

GRAND CHAMBER OF THE
EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NO. 30814/06

LAUTSI

Applicants

v.

ITALY

Respondent

**WRITTEN OBSERVATIONS
OF THIRD PARTY INTERVENERS:**

The Alliance Defense Fund on Behalf of 32 Members of European Parliament:

- | | |
|-----------------------------------|---|
| 1. Agnes Hankiss (Hungary) | 18. Jose Ignacio Salafranca Sanchez-Neyre (Spain) |
| 2. Aldo Patriciello (Italy) | 19. Jozsef Szajer (Hungary) |
| 3. Alfredo Pallone (Italy) | 20. Kinga Gal (Hungary) |
| 4. Antonello Antinoro (Italy) | 21. Lara Comi (Italy) |
| 5. Antonio Cancian (Italy) | 22. Laszlo Tokes (Romania) |
| 6. Bernd Posselt (Germany) | 23. Livia Jaroka (Hungary) |
| 7. Boguslaw Sonik (Poland) | 24. Marek Jozef Grobarczyk (Poland) |
| 8. Carlo Casini (Italy) | 25. Mario Borghezio (Italy) |
| 9. Cristiana Muscardini (Italy) | 26. Mario Mauro (Italy) |
| 10. Eija-Riitta Korhola (Finland) | 27. Miroslav Mikolasik (Slovak Republic) |
| 11. Eleni Theocharous (Cyprus) | 28. Oreste Rossi (Italy) |
| 12. Ermina Mazzoni (Italy) | 29. Othmar Karas (Austria) |
| 13. Giovanni La Vie (Italy) | 30. Paolo Bartolozzi (Italy) |
| 14. Jacek Protasiewicz (Poland) | 31. Sergio Paolo Francesco Silvestris (Italy) |
| 15. Jacek Wlosowicz (Poland) | 32. Tadeusz Cymanski (Poland) |
| 16. Jan Olbrycht (Poland) | 33. Valdemar Tomasevski (Lithuania) |
| 17. Janusz Wojciechowski (Poland) | |

Submitted By:



Roger Kiska
Legal Counsel
Alliance Defense Fund

07 June 2010

Date

Introduction

1. The Alliance Defense Fund (ADF), acting in its capacity as legal counsel for the above-named 32 Members of European Parliament, is a not-for-profit international legal alliance of more than 1600 lawyers dedicated to the protection of fundamental human rights. The Alliance Defense Fund has argued cases before the United States Supreme Court and the European Court of Human Rights. It has also provided expert testimony to the European Parliament and United States Congress. ADF has full accreditation with the Organization for Security and Co-operation in Europe, full accreditation with the European Union (Fundamental Rights Agency and European Parliament) and provisional accreditation with the United Nations. As a result, ADF is fully-versed in the Convention rights and international law issues that bear upon this third party intervention.

2. The Members of European Parliament intervening in this case, representing 11 Member States of the Council of Europe, do so to restate the fundamental importance of both subsidiarity and cultural sovereignty to the success of European integration. Additionally, the outcome of this matter raises particular questions of institutional importance to the intervening Members of European Parliament in light of the recent ratification of the Lisbon Treaty and consequent European Union dialogue regarding adopting the European Convention of Human Rights.

3. This brief addresses this Court's governing jurisprudence as it should apply to the presence of religious symbols in public schools in Italy. By direction of the Court, this brief does not address the specific facts of this case or its applicants. The brief sets forth three primary arguments: (a) the issue of the placement of religious symbols in the classroom falls within the margin of appreciation afforded to Member States by the Convention as a matter of respect for cultural sovereignty; (b) a proper reading of the existing case-law governing the interpretation of Protocol 1, Article 2 speaks only to the content of education and whether a given subject matter indoctrinates, and not to the issue of place and setting of education; (c) non-pecuniary damages may only be assessed by the court where actual harm has been assessed and not as a means of punishing a Member State.

