



AMICUS CURIAE

BRIEF PRESENTED BY THE INTERNATIONAL COMMISSION OF JURISTS

BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE CASE OF GRETTEL ARTAVIA MURILLO & OTHERS V. COSTA RICA

INTRODUCTION

1. This Amicus Curiae brief is respectfully submitted on behalf of the International Commission of Jurists (ICJ) to the Honourable Inter-American Court of Human Rights (the Court) in the case of *Grettel Artavia Murillo & Others v. Costa Rica*. The ICJ is grateful to the Court for the opportunity to present its considerations on certain legal questions arising from submissions in the case.
2. The ICJ is an international non-governmental organization, established in 1952 and headquartered in Geneva, Switzerland. It is dedicated to promoting the understanding and observance of the Rule of Law and the legal protection of human rights. It is comprised of 60 eminent jurists, who represent the different legal systems of the world. It has several national sections and affiliated organizations. It enjoys consultative status with the United Nations Economic and Social Council, the Council of Europe and the African Union. It maintains cooperative relations with various bodies of the Organization of American States.
3. The ICJ's legitimate interest in the present case is reflected in the fact that it works to advance the rule of law and to ensure the domestic implementation of international human rights law. In this context it works to promote States' compliance with their international human rights legal obligations, to advance victims' access to remedies, including reparations, to support efforts to combat impunity and ensure legal accountability for human rights violations.

SUMMARY OF PURPOSE: ADDRESSING KEY DOCTRINAL ISSUES AT STAKE

4. The immediate matter before this Court concerns the regulation of in vitro fertility treatment (*in vitro*) and the extent to which a State party to the American Convention may limit its availability. The applicants allege that Costa Rica has violated its obligation to respect their rights to protection of private and family life and the right to found a family as required by Articles 11 and 17 of the Convention together with Articles 1 and 2. They submit that this violation has occurred as a result of an impermissible restriction on their rights by the respondent State in the form of a complete legal prohibition of *in vitro*.
5. On its facts alone the case presents the Court with a series of complex issues involving a range of Convention provisions. The Court's decision will have important consequences for individuals in Costa Rica who cannot have children without the assistance of *in vitro*.
6. However the implications of the Court's decision will also extend beyond the current facts at issue and the rights at stake. Arguments by the respondent State and some Amici invoke the European Court of Human Rights doctrine of margin of appreciation.¹ In doing so they raise important doctrinal questions as to the nature and scope of States parties' ability to place restrictions on the enjoyment and exercise of rights under the American Convention. These questions entail potentially far-reaching legal determinations as to the interpretive principles and doctrine that should guide the Court both in assessing the permissibility of restrictions under the Convention and in defining its own role in undertaking such an assessment.
7. In the following paragraphs the ICJ will seek to outline a range of international legal and policy considerations of relevance to the Court's deliberations on these questions.

PERMISSIBLE STATE RESTRICTIONS ON RIGHTS: THE DIVERGENT APPROACH OF SUPRANATIONAL AUTHORITIES AT ISSUE IN THIS CASE

8. It is an established tenet of international law common to each of the major supranational human rights regimes that not all protected rights are absolute. Indeed each supranational framework incorporates the principle that certain rights may permissibly be subject to State restrictions.² However it is also a commonly established rule that such restrictions are permissible only to the extent envisaged by the provisions of the international instrument in which the right concerned is enshrined. For example both the legal regimes established under the ICCPR and the ECHR subject State restrictions to rigorous criteria universally specifying that they will not be permissible unless their terms,

¹ Final Oral Argument of Costa Rica, 6 September 2012

² See for example ICCPR Articles 5(1), 17, 18; Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights; General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 26 May 2004, Para.6; HRC General Comment No. 34, Article 19: Freedoms of opinions and expression, 12 September 2011, CCPR/C/GC/34, Paras. 21 et seq. HRC General Comment No. 27, Freedom of Movement, CCPR/C/21/Rev.1/Add.9, 2 November 1999, Paras.11 et seq. See also Articles 17,18 & 8 European Convention on Human Rights; See also International Court of Justice, Advisory Opinion on Wall, Para. 136

form and effects comply with the requirements specified by the provisions of the relevant treaty and jurisprudence of concerned supranational Courts or monitoring mechanisms.³ Again both the Human Rights Committee and European Court of Human Rights express these criteria or requirements in broadly similar terms: restrictions must be prescribed by law, have a legitimate purpose, and be necessary in a democratic society. In turn the latter requirement implies that the measure must be necessary and proportionate.⁴

