measures taken at national level were justified in principle and proportionate (*Manoussakis and others*, judgment cited above, §44). In delimiting the extent of the margin of appreciation in the present case the Court must have regard to what is at stake, namely the need to protect the rights and freedoms of others, to preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society (see, *mutatis mutandis*, *Kokkinakis*, judgment [of 25 May 1983, Series A No. 260–A], §31; *Manoussakis and others*, judgment cited above, p. 1364, §44; and *Casado Coca*, judgment cited above, §55).

111. The Court also notes that in the decisions of *Karaduman* v. *Turkey* (No. 16278/90, Commission decision of 3 May 1993, DR 74, p. 93) and *Dahlab* v. *Switzerland* (No. 42393/98, ECHR 2001–V) the Convention institutions found that in a democratic society the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety. In the *Karaduman* case, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who did not practise their religion or who belonged to another religion were found to be justified under Article 9 §2 of the Convention. Consequently, it is established that institutions of higher education may regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others (see, among other authorities, *Refah Partisi and others*, cited above, §95). In the *Dahlab* case, which concerned the teacher of a class of small children, the Court stressed among other matters the 'powerful external symbol' which her wearing a headscarf represented and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. It also noted that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils.

112. The interference in issue caused by the circular of 23 February 1998 imposing restrictions as to place and manner on the rights of students such as Ms Şahin to wear the Islamic headscarf on university premises was, according to the Turkish courts ..., based in particular on the two principles of secularism and equality.

113. In its judgment of 7 March 1989, the Constitutional Court stated that secularism, as the guarantor of democratic values, was the meeting point of liberty and equality. The principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements. The Constitutional Court added that freedom to manifest one's religion could be restricted in order to defend those values and principles ...

114. As the Chamber rightly stated [in the judgment of 29 June 2004] (see paragraph 106 of its judgment), the Court considers this notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as being

covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention (see *Refah Partisi and others*, judgment cited above, §93).

115. After examining the parties' arguments, the Grand Chamber sees no good reason to depart from the approach taken by the Chamber (see paragraphs 107–109 of the Chamber judgment) as follows: '... The Court ... notes the emphasis placed in the Turkish constitutional system on the protection of the rights of women ... Gender equality – recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe (see, among other authorities, *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*, judgment of 28 May 1985, Series A No. 77, p. 38, §78; *Schuler-Zgraggen* v. *Switzerland*, judgment of 24 June 1993, Series A No. 263, pp. 21–22, §67; *Burgharz* v. *Switzerland*, judgment of 22 February 1994, Series A No. 280–B, p. 29, §27; *Van Raalte* v. *Netherlands*, judgment of 21 February 1997, *Reports* 1997–I, p. 186, §39, *in fine*; and *Petrovic* v. *Austria*, judgment of 27 March 1998, *Reports* 1998–II, p. 587, §37) – was also found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution ... In addition, like the Constitutional Court ..., the Court considers that, when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. As has already been noted (see *Karaduman*, decision cited above; and *Refah Partisi and others*, cited above, §95), the issues at stake include the protection of the 'rights and freedoms of others' and the 'maintenance of public order' in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated ..., this religious symbol has taken on political significance in Turkey in recent years ... The Court does not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts ... It has previously said that each Contracting State may, in accordance with the Convention provisions, take a stance against such political movements, based on its historical experience (*Refah Partisi and others*, cited above, §124). The regulations concerned have to be viewed in that context and constitute a measure intended to achieve the legitimate aims referred to above and thereby to preserve pluralism in the university.'

116. Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court ..., which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.

117. The Court must now determine whether in the instant case there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference.

118. [The Court] notes at the outset that it is common ground that practising Muslim students in Turkish universities are free, within the limits imposed by educational organisational constraints, to manifest their religion in accordance with habitual forms of Muslim observance. In addition, the resolution adopted by Istanbul University on 9 July 1998 shows that various other forms of religious attire are also forbidden on the university premises ...

119. It should also be noted that when the issue of whether students should be allowed to wear the Islamic headscarf surfaced at Istanbul University in 1994 in relation to the medical courses, the Vice Chancellor reminded them of the reasons for the rules on dress. Arguing that calls for permission to wear the Islamic headscarf in all parts of the university premises were misconceived and pointing to the public-order constraints applicable to medical courses, he asked the students to abide by the rules, which were consistent with both the legislation and the case law of the higher courts ...

120. Furthermore, the process whereby the regulations that led to the decision of 9 July 1998 were implemented took several years and was accompanied by a wide debate within Turkish society and the teaching profession ... The two highest courts, the Supreme Administrative Court and the Constitutional Court, have managed to establish settled case law on this issue ... It is quite clear that throughout that decision-making process the university authorities sought to adapt to the evolving situation in a way that would not bar access to the university to students wearing the veil, through continued dialogue with those concerned, while at the same time ensuring that order was maintained and in particular that the requirements imposed by the nature of the course in question were complied with.

121. In that connection, the Court does not accept the applicant's submission that the fact that there were no disciplinary penalties for failing to comply with the dress code effectively meant that no rules existed ... As to how compliance with the internal rules should have been secured, it is not for the Court to substitute its view for that of the university authorities. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course (see, *mutatis mutandis*, *Valsamis* v. *Greece*, judgment of 18 December 1996, *Reports* 1996–VI, p. 2325, §32). Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's 'internal rules' devoid of purpose. Article 9 does not always guarantee the right to behave in a manner governed by a religious belief (*Pichon and Sajous* v. *France* (dec.), No. 49853/99, ECHR 2001–X) and does not confer on people who do so the right to disregard rules that have proved to be justified (see the opinion of the Commission, §51, contained in its report of 6 July 1995 appended to the *Valsamis* judgment cited above, p. 2337).

122. In the light of the foregoing and having regard to the Contracting States' margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued.

123. Consequently, there has been no breach of Article 9 of the Convention.

The UN Special Rapporteur on freedom of religion or belief, Ms Asma Jahangir, also provided useful comments on this issue. Following a mission to France in 2005, she

expressed her concern at certain consequences of the Law of 15 March 2004 on the wearing of religious symbols in public schools, particularly as regards the radicalization of Muslim communities and, generally, the feeling of exclusion of these communities. She also proposed a set of criteria, in order to assist governments in assessing whether the regulations in place on the wearing of religious symbols comply with the requirements of freedom of religion.

Report submitted by Asma Jahangir, Special Rapporteur on freedom of religion or belief: Mission to France (18–29 September 2005), E/CN.4/2006/5/Add. 4 (8 March 2006):

IV. Religious symbols in public schools

47. Since the beginning of the school year 2004/05, in application of Law 2004–228 of 15 March 2004 on '*laïcité*', and conspicuous religious symbols in public schools (Loi no 2004–228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics), the wearing of conspicuous religious symbols is prohibited in public schools.

A. Background 48. Until March 2004, there was no legislation related to the wearing of religious symbols in schools. In 1989, the State Council (*Conseil d'Etat*), referring to the right to freedom of expression and the right to publicly manifest one's religion or beliefs, decided that the wearing of symbols intended to show a child's affiliation to a religion in public schools was not necessarily considered incompatible with the principle of the separation of Church and State. It would only constitute a breach of this principle, and therefore be considered illegal, if it was accompanied by proof of proselytizing behaviour or provocation. It distinguished between an 'ostentatious (*ostentatoire*) religious symbol' and the 'ostentatious wearing of a religious symbol'.

49. School administrations found this regime complex and difficult to implement on a case–by–case basis, in the absence of any legislation. Accordingly, educational professionals advocated for the adoption of a law on the issue.

50. As a result, in December 2003, a special commission was appointed by the President and headed by the national ombudsman, Bernard Stasi, to analyse the application of the principle of *laïcité* in France. Among other recommendations, the Commission recommended that a law be drafted banning conspicuous religious symbols (including large Christian crosses, Jewish skullcaps and Islamic headscarves) in State schools.

51. Law 2004–228, which amended the Education Act, was adopted by a large majority in the National Assembly and across party lines. In its article 1, it provides that in public elementary schools, middle schools (*collèges*) and secondary schools (*lycées*), wearing symbols or clothing by which students ostentatiously show a religious identity is prohibited. School rules are to stipulate that any disciplinary procedure must be preceded by dialogue with the student.

52. The assessment of whether a religious symbol constitutes a conspicuous sign is left to the head of the school establishment, a power that is said to have led in some cases to abuse, including in cases where some of the heads decided to ban all manner of head coverings, with even the slightest religious connotation.

B. The reasons behind and arguments supporting the law 53. According to many interlocutors, the reasons behind this legislation go beyond the application of the principle of the separation of Church and State. This legislation is also illustrative of the relationship between the French State and religion, in particular certain practices of the Muslim community.

54. The French religious landscape has dramatically changed since 1905, in part as a result of the immigration of a large amount of people from Muslim backgrounds. Throughout the years, the population of Muslim background has significantly increased and, in many places, has settled in some of the so-called *banlieues* or housing estates. The *banlieues* are the suburbs surrounding France's larger cities, such as Paris and Marseilles. The population of the *banlieues* is often characterized by poverty, high unemployment rates among young people, growing extremism among Muslim youth and an increasing feeling of alienation from French society at large.

55. On 4 October 2002, Sohane Benziane was burnt alive, reportedly for reasons related to her refusal to wear the headscarf. This tragic incident was at the origin of the creation of movements such as *Ni putes, ni soumises* ... [Associations defending women's rights] mainly claim that most young women of Muslim background wear the headscarf because they are forced to do so by their family and, in particular, by the male members. They emphasize the individual character of the right to freedom of religion and consider that the exercise of this right, which would include the right to wear the headscarf, should be based on free and individual choice.

56. The associations argue that an increasing proportion of young French citizens of Muslim background want to emancipate themselves from the religion to which they are associated. They are of the opinion that Law 2004–228 has provided them with a legitimate means of reaching this goal.

57. The National Assembly and the Government reportedly considered that this law would constitute a means of protecting young women who were not willing to abide by certain so–called religious norms, including the wearing of the headscarf. The banning of religious symbols at school would enable those young female children to freely choose the way they conduct their lives.

58. Many supporters of the law have also argued that the school is a place where children should learn about the elements that unify them rather than the elements that differentiate them. In this context, they argue that differentiating between pupils on the basis of religion has resulted in some pupils refusing to participate in classes such as biology or swimming classes.

59. The Special Rapporteur noted the inconsistency in the position of certain interlocutors from women's organizations who argued that Islam does not, as such, require women to wear a headscarf whilst at the same time arguing that the law should be applied to the headscarf because it was, in fact, being worn as a religious symbol.

60. Finally, at a meeting with members of staff of the office of the Minister of National Education, the Special Rapporteur was told that the wearing of religious symbols in schools hurt the freedom of conscience of the other children. She was concerned about the intolerant nature of such arguments.

C. Consequences of the implementation of the law 61. It is claimed by the Government that the implementation of the law has actually proved less problematic than expected and most interlocutors have agreed with this conclusion. According to the Minister of National Education, 47 children have been expelled from schools, including three Sikh pupils who had refused to remove their under-turban. French tribunals have usually upheld these expulsions.

62. It is however difficult to assess the number of pupils who have chosen not to abandon their religious signs. In addition to dismissals, some have removed themselves from the school system by abstaining from registering with a school. Others aged above 16 are no longer obliged to attend school. A few have left France or have registered with private schools, which allowed them to keep wearing their symbols. Finally, a few have enrolled with distance learning systems (*Centre national d'enseignement à distance*).

63. When assessing the indirect consequences of the law, opinions are much more divided. Although the scope of the new law applies equally to all religious symbols, its application disproportionately affects young Muslim women wearing the headscarf. A large number of these women told the Special Rapporteur about the difficulties they had endured because they had freely chosen to wear the headscarf. Many had been intimidated or humiliated for expressing their personal opinion on the question. Even in cases where young girls were obliged to wear headscarves by their families, the law is said to have provoked particularly painful situations within the families. Some girls who did not wear the headscarf before the law have decided to wear it when they leave the school as a form of protest. Some informed the Special Rapporteur that they felt torn between loyalty to their religious community and their commitment to women's rights.

64. The adoption of the law is also said to have radicalized a fraction of the Muslim youth and has been systematically used in the *banlieues* and Mosques to disseminate a message of religious radicalism. Some critics of the new law argue that it may have been among the different elements explaining the widespread violence and riots that erupted all around France's *banlieues* in early November 2005.

65. While CFCM [*Conseil français du culte musulman*] was unable to reach a unified position on Law 2004–228 UOIF [*union des organisations islamiques de France*] openly denounced the adoption of the law, although it did ask Muslim girls to comply with it.

66. Another religious minority that has been seriously affected by the adoption of the law is the Sikh community. Their members reported to the Special Rapporteur that displaying religious symbols was an essential part of their faith. They described the painful experiences they endured when their children had to cut their hair, as a result of the rigid application of the law by some educational institutions.

67. The law also appears to have sent the wrong message to a certain portion of the population which has come to believe that the wearing of religious symbols per se, and in particular headscarves, is generally unlawful. As a result of the new law, a portion of the population has come to associate the headscarf solely with gender inequality and oppression. The Special Rapporteur was informed about instances where women were refused access to shops or were insulted in the street because they wore the headscarf. For the same reasons, some women were dismissed from their employment, while others found it difficult to find employment.

68. More generally, some interlocutors criticized the law because, in their opinion it was meant to solve a problem of a more social than religious nature. They consider that the law has had a negative impact on social cohesion and that, instead of prohibiting religious symbols, the school system should teach the peaceful cohabitation of communities and universal values.