(a) Subsidiarity and National Sovereignty

4. The European Court of Human Rights is not a Constitutional Court and therefore does not have direct competency over questions that fall within the sphere of the cultural or historical sovereignty of Member States. For the European Court to forbid a Member State from publically displaying a religious symbol of historical and cultural significance would be inconsistent with Article 4, paragraph 3 of the European Charter on Local Self-Government which affirms the role of the principle of subsidiarity among Council of Europe Member States. The Charter calls for action and respect for the work of those authorities closest to the citizen with regard to the specific functions of state government. This same principle was reaffirmed by the Council of Europe in 1995 in its Recommendation *On the Implementation of the Principle of Subsidiarity*.¹ The manifestation of the principle of subsidiarity in European Court of Human Rights jurisprudence is the "margin of appreciation" doctrine which holds that local authorities are better suited to assessing the cultural, legal and social elements of their own nation than is the Strasbourg Court.

¹ Council of Europe, Committee of Ministers, *On the Implementation of the Principle of Subsidiarity*, Recommendation No. R (95) 19 (adopted on 12 October 1995).

5. The Court has held that the legal and factual features which characterize the life and culture of a society cannot be disregarded and must play a measure in deciding a dispute. To ignore these basic precepts of respect for national sovereignty and subsidiarity would damage the nature of the international treaty law and the relationship among inter-governmental bodies and participating states.²

6. Directive no. 2666 (03 October 2007), recommending that public schools display the crucifix, is prescribed by law and falls within the constitutional scope afforded by the second sentence of Article 7 of the Italian Constitution.³ Furthermore, the Directive is grounded on existing legislation that predates both Italy's accession to the Convention and the ratification of its current Constitution.⁴ The law is accessible and foreseeable in its effects and contains the requisite clarity and precision required under the Convention.⁵ The law itself meets all of the criteria of promoting the principles of a democratic society: tolerance, broadmindedness and pluralism.⁶

7. Any order requiring the removal of the crucifix from the classroom would have a *de facto* chilling effect on Member State cultural and national sovereignty and would breach the principle of subsidiarity. Furthermore, any such action would do violence to tolerance, broadmindedness and pluralism by restricting expressions of cultural sovereignty and unity and eroding the very national fabric of effected Member States. This proper understanding of Article 9, taken in conjunction with Protocol 1, Article 2 (or within the wider context of national sovereignty), requires the ability of Contracting Parties to celebrate and unify their populations through the presence of nationally recognized symbols of historical and cultural importance. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.⁷

8. The recent judgment of the United States Supreme Court in *Salazar v. Buono*⁸ is instructive as to the secular value of religious symbols in the public square. The case, involving the presence of a large cross in the Mojave National Preserve, held that the "separation of church and state" does not require the eradication of all public symbols in the public realm.⁹ Justice Kennedy, writing for the majority, made it clear that the application of the doctrine of "separation of church and state" requires accommodation rather than a strict ban on religious

² ECHR, *Belgian Linguistic Case*, no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, Part I.B. § 10, ECHR Series A, No. 6.

³ *Constitution of the Republic of Italy*, Adopted on 22 December 1947, Article 7: "The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are governed by the Lateran Pacts. Changes to the Pacts that are accepted by both parties do not require the procedure for constitutional amendment."

⁴ Article 118 of Royal Decree No. 965 (April 30, 1924); Article 119 of Royal Decree No. 1297 (26 April 1928).

⁵ See: ECHR, 26 April 1979, *Sunday Times v. the United Kingdom*, Series A, No. 30 § 49 *et seq*; ECHR, 24 March 1998, *Olsson v. Sweden*, Series A, No. 130 § 61f; ECHR, *Kruslin v. France*, Series A No 176-B; Application No 11801/85 (1990); 12 EHRR 547 24 APRIL 1990 § 36. Also *cf.* ECHR, 22 November 1995, *SW v. the United Kingdom*, Series A, No. 335-B, § 36.

⁶ ECHR, 30 September 1976, *Handyside v. the United Kingdom*, Series A, No. 24, § 49 *et seq*.

⁷ ECHR, *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A no. 260-A, at para. 31.

⁸ *Salazar v. Buono*, 559 U.S. _____ (2010).), No. 08-472, available at <http://www.law.cornell.edu/supct/html/08-472.ZS.html>.

