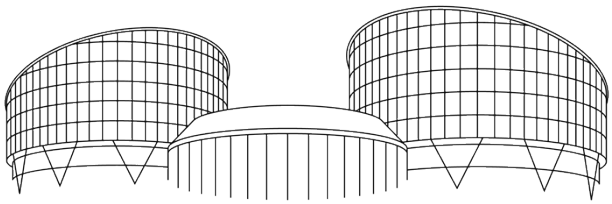

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MOUVEMENT RAËLIEN SUISSE v. SWITZERLAND

(Application no. 16354/06)

JUDGMENT

STRASBOURG

13 July 2012

This judgment is final but may be subject to editorial revision.

In the case of Mouvement raëlien suisse v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President,*
Françoise Tulkens,
Josep Casadevall,
Corneliu Bîrsan,
Egbert Myjer,
Mark Villiger,
Päivi Hirvelä,
András Sajó,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Ann Power-Forde,
Mihai Poalelungi,
Nebojša Vučinić,
Kristina Pardalos,
Ganna Yudkivska,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*

and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 16 November 2011 and on 9 May 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 16354/06) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an association constituted under Swiss law, Mouvement raëlien suisse ("the applicant association"), on 10 April 2006.

2. The applicant association was represented by Mr E. Elkaim, a lawyer practising in Lausanne (Switzerland). The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, of the Federal Office of Justice.

3. The applicant association alleged that the banning of its posters by the Swiss authorities had breached its right to freedom of religion and its right to freedom of expression, as guaranteed by Articles 9 and 10 of the Convention respectively.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 15 May 2008 the Court decided to

give notice of the application to the Government and, under former Article 29 § 3 of the Convention, to examine the admissibility and merits at the same time.

5. On 13 January 2011 a Chamber of that Section composed of the following judges: Christos Rozakis, Nina Vajić, Khanlar Hajiyev, Dean Spielmann, Sverre Erik Jebens, Giorgio Malinverni and George Nicolaou, and also of Søren Nielsen, Section Registrar, delivered a judgment in which it found, by five votes to two, that there had been no violation of Article 10 of the Convention and that there was no need to examine separately the complaint under Article 9. The dissenting opinion of Judges Rozakis and Vajić was appended to the judgment.

6. On 12 April 2011 the applicant association requested the referral of the case to the Grand Chamber under Article 43 of the Convention and Rule 75. On 20 June 2011 the panel of the Grand Chamber accepted that request.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. Mihai Poalelungi's term of office expired on 30 April 2012. He continued to sit in the case (Article 23 § 3 of the Convention and Rule 24 § 4).

8. The applicant association and the Government each filed further written observations (Rule 59 § 1). In addition, third-party comments were received from the non-governmental organisation Article 19, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 November 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr F. SCHÜRMANN, Head of European law and international human rights section, Federal Office of Justice, Federal Police and Justice Department, *Agent*,

Mr A. TENDON, Lawyer, Deputy Head of the Legal Department of the Canton of Neuchâtel,

Ms D. STEIGER LEUBA, Technical adviser, European law and international human rights section, Federal Office of Justice, Federal Police and Justice Department, *Advisers*;

(b) *for the applicant association*

Mr E. ELKAIM, lawyer,

Mr N. BLANC, associate lawyer, *Counsel*,

Mr M.P. CHABLOZ, head and spokesman of the Mouvement raëlien suisse, *Adviser*.

The Court heard addresses by Mr Elkaim and Mr Schürmann, and also their replies to certain questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant association and the Raelian Movement

10. The applicant association, which was set up in 1977, is a non-profit association registered in Rennaz (Canton of Vaud). It is the national branch of the Raelian Movement, an organisation based in Geneva and founded in 1976 by Claude Vorilhon, known as "Raël". According to its constitution, its aim is to make the first contacts and establish good relations with extraterrestrials.