9. The applicability of this regime and the same broadly defined criteria within the framework of the American Convention is not at issue in the instant case. The applicants and respondents accept that certain rights guaranteed by the American Convention, including privacy and family life, may permissibly be subject to State restrictions. Indeed as this Court has clearly stated on a number of occasions the right to private life, including family life, home, and correspondence “is not an absolute right and can be restricted by the States.”⁵ Moreover the fact that the Inter-American human rights framework imposes strict confines on States’ recourse to restrictions is not in question. The terms of the Convention clearly hold that restrictions may not suppress or restrict the enjoyment of the rights concerned to a greater extent than provided for by the Convention.⁶ For example Convention provisions explicitly outline that restrictions on the right to privacy and family life may not be “abusive or arbitrary.”⁷ Nor does the case require the Court to revisit the extent to which the Inter-American system aligns with the other two supranational frameworks cited above in its description of the broad criteria against which State measures restricting rights will be assessed. This Court describes the relevant assessment criteria in similar terms holding that a restriction, “must comply with the following requirements: (a) it must be established by law; (b) it must have a legitimate purpose, and (c) it must be appropriate, necessary and proportionate.”⁸

10. Instead it is the interpretative approach and doctrine that are to be employed by the Court in determining the compliance of a given State restriction with these broadly agreed criteria that are of concern in this case. For in response to the Applicants’ submission that the complete prohibition of *in vitro* in Costa Rica represented an impermissible restriction on their rights to privacy and family life the respondent State and some *Amici* allege that in considering the proportionality and necessity of the prohibition the Court should invoke the European Court’s judge-made ‘margin of appreciation’ doctrine. They argue

³ Ibid.

⁴ Ibid. These criteria are applied to rights provisions concerning, among others, the freedoms of expression, assembly, thought, conscience and religion as well as to rights to privacy and family life and property. Separate criteria may govern the State’s derogation of rights in a state of emergency.

⁵ Case of Escher et al. v. Brazil Judgment of July 6, 2009 (Preliminary Objections, Merits, Reparations, and Costs), Para. 116. See also, Case of Tristán Donoso v. Panamá Judgment of January 27, 2009 (Preliminary Objection, Merits, Reparations, and Costs), Para. 56.

⁶ Article 29, American Convention

⁷ Article 11(2) American Convention; Case of Escher et al. v. Brazil Judgment of July 6, 2009 (Preliminary Objections, Merits, Reparations, and Costs), Paras. 116 & 129; Case of Tristán Donoso v. Panamá Judgment of January 27, 2009 (Preliminary Objection, Merits, Reparations, and Costs), Paras. 55, 56 & 76.

⁸ Case of Escher et al. v. Brazil Judgment of July 6, 2009 (Preliminary Objections, Merits, Reparations, and Costs), Para. 129; Case of Tristán Donoso v. Panamá Judgment of January 27, 2009 (Preliminary Objection, Merits, Reparations, and Costs), Para. 76. In these cases the Court has also held these requirements to be cumulative and each of the individual criteria must be met: “the failure to meet any one of such standards implies the measure runs contrary to the Convention.”

that doing so would result in Costa Rica being accorded a 'wide' margin of appreciation enabling it to exercise considerable discretion as to the necessity and proportionality of the prohibition and thereby limiting the role of the Court in assessing the prohibition's compliance with the Convention requirements.⁹

11. This Court's reliance on the doctrine in the present case would mark its introduction into the jurisprudence of the Court for the first time.¹⁰ It would signify a significant departure in its approach to rights restrictions and from that of other supranational bodies such as the Human Rights Committee. It would diverge from the victim-centered principle of interpretation usually applied by this Court. It would have wider policy and institutional implications in relation to the Court's role as pre-eminent adjudicative body within the Inter-American human rights framework.