⁹ *Id.*, Section III, para. 12.

symbols of faith.¹⁰ Furthermore, as with the presence of the cross or religious symbols in Italy and other Member States with strong historical ties to the Christian faith, Justice Kennedy wrote that although the cross is certainly a Christian symbol, its placement in the public square does not necessarily promote a Christian message.¹¹

9. Many Council of Europe members have rich cultural and historical ties to the Christian religion. These Member State use symbols of their Christian heritage, including the cross, in public schools and other state sponsored entities as signs of culture and unity. Fifteen Council of Europe Member States currently make legal allowance for the display of religious symbols in public schools or other forums within the public square.¹² Furthermore, many more Contracting Parties display the cross on their flags.¹³ Any decision with general application which would require religious symbols to be removed from public schools would send a radical ideological message throughout Europe. This impact would be felt strongest in the former Soviet States, among which several display crucifixes in public classrooms, where the forced removal of symbols of national religious identity could be a reminder of a painful past. Under the logic of such a reading of the Convention, religious symbols in public places would be subject to censorship whenever someone claimed offense. This would reduce freedom of expression to its lowest common denominator.¹⁴

10. It is not a violation of the Convention to have a State church¹⁵ or to show preference to a specific religious denomination in a Member State¹⁶. The Convention does not impose a set of rigid requirements, but rather sets a minimum standard of practice whereby different religious traditions and differences in constitutional arrangements regulating church and state will continue to form part of Europe's diverse landscape. Precisely stated, the European Court of Human Rights does not deal directly with the relationship between church and state.¹⁷ This Court has held that where the issue of the relationship between church and state arises, a large margin of appreciation has to be afforded the Member State.¹⁸ This margin of appreciation is necessary because of wide divergence among Contracting Parties towards the issue of church and state relations based on cultural, historical and legal reasons. Even within a single Member State, the conception of the relationship between church and state may vary widely.¹⁹

11. The right of a sovereign state to govern its own affairs with regard to the placement of religious symbols on public property is also protected under the International Covenant on Civil

¹⁰ See e.g.: *Id.*

¹¹ *Id.*, Section III, para. 5.

¹² Austria, Croatia, Cyprus, Georgia, Germany, Greece, Ireland, Italy, Lithuania, Malta, Poland, Romania, San Marino, Slovakia and Spain.

¹³ See e.g.: Denmark, Finland, Greece, Norway, Slovakia, Sweden, Switzerland and the United Kingdom.

¹⁴ As the famous American Jurist Justice Cardoza aptly wrote: "a legal principle has a "tendency . . . to expand itself to the limit of its logic." Justice Benjamin Nathan Cardoza, *The Nature of the Judicial Process* (New Haven: Yale University Press: 1921).

¹⁵ See: ECHR, *Darby v. Sweden*, application no. 11581/85, 31 Eur. Comm'n H.R. Dec. & Rep. 1 (1989) (Commission Report).

¹⁶ ECHR, *E. & G.R. v. Austria*, application no. 9781/82, 37 Eur. Comm'n H.R. Dec. & Rep. 42 (1984).

¹⁷ See: Carolyn Evans & Christopher A. Thomas, *Church-State Relations in the European Court of Human Rights*, 2006 BYU L. REV. 699.

¹⁸ ECHR, *Wingrove v. United Kingdom*, App. No. 17419/90, 24 Eur. H.R. Rep. 1, 20 (1996).

¹⁹ ECHR, *Otto-Preminger-Inst. v. Austria*, App. No. 13470/87, 19 Eur. H.R. Rep. 34, 57-58 (1995).

and Political Rights (ICCPR), Article 18²⁰, to which Italy is a signatory.²¹ General Comment No. 22 discussing Article 18 of the ICCPR affirms the right of a nation to have a recognized or predominant religion so long as an abuse of the dominant position does not occur: “The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers”.²² Thus the recognition of the role of a dominant religion in a society, be it cultural or historical, through the presence of its religious symbols in the public square, is a protected means of expression.

