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# Toward a General Margin of Appreciation Doctrine in International Law?

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## Abstract

*Three recent International Court of Justice decisions – Oil Platforms, Avena and Wall in the Occupied Palestinian Territory – highlight the uncertain status of the margin of appreciation doctrine in the Court’s jurisprudence. The purpose of this article is to evaluate, in the light of contemporary practice of other courts, the current status under international law of the margin of appreciation doctrine, which encourages international courts to exercise restraint and flexibility when reviewing the decisions of national authorities, and to offer preliminary guidelines for future application. The article also discusses a variety of policy arguments concerning the legitimacy and effectiveness of international courts, which can be raised in support of the development of a general margin of appreciation doctrine with relation to some categories of international law norms governing state conduct, and it examines potential criticism. Eventually, it argues that the same considerations which have led to the creation of ‘margin of appreciation type’ doctrines in the domestic law of many states and in the context of specific international regimes (for instance, the European Convention on Human Rights) also support the introduction of the doctrine into general international law. The position of the ICJ towards the application of the doctrine therefore merits reconsideration.*

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## Introduction

Three recent International Court of Justice (ICJ) decisions – *Oil Platforms*,<sup>1</sup> *Avena*<sup>2</sup> and *Wall in the Occupied Palestinian Territory*<sup>3</sup> – bring the question of the status of the margin of appreciation doctrine to the forefront of contemporary debates on the legitimacy and effectiveness of international adjudication in general, and its ability to introduce meaningful rule of law restrictions on the actions of powerful states in particular. The question whether international courts should embrace non-intrusive standards of review, under a ‘margin of appreciation type’ decision-making methodology, is also linked to contemporary discussions on the subsidiary nature of international law – i.e., whether international law should embrace a centralized or decentralized vision of organization.<sup>4</sup> Interestingly enough, the Court’s position towards the acceptability of the margin of appreciation doctrine in the three aforementioned decisions was inconsistent: the *Oil Platforms* and *Wall in the Occupied Palestinian Territory* decisions rejected the doctrine, explicitly or implicitly; whereas, in *Avena* the Court adopted a more hospitable attitude towards its application. This state of uncertainty is further compounded by the fact that some ICJ judges wrote Separate Opinions in *Oil Platforms*, which question the propriety of the approach taken by the majority, as well as by the increased readiness of international courts other than the ICJ to embrace a ‘margin of appreciation type’ methodology.

The purpose of this article is to evaluate the current status under international law of the margin of appreciation doctrine, as applied by international courts and tribunals, on the one hand, and national authorities, on the other hand, and to offer preliminary guidelines for its future application. Furthermore, I argue that a variety of policy arguments relating to the quality and legitimacy of the operation of the international judiciary supports, by and large, the development of a general margin of appreciation doctrine in relation to *some* categories of international law norms governing state conduct.<sup>5</sup>

The increased power of judicial review exercised by international courts over national decision-makers raises a host of problems, mainly involving legitimacy and capacity concerns (for instance, perceived inadequacies in the quality of international judicial decisions, democratic deficits in the operation of international courts, resource limitations which limit the ability of international courts to handle an increased

<sup>1</sup> *Oil Platforms (Iran v US)* [2003] ICJ Rep 90.

<sup>2</sup> *Avena (Mexico v US)* [2004] ICJ Rep (forthcoming).

<sup>3</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Opinion of 9 July 2004 [2004] ICJ Rep (forthcoming), 43 ILM (2004) 1009 (hereinafter *OPT Wall*).

<sup>4</sup> Cf EC – *Measures Concerning Meat and Meat Products (Hormones)*, WTO WT/DS26/AB/R (1998), at para. 115 (‘The standard of review ... must reflect the *balance* established in that [SPS] Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves’); Ehlermann and Lockhart, ‘Standard of Review in WTO Law’, 7 *J Int’l Eco L* (2004) 491, at 493. One can also link the debate over the status of the margin of appreciation doctrine to the constitutionalization of international law: see Zleptnig, ‘The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority’, 6 *European Integration online Papers (EIoP)*, No 17 (2002), available at <http://eiop.or.at/eiop/texte/2002-017a.htm>, at 9–10.

<sup>5</sup> Some but not all of the considerations discussed in this article could also support the application of a margin of theory doctrine *vis-à-vis* obligations incumbent upon non-state actors.

caseload). A general margin of appreciation doctrine responds to some of these concerns through the development of less intrusive and, by implication, more politically acceptable and cost-effective standards of review of national decisions. Hence, the same considerations which have led to the creation of 'margin of appreciation type' doctrines in the domestic law of many states (especially in the field of administrative law)<sup>6</sup> and in the context of specific international regimes (most notably under the European Convention on Human Rights), also support the introduction of the doctrine into general international law. The sceptical stance of the ICJ towards application of the doctrine, which runs contrary to such policy considerations, therefore merits reconsideration.

Following these introductory remarks, Section 1 of the article attempts to describe the basic contours of a possible general margin of appreciation doctrine, explain its main policy rationales and counter some of the criticism it might attract. It also identifies three types of international norms, which are particularly amenable to a margin of appreciation decision-making methodology – standard-type, discretionary and result-oriented norms. Section 2 surveys, in brief, the recent case law of a variety of international courts and tribunals, other than the ICJ, which reveals a growing acceptance of the doctrine or comparable decision-making methodologies. Section 3 discusses in a critical manner the recent case law of the ICJ on the applicability of the margin of appreciation doctrine. Section 4 concludes.

## 1 The Contours of the Margin of Appreciation Doctrine and its Potential Justifications

### A *The Essence of the Doctrine*

The margin of appreciation doctrine, most renowned for its application in the case law of the European Court of Human Rights (ECtHR), establishes a methodology for scrutiny by international courts of the decisions of national authorities – i.e., national governments, national courts and other national actors. While the case law of the ECtHR and other international tribunals on the contours of the doctrine<sup>7</sup> is somewhat inconsistent, two principal elements may be identified:<sup>8</sup> (i) *Judicial deference* – international

<sup>6</sup> See, e.g., Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002), at 2–3 (discussing the French and German origins of the doctrine).

<sup>7</sup> See *infra* Part II.

<sup>8</sup> For a clear elaboration of the two prongs of the doctrine, see Art. 17.6 of the Antidumping Agreement. Agreement on the Implementation of Art. VI of the General Agreement on Tariff and Trade 1994, Annex 1A to the Agreement establishing the World Trade Organization, 15 Apr. 1994, 33 ILM (1994) 1144 ('(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations').

courts should grant national authorities a certain degree of deference and respect their discretion on the manner of executing their international law obligations. Thus, international courts ought not to replace the discretion and independent evaluation exercised by national authorities<sup>9</sup> – i.e., refrain from reviewing national decisions *de novo*. Rather, international judicial bodies should exercise judicial restraint;<sup>10</sup> (ii) *Normative flexibility* – international norms subject to the doctrine have been characterized as open-ended or unsettled.<sup>11</sup> Such norms provide limited conduct-guidance and preserve a significant ‘zone of legality’ within which states are free to operate.<sup>12</sup> Consequently, different national authorities, in distinct states, could conceivably reach different, yet lawful decisions regarding the application of the same international norm.<sup>13</sup> Although these two elements are analytically separable – the first element primarily relates to norm-application, while the second to norm-interpretation – international courts have not always distinguished between the two. Furthermore, the two elements intertwine: the construction of international norms in an ambiguous manner might facilitate the exercise of judicial deference and *vice versa*. Hence, the policy rationales that support granting national actors some deference and those which sustain judicial acknowledgement of normative ambiguity reinforce one another.

However, it must be stressed that the margin of appreciation afforded to states is never unlimited – i.e., there is no total deference to the national decision-making process.<sup>14</sup> First, states must always exercise their discretion in good faith.<sup>15</sup> Second, international courts are ultimately authorized to review whether national decisions are reasonable – namely, whether the course of action selected by the state conforms

<sup>9</sup> *Ireland v UK*, 2 EHRR 25, at 91–92 (1978); Ehlermann and Lockhart, *supra* note 4, at 502.

<sup>10</sup> *James v UK*, 8 EHRR (1986) 123, at 1142–143 (‘[T]he Court cannot substitute its own assessment for that of the national authorities’); *Karatas v Turkey* [1999] IV ECtHR 81, at 120 (Joint Partly Dissenting Opinion of Judges Wildhaber, Pastor Ridruejo, Costa and Baka) (‘In the assessment of whether restrictive measures are necessary in a democratic society, due deference will be accorded to the State’s margin of appreciation; the democratic legitimacy of measures taken by democratically elected governments commands a degree of judicial self-restraint’); *Hormones (AB)*, *supra* note 4, at para. 117 (‘the applicable standard is neither *de novo* review as such, nor “total deference”, but rather the “objective assessment of the facts”’); *Argentina – Safeguard Measure on Imports of Footwear (Footwear)*, WTO Doc. WT/DS121/AB/R (2000), at para. 121; *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (2001), at para. 168.

<sup>11</sup> See, e.g., *Sheffield v UK*, 27 EHRR (1998) 163, at 179 and 192; *Odièvre v France*, judgment of 13 Feb. 2003, at para. 40.

<sup>12</sup> See, e.g., *Vo v France*, ECtHR judgment of 8 July 2004, at para. 82.

<sup>13</sup> See, e.g., Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), available at <http://www.un.org/icty/pressreal/nato061300.htm>, at para. 50. See also Donoho, ‘Autonomy, Self-Government, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights’, 15 *Emory Int’l L Rev* (2001) 391, at 457; Greer ‘Constitutionalising Adjudication under the European Convention on Human Rights’, 23 *Oxford J Legal Studies* (2003) 405, at 409.

<sup>14</sup> See *Hormones (AB)*, *supra* note 4, at para. 117.

<sup>15</sup> See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 311, Art. 26 (hereinafter VCLT). See also Akande and Williams, ‘International Adjudication on National Security Issues: What Role for the WTO?’, 43 *Va J Int’l L* (2003) 365, at 389–391.

with the object and purpose of the governing norm. This might include *inter alia* assessment of the national decision-making process (for instance, whether all pertinent considerations were taken into account) and the substantive outcome (for instance, whether the decision promotes the attainment of the overarching norms).<sup>16</sup> Hence, the margin of appreciation doctrine does not preclude judicial review, but rather works to limit its scope of operation.

## B Formal Source of Applicability

The authority of international courts and tribunals to grant states a margin of appreciation is rarely grounded in explicit treaty norms.<sup>17</sup> Instead, the capacity to employ the doctrine seems to derive from the inherent power of international judicial bodies to determine their own procedures<sup>18</sup> and to effectively exercise their jurisdiction<sup>19</sup> (these authorities are sometimes couched in explicit 'general powers' rules of procedure).<sup>20</sup> Such broad powers arguably include the ability of courts to set applicable standards of review. Alternatively, the margin of appreciation could be linked to the inherent judicial authority to settle 'the method of handling the evidence'<sup>21</sup> or 'make an objective assessment of the matter'.<sup>22</sup>

<sup>16</sup> See *Rekvenyi v Hungary*, 30 EHRR (2000) 518, at 549 ('[T]he court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in art 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts'); *US – Restrictions on Imports of Cotton and Man-Made Fiber Underwear*, WTO Doc. WT/DS24/R (1996), at para. 7.13 ('[A]n objective assessment would entail an examination of whether the [US Committee for the Implementation of Textiles Agreements] had examined all relevant facts before it... whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States'); *Argentinean Safeguards*, *supra* note 10, at para. 121.

<sup>17</sup> A conspicuous exception is found in Art. 17.6 of the Antidumping Agreement. See *supra* note 8. Notably, even critics of the doctrine do not normally allude to the formal lack of legal basis as a serious deficiency. But see Arai-Takahashi, *supra* note 6, at 231.

<sup>18</sup> L. Henkin, *International Law: Cases and Materials* (3rd edn, 1993), at 791. See also *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v US)* [1992] ICJ Rep 3, at 113 (Order of 14 Apr. 1992; Dissenting Opinion of Judge El-Koshi) (courts have inherent power to ensure the proper administration of justice).

<sup>19</sup> *Prosecutor v Bobetko*, Decision of 29 Nov. 2002 (ICTY, AC), at para. 15.

