHR Grand Chamber ruled against Evans’ appeal.

³⁷ *Ibid.*

³⁸ Shany, *supra* note 5 at 929.

³⁹ *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* (1984), *supra* note 21 at para 58.

⁴⁰ *Ibid.*

⁴¹ For example: *Mahuika v. New Zealand*, UNHCR, 55th Sess, UN Doc CCPR/C/70/D/547/1993 (2000) at paras 9.10, 9.11, emphasizing the circumstantial context of the limitation upon the applicants’ rights;

trend has been pointed out by several authors.⁴²

A number of arbitral awards have also adopted 'margin of appreciation type' methodology. For example, the Arbitral Tribunal in Heathrow charges held that the UK is entitled to a margin of appreciation in setting airport charges.⁴³

B. Margin of Appreciation in the ECtHR jurisprudence

The *ECHR* gave the State Parties the power to bring limitations to different rights. Limitations to FOE were set in article 10§2, which provides that the right to FOE may be

subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁴⁴

Reference to the margin of appreciation goes back to the earliest days of the *European Convention on Human Rights* mechanisms, in the case taken by Greece against UK over the situation on Cyprus, in 1956.⁴⁵ But it concerns the lawfulness of a state of emergency imposed by the UK to Cyprus, and other acts of torture or violence that took place around that period.

The notion was tackled soon after in the *Lawless case*⁴⁶ – always about the existence of public emergency – but only in a separate opinion of five Commission members who stated that

Aumeeruddy-Cziffra v Mauritius, UNHCR, 12th Sess, Supp No 35, UN Doc A/36/40 (1981) at para 9.2(b)(2)(ii), stating that "the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions."

⁴² Schmidt, "Book review: Coming to Grips with Indigenous Rights" (1997) 10:1 *Harvard Hum Rts J* 333 at 338.

⁴³ United Nations, *Report of International Arbitral Awards: United States-United Kingdom Arbitration concerning Heathrow Airport User Charges (United States-United Kingdom)*, 30 November 1992, at 3 para 2.2.6, 179 para 11.4.10, online: UNSC <legal.un.org/riaa/cases/vol_XXIV/1-359.pdf>.

⁴⁴ *European Convention for the Protection Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at art 10§2 (entered into force 3 September 1953) [EHCR].

⁴⁵ *Greece v UK*, *supra* note 2 at 117-18; for the Parties' thesis, at 132.1-136: "The assessment whether or not a public danger existed is a question of appreciation. The United Kingdom Government made such an assessment of the situation prevailing at that time and concluded that there existed a public danger threatening the life of the nation. That this appreciation by the British Government was correct was subsequently proved by the great increase of violence..."; at 138: "The Commission of Human Rights is authorised by the *Convention* to express a critical opinion on derogations under Article 15, but the Government concerned retains, within certain limits, its discretion in appreciating the threat to the life of the nation. In the present case the Government of Cyprus has not gone beyond these limits of appreciation."

⁴⁶ *Lawless v Ireland* (1961), 3 ECHR (Ser A) 332, 1 EHRR 15.

a certain discretion – a certain margin of appreciation – must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the *Convention*.⁴⁷

In the *Vagrancy* case⁴⁸ (arbitrary detention, slavery, ill-treatment, violation of liberty of conscience and religion, etc.), the Court used a slightly different word, finding “that the competent Belgian authorities did not transgress in the present cases the limits of the power of appreciation which Article 8 (2) (art. 8-2) of the *Convention* leaves to the Contracting States”.⁴⁹

The same wording appeared in the *Golder* case⁵⁰ where the Court stated:

Even having regard to the power of appreciation left to the Contracting States, the Court cannot discern how these considerations, as they are understood "in a democratic society", could oblige the Home Secretary to prevent Golder from corresponding with a solicitor with a view to suing Laird for libel.⁵¹

The Court adopted the principle in the *Engel* case⁵² where it stated that “Each State is competent to organize its own system of military discipline and enjoys in the matter a certain margin of appreciation”⁵³, that in respect of hierarchical structure inherent in armies “the *European Convention* allows the competent national authorities a considerable margin of appreciation”⁵⁴, and that the Court “must not in this respect disregard [...] the margin of appreciation that Article 10 para. 2 (art. 10-2), like Article 8 para. 2 (art. 8-2), leaves to the Contracting States”.⁵⁵

1. THE HANDYSIDE CASE

It is interesting to observe that the first jurisprudence related to the margin of appreciation emerged in a case related to FOE.