12. Furthermore, the Guidelines for Review of Legislation Pertaining to Religion or Belief prepared by the OSCE/ODIHR Advisory Panel of Experts in consultation with the Council of Europe’s Venice Commission confirms that “legislation that acknowledges historical differences in the role that different religion have played in a particular country’s history are permissible so long as they are not used as a justification for discrimination”.²³ In Italy, crosses are a commonplace symbol expressing sentiments as diverse as religious faith, cultural identity and unity. Their presence and placement has no bearing on religious freedom for non-Catholics in Italy, which is governed by Article 8 of the Italian Constitution.²⁴ Article 19 of the Italian Constitution further promotes the principle of freedom of religion for all confessions and beliefs: “All persons have the right to profess freely their own religious faith in any form, individually or in association, to disseminate it and to worship in private or public, provided that religious rites are not contrary to public morality.”²⁵

13. It is fundamentally important in understanding the relationship of church and state in Italy by properly interpreting Article 7 of the Italian Constitution²⁶ The first sentence of Article 7 regarding “separation of church and state” must be informed by the second sentence’s guiding hermeneutic. The Lateran Pacts, as referenced by the second sentence of Article 7, were

²⁰ *International Covenant on Civil and Political Rights*. United Nations General Assembly Resolution 2200A [XXI]. 16 December 1966. Article 18 reads: “1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental freedoms of others.”

²¹ Italy signed the International Covenant on Civil and Political Rights on 18 January 1967. It was ratified by Italy on 15 September 1978.

²² *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18)*: 07/30/1993. CCPR/C/21/Rev.1/Add. 4, General Comment No. 22. (General Comments), para. 9.

²³ *Guidelines for Review of Legislation Pertaining to Religion or Belief*, prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in Consultation with the European Commission for Democracy Through Law (Venice Commission): Adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), II.B.3.

²⁴ *Constitution of the Republic of Italy*, Adopted on 22 December 1947, Article 8: “All religious confessions are equally free before the law. Religious confessions other than the Catholic one have the right to organise themselves in accordance with their own statutes, provided that these statutes are not in conflict with Italian law. Their relations with the State are regulated by law on the basis of accords between the State and the respective representatives.”

²⁵ *Id.*, Article 19.

²⁶ *Id.*, Article 7.

amended by the Agreement Between the Italian Republic and the Holy See²⁷, and call for full mutual respect and reciprocal co-operation.²⁸ Article 9, paragraph 2 of the Concordat speaks specifically to the relationship of the Roman Catholic church to education in Italy:

The Italian Republic, recognizing the value of the religious culture and considering that the principles of the Catholic Church are part of the historical heritage of the Italian people, shall continue to assure, within the framework of the scope of the schools, the teaching of Catholic religion in the public schools of every order and grade except for Universities. With respect for the freedom of conscience and educational responsibility of the parents, everyone shall be granted the right to choose whether or not to receive religious instruction. When they enroll, the students or their parents shall exercise this right at the request of the school authority and their choice shall not give rise to any form of discrimination.²⁹

14. Article 9, paragraph 2 of the Concordat is definitive with respect to two key points. First, the guarantee of respect for parental rights with regard to raising children in accordance with their own religious and philosophical beliefs is prescribed by Italian law without limitation. To this extent, Italian law on allowing opt-outs of religious education is in full conformity with the principles announced by the Grand Chamber in *Folgero*.³⁰ Second, Article 9, paragraph 2 of the Concordat, when read in conjunction with the first sentence of Article 33 of the Italian Constitution³¹, clearly establishes that the presence of crosses in the classroom does not impugn the rights of parents as the content of the curriculum remains neutral and free.