<sup>20</sup> See, e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159, Art. 44; ICSID Rules of Procedure for Arbitration Proceedings (as amended on 29 Sept. 2002), Art. 19, available at <http://www.worldbank.org/icsid/basicdoc/partF.htm>; UN Convention on the Law of the Sea, 10 Dec. 1982, 21 ILM (1982) Annex VII, Art. 5 (Arbitration Rules), 1261 (hereinafter UNCLOS); Understanding on the Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Agreement Establishing the World Trade Organization), 15 Apr. 1994, 33 ILM (1994) Art. 12.1, 1226 [hereinafter DSU].

<sup>21</sup> See, e.g., International Court of Justice Rules of Court 1978, as amended on 5 Dec. 2000, Art. 58(2), available at [http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicrulesofcourt\\_20001205.html](http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicrulesofcourt_20001205.html); International Criminal Court Rules of Procedure and Evidence, 10 Sept. 2002, ICC Off. Rec. ICC/ASP/1/3 (2002) Art. 63(2). The ability to deduce rules of evidence from the inherent powers of the international judiciary has been confirmed by the ICTY: *Prosecutor v Jelusic*, ICTY AC Decision of 15 Nov. 2000.

<sup>22</sup> DSU *supra* note 20, Art. 11. See Zleptnig, *supra* note 4, at 3–4.

### C *Types of Norms Amenable to the Application of the Doctrine*

One possible way to understand the call for the development of a general margin of appreciation doctrine might be that courts should construe international law norms as introducing minimal side-constraints upon state conduct.<sup>23</sup> Such a general construction would leave states with considerable ‘zones of legality’ (a position informed by the *Lotus* principle that all that is not prohibited is permissible).<sup>24</sup> The narrowing of the margins of illegality, through restrictive interpretation of international norms could minimize interference on the part of the international community with state conduct and promote a vision of subsidiarity in international life.<sup>25</sup>

It is not surprising that much of the criticism directed against possible recourse to the margin of appreciation doctrine has focused on its normative guidance-eroding implications. For example, it was argued that the doctrine encourages non-uniform, subjective or relativist applications of international law, detracting thereby from the conduct-regulating quality of legal rules and undermining their authority and perceived fairness (for instance, the expectation that like cases will be treated alike).<sup>26</sup> The doctrine arguably contributes to obliteration of the boundaries of legality, and might reinforce perceptions of international law as non-law – i.e., a loose system of non-enforceable principles, containing little, if any real constraints on state power. In short, the doctrine has been described as an insidious method to enable powerful states to evade the objective rule of international law,<sup>27</sup> and as a sophisticated way to reintroduce the ‘S word’ into international life.<sup>28</sup>

I believe that there is much merit in these objections. Admittedly, some of the policy arguments discussed below would support a flexible reading of international law *per se*<sup>29</sup> (for instance, as a method to increase its compliance-pull).<sup>30</sup> In addition,

<sup>23</sup> The theory of rights as side-constraints had been developed by R Nozick, *Anarchy, State, and Utopia* (1974), at 29–34.

<sup>24</sup> *Lotus (France v Turkey)* [1927] PCIJ Rep. Series A, No 10, at 18–19.

<sup>25</sup> The link between the principle of subsidiarity and the margin of appreciation was discussed by the ECtHR in *Use of Languages in Belgium (the Belgian Linguistics Case)*, 1 EHRR 252, at 281–282 (1968). See also Arai-Takahashi, *supra* note 6, at 3; Petzold, ‘The Convention and the Principle of Subsidiarity’, in R St J MacDonald *et al.* (eds), *The European System for the Protection of Human Rights* (1993), at 41, 59; Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’, 97 *AJIL* (2003) 38, at 57–58.

<sup>26</sup> See, e.g., *Certain Aspects of the Laws on the Use of Languages in Education in Belgium (No 2)* (Merits), 1 EHRR 252, at 353 (1967), Partly Dissenting Opinion of Judge Wold; Lord Lester of Herne Hill, ‘Universality Versus Subsidiarity: A Reply’ [1998] *Eur Hum Rts L Rev* 73, at 75; Benvenisti, ‘Margin of Appreciation, Consensus and Universal Values’, 31 *NYU J Int’l L & Pol* (1999) 843, at 844; Besselink, ‘Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union’, 35 *CML Rev* (1998) 629, at 639–640; P van Dijk and G van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, 1998), at 93; Arai-Takahashi, *supra* note 6, at 233.

<sup>27</sup> See, e.g., Feingold, ‘The Doctrine of Margin of Appreciation and the European Convention on Human Rights’, 53 *Notre Dame L Rev* (1977) 90, at 95.

<sup>28</sup> Henkin, ‘That “S” Word: Sovereignty, and Globalization, and Human Rights, et cetera’, 68 *Fordham L Rev* (1999) 1, at 7.

<sup>29</sup> See *Golder v UK*, 1 EHRR 524, at 526–527 (1975), at 53 (Separate Opinion of Judge Fitzmaurice).

<sup>30</sup> Cf M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), at 2–6 (discussing the link between the responsiveness of international law to state needs and the propensity to comply).

some authors have suggested that there is an independent virtue in legal pluralism (especially in the field of human rights).<sup>31</sup> But, at the end of the day, these policy considerations must, in my mind, give way to the more fundamental relationship between the need for meaningful normative guidance, on the one hand, and the attainment of the substantive goals of specific norms and regimes, on the other hand. I believe it would be deplorable if application of the margin of appreciation doctrine were to result in a significant dilution of the degree of objective legal certainty which appertains to important international law norms – for instance, in promoting divergent interpretations as to whether certain interrogation techniques constitute prohibited torture<sup>32</sup> or whether the release of ‘greenhouse’ gasses violates environmental law.<sup>33</sup> Perpetuating normative ambiguity in these and other areas of the law might encourage states to evade inconvenient legal obligations and render such obligations meaningless.<sup>34</sup>

However, different international law norms are endowed with different levels of inherent legal certainty. Furthermore, some law-application exercises, i.e., interactions between facts and law, are by their very nature less certain than others and hinge upon intrinsically indeterminate circumstances.<sup>35</sup> I submit that in cases where the application of law is inherently or inevitably uncertain there are strong policy reasons which support recourse to the margin of appreciation doctrine. Since the ideal of legal certainty remains largely unattainable in such cases, regardless of whether the doctrine is applied or not, the guidance-eroding disadvantages that attach to the application of the doctrine are greatly reduced.<sup>36</sup> Furthermore, I argue below that national authorities enjoy comparative institutional advantages over international courts with regard to fact-finding and fact-assessing exercises, but not in relation to norm-interpretation projects. As a result, a general margin of appreciation doctrine should mainly govern fact-intensive law-application decisions and not norm-intensive law-interpretation processes,<sup>37</sup> whose ultimate elaboration should remain the exclusive province of the international judiciary.<sup>38</sup> While distinctions between certain and uncertain norms and between law-interpretation and

<sup>31</sup> See, e.g., Donoho, *supra* note 13, at 406; Perry, ‘Are Human Rights Universal? The Relativist Challenge and Related Matters’, 19 *Hum Rts Q* (1997) 461, at 498–509; Sweeney, ‘Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era’, 54 *ICLQ* (2005) 459, at 471; Arai-Takahashi, *supra* note 6, at 235.

<sup>32</sup> See, e.g., Department of Defense Working Group Report on Detainee Interrogations in the Global War Against Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations, 6 Mar. 2003, available at [http://stopimperialism.be/military\\_0604.pdf](http://stopimperialism.be/military_0604.pdf), at 10–16.

<sup>33</sup> See, e.g., Murphy, ‘Contemporary Practice of the United States’, 96 *AJIL* (2002) 461, at 487–488.

<sup>34</sup> On the link between norm determinacy and legitimacy, see TM Franck, *The Power of Legitimacy Among Nations* (1990), at 50.

<sup>35</sup> Cf Carozza, *supra* note 25, at 72.

<sup>36</sup> On the link between legal certainty and the margin of appreciation doctrine, see, e.g., *Rees v UK*, 9 EHRR (1987) 56, at 67.

<sup>37</sup> This also includes balancing between competing norms. See Greer, *supra* note 13, at 429; Ehlermann and Lockhart, *supra* note 4, at 497.

<sup>38</sup> Cf Croley and Jackson, ‘WTO Procedures, Standard of Review, and Deference to National Governments’, 90 *AJIL* (1996) 193, at 202.

law-application exercises are never clear-cut,<sup>39</sup> some distinctive indicators exist. Ultimately, it would be for international courts to determine whether deference to national authorities is warranted, and to what extent.<sup>40</sup> This judicial ‘gatekeeper’ role is vital in order to prevent misuse of the doctrine in a manner which might undermine the rule of international law.

I propose that there are three principal categories of international law norms, which might meet the test of inherent uncertainty in their application: standard-type norms, discretionary norms and result-oriented norms. The common denominator of these norms is that their application across diverse situations involving different state actors can never attain significant uniformity since they are either inevitably circumstance-dependent or purposefully non-uniform. As a result, the practice of states applying these norms is bound to be inconsistent. Of course, there are various gradations of ambiguity within these groups of norms – i.e., some uncertain norms are more uncertain than others. However, I posit that such distinctions should be better addressed by a nuanced margin of appreciation rule (according states wider or narrower margins, as appropriate), and not through an across-the-board rejection of the doctrine.

### 1 *Standard-type Norms*

The first group of inherently flexible norms comprises ‘standard-type’ norms. The distinction between rules and standards is well known in the domestic laws of many states,<sup>41</sup> and resort to standards such as ‘public policy’, ‘good faith’, ‘reasonable’ or ‘proportional’ is a common feature of virtually every legal system. International law is also rich with standard-type norms (for instance, ‘necessity’,<sup>42</sup> ‘proportionality’ or ‘excessiveness’,<sup>43</sup> ‘good faith’,<sup>44</sup> ‘reasonable’,<sup>45</sup> etc.), many of which appear in the exception clauses (sometimes also referred to as ‘clawback’ or ‘limitation’ clauses) of

<sup>39</sup> See, e.g., *Marbury v Madison*, 5 US 137 (1803), at 177 (‘It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule’); Ehlermann and Lockhart, *supra* note 4, at 504.

<sup>40</sup> Cf Croley and Jackson, *supra* note 38, at 205.

<sup>41</sup> See, e.g., Kennedy, ‘Form and Substance in Private Law Adjudication’, 89 *Harvard L Rev* (1976) 1754; Schlag, ‘Rules and Standards’, 33 *UCLA L Rev* (1985) 379, at 382–383; Cox, ‘An Interpretation and (Partial) Defense of Legal Formalism’, 36 *Indiana L Rev* (2003) 57, at 68; Kaplow, ‘Rules Versus Standards: An Economic Analysis’, 42 *Duke LJ* (1992) 557, at 568–570; Sullivan, ‘The Justices of Rules and Standards’, 106 *Harvard L Rev* (1992) 22, at 57–59.

<sup>42</sup> See, e.g., General Agreement on Tariffs and Trade, 30 Oct. 1947, 55 UNTS 194 (hereinafter GATT), Art. XX(b); International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171 (hereinafter ICCPR), Art. 19(3); Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 UNTS 287, Art. 53.

<sup>43</sup> See, e.g., UNCLOS, *supra* note 20, Art. 221(a); Additional Protocol to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Art. 57(b).

<sup>44</sup> Charter of the United Nations, 26 June 1945, 59 Stat. 1031, Art. 2(3); VCLT, *supra* note 15, Art. 26.