The rationale of the *Margin of Appreciation* doctrine appeared in the jurisprudence of the ECtHR with the *Handyside* case⁵⁶ where the Court states that the “*Convention* leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.”⁵⁷ The Court believes that:

[b]y reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the

⁴⁷ *Greece v UK*, *supra* note 2 at 85.

⁴⁸ *De Wilde, Ooms & Versyp ("Vagrancy") v Belgium (Merits)* (1971), 12 EHCR (Ser A) 1, 1 EHRR 373.

⁴⁹ *Ibid* at 93.

⁵⁰ *Golder v The United Kingdom* (1975), 18 EHCR (Ser A) 1, 1 EHRR 524 .

⁵¹ *Ibid*.

⁵² *Engel and Others v The Netherlands* (1976), 22 EHCR (Ser A) 3, 1 EHRR 647.

⁵³ *Ibid* at 59.

⁵⁴ *Ibid* at 72.

⁵⁵ *Ibid* at 100.

⁵⁶ *Handyside v the United Kingdom*, *supra* note 34 at 48-9.

⁵⁷ *Ibid* at 48.

international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them", and that "it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context."⁵⁸

This elbow room is nevertheless submitted to the control of the Court since art. 10§2:

does not give the Contracting States an unlimited power of appreciation. The Court [...] is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision.⁵⁹

The Court makes hence the difference between "power of appreciation" and "margin of appreciation". States' power being limited by the *Convention*; it becomes a margin. This margin is granted by the *Convention* and does not proceed from the States.

This power of appreciation is controlled by the ECtHR. The Court is responsible with the Commission for ensuring the observance of those States' engagements (Art. 19). It is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression. "Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court."⁶⁰

As previously said, it is important to highlight the fact that the *Handyside* concerns FOE. The applicant, Mr. Richard Handyside, was the owner of a publishing firm *Stage 1* in London. He published, among other books, *The Little Red Schoolbook*, which provoked a number of complaints regarding its sexual content, which shocked the media. The judiciary ordered the provisional seizure of all copies, leaflets, posters, etc., related to publication and sales of the book. Despite the order, Handyside continued selling his book and finally he was charged of having twice in his possession obscene books for publication for gain. He was found guilty of both offences and condemned to pay a fine. The judgment also required the destruction of the books. The action against the Schoolbook was based on the *Obscene Publications Act 1959*, as amended by the *Obscene Publications Act 1964*.⁶¹

The applicant filed his complaint on the grounds of Article 10 *ECHR* violation. Relying on its previous jurisprudence,⁶² the Court stated that:

Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at 49.

⁶⁰ The Lisbon Network, *The Margin of Appreciation*, *supra* note 1.

⁶¹ *Obscene Publications Act 1964* (UK), 1964, c. 74.

⁶² *Golder v The United Kingdom*, *supra* note 50 at 41-2 para 100, for Article 8 para 2 (art 8-2); *Lawless v Ireland*, *supra* note 46.

("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.⁶³

However, the Court continued and stated that this margin of appreciation is not open nor absolute. It is restricted by three conditions. The first two restrictions are brought by the text itself: first, it must be shown that the interference in question was necessary in a democratic society for one or more of these exceptions; second, the restriction must be in accordance with, or prescribed by, law. The third condition was brought by the jurisprudence of the ECtHR: the limitation of FOE has to be proportionate to a pressing social need.⁶⁴ Therefore, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context. The jurisprudence of the ECtHR extended this power to the bodies, judicial amongst others, which are called upon to interpret and apply the laws in force.⁶⁵ These conditions will be tackled later in this paper.