15. The aforementioned guiding interpretive principles adopted by the Venice Commission speak to the fact that there is great state divergence as to regulations regarding the placement of religious symbols in schools and no conformity among international instruments exists on this issue.³² It is not the place of the Court, charged with safeguarding minimal standards of practice enumerated by the Convention, to deem legislation held to be in accord with Italian Constitutional law to be violative of Protocol 1, Article 2. Respect for national sovereignty is a fundamental principle of international law. The definition of international law itself, requires an *a priori*, recognition that states must be sovereign in order to agree to be bound by international obligations vis-à-vis treaty law.³³

16. To this extent, the Italian Constitutional Court has held on several occasions that rights and principles enumerated in the Italian Constitution superseded any international

²⁷ *Agreement Between the Italian Republic and the Holy See* Signed by the Italian Republic and the Holy See on 18 February 1984. Ratified by the Italian Parliament on 25 March 1985 by Law No. 121.

²⁸ *Id.*, Article 1.

²⁹ *Id.*, Article 9(2).

³⁰ *Cf. ECHR, Folgero and Others v. Norway* [Grand Chamber], application no. 15472/02, judgment of 29 June 2007, §§ 85-102.

³¹ Constitution of the Republic of Italy, Article 33: “The Republic guarantees the freedom of the arts and sciences, which may be freely taught.”

³² *Guidelines for Review of Legislation Pertaining to Religion or Belief*, prepared by the OSCE/ODIHR Advisory Panel of Experts on Freedom of Religion or Belief in Consultation with the European Commission for Democracy Through Law (Venice Commission): Adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June 2004), II.C.6.

³³ *See e.g., Hedley Bull, The Anarchical Society: A Study of Order in World Politics* 122 (1977).

commitments in its domestic law. Most recently, the Constitutional Court held that decisions of the European Court of Human Rights may assume the rank of a supplementary source of Constitutional limits, but is secondary to Italian Constitutional law itself.³⁴ Similarly, the Constitutional Court held in its 1973 *Frontini* decision, that Article 11 of the Constitution which governs when Italy may relinquish partial sovereignty through international agreements, as requiring that international obligations never interfere with the fundamental precepts set forth in the Italian Constitution.³⁵

17. The recognition in international law of the right to display religious symbols in the public square taken in conjunction with the principles of subsidiarity and respect for national sovereignty, require that Italy have sole competency to govern its own affairs with regard to the display of the crucifix in Italian schools.

(b) Protocol 1, Article 2: Right to Education

18. Protocol 1, Article 2 of the Convention³⁶ must be read in light of its legislative history and the case-law governing its interpretation. The protections afforded by Protocol 1, Article 2 extend to the content of the subject matter taught but not to matters such as the setting and planning of education which fall within the exclusive competency of Member States.³⁷ The placement of crosses in public schools being within the sphere of setting and planning of education therefore falls within the margin of appreciation afforded to Italy by the Convention.

19. The Court has held that the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era.³⁸ The travaux préparatoires³⁹ of Protocol 1, Article 2 indicates that the drafters of the article clearly intended the second sentence on parental rights only to extend to matters being taught and not to matters of place and setting. The Committee on Legal and Administrative Questions, with regard to the issue of respect for parental rights, adopted by a vote of eight to nil, with three abstentions, the following text: “The responsibilities assumed by the State with regard to education may not encroach on the right of parents to ensure the spiritual and moral instruction of their children in accordance with their own religious and philosophical

³⁴ Constitutional Court of Italy, Judgment No. 311 (2009).

³⁵ See: Francesco P. Ruggieri Laderchi, “Report on Italy,” in Anne-Marie Slaughter, Alec Stone Sweet, and Joseph Weiler (eds), *The European Courts and National Courts* (Oxford: Hart Publishing, 1998).

³⁶ Convention for the protection of Human Rights and Fundamental Freedoms, Protocol 1, Article 2: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.”

³⁷ See e.g.: ECHR, *Valsamis v. Greece*, application no. 21787/93, judgment of 18 December 1996, § 28.

³⁸ *Id.*

³⁹ In accord with Article 32 of the Vienna Convention on the Law of Treaties, the use of travaux préparatoires is of import in clarifying the intent of a treaty or legal instrument. United Nations, *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969. Entered into force on 27 January 1980. *Treaty Series*, vol. 1155, p. 331. Article 32 states: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

beliefs.”⁴⁰ The second sentence of Protocol 1, Article 2 must therefore be read within the context of the Draft Committees original intent as to the meaning of the phrase “respect for the right of parents”.