THE EUROPEAN COURT'S MARGIN OF APPRECIATION: AN INTERPRETATIVE DOCTRINE OF JUDICIAL RESTRAINT AND STATE DISCRETION

12. The essence of the European Court's margin of appreciation doctrine involves the imposition by that Court of differing degrees of self-restraint on its review of State conduct. The doctrine was first referenced by the European Court in cases concerning national security interests and declarations of states of emergency.¹¹ However its application by the Court has now extended far beyond its initial confines and it is regularly invoked in circumstances ranging from broader national security concerns, to restrictions on rights in the administration of justice; from restrictions on freedom of expression to restrictions on privacy and family rights as a result of moral interests.¹²
13. Under the doctrine, the extent to which the European Court will undertake a substantive review of whether a State restriction meets the interconnected requirements of necessity and proportionality will increase or decrease on a case-by-case basis depending on a range of factors at play. These factors include: the nature of the rights concerned, the importance, either by the Court's own reckoning or in the national view, of the 'interest' the restriction seeks to protect and the extent to which there is or is not a consensus approach among State parties to the European Convention regarding the matter at issue.¹³
14. In cases where the European Court does not find the concerned interest to be accorded a high degree of importance or where it finds a consensus of approach among States parties to the Convention the 'margin of appreciation'

⁹ Final Oral Argument of Costa Rica, 6 September 2012, Inter-American Court of Human Rights

¹⁰ Although the Court referred to the phrase 'margin of appreciation' once in an advisory opinion in 1984 it does not appear that its purpose was to invoke a legal concept in the form of the doctrine of margin of appreciation as applied by the European Court of Human Rights. Instead it appears to simply reflect the Courts use of a turn of phrase to describe a degree of discretion available to States in granting nationality. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, 19 January 1984.

¹¹ *Lawless v. Ireland*, 1 July 1961; *Ireland v. UK*, Application No. 5310/71, 18 January 1978

¹² For a cross section of cases see: *Handyside v. the UK*, 7 December 1976; *Sunday Times v. United Kingdom*, 1979; *Evans v. UK* (Application no. 6339/05), 7 March 2006; *ABC v. Ireland*, 16 December 2010, Application No. 25579/05; *Zana v. Turkey*, Application No. 69/1996/688/880, 25 November 1997.

¹³ *Ibid.*

it affords to the State concerned will be slim or will not apply. In such instances the Court will undertake a fuller review of whether the measure in question complied with the requirements of necessity and proportionality. However where the Court considers the interest at stake to be of high national importance or where it finds there is a lack of a consensus approach among States parties it will accord the respondent State a wide margin of appreciation. It may then limit the extent to which it will conduct its own detailed assessment of whether the State's chosen measure of restriction was necessary and proportional, holding that in such cases the State is better placed to decide what meets these criteria. Increasingly in such cases the Court will move directly from finding a wide margin exists to finding that the restriction in question was permissible.¹⁴

INTRODUCING THE DOCTRINE WOULD MARK A SIGNIFICANT DEPARTURE IN THE APPROACH OF THIS COURT TO ITS ROLE IN A REVIEW OF STATE RESTRICTIONS

15. The approach to State discretion and refrain from substantive review of State conduct that the European Court has developed through the margin of appreciation doctrine finds no equivalent or parallel in the jurisprudence of this Court to date. Indeed it appears the use by different legal authorities of similar terminology to describe the basic criteria a State restriction must meet does not imply recourse by those authorities to the same interpretative doctrine and approach in assessing compliance. Nor does it imply they will reach the same conclusions as to permissibility.
16. Indeed this Court has never alluded to a sphere of State discretion that is to be defined with reference to national interests and public opinion in the concerned country or with regard to the extent to which State parties to the American Convention employ a commonality of approach. Instead in instances where it has been asked to consider States' imposition of rights restrictions the Court has consistently specified that it will "examine in detail"¹⁵ the given measure's compliance with relevant criteria. This has involved a clear and definitive assessment by the Court through undertaking a full and substantive criteria-by-criteria review of a given restriction and its effect on the individual rights-bearer concerned.¹⁶ When considering the interconnected requirements of necessity and proportionality the Court will analyze the measure against the following: (a) is the measure designed to fulfill an essential public interest, (b) is it actually effective in achieving this purpose, (c) is it the least restrictive measure possible.¹⁷

¹⁴ See for example: *ABC v. Ireland*, 16 December 2010, Application No. 25579/05. See for a general discussion: *Allowing the Right Margin, The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review*, Dean Spielmann, current President and Judge of the European Court of Human Rights writing extra-judicially.