D. Human rights law 69. With regard to the compatibility of Law 2004–228 with human rights law and, in particular, the right to freedom of religion or belief, the Special Rapporteur notes that the law constitutes a limitation of the right to manifest a religion or a belief ...

70. Paragraph 3 of article 18 of the International Covenant on Civil and Political Rights provides for certain such limitations under restrictive conditions. General comment No. 22 (1993) of the Human Rights Committee emphasizes that paragraph 3 of article 18 '... is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner ...' (para. 8). So far, there has not been an assessment of the compatibility of this legislation with relevant international standards protecting the right to freedom of religion or belief by a judicial or quasi–judicial international human rights body.

71. However, besides a strict assessment of compatibility with the right to freedom of religion or belief, the law has been the object of careful consideration by the United Nations treaty bodies. The Committee on the Rights of the Child, in its concluding observations on the second periodic report of France, expressed its concern that 'the new legislation (Law No. 2004–228 of 15 March 2004) on wearing religious signs in public schools may be counterproductive, by neglecting the principle of the best interests of the child and the right of the child to access to education ... the Committee recommends that the State party ... consider alternative means, including mediation, of ensuring the secular character of public schools, while guaranteeing that individual rights are not infringed upon and that children are not excluded or marginalized from the school system ... The dress code in schools may be better addressed within the public schools themselves, encouraging participation of children' (CRC/C/15/Add. 4, paras. 25–26).

72. In its concluding observations on the fifteenth and sixteenth periodic reports of France, the Committee on the Elimination of Racial Discrimination 'recommend[ed] to the State party that it should continue to monitor the implementation of the Act of 15 March 2004 closely, to ensure that it has no discriminatory effects and that the procedures followed in its implementation always place emphasis on dialogue, to prevent it from denying any pupil the right to education and to ensure that everyone can always exercise that right' (CERD/C/FRA/CO/16, para 18).

IX. Conclusions and Recommendations

98. Law 2004–228 of 15 March 2004 on the wearing of conspicuous religious symbols in public schools is widely supported by the political apparatus as well as by the population. Although the law is intended to apply equally to all persons, the Special Rapporteur is of the opinion that it has mainly affected certain religious minorities, and notably, people of a Muslim background. The Special Rapporteur believes that the wide political support for the law has conveyed a demoralizing message to religious minorities in France.

99. The law is appropriate insofar as it is intended, in accordance with the principle of the best interests of the child, to protect the autonomy of minors who may be pressured or forced to wear a headscarf or other religious symbols. However, the law denies the right of those minors who have freely chosen to wear a religious symbol to school as part of their religious belief.

100. The Special Rapporteur is of the opinion that the direct and, in particular, the indirect consequences of this law may not have been thoroughly considered. Although many interlocutors at the governmental level are satisfied with the results of the implementation of the law, she noticed that the figures are often disputed, including because the criteria used for the assessment vary. Moreover, the Special Rapporteur considers that aside from statistics, the issue is one of principle.

101. The concerns of the Special Rapporteur are more serious with regard to the indirect consequences of Law 2004–228 in the longer term. The implementation of the law by educational institutions has led, in a number of cases, to abuses that have provoked humiliation, in particular amongst young Muslim women. According to many sources, such humiliation can only lead to the radicalization of the persons affected and those associated with them. Moreover, the stigmatization of the headscarf has provoked instances of religious intolerance when women wear it outside school, at university or in the workplace. Although the law was aimed at regulating symbols related to all religions, it appears to mainly target girls from a Muslim background wearing the headscarf.

102. The Special Rapporteur encourages the Government to closely monitor the way educational institutions are implementing the law, in order to avoid the feelings of humiliation that were reported to her during her visit. She also recommends a flexible implementation of the law which would accommodate the schoolchildren for whom the display of religious symbols constitutes an essential part of their faith.

103. In all circumstances, the Government should uphold the principle of the best interests of the child and guarantee the fundamental right of access to education, as has been recommended by several United Nations treaty-monitoring bodies.

104. Moreover, the Government should take appropriate measures to better inform school authorities, and more generally the French population, about the exact nature and purpose of the law. It should be made clear that the wearing or display of religious symbols is an essential part of the right to manifest one's religion or belief that can only be limited under restrictive conditions. The Government should also promptly provide redress in any situation where persons have been the victim of discrimination or other act of religious intolerance because of their religious symbols, including by prosecuting the perpetrators of such acts in the relevant cases.

Report submitted by Asma Jahangir, the Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5 (9 January 2006), paras. 36–72:

III. Religious symbols

A. Factual aspects 36. When dealing with the issue of religious symbols, two aspects of the question need to be taken into account. On the one hand, many individuals in various parts of the world are prevented from identifying themselves through the display of religious symbols, while on the other hand the reports and activities of the mandate have revealed the practice in some countries of requiring people to identify themselves through the display of religious symbols, including religious dress in public. The Special Rapporteur refers to the former as positive freedom of religion or belief, and to the latter as negative freedom of religion. The

following paragraphs examine, from an international human rights perspective, both positive and negative freedom of religion or belief of individuals with regard to the wearing of religious symbols such as garments and ornaments. A different, albeit related, issue is the display of religious symbols in public locations such as courthouses, polling stations, classrooms, public squares, etc. Some aspects of these situations have been the subject of several national legal judgements at the highest level, but the question will not be covered in this section.

37. A comparative analysis of the factual aspects reveals a set of regulations or prohibitions on wearing religious symbols in more than 25 countries all over the world. Several religions are affected and religious symbols remain a subject of controversy in a number of countries. Examples of affected believers and their religious garments or ornaments include Muslims wearing headscarves, Jews wearing yarmulkes, Christians wearing crucifixes, collars and nuns' habits, Hindus displaying a bindi, Buddhists wearing saffron robes, Sikhs wearing turbans or kirpans as well as followers of Bhagwan (Osho) wearing reddish-coloured clothing. There are different levels of regulation or prohibition on the wearing of religious symbols including constitutional provisions, legislative acts at the national level, regulations and mandatory directives of regional or local authorities, rules in public or private organizations or institutions (e.g. school rules) and court judgements. The intensity of possible adverse effects for individuals who do not abide by the regulations or prohibitions also depends on the respective field of application. Pupils in primary and secondary schools run the risk of being expelled from the public school system, whereas teachers are in danger of reprimands, suspension and, ultimately, dismissal from their jobs. At the university level, students also run the risk of being expelled or of not being awarded their degrees unless they abide by prescriptions concerning religious symbols. University lecturers are likely not to be employed in the first place. In the work environment in general there is a risk of reprimands, suspension and dismissal directly connected to the wearing of religious symbols. This may affect both employees in private enterprises and civil servants, as well as members of Parliament and military personnel. When certain dress codes are applicable for ID photographs, e.g. on permanent resident cards, visas, passports and driving licences, individuals run the risk of not receiving the official ID or of being forced to wear the required head covering on ID photographs for deportation purposes. In public, individuals may either be prevented (positive aspect of freedom of religion or belief) or coerced to wear religious symbols that they consider not essential to their convictions (negative freedom of religion or belief).

38. The obligation to wear religious dress in public in certain countries was particularly criticized by Special Rapporteur Amor, who stated that 'women are among those who suffer most because of severe restrictions on their education and employment, and the obligation to wear what is described as Islamic dress' (E/CN.4/1998/6, para. 60). There were reports of punishment by whipping and/or a fine (A/51/542/Add. 2, para. 51) and a growing number of women being attacked in the streets (E/CN.4/2003/66/Add. 1, para. 59), or even killed after being threatened for failing to wear religious symbols (E/CN.4/1995/91, p. 36). After in situ visits, Special Rapporteur Amor addressed possible solutions by urging that dress should not be the subject of political regulation and by calling for flexible and tolerant attitudes in this regard. At the same time he emphasized that traditions and customs were worthy of respect (E/CN.4/1996/95/Add. 2, para. 97 and A/51/542/Add. 2, para. 140). In his thematic studies he also referred to the different possible meanings of religious symbols (E/CN.4/2002/73/Add. 2, paras. 101–102) and in particular to the situation of pupils in the public school system (A/CONF.189/PC.2/22, paras. 56–59).

39. Furthermore, in resolution 1464 (2005) on 'Women and religion in Europe', the Parliamentary Assembly of the Council of Europe has recently called on its member States to 'ensure that freedom of religion and respect for culture and tradition are not accepted as pretexts to justify violations of women's rights, including when underage girls are forced to submit to religious codes (including dress codes)' (Parliamentary Assembly of the Council of Europe, resolution 1464 (2005), para. 7.4, adopted on 4 October 2005).

B. Legal framework at the international level 40. As mentioned in the Special Rapporteur's previous annual report (E/CN.4/2005/61, para. 65), most international judicial or quasi-judicial bodies consider the display of religious symbols as a manifestation of religion or belief (*forum externum*) rather than being part of internal conviction (*forum internum*), which is not subject to limitation. Several universal and regional human rights instruments refer to the freedom 'to manifest his religion or belief in worship, *observance*, *practice* and teaching' (emphasis added). The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief more specifically enumerates the freedom to 'make, acquire and use to an adequate extent the necessary articles and materials related to rites or customs of a religion or belief' (Article 6(c) of the 1981 Declaration) According to the Human Rights Committee's general comment No. 22 on article 18 of the Covenant, '[t]he observance and practice of religion or belief may include not only ceremonial acts but also such customs as ... the wearing of distinctive clothing or head coverings' (para. 4).

41. It is not clear whether the wearing of religious symbols falls under the category of 'practice' or 'observance'. In listing the features that required protection, the Committee does not seem to distinguish clearly between these two categories. However, some commentators have suggested that observance refers to 'prescriptions that are inevitably connected with a religion or belief and protects both the right to perform certain acts and the right to refrain from doing certain things', whereas practice concerns manifestations which are 'not prescribed, but only authorized by a religion or belief'. Such a distinction between compulsory prescriptions and mere authorizations may ultimately lead to problems when trying to determine who should be competent to consider this aspect of the individual's freedom of religion or belief. During the elaboration of general comment No. 22, Human Rights Committee member Rosalyn Higgins stated that '... it was not the Committee's responsibility to decide what should constitute a manifestation of religion'. She resolutely opposed the idea that 'States could have complete latitude to decide what was and what was not a genuine religious belief. The contents of a religion should be defined by the worshippers themselves' (See the Human Rights Committee discussion on 24 July 1992, Summary Records of the 1166th meeting of the forty-fifth session, para. 48). A certain appearance or exhibition of a symbol may or may not be linked to any religious sentiment or belief. It would therefore be most inappropriate for the State to determine whether the symbol in question was indeed a manifestation of religious belief. The Special Rapporteur therefore shares the approach of the Human Rights Committee in dealing with the wearing of religious symbols under the headings of 'practice and observance' together.

42. The controversy under international human rights law tends to centre on possible limitations on the freedom to manifest one's religion or belief, e.g. according to article 29(2) of the Universal Declaration on Human Rights, article 18(3) of the International Covenant on Civil and Political Rights, article 1(3) of the Declaration, article 9(2) of the European Convention on Human Rights (ECHR) and article 12(3) of the American Convention on Human Rights (AmCHR).

Generally speaking, these clauses only accept such limitations as are prescribed or determined by law and are necessary – in a democratic society – to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The list of permissible reasons for intervention notably does not include additional grounds stipulated for different human rights, e.g. national security or the reputations of others. Furthermore, article 4(2) of the Covenant and article 27(2) of the American Convention on Human Rights prescribe that, even in time of public emergency or war, no derogation from the freedom of conscience and religion is permissible. That this right is non-derogable again underlines the importance of the freedom of religion or belief.

C. International case law 43. When discussing the wording of its general comment No. 22, the Human Rights Committee also took account of the 'need to avoid rivalry or provocation' (id., para. 27 (Human Rights Committee member Mr Sadi)) with regard to the wearing of clothing in accordance with religious practice. The following cases illustrate typical contentious situations and the respective findings of the relevant international judicial or quasi-judicial body. Two cases before the Human Rights Committee as well as concluding observations of the Committee on the Rights of the Child appear to be pertinent to the issue of religious symbols. Furthermore, there are a number of precedents, including the most recent Grand Chamber decision of 10 November 2005, in the case law of the European Court of Human Rights and of the European Commission on Human Rights.

44. Communication No. 931/2000, *Hudoyberganova* v. *Uzbekistan* [see above in this section] concerned a female Muslim student of the Tashkent State Institute for Eastern Languages who allegedly had been suspended for wearing a headscarf. On 5 November 2004, the majority of the Human Rights Committee concluded, in the absence of any justification provided by the State party, that there had been a violation of article 18, paragraph 2, of the Covenant. It also confirmed that 'the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion' (CCPR/C/82/D/931/2000, para. 6.2). Three Committee members, however, decided to append individual opinions, referring to the uncertain state of the record and to more complex causes for Ms Hudoyberganova's exclusion from the institute, based on her own statements.

45. In communication No. 208/1986, *Bhinder* v. *Canada* [discussed in greater detail in chapter 7, section 3.1.] the Human Rights Committee held on 9 November 1989 that the requirement for Sikhs to wear safety headgear during work was justified under article 18(3) of the Covenant, without further specifying which of the grounds for limitation it thought to be in question. In addition, the Committee did not find de facto discrimination against persons of the Sikh religion violating article 26 of the Covenant because the legislation was to be 'regarded as reasonable and directed towards objective purposes that are compatible with the Covenant' (CCPR/C/37/D/208/1986, para. 6.2.).