20. The travaux préparatoires also indicates that the jurisdictional scope of the education protocol allows for a particularly large margin of appreciation as many Council of Europe states did not see a need to add a right to education to the Protocol.⁴¹ Italy however, expressed its “strong desire” to add the issue of education to the First Protocol.⁴² The fact of Italy’s overt push to add education to the First Protocol to the Convention further clearly establishes that Italy in no way understood or agreed to the text of the Article to mean that it would no longer have the right to display crosses in its schools. States are bound by international treaty law where there has been a meeting of the minds and fully informed consensual accession (*pacta sunt servanda*). In no way, as evidenced by the travaux préparatoires, did Italy foresee or agree to the terms of the education article with an understanding that expressions of its religious heritage would be forbidden from display in public schools.

21. The Court in *Angelini v. Sweden* held that the mere fact that Christianity represents a greater part of a curriculum for religious education than other religions does not in and of itself impair pluralism or amount to indoctrination.⁴³ The Grand Chamber in *Folgero* affirmed that because of the place occupied by Christianity in a Member State’s national history and tradition, the expression of this fact must fall within a State’s margin of appreciation for planning and setting of its curriculum.⁴⁴ As the placement of crosses in public schools is an indirect aspect of setting and planning of education and does not fall within the sphere of curriculum which would require direct transmission of teaching, the matter therefore falls outside of the competency of the Court.

22. If Contracting Parties were to listen to the philosophical or religious objections of all parents then all institutionalized teaching would run the risk of being impracticable.⁴⁵ The very recognition of the Court of the fact that the planning and setting of education differs according to the country and era in question, clearly suggests that great deference must be afforded by the Court to Contracting Parties with regards to their obligations in the competency of education.

23. The current jurisprudence of the Court has defined the meaning of the second sentence of Protocol 1, Article 2 in a conservative manner as a means of maintaining respect for Member State competency over educative matters. The Court, for example, in *Valsamis v. Greece*⁴⁶ held that the protections afforded to parental rights by Protocol 1, Article 2 did not include the right to remove the child of Jehovah’s Witnesses’, who held pacifism as a major religious tenet, from school for a single day where a mandatory parade was taking place to

⁴⁰ Council of Europe, *Preparatory Work on Article 2 of the Protocol of the Convention*, CDH(67)2, 9 May 1967, p. 59.

⁴¹ See e.g.: *Id.*, p. 98 (on the fact that the proposed text of Protocol 1, Article 2 represented a compromise because of the lack of desire of some Member States not to include a right to education); p. 110 (the statement of the French representative with regard to the Council of Ministers initial decision to not add a right to education to the Convention).

⁴² *Id.*, 101.

⁴³ ECHR, *Angelini v. Sweden* (dec.), no 1041/83, 51 DR (1983).

⁴⁴ ECHR, *Folgero and Others v. Norway*, *op. cit.*, § 89.

⁴⁵ *Id.*

⁴⁶ ECHR, *Valsamis v. Greece*, *op. cit.*

celebrate a national holiday that commemorated the outbreak of the war between Greece and Italy on 28 October 1940. The family argued that pacifism was a religious conviction protected by Article 9 which had been recognized as such by the Court in *Arrowsmith*⁴⁷ and that commemoration of any military event was contrary to the Jehovah's Witness faith. The judgment held that a minor disturbance to the religious beliefs of the families does not deprive the family of their right "to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions."⁴⁸

24. In the case of *Kjeldsen, Burk Madsen and Pedersen v. Denmark*⁴⁹ opt-outs for "sexual education" were refused to parents who wished their children not to participate in the classes because of the family's religious convictions. The Court in so holding stated that respect for parental rights in education was ancillary to the State's responsibility to guaranteeing the provision of education.⁵⁰ The *Kjeldsen, Burk Madsen and Pedersen* court also strongly held to the guiding principle that competency in educational matters falls to the State. In so doing it noted that parents have the option of private education and in many states home education if they object to the convictions being taught in public schools.⁵¹

25. The Court has further held that Protocol 1, Article 2 guarantees only respect for parental convictions and did not guarantee absolute freedom to educate according to one's religious or philosophical convictions.⁵² Additionally, the Court has stated that parents are free to educate their children according to their religious and philosophical convictions on weekends and during the week when they are not in school.⁵³ The ability of parents to provide religious and philosophical education therefore does not, according to the Court, create a disproportionate emphasis on the education that is being provided to children in state run schools.