2. "MARGIN OF APPRECIATION" JURISPRUDENCE IN FOE ISSUES

The jurisprudence of the ECtHR is particularly interesting to study when it comes to "qualified rights, which are not absolute and have concomitant limitations expressed within the right itself".⁶⁶

Articles 8 to 11 of the *European Convention for Human Rights* fall into this category, and Article 10 protecting FOE is part of this pattern, where the first paragraph of the article sets the rule, the second authorizes States to breach the rule, and the third imposes the conditions for the breach to be lawful.⁶⁷ For FOE limitation to be lawful, it has to be "prescribed by a law", to meet one of the "legitimate aims", to be "necessary in a democratic society". The term "necessary" was interpreted as being proportionate to the aims. In any case, it quickly appears that both "proportionality" and "democratic society" were variable notions and allow hence variable margin of appreciation.

The *Sunday Times* case⁶⁸ came three years after the *Handyside* case. It was about the prohibition of the publication of an article by the Sunday Times newspaper, concerning the thalidomide scandal. The case was still pending before the judiciary. It was considered by the British justice as contempt of Court. The Court held that unlike the concept of morals, the notion of authority of the judiciary is objective, and the domestic law and practice of contracting States reveal a fairly substantial measure of common ground in this area.⁶⁹

⁶³ *Handyside v the United Kingdom*, *supra* note 34 at para 48.

⁶⁴ *Ibid* at 50; this jurisprudence will be confirmed in *Silver v the United Kingdom* (1983), 5 ECHR (Ser A) 61, 5 EHRR 347 at 97-8; also *Lingens v Austria* (1986), 103 ECHR (Ser A) 7, 8 EHRR 407, at 37-41.

⁶⁵ *Engel and Others v The Netherlands*, *supra* note 52 at 100; *De Wilde, Ooms & Versyp ("Vagrancy") v Belgium (Merits)*, *supra* note 48; *Golder v The United Kingdom*, *supra* note 50 at 45.

⁶⁶ The Lisbon Network, *The Margin of Appreciation*, *supra* note 1; Kathleen A. Kavanaugh, *Policing the Margins: Rights Protection and the European Court of Human Rights*, 2006, EHRLR at 425.

⁶⁷ *EHCR*, *supra* note 44 at arts 8, 10, 11.

⁶⁸ *Sunday Times v the United Kingdom*, *supra* note 31.

⁶⁹ *Ibid* at 59.

The Court also noted in other cases that, when a European consensus on the meaning or need for limitation on particular rights is absent, as it was in *Handyside*, for example, the margin available to states expands. Conversely, when consensus is present, it means that the meanings are defined with precision, which is reducing the margin for appreciation.⁷⁰

In the *Wingrove* case,⁷¹ the Court started by reaffirming the lack of European consensus on the requirement of the protection of rights of others in relation to attacks on their religious conviction, the Court found the position of the British Government relevant and sufficient for the purpose of article 10, §2, and stated that this position did not reveal any signs of arbitrary nature or excessiveness.

C. Margin of Appreciation in the ICCPR Committee (HCR) jurisprudence

Adopted in 1966, the *International Covenant on Civil and Political Rights (ICCPR)*⁷² does not mention "margin of appreciation". However, the *Covenant* granted the State Parties a "right of derogation" by allowing them to take "measures derogating from their obligations under the present *Covenant* to the extent strictly required by the exigencies of the situation."⁷³ The *ICCPR* excluded the possibility of derogating to certain "absolute" rights.⁷⁴

But for non-absolute rights, derogation is possible under certain strict conditions. This is the case of Freedom of Expression consecrated by Article 19, that states in §3:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.⁷⁵

Interpreting Article 19, *UN General Comment n°10* of 1983, recognized to states a margin of appreciation and stated that with "the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3",⁷⁶ but States did not provide the Committee with any suggestions to understand what "effective measures" can be in this respect, probably preferring to keep a bigger freedom of appreciation rather than being restricted by a text.

⁷⁰ The Lisbon Network, *The Margin of Appreciation*, *supra* note 1.

⁷¹ *Wingrove v the United Kingdom* (1996), 25 ECHR (Ser A) 60, 24 EHRR 1 at 64.

⁷² *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [*ICCPR*].

⁷³ *Ibid*, art 4.

⁷⁴ *Ibid*, art 5.

⁷⁵ *Ibid*, art 19.

⁷⁶ UNSC, Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9(Vol. I), May 2008, at 2.

The Human Rights Commission has adopted the *Margin of Appreciation* doctrine, but preferred the use of the term ‘margin of discretion’.