<sup>45</sup> See, e.g., Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997, 36 ILM (1997) 700, Art. 5; Treaty Establishing the European Community (Consolidated Version), 24 Dec. 2002, OJ (2002) C 325/33, Art. 77; European Convention on Human Rights, 4 Nov. 1950, ETS 5, Art. 5(3).



numerous international instruments.<sup>46</sup> Although the boundaries between ‘rules’ and ‘standards’ are vague,<sup>47</sup> some useful rules of thumb exist (for instance, resort to common standard-type phrases, explicit or implicit reference to factual circumstances, incorporation in exception clauses).<sup>48</sup>

The resort to open-ended principles overcomes some of the problems associated with the inbuilt limits of law-making through black-letter instruments – i.e., the inability of legislators to fully foresee and assess the implications of applying law to reality, including future developments. ‘Standard-type’ norms mediate between law and reality and inject considerable flexibility into the law. The choice to replace rules with standards could also be analysed as a political choice.<sup>49</sup> It marks a preference for pluralism and diversity over uniformity in law-application, and the empowerment of decentralized national decision-makers at the expense of their international counterparts.<sup>50</sup> In all events, resort to standard-type norms reduces legal certainty,<sup>51</sup> since their application is always circumstance-dependent.<sup>52</sup>

For example, states may use force in self-defence only if the forceful measures to be taken are necessary and proportional.<sup>53</sup> Hence, the authorities of the defending state must adopt a series of determinations: for instance, whether to apply force in the first place; what extent of force to use; and whether to pursue a specific target with specific military means. Assessment of the lawfulness of each of these decisions cannot be divorced from fact analysis, risk assessment, impact evaluation, ascertaining the supposed intentions of the parties to the conflict and the like. The subjective and speculative nature of these factors (which at times requires calculation of future risks) makes it quite impossible to expect that the said standards will be uniformly applied across armed conflicts, as the factors that need balancing and the perceptive capabilities of the relevant actors are bound to differ from one case to another.<sup>54</sup> While international

<sup>46</sup> See, e.g., GATT, *supra* note 42, Art XX; ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/CN.4/L.602/Rev.1 (2001), Arts. 25 and 51; ICCPR, *supra* note 42, Art. 4; International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 UNTS 3 (hereinafter ICESCR), Art. 4. See also Arai-Takahashi, *supra* note 6, at 8.

<sup>47</sup> See, e.g., D’Amato, ‘Legal Uncertainty’, 71 *California L Rev* (1983) 1, at 3, n. 6; Kennedy, *supra* note 41, at 1701.

<sup>48</sup> See, e.g., Korobkin, ‘Behavioral Analysis and Legal Form: Rules VS. Standards Revisited’, 79 *Oregon L Rev* (2000) 23, at 25–30.

<sup>49</sup> See Kennedy, *supra* note 41, at 1702–1706, 1709–1710.

<sup>50</sup> See, e.g., Carozza, *supra* note 25, at 60–63; Mahoney, ‘Judicial Activism and Judicial Self-restraint in the European Court of Human Rights: Two Sides of the Same Coin’, 11 *Hum Rts LJ* (1990) 57, at 78; Sweeney, *supra* note 31, at 472.

<sup>51</sup> But see Schlag, *supra* note 41, at 412–413 (challenging the traditional certainty/uncertainty dichotomy by pointing out that the application of rules in some areas works to increase uncertainty in unregulated areas and that the application of precedents to standard settings reduces flexibility of the standards).

<sup>52</sup> See, e.g., Carozza, *supra* note 25, at 60. See also Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’, 61 *MLR* (1998) 11, at 20–21 (arguing that distinct legal traditions might also influence the application of standards); Arai-Takahashi, *supra* note 6, at 238–239; Greer, *supra* note 13, at 425.

<sup>53</sup> These requirements exist separately under *jus ad bellum* and *jus in bello*. See, e.g., *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, at 245; Protocol I, *supra* note 43, Art. 51(5)(b).

<sup>54</sup> Cf Zleptnig, *supra* note 4, at 12.

courts can provide some important guidance to parties involved in armed conflicts on how to apply international law, especially by means of highlighting areas of patent illegality (for instance, strict prohibition of certain means and methods of warfare, etc.),<sup>55</sup> and by maintaining some degree of supervision over the application of standards by the warring parties, some degree of uncertainty will always remain. I argue below that the grant of a margin of appreciation to national authorities entrusted with making use of force-related determinations acknowledges the inherent uncertainty of the applicable standards and offers a realistic framework of review, which enhances overall the legitimacy and effectiveness of international judicial supervision.

## 2 Discretionary Norms

The second category involves norms which explicitly or implicitly condition their application upon the exercise of discretion by relevant states. These discretionary norms might comprise either standard-type or rule-type norms. For example, the national security exception to the GATT permits certain trade restrictions which the contracting parties ‘consider necessary’ (a discretionary standard-type norm).<sup>56</sup> At the same time, United Nations Convention on the Law of the Sea (UNCLOS) authorizes coastal states to grant or deny marine research projects in their national exclusive economic zone (EEZ) and continental shelf areas, at their discretion;<sup>57</sup> and diplomatic law enables states to reject without explanation the credentials of a foreign diplomat or declare her as a *persona non grata*.<sup>58</sup> These last two examples demonstrate the possibility of granting states broad discretion in relation to the application of norms formulated as rules.<sup>59</sup>

The reference in the primary norm to the discretionary power of the state in applying it signifies the drafters’ preference for a non-uniform mode of application and their conscious decision to empower norm-applying states. Hence, states should be granted a wider margin of appreciation in relation to discretionary norms than with respect to comparably phrased non-discretionary norms (both standard-type and rule-type norms).<sup>60</sup>

<sup>55</sup> See *Oil Platforms*, *supra* note 1, Separate Opinion of Judge Koojimas, at para. 44 ([‘T]he means by which interests may be protected are usually subjected to legal prescriptions that are stricter and more compelling’).

<sup>56</sup> GATT, *supra* note 42, Art. XXI. For similar language see Council of Europe Convention on Cybercrime, 23 Nov. 2001, ETS 185, Art. 27(4); Agreement on the Establishment of a Free Trade Area (US – Jordan), 24 Oct. 2000, 41 ILM (2002) 63, Art. 12(2)(a)-(b); Central European Free Trade Agreement, 21 Dec. 1992, 34 ILM (1995) 3, Art. 19; North American Free Trade Agreement, 8 Dec. 1992, 32 ILM (1993) 296, Art. 2101(1)(b); UN Convention on the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 Dec. 1988, 28 ILM (1989) 497, Art. 13.

<sup>57</sup> UNCLOS, *supra* note 20, Art. 246(5).

<sup>58</sup> Vienna Convention on Diplomatic Relations, 18 Apr. 1961, 500 UNTS 95, Art. 9.

<sup>59</sup> See also Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 Sept. 1968, 29 ILM (1990) 1413, Art. 28, as updated by Council Regulation 44/2001 of 22 Dec. 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ (2001) L 12/1 (hereinafter Brussels Convention)(states may also have discretion on whether to recognize the effect of related proceedings taking place before foreign courts). See also Arai-Takahashi, *supra* note 6, at 220.

<sup>60</sup> See, e.g., Akande and Williams, *supra* note 15, at 386–388.

### 3 Result-oriented Norms

Another group of flexible international law norms are result-oriented norms. Although the 2001 Draft Articles on State Responsibility refrained from underscoring the differences between obligations of conduct and obligations of result, there is little question that the two groups of obligations are distinct from one another.<sup>61</sup> While this perhaps has few implications for the law of state responsibility, which takes effect *after* a breach has occurred, it has significant implications for our present topic, which involves an inquiry of a more preliminary nature – i.e., whether a norm of international law has been breached.

Result-oriented norms are, as a rule, indifferent to the way in which a desired object is attained, provided that its eventual attainment is ensured. States thus enjoy broad discretion as regards the choice of means and manner of implementation of result-oriented norms and the path to the desired end is bound to be uncertain.<sup>62</sup> For example, most economic and social human rights introduce obligations of result upon states to ensure basic social services, through a variety of means from which states are free to choose.<sup>63</sup> Similarly, some environmental law norms set maximum emission quotas for various harmful substances and materials, but leave it up to the state in question to determine how to meet the required goal.<sup>64</sup> EC directives also represent a regular procedure for the promulgation of result-oriented norms.<sup>65</sup>

At first glance, one might deny the utility of introducing a margin of appreciation analysis in relation to result-oriented norms: in the absence of primary rules regulating the means to obtain the end, states enjoy, by definition, wide discretion in the exercise of their powers.<sup>66</sup> However, the policy considerations which support the introduction of the doctrine encourage the *construction* of some international norms as flexible result-oriented norms, providing thereby a *de facto* margin of appreciation in relation to their implementation.<sup>67</sup> I argue below that the ICJ decisions in *Avena* and *LaGrand* should be understood in this light.

<sup>61</sup> See ILC Commentary to Art. 12 of the Draft Articles on State Responsibility for Internationally Unlawful Acts, GAOR 56th Sess., Supp. No. 10 (A/56/10), chp IV.E.2 (2001), at 130–131 (para. 11).

<sup>62</sup> See, e.g., *Colozza v Italy*, 7 EHRR (1985) 516, at 525 (“The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6(1) in this field”); *LaGrand (Germany v. US)* [2001] ICJ Rep 466, at 514.

<sup>63</sup> ICESCR, *supra* note 46, Art. 2(1). See also *Johnston v Ireland*, 9 EHRR (1987) 203, at 220; Mahoney, *supra* note 50, at 79.

<sup>64</sup> Kyoto Protocol to the Framework Convention on Climate Change, 10 Dec. 1997, 37 ILM (1998) 22, Art. 3(1). Greer refers to the discretion afforded to governments in such cases as ‘implementation discretion’: Greer, *supra* note 13, at 423.

<sup>65</sup> See, e.g., Case C-6/90, *Francovich v Italy* [1991] ECR I-5357, at 5412.

<sup>66</sup> See *Lotus*, *supra* note 24, at 19 (states generally enjoy in their exercise of powers a ‘wide measure of discretion, which is only limited in some cases by prohibitive rules’). See also *National Union of Belgian Police*, 1 EHRR 578, at 591 (1975).

<sup>67</sup> See, e.g., Evrigenis, ‘Recent Case-Law of the European Court of Human Rights on Articles 8 and 10 of the European Convention on Human Rights’, 3 *Hum Rts LJ* (1982) 121, at 137–138.

## D *Pro-application Policy Arguments*

Several policy considerations are normally cited in favour of the application of margin of appreciation doctrine in both national and international law.<sup>68</sup> The following section focuses on those considerations which are particularly relevant for application by international courts. The subsequent section will address some counter-arguments criticizing the doctrine.

### 1 *Institutional Advantages*

A central argument in favour of a general margin of appreciation doctrine is that national actors have superior law-application capabilities to those of international courts. There are two prongs to this argument: (a) that the judicial decision-making process, both at the national and international levels, suffers from chronic deficiencies that support the delegation of decision-making powers to non-judicial decision-makers; and (b) that international courts have more limited decision-making capabilities than their domestic counterparts.

The first contention is premised upon the notion that courts are often sub-optimal decision-makers. Courts adopt decisions in the context of a specific dispute, on the basis of information supplied to them by the parties, and through the prism of legal norms (which often reflect social interests in an unsatisfactory manner).<sup>69</sup> These features constrain judicial perspectives, limit courts' sources of information and introduce a circumscribed time-frame for the decision-making process. By contrast, state bureaucracies continually monitor situations and address them utilizing a variety of inter-disciplinary tools, incorporating a variety of short-term and long-term interests. Hence, they seem to be better situated to adopt general policies and to anticipate the entire gamut of implications deriving from specific decisions. Furthermore, courts are often resource-starved, lacking the information-gathering, data-analysis and access to expertise which are available to non-judicial administrators. As a result, many national courts regularly defer to the professional expertise of state legislators and administrations, and abstain from substituting their discretion with judicial discretion – i.e., they accord them a margin of appreciation *vis-à-vis* their actions.<sup>70</sup>

These arguments assume particular force at the international level. This is because the resource gap between courts and national bureaucracies is normally greater at this level since international courts are under-funded or under-staffed in comparison

<sup>68</sup> See, e.g., Croley and Jackson, *supra* note 38.

<sup>69</sup> Cf Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"', 19 *Florida State U L Rev* (1991) 1, at 7 ('[O]utcomes derived from our adversarial judicial system or the negotiation that occurs in its shadows are inadequate for solving many human problems').

<sup>70</sup> See, e.g., H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996), at 14; Mahoney, *supra* note 50, at 76; *Chevron, USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984), at 843–845 ('[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency'); *Associated Provincial Picture Houses, Ltd v Wednesbury Corp* [1948] 1 KB, 223, at 230; HCJ (High Court of Justice) 389/90 *Dapei Zahav Ltd v Broadcasting Authority*, 35(1) PD 421, at 440–441 (Supreme Court of Israel) ('The question is not what the court would have done in the concrete circumstances, but whether a reasonable administrative authority would have conducted itself like the public official conducted himself') (unofficial translation); Croley and Jackson, *supra* note 38, at 206–207. Cf Kennedy, *supra* note 41, at 1752.

to many national courts.<sup>71</sup> Moreover, the physical detachment of international courts from the national societies whose compliance with the law they assess exacerbates their lack of expertise. While national courts are generally familiar with local conditions, which influence the manner of application of international norms, this is hardly the case with international courts, which must undergo a much longer 'learning curve' in order to reach an equivalent level of familiarity with the background conditions underlying the dispute at hand. The inability of international courts to compel the production of evidence and documents also undercuts their fact-finding capabilities. As a result, national actors (including national courts) seem to be better situated than international courts to establish the facts underlying law-application processes.<sup>72</sup>

The perceived superiority of law-application by national actors no doubt affects the legitimacy by which international judgments are perceived by addressee states and local communities.<sup>73</sup> Under-informed international judges might misunderstand the complexities of the conflict, misapply the law to the facts or set totally unrealistic legal standards. This might undermine the compliance-pull of their judgments<sup>74</sup> and hinder the prospects of an effective international rule of law.