11. According to the information available on the applicant association's website at the time of the adoption of the present judgment, the Raelian Movement's doctrine is based on Raël's alleged contact with the "Elohim", extraterrestrials with "advanced technology", who are said to have created life on earth and a number of world religions, including Christianity, Judaism and Islam. The Raelian Movement's followers believe that scientific and technical progress is of fundamental importance and that cloning and the "transfer of conscience" will enable man to become immortal. In that connection the Raelian Movement has expressed opinions in favour of human cloning.

12. Some texts of the Raelian Movement or works written by Raël himself advocate a system of government called "geniocracy", a doctrine whereby power should be entrusted only to those individuals who have the highest level of intellect.

13. In his book *Sensual Meditation* Raël defines this concept as an "instruction manual" given to humans by extraterrestrials, enabling each person "to discover his/her body and especially to learn how to use it to enjoy sounds, colors, smells, tastes, caresses, and particularly a sexuality felt with all one's senses, so as to experience the cosmic orgasm, infinite and absolute, which illuminates the mind by linking the one who reaches it with the universes he/she is composed of and composes".

B. The relevant proceedings

14. On 7 March 2001 the applicant association requested authorisation from the police administration for the city of Neuchâtel (the "police administration") to conduct a poster campaign in the period between 2 and 13 April 2001. The poster in question, measuring 97 cm by 69 cm, featured in the upper part the following wording in large yellow characters on a dark blue background: "The Message from Extraterrestrials"; in the lower part of the poster, in characters of the same size but in bolder type, the address of the Raelian Movement's website, together with a telephone number in France, could be seen; at the very bottom was the phrase "Science at last replaces religion". The middle of the poster was taken up by pictures of extraterrestrials' faces and a pyramid, together with a flying saucer and the Earth.

15. On 29 March 2001 the police administration denied authorisation, referring to two previous refusals. It had been indicated in a French parliamentary report on sects, dating from 1995, and in a judgment of the president of the Civil Court for the district of La Sarine (Canton of Fribourg), that the Raelian Movement engaged in activities that were contrary to public order (*ordre public*) and immoral.

16. In a decision of 19 December 2001 the municipal council of the city of Neuchâtel dismissed an appeal from the applicant association, finding that it could not rely on the protection of religious freedom because it was to be regarded as a dangerous sect. The interference with freedom of expression had been based on Article 19 of the Administrative Regulations for the City of Neuchâtel (the "Regulations"); its purpose was to protect the public interest and it was proportionate, since the organisation advocated, among other things, human cloning, "geniocracy" and "sensual meditation".

17. On 27 October 2003 the Neuchâtel Land Management Directorate upheld that decision. It noted that, for the Raelian Movement, life on earth had been created by extraterrestrials, who were also the founders of the various religions and were capable of saving the world, and accepted that this amounted to a religious conviction protected by freedom of conscience and belief. It further accepted that the Regulations constituted a sufficient legal basis in such matters. The Directorate observed that there was nothing offensive in the text and picture on the poster, or in the allusion to extraterrestrials. However, it pointed to the fact that the Raelian Movement advocated "geniocracy" (a political model based on intelligence) and human cloning. Moreover, in a judgment of 13 February 1998 the Fribourg Cantonal Court had found that the movement also "theoretically" advocated paedophilia and incest, especially in the works of Raël himself. The practice of "sensual meditation" could also easily lead to abuse. In addition, the website of Clonaid, to which the Raelian Movement's site contained a link, offered specific services in the area of cloning, and the notion of eugenics

was contrary to the principle of non-discrimination. The poster campaign was prejudicial to morals and to the rights of others. In any event, the Raelian Movement had other means by which to disseminate its ideas.

18. The applicant association appealed to the Administrative Court for the Canton of Neuchâtel. It claimed, among other things, that the mere defence of "geniocracy", cloning and sensual meditation were not offensive opinions. Moreover, it argued that the movement denounced paedophilia through its association Nopedo. The refusal to authorise its poster thus amounted purely and simply to censorship, especially as the applicant association's website was, in any event, accessible through a search engine.