1. HERTZBERG V. FINLAND CASE

This case concerns Freedom of Expression. Just six years after the *Handyside* case, the HRC reached a similar conclusion in *Hertzberg v. Finland*.⁷⁷ In *Handyside*, the Court considered the legality of the United Kingdom’s seizure of a book intended for schoolchildren, parts of which spoke frankly and openly about homosexuality, sex, and drug use. The ECtHR found that the aim of the seizure and destruction judgment as well as the initial seizures of the book — that is, “the protection of the morals of the young” — was legitimate.⁷⁸ The Court then determined that the measures used were sufficiently “necessary” to pursue that aim, and it ultimately concluded that no violation of the *European Convention* had taken place.

The complainants in *Hertzberg* had produced or appeared in television or radio programs related to homosexuality — programs that were censored by the state-controlled Finnish Broadcasting Company. In its ruling, the HRC noted that:

public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities. The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. [...] In particular, harmful effects on minors cannot be excluded.⁷⁹

2. HERVÉ BARZHIG V. FRANCE CASE (11 APRIL 1991)

The author of the communication⁸⁰ is Hervé Barzhig, a French citizen born in 1961 and a resident of Rennes, Bretagne, France. On 7 January 1988, he appeared before the *Tribunal Correctionnel* of Rennes on charges of having defaced twenty-one road signs on 7 August 1987. He requested permission of the Court to express himself in Breton, which he states is his mother tongue, and asked for an interpreter. The Court rejected the request and referred consideration of the merits to a later date.⁸¹ The Court of Appeal of Rennes confirmed the first instance court judgment.⁸² In both proceedings, he was heard in French.

France pleaded that “the President of the Criminal Appeals Chamber of the

⁷⁷ *Hertzberg v Finland*, *supra* note 19.

⁷⁸ *Handyside v the United Kingdom*, *supra* note 34 at para 52.

⁷⁹ *Hertzberg v Finland*, *supra* note 19 at paras 10.3, 10.4.

⁸⁰ *Barzhig v France*, HRC Dec 327/1988, UNHRC, 41th Sess, Supp No 40, UN Doc A/46/40 (1991).

⁸¹ *Ibid* at para 2.1.

⁸² *Ibid* at para 2.3.

Tribunal Correctionnel of Rennes was justified in not applying section 407 of the *French Code of Penal Procedure*, as requested by the author” and that “In the application of article 407, the judge exercises a considerable margin of discretion”.⁸³

However, the Commission did not reply to this particular point, and ended up ruling that, according to the facts disclosed, France did not breach its obligations under the *ICCPR*.

3. DOMINIQUE GUESDON V. FRANCE (1990)

Dominique Guesdon is a French citizen who claims to be a victim of violations of Articles 14§1, 3(e) and (f), 19§2, 26, and 27 of the *Covenant* by France.⁸⁴ He is a Breton and that his mother tongue is Breton, which is the language in which he can express himself best, although he also speaks French.⁸⁵

On 11 April 1984, before the *Optional Protocol* entered into force for France (17 May 1984), he appeared before the *Tribunal Correctionnel* of Rennes on charges of having damaged public property by defacing road signs in French. He admits that militant Bretons who advocate the use of the Breton language painted over some road signs in order to manifest their desire that road signs be henceforth bilingual. The author never admitted his participation in the offences he was charged with, and claims that he was convicted in the absence of any proof.

On 11 April 1984, the day of the hearing, he requested that twelve witnesses be heard on his behalf. He indicated that all the witnesses and himself wished to give testimony in Breton. This request was refused by the French judiciary at first instance, Appeal and Cassation. France stated that:

the President of the Tribunal of Rennes was perfectly justified not to apply article 407 of the *French Penal Code*, as requested by the author. This provision stipulates that whenever the accused or a witness do not sufficiently master French, the President of the Court must ex officio request the services of an interpreter. In the application of article 407, the President of the Court exercises a considerable margin of discretion, based on a detailed analysis of the individual case and all the relevant documents.⁸⁶

The Human Right Committee did not answer the issue, this time either, even before the French allegation that the President of the domestic Court has a considerable margin of discretion. The Committee didn't find any violation of France's duties under the *ICCPR*.