46. The Committee on the Rights of the Child in its concluding observations on the second periodic report of France was concerned at the alleged rise in discrimination, including that based on religion, and that the new legislation on wearing religious symbols and clothing in public schools may neglect the principle of the best interests of the child and the right of the

child to access to education. It recommended that the State party 'consider alternative means, including mediation, of ensuring the secular character of public schools, while guaranteeing that individual rights are not infringed upon and that children are not excluded or marginalized from the school system and other settings as a result of such legislation. The dress code of schools may be better addressed within the public schools themselves, encouraging participation of children.' The Committee further recommended that 'the State party continue to closely monitor the situation of girls being expelled from schools as a result of the new legislation and ensure that they enjoy the right of access to education' (CRC/C/15/Add. 240, paras. 25–26).

47. At the regional level, the European Court of Human Rights and, previously, the European Commission on Human Rights appear to be more inclined to allow States to limit individuals' positive freedom of religion or belief. The Court case *Şahin* v. *Turkey* concerned the refusal of admission to lectures and examinations at Istanbul University for students whose heads were covered [see above in this section]. Both the Court Chamber and the recent Grand Chamber judgements held the notion of secularism to be consistent with the values underpinning the European Convention on Human Rights. With regard to article 9 of ECHR, 'the Court considered that, when examining the question of the Islamic headscarf in the Turkish context, there had to be borne in mind the impact which wearing such a symbol, which was presented or perceived as a compulsory religious duty, may have on those who chose not to wear it' (*Şahin* v. *Turkey*, application No. 44774/98, ECtHR Chamber judgement of 29 June 2004, para. 108 and ECtHR Grand Chamber judgement of 10 November 2005, para. 115). In her dissenting opinion, however, Judge Tulkens disagreed with the manner in which the principles of secularism and equality were applied by the majority of the Grand Chamber. She underlined that not mere worries, but only 'indisputable facts and reasons whose legitimacy is beyond doubt' were capable of justifying interference with a right guaranteed by the Convention.

48. In the case *Dahlab* v. *Switzerland*, the application of a teacher in a primary school who had been prohibited from wearing a headscarf in the performance of her professional duties was dismissed by the European Court of Human Rights at the admissibility stage [see above in this section]. The Court held that a teacher, wearing a 'powerful external symbol' such as the headscarf might have some kind of proselytizing effect on young children, who were in this case aged between 4 and 8 years. Thus, the Court concurred with the view of the Swiss Federal Court that the prohibition of wearing a headscarf in the context of the applicant's activities as a teacher was 'justified by the potential interference with the religious beliefs of her pupils, other pupils at the school and the pupils' parents, and by the breach of the principle of denominational neutrality in schools' (*Dahlab* v. *Switzerland*, application No. 42393/98, ECtHR decision of 15 February 2001(ECHR 2001–V at p. 462)).

49. The protection of the beliefs of others and of public order was also stressed in the case *Refah Partisi (the Welfare Party) and others* v. *Turkey*, where the Grand Chamber of the European Court stated that 'measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under article 9 [paragraph] 2 of the Convention' (*Refah Partisi (the Welfare Party) and others* v. *Turkey*, applications Nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECtHR Grand Chamber judgement of 13 February 2003, para. 95. See also the ECtHR Chamber judgement of 31 July 2001, para. 51).

50. The European Commission on Human Rights also dealt with two applications, *Karaduman* v. *Turkey* (No. 16278/90) and *Bulut* v. *Turkey* (No. 18783/91), concerning the university's refusal to issue a diploma because the photographs that the applicants had submitted for their identity documents portrayed them with their heads covered. In its decisions of 3 May 1993, the Commission did not regard the rejection to be an interference with the applicants' freedom of religion or belief as secular universities may regulate manifestation of religious rites and symbols with the aim of ensuring harmonious coexistence between students of various faiths and thus protecting public order and the beliefs of others.

D. Development of a set of general criteria to balance competing human rights 51. In general, contentious situations should be evaluated on a case-by-case basis, e.g. by weighing the right of a teacher to manifest his or her religion against the need to protect pupils by preserving religious harmony according to the circumstances of a given case. However, developing a set of general criteria to balance competing human rights seems to be desirable in order to give some guidance in terms of the applicable international human rights standards and their scope. In a manner similar to the guideline developed in 2004 by the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE, the aim of these general criteria is to assist national and international bodies in their analyses and reviews of laws and draft legislation pertaining to the freedom of religion or belief. The Special Rapporteur invites Governments that intend to regulate the wearing of religious symbols to consider seeking advisory services from the Office of the High Commissioner for Human Rights.

52. When developing such a set of general criteria, the competing human rights and public interests put forward in national and international forums need to be borne in mind. Freedom of religion or belief may be invoked both in terms of the positive freedom of persons who wish to wear or display a religious symbol and in terms of the negative freedom of persons who do not want to be confronted with or coerced into it. Another competing human right may be the equal right of men and women to the enjoyment of all civil and political rights, as well as the principle of the right to be protected from discrimination of any kind, including on the basis of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status. The right of everyone to education may be invoked by pupils who have been expelled for wearing religious symbols in accordance with their religion or belief. Furthermore, the rights of parents or legal guardians to organize life within the family in accordance with their religion or belief and bearing in mind the moral education which they believe should inform the child's upbringing (see article 5(1) of the Declaration) may also be at stake. On the other hand, the State may try to invoke the 'denominational neutrality of the school system' and the desire to '[preserve] religious harmony in schools' (see the Swiss Federal Court in the *Dahlab* case). According to the individual opinion by Human Rights Committee member Ruth Wedgwood in the *Hudoyberganova* case 'a State may be allowed to restrict forms of dress that directly interfere with effective pedagogy'. Furthermore, the recent European Court Grand Chamber judgement in the *Şahin* case referred to the need to 'preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society'.

53. However, any limitation must be based on the grounds of public safety, order, health, or morals, or the fundamental rights and freedoms of others, it must respond to a pressing public or social need, it must pursue a legitimate aim and it must be proportionate to that aim.

Furthermore, the burden of justifying a limitation upon the freedom to manifest one's religion or belief lies with the State. Consequently, a prohibition of wearing religious symbols which is based on mere speculation or presumption rather than on demonstrable facts is regarded as a violation of the individual's religious freedom (See Board of Experts of the International Religious Liberty Association, Guiding Principles Regarding Student Rights to Wear or Display Religious Symbols (15 November 2005), Principles Nos. 6 and 7, available at www.irla.org/documents/reports/symbols.html).

54. With regard to the scope of permissible limitation clauses, the Human Rights Committee's general comment No. 22 emphasizes that article 18 (3) of the Covenant 'is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner (para. 8).'

55. On the basis of the above-mentioned factual aspects, the legal framework and international case law, the Special Rapporteur has endeavoured to develop a set of general criteria in order to evaluate – from a human rights law perspective – restrictions and prohibitions on wearing religious symbols. The following 'aggravating indicators' show legislative and administrative actions which typically are incompatible with international human rights law whereas the subsequent 'neutral indicators' by themselves do not tend to contravene these standards:

(a) Aggravating indicators:

- The limitation amounts to the nullification of the individual's freedom to manifest his or her religion or belief;
- The restriction is intended to or leads to either overt discrimination or camouflaged differentiation depending on the religion or belief involved;
- Limitations on the freedom to manifest a religion or belief for the purpose of protecting morals are based on principles deriving exclusively from a single tradition;
- Exceptions to the prohibition of wearing religious symbols are, either expressly or tacitly, tailored to the predominant or incumbent religion or belief;
- In practice, State agencies apply an imposed restriction in a discriminatory manner or with a discriminatory purpose, e.g. by arbitrarily targeting certain communities or groups, such as women;
- No due account is taken of specific features of religions or beliefs, e.g. a religion which prescribes wearing religious dress seems to be more deeply affected by a wholesale ban than a different religion or belief which places no particular emphasis on this issue;
- Use of coercive methods and sanctions applied to individuals who do not wish to wear a religious dress or a specific symbol seen as sanctioned by religion. This would include legal provisions or State policies allowing individuals, including parents, to use undue pressure, threats or violence to abide by such rules;

(b) Neutral indicators:

- The language of the restriction or prohibition clause is worded in a neutral and all-embracing way;

- The application of the ban does not reveal inconsistencies or biases *vis-à-vis* certain religious or other minorities or vulnerable groups;
- As photographs on ID cards require by definition that the wearer might properly be identified, proportionate restrictions on permitted headgear for ID photographs appear to be legitimate, if reasonable accommodation of the individual's religious manifestation are foreseen by the State;
- The interference is crucial to protect the rights of women, religious minorities or vulnerable groups;
- Accommodating different situations according to the perceived vulnerability of the persons involved might in certain situations also be considered legitimate, e.g. in order to protect underage schoolchildren and the liberty of parents or legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

56. In seeking to accommodate different categories of individual details of permissible limitations will be controversial. In general schoolchildren are generally considered vulnerable in view of their age, immaturity and the compulsory nature of education. In addition, parental rights are also put forward as justification for limiting teachers' positive freedom to manifest their religion or belief. In all actions concerning children, the best interests of the child shall be the primary consideration. University students, however, have normally reached the age of majority and are generally considered to be less easily influenced than schoolchildren, and parental rights are usually no longer involved.

57. The above-mentioned controversy over the peculiarities of certain institutional settings was already alluded to in 1959 by Arcot Krishnaswami, then Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his seminal study of discrimination in the matter of religious rights and practices: 'A prohibition of the wearing of religious apparel in certain institutions, such as public schools, may be motivated by the desire to preserve the non-denominational character of these institutions. It would therefore be difficult to formulate a rule of general application as to the right to wear religious apparel, even though it is desirable that persons whose faith prescribes such apparel should not be unreasonably prevented from wearing it.' (E/CN.4/Sub.2/200/Rev.1, p. 33).

58. Where a policy decision has been taken at the national level to interfere with the freedom to manifest one's religion or belief with regard to wearing religious symbols issues of commensurability need to be thoroughly respected both by the administration and during possible legal review. For this purpose, the following questions should be answered in the affirmative:

- Was the interference, which must be capable of protecting the legitimate interest that has been put at risk, appropriate?
- Is the chosen measure the least restrictive of the right or freedom concerned?
- Was the measure proportionate, i.e. balancing of the competing interests?
- Would the chosen measure be likely to promote religious tolerance?
- Does the outcome of the measure avoid stigmatizing any particular religious community?

59. When dealing with the prohibition of religious symbols, two general questions should always be borne in mind: What is the significance of wearing a religious symbol and its relationship with competing public interests, and especially with the principles of secularism and equality? Who is

to decide ultimately on these issues, e.g. should it be up to the individuals themselves, religious authorities, the national administration and courts, or international human rights mechanisms? While acknowledging that the doctrine of 'margin of appreciation' may accommodate ethnic, cultural or religious peculiarities, this approach should not lead to questioning the international consensus that '[a]ll human rights are universal, indivisible and interdependent and interrelated', as proclaimed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993.

60. The fundamental objective should be to safeguard both the positive freedom of religion or belief as manifested in observance and practice by voluntarily wearing or displaying religious symbols, and also the negative freedom from being forced to wear or display religious symbols. At the same time, the competing human rights need to be balanced and public interest limitations should be applied restrictively. The Special Rapporteur fully agrees with European Court Judge Tulkens' closing remarks: 'Above all, the message that needs to be repeated over and over again is that the best means of preventing and combating fanaticism and extremism is to uphold human rights' (dissenting opinion of Judge Tulkens in the ECtHR Grand Chamber judgement of 10 November 2005 in the case of *Şahin* v. *Turkey*, para. 20).

Finally, the *Multani* case decided by the Canadian Supreme Court highlights the usefulness of relying on the notion of 'reasonable accommodation' in making decisions about the proportionality of restrictions to rights such as freedom of religion (see also, for a discussion of the notion of reasonable accommodation in equal treatment cases, chapter 7, section 3.2.). When such restrictions are based on considerations of a general nature, such considerations may not apply in specific, individual instances, where a solution better taking into account specific circumstances might be identified. This explains the reference made in the *Multani* judgment to the case of *Eldridge* v. *British Columbia* [1997] 3 S.C.R. 624. In that case, the appellants were born deaf and their preferred means of communication was sign language. They argued that it followed from the requirement of equality that they should be provided sign language interpreters as an insured benefit under the Medical Services Plan. They relied on s. 15(1) of the Canadian Charter of Rights and Freedoms, which provides: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.' Having failed to obtain a declaration to that effect in the Supreme Court of British Columbia, they then appealed to the Supreme Court of Canada, contending that the absence of interpreters impairs their ability to communicate with their doctors and other health-care providers, and thus increases the risk of misdiagnosis and ineffective treatment. The Canadian Supreme Court agreed, noting: 'The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field ... It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged

groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship"' (paras. 78–9). This notion played a central role in *Multani*, which related to the wearing of the kirpan, a religious object that resembles a dagger and must be made of metal, on the school's premises:

Supreme Court of Canada, *Multani* v. *Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256, 2006 SCC 6:

[Gurbaj Singh Multani (G) and his father Balvir Singh Multani (B) are orthodox Sikhs. G believes that his religion requires him to wear a kirpan at all times. In 2001, the school board authorized G to wear his kirpan to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing. G and his parents agreed to this arrangement. However, the governing board of the school refused to ratify the agreement on the basis that wearing a kirpan at the school violated art. 5 of the school's *Code de vie* (code of conduct), which prohibited the carrying of weapons. The school board's council of commissioners upheld that decision and notified G and his parents that a symbolic kirpan in the form of a pendant or one in another form made of a material rendering it harmless would be acceptable in the place of a real kirpan. B then filed in the Superior Court a motion for a declaratory judgment to the effect that the council of commissioners' decision was of no force or effect. The Superior Court granted the motion, declared the decision to be null, and authorized G to wear his kirpan under certain conditions (judgment of Grenier J. [2002] Q.J. No. 1131 (QL)). The Court of Appeal set aside the Superior Court's judgment ((Pelletier and Rochon JJ.A. and Lemelin J. (ad hoc)) [2004] R.J.Q. 824, 241 D.L.R. (4th) 336, 12 Admin. L.R. (4th) 233, [2004] Q.J. No. 1904 (QL)). After deciding that the applicable standard of review was reasonableness simpliciter, the Court of Appeal restored the council of commissioners' decision. It concluded that the decision in question infringed G's freedom of religion under s. 2(a) of the Canadian Charter of Rights and Freedoms (Canadian Charter) and s. 3 of Quebec's Charter of human rights and freedoms (Quebec Charter), but that the infringement was justified for the purposes of s. 1 of the Canadian Charter ('The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society') and s. 9.1 of the Quebec Charter. On appeal, the Supreme Court strikes down the order of the Quebec school authority prohibiting the wearing of a kirpan to school as a violation of freedom of religion under s. 2(a) of the Canadian Charter of Rights and Freedoms. The Supreme Court takes the view that the order could not be saved under s. 1 of the Charter.]