¹⁵ See for example *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Para. 96;

¹⁶ *Case of Castañeda Gutman v. México*, Judgment of August 6, 2008; *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004; *Case of Herrera-Ulloa v. Costa Rica*, Judgment of July 2, 2004; *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005; *Case of Escher et al. v. Brazil* Judgment of July 6, 2009; *Case of Tristán Donoso v. Panamá* Judgment of January 27, 2009.

¹⁷ *Case of Castañeda Gutman v. México*, Judgment of August 6, 2008, Para. 186

17. In regard to the latter requirement of least restrictive measure, which the applicants in the instant case allege is contravened by the State's total prohibition on *in vitro*, this Court holds that the option "which least restricts the protected right should be selected,"¹⁸ and underlines that the restriction must be so conceived so as not to limit the right any more than is necessary.¹⁹ To this end the Court will undertake its own detailed review and assessment of the terms and impact of the given measure, the extent to which it limits the rights in question, and will assess it against the alternative measures possible.²⁰ Indeed while it is only in this regard that the Court has had regard to the practice of other States regarding the matter at hand its purpose in doing so has not been to determine whether a consensus approach exists or to enable the respondent State to claim a breath of discretion. Rather its aim has been to conduct its own assessment as to whether, and what, less restrictive options may have been possible.²¹ This approach confirms the Courts intention to undertake a full assessment in each case of whether each one of the substantive requirements has been met when considered in light of the individual applicant's particular experiences.
18. The methodology of this Court in undertaking a full substantive assessment of State restrictions aligns with that of the Human Rights Committee which will also undertake a complete step-by-step assessment of a State restriction. The Committee has held that in assessing necessity and proportionality it will make its own determination on the facts as to whether restrictions are, "appropriate to achieve their protective function ... the least intrusive instrument amongst those which might achieve their protective function ... proportionate to the interest to be protected."²² In this regard the Committee has underlined that in imposing restrictions on rights a State "must demonstrate in specific and individualized fashion"²³ its compliance with each of the specified criteria.
19. Indeed not only have this Court and the Human Rights Committee refrained from introducing the doctrine, its components have been distinguished by the Court and the Committee as immaterial to their considerations.
20. For example the Human Rights Committee has held explicitly distinguished the doctrine from the ICCPR legal framework specifying that the scope of a States ability to restrict rights under the Covenant, "is not to be assessed by reference to a margin of appreciation but by reference to the obligations it has undertaken."²⁴ The Committee has reserved to itself the assessment of

¹⁸ Advisory Opinion OC-5/85, 13 November 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Para. 46; Case of Ricardo Canese v. Paraguay, Judgment of August 31, 2004, Para. 96; Case of Herrera-Ulloa v. Costa Rica, Judgment of July 2, 2004, Para. 121; Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of 17 June 2005, Para. 145.

¹⁹ Ibid.

²⁰ See by analogy the Courts reasoning in the Case of Castañeda Gutman v. México, Judgment of August 6, 2008, Para.196.

²¹ See for example, Case of Castañeda Gutman v. México, Judgment of August 6, 2008, Para.196

²² Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinions and expression, 12 September 2011, CCPR/C/GC/34, Para. 34

²³ Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinions and expression, 12 September 2011, CCPR/C/GC/34, Para. 35

²⁴ Human Rights Committee, Lansman v. Finland, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992, 1994, Para. 9.4

whether, in a given situation, a rights restriction complies with the criteria of necessity and proportionality, recalling again that this is not to be assessed by reference to a “margin of appreciation.”²⁵

21. Meanwhile this Court has specified that rights cannot be restricted at the discretion of governments²⁶ and has held that the fact that a matter, “is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since in doing so it must refer solely and exclusively to the stipulations of the international obligations arising from a sovereign decision by the States to adhere to the American Convention.”²⁷