The proposition that international courts are sub-optimal decision-makers is also supported by utilitarian concerns: since international courts are today busier than ever, considerations of judicial economy exert growing pressures on courts to delegate some decision-making powers to state authorities and to assume less intrusive (and, by implication, less time- and resource-consuming) standards of review.

Still, it is important to note that the margin of appreciation doctrine does not imply that the decision-making process should remain exclusively in the hands of state actors as such an outcome might render the rule of law illusory.<sup>75</sup> To the contrary, since international courts are typically better situated than national actors to identify and interpret the relevant norms of international law, they play a crucial part in ensuring the legal appropriateness of national decisions. Hence, it is the combination of discretion on the part of national authorities and non-intrusive review by international courts which may produce the right mix between deference and supervision, in the light of the comparable advantages of the two sets of actors.<sup>76</sup>

## 2 Democratic Accountability

A second argument which can be invoked in support of the application of a general margin of appreciation doctrine pertains to the democratic deficit in the operation of

<sup>71</sup> Arai-Takahashi, *supra* note 6, at 239; Ehlermann and Lockhart, *supra* note 4, at 502.

<sup>72</sup> Cf *Handyside v UK*, 1 EHRR 737 (1976), at 753–754; *Ireland v UK*, *supra* note 9, at 92 (state authorities are better situated than international judges to appreciate domestic conditions). See also Carozza, *supra* note 25, at 73; Croley and Jackson, *supra* note 38, at 208. But see van Dijk and van Hoof, *supra* note 26, at 94; Greer, *supra* note 13, at 420.

<sup>73</sup> Arai-Takahashi, *supra* note 6, at 207; Helfer and Slaughter, 'Toward a Theory of Effective *Supra* national Adjudication', 107 *Yale LJ* (1997) 273, at 320; Ehlermann and Lockhart, *supra* note 4, at 493.

<sup>74</sup> On the link between legitimacy and compliance, see Franck, *supra* note 34, at 24.

<sup>75</sup> Benvenisti, *supra* note 26, at 844.

<sup>76</sup> Cf Carozza, *supra* note 25, at 67.

judicial bodies. Since domestic and international courts are comprised of non-directly-elected individuals, their suitability to make important choices regarding social conditions within states is controversial.<sup>77</sup> Arguably, such choices should be taken, whenever possible, by democratically elected officials, i.e., the government apparatus,<sup>78</sup> through a process of public deliberation.<sup>79</sup>

At the international level, the democratic deficit argument would mainly support the application of a margin of appreciation doctrine with regard to ‘inward-looking’ international norms that regulate domestic conditions (for instance, human rights norms).<sup>80</sup> This is because international courts might be even less democratically accountable than their domestic counterparts.<sup>81</sup> Hence, societies should arguably be entitled to some latitude in adopting social arrangements which reflect the wishes, values and perceived interests of the population, as expressed through democratic processes.<sup>82</sup>

However, it must be acknowledged that the democratic deficit argument fails in relation to ‘outward-looking’ norms regulating state conduct which radiates across national boundaries (for instance, the prohibition against the use of force). This is because the role of international courts in such cases is to protect one society from unlawful encroachments made against it by another society.<sup>83</sup> Notably, the decision-makers in the ‘cost-externalizing’ society do not hold themselves accountable to the foreign societies adversely affected by their conduct. Benvenisti argues that similar considerations militate against application of the doctrine with respect to intra-societal majority-minority conflicts since democratic decision-making processes might

<sup>77</sup> At the national level, separation of powers considerations also militate against excessive intrusiveness on the part of the judiciary in the business of government. See, e.g., Sprigman, ‘Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis’, 59 *U Chicago L Rev* (1992) 1645, at 1667–1668; Starr, ‘Judicial Review in the Post-Chevron Era’, 3 *Yale J of Regulation* (1986) 283, at 308, 312.

<sup>78</sup> See *Hatton v UK*, 37 EHRR (2003) 611, at 634 (‘The national authorities have direct democratic legitimacy and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions’); Croley and Jackson, *supra* note 38, at 207; Greer, *supra* note 13, at 420.

<sup>79</sup> See Zleptnig, *supra* note 4, at 16; Ehlermann and Lockhart, *supra* note 4, at 493.

<sup>80</sup> Arai-Takahashi identifies several areas of human rights law which are closely linked to state sovereignty notions and attract a wide margin of appreciation. These include immigration and election systems: Arai-Takahashi, *supra* note 6, at 210–213.

<sup>81</sup> See, e.g., Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’, 19 *Hum Rts LJ* (1998) 2, at 4.

<sup>82</sup> Benvenisti, *supra* note 26, at 843, 846; Arai-Takahashi, *supra* note 6, at 216; Mahoney, *supra* note 50, at 81–82; Marks, ‘The European Convention on Human Rights and its “Democratic Society”’, 66 *BYIL* (1995) 209, at 219. The classical exposition of this rationale is found in the arguments made by the European Human Rights Commission President, Sir Humphrey Waldock, before the ECtHR in *Lawless v Ireland*, ECtHR, Series B, No 1 (1960–1961), at 408 (‘[T]he interest which the public itself has in effective Government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government’s appreciation’). See also Waldock, ‘The Effectiveness of the System Set Up by the European Convention on Human Rights’, 1 *Hum Rts LJ* (1980) 1, at 9.

<sup>83</sup> Croley and Jackson, *supra* note 38, at 209. Cf *Oil Platforms*, *supra* note 1, Separate Opinion of Judge Kooijmans, at para. 44 (Resort to force ‘lends itself much more to judicial review and thus to a stricter test, since the means chosen directly affect the interests and rights of others’).

inadequately safeguard the interests of minority groups.<sup>84</sup> Another predicament involves the grant of margin of appreciation to authoritarian regimes (which have an inherent democratic deficit).<sup>85</sup> In all of these cases, one can hardly rely upon the democratic deficit of international courts as a factor favouring the application of the doctrine.<sup>86</sup>

Given the problematic nature of the distinction between 'inward' and 'outward' looking norms in an age of globalization, one ought to recognize the limited reach of the democratic accountability rationale. It could still support, however, the broad proposition that some international norms (for instance, inward-looking) are more amenable to the application of the doctrine in certain specific contexts (for instance, when applied within democratic states), than other international norms applied in less hospitable conditions.<sup>87</sup>

### 3 Fairness in Attributing Responsibility

A third policy argument supporting the general applicability of a margin of appreciation doctrine relates to the *ex post facto* nature of attributing state responsibility for violations of vague legal standards. Given the serious implications of holding states in breach of international law and the formal and informal consequences that might ensue (for instance, sanctions, countermeasures, public shaming etc.), it is prudent to require international courts to exercise some caution in attributing liability.<sup>88</sup>

The uncertainty of the primary norm in question invites particular prudence in assigning blame. In fact, attribution of liability, facilitated by judicial review *de novo* of national decisions and the elaboration in hindsight of precise criteria of legality, might be viewed as an unfair *ex post facto* law-application of dubious legitimacy.<sup>89</sup> Resort to a deferential and less normatively ambitious margin of appreciation methodology minimizes such concerns.<sup>90</sup>

### 4 Inter-institutional Comity

Finally, it may be submitted that a general margin of appreciation doctrine is supported by consideration of inter-institutional comity. The sentiment of courtesy and

<sup>84</sup> Benvenuti, *supra* note 26, at 847, 849. See also Arai-Takahashi, *supra* note 6, at 223 (a narrow margin of appreciation is granted in discrimination cases).

<sup>85</sup> Greer, *supra* note 13, at 420.

<sup>86</sup> Cf Carozza, *supra* note 25, at 45–46.

<sup>87</sup> The practice of according wider margins of appreciation in specific human rights type legal arrangements comprising democratic regimes fits this analysis well: Ni Aolain, 'The Emergence of Diversity: Differences in Human Rights Jurisprudence', 19 *Fordham Int'l LJ* (1995) 101, at 114, 119.

<sup>88</sup> Cf *Prisoners of War (Eritrea Claim 17) (Eritrea v Ethiopia)* (partial award), 42 ILM (2003) 1083, at 1092 (Claims Commission) (grave charges against a state must be supported by a high level of certainty). An analogy could even be drawn to the notion that ambiguous criminal legislation should be construed in favour of the accused. See, e.g., Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9 (1998), Art. 22(2).

<sup>89</sup> Carozza, *supra* note 25, at 77. See also *Ireland v UK*, *supra* note 9, at 95 (the Court must not reach its decision out of 'a purely retrospective examination' of the efficiency of the measures in question).

<sup>90</sup> The argument can also be linked to the *Lotus* principle that '[r]estrictions upon the independence of States cannot therefore be presumed': *Lotus*, *supra* note 24, at 18. While the breadth of the *Lotus* theory has been subject to much justified criticism (see, e.g., J Pauwelyn, *Conflict of Norms in Public International Law* (2003), at 154), the basic thrust of the doctrine – i.e., that states retain a residual freedom to act in areas not regulated by international law (sometimes described as a principle of subsidiarity) – still seems valid.

the good faith presumption which comity conveys encourage reciprocal cooperation and coordination between international and national institutions. By resorting to comity, international courts entice greater compliance with their decisions on the part of national authorities – i.e., they invite them to respond with comity to comity.

More specifically, the division of labour between national authorities and international courts, instituted by the margin of appreciation doctrine, contributes to the development of a sense of partnership between the two sets of institutions.<sup>91</sup> The shared decision-making process and the joint responsibility for the final outcome also accelerate the process of norm-internalization by domestic actors.<sup>92</sup> Furthermore, the degree of control over law-application retained by the domestic authorities helps to sustain their confidence in the international adjudicative process and provides them with a face-saving leeway,<sup>93</sup> which facilitates judgment enforcement.<sup>94</sup> Finally, a margin of appreciation doctrine could provide international courts with a flexible tool for the long-term monitoring of national actors: it enables international courts to criticize states, without explicitly pronouncing the illegality of their conduct, and to prod national actors to gradually improve their record of performance. Such an incremental approach could weaken resistance to judicial supervision and facilitate the long-term internalization of international norms and values (as had occurred in Europe in relation to ECtHR case law). While such considerations are sometimes derisively described as ‘judicial politics’,<sup>95</sup> one could maintain that comity represents judicious politics.<sup>96</sup>

## **E Potential Criticism**

### *1 Stymieing the Elaboration of International Law Norms*

The main counter-argument directed against the application of a margin of appreciation doctrine *vis-à-vis* flexible norms, such as standard-type norms, is that the doctrine might stifle the development of judge-made law, which contributes, in turn, to the elaboration of international norms over time. Indeed, adjudication helps to elucidate legal norms, and to develop their contents through application of norms to new sets of circumstances.<sup>97</sup> This law-application process gradually builds the effective

<sup>91</sup> Carozza, *supra* note 25, at 74–75; Helfer and Slaughter, *supra* note 73, at 310–312; Mahoney, *supra* note 50, at 81.

<sup>92</sup> Koh, ‘Bringing International Law Home’, 35 *Houston L Rev* (1998) 623, at 648–650.

<sup>93</sup> Cf Benvenisti, *supra* note 26, at 849.

<sup>94</sup> This is of particular importance, given the under-enforcement of many international judgments: Croley and Jackson, *supra* note 38, at 212.

<sup>95</sup> See, e.g., Benvenisti, *supra* note 26, at 846. Some writers have argued that the margin of appreciation is invoked in a meaningless manner, and constitutes ‘window-dressing’ for judicial activism: Arai-Takahashi, *supra* note 6, at 232.