Per McLachlin C.J. and Bastarache, Binnie, Fish and Charron JJ. [LeBel J. filed a separate opinion, essentially concurring with that of the majority. It is not reproduced here.]:

24 The parties have been unable to agree on the most appropriate analytical approach. The appellant considers it clear that the council of commissioners' decision infringes his son's freedom of religion protected by s. 2(*a*) of the *Canadian Charter*. In response to the respondents' submissions, he maintains that only a limit that meets the test for the application of s. 1 of the *Canadian Charter* can be justified. The Attorney General of Quebec concedes that the prohibition against the appellant's son wearing his kirpan to school infringes the son's freedom of religion,

but submits that, regardless of the conditions ordered by the Superior Court, the prohibition is a fair limit on freedom of religion, which is not an absolute right.

25 According to the CSMB [Commission scolaire Marguerite-Bourgeoys], freedom of religion has not been infringed, because it has internal limits. The CSMB considers that, in the instant case, the freedom of religion guaranteed by s. 2(*a*) must be limited by imperatives of public order, safety, and health, as well as by the rights and freedoms of others. In support of this contention, it relies primarily on *Trinity Western University* v. *British Columbia College of Teachers* [2001] 1 S.C.R. 772, 2001 SCC 31, in which the Court defined the scope of the rights in issue (freedom of religion and the right to equality) in order to resolve any potential conflict. The CSMB is of the view that, in the case at bar, delineating the rights in issue in this way would preserve Gurbaj Singh's freedom of religion while, as in *Trinity Western University*, circumscribing his freedom to act in accordance with his beliefs. According to this line of reasoning, the outcome of this appeal would be decided at the stage of determining whether freedom of religion has been infringed rather than at the stage of reconciling the rights of the parties under s. 1 of the *Canadian Charter*.

26 This Court has clearly recognized that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others (see *R.* v. *Big M Drug Mart Ltd* [1985] 1 S.C.R. 295, at p. 337, and *Syndicat Northcrest* v. *Amselem* [2004] 2 S.C.R. 551, 2004 SCC 47, at para. 62). However, the Court has on numerous occasions stressed the advantages of reconciling competing rights by means of a s. 1 analysis. For example, in *B. (R.)* v. *Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315, the claimants, who were Jehovah's Witnesses, contested an order that authorized the administration of a blood transfusion to their daughter. While acknowledging that freedom of religion could be limited in the best interests of the child, La Forest J., writing for the majority of the Court, stated the following, at paras. 109–10: 'This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter* ... In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(*a*) ...'

27 *Ross* [v. *New Brunswick School District No. 15* [1996] 1 S.C.R. 825] provides another example of this. In that case, the Court recognized a teacher's right to act on the basis of antisemitic views that compromised the right of students to a school environment free of discrimination, but opted to limit the teacher's freedom of religion pursuant to s. 1 of the *Canadian Charter* (at paras. 74–75): 'This mode of approach is analytically preferable because it gives the broadest possible scope to judicial review under the *Charter* ..., and provides a more comprehensive method of assessing the relevant conflicting values ...

... That approach seems to me compelling in the present case where the respondent's claim is to a serious infringement of his rights of expression and of religion in a context requiring a detailed contextual analysis. In these circumstances, there can be no doubt that the detailed s. 1 analytical approach developed by this Court provides a more practical and comprehensive mechanism, involving review of a whole range of factors for the assessment of competing interests and the imposition of restrictions upon individual rights and freedoms.'

28 It is important to distinguish these decisions from the ones in which the Court did not conduct a s. 1 analysis because there was no conflict of fundamental rights. For example, in *Trinity Western University*, the Court, asked to resolve a potential conflict between religious freedoms and equality rights, concluded that a proper delineation of the rights involved would make it possible to avoid any conflict in that case. Likewise, in *Amselem*, a case concerning the *Quebec Charter*, the Court refused to pit freedom of religion against the right to peaceful enjoyment and free disposition of property, because the impact on the latter was considered 'at best, minimal' (para. 64). Logically, where there is not an apparent infringement of more than one fundamental right, no reconciliation is necessary at the initial stage.

29 In the case at bar, the Court does not at the outset have to reconcile two constitutional rights, as only freedom of religion is in issue here. Furthermore, since the decision genuinely affects both parties and was made by an administrative body exercising statutory powers, a contextual analysis under s. 1 will enable us to balance the relevant competing values in a more comprehensive manner.

30 This Court has frequently stated, and rightly so, that freedom of religion is not absolute and that it can conflict with other constitutional rights. However, since the test governing limits on rights was developed in *Oakes*, the Court has never called into question the principle that rights are reconciled through the constitutional justification required by s. 1 of the *Canadian Charter*. In this regard, the significance of *Big M Drug Mart*, which predated *Oakes*, was considered in *B. (R.)*, at paras. 110–11; see also *R.* v. *Keegstra* [1990] 3 S.C.R. 697, at pp. 733–34. In *Dagenais* v. *Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, the Court, in formulating the common law test applicable to publication bans, was concerned with the need to 'develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution' (p. 878). For this purpose, since the media's freedom of expression had to be reconciled with the accused's right to a fair trial, the Court held that a common law standard that 'clearly reflects the substance of the *Oakes* test' was the most appropriate one (p. 878).

31 Thus, the central issue in the instant case is best suited to a s. 1 analysis. But before proceeding with this analysis, I will explain why the contested decision clearly infringes freedom of religion.

6. Infringement of Freedom of Religion

32 This Court has on numerous occasions stressed the importance of freedom of religion. For the purposes of this case, it is sufficient to reproduce the following statement from *Big M Drug Mart*, at pp. 336–37 and 351: 'The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that ... Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience ... With the *Charter*, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise.'

33 It was explained in *Amselem* [*Syndicat Northcrest* v. *Anselem* [2004] 2 S.C.R. 551], at para. 46, that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or

is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, *irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials* [emphasis added].

34 In *Amselem*, the Court ruled that, in order to establish that his or her freedom of religion has been infringed, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.

35 The fact that different people practise the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion. The religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice (*Amselem*, at para. 52). In assessing the sincerity of the belief, a court must take into account, *inter alia*, the credibility of the testimony of the person asserting the particular belief and the consistency of the belief with his or her other current religious practices (*Amselem*, at para. 53).

36 In the case at bar, Gurbaj Singh must therefore show that he sincerely believes that his faith requires him at all times to wear a kirpan made of metal. Evidence to this effect was introduced and was not contradicted. No one contests the fact that the orthodox Sikh religion requires its adherents to wear a kirpan at all times ...

37 Much of the CSMB's argument is based on its submission that 'the kirpan is essentially a dagger, a weapon designed to kill, intimidate or threaten others'. With respect, while the kirpan undeniably has characteristics of a bladed weapon capable of wounding or killing a person, this submission disregards the fact that, for orthodox Sikhs, the kirpan is above all a religious symbol. Chaplain Manjit Singh mentions in his affidavit that the word 'kirpan' comes from 'kirpa', meaning 'mercy' and 'kindness', and 'aan', meaning 'honour'. There is no denying that this religious object could be used wrongly to wound or even kill someone, but the question at this stage of the analysis cannot be answered definitively by considering only the physical characteristics of the kirpan. Since the question of the physical makeup of the kirpan and the risks the kirpan could pose to the school board's students involves the reconciliation of conflicting values, I will return to it when I address justification under s. 1 of the *Canadian Charter*. In order to demonstrate an infringement of his freedom of religion, Gurbaj Singh does not have to establish that the kirpan is not a weapon. He need only show that his personal and subjective belief in the religious significance of the kirpan is sincere.

38 Gurbaj Singh says that he sincerely believes he must adhere to this practice in order to comply with the requirements of his religion. Grenier J. of the Superior Court declared (at para. 6) – and the Court of Appeal reached the same conclusion (at para. 70) – that Gurbaj Singh's belief was sincere. Gurbaj Singh's affidavit supports this conclusion, and none of the parties have contested the sincerity of his belief.

39 Furthermore, Gurbaj Singh's refusal to wear a replica made of a material other than metal is not capricious. He genuinely believes that he would not be complying with the requirements of his religion were he to wear a plastic or wooden kirpan. The fact that other Sikhs accept such a compromise is not relevant, since as Lemelin J. mentioned at para. 68 of her decision, '[w]e must recognize that people who profess the same religion may adhere to the dogma and practices of that religion to varying degrees of rigour'.

40 Finally, the interference with Gurbaj Singh's freedom of religion is neither trivial nor insignificant. Forced to choose between leaving his kirpan at home and leaving the public school system, Gurbaj Singh decided to follow his religious convictions and is now attending a private school. The prohibition against wearing his kirpan to school has therefore deprived him of his right to attend a public school.

41 Thus, there can be no doubt that the council of commissioners' decision prohibiting Gurbaj Singh from wearing his kirpan to Sainte-Catherine-Labouré school infringes his freedom of religion. This limit must therefore be justified under s. 1 of the *Canadian Charter*.

7. Section 1 of the Canadian Charter

42 As I mentioned above, the council of commissioners made its decision pursuant to its discretion under s. 12 of the *Education Act*. The decision prohibiting the wearing of a kirpan at the school thus constitutes a limit prescribed by a rule of law within the meaning of s. 1 of the *Canadian Charter* and must accordingly be justified in accordance with that section: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

43 The onus is on the respondents to prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question: *Oakes*; *R.* v. *Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713.

7.1 Importance of the Objective 44 As stated by the Court of Appeal, the council of commissioners' decision 'was motivated by [a pressing and substantial] objective, namely, to ensure an environment conducive to the development and learning of the students. This requires [the CSMB] to ensure the safety of the students and the staff. This duty is at the core of the mandate entrusted to educational institutions' (para. 77). The appellant concedes that this objective is laudable and that it passes the first stage of the test. The respondents also submitted fairly detailed evidence consisting of affidavits from various stakeholders in the educational community explaining the importance of safety in schools and the upsurge in problems relating to weapons and violence in schools.

45 Clearly, the objective of ensuring safety in schools is sufficiently important to warrant overriding a constitutionally protected right or freedom. It remains to be determined what level of safety the governing board was seeking to achieve by prohibiting the carrying of weapons and dangerous objects, and what degree of risk would accordingly be tolerated. As in *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868, at para. 25, the possibilities range from a desire to ensure absolute safety to a total lack of concern for safety. Between these two extremes lies a concern to ensure a reasonable level of safety.

46 Although the parties did not present argument on the level of safety sought by the governing board, the issue was addressed by the intervener Canadian Human Rights Commission, which correctly stated that the standard that seems to be applied in schools is reasonable safety, not absolute safety. The application of a standard of absolute safety could result in the installation of metal detectors in schools, the prohibition of all potentially dangerous objects

(such as scissors, compasses, baseball bats and table knives in the cafeteria) and permanent expulsion from the public school system of any student exhibiting violent behaviour. Apart from the fact that such a standard would be impossible to attain, it would compromise the objective of providing universal access to the public school system.

47 On the other hand, when the governing board approved the article in question of the *Code de vie*, it was not seeking to establish a minimum standard of safety. As can be seen from the affidavits of certain stakeholders from the educational community, violence and weapons are not tolerated in schools, and students exhibiting violent or dangerous behaviour are punished. Such measures show that the objective is to attain a certain level of safety beyond a minimum threshold.

48 I therefore conclude that the level of safety chosen by the governing council and confirmed by the council of commissioners was reasonable safety. The objective of ensuring a reasonable level of safety in schools is without question a pressing and substantial one.

7.2 Proportionality

7.2.1 Rational Connection 49 The first stage of the proportionality analysis consists in determining whether the council of commissioners' decision was rendered in furtherance of the objective. The decision must have a rational connection with the objective. In the instant case, prohibiting Gurbaj Singh from wearing his kirpan to school was intended to further this objective. Despite the profound religious significance of the kirpan for Gurbaj Singh, it also has the characteristics of a bladed weapon and could therefore cause injury. The council of commissioners' decision therefore has a rational connection with the objective of ensuring a reasonable level of safety in schools. Moreover, it is relevant that the appellant has never contested the rationality of the *Code de vie*'s rule prohibiting weapons in school.

