CHAPTER 4

The ‘Margin of Appreciation’ in the Use of Exemptions in International Law: Comparing the ICJ Whaling Judgment and the Case Law of the ECtHR

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Introduction

In its 31 March 2014 Judgment in the Whaling Case, the International Court of Justice (ICJ) mentioned for the first time expressly the concept of ‘margin of appreciation’,1 renowned for its widespread use in the case law of the European Court of Human Rights (ECtHR). According to this concept, described by the ECtHR as a ‘tool to define relations between the domestic authorities and the Court’,2 State authorities ‘are in principle in a better position than the international judge to give an opinion’ on the ‘necessity’ and ‘proportionality’ of an exemption, derogation or restriction authorized by International Law.3 As a consequence, international courts ‘should grant national authorities an important degree of deference and respect their discretion’4 on the implementation of exceptions. Thus, without precluding judicial review of a State’s action in this field, the doctrine intends to ‘limit the scope of this review’5 and to impose some degree of judicial self-restraint in the assessment of the attitude of national authorities.

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1 ICJ, Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment, 31 March 2014, para. 59 of the Judgment. The Court had previously mentioned the term ‘margin of appreciation’, but not in relation to exceptions. See ICJ, Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, para. 162, at 113: ‘With regard to the role which may be played by the coastal configuration, Ukraine states that there is a broad margin of appreciation as to its scope as a relevant circumstance’.


3 See infra 2.3.


In previous cases the ICJ made reference to some similar terms such as ‘choice of means’, ‘measure of discretion’ or ‘a very considerable discretion’, but without ever mentioning as such, to our knowledge, the concept of ‘margin of appreciation’.

It is interesting to note that it was not a European but an Asian State, unfamiliar with the concept of national ‘margin of appreciation’, that invited the ICJ to ‘introduce’ this ECtHR-made concept in its case law. As we will see in Part 1 of this paper, Japan used this argument in order to claim a wide discretion in the implementation of the faculty to grant special permits to its nationals under article VIII, paragraph 1, of the Whaling Convention. Japan argued that ‘the principle [of margin of appreciation] must be an axiom of international law and relations’. Australia and New Zealand strongly opposed this argument. And the ICJ itself was reluctant to endorse this concept. While mentioning for the first time the concept of ‘margin of appreciation’, the ICJ did not follow this path, preferring instead the concept of ‘standard of review’. In reality, as we will see, this methodological choice didn’t really influence the outcome of the case. Indeed, in Part 2 of this paper, we will try to show that even if the ICJ had followed Japan and applied the ‘margin of appreciation’ doctrine, and the ECtHR’s understanding of it in the Whaling Case, there would have been few, if any, substantial differences in the final judgment.

1 The Use of the ‘Margin of Appreciation’ Argument in the Whaling Case

I will first present the use of the ‘margin of appreciation’ doctrine by Japan in its pleadings, before referring to Australia’s and New Zealand’s strong opposition to this concept. I will finally turn to the position of the ICJ, refer to previous

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6 See infra, 1.3.
7 But see supra note 1.
8 Article VIII, paragraph 1, of the Convention reads as follows: ‘Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted’.
9 See infra 1.1.