<sup>96</sup> MacDonald, ‘The Margin of Appreciation’, in MacDonald *et al.*, *supra* note 25, at 83, 123 (‘The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Contracting States...’). Of course, to some degree all law is politics: Mensch, ‘The History of Mainstream Legal Thought’, in D Kayris (ed.), *The Politics of Law: A Progressive Critique* (2nd edn, 1998), at 13, 33.

<sup>97</sup> Cf *Avena*, *supra* note 2, Separate Opinion of Judge *ad hoc* Sepúlveda, at paras 66–69 (affording the US discretion in implementing the judgment undermines its effectiveness).



conduct-regulating quality of international norms.<sup>98</sup> These arguments are particularly potent with regard to areas of international law which require uniform application as a matter of utility or ideology (such as economic law<sup>99</sup> or human rights law). In addition, the existence of a general margin of appreciation might perpetuate auto-interpretations of the law and could foster a habit of non-accountability.<sup>100</sup>

While there is some merit in these arguments, they are not utterly persuasive. Leaving aside the question of propriety of judicial legislation as a method of creating new legal obligations,<sup>101</sup> one could argue that the inherent flexibility of standard-type norms limits the usefulness of judicial precedents pertaining to their application, as the same conduct which was 'reasonable' or 'proportional' in one set of circumstances, might be deemed 'unreasonable' or 'disproportional' in different circumstances. Attempts to set fixed criteria for the application of standard-type norms might thus be no less futile than attempts to tame an untameable beast.<sup>102</sup>

Furthermore, acceptance of a general margin of appreciation doctrine does not necessarily negate the possibility that international law-makers would gradually develop more precise standards, which will progressively limit the scope of the states' freedom of action. Such a process might be commendable if, for example, it becomes apparent over time that national institutions do not enjoy any meaningful advantages in their norm-application capacities in the regulated field of law. However, until stricter standards are developed in appropriate areas (even through incremental judicial action),<sup>103</sup> a strong case could be made that states should be judged in fairness only in accordance with *lex lata*, which should be applied with a degree of flexibility commensurate to its inconclusive contents.<sup>104</sup> The ECtHR practice of gradually narrowing down the scope of the margin granted to national authorities, in some areas of the law, without renouncing the margin of appreciation doctrine, represents an interesting example of such incremental methodology.<sup>105</sup>

## 2 Fears of Bias

Another consideration militating against the adoption of a general margin of appreciation doctrine is the perception that state authorities take decisions on the application of

<sup>98</sup> But see Kennedy, *supra* note 41, at 1707 (resort to specific rules may be counter-productive in promoting compliance).

<sup>99</sup> See, e.g., Ehlermann and Lockhart, *supra* note 4, at 494.

<sup>100</sup> Cf. Furtado, Jr. 'Guess Who's Coming to Dinner? Protection for National Minorities in Eastern and Central Europe under the Council of Europe', 34 *Columbia Hum Rts L Rev* (2003) 333, at 365.

<sup>101</sup> See, e.g., Golder, *supra* note 29, at 567 (Separate Opinion of Judge Fitzmaurice); Johnston, *supra* note 63, at 221; Arai-Takahashi, *supra* note 6, at 201; Mahoney, *supra* note 50, at 60. While some degree of judicial legislation is inevitable, there is often a policy choice whether or not to encourage it: Arai-Takahashi, *supra* note 6, at 202.

<sup>102</sup> Cf. Kennedy, *supra* note 41, at 1690.

<sup>103</sup> Mahoney, *supra* note 50, at 77; Arai-Takahashi, *supra* note 6, at 202–203.

<sup>104</sup> Cf. *SW v UK*, 29 EHRR (1996) 363, at 399 ('Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen').

<sup>105</sup> *Rees*, *supra* note 36, at 67–68; *Tyrrer v UK*, 2 EHRR 1, at 10 (1978). But see Arai-Takahashi, *supra* note 6, at 200–201 (describing objections to the 'evolving standards' methodology employed by the ECtHR).

international law in the light of overriding national interests and the degree to which they can be trusted with the exercise of discretion regarding the manner of application of international norms is doubtful.<sup>106</sup> The expertise gap between national actors and international courts is thus overshadowed by the biased nature of law-application by states.<sup>107</sup>

One could respond to this argument on various levels: first, all institutions, including international courts, have inherent biases, which affect the way they interpret and apply international law. The decision to prefer accommodating one set of biases over the other (i.e., anti-sovereignty over pro-sovereignty) is a political decision, which cannot be taken for granted.<sup>108</sup> In other words, the vision of international courts as ‘impartial guardians of international law’ and of states as entities keen on getting away with violations of international law could be challenged with competing visions of world order, which regard states as authentic and legitimate law-appliers and universalism as a form of imperialism.<sup>109</sup> By contrast, a comparative analysis of objective capabilities – for instance, levels of expertise, fact-finding capacities and compliance prospects – seems to offer relatively ideology-neutral criteria for evaluating the institutional advantages and disadvantages of the competing decision makers.

Second, the sharp dichotomy between national and international interests seems exaggerated. In reality the two are often intertwined, not the least because states create international law and international law is designed to accommodate their interests. Hence, the fear that states will exploit their discretion under a margin of appreciation doctrine to evade their international responsibilities seems overblown. Most significantly, application of the margin of appreciation doctrine could take care of these considerations and set narrower margins of discretion in areas of the law that are more vulnerable to political abuse than others. Hence, the argument in favour of total abdication of the doctrine does not follow from these potential deficiencies.

### 3 *The Problem of Externalities*

Another possible objection relates to the question of who should incur the costs of normative ambiguity – the acting state or the entities adversely affected by its actions (other states, individuals etc.). Less intrusive standards of supervision over state conduct would arguably decrease the scope of protection afforded by international law to adversely affected parties. So, for instance, the assertion that states exercising self-defence are entitled to some room for discretion in devising the proper response would leave victim states more vulnerable to excessive forceful acts disguised as proportional ‘self-defence’ operations. Arguably, attainment of the substantive goals underlying the norm in question (for instance, renouncement of the use of force) is more

<sup>106</sup> Benvenisti, *supra* note 26, at 850; Croley and Jackson, *supra* note 38, at 209.

<sup>107</sup> These considerations apply with special force when domestic law, which governs the operations of the domestic authorities, interferes with the manner of application of international law: Ehlermann and Lockhart, *supra* note 4, at 510.

<sup>108</sup> See, e.g., Croley and Jackson, *supra* note 38, at 211 (legal harmony should not always trump sovereignty). Cf Koskenniemi, *supra* note 30, at 211.

<sup>109</sup> See Carozza, *supra* note 25, at 64.

compatible with the proposition that the 'cost-externalizing' state, and not the victim state, should bear the costs of any normative ambiguity.

Indeed, as already indicated above, cost-externalization could justify a distinction between 'inward-looking' and 'outward-looking' norms, and the scope of margin of appreciation afforded to the acting states in each case should vary. However, the conclusion that cost-externalizing conduct should not be subject to any margin of appreciation seems unwarranted. Since norms, including 'outward-looking' norms, protect legitimate state interests, requiring cost-externalizing states to incur the costs of ambiguity might under protect their interests and overprotect those of the other implicated actors. This could have undesirable effects. For example, denying self-defending states any margin of appreciation could produce a 'chilling effect', which would deter them from responding to mid-level armed attacks. This, in turn, might encourage enemies of the legally-restrained state to engage in provocations against it (which is also a form of cost externalization). The assertion that the cost-externalizing party should be subject to exacting legal scrutiny marks a questionable policy preference for inaction (i.e., the prevailing *status quo*), even when action is legitimized by international law. This represents a political stance, which might be open to criticism since it detracts from the ability of international law to react to new challenges; in addition, it seems to conflict with the *Lotus* principle, which can be read in support of the contention that in the absence of a clear normative proscription the state whose conduct is being reviewed should retain some freedom of action.

#### 4 *Jus cogens Norms*

In the same vein, it has been argued that the margin of appreciation doctrine cannot conceivably apply in relation to *jus cogens* norms.<sup>110</sup> The non-derogable nature of these norms and the fundamental significance of the international values and interests they protect militate against diluting their contents through resort to the doctrine. Arguably, strict scrutiny by international courts is more responsive to the gravity of the interests at stake.

Once again, such arguments are hardly decisive. The premise that *jus cogens* norms have fixed contents capable of mechanical application seems inaccurate. Rather, *jus cogens* norms such as the prohibition against the use of force or the right to self-determination<sup>111</sup> are perhaps among the less certain norms of international law. At the same time the implications of finding a state in violation of *jus cogens* norms are particularly grave (for instance, it might entail criminal proceedings against individuals). Hence, the aforementioned fairness rationale supports application of the doctrine to *jus cogens* with exceptional force.

The sensitive nature of the national interests protected by decisions relating to the application of *jus cogens* norms<sup>112</sup> should also encourage international courts to proceed carefully so as to avoid accusations of politicization and rash judgments. Indeed,

<sup>110</sup> See, e.g., Arai-Takahashi, *supra* note 6, at 210, 226.

<sup>111</sup> See, e.g., Espiell, 'Self-Determination and Jus Cogens', in A Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law* (1979) 167; Frowein, 'Jus Cogens', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1997), iii, 65, at 67.

<sup>112</sup> Cf *Legality of Nuclear Weapons*, *supra* note 63, at 262–263 (the Court hesitated to pronounce the illegality of using nuclear weapons in circumstances where the very existence of the state was threatened).

some international courts provide states with wider margins of discretion in security-related matters,<sup>113</sup> acknowledging thereby the link between the importance of the state interests at stake and the latitude in the application of norms affecting those interests.<sup>114</sup> So, although the gradual narrowing of the margin of appreciation afforded to states as a method of increasing legal certainty in respect of *jus cogens* norms may be commendable, a sweeping abrogation of the doctrine seems unwarranted.<sup>115</sup>

## 2 The Practice of Courts and Tribunals Other than the ICJ

### A *The European Court of Human Rights*

The margin of appreciation doctrine has long been applied by courts other than the ICJ. Most renowned is the extensive application of the doctrine by the ECtHR in numerous cases.<sup>116</sup> For example, in the 1976 *Handyside* case<sup>117</sup> the Court reviewed the lawfulness of a prohibition by UK officials on the distribution of a teenage guidebook alleged to adversely affect public morals. In accepting the government's position that the measure in question was a legitimate restriction upon freedom of expression, the Court stated the main parameters of the margin of appreciation doctrine:

Article 10(2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force [cites omitted]. Nevertheless, Article 10(2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (art. 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.<sup>118</sup>

Notably, Article 10(2) deals with a 'standard-type' norm: the introduction of necessary and proportional restrictions upon freedom of expression. In such cases, the ECtHR does not sit as a 'fourth court of appeal', but rather as a non-intrusive supervisory mechanism.

<sup>113</sup> See *infra* note 122.

<sup>114</sup> In fact it had been argued that the natural field of application of the doctrine by the ECtHR is national emergencies: Gross, "Once More unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', 23 *Yale J Int'l L* (1998) 437, at 497–498; Benvenisti, *supra* note 26, at 845.

<sup>115</sup> For support, see *Oil Platforms*, *supra* note 1, Separate Opinion of Judge Koojijmans, at para. 46 ('[T]he prohibition of force is considered to have a peremptory character. The measure of discretion to which the United States is entitled is therefore considerably more limited than if it had chosen, for instance, the use of economic measures').

<sup>116</sup> See, e.g., *Engel v Netherlands*, 1 EHRR 647 (1976); *Golder*, *supra* note 29; *De Wilde v Belgium*, 1 EHRR 373 (1971); *Mellacher v Austria*, 12 EHRR (1990) 391; *Goodwin v UK*, 22 EHRR (1996) 123; *Smith v UK*, 29 EHRR (2000) 493; *Pretty v UK*, 35 EHRR (2002) 1; *Dudgeon v UK*, 4 EHRR (1982) 149; *Lehideux v France*, 30 EHRR (2000) 665.

<sup>117</sup> *Handyside v UK*, *supra* note 72.

<sup>118</sup> *Ibid.*, at 22–23.