⁸³ *Ibid* at para 4.4.

⁸⁴ *Dominique Guesdon v France*, HRC Dec 219/1986, UNHRC, 39th Sess, UN Doc CCPR/C/39/D/219/1986 (1989).

⁸⁵ *Ibid* at para 2.1.

⁸⁶ *Ibid* at para 8.3.

4. JOHN BALLANTYNE AND ELIZABETH DAVIDSON, AND GORDON MCINTYRE (1993)

The authors of the complaint⁸⁷ owe shops in the Province of Quebec and they had installed signs for their shops written in English, to attract English-speaking clients. They were forced to remove their English signs and replace them with French signs, in compliance with *Charter of the French Language (Charte de la langue française)*. They challenged sections 1, 6 and 10 of *Bill No. 178* enacted by the Provincial Government of Quebec on 22 December 1988, with the purpose of modifying *Bill No. 101*, known as the *Charter of the French Language (Charte de la langue française)*.

After, exhaustion of all domestic remedies, they turned to the Human Rights Commission alleging that the aforementioned *Bill* violates the right to Freedom of Expression and runs contrary to both the *Canadian and Quebec Charters of Human Rights*; that both the Quebec and federal courts have found in particular that the obligation to use only French on commercial signs and in advertising violated the right of Freedom of Expression and constituted discrimination based on language.⁸⁸

The Government of Quebec rejected the allegations of the authors, claiming that commercial issues are not concerned with FOE which is restricted to “political, cultural and artistic expression and does not extend to the area of commercial advertising” It adds that:

Even if this were not the case, freedom of expression in commercial advertising requires lesser protection than that afforded to the expression of political ideas, and the Government must be allowed a large measure of discretion to achieve its objectives.⁸⁹

The HRC decision re-stated all the conditions and elements of Freedom of Expression:

Under article 19 of the Covenant, everyone shall have the right to freedom of expression; this right may be subjected to restrictions, conditions for which are set out in article 19, paragraph 3. The Government of Quebec has asserted that commercial activity such as outdoor advertising does not fall within the ambit of article 19. The Committee does not share this opinion. Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee’s opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom. The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitations, with the result that some forms of expression may suffer broader restrictions

⁸⁷ *Ballantyne Davidson, McIntyre v Canada*, HRC Dec 359/1989 and 385/1989, UNHRC, 47th Sess, UN Doc CCPR/C/47/D/359/1989 (1993).

⁸⁸ *Ibid* at paras 6.7, 6.8.

⁸⁹ *Ibid* at para 8.9.

than others.⁹⁰

The HCR continues by reaffirming the conditions required for the limitations of FOE:

Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the restrictions on outdoor advertising are indeed provided for by law, the issue to be addressed is whether they are necessary for the respect of the rights of others. The rights of others could only be the rights of the francophone minority within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. The Committee notes that the State party does not seek to defend *Bill 178* on these grounds. Any constraints under paragraphs 3(a) and 3(b) of article 19 would in any event have to be shown to be necessary. The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.⁹¹ [formatting added]

Once again, the Committee does not address the issue of the *Margin of Discretion* per se, but while exposing the conditions required for a lawful limitation, the Committee affirms implicitly that any margin of discretion, any assessment of the circumstances leading to the limitation of FOE has to comply with conditions set in §2 of Article 19, i.e. have legitimate aims.

5. ILMARI LANSMAN AT AL. CASE (1994)

This case concerns Ilmari Länsman and forty-seven other members of the Muotkatunturi Herdsmen's Committee and members of the Angeli local community. They belong to the Sami population in Finland, a minority who lives in the northern part of the country from deer husbandry. The Central Forestry Board decided in 1989 to pass a contract with a private company, which would allow the quarrying of stone in an area covering ten hectares on the flank of the mountain Etela-Riutusvaara, where this population lives and works.

⁹⁰ *Ibid* at para 11.3.

⁹¹ *Ibid* at para 11.4.