7.2.2 Minimal Impairment 50 The second stage of the proportionality analysis is often central to the debate as to whether the infringement of a right protected by the *Canadian Charter* can be justified. The limit, which must minimally impair the right or freedom that has been infringed, need not necessarily be the least intrusive solution. In *RJR-MacDonald Inc.* v. *Canada (Attorney General)* [1995] 3 S.C.R. 199, at para. 160, this Court defined the test as follows: 'The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ...'

51 The approach to the question must be the same where what is in issue is not legislation, but a decision rendered pursuant to a statutory discretion. Thus, it must be determined whether the decision to establish an absolute prohibition against wearing a kirpan 'falls within a range of reasonable alternatives'.

52 In considering this aspect of the proportionality analysis, Lemelin J. expressed the view that '[t]he duty to accommodate this student is a corollary of the minimal impairment [test]' (para. 92). In other words, she could not conceive of the possibility of a justification being sufficient for the purposes of s. 1 if reasonable accommodation is possible (para. 75). This correspondence of the concept of reasonable accommodation with the proportionality analysis is not without precedent. In *Eldridge*, [*Eldridge* v. *British Columbia* [1997] 3 S.C.R. 624 (in which

the Court had concluded that sign-language interpreters should be available to deaf patients in hospitals)] at para. 79, this Court stated that, in cases concerning s. 15(1) of the *Canadian Charter*, 'reasonable accommodation' was equivalent to the concept of 'reasonable limits' provided for in s. 1 of the *Canadian Charter.*

53 In my view, this correspondence between the legal principles is logical. In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar ... Professor José Woehrling correctly explained the relationship between the duty to accommodate or adapt and the *Oakes* analysis in the following passage: 'Anyone seeking to disregard the duty to accommodate must show that it is necessary, in order to achieve a legitimate and important legislative objective, to apply the standard in its entirety, without the exceptions sought by the claimant. More specifically, in the context of s. 1 of the *Canadian Charter*, it is necessary, in applying the test from *R.* v. *Oakes*, to show, in succession, that applying the standard in its entirety constitutes a rational means of achieving the legislative objective, that no other means are available that would be less intrusive in relation to the rights in question (minimal impairment test), and that there is proportionality between the measure's salutary and limiting effects. At a conceptual level, the minimal impairment test, which is central to the section 1 analysis, corresponds in large part with the undue hardship defence against the duty of reasonable accommodation in the context of human rights legislation. This is clear from the Supreme Court's judgment in *Edwards Books*, in which the application of the minimal impairment test led the Court to ask whether the Ontario legislature, in prohibiting stores from opening on Sundays and allowing certain exceptions for stores that were closed on Saturdays, had done enough to accommodate merchants who, for religious reasons, had to observe a day of rest on a day other than Sunday' (J. Woehrling, 'L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse', *McGill Law Journal*, 43 (1998) 325 at 360)

54 The council of commissioners' decision establishes an absolute prohibition against Gurbaj Singh wearing his kirpan to school. The respondents contend that this prohibition is necessary, because the presence of the kirpan at the school poses numerous risks for the school's pupils and staff. It is important to note that Gurbaj Singh has never claimed a right to wear his kirpan to school without restrictions. Rather, he says that he is prepared to wear his kirpan under the above-mentioned conditions imposed by Grenier J. of the Superior Court. Thus, the issue is whether the respondents have succeeded in demonstrating that an absolute prohibition is justified.

55 According to the CSMB, to allow the kirpan to be worn to school entails the risks that it could be used for violent purposes by the person wearing it or by another student who takes it away from him, that it could lead to a proliferation of weapons at the school, and that its presence could have a negative impact on the school environment. In support of this last point, the CSMB submits that the kirpan is a symbol of violence and that it sends the message that the use of force is the way to assert rights and resolve conflicts, in addition to undermining the perception of safety and compromising the spirit of fairness that should prevail in schools, in that its presence suggests the existence of a double standard. Let us look at those arguments.

7.2.2.1 Safety in Schools 56 According to the respondents, the presence of kirpans in schools, even under certain conditions, creates a risk that they will be used for violent purposes, either by those who wear them or by other students who might take hold of them by force.

57 The evidence shows that Gurbaj Singh does not have behavioural problems and has never resorted to violence at school. The risk that this particular student would use his kirpan for violent purposes seems highly unlikely to me. In fact, the CSMB has never argued that there was a risk of his doing so.

58 As for the risk of another student taking his kirpan away from him, it also seems to me to be quite low, especially if the kirpan is worn under conditions such as were imposed by Grenier J. of the Superior Court. In the instant case, if the kirpan were worn in accordance with those conditions, any student wanting to take it away from Gurbaj Singh would first have to physically restrain him, then search through his clothes, remove the sheath from his guthra, and try to unstitch or tear open the cloth enclosing the sheath in order to get to the kirpan. There is no question that a student who wanted to commit an act of violence could find another way to obtain a weapon, such as bringing one in from outside the school. Furthermore, there are many objects in schools that could be used to commit violent acts and that are much more easily obtained by students, such as scissors, pencils and baseball bats.

59 ... The Court does not believe that the safety of the environment would be compromised. In argument, it was stated that in the last 100 years, not a single case of kirpan-related violence has been reported. Moreover, in a school setting, there are usually all sorts of instruments that could be used as weapons during a violent incident, including compasses, drawing implements and sports equipment, such as baseball bats (*Multani (Tuteur de)* v. *Commission scolaire Marguerite-Bourgeois* [2002] Q.J. No. 619 (QL) (Sup. Ct.), at para. 28) ...

62 The respondents maintain that freedom of religion can be limited even in the absence of evidence of a real risk of significant harm, since it is not necessary to wait for the harm to occur before correcting the situation ...

67 ... I agree that it is not necessary to wait for harm to be done before acting, but the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified. Given the evidence in the record, it is my opinion that the respondents' argument in support of an absolute prohibition – namely that kirpans are inherently dangerous – must fail.

7.2.2.2 Proliferation of Weapons in Schools 68 The respondents also contend that allowing Gurbaj Singh to wear his kirpan to school could have a ripple effect. They submit that other students who learn that orthodox Sikhs may wear their kirpans will feel the need to arm themselves so that they can defend themselves if attacked by a student wearing a kirpan.

69 This argument is essentially based on the one discussed above, namely that kirpans in school pose a safety risk to other students, forcing them to arm themselves in turn in order to defend themselves. For the reasons given above, I am of the view that the evidence does not support this argument. It is purely speculative and cannot be accepted in the instant case: see *Eldridg*e, at para. 89. Moreover, this argument merges with the next one, which relates more specifically to the risk of poisoning the school environment. I will therefore continue with the analysis.

7.2.2.3 Negative Impact on the School Environment 70 The respondents submit that the presence of kirpans in schools will contribute to a poisoning of the school environment. They

maintain that the kirpan is a symbol of violence and that it sends the message that using force is the way to assert rights and resolve conflict, compromises the perception of safety in schools and establishes a double standard.

71 The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism.

72 As for the submissions based on the other students' perception regarding safety and on feelings of unfairness that they might experience, these appear to stem from the affidavit of psychoeducator Denis Leclerc, who gave his opinion concerning a study in which he took part that involved, *inter alia*, questioning students and staff from 14 high schools belonging to the CSMB about the socio-educational environment in schools. The results of the study seem to show that there is a mixed or negative perception regarding safety in schools. It should be noted that this study did not directly address kirpans, but was instead a general examination of the situation in schools in terms of safety. Mr Leclerc is of the opinion that the presence of kirpans in schools would heighten this impression that the schools are unsafe. He also believes that allowing Gurbaj Singh to wear a kirpan would engender a feeling of unfairness among the students, who would perceive this permission as special treatment. He mentions, for example, that some students still consider the right of Muslim women to wear the chador to be unfair, because they themselves are not allowed to wear caps or scarves ...

74 With respect for the view of the Court of Appeal, I cannot accept Denis Leclerc's position. Among other concerns, the example he presents concerning the chador is particularly revealing. To equate a religious obligation such as wearing the chador with the desire of certain students to wear caps is indicative of a simplistic view of freedom of religion that is incompatible with the *Canadian Charter*. Moreover, his opinion seems to be based on the firm belief that the kirpan is, by its true nature, a weapon. The CSMB itself vigorously defends this same position ... These assertions strip the kirpan of any religious significance and leave no room for accommodation ...

76 Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is, as I will explain in the next section, at the very foundation of our democracy.

77 In my opinion, the respondents have failed to demonstrate that it would be reasonable to conclude that an absolute prohibition against wearing a kirpan minimally impairs Gurbaj Singh's rights.

7.2.3 Effects of the Measure 78 Since we have found that the council of commissioners' decision is not a reasonable limit on religious freedom, it is not strictly necessary to weigh the deleterious effects of this measure against its salutary effects. I do believe, however, like the intervener Canadian Civil Liberties Association, that it is important to consider some effects that could result from an absolute prohibition. An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others. This Court has on numerous occasions reiterated the importance of these values ...

79 A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects.

[Not all justices of the Supreme Court agreed. Two justices – Deschamps and Abella JJ. – considered instead that recourse to a constitutional law justification is not appropriate where, as in this case, what must be assessed is the propriety of an administrative body's decision relating to human rights. Whereas a constitutional justification analysis must be carried out when reviewing the validity or enforceability of a norm such as a law, regulation or other similar rule of general application, the administrative law approach must be retained for reviewing decisions and orders made by administrative bodies. Therefore, while they arrive at the same conclusion – that the appeal should be upheld – they do so for quite distinct reasons, based on administrative law reasons rather than on constitutional law justifications. Their opinion is interesting in that it shows the ambiguities which result from extending the scope of the expression 'law' to individual decisions, when this expression is used to refer to the form through which a restriction to a constitutionally protected right must be justified. The opinion also leads to question the level – individual or, on the contrary, collective – at which the test of proportionality ought to be performed. Excerpts of their opinion follow:]

Meaning of the Expression 'Law' in Section 1 of the Canadian Charter 112 An administrative body determines an individual's rights in relation to a particular issue. A decision or order made by such a body is not a law or regulation, but is instead the result of a process provided for by statute and by the principles of administrative law in a given case. A law or regulation, on the other hand, is enacted or made by the legislature or by a body to which powers are delegated. The norm so established is not limited to a specific case. It is general in scope. Establishing a norm and resolving a dispute are not usually considered equivalent processes. At first glance, therefore, equating a decision or order with a law, as Lamer J. does in *Slaight*, seems anomalous. [In *Slaight Communications Inc.* v. *Davidson* [1989] 1 S.C.R. 1038, Lamer J. had explained (at pp. 1079–80) that 'where the legislation pursuant to which an administrative body has made a contested decision confers a discretion (in the instant case, the choice of means to keep schools safe) and does not confer, either expressly or by implication, the power to limit the rights and freedoms guaranteed by the *Canadian Charter*, the decision should, if there is an infringement, be subjected to the test set out in s. 1 of the *Canadian Charter* to ascertain whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society. If it is not justified, the administrative body has exceeded its authority in making the contested decision.' In *Multani*, the majority considered that this doctrine applied since the council of commissioners' decision may be said to infringes Gurbaj Singh's freedom of religion (para. 23).]

113 ... [The] expression 'law' (*règle de droit*) used in s. 1 of the *Canadian Charter* naturally refers to a norm or rule of general application: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' ...

115 ... Professors Brun and Tremblay define 'law' as follows (H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at p. 944): 'A law, within the meaning of s. 1, is an "intelligible legal standard". The notion of a legal standard relates to the unilaterally coercive and legally enforceable character of the act in question.' These authors express surprise at the unified approach suggested in *Slaight* (at p. 945): 'It would appear that an order of a court or tribunal is also a law within the meaning of s. 1. The Supreme Court has applied the reasonableness test under s. 1 to such orders on several occasions. This means that limits on rights can arise out of individualized legal standards, which is surprising. Such orders are of course law, but to have s. 1 apply to them without reservation means that litigants may often be unable to determine the status of their fundamental rights in advance, as in the case of limits resulting from general norms, such as statutes and regulations. We would have thought that limits on rights could not result from individualized orders unless the legislation conferring authority for those orders envisaged such a possibility ...

117 E. Mendes, 'The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section', in G.-A. Beaudoin and E. Mendes, eds., *Canadian Charter of Rights and Freedoms* (4th ed. 2005), 165, attempts to reconcile the various approaches the Court has taken in dealing with the expression 'law' (at pp. 172–73): 'An analysis that could reconcile the various cases in this area is one which argues that the courts have distinguished between arbitrary action that is exercised without legal authority and discretion that is constrained by intelligible legal standards and they have held that the latter will meet the "prescribed by law" requirement. However, in *Irwin Toy*, the Supreme Court held that it would not find that a law provided an intelligible standard if it was vague. The "void for vagueness" doctrine comes from the rule of law principle that a law must provide sufficient guidance for others to determine its meaning ... Put another way, the phrase "prescribed by law" requires that "the legislature [provide] an intelligible standard according to which the judiciary must do its work."'

118 To include administrative decisions in the concept of 'law' therefore implies that it is necessary in every case to begin by assessing the validity of the statutory or regulatory provision on which the decision is based. This indicates that the expression 'law' is used first and foremost in its normative sense. Professor Mendes does not seem totally convinced that it is helpful to apply s. 1 of the *Canadian Charter* to assess a decision (at p. 173): 'One could argue that this is a form of double deference: first, to the legislature to allow them to enact provisions which, although vague, are not beyond the ability of the judiciary to interpret. Second, there is a form of self-deference that the judiciary can turn such legislated vagueness into sufficient precision and certainty to satisfy the requirements of section 1. Depending how consistent the courts are in interpreting the vastly open-textured terms of section 1, this form of self-deference may or may not be justified.'