The subsequent case law of the ECtHR indicates that the manner of application of the doctrine depends on a variety of factors, which determine the scope of margin afforded to the national authorities. Three factors are particularly pertinent:<sup>119</sup> (i) *comparative advantage of local authorities* – subjective norms (i.e., circumstance-dependent), which domestic institutions are better situated to assess, should entail a broader margin than objective norms, whose manner of application the ECtHR can independently assess;<sup>120</sup> (ii) *indeterminacy of the applicable standard* – the greater is the degree of European consensus on the application of the standard, the narrower is the margin that should be accorded to state parties;<sup>121</sup> (iii) *nature of the contested interests* – the importance of the national interest at stake ought to be balanced against the nature of the individual rights compromised by the reviewed limitation. The width of the margin to be granted to states should reflect this balancing formula.<sup>122</sup>

## B The European Court of Justice

An approach similar to that taken by the ECtHR has been adopted by the European Court of Justice (ECJ). For example, in *Leifer*,<sup>123</sup> it held that the Member States have discretion in invoking the security exception to Community legislation which generally bars the introduction of unilateral sanctions on third states:<sup>124</sup>

<sup>119</sup> See Brems, 'The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights', 56 *Heidelberg J Int'l L* (1996) 240, at 256; Yourow, *supra* note 70, at 186–196.

<sup>120</sup> See *Sunday Times v UK* (1980) 2 EHRR 245, at para. 59.

<sup>121</sup> See *Rees*, *supra* note 36; Yourow, *supra* note 70, at 54. For criticism of the Court's emphasis on consensus, see Benvenisti, *supra* note 26, at 851–852; Helfer, 'Consensus, Coherence and the European Convention on Human Rights', 26 *Cornell Int'l LJ* (1993) 133, at 141–142; MacDonald, *supra* note 96, at 124; Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Justice', 73 *Notre Dame L Rev* (1998) 1217; Arai-Takahashi, *supra* note 6, at 195–196. The present author also questions the appropriateness of reliance upon consensus among states parties as an independent criterion for determining the need to apply the doctrine. However, resort to comparative study might be useful in asserting the determinacy of specific norms and in refuting claims that certain social arrangements are inevitable. See also Mahoney, *supra* note 50, at 74.

<sup>122</sup> For example, see *Leander v Sweden*, 9 EHRR (1987) 433, at para. 59 ('[T]he national authorities enjoy a margin of appreciation, the scope of which will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference involved. In the instant case, the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life'). See also *Rekvenyi*, *supra* note 16, at 534; *Çakici v Turkey*, 31 EHRR (2001) 135, at 191–192; *The Observer v UK*, 14 EHRR (1992) 153, at 218 (Partly Dissenting Opinion of Judge Morneilla) ('It is true that the State's margin of appreciation is wider when it is a question of protecting national security than when it is a question of maintaining the authority of the judiciary by safeguarding the rights of the litigants'). The first case litigated by the Court, the *Lawless* case, also comports with this trend: *Lawless v Ireland*, *supra* note 82. But see *Rotaru v Romania* [2000] V ECtHR 61, at 134–135; *Smith v UK*, 29 EHRR (2000) 493, at 530; *Timmely & Sons v UK*, 27 EHRR (1999) 249, at 288.

Note also that the Court held that no margin of appreciation exists at all in cases alleging torture or inhuman or degrading treatment or punishment: *Chahal v UK*, 23 EHRR (1997) 413, at 457. For discussion of the application of the margin of appreciation doctrine to security-related ECtHR cases, see Greer, *supra* note 13, at 427; Benvenisti, *supra* note 26, at 845; Ni Aolain, *supra* note 87.

<sup>123</sup> Case C-83/94, *Germany v Leifer* [1995] ECR I-3231.

<sup>124</sup> Reg. (EEC) No 2603/69 establishing Common Rules for Exports, 1969 OJ (1969) L 324/25, Art. 11.

[D]epending on the circumstances, the competent national authorities have a *certain degree of discretion* when adopting measures which they consider to be necessary in order to guarantee public security in a Member State within the meaning indicated above.<sup>125</sup>

Similarly, in *Sirdar*,<sup>126</sup> dealing with the application of European gender equality regulations to elite military units, the Court held that:

[T]he competent authorities were entitled, in the exercise of their discretion as to whether to maintain the exclusion in question in the light of social developments, and without abusing the principle of proportionality, to come to the view that the specific conditions for deployment of the assault units of which the Royal Marines are composed ... justified their composition remaining exclusively male.

Cumulatively, these and other ECJ cases<sup>127</sup> are indicative of an acceptance of a 'margin of appreciation type' decision-making methodology, especially in relation to exception clauses (which comprise standard-type norms).<sup>128</sup>

### C *The WTO Dispute Settlement Body*

In a series of WTO cases, Dispute Settlement Body (DSB) panels and the Appellate Body (AB) have adopted a non-intrusive standard of review toward discretionary determinations made by the national authorities of the Member States<sup>129</sup> (though this flexibility is somewhat offset by onerous procedural requirements).<sup>130</sup> For example, in the *Asbestos* case, the AB held that: 'it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation'.<sup>131</sup> This approach is generally consistent with the decision taken by a GATT panel in the 1994 *Tuna* case<sup>132</sup> and with the explicit standard of review

<sup>125</sup> *Leifer*, *supra* note 23, at 3250 (emphasis added).

<sup>126</sup> Case C-273/97, *Sirdar v Army Bd* [1999] ECR 7403, esp. at para. 27.

<sup>127</sup> See, e.g., Case C-368/95, *Vereinte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689, at 3716; Case C-260/89, *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis (DEP)* [1991] ECR I-2925, at 2960; Case C-186/01, *Dory v Bundesrepublik Deutschland* [2003] ECR I-2479, at para. 36; Case C-285/98, *Kreil v Bundesrepublik Deutschland* [2000] ECR I-69, at 105; Case 131/79, *R v Secretary of State for Home Affairs, ex parte Santillo* [1980] ECR 1585, at 1600–1611; Case 34/79, *R v Henn* [1979] ECR 3795, at 3818–3814. Carozza maintains that the ECJ's traditional deference towards human rights decisions taken at the national level is indicative of its recognition of the comparative advantage of national institutions: Carozza, *supra* note 25, at 55.

<sup>128</sup> *Ibid.*, at 55–56.

<sup>129</sup> See, e.g., *EC – Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/R/USA (1997); *Underwear*, *supra* note 16; *Argentinean Safeguards*, *supra* note 10.

<sup>130</sup> See *US – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (Wheat Gluten)*, WTO Doc. WT/DS166/AB/R (2001), at para. 161–162; Zleptnig, *supra* note 4, at 5–6; Ehlermann and Lockhart, *supra* note 4, at 517.

<sup>131</sup> *Asbestos*, *supra* note 10, at para. 168.

<sup>132</sup> *US – Restrictions on Imports of Tuna*, 33 ILM (1994) 839, at para. 3.73 ('The reasonableness inherent in the interpretation of "necessary" was not a test of what was reasonable for a government to do, but of what a reasonable government would or could do. In this way, the panel did not substitute its judgment for that of the government'). However, earlier GATT case law on the applicable standards of review matter is inconsistent: Croley and Jackson, *supra* note 38, at 196–197 (discussing the *Hatter Fur*, *Transformer Imports* and *Polyacetal Resins* cases).

provided for in Article 17.6 of the Antidumping Agreement.<sup>133</sup> Generally speaking, the DSB's deferential decision-making methodology is compatible with the margin of appreciation doctrine<sup>134</sup> since it denotes judicial restraint and acknowledges the normative ambiguity of some WTO norms.

## D Other International Courts and Tribunals

The case law of other international courts and tribunals on the application of the margin of appreciation doctrine is less explicit and extensive. Still, it seems to be generally supportive of the doctrine. While human rights courts and quasi-judicial bodies other than the ECtHR have usually refrained from adopting an explicit margin of appreciation vocabulary,<sup>135</sup> some exceptional decisions cited the doctrine with approval.<sup>136</sup> 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.<sup>137</sup>

In the same vein, a number of arbitral awards have also adopted 'margin of appreciation type' methodology. For example, the arbitral tribunal in *Heathrow Charges*

<sup>133</sup> See *supra* note 8. Note however that Art. 17.6 requires panels to exercise deference *vis-à-vis* both legal and factual national determinations. For discussion see Ehlermann and Lockhart, *supra* note 4, at 500.

<sup>134</sup> Martínez, 'Towards an International Judicial System', 56 *Stanford L Rev* (2003) 429, at 519. At least in one case, a WTO arbitrator referred explicitly to the margin of appreciation doctrine: *US – Tax Treatment of 'Foreign Sales Corp'* (Art. 22.6 arbitration), WTO Doc. WT/DS108/ARB (2002), at para. 5 ('Not only is a Member entitled to take countermeasures that are tailored to offset the original wrongful act and the upset of the balancing of rights and obligations which that wrongful act entails, but in assessing the "appropriateness" of such countermeasures – in light of the gravity of the breach – a margin of appreciation is to be granted, due to the severity of that breach'). Essentially the same reasoning was embraced by one of the WTO arbitrations in the Bananas litigation (*EC – Regime for the Importation, Sale and Distribution of Bananas* (Art. 22.6 arbitration) (recourse by EC), WTO Doc. WT/DS27/ARB/ECU (2000), at paras 52–56.

<sup>135</sup> It may be assumed that certain human rights bodies were concerned that explicit resort to the margin of appreciation doctrine might encourage states parties to challenge the universality of human rights. Arguably, the more confident ECtHR could afford to acknowledge normative pluralism.

<sup>136</sup> For example, the Inter-American Court of Human Rights (I/A CHR) has in one of its first Advisory Opinions accepted the doctrine in the context of the right of member states to regulate naturalization procedures: *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Inter-AmCtHR, Series A, No 4 (1984), at para. 58 ('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'). See also *Hertzberg v Finland*, 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').

<sup>137</sup> See, e.g., Comm. 547/1993, *Mahuika v New Zealand*, UN Doc. CCPR/C/70/D/547/1993 (2000), paras 9.10–9.11 (emphasizing the circumstantial context of the limitation upon the applicants' rights); Comm. 35/1978, *Aumeeruddy-Cziffra v Mauritius*, UN Doc. A/36/40 (1981), at para. 9.2(b)(2)(ii) ('[T]he 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'). See also Benvenisti, *supra* note 26, at 844–845; JG Merrills, *The Development of International Law by the European Court of Human Rights* (1993), at 19; Schmidt, 'Book Review: Coming to Grips with Indigenous Rights', 10 *Harvard Hum Rts J* (1997) 333, at 338.

held that the UK is entitled to a margin of appreciation in setting airport charges.<sup>138</sup> Similarly, a NAFTA Chapter 11 arbitral tribunal held in *D. Myers, Inc.* that:

[A] breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the *high measure of deference* that international law generally extends to the right of domestic authorities to regulate matters within their own borders.<sup>139</sup>

While the majority in ITLOS has not embraced to date the margin of appreciation doctrine, some individual ITLOS judges advocated its adoption as the proper standard of review by which the Tribunal should oversee domestic court decisions concerning bond-setting in prompt release of vessels cases:<sup>140</sup> One ITLOS judge even argued in one case that the margin of appreciation is a well-known principle of international law;<sup>141</sup> two other ITLOS judges have resorted to the doctrine in their dissenting opinions in another case.<sup>142</sup>

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.

Indeed, the approach of the Prosecutorial Committee, which evaluated the criminal responsibility of NATO service members with relation to the 1999 air bombing campaign in Yugoslavia,<sup>143</sup> is comparable to a margin of appreciation analysis since

<sup>138</sup> Award on the First Question, *US/UK Arbitration concerning Heathrow Airport User Charges*, 30 Nov. 1992, ch 5, at 84 (para. 2.2.6), cited in Witten, 'The US-UK Arbitration Award concerning Heathrow Airport User Charges', 89 *AJIL* (1995) 174, at 187 n. 56.

<sup>139</sup> *D. Myers, Inc v Canada* (Partial Award), 40 ILM (2001) 1408, at 1438 (emphasis added). For a discussion on the suitability of the margin of appreciation doctrine to NAFTA obligations, see Freeman, 'Regulatory Expropriation Under NAFTA Chapter 11: Some Lessons From the European Court of Human Rights', 42 *Columbia J Transnat'l L* (2003) 177, at 211–212.

<sup>140</sup> UNCLOS, *supra* note 20, Arts 73 and 292.

<sup>141</sup> *The Volga Case (Russia v Australia)* (Application for Prompt Release) (Separate Opinion, Judge Cot), 42 ILM (2003) 159, at 183–186.