INTRODUCING THE DOCTRINE WOULD HAVE SIGNIFICANT POLICY & INSTITUTIONAL IMPLICATIONS: CRITICISMS & CONCERNS

22. The caution which this Court has implicitly expressed in relation to the margin of appreciation doctrine, and which is echoed in the Human Rights Committee’s explicit rejection of the doctrine, resonates with significant criticisms and concerns regarding the doctrine that have been expressed by a range of leading additional actors and authorities. In the words of one jurist: “the margin of appreciation is the most controversial ‘product’ of the European Court of Human Rights.”²⁸ Indeed it is notable that in global UN negotiations of a new Optional Protocol to the Covenant on Economic, Social and Cultural Rights establishing an individual communication mechanism a majority of States overwhelmingly rejected a proposal to include a textual reference to the doctrine.²⁹ In this context many States parties to the American Convention expressed the view that the doctrine was not appropriate for inclusion in a supranational human rights framework and observed that the concept was foreign to their systems of judicial and legal review.³⁰ The Optional Protocol was adopted in 2008 without such a reference.
23. Although varied and nuanced these concerns ultimately relate to the institutional and policy implications arising from the role the doctrine defines for the judicial body and the excessive extent of discretion and latitude it accords to State decision-making which is inconsistent with the object and purpose of international human rights instruments. The doctrine may serve to undermine the essential role of a Court in clearly enunciating what the treaty provides.
24. *The doctrine causes supranational adjudicative bodies to limit the exercise of their appropriate conventional review functions.* Key concerns regarding the application of the doctrine relate to the fact that for many commentators it

²⁵ Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinions and expression, 12 September 2011, CCPR/C/GC/34, Para. 36

²⁶ Advisory Opinion OC-6/86, 9 May 1986, The word “laws” in Article 30 of the American Convention on Human Rights, Paras. 22 & 26

²⁷ Case of Atala Riffó and Daughters v. Chile, Judgment of 24 February 2012, Para. 92

²⁸ S. van Drooghenbroeck, La proportionnalité dans le droit de la Convention européenne des droits de l’homme. Prendre l’idée simple au sérieux, p.527

²⁹ See Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session, UN/A/HRC/8/7*, 23 May 2008

³⁰ Ibid.

entails an abdication of responsibility by the European Court when matters are politically sensitive or socially controversial thereby allowing States a degree of immunity in regard to such matters.³¹ In the words of one jurist there is a widespread concurrence of legal opinion that that doctrine entails “a level of European review that is less intense than the review that the Court is entitled to perform on the basis of its ‘full jurisdiction.’”³² Indeed a judge of the European Court has indicated that perhaps at times through the doctrine the “Court waives its power of review – if indeed one may speak of a waiver.”³³

25. *The doctrine extends beyond State discretion to decide on national mechanisms of rights implementation.* It is uncontested that there are many different ways in which a State may acceptably give effect to its international human rights obligations. A range of compatible measures may be available to national authorities. In the realm of State restrictions on rights the appropriate role of the supranational authority may not always involve precise prescription in every case of the exact form that a treaty-compliant restriction must take. Rather its task is to identify what State conduct will fall foul of the treaty under its jurisdiction and to consider the extent to which a particular law or practice is compatible with a State’s discharge of its obligations. However the margin of appreciation doctrine may limit the appropriate role of the supranational authority in undertaking this assessment.
26. *Conventional standards concerning State restrictions already involve significant State discretion.* Significant concerns regarding the doctrine emanate from the fact that the concept of permissible State restrictions on rights already necessarily conceives of an integral degree of State discretion in the implementation of human rights obligations. By their very nature the legal components of necessity and proportionality enable a significant degree of flexibility and latitude and allow for State justification of interference with rights. Whereas generating an additional layer of leeway, defined with vague reference to national interests and the practice and conduct of other States, the margin of appreciation doctrine extends State discretion over and above that already implicitly entailed in the express treaty provision for restrictions.
27. *State compliance with international treaty obligations should not be assessed with wholesale deference to State interests, national public opinion and practices of other States.* Considerable concerns are often expressed regarding the doctrine’s implications for the universality of human rights and the

³¹ See for a selection of views: Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Jurídica de Chile, Santiago, 2001, p. 386 et seq; Ni Aolain, *The Emergency of Diversity: Differences in Human Rights Jurisprudence*, Fordham International Law Journal, October, 1995; Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, New York University Journal of International Law and Politics, 1999; Lord Lester of Herne Hill, “The European Court of Human Rights after 50 Years”, *European Human Rights Law Review*, 2009, p. 474; See for a general discussion of views concerning the doctrine: *Allowing the Right Margin, The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review*, Dean Spielmann, current President and Judge of the European Court of Human Rights writing extra-judicially.