119 The fact that justification is based on the collective interest also suggests that the expression 'law' should be limited to rules of general application. In *R.* v. *Oakes* [1986] 1 S.C.R. 103, Dickson C.J. wrote the following (at p. 136): 'The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to *the realization of collective goals of fundamental importance*' (emphasis added).

120 To suggest that the decisions of administrative bodies must be justifiable under the *Oakes* test implies that the decision makers in question must incorporate this analysis into their decision-making process. This requirement makes the decision-making process formalistic and distracts the reviewing court from the objective of the analysis, which relates instead to the substance of the decision and consists of determining whether it is correct or reasonable.

121 An administrative decision maker should not have to justify its decision under the *Oakes* test, which is based on an analysis of societal interests and is better suited, conceptually and literally, to the concept of 'prescribed by law'. That test is based on the duty of the executive and legislative branches of government to account to the courts for any rules they establish that infringe protected rights. The *Oakes* test was developed to assess legislative policies. The duty to account imposed – conceptually and in practice – on the legislative and executive branches is not easily applied to administrative tribunals ...

125 We accordingly believe that the expression 'law' should not include the decisions of administrative bodies. Such decisions should be reviewed in accordance with the principles of administrative law, which will both allow claimants and administrative bodies to know in advance which rules govern disputes and help prevent any blurring of roles ...

Reasonable Accommodation 129 The apparent overlap between the concepts of minimal impairment and reasonable accommodation is another striking example of the need to preserve the distinctiveness of the administrative law approach ... We agree that these concepts have a number of similarities, but in our view they belong to two different analytical categories ...

131 The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs.

132 The approach is different, however, in the case of minimal impairment when it is considered in the context of the broad impact of the result of the constitutional justification analysis. The justification of the infringement is based on societal interests, not on the needs of the individual parties. An administrative law analysis is microcosmic, whereas a constitutional law analysis is generally macrocosmic. The values involved may be different. We believe that there is an advantage to keeping these approaches separate.

133 Furthermore, although the minimal impairment test under s. 1 of the *Canadian Charter* is similar to the undue hardship test in human rights law, the perspectives in the two cases are different, as is the evidence that can support the analysis. Assessing the scope of a law sometimes requires that social facts or the potential consequences of applying the law be taken into account, whereas determining whether there is undue hardship requires evidence of hardship in a particular case.

134 These separate streams – public versus individual – should be kept distinct. A lack of coherence in the analysis can only be detrimental to the exercise of human rights. Reasonable accommodation and undue hardship belong to the sphere of administrative law and human rights legislation, whereas the assessment of minimal impairment is part of a constitutional analysis with wider societal implications.

3.8. Questions for discussion: restrictions to freedom of religion in vestimentary codes

1. Would the notion of reasonable accommodation, if it were taken into account more fully in the case law of the European Court of Human Rights, have led to a different outcome in the case of *Leyla Sahin* v. *Turkey*? How could such a notion be implemented in practice, in a situation such as that the Court was presented with in that case?

   Is the reference to the criteria set forth by the UN Special Rapporteur on freedom of religion and belief useful in order to arrive at a satisfactory solution? Consider in particular her insistance on the fact that 'freedom of religion or belief may be invoked both in terms of the positive freedom of persons who wish to wear or display a religious symbol and in terms of the negative freedom of persons who do not want to be confronted with or coerced into it'. Is the implication that, in each specific case, the respective weight of each of these freedoms should be evaluated, depending on the social context, the family situation of the individual concerned, etc?

2. In *Leyla Sahin* v. *Turkey*, the European Court of Human Rights emphasizes the importance of gender equality, as one of the two main justifications for the prohibition of the wearing of the hijab in Turkish public universities. However, the result of such prohibition may be, in practice, that students belonging to certain Muslim families will be relegated to private institutions, with fewer or no contacts with other student bodies. Did the Court underestimate this risk?

3. How relevant is *Leyla Sahin* v. *Turkey* to the evaluation of a situation such as that created by the Law of 15 March 2004 adopted in France? To which extent was the outcome reached by the Court in the case of *Leyla Sahin* dependent on the specific situation of Turkey, where the Muslim religion is largely dominant and where there exists a strong social pressure towards conforming with the prescriptions of the Muslim faith?

4. Both *Leyla Sahin* and *Multani* seem to betray a hesitation between the two approaches which could be taken in order to assess the proportionality of the interference with freedom of religion resulting from the application of a dress code prohibiting certain religious symbols: one approach is to examine whether the general regulatory framework is proportionate to the aims pursued, and to accept that in certain cases the application of the framework will impose restrictions on the freedom to manifest one's religion; another approach is to examine whether this application itself leads to undue hardship in individual cases.

   (a) Should such proportionality be assessed as regards the general rule concerned, or should the individual measure, applying the general rule to the specific individual, also be justified?

   (b) If the latter, how could the principle of legality be complied with, since, per definition, it may be impossible to anticipate whether specific exemptions might benefit the individual concerned, where his/her particular situation could lead to identify particular accommodation measures, tailored to meet his/her needs? If, indeed, the requirement of proportionality ultimately calls for the necessity of the restriction of a right to be evaluated on a strictly individual basis, taking into account the possibility of accommodating the

specific needs of the individual concerned, this may require us to rethink the classical understanding of the condition of legality: in order for this condition to be fulfilled, would it be sufficient to ensure that each restriction be decided according to procedures established in advance and allowing for all relevant views to the considered in making the decision, even though the outcome of such a decisional process may not always be predictable? Is this an adequate substitute to the idea that any restriction to human rights should be 'accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct', as stated by the European Court of Human Rights?

4

The Application of Human Rights in Private Relationships and the Obligation to Protect

INTRODUCTION

States must not only abstain from violating the rights of individuals under their jurisdiction, by ensuring that State agents do not commit such infringements. They must also intervene where acts committed by private parties, whether individuals, groups or legal persons, threaten to violate those rights. Where there are indications that an individual is at risk of having his/her rights violated, or where a situation exists which gives rise to such a risk, preventive measures must be taken, in order to ensure, to the fullest extent possible, that these risks do not materialize. And when the measures they adopt fail, and violations are caused by the conduct of non-State actors, State authorities may not remain passive: they are under an obligation to provide effective remedies to the individual whose rights have been violated, in order to ensure that he/she will be compensated, and in certain cases, that the wrongdoer will be sanctioned through administrative or criminal penalties.

This chapter is focused on this obligation to protect. This obligation arises where the State is confronted with acts of private actors which may lead to human rights being violated: an obligation is then imposed on the State to prevent such violations from occuring, and to provide remedies where the preventive measures have failed. But it seems necessary, as a preliminary matter, carefully to circumscribe the notion of the obligation to protect, in order to avoid confusing it with situations which present a superficial similarity to those that give rise to such an obligation. Section 1 recalls that, under certain, rather restrictive conditions, the State may be directly attributed the acts of private parties. Where this is the case, it is the classical obligation to respect which is at stake; there is no question of extending the obligation of the State to an obligation to protect, since, per hypothesis, the act of the private individual will be treated as an act of the State itself.

Section 2 then describes the obligation to protect in more detail. In principle, international human rights instruments only prescribe the result to be achieved, leaving it to the State to choose the means through which to provide this protection (section 2.1.). In addition, the 'result' itself – the prevention of human rights violations which

may have their source in private initiatives – is not to be understood in absolute terms. The obligation to protect is defined as an obligation to take all reasonable measures that might have prevented the event from occurring: it is thus an obligation of means, rather than an obligation of result. In order to engage the responsibility of the State, it is therefore not enough that the event which should have been prevented did occur: it must be shown, *in addition*, that the State could have taken certain measures which might have succeeded to prevent the event, and yet failed to take such measures (section 2.2.).

Sections 2.3. to 2.5. review what might be called the 'limiting factors' to the obligation to protection, i.e. the arguments the State may invoke in order to justify remaining passive. These are in particular (a) the fact that, in a free society, human conduct remains in part unpredictable by authorities; (b) the budgetary constraints facing States; and (c) the obligation for States to respect other, conflicting human rights. In addition, where alleged violations have their source in contractual relationships, (d) respect for the contractual freedom of parties, one of which has agreed to a restriction to his/her right, may play a role. Finally, since individual right-holders may inflict harm upon themselves, the question arises whether (e) the autonomy of the individual who chose to waive his/her right, by means other than by the conclusion of a contract, deserves to be respected and may create an obstacle to the protection provided by the State. Because of the complex and controversial nature of these issues, specific developments focus on two of these limiting factors: section 2.4. addresses human rights in contractual relationships and the question of waiver of rights; section 2.5. discusses the situations of conflicting rights which may occur when, in order to discharge its obligation to protect certain human rights, the State intervenes in private relationships to restrict other, competing human rights.

I regret that, in these sub-sections, I have borrowed my illustrations primarily from the case law of the European Court of Human Rights. I have thus been unable to comply with the rule I have otherwise sought to impose upon myself, which is to seek to highlight the identical nature of the questions (if not necessarily always of the answers) confronting different human rights bodies, under the various human rights instruments. However, what I have sought here – even more so than in other chapters – is to propose a sound analytical framework, enabling the reader to relate the further developments of the case law to the framework offered, in order to enrich and criticize it. The origin of the materials that illustrate the framework matter less, in my mind, than whether or not the conceptual apparatus is useful and promotes further study.

1 THE IMPUTABILITY TO THE STATE OF THE CONDUCT OF NON-STATE ACTORS AND THE OBLIGATION TO PROTECT

The obligation to protect may arise in situations where the rights of the individual are threatened as the result of private initiatives. The State is not allowed to remain passive in such a circumstance: it must adopt measures, both preventive and remedial, in order to avoid the violation from occurring, or to provide remedies to the individual if the preventive measures fail. In that sense, violations of human rights originating in

private relationships may reveal a failure of the State to discharge its obligation to protect. This should not be confused with situations where the acts of non-State actors, as such, are imputed to the State, and are thus considered to be those of the State itself.

1.1 The attribution to the State of acts committed by private entities

In general international law, States may only exceptionally be imputed acts committed by private persons. According to the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts, while any organ of the State may engage the responsibility of the State (Art. 4), the act of a person who is not an organ of the State will be attributed to the State only if (a) that person is empowered by the law of that State to exercise elements of the governmental authority and has acted in that capacity in the particular instance (Art. 5); or (b) that person has in fact acted on the instructions of, or under the direction or control of, the State in carrying out the conduct (Art. 8); or (c) the State has acknowledged and adopted the conduct in question as its own (Art. 11).

International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its Fifty-third Session, 2001 (A/56/10):

Article 4 Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5 Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 8 Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 11 Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

In practice, it is the situation where the conduct of a private party is directed or controlled by a State, and thus may be attributed to that State, which has been most controversial. Article 8 of the ILC's Articles, which is reproduced above, reflects the position

adopted by the International Court of Justice in the 1986 *Nicaragua* case. There, the Court refused to impute to the United States the violations of human rights and of humanitarian law committed by the *contras*, a guerilla combating the Nicaraguan Sandinista Government, despite the fact that they were trained and financed by US agencies:

International Court of Justice, case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) (merits)*, judgment of 27 June 1986, I.C.J. Reports 1986, 14:

106. In the light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the contra force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States. However, it is in the Court's view established that the support of the United States authorities for the activities of the contras took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the contras by the United States.

107. To sum up, despite the secrecy which surrounded it, at least initially, the financial support given by the Government of the United States to the military and paramilitary activities of the contras in Nicaragua is a fully established fact. The legislative and executive bodies of the respondent State have moreover, subsequent to the controversy which has been sparked off in the United States, openly admitted the nature, volume and frequency of this support. Indeed, they clearly take responsibility for it, this government aid having now become the major element of United States foreign policy in the region. As to the ways in which such financial support has been translated into practical assistance, the Court has been able to reach a general finding.

108. Despite the large quantity of documentary evidence and testimony which it has examined, the Court has not been able to satisfy itself that the respondent State 'created' the contra force in Nicaragua. It seems certain that members of the former Somoza National Guard, together with civilian opponents to the Sandinista regime, withdrew from Nicaragua soon after that regime was installed in Managua, and sought to continue their struggle against it, even if in a disorganized way and with limited and ineffectual resources, before the Respondent took advantage of the existence of these opponents and incorporated this fact into its policies *vis-à-vis* the regime of the Applicant. Nor does the evidence warrant a finding that the United States gave 'direct and critical combat support', at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all contra operations reflected strategy and tactics wholly devised by the United States. On the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN [Fuerza Democratica Nicaraguense, an armed opposition group to the Sandinista Government of Nicaragua].

109. What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government ... Yet despite the heavy subsides and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.

110. So far as the potential control constituted by the possibility of cessation of United States military aid is concerned, it may be noted that after 1 October 1984 such aid was no longer authorized, though the sharing of intelligence, and the provision of 'humanitarian assistance' ... may continue. Yet, according to Nicaragua's own case, and according to press reports, contra activity has continued. In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is a fortiori unable to determine that the contra force may be equated for legal purposes with the forces of the United States. This conclusion, however, does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras.

111. In the view of the Court it is established that the contra force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless, adequate direct proof that all or the great majority of contra activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above, is inherent in the position in which the contra force finds itself in relation to that Government.