19. In a judgment of 22 April 2005 the Administrative Court dismissed the appeal, after acknowledging, however, that the applicant association defended a global vision of the world and was entitled to both freedom of opinion and religious freedom. It found first that the impugned measure was based on the Administrative Regulations, which constituted a law in the substantive sense, and that the poster had to be assessed in relation to the message conveyed by the books and websites that could be accessed from the movement's website. The services proposed by Clonaid were manifestly contrary to Swiss public order. The court further observed that criminal complaints had been filed against the Raelian Movement alleging the existence of sexual practices that were intended to systematically corrupt young teenagers. The content of the works on "geniocracy" and "sensual meditation" could lead certain adults to sexually abuse children, the child being described in certain works as a "privileged sexual object". The comments on "geniocracy" and the criticisms of contemporary democracies were likely to undermine public order, safety and morality. For those reasons the Administrative Court concluded that it was not justifiable to authorise the dissemination of such ideas on the public highway.

20. The applicant association lodged a public-law appeal against that judgment with the Federal Court, requesting that it be set aside and that the case be referred back to the respondent authority for a new decision.

21. In a judgment of 20 September 2005, served on the applicant association on 10 October 2005, the Federal Court dismissed the appeal. The relevant passages read as follows:

> "The Directorate, and subsequently the Administrative Court, acknowledged that the [applicant] association could rely on the right to freedom of religion (Art. 15 of the Constitution, Art. 9 ECHR and Art. 18 UN Covenant II), in so far as it defended a global vision of the world, especially as regards its creation and the origin of the various religions. The City of Neuchâtel disputes this, noting that the aim of the [applicant] association as defined in Article 2 of its Constitution, is not religious in nature. According to a report on 'sects' produced in 1995 for the French National Assembly, the Raelian Movement is classified among the movements that present dangers for the individual, especially on account of the excessive financial demands made of its members and practices that cause bodily harm, and also dangers for the community, in particular through an antisocial discourse. Many of the movement's publications contain passages described as offensive.

There is no need to ascertain whether a religious movement may, on account of the dangers it represents, be precluded from relying on the right to freedom of religion, or whether the [applicant] association presents such dangers. Indeed, the parties agree that the [applicant] is entitled to rely on the right to freedom of opinion. As to the conditions in which such freedom may be restricted, as laid down in Article 36 of the Constitution, it makes little difference whether Article 15 or Article 16 of the Constitution is relied on (see also Article 9 § 2 and Article 10 § 2 ECHR). The [applicant] does not argue that the impugned measure impairs the very essence of its religious freedom, or that the restrictions on that freedom are, in the circumstances of the case, subject to stricter conditions. On the contrary, the [applicant] relies on the principles of proportionality and public interest, without distinction as to the constitutional right invoked.

...

5.2 According to case-law, citizens do not have an unconditional right to an extended use of public space, in particular when a means of advertising on the public highway involves activity of a certain scale and duration, and excludes any similar use by third parties (Federal Court judgment 128 I 295 point 3c/aa p. 300 and the judgments cited therein). When it wishes to grant authorisation for extended or private use of public space, or when it supervises the conditions under which a licence is used, the State must nevertheless take into account, in balancing the interests at stake, the substantive content of the right to freedom of expression (Federal Court judgment 100 Ia 392 point 5 p. 402).

5.3 In the present case, the grounds given by the Cantonal Court to confirm the refusal by the City of Neuchâtel relate to respect for morality and the Swiss legal order. The Administrative Court took the view that it was necessary to take into account not only the content of the poster but also the ideas conveyed by the Raelian Movement, together with the works and websites that could be accessed from the movement's website. Three different criticisms are thus directed against the [applicant] association. Firstly, the [applicant] association's website contains a link to that of Clonaid, via which this company offers specific cloning-related services to the general public and announced, in early 2003, the birth of cloned babies. Cloning is prohibited under Swiss law, pursuant to Art. 119 of the Constitution and to the Medically-Assisted Reproduction Act (RS 814.90). Secondly, the Administrative Court referred to a judgment of the District Court of La Sarine, which mentioned possible sexual abuse of children. Numerous members of the movement had, moreover, been investigated by the police because of their sexual practices. Thirdly, the promotion of 'geniocracy', a doctrine according to which power should be given to the most intelligent individuals, and the criticism consequently directed at contemporary democracies, was likely to undermine the maintaining of public order, safety and morality.