³² J. Callewaert, “Quel avenir pour la marge d’appréciation ?”, in P. Mahoney, F. Matscher, H. Petzold and L. Wildhaber (ed.), *Protecting Human Rights: The European Perspective. Studies in memory of Rolv Ryssdal*, p. 149

³³ *Allowing the Right Margin, The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review*, Dean Spielmann, current President and Judge of the European Court of Human Rights writing extra-judicially.

integrity of international law and standards. These relate to the deference and relevance it extends to national interests and local public opinion as well as to the behaviour of other States parties and to concerns regarding an emerging relativity of rights in certain controversial or sensitive spheres. The introduction of these elements as key reference points in a international human rights framework belies both the universal nature of the legal obligations to which State parties have consented and the central purpose of the system as to provide legal guarantees to individual rights-bearers in all States parties notwithstanding the social mores at play in the given national context. Moreover allowing State restrictions to limit the exercise of rights in the personal sphere through considerable deference to public opinion and/or majority religious or moral views may undermine the nature of human rights guarantees and the safeguards necessary for social pluralism and protecting the rights of individuals from majority override. As this Court has underlined, “social, cultural and institutional changes are taking place in the framework of contemporary societies, which are aimed at being more inclusive of their citizens different lifestyles. This is evident in the social acceptance of interracial couples, single mothers or fathers and divorced couples, which at one time were not accepted by society. In this regard the law and the State must help to promote social process.”³⁴

28. *The doctrine can become an institutional touchstone for States parties in seeking a more limited form of judicial review.* In the European system, the margin of appreciation doctrine has become a central element in political challenges to the Court’s review by certain governments, which have urged an even broader application of the margin so as to avoid what they see as the Court’s unjustifiable intrusion into national sovereignty.³⁵ Governments of some State parties have sought to shape the doctrine through Ministerial Declarations and amendments to the Convention, which would prescribe the breadth of the margin of appreciation and thereby limit the scope of the Court’s review of States’ Convention obligations. In particular, in negotiations of the Brighton Declaration on the Future of the European Court of April 2012, early drafts of the Declaration called for the codification of the margin of appreciation in the Convention, and affirmed that states should enjoy a “considerable” margin of appreciation in the application of the Convention rights, without reference to the nature of the rights or circumstances at issue.³⁶ Ultimately these proposals were rejected by State parties, and the final Brighton Declaration called only for a mere reference to the doctrine in the preamble of the Convention.³⁷ However the debate demonstrates the doctrine’s potential as a conduit for undue government pressure on the Court.³⁸

³⁴ Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012, Para. 120

³⁵ See for example, Speech by David Cameron, Prime Minister of the United Kingdom, 25 January 2012

³⁶ Draft Brighton Declaration, 23 February 2012, <http://www.guardian.co.uk/law/interactive/2012/feb/28/echr-reform-uk-draft?INTCMP=SRCH>

³⁷ High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, <http://hub.coe.int/en/20120419-brighton-declaration/> para.12.a and b.

³⁸ The Court itself opposed such proposals and the President of the Court stressed, extrajudicially, the Court’s concern at this and other related proposals which carried “the idea that Governments can in some way dictate to the Court how its case-law should evolve or how it should carry out the judicial functions conferred on it.”High

Concerns from within the European Court of Human Rights

29. Indeed to differing degrees many of these concerns have been echoed from within the European Court itself and the doctrine has been the subject of partly dissenting opinions by a range of European Court judges in a variety of cases.
30. In his partly dissenting judgment in *Z v. Finland*, Judge de Meyer issued the most explicit doctrinal critique of the doctrine that has emerged from within the European Court. He expressed the view that:

“In the present judgment the Court once again relies on the national authorities' "margin of appreciation." I believe that it is high time for the Court to banish that concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies. It is possible to envisage a margin of appreciation in certain domains. It is, for example, entirely natural for a criminal court to determine sentence - within the range of penalties laid down by the legislature - according to its assessment of the seriousness of the case. But where human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not. On that subject the boundary not to be overstepped must be as clear and precise as possible. It is for the Court, not each State individually, to decide that issue, and the Court's views must apply to everyone within the jurisdiction of each State.”³⁹

31. Meanwhile judges have also criticized the growing readiness of the Court to invoke the doctrine in relation to an ever-increasing set of legal questions and rights-issues. For example, in a concurring opinion in *Egeland and Hanseid v. Norway*, Judge Rozakis contested the doctrine's introduction into the Courts reasoning in the case, emphasizing that in his view, “the Chamber has applied in the circumstances of the case the concept of the margin of appreciation with a degree of automaticity”⁴⁰ even though the facts of the case did not “allow” its introduction. He went on to underline that:

“If the concept of the margin of appreciation has any meaning whatsoever in the present-day conditions of the Court's case-law, it should only be applied in cases where, after careful consideration, it establishes that national authorities were really better placed than the Court to assess the “local” and specific conditions which existed within a particular domestic order, and, accordingly, had greater

Level Conference, Brighton, Speech of Sir Nicholas Bratza. http://www.echr.coe.int/NR/rdonlyres/8D587AC3-7723-4DB2-B86F-01F32C7CBC24/0/2012_BRIGHTON_Discours_Bratza_EN.pdf

³⁹ Case of *Z v. Finland*, Application No. 9/1996/627/811, 25 February 1997, Partly Dissenting Opinion of Judge de Meyer, Para.III

⁴⁰ Case of *Egeland & Hanseid v. Norway*, Applications nos. 34438/04, 16 April 2009, Concurring Opinion of Judge Rozakis, Para. (a)

*knowledge than an international court in deciding how to deal, in the most appropriate manner, with the case before them. Then, and only then, should the Court relinquish its power to examine, in depth, the facts of a case, and limit itself to a simple supervision of the national decisions, without taking the place of national authorities, but simply examining their reasonableness and the absence of arbitrariness.”*⁴¹

32. More recently in a joint dissenting opinion in *ABC v. Ireland* a group of judges expressed grave concern regarding the trajectory of the doctrine’s development and its expansion by the majority opinion in that case.⁴² While they did not seek to abrogate the doctrine *per se* they expressed alarm regarding its increasing breath and the degree of State discretion allowed. In that case, in finding a restriction on the rights of two of the applicants to be permissible, the majority of the Court considered that despite the existence of a clear consensus among State parties regarding the matter at stake, the State still enjoyed a wide margin of appreciation as a result of the national importance ascribed to the interest at stake as evidenced by the “profound moral views of the Irish people.”⁴³ However in the view of the dissenting judges this marked a considerable departure: “this will be one of the rare times in the Court’s case-law that Strasbourg considers that such consensus does not narrow the broad margin of appreciation of the State concerned.”⁴⁴ In their view the restriction in question did give rise to a violation of the Convention and the dissenting opinion emphasized their strong disagreement with the majority’s approach to the margin of appreciation specifying that it, “shifts the focus of this case away from the main issue,”⁴⁵ “bases its reasoning on two disputable premises”⁴⁶ and in some respects reflects a “circular” argument.⁴⁷

33. More specifically the dissenting opinion expresses considerable alarm regarding the weight attributed by the Court to national public opinion:

*“It is the first time that the Court has disregarded the existence of a European consensus on the basis of “profound moral views”. Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court’s case-law. A case-law which to date has not distinguished between moral and other beliefs when determining the margin of appreciation which can be afforded to States in situations where a European consensus is at hand.”*⁴⁸

⁴¹ Ibid.

⁴² Case of *ABC v. Ireland*, Application No. 25579/05, 16 December 2010, Joint Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvela, Malinverni and Poalenlungi

⁴³ Case of *ABC v. Ireland*, Application No. 25579/05, 16 December 2010, Para. 21

⁴⁴ Case of *ABC v. Ireland*, Application No. 25579/05, 16 December 2010, Joint Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvela, Malinverni and Poalenlungi, Para. 6

⁴⁵ Ibid. Para. 7

⁴⁶ Ibid.