The complainants allege that the contract would not only allow the company to extract stone but also to transport it right through the complex system of reindeer fences to the Angeli-Inari road,⁹² which “would disturb their reindeer herding activities and the complex system of reindeer fences determined by the natural environment”.⁹³ They also stated that “the village of Angeli is the only remaining area in Finland with a homogenous and solid Sami population.”⁹⁴ They affirmed that:

the quarrying of stone on the flank of the Etelä-Riutusvaara Mountain and its transportation through their reindeer herding territory would violate their rights under article 27 of the *Covenant*, in particular their right to enjoy their own culture, which has traditionally been and remains essentially based on reindeer husbandry.⁹⁵

In its answer, Finland pleaded that the requirements of Article 27 have “continuously been taken into consideration by the national authorities in their application and implementation of the national legislation and the measures in question”. But it stated that “a margin of discretion must be left to national authorities even in the application of article 27”. The decision of HCR quotes their statement:

As confirmed by the European Court of Human Rights in many cases..., the national judge is in a better position than the international judge to make a decision. In the present case, two administrative authorities and... the Supreme Administrative Court, have examined the granting of the permit and related measures and considered them as lawful and appropriate.⁹⁶

Finland submitted that the authors can continue to practice reindeer husbandry and are not forced to abandon their lifestyle. The quarrying and the use of the old forest road line, or the possible construction of a proper road, are insignificant or at most have a very limited impact on this means of livelihood. HCR answers clearly:

A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.⁹⁷

The Committee hence examines the facts according to the rules set by the *Covenant*, and states he is “of the view that the facts as found by the Committee do not reveal a breach of article 27 or any other provision of the *Covenant*.”⁹⁸

⁹² *Länsman et al. v Finland*, HRC Dec 511/1992, UNHRC, 52th Sess, UN Doc CCPR/C/52/D/511/1992 (1994) at para 2.3.

⁹³ *Ibid* at para 2.5.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* at para 3.1.

⁹⁶ *Ibid* at para 7.13.

⁹⁷ *Ibid* at para 9.4.

⁹⁸ *Ibid* at para 10.

In few words, a margin of discretion is recognized to states, but within the respect of their international obligations, and with due observation of the conditions of necessity and proportionality of the measures curtailing any freedom for legitimate aims.

6. A.H.G v. CANADA (2015)

A.H.G. went to Canada as a landed immigrant in 1980 at the age of eighteen.⁹⁹ In 1993, he was diagnosed with paranoid schizophrenia and subsequently treated at hospital for a year and a half. Thereafter, he was treated on an outpatient basis, under supervision. He also suffered from diabetes.¹⁰⁰ From 1995 until 2005, he lived independently and without incident. His history of criminal behaviour began in 2005, when he was evicted from his apartment and started living in shelters. It became difficult for him to manage his schizophrenia and diabetes and comply with his treatment. This resulted in relapses of his schizophrenic symptoms and problems with the judicial system.¹⁰¹ In 2005, he was found guilty of assault with a weapon assaulted; in 2006, he was found guilty of failing to appear. In May 2007, he was detained by the Canada Border Services Agency and remained on immigration hold until his subsequent removal to Jamaica and on 24 April 2007, the Immigration and Refugee Board ordered his deportation as a result of his conviction for assault with a weapon.¹⁰² He formed an Appeal before the Immigrant Appeal Division, but the Division stressed the seriousness of the offence and determined that the prospects of rehabilitation were low, while risks to the general public were high.

After exhaustion of domestic remedies, he addressed a complaint to HCR. In the exchange of views, Canada stated that it “refers to the Committee’s general comments Nos. 15, 16 and 19, and, recalling that Governments enjoy wide discretion when expelling aliens from their territory [...]”.¹⁰³ HRC did not give a straight answer to this statement, not to accept the doctrine, no to dismiss it. The terms used by the HRC are very strong, and indicate a situation where discretion to expel does not work:

[...] the Committee considers that the deportation to Jamaica of the author, a mentally ill person in need of special protection who has lived in Canada for most of his life, on account of criminal offences recognized to be related to his mental illness, and which has effectively resulted in the abrupt withdrawal of the medical and family support on which a person in his vulnerable position is necessarily dependent, constituted a violation by the State party of its obligations under article 7 of the *Covenant*.¹⁰⁴

The Committee, acting under article 5 (4) of the Optional Protocol to the Covenant, is of the view that the author’s deportation to Jamaica violated his

⁹⁹ *A.H.G v Canada*, HRC Dec 2091/2011, UNHRC, 113th Sess, UN Doc CCPR/113/D/2091/2011 (2015).