5.4 The [applicant] no longer contests, at this stage, the existence of a sufficient legal basis, namely, in this case, Article 19 of the Regulations. A municipal by-law offers the same guarantees, in terms of democratic legitimacy, as a Cantonal law, and thus constitutes a sufficient legal basis (judgment 1P.293/2004 of 31 May 2005, point 4.3, Federal Court judgment 131 I xxx; Federal Court judgment 122 I 305, point 5a, p. 312; 120 Ia 265, point 2a, pp. 266-267 and the references cited therein). The [applicant] invokes, however, the principle of public interest and criticises the respondent authorities for going beyond the content of the poster and engaging in an assessment of the [applicant] association's activities. It argues that if it had generally

engaged in conduct that was immoral or in breach of public order, it would have been dissolved by the courts pursuant to Article 78 of the Civil Code. If no decision had been taken to that effect, it would not be possible to prohibit it from publicising its philosophy and world vision.

5.5 The poster in itself does not contain anything, either in its text or in its illustrations, that was unlawful or likely to offend the general public. Above the central drawing representing extra-terrestrials appears the text 'The Message from Extraterrestrials', without any explanation. Below that, the [applicant] association's website address and a telephone number are printed in bolder type. The phrase 'Science at last replaces religion' is admittedly capable of offending the religious beliefs of certain persons, but it is merely the expression of the movement's doctrine and cannot be described as particularly provocative.

The poster as a whole can thus clearly be seen as an invitation to visit the website of the [applicant] association or to contact it by telephone. Faced with such advertising, the authority must examine not only the acceptability of the advertisement's message as such, but also that of its content. It is therefore legitimate to ascertain whether the website in question might contain information, data or links capable of offending people or of infringing the law.

Moreover, contrary to the [applicant]'s allegation, an association may be criticised for opinions or activities which, without constituting grounds for dissolution within the meaning of Article 78 of the Civil Code, nevertheless justify a restriction on advertising.

5.5.1 As regards cloning, it was not the opinions expressed by the [applicant] association in favour of such practices (particularly in the book *Yes to Human Cloning*, published in 2001 and available via the [applicant]'s website) that were penalised, but the link with the company Clonaid, set up by the association itself, which offers various practical services in this area for payment. The issue is thus not simply, contrary to what the [applicant] has argued, the expression of a favourable opinion of cloning, protected by Article 16 of the Constitution, but the practice of that activity, in breach of its prohibition under Article 119 § 2 (a) of the Constitution. That provision, accepted in 1992 by the majority of the population and of the Swiss Cantons (in the form of Article 24 *novies* (a) of the Constitution), falls in particular within a policy of protection of human dignity, according to the conception thereof that is generally shared in this country (FF 1996 III 278; see also the response of the Federal Council to a question from R. Gonseth of 9 June 1997). The [applicant] does not contest the unlawfulness of human cloning, especially if it is carried out for commercial gain (section 36 Medically Assisted Reproduction Act; Art. 119 § 2 (e) of the Constitution). Nor can it seriously contest the fact that the link to the Clonaid website contributes to the promotion of an unlawful activity, and goes further than the mere expression of an opinion. On that first point, which already justifies the decision under appeal, the [applicant] has not put forward any real relevant argument within the meaning of section 90 § 1 (b) of the Judicial Organisation Act.