26. The standard of the Court with regard to the second clause of Protocol 1, Article 2 is that a Contracting Party's only obligation to minority rights is to ensure that an abuse of the dominant position by the majority does not occur.⁵⁴ Precisely stated, the Court must afford Contracting Parties a wide margin of appreciation with regards to the organization and supervision of education to the extent that an abuse of the majority position does not occur. The placement of religious symbols in schools cannot be said to be an abuse of the dominant position and therefore should fall within a Contracting party's margin of appreciation. Religious symbols, when culturally commonplace in the public square of a Member State, does not compel a person to any religious belief. Nor does the religious symbol's presence require a person to pay homage to or even to look at it.

⁴⁷ ECHR, *Arrowsmith v. the United Kingdom*, application no. 7050/75, Decision and Reports 19, p. 19, para. 69.

⁴⁸ ECHR, *Valsamis v. Greece, op. cit.*, para. 31.

⁴⁹ ECHR, *Kjeldsen, Burk Madsen and Pederson v. Denmark*, application no. 5095/71; 5920/72; 5926/72, judgment of 7 December 1976.

⁵⁰ *Id.*, §52.

⁵¹ *Id.*, § 54.

⁵² ECHR, *Konrad and Others v. Germany*, application no. 35504/03, decision of 11.09.2006, section 1, para. 4-5.

⁵³ *Id.*, section 1, para. 9.

⁵⁴ ECHR, *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A, no. 44, p. 25, para. 63.

27. The Court further defines the scope of Protocol 1, Article 2 as affording to the state discretion to exercise autonomy from Convention supervision to the limit that it not pursue an aim of indoctrination that might be regarded as not respecting parents' religious and philosophical convictions.⁵⁵ Indoctrination with regard to religion is defined by the Court as abusing a position of authority to unduly influence or coerce another to adhere to a specific religious belief or philosophical belief.⁵⁶

28. The mere placement of a religious symbol in the public square, particularly in a nation where the presence of the cross proliferates the cultural landscape, does not have any of the elements of indoctrination or abuse of the dominant position. A strong international parallel can be drawn between the indoctrination standard enumerated by the Court for Protocol 1, Article 2 and Article 9 cases and the coercion standard used in American jurisprudence.⁵⁷ The latter standard requires that the state establishment of a religion through the placement of religious symbols requires actual legal coercion.⁵⁸

29. The issue of the display of crosses in public schools in Italy is fundamentally different than the teaching of religious education as addressed by the Grand Chamber in *Folgero*. The Court in *Folgero* was interested only in the issue of the content of the curriculum and whether it had the effect of compulsion to the Christian faith.⁵⁹ The Court was further concerned about the requirement of parents to divulge information about their religious beliefs and affiliation in order to receive certain partial exemptions from religious education.⁶⁰ The issues facing the *Folgero* Court are not present in Italy because of its right to full exemptions from religious education and no requirement to provide personal information about religious affiliation.⁶¹ Nor is the display of the crucifix related to the curriculum being taught in public schools.

30. A glaring inconsistency is created where a direct threat to respect for the religious and philosophical convictions of parents are ignored as in the above noted cases and where the indirect presence of a religious symbol is deemed to offend parents' right to educate their child according to their own religious or philosophical convictions. To define the prohibition of religious symbols in public schools within the same progeny as *Folgero* is to create a precedent which suggests that the "right" afforded under Protocol 1, Article 2 is to be free from religion all together. This reasoning is an abuse of the minority position and runs afoul of both Article 9 and Article 14 of the Convention. Such reasoning elevates a religious/philosophical viewpoint, secular humanism, to be superior to a tradition religious/cultural viewpoint. Such an approach cannot be said to be "neutral".