<sup>142</sup> *Camouco (Panama v France)*(Application for Prompt Release)(Dissenting Opinions of Judges Anderson and Wolfurn), 39 ILM (2000) 666, at 690, 699.

<sup>143</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), available at <http://www.un.org/icty/pressreal/nato061300.htm>.



the Committee's position was primarily premised upon the inherent ambiguity of the principle of proportionality.<sup>144</sup> In examining whether the principle had been breached, the Committee stated:

[I]t is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the 'reasonable military commander'. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.<sup>145</sup>

In line with this approach, the Committee held that prosecution for violation of the principle of proportionality would only take place 'in cases where the excessiveness of the incidental damage was obvious'.<sup>146</sup>

Although discussion of the rationales and scope of application of the margin of appreciation doctrine in many of the surveyed cases is lacking or unsatisfactory, the explicit or implicit support for the doctrine in the jurisprudence of several international courts and tribunals serves as a strong indicator of the growing acknowledgement of the doctrine's utility. It also serves as background for a critical review of the approach taken by the ICJ in relation to the application of the doctrine, which stands out as being out of sync with the emerging consensus on the topic.

### 3 'No Room for Discretion' – Rejection of the Margin of Appreciation Doctrine by the ICJ

#### A *The Oil Platforms Case*

The status of the margin of appreciation doctrine under international law was explicitly addressed in the recent ICJ judgment in *Oil Platforms*, which involved review of the legality of two military attacks perpetrated by the US against Iranian oil installations in response to attacks against oil tankers sailing in the Persian Gulf with US and other neutral flags hoisted. During the proceedings, the US argued that the Court should afford it some margin of discretion in determining whether the decision to resort to counter-force was necessary and proportional.<sup>147</sup> The Court flatly rejected the argument:

[T]he United States claims that it considered in good faith that the attacks on the platforms were necessary to protect its essential security interests, and suggests that 'A measure of discretion should be afforded to a party's good faith application of measures to protect its essential security interests'... The Court does not however have to decide whether the United States

<sup>144</sup> See, e.g., *ibid.*, at para. 48. One could also view the principle of complementarity (Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9 (1998), Art. 17) as indicative of the low premium placed on uniformity in international criminal law matters.

<sup>145</sup> ICTY Prosecutor's Final Report, *supra* note 143, at para. 50.

<sup>146</sup> *Ibid.*, at para. 21.

<sup>147</sup> Note that the customary status of the two conditions had been reaffirmed by the ICJ in *Oil Platforms*, *supra* note 1, at para. 76.

interpretation of Article XX, paragraph 1(d), [of the applicable Friendship, Navigation and Commerce Treaty] on this point is correct, since the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is *strict and objective, leaving no room for any 'measure of discretion'*.<sup>148</sup>

The precise position of the Court on the feasibility of a general margin of appreciation doctrine remains unclear, however, as the above statement of the law could be construed in either an expansive or narrow fashion: the Court might have suggested that the margin of appreciation doctrine has no place under international law, in the absence of specific treaty language – a position which embraces some or all of the aforementioned objections in principle to the doctrine. On the other hand, the Court might have taken a more restricted position, arguing that self-defence measures are not encompassed by the doctrine, even if its application could sometimes be appropriate – an approach suggesting acceptance of the aforementioned *jus cogens* objection.

The Court's approach has been criticized by two individual judges. However, extrapolation of policy rationales from these opinions is also difficult. Judge Koojijmans wrote:

The evaluation of what essential security interests are and whether they are in jeopardy is first and foremost a political question and can hardly be replaced by a judicial assessment. *Only when the political evaluation is patently unreasonable* (which might bring us close to an 'abuse of authority') *is a judicial ban appropriate*. . . In the case before the Court the United States has concluded that a missile attack on and the mining of ships flying its flag combined with other acts endangering neutral shipping are a threat to its essential security interests. *I find it difficult to apply the test of reasonableness and to conclude that the American assessment cannot stand that test*. Any other government finding itself in the same situation might have come to the same conclusion and the reactions of a large number of other governments confirm that assessment.

Confronted with this threat to its essential security interests the United States decided (unlike other States) no longer to use diplomatic and other political pressure, but to opt for a reaction which involved the use of force. By doing so, it opted for means the use of which must be subjected to strict legal norms, since the prohibition of force is considered to have a peremptory character. The measure of discretion to which the United States is entitled is therefore considerably more limited than if it had chosen, for instance, the use of economic measures.<sup>149</sup>

Koojijmans seems to have believed that the inherent uncertainty appertaining to the exercise of self-defence (which he defines, for some reason, as political in nature) justifies recourse to the doctrine. It is nevertheless difficult to assess whether his Opinion supports the general applicability of the margin of appreciation doctrine or is confined to politically charged circumstances. Further, Koojijmans' conclusion that the peremptory nature of the norm warrants a narrow margin is not foolproof. While the peremptory nature of the prohibition against the use of force symbolizes the importance of the interests protected thereby, other factors, such as the relative importance of the competing set of interests (for instance, the magnitude of the perceived threat), the legal implications of attributing liability for breach of *jus cogens* norms and the

<sup>148</sup> *Ibid.*, at para. 73 (emphasis added).

<sup>149</sup> *Ibid.*, Separate Opinion of Judge Koojijmans, at paras 44–46 (emphasis added).

degree of legal uncertainty appertaining to such norms should also have been factored in.

In turn, Judge Buergenthal's position on the applicability of the margin of appreciation doctrine is based on the text of the Friendship, Navigation and Commerce (FNC) Treaty in force between Iran and the US. He wrote:

The language of Article XX, paragraph 1 (*d*) 'measures . . . necessary to protect essential security interests, suggests that the parties to the Treaty, without leaving it exclusively to their subjective determination as to whether or not the measures were necessary to protect their respective essential security interests, must nevertheless not be understood to have excluded the right of each party to make that assessment by reference to a standard of reasonableness. That much is implicit in the requirement the Article postulates, if only because the concept of 'essential security interests' must of necessity bear some relation to a State's own reasonable assessment of its essential security interests, even if ultimately it is for the Court to pass on that assessment. . . . [W]hile a government's determination is ultimately subject to review by the Court, it may not substitute its judgment completely for that of the government which, in assessing whether the disputed measures were necessary, must be given the opportunity to demonstrate that its assessment of the perceived threat to its essential security interests was reasonable under the circumstances.<sup>150</sup>

Hence, unlike the majority which emphasized the legal position under general international law,<sup>151</sup> Buergenthal attributed decisive meaning to the discretionary nature of the norm found in the relevant FNC Treaty. It remains unclear whether he would have supported a general margin of appreciation doctrine. Although Buergenthal's treaty-interpretation methodology, in general, and the reference to reasonableness, in particular, lends itself to application in additional cases, the failure to explicitly discuss the rationales for applying the doctrine leaves his overall position on the matter somewhat obscure.

## B Earlier ICJ Case Law

An important aspect of the controversy between the views of the majority and the minority<sup>152</sup> is the relationship between the holding of the majority in *Oil Platforms* and earlier ICJ case law. In his Separate Opinion, Judge Buergenthal noted that the majority's opinion represents a regression on the part of the Court from its application of the doctrine in the *Nicaragua* judgment.<sup>153</sup> Review of that case and other pertinent ICJ cases largely confirms Buergenthal's criticism on the exceptional nature of the Court's decision in *Oil Platforms*.

In *Nicaragua*, the ICJ held that Article XXI of the FNC treaty in force between Nicaragua and the US does not afford the parties absolute discretion in invoking its security exception:

<sup>150</sup> *Ibid.*, Separate Opinion of Judge Buergenthal, at para. 37 (emphasis added).

<sup>151</sup> *Ibid.*, at para 42.

<sup>152</sup> For support for the majority view, see *ibid.*, Separate Opinion of Judge Higgins, at para. 48; *ibid.*, Separate Opinion of Judge Simma, at para. 11.

<sup>153</sup> *Ibid.*, Separate Opinion of Judge Buergenthal, at para. 37.

[W]hether a measure is necessary to protect the essential security interests is not, as the Court has emphasized (paragraph 222 above), *purely* a question for the subjective judgment of the party.<sup>154</sup>

This *dictum* (which was cited with approval by the majority in *Oil Platforms*)<sup>155</sup> is much narrower than the passage from *Oil Platforms* cited above, since it merely implies that the discretion of the state in evaluating the necessity of applying a security measure is never absolute, but subject to ultimate review by the Court. In fact, the language used in *Nicaragua* seems to support the proposition that some margin of appreciation is permitted.<sup>156</sup>

Essentially the same position was taken by the ICJ in *Gabcikovo/Nagymaros*. In evaluating the lawfulness of Hungary's necessity defence, the Court stated that:

[T]he state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is *not the sole judge* of whether those conditions have been met.<sup>157</sup>

By way of implication, again, it could be argued that the Court accepted the theory that the state concerned retains some degree of judgment – though certainly not exclusive judgment – over the question of whether the conditions of necessity have been met.<sup>158</sup>

Clearer espousal of the margin of appreciation doctrine can be found in one of the individual opinions appended to the *Legality of Nuclear Weapons* Advisory Opinion. In his Dissenting Opinion Judge Shahabuddeen stated the view that the decision whether a certain weapon causes unnecessary suffering and is unlawful under IHL is primarily one that states ought to make:

[B]alance has to be struck between the degree of suffering inflicted and the military advantage in view... And, of course, *the balance has to be struck by States. The Court cannot usurp their judgment*; but, in this case, it has a duty to find what that judgment is.<sup>159</sup>

<sup>154</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1986] ICJ Rep 14, at para. 282 (emphasis added).

<sup>155</sup> *Oil Platforms*, *supra* note 1, at para. 43.

<sup>156</sup> *Oil Platforms*, *supra* note 154, Separate Opinion of Judge Buergerthal, at para. 37 ('The *Nicaragua* Court's suggestion that it may not be "purely" a matter of the subjective judgment of a party, implies that while a government's determination is ultimately subject to review by the Court, it may not substitute its judgment completely for that of the government which, in assessing whether the disputed measures were necessary, must be given the opportunity to demonstrate that its assessment of the perceived threat to its essential security interests was reasonable under the circumstances'). Some additional support for this proposition can be found in the Dissenting Opinion of Judge Schwebel in *Nicaragua*, which stated that in his view the US had acted reasonably, or 'at any rate, not unreasonably': *Military and Paramilitary Activities*, *supra* note 154, dissenting opinion of Judge Schwebel, at para. 76.

<sup>157</sup> *Gabcikovo/Nagymaros* (Hungary/Slovakia), 1997 ICJ 7, at 40 (emphasis added).

<sup>158</sup> See also ILC Commentary, *supra* note 61, at Art. 25, para. 17 ('[T]he interest relied on must outweigh all other considerations, not *merely* from the point of view of the acting State but on a reasonable assessment of the competing interests')(emphasis added).

<sup>159</sup> *Legality of Nuclear Weapons*, *supra* note 53, Separate Opinion of Judge Shahabuddeen, at Part III, sec. 2 (emphasis added).

Although the majority opinion in that case did not mention the doctrine at all, the acknowledgement by the Court that an *in abstracto* assessment of the legality of the use of nuclear weapons is impossible,<sup>160</sup> sits well with the proposition that standard-type norms are always circumstance-dependent. As a result, they are hardly amenable to *ex ante* mechanical application. While there is room, in my view, to argue that the Court overplayed the degree of legal ambiguity associated with application of the principles of proportionality and distinction in the *Legality of Nuclear Weapons* case, the final outcome confirms the unavoidability of utilizing standards in some areas of the law. This in turn sustains the utility of employing margin of appreciation analysis to such uncertain standards.

### C The Consular Assistance Cases

A conspicuous recent example of resort by the ICJ to a decision-making methodology compatible with the margin of appreciation doctrine can be found in the discussion of appropriate remedies in the two consular assistance cases – *LaGrand*<sup>161</sup> and *Avena*.<sup>162</sup> In both cases, the Court refrained from spelling out any specific obligations on the part of the US to reopen the judicial convictions of foreign defendants who should have been notified of their right to consular assistance. Instead the Court held in *LaGrand* that:

[I]t would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.<sup>163</sup>

In the same vein, it was held in *Avena* that:

The question ... is an integral part of criminal proceedings before the courts of the United States and it is for them to determine the process of review and reconsideration.<sup>164</sup>

The Court highlighted, however, that the margin of discretion afforded to the US authorities is not unlimited:

[T]he concrete modalities for such review and reconsideration should be primarily left to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification ... [It] has to be carried out 'by taking account of the violations of the rights set forth in the Convention'.<sup>165</sup>

The two decisions take the position that the obligation to provide remedies to individuals whose right to notification had been breached is a result-oriented remedy. As a result, states are entitled to a margin of appreciation in fulfilling their remedial obligations.