⁴⁷ Ibid. Para. 8

⁴⁸ Ibid. Para 9

34. Another separate opinion in the case took issue with the majority approach, which upon finding a wide margin of appreciation to exist in the case had directly moved to a finding that the restriction in question was permissible. In doing so the Court did not undertake its own appraisal and assessment of the impact of the restriction on the individual applicants, considering their particular and specific circumstances. In the view of the separate opinion, even where a wide margin of appreciation exists, such an individualized appraisal by the Court itself is still vital.⁴⁹

CONCLUSION: INTRODUCING THE DOCTRINE WOULD SYMBOLIZE A DEPARTURE FROM THE VICTIM-CENTERED APPROACH OF THIS COURT TOWARD INCREASED STATE LATITUDE

35. In 2001 a leading Brazilian jurist expressed the view that this Court's application of the doctrine would contradict the victim centered approach at the heart of the Court's jurisprudence and which has designated it a standard-bearer for rights-protection and justice among all the supranational adjudicative bodies. He wrote: "the doctrine of the margin of appreciation requires a serious reappraisal. Fortunately, that doctrine has not found an explicit equivalent development in the case law of the Inter-American Court of Human Rights."⁵⁰ Moreover, while a justice of this Court, in a concurring opinion, the same jurist noted that, "if other international organizations for the supervision of human rights have incurred in the uncertainties of a fragmenting interpretation, why would the Inter-American Court have to follow this road, abdicating its avant-garde jurisprudence, that has won it the respect of the beneficiaries of our system of protection as well as of the international community."⁵¹

36. Whereas the doctrine of margin of appreciation prioritizes judicial restraint and deference to national considerations over deference to the individual rights bearer's rights to judicial scrutiny and justice, this Court has consistently specified that the Convention framework "requires that the Convention be interpreted in favor of the individual, who is the object of international protection."⁵² As a result the Court has adopted a strict approach to interpretation in favor of the individual: the interpretation most favorable to the human being must prevail.⁵³ In the words of this Court, "when interpreting the Convention it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined."⁵⁴ When applying this principle in the sphere of rights restrictions the Court has specified that restrictions from

⁴⁹ Case of ABC v. Ireland, Application No. 25579/05, 16 December 2010, Concurring Opinion of Judge Lopez Guerda joined by Judge Casadevall, Paras. 3-4

⁵⁰ Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Jurídica de Chile, Santiago, 2001, p. 386 et seq.

⁵¹ Concurring Opinion of Cançado Trindade, Case of López Álvarez v. Honduras, Judgment of February 1, 2006

⁵² 13 November 1981, In the Matter of Viviano Gallardo, Decision of the Inter-American Court of Human Rights, Para. 16

⁵³ *Ibid.*

⁵⁴ Mapiripan Massacre, v. Colombia, Merits, 15 September 2005, Para.106; Case of the Ricardo Canese v. Paraguay, Judgment of August 31, 2004, Para. 181; Case of Atala Riffo and Daughters v. Chile, Judgment of 24 February 2012, Para. 84; Advisory Opinion OC-5/85, 13 November 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Para. 52

other international frameworks which may jeopardize the rights of the individual must not be imported into the Convention framework.⁵⁵

37. As outlined above the trajectory of the doctrine of margin of appreciation within the jurisprudence of the European Court demonstrates that its application cannot be limited to one set of facts or specific set of rights issues. Nor can its content be contained. Its remit and scope has continuously developed and expanded. Meanwhile it has become a reference point in the efforts of States to counter judicial independence and limit the role of the Court.
38. The case of *Grettel Artavia Murillo & Others v. Costa Rica* concerns a number of issues which have not previously come before this Court. For some these matters are complex and sensitive. However it is submitted that the questions involved in the case can and should be considered within the framework of the Court's approach to rights restrictions thus far. The legal principles and standards it has always applied are well tailored to deal with new and emerging human rights issues. The exigencies of the present case do not necessitate the introduction into its jurisprudence of another Court's doctrine. Especially one that would involve the Court stepping back from its proper role of judicial review and which extends deference to State decision making over the rights-protection necessity of judicial scrutiny.



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⁵⁵ Advisory Opinion OC-5/85, 13 November 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Para. 52