¹⁰⁰ *Ibid* at para 2.2.

¹⁰¹ *Ibid* at para 2.3.

¹⁰² *Ibid* at para 2.4.

¹⁰³ *Ibid* at para 4.10.

¹⁰⁴ *Ibid* at para 10.4.

rights under article 7 of the *Covenant*.¹⁰⁵

Moreover, the HRC found that Canada had to provide the author with effective remedy:

In accordance with article 2 (3) (a) of the *Covenant*, the State party is under an obligation to provide the author with effective remedy. The State party is under an obligation to make reparation to the author, by allowing him to return to Canada if he so wishes, and to provide adequate compensation to the author. The State party is also under an obligation to avoid similar violations in the future.¹⁰⁶

This issue depends in fact on the nature of the right at stake.

D. Is the Margin of Appreciation doctrine applicable before International Criminal Courts?

When the Court takes its decisions, it has the full power to do so, but it has to justify its decision. Once the Court has taken the decision to keep proceedings confidential, any disclosure becomes an offence. The only recourse open is Appeal, but before the same Court. It is clear that checks and balance procedures are not available in what concerns International Criminal Courts. Also, and as some authors state:

So far there has been little discussion before international criminal courts of the standards of review in applying standard-type norms, such as necessity and proportionality. In fact, it may be argued that the special nature of criminal proceedings puts into question the applicability of any general international law margin of appreciation doctrine: since courts sitting in criminal cases exercise judicial supervision over individual conduct, considerations of deference which might be appropriate vis-à-vis state conduct might be irrelevant. At the same time, principles of criminal justice, introduce independent reasons for judicial restraint: for instance, they militate in favour of a cautious approach towards statutory construction (especially interpretation in favour of the accused) and toward a high evidentiary threshold for conviction. Hence, interpretation of criminal norms might raise analogous considerations to the margin of appreciation methodology.¹⁰⁷

If a state has a margin of discretion, at least we know that internal procedures are available that hinder abuse attempts. Which is not the case in International Criminal Courts, and this is perhaps a weakness that makes peoples rather uncomfortable about International Criminal Justice despite the huge relief to see certain criminals tried and punished for their crimes.

This subject also raises the question of knowing how much International Criminal Courts are bound by international human rights instruments. If FOE was raised before the International Criminal Tribunal for the former Yugoslavia in

¹⁰⁵ *Ibid* at para 11.

¹⁰⁶ *Ibid* at para 12.

¹⁰⁷ Shany, *supra* note 5 at 929.

Hartmann's case, the cases of *Khayat*, *Al-Amine*, *Al-Jadeed*, and *Al-Akhbar* before the Special Tribunal for Lebanon did not mention it at all. International Criminal Courts margin of appreciation is probably considered stronger than states *Margin of Appreciation*.

Originally, "[t]he margin of appreciation was created to allow the European Court of Human Rights to balance state sovereignty with the need to safeguard Convention rights and an individual's rights against the general interest."¹⁰⁸

It is true that there are multiple and conflicting interests to be weighed in relation to an International criminal proceeding.

In addition to considering the rights of the accused and victims in a case, the following must also be taken into account: the protection of witnesses associated with the proceeding; the interest of the international criminal tribunal itself in effectively discharging its judicial role; and the international community's desire to see a fair and expeditious trial, the end of impunity, and the deterrence of future crimes.¹⁰⁹

In the meantime, French journalist Florence Hartmann is serving her sentence in a prison in The Hague, for a case that is closed, the accused dead, where the victims could not get remedy, and having been sentenced by a Tribunal that is now nearly closed.

¹⁰⁸ Richard Smith, "The Margin of Appreciation and Human Rights Protection in the War on Terror: Have the Rules Changed before the European Court of Human Rights?" (2011), online: EHRR <projects.essex.ac.uk/ehrr/V8N1/Smith.pdf>.

¹⁰⁹ Brandeis Institute for International Judges, *The Expanding Impact of Human Rights Law on International Courts and Tribunals*, 2013, at 12, online: BIJ <<https://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIJ2013.pdf>>.