<sup>160</sup> *Ibid.*, at 262–263.

<sup>161</sup> *LaGrand*, *supra* note 62.

<sup>162</sup> *Avena*, *supra* note 2.

<sup>163</sup> *LaGrand*, *supra* note 62, at 514.

<sup>164</sup> *Avena*, *supra* note 2, at para. 122.

<sup>165</sup> *Ibid.*, at para. 131.

It is important to appreciate the policy choice underlying this solution. The Court refused in both cases to resort to the traditional *Chorzów Factory* formulation, which leads to the *status quo ex ante*<sup>166</sup> (requiring, most probably, retrials of the surviving convicts). Instead, it preferred a flexible definition of the remedial obligations incumbent upon the US, which provides limited *ex ante* guidance,<sup>167</sup> and facilitates the exercise of discretion on their manner of implementation by those US authorities responsible for domestic criminal law procedures.<sup>168</sup> This delegation of decision-making power, and the Court's refusal to assume bad faith on the part of the US in carrying out the judgment,<sup>169</sup> lead to a discourse which closely mirrors the traditional justifications for the margin of appreciation doctrine: acknowledgement of the institutional advantage of national actors and inter-institutional comity.

## D Analysis

Obviously, there are relevant distinctions between the legal and procedural contexts of the consular assistance and *Oil Platforms* judgments: Whereas *Oil Platforms* reviewed outward-looking norms – particularly *jus ad bellum* norms, the consular assistance cases addressed inward-looking norms – essentially norms governing US criminal law. According to the aforementioned democratic accountability rationale, a less intrusive standard of review was indeed warranted in the latter cases. In addition, the consular assistance judgments spell out future secondary obligations (i.e., the obligation to remedy a wrong), whereas the *Oil Platforms* judgment reviews the *ex post* fulfilment of primary norms (i.e., the obligation not to wrong). This too could justify variations in the level of judicial supervision exercised by the ICJ over state conduct (for instance, reluctance to apply a strict *ex ante*, as opposed to *ex post* judicial supervision; greater need to provide normative guidance on primary norms than on secondary norms).

Still, a careful review of the judgments suggests that more fundamental methodological choices were at play, and that the decisions reveal inconsistencies in the Court's basic approach toward judicial deference and in its readiness to acknowledge normative ambiguity. While some factors related to the *Oil Platforms* case might have worked in the direction of narrowing down the margin of appreciation due to the US authorities (importance of the implicated Iranian interests and cost-externalizing nature of the use of force), some cogent policy reasons point in the opposite direction: the ambiguity of the relevant legal standards (i.e., necessity and proportionality)

<sup>166</sup> *Factory at Chorzów (Germany v Poland)* [1928] PCIJ, Series A, No 17, at 47 (Merits) ('[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed').

<sup>167</sup> The *Consular Assistance* cases in this point mirror the judgment of the ICJ in *Haya de la Torre (Colombia v Peru)* [1951] ICJ Rep 71, at 83 ('Having thus defined in accordance with the Havana Convention, the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view toward terminating the asylum, since, by doing so, it would depart from its judicial function').

<sup>168</sup> *Avena*, *supra* note 2, at para. 141.

<sup>169</sup> *LaGrand*, *supra* note 62, at 513.

lends itself to application of the doctrine in the light of the institutional advantages appertaining to the standard-invoking party and by reason of the aforementioned fairness and comity rationales. Furthermore, a proper balancing between the interests protected and adversely affected by the US action also supports the grant of some margin of appreciation.

So, to my mind, the US should have been entitled to a certain margin of appreciation in *Oil Platforms* in evaluating the application of the controlling legal standards – whether resort to counterforce against Iran was necessary and whether the response had been proportional. Instead, the Court applied a stringent standard of *ex post* review in relation to each of these questions.<sup>170</sup> Still, a margin of appreciation analysis would ask not whether US operations were necessary and proportional, but whether the US's conclusions on the aforementioned questions were reasonable. When viewed from this perspective, the Court's conclusions on the legality of the US attacks do not seem unassailable (as was indeed pointed out by Judge Koojimens). At the same time, no margin of appreciation should have been granted to the US with relation to establishing the threshold of violence which constitutes an armed attack under international law,<sup>171</sup> as this is a law-intensive, not fact-intensive determination that the Court is institutionally better equipped to prescribe. Here, application of the margin of appreciation doctrine might have an undesirable norm-diluting effect and the Court's decision-making methodology related to this point seems proper (leaving aside the propriety of the substantive outcome).<sup>172</sup>

In the consular assistance cases, the Court wisely decided to adopt a non-intrusive strategy in relation to the spelling out of legal remedies relating to US criminal procedures. This is consistent with the policy considerations of enhancing democratic accountability and offering comity to domestic institutions. Still, it may be acknowledged that some factors relating to the consular assistance cases could have worked in the other direction as well – i.e., against the grant of discretion to the US authorities: First, as was already noted, the consular assistance cases did not involve any 'standard-type' rule, and the introduction of 'result-oriented' rules, in the remedial part of the judgment, was initiated by the ICJ. Second, the *ex ante* nature of the decision reduced the potential effect of the aforementioned fairness rationale, as it did not entail any retrospective attribution of liability. Finally, the consequences of a strict '*Chorzów Factory*-type' decision upon the US – i.e., ordering retrials – would arguably have been less detrimental to US interests than the effects of the *Oil Platforms* judgment on US national security interests. Hence, it would seem that the differences in methodology between *Oil Platforms* and the consular assistance cases cannot be

<sup>170</sup> Notably, the Court tended to dissociate the specific incidents underlying the proceedings from the 'bigger picture' – the tanker war in the Gulf, Iran's hostile statements against the US and its repeated violations of the freedom of navigation in the Gulf area. Cf Young, 'Destruction of Property (on an International Scale): The Recent Oil Platforms Case and the International Court of Justice's Inconsistent Commentary on the Use of Force by the United States', 30 *N Carolina J Int'l L & Commercial Reg* (2004) 335, at 371; Taft IV, 'Self-Defense and the Oil Platforms Decision', 29 *Yale J Int'l L* (2004) 295, at 305.

<sup>171</sup> *Oil Platforms*, *supra* note 1, at para. 51.

<sup>172</sup> *Ibid.*, at para. 59.

merely attributed to their relative suitability for margin of appreciation analysis. In fact, the opposite might be true – the margin of appreciation doctrine might have actually been excluded from the more suitable case for its application.

What seems to be the decisive factor in the eyes of the Court in determining the applicability of ‘margin of appreciation type’ considerations in the surveyed cases is the political need for definitive legal guidance in the more sensitive cases (for instance, use of force cases implicating *jus cogens* norms). However, as explained above, the exclusion of the margin of appreciation doctrine from use of force cases is hardly convincing in the light of the open-ended nature of the governing norms, the relative importance of interests of the state whose conduct is being reviewed and the serious implication of holding a state to be in breach of *jus cogens* norms.

### E *The Wall in the Occupied Palestinian Territory Case*

The ICJ’s incoherent method of applying a ‘margin of appreciation type’ methodology becomes more apparent when the consular assistance cases are juxtaposed against the position taken by the Court in the recent *Wall in the Occupied Palestinian Territory* Advisory Opinion. In that decision, the Court spelled out, *inter alia*, the future secondary obligations of the state of Israel, which ensue from the Court’s conclusion that the separation barrier was unlawful. However, this time, the Court refused to allow any margin of appreciation in implementing the decision and strictly applied the *Chorzów Factory* remedial formula to the situation at hand.<sup>173</sup> True, the outward-looking nature of the dispute over the construction of the separation barrier in the West Bank would probably require the Court to grant a narrower margin of appreciation than the one granted in the consular assistance cases, which had inward-looking attributes (for instance, by way of specifying guidelines according to which the barrier had to be rerouted and compensation made). Still, there were some relevant considerations which should have supported application of the doctrine to the standard-type norms addressed in the Opinion (mainly military necessity and the general defence of necessity): in particular, Israeli authorities seemed to have an institutional advantage over the ICJ in applying law to facts, given their superior familiarity with the complex situation on the ground.<sup>174</sup>

The possibility of applying a ‘consular assistance-type’ margin of appreciation was demonstrated by the judgment of the Supreme Court of Israel in the *Beit Sourik* case: although the Supreme Court declared the unlawfulness of various segments of the separation barrier, it granted Israeli authorities some discretion with regard to planning an alternative route which would meet the requirements of necessity and proportionality.<sup>175</sup> Furthermore, the case perhaps indicates that Israeli courts could have had some positive role in applying international law standards and that exercise of

<sup>173</sup> *Wall in the OPT*, *supra* note 3, at paras 151–153.

<sup>174</sup> Perhaps, the Court felt that Israel was not entitled to comity, because of its past violations of international law; however, the opinion fails to spell out this consideration. Cf Zleptnig, *supra* note 4, at 4 (the WTO and the ECJ seem to accord greater deference to more competent and credible national authorities).

<sup>175</sup> HCJ 2056/04 *Beit Sourik Village v Government of Israel*, 58(5) PD 807, paras 80 and 85.



comity towards them may have had a beneficial effect on the Opinion's compliance-pull. It seems that the position of the ICJ on whether to accord Israel some margin of appreciation *vis-à-vis* its remedial obligations had less to do with the prospective nature of these obligations (since this was also the case in the consular assistance-case), and more with general considerations of legal policy, which the Opinion unfortunately fails to elaborate.<sup>176</sup>

## Conclusion

The discussion undertaken in this article reveals a growing acceptance on the part of many international courts and tribunals of the margin of appreciation doctrine. I have argued that this development generally merits our support: it improves the quality and perceived legitimacy of legal pronouncements; it promotes the accountability of decision-makers; it produces a more realistic match between law-application in theory and practice; and it encourages the application of inter-institutional comity. However, several caveats should be noted. First, the doctrine is particularly suitable only for certain types of international law norms, which are intrinsically uncertain or consciously sacrifice legal certainty for pluralism (standard-type norms, discretionary norms and result-oriented norms). It should not be used to obfuscate areas of the law where legal precision has been or is in the process of being attained. Second, the scope of the margin of appreciation could change over time, in the light of emerging specific norms, the development of value choices which place a higher premium on legal certainty (or uniformity) and shifts in the respective institutional capacities of national and international courts. Finally, the degree of judicial deference in the context of application of the doctrine is not fixed. It should vary in the light of a variety of considerations. The practice of the ECtHR, the most experienced of the international courts applying the doctrine, as well as the policy considerations developed above suggest that these considerations should include: (a) importance of the interests implicated by the relevant norms; (b) the degree of normative uncertainty; and (c) the comparative decision-making facilities of international courts and domestic institutions relating to the specific matter at hand.

The recent practice of the ICJ in relation to the application of the margin of appreciation doctrine seems out of sync with the general trend of gradual acceptance of the doctrine. The decisions in *Oil Platforms* and *Wall in the Occupied Palestinian Territory*, which explicitly or implicitly reject the doctrine, deserve criticism, in my view, both

<sup>176</sup> One may also note that the ICJ's sweeping assertion that the entire route of the barrier in the Occupied Territories is unnecessary from a military point of view, without distinguishing between the different military functions of different barrier segments, represents anything but a cautious approach to the application of a highly uncertain body of law to a complex situation. See, e.g., Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense', 99 *AJIL* (2005) 52, at 59; Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law', 99 *AJIL* (2005) 88, at 100. This lack of restraint, combined with the failure to grant Israeli authorities any margin of appreciation, detracted from the acceptability of the opinion in Israel. See Shany, 'Capacities and Inadequacies: A Look at the Two Separation Barrier Cases', 37 *Israeli L Rev* (2005) 230.

for their underlying problematic policy choices and for their inconsistency with international jurisprudence, including ICJ jurisprudence, on the matter. It remains to be seen whether the ICJ will eventually join the prevailing trend, and replace the façade of objective normative guidance adopted in several of its recent decisions with a more nuanced and conducive approach to the above-mentioned categories of obligations incumbent upon state actors.