112. To show the existence of this control, the Applicant argued before the Court that the political leaders of the contra force had been selected, installed and paid by the United States; it also argued that the purpose herein was both to guarantee United States control over this force, and to excite sympathy for the Government's policy within Congress and among the public in the United States. According to the affidavit of Mr Chamorro, who was directly concerned, when the FDN was formed 'the name of the organization, the members of the political junta, and the members of the general staff were all chosen or approved by the CIA'; later the CIA asked that a particular person be made head of the political directorate of the FDN, and this was done. However, the question of the selection, installation and payment of the leaders of the contra force is merely one aspect among others of the degree of dependency of that force. This partial dependency on the United States authorities, the exact extent of which the Court cannot establish, may certainly be inferred *inter alia* from the fact that the leaders were selected by the United States. But it may also be inferred from other factors, some of which have been examined by the Court, such as the organization, training and equipping of the force, the planning of operations, the choosing of targets and the operational support provided.

113. The question of the degree of control of the contras by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the contras whereby the United States has, it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua. The activities in question are said to represent a tactic which includes 'the spreading of terror and danger to non-combatants as an end in itself with no attempt to observe humanitarian standards and no reference to the concept of military necessity'. In support of this, Nicaragua has catalogued numerous incidents, attributed to 'CIA-trained mercenaries' or 'mercenary forces', of kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity ...

114. In this respect, the Court notes that according to Nicaragua, the contras are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command. In the view of Nicaragua, 'stricto sensu, the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States.' If such a finding of the imputability of the acts of the contras to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the contras to commit them.

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct *vis-à-vis* Nicaragua, including conduct related to the acts of the contras. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the contras, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the contras. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the contras may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the contras were in fact committed by them. At the

same time, the question whether the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the contras is relevant to an assessment of the lawfulness of the action of the United States.

In *Prosecutor* v. *Tadic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) examined what degree of State control was required under international law over organized military groups in order to decide whether certain provisions of international humanitarian law applicable to international armed conflicts could be invoked. In formulating its standard, it took into account the UN Security Council Resolutions and debates surrounding the raids of South Africa into Zambia in order to destroy bases of the South West Africa People's Organization (SWAPO) in 1976, the Israeli incursions into Lebanon in June 1982, the South African raid in Lesotho in December 1982, and of course the judgment of the International Court of Justice in the *Nicaragua* case. It arrived at this conclusion:

International Criminal Tribunal for the former Yugoslavia, *Prosecutor* v. *Tadic*, Case No. IT-94-1-A, Judgment of 15 July 1999, para. 120:

[I]t would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State … [I]t must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

This could have been seen as relaxing the standard required by the *Nicaragua* case, although the context was entirely different, and although at issue was the individual responsibility of an individual and not the international responsibility of a State. The International Law Commission (ILC), in any case, remained unconvinced: Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts simply reiterates the classical *Nicaragua* doctrine. The position of the ILC was subsequently confirmed by the International Court of Justice (ICJ), although with an important nuance. The circumstances were as follows. In March 1993, the Government of Bosnia and Herzegovina had filed an application instituting proceedings against the Federal Republic of Yugoslavia (FRY) (later Serbia and Montenegro, and now the Republic of Serbia) alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948. One of the arguments of Bosnia and Herzegovina was that certain paramilitary groups involved in the operation in Srebenica where Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of the 'safe area' in July

1995, even if they were not *de jure* organs of the defendant State (at the time, the FRY), nevertheless had to be considered '*de facto* organs' of the FRY, 'so that all of their acts, and specifically the massacres at Srebrenica, must be considered attributable to the FRY, just as if they had been organs of that State under its internal law; reality must prevail over appearances' (para. 390). In its judgment of 26 February 2007, the Court responds as follows:

International Court of Justice, case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro) (merits)*, judgment of 26 February 2007, I.C.J. Reports 2007, paras. 391–7 and 400–6:

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons – or groups of persons – who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits, Judgment, I.C.J. Reports 1986, pp. 62–64). In paragraph 109 of that Judgment the Court stated that it had to 'determine ... whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government' (p. 62). Then, examining the facts in the light of the information in its possession, the Court observed that 'there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf' (para. 109), and went on to conclude that 'the evidence available to the Court ... is insufficient to demonstrate [the contras'] complete dependence on United States aid', so that the Court was 'unable to determine that the contra force may be equated for legal purposes with the forces of the United States' (pp. 62–63, para. 110).

392. The passages quoted show that, according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

393. However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as 'complete dependence'. It remains to be determined in the present case whether, at the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it;

it is only if this condition is met that they can be equated with organs of the Respondent for the purposes of its international responsibility.

394. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS [Army of the Republika Srpska (Bosnian Serbs)] could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years ... and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have 'conduct[ed] its crucial or most significant military and paramilitary activities' (I.C.J. Reports 1986, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

[The Court concludes that the acts of genocide at Srebrenica cannot be attributed to the FRY, since these acts have been committed neither by its organs nor by persons or entities wholly dependent upon it. The FRY's international responsibility therefore cannot be engaged on this basis alone. The ICJ then turns to the question whether such attribution can be made on the basis of direction or control, as envisaged in Article 8 of the ILC's Articles on State Responsibility for Internationally Wrongful Acts. The Court first emphasizes that this is a question different from the one dealt with above:]

397. ... An affirmative answer to [the question whether, in the Srebrenica events, the perpetrators of genocide were acting on the instructions of the FRY, or under its direction or control] would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs – this question having already been answered in the negative. What must be determined is whether FRY organs – incontestably having that status under the FRY's internal law – originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

[Referring both to Article 8 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts, which it considers to embody customary international law, and to para. 115 of its 1986 judgment in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) (merits)*, the Court adopts the following view:]

400. The test thus formulated [in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) (merits)*] differs in two respects from the test – described above – to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary

to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of 'complete dependence' on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations ...

402. The Court notes however that the Applicant has ... questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the 'overall control' exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid*., para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the 'overall control' test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the 'overall control' test as equally applicable under the law of State responsibility for the purpose of determining – as the Court is required to do in the present case – when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's

involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 [of the ILC's Articles on State Responsibility]. This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

In sum, the International Court of Justice considers that there are two situations where the acts of non-State actors may be attributed to a State: such an attribution is justified either (a) when the non-State actor is under the 'complete dependence' of the State, so that it has in fact no autonomous will of its own; or (b) when the non-State entity is acting on the instructions of the State, or is under its direction or control in the adoption of the act which is alleged to engage the responsibility of the State. As such, 'overall control' by the State would therefore not be sufficient to engage its responsibility. This position, however, should not lead to obfuscate that positive obligations imposed on the State under international human rights law might in fact extend such responsibility, not by attributing to the State acts adopted by the private entity, but by imposing on the State a duty to exercise control on that entity. It is here that the obligation to protect in fact adds a layer to the responsibility of the State in human rights cases: in addition to having to *respect* human rights in all the acts it adopts, directly through its organs or through entities whose conduct it may be imputed, the State may be obliged to *protect* human rights, whereby remaining passive, State organs would be allowing infringements upon human rights by private actors to go undeterred and unremedied.

It may be useful in that respect to contrast the position of the ICJ with that of the European Court of Human Rights in the case of *Ilascu and others* v. *Moldova and Russia* (Appl. No. 48787/99, judgment of 8 July 2004; see also on this judgment the discussion in chapter 2, section 2.2., where the background to the case is explained). The Court recalled in that case that, where a State party to the Convention exercises *de facto* control over territory which is not its national territory, situations occuring

on that territory fall under its 'jurisdiction' for the purposes of Article 1 ECHR: 'it is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned ... Where a Contracting State exercises overall control over an area outside its national territory its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support' (paras. 315–16). The Court arrived at the conclusion that the influence exercised by Russia on the Transdniestrian separatist regime was such that its responsibility could be engaged by the acts adopted by this regime, located on the national territory of Moldova (paras. 379–94). The following excerpts show its reasoning on this point:

European Court of Human Rights (GC), *Ilascu and others* v. *Moldova and Russia* (Appl. No. 48787/99), judgment of 8 July 2004, paras. 379–94:

(a) Before ratification of the Convention by the Russian Federation

379. The Court notes that on 14 November 1991, when the USSR was being broken up, the young Republic of Moldova asserted a right to the equipment and weapons stocks of the USSR's Fourteenth Army which was stationed in its territory ... It also entered into negotiations with the Russian Federation with a view to the withdrawal of that army from its territory.

380. The Court observes that during the Moldovan conflict in 1991–92 forces of the former Fourteenth Army (which owed allegiance to the USSR, the CIS and the Russian Federation in turn) stationed in Transdniestria, an integral part of the territory of the Republic of Moldova, fought with and on behalf of the Transdniestrian separatist forces. Moreover, large quantities of weapons from the stores of the Fourteenth Army (which later became the ROG [Russian Operational Group in the Transdniestrian region of Moldova]) were voluntarily transferred to the separatists, who were also able to seize possession of other weapons unopposed by Russian soldiers ...

The Court notes that from December 1991 onwards the Moldovan authorities systematically complained, to international bodies among others, of what they called 'the acts of aggression' of the former Fourteenth Army against the Republic of Moldova and accused the Russian Federation of supporting the Transdniestrian separatists.

Regard being had to the principle of States' responsibility for abuses of authority, it is of no consequence that, as the Russian Government submitted, the former Fourteenth Army did not participate as such in the military operations between the Moldovan forces and the Transdniestrian insurgents.

381. Throughout the clashes between the Moldovan authorities and the Transdniestrian separatists the leaders of the Russian Federation supported the separatist authorities by their political declarations ... The Russian Federation drafted the main lines of the ceasefire agreement of 21 July 1992, and moreover signed it as a party.

382. In the light of all these circumstances the Court considers that the Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting

thus the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, which is part of the territory of the Republic of Moldova.

The Court next notes that even after the ceasefire agreement of 21 July 1992 the Russian Federation continued to provide military, political and economic support to the separatist regime ..., thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy *vis-à-vis* Moldova.

383. The Court further notes that in the context of the events mentioned above the applicants were arrested in June 1992 with the participation of soldiers of the Fourteenth Army (subsequently the ROG). The first three applicants were then detained on Fourteenth Army premises and guarded by Fourteenth Army troops. During their detention these three applicants were interrogated and subjected to treatment which could be considered contrary to Article 3 of the Convention [prohibiting torture and other inhuman or degrading treatments or punishments]. They were then handed over into the charge of the Transdniestrian police.

Similarly, after his arrest by soldiers of the Fourteenth Army, the fourth applicant was handed over to the Transdniestrian separatist police, then detained, interrogated and subjected on police premises to treatment which could be considered contrary to Article 3 of the Convention.

384. The Court considers that on account of the above events the applicants came within the jurisdiction of the Russian Federation within the meaning of Article 1 of the Convention, although at the time when they occurred the Convention was not in force with regard to the Russian Federation.

This is because the events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants' arrest and detention, but also their transfer into the hands of the Transdniestrian police and regime, and the subsequent ill-treatment inflicted on them by those police, since in acting in that way the agents of the Russian Federation were fully aware that they were handing them over to an illegal and unconstitutional regime.

In addition, regard being had to the acts the applicants were accused of, the agents of the Russian Government knew, or at least should have known, the fate which awaited them.

385. In the Court's opinion, all of the acts committed by Russian soldiers with regard to the applicants, including their transfer into the charge of the separatist regime, in the context of the Russian authorities' collaboration with that illegal regime, are capable of engaging responsibility for the acts of that regime.

It remains to be determined whether that responsibility remained engaged and whether it was still engaged at the time of the ratification of the Convention by the Russian Federation.

(b) After ratification of the Convention by the Russian Federation

386. With regard to the period after ratification of the Convention, on 5 May 1998, the Court notes the following.

387. The Russian army is still stationed in Moldovan territory in breach of the undertakings to withdraw them completely given by the Russian Federation at the OSCE summits in Istanbul (1999) and Porto (2001). Although the number of Russian troops stationed in Transdniestria has in fact fallen significantly since 1992 ..., the Court notes that the ROG's weapons stocks are still there.

Consequently, in view of the weight of this arsenal ..., the ROG's military importance in the region and its dissuasive influence persist.

388. The Court further observes that by virtue of the agreements between the Russian Federation, on the one hand, and the Moldovan and Transdniestrian authorities respectively, on the other ..., the 'MRT' authorities were supposed to acquire the infrastructure and arsenal of the ROG at the time of its total withdrawal. It should be noted in that connection that the interpretation given by the Russian Government of the term 'local administrative authorities' of the region of Transdniestria, to be found, among other places, in the agreement of 21 October 1994 ... is different from that put forward by the Moldovan Government, a fact which enabled the 'MRT' regime to acquire that infrastructure.

389. As regards military relations, the Court notes that the Moldovan delegation to the Joint Control Commission constantly raised allegations of collusion between the ROG personnel and the Transdniestrian authorities regarding transfers of weapons to the latter. It notes that the ROG personnel denied those allegations in the presence of the delegates, declaring that some equipment could have found its way into the separatists' hands as a result of thefts.

Taking into account the accusations made against the ROG and the dangerous nature of its weapons stocks, the Court finds it hard to understand why the ROG troops do not have effective legal resources to prevent such transfers or thefts, as is apparent from their witness evidence to the delegates.