31. As the recommendation that the crucifix be displayed within public schools is a component of setting and planning of education, and being that the presence of the cross does not indoctrinate students, the case-law of this Court and the travaux préparatoires clearly mandate a finding that Protocol 1, Article 2 is not violated by the Italian directive on religious symbols in schools.

⁵⁵ ECHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *op. cit.*, para. 53.

⁵⁶ See e.g.: ECHR, *Kokkinakis v. Greece*, *op. cit.*, p. 658.

⁵⁷ *Cf.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁵⁸ See e.g. *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring).

⁵⁹ ECHR, *Folgero and Others v. Norway*, *op. cit.*, §§ 96-102.

⁶⁰ *Id.*, § 98.

⁶¹ *Supra* fn. 27.

(d) Article 41: Just Satisfaction⁶²

32. The Court has held that when assessing damages, only injury to the applicant can be assessed.⁶³ Furthermore, a causal link must be drawn between the damage claimed and the violation of the Convention.⁶⁴ The damage must be actual; awards for non-pecuniary damages cannot be awarded for theoretical suffering or as a means of punishing the state as a deterrent. Finally, regarding non-pecuniary damages, the Court may rule only on an equitable basis, having regard to the particular circumstances of the case and to the actual suffering which occurred.⁶⁵

33. This Court has also stressed the importance of subsidiarity with regard to the relationship of the Convention with the computation of damages. To this extent, the Court has held that Article 46 on the execution of judgments is more important than Article 41 on just satisfaction and awarding damages.⁶⁶ The computation of non-pecuniary damages must meet specific and objective criteria therefore, with the extent of damages being gleaned both from the facts of the case and a review of the Court's previous awards in similar cases.⁶⁷ Where actual harm cannot be established, the award of monetary damages is inappropriate, particularly where the judgment itself may act as just satisfaction.⁶⁸

Conclusion

34. The third-party intervenors to this submission hereby reiterate that this Court's governing jurisprudence dictates that the European Court of Human Rights is not a Constitutional Court and must afford a particularly large margin of appreciation to Member States with regard to the manner in which they define church and state relations. Equally important, as this Court recognizes, that Contracting Parties are within the margin of appreciation to show preference to one religion over another religion or belief based on national history or tradition. The placement of crosses in a public setting therefore does not violate the Convention. Nor does the presence of religious symbols in the public square equate to coercion or indoctrination, but rather can have meaning as a symbol of cultural unity and identity. In this latter context, religious symbols indeed have a secular importance and should be celebrated rather than eradicated. Finally, the purpose of Article 41 of the Convention with regard to the award of damages is to compensate a victim for actual harm suffered and not theoretical injury in order to punish a Contracting party.

⁶² Convention for the protection of Human Rights and Fundamental Freedoms, Article 41: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

⁶³ See e.g.: ECHR, *Supreme Holy Council of the Muslim Community v. Bulgaria*, application no. 39023/97, § 116, 16 December 2004, with further references,

⁶⁴ See, among other authorities, ECHR, *Barberà, Messegué and Jabardo v. Spain*, judgment of 13 June 1994 (Article 50), Series A no. 285-C, pp. 57-58, §§ 16-20; ECHR, *Salman v. Turkey* [GC], no. 21986/93, § 137, ECHR 2000-VII; and ECHR, *Demiray v. Turkey*, no. 27308/95, § 67, ECHR 2000-XII.

⁶⁵ Cf., ECHR, *Case of Oneryildiz v. Turkey* [GC], application no. 48939/99, judgment of 30.12.2004, § 160.

⁶⁶ ECHR, *Tomasik v. Croatia*, judgment of 19 October 2006.

⁶⁷ See e.g.: ECHR, *Cochiarella v. Italy*, judgment of 10 November 2004.

⁶⁸ The Grand Chamber has already utilized this standard with regard to Protocol 1, Article 2 cases. ECHR, *Folgero and Others v. Norway*, *op. cit.*, § 110.