390. The Court attaches particular importance to the financial support enjoyed by the 'MRT' by virtue of the following agreements it has concluded with the Russian Federation:

- the agreement signed on 20 March 1998 between the Russian Federation and the representative of the 'MRT', which provided for the division between the 'MRT' and the Russian Federation of part of the income from the sale of the ROG's equipment;
- the agreement of 15 June 2001, which concerned joint work with a view to using armaments, military technology and ammunition;
- the Russian Federation's reduction by 100 million US dollars of the debt owed to it by the 'MRT'; and
- the supply of Russian gas to Transdniestria on more advantageous financial terms than those given to the rest of Moldova ...

The Court further notes the information supplied by the applicants and not denied by the Russian Government to the effect that companies and institutions of the Russian Federation normally controlled by the State, or whose policy is subject to State authorisation, operating particularly in the military field, have been able to enter into commercial relations with similar firms in the 'MRT' ...

391. The Court next notes that, both before and after 5 May 1998, in the security zone controlled by the Russian peacekeeping forces, the 'MRT' regime continued to deploy its troops illegally and to manufacture and sell weapons in breach of the agreement of 21 July 1992 ...

392. All of the above proves that the 'MRT', set up in 1991–1992 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.

393. That being so, the Court considers that there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate, as the Russian Federation's policy of support for the regime and collaboration with it continued beyond 5 May 1998, and after that date the Russian Federation made no attempt to put an end to the

applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998.

Regard being had to the foregoing, it is of little consequence that since 5 May 1998 the agents of the Russian Federation have not participated directly in the events complained of in the present application.

394. In conclusion, the applicants therefore come within the 'jurisdiction' of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility is engaged with regard to the acts complained of.

1.2 Positive obligations to protect

The private-public distinction on which the rules of attribution discussed above are based is mooted (though not contradicted) by the imposition of positive obligations on the States parties to international human rights instruments: once a situation is found to fall under its 'jurisdiction', the State must accept responsibility not only for the acts its organs have adopted (or for the conduct of private entities which, in exceptional cases, it may be imputed), but also for the omissions of these organs, in situations where such omissions result in an insufficient protection of private persons whose rights or freedoms are violated by the acts of other non-State actors.

(a) Before UN human rights treaty bodies

Under the International Covenant for Civil and Political Rights (ICCPR), the obligation to protect developed, initially, as an answer to the phenomenon of forced disappearances. Indeed, what is typical about forced disappearances is that only in rare cases shall it be possible for the family members of the victim to prove the involvement of State agents: in most cases, the body of the 'disappeared' will not have been found, and no information will have been provided to the family members allowing them to impute to the State a direct responsibility. It was therefore found necessary to identify an obligation of the State to take measures in order to provide effective protection from forced disappearances:

Human Rights Committee, General Comment No. 6, *The Right to Life* (Art. 6), 30 April 1982:

4. States parties should ... take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

Human Rights Committee, *Herrera Rubio et al.* v. *Colombia*, Communication No. 161/1983, final views of 2 November 1987 (CCPR/C/OP/2 at 192) (1990):

[The author alleges that on 17 March 1981 he was arrested in Cartagena del Chaira, Colombia, by members of the armed forces, taken to a military camp and subjected to torture in an attempt to extract from him information about a guerrilla movement, although he did not possess such information. After being transferred to another place of detention, he was again tortured, and was told that his parents would be killed if he refused to sign a confession prepared by his captors. He was later transferred to the military barracks of Juananbu in the city of Florencia, where he was again beaten (the name of the responsible officer is given) and threatened with his parents' possible death. He was then taken before Military Tribunal No. 35 and allegedly forced to sign a confession, pleading guilty, *inter alia*, of having kidnapped a man called Vicente Baquero, who later declared that he had never been kidnapped. On 5 April 1981, the author was taken to the prison in Florencia and informed that his parents had been killed. At his request, he was immediately brought again before the military judge, before whom he retracted his 'confession' and denounced the death threats received earlier concerning his parents. His new declaration allegedly disappeared from his dossier. He was finally released in December 1982.

Concerning the death of his parents, the author alleges that on two occasions his father had been taken away by the armed forces and tortured, before being released, in February 1981. On 27 March 1981, at 3 a.m., a group of individuals in military uniforms, identified as members of the 'counterguerrilla', arrived at the home of the author's parents and ordered his father to follow them. When his mother objected, she was also obliged to follow them. The author's brothers reported the disappearance of their parents immediately afterwards to the Tribunal of Doncello. One week later they were called by the authorities of Doncello to identify the bodies of their parents; their father's body was decapitated and his hands tied with a rope.]

10.2. Joaquin Herrera Rubio was arrested on 17 March 1981 by members of the Colombian armed forces on suspicion of being a 'guerrillero'. He claims that he was tortured ... by Colombian military authorities who also threatened him that unless he signed a confession his parents would be killed. On 27 March 1981, several individuals wearing military uniforms, identifying themselves as members of the counter-guerrilla, came to the home of the author's parents and led them away by force. One week later the bodies of Jose Herrera and Emma Rubio de Herrera were found in the vicinity. At that time the District of Caqueta is reported to have been the scene of a military counterinsurgency operation, during which most villages in the area were subjected to stringent controls by the armed forces. The State party has shown that a judicial investigation of the killings was carried out from 24 September 1982 to 25 January 1983, and claims that it was established that no member of the armed forces had taken part in the killings. With respect to the author's allegations of torture, the State party contends that they are not credible in view of the fact that three months elapsed from the time of the alleged ill-treatment before the author's complaint was brought to the attention of the Court.

10.3. Whereas the Committee considers that there is reason to believe, in the light of the author's allegations, that Colombian military persons bear responsibility for the deaths of Josh Herrera and Emma Rubio de Herrera, no conclusive evidence has been produced to establish the identity of the murderers. In this connection the Committee refers to its general comment No. 6 (16) concerning article 6 of the Covenant [see above in this section], which provides, *inter alia*, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an

appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life. The Committee has duly noted the State party's submissions concerning the investigations carried out in this case, which, however, appear to have been inadequate in the light of the State party's obligations under article 2 of the Covenant.

10.4. With regard to the author's allegations of torture, the Committee notes that the author has given a very detailed description of the ill-treatment to which he was subjected and has provided the names of members of the armed forces allegedly responsible. In this connection, the Committee observes that the initial investigations conducted by the State party may have been concluded prematurely and that further investigations were called for in the light of the author's submission of 4 October 1986 and the Working Group's request of 18 December 1986 for more precise information.

10.5. With regard to the burden of proof, the Committee has already established in other cases (for example, Nos. 30/1978 and 85/1981) that this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. In the circumstances, due weight must be given to the author's allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In no circumstances should a State party fail to investigate fully allegations of ill-treatment when the person or persons allegedly responsible for the ill-treatment are identified by the author of a communication. The State party has in this matter provided no precise information and reports, *inter alia*, on the questioning of military officials accused of maltreatment of prisoners, or on the questioning of their superiors.

11. The Human Rights Committee ... is of the view that the facts as found by the Committee disclose violations of the Covenant with respect to:

- Article 6, because the State party failed to take appropriate measures to prevent the disappearance and subsequent killings of Jose Herrera and Emma Rubio de Herrera and to investigate effectively the responsibility for their murders; and
- Article 7 and article 10, paragraph 1, because Joaquin Herrera Rubio was subjected to torture and ill-treatment during his detention.

The existence of an obligation to protect cuts across the full range of the rights listed in the ICCPR, however:

Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add. 13), 26 May 2004, para. 8:

The article 2, paragraph 1, obligations [according to which 'Each State Party to the ... Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction' the rights recognized in the Covenant] are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot

be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in Article 16: 'Each State Party shall undertake to prevent in any territory under its jurisdiction [acts of cruel, inhuman or degrading treatment or punishment], when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' Where prevention has failed, Article 12 of the Convention requires a 'prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture [or acts of cruel, inhuman or degrading treatment or punishment] has been committed in any territory under its jurisdiction'. Article 13 guarantees that the complainant shall have his case promptly and impartially examined by the competent national authorities. While Articles 12 and 13 refer explicitly only to acts of torture, Article 16 extends their guarantees to acts of cruel, inhuman or degrading treatment or punishment, where the latter have been committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Although this latter limitation suggests that acts of cruel, inhuman or degrading treatment or punishment in which State agents have no implication whatsoever may not raise an issue under this provision of the CAT, the interpretation of the Committee against Torture in fact equates passivity of the authorities, when circumstances would have dictated that they adopt measures of protection, with 'acquiescence'. It follows from this interpretation that the CAT imposes an obligation to protect from torture or acts of cruel, inhuman or degrading treatment or punishment. The following case provides an illustration.

Committee against Torture, *Hajrizi Dzemajl et al.* v. *Serbia and Montenegro*, Communication No. 161/2000, decision of 21 November 2002 (CAT/C/29/D/161/2000):

[The sixty-five complainants are all of Romani origin and nationals of the Federal Republic of Yugoslavia. On 14 April 1995, after it received a report indicating that two Romani minors had raped a minor ethnic Montenegrin girl, the Danilovgrad Police Department entered and searched a number of houses in the Bozova Glavica Roma settlement and brought into custody all of the young male Romani men present in the settlement. The same day, around midnight, 200 ethnic Montenegrins, led by relatives and neighbours of the raped girl, assembled in front of the police station and publicly demanded that the Municipal Assembly adopt a decision expelling all Roma from Danilovgrad. The crowd shouted slogans addressed to the Roma, threatening to 'exterminate' them and 'burn down' their houses. When the Roma which had been arrested for interrogation were released (except for two men who had confessed to the crime), they were told by the police to leave Danilovgrad immediately with their families because they would be at risk of being lynched by their non-Roma neighbours. The other Romani residents of the settlement were also told by the police that they must evacuate the settlement immediately; they fled in panic. Then, in the morning, a group of non-Roma residents of Danilovgrad entered the Bozova Glavica Roma settlement, hurling stones and breaking windows of houses owned by the complainants. Those Roma who had still not left the settlement hid in one of the houses from which they eventually managed to flee through the fields and woods towards Podgorica. In the afternoon, the non-Roma residents of Danilovgrad attacked the settlement. Houses were burned down. The pogrom lasted for hours. The police remained passive throughout. According to the presentation of the facts by the complainants: 'As the violence and destruction unfolded, police officers did no more than feebly seek to persuade some of the attackers to calm down pending a final decision of the Municipal Assembly with respect to a popular request to evict Roma from the Bozova Glavica settlement.' A few days after the incident, the debris of the Roma settlement were cleared away, so that no trace of the Roma presence in Danilovgrad remained. Only one of the non-Roma residents of Danilovgrad was prosecuted for the attack on the settlement, but the case against him was dropped due to lack of evidence. At the time when the complainants addressed themselves to the Committee against Torture, their civil claims were still pending.]

9.2 As to the legal qualification of the facts that have occurred on 15 April 1995, as they were described by the complainants, the Committee first considers that the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment. The nature of these acts is further aggravated by the fact that some of the complainants were still hidden in the settlement when the houses were burnt and destroyed, the particular vulnerability of the alleged victims and the fact that the acts were committed with a significant level of racial motivation. Moreover, the Committee considers that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying 'acquiescence' in the sense of article 16 of the Convention. In this respect, the Committee has reiterated on many instances its concerns about 'inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened' (concluding observations on the initial report of Slovakia, CAT A/56/44 (2001), paragraph 104; see also concluding observations on the second periodic report

of the Czech Republic, CAT A/56/44 (2001), paragraph 113 and concluding observations on the second periodic report of Georgia, CAT A/56/44 (2001), paragraph 81). Although the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with their acquiescence and constitute therefore a violation of article 16, paragraph 1, of the Convention by the State party.

9.3 Having considered that the facts described by the complainants constitute acts within the meaning of article 16, paragraph 1 of the Convention, the Committee will analyse other alleged violations in the light of that finding.

9.4 Concerning the alleged violation of article 12 of the Convention, the Committee, as it has underlined in previous cases (see *inter alia Encarnacion Blanco Abad* v. *Spain*, Case No. 59/1996, decided on 14 May 1998), is of the opinion that a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein. In the present case, the Committee notes that, despite the participation of at least several hundred non-Roma in the events of 15 April 1995 and the presence of a number of police officers both at the time and at the scene of those events, no person nor any member of the police forces has been tried by the courts of the State party. In these circumstances, the Committee is of the view that the investigation conducted by the authorities of the State party did not satisfy the requirements of article 12 of the Convention.

9.5 Concerning the alleged violation of article 13 of the Convention, the Committee considers that the absence of an investigation as described in the previous paragraph also constitutes a violation of article 13 of the Convention. Moreover, the Committee is of the view that the State party's failure to inform the complainants of the results of the investigation by, *inter alia*, not serving on them the decision to discontinue the investigation, effectively prevented them from assuming 'private prosecution' of their case. In the circumstances, the Committee finds that this constitutes a further violation of article 13 of the Convention.

9.6 ... The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation.

(b) Before regional courts

The obligation to protect thus affirmed by the Human Rights Committee has been emerging in the international law of human rights, since the mid-1980s. Both the European Court of Human Rights and the Inter-American Court of Human Rights delivered leading judgments on this issue during that period (see, e.g. E. A. Alkema, 'The Third-Party Applicability or "*Drittwirkung*" of the European Convention on Human Rights' in F. Matscher, H. Petzold, and G. J. Wiarda (eds.), *Protecting Human Rights: the European Dimension* (Cologne: Carl Heymans Verlag, 1988), p. 35; A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993); A. Drzemczewski, 'The European Human Rights Convention and Relations between Private Parties', *Netherlands International Law Review*, 2 (1979), 168; A. R. Mowbray, *The Development of Positive*