5.5.2 On 15 October 2003 the Intercantonal Beliefs Information Centre provided information on the Raelian Movement. This information shows, among other things, that the movement apparently has a political mission. Virulently attacking democracies, which are referred to as 'mediocracies', it defends the notion of 'geniocracy', a political model based on individuals' level of intelligence. A world government would consist of geniuses, elected by individuals whose intelligence is

10% higher than average. Admittedly, 'geniocracy' is presented as a utopia and not as a genuine political project; contrary to the finding of the Administrative Court, this doctrine does not appear likely to undermine public order or safety.

However, apart from the fact that the doctrine appears to be largely inspired by eugenics, it is manifestly capable of offending the democratic and anti-discriminatory convictions that underpin the rule of law (see, in particular, the wording of the preamble to the Federal Constitution of 18 April 1999, together with Article 8 of the Constitution concerning equality and the prohibition of discrimination).

5.5.3 Lastly, according to the judgment under appeal, it cannot be considered that the Raelian Movement advocates paedophilia. However, numerous members have apparently been investigated by the police on account of their sexual practices. According to a judgment delivered on 28 November 1997 by the District Court of La Sarine, concerning a right of reply requested by the Mouvement Raëlien Suisse, the remarks made by Raël in his works could lead certain adults to commit acts of sexual abuse against children. The judgment quotes extracts from works by Raël that can be downloaded from the website of the [applicant] association, according to which the sexual education of children should not only be theoretical but should consist of a sensual education aimed at showing them how to derive pleasure from it. That judgment further indicates that, notwithstanding the denial subsequently issued on this point, certain articles published in the quarterly newsletter *Apocalypse* described the child as a 'privileged sexual object'. Lastly, it is stated that a friend and a member of the Raelian Movement were convicted by the Vaucluse Assize Court and sentenced to five years' imprisonment for sexually assaulting a twelve-year-old girl. The judgment was confirmed on 13 February 1998 by the Fribourg Cantonal Court. An ordinary appeal and a public-law appeal by the Mouvement Raëlien were dismissed on 24 August 1998 by the Federal Court, having regard in particular to the equivocal writings of the movement's founder or members (judgments 5P.172/1998 and 5C.104/1998).

The case-file, moreover, contains various documents concerning criminal proceedings brought against members of the [applicant association] for sexual assault. A judgment of 24 January 2002 of the Lyons Court of Appeal clearly shows that acts of sexual abuse were committed by leaders of the movement against minors. The movement's leaders are thus said to have advocated 'a broad sexual freedom strongly encouraging commission of the act'; they had thus corrupted young teenagers by supposedly philosophical discourse, by increasingly specific sexual fondling and by inciting them more and more forcefully, in order to satisfy 'their sexual needs and fantasies with young girls who had just turned fifteen, and who were changing partners very quickly'.

The fact that the impugned articles date from the 1980s and that there has been no conviction in Switzerland does not negate the involvement of members of the [applicant] association in acts leading to criminal sanctions. The [applicant] does not dispute the fact that certain passages in the books available via its website could lead adults to abuse children. On that point also, the [applicant]'s arguments do not address the grounds set out in the decision under appeal. Since acts of abuse have indeed been recorded on the part of certain members of the Raelian Movement, the argument that paedophilia is strongly condemned by the movement's official doctrine is not decisive.

5.6 Having regard to the foregoing, the refusal issued to the [applicant] appears to be justified by sufficient public-interest grounds, because it is necessary to prevent the commission of acts constituting criminal offences under Swiss law (reproductive cloning and sexual acts with children). Moreover, certain passages in the works available via the [applicant]'s website (in particular about the 'sensual awakening' of children, and 'geniocracy') are likely to be seriously offensive to readers.

5.7 The [applicant] invokes the principle of proportionality. It points out that the poster itself contains nothing that is contrary to public order, and maintains that the measure is not appropriate to the aim pursued.

5.7.1 In accordance with Article 36 § 3 of the Constitution, any restriction on a fundamental right must be proportionate to the aim pursued. It must be appropriate to the fulfilment of that aim and any damage to private interests must be kept to a minimum (Federal Court judgment 125 I 474, point 3, p. 482, and the references cited therein).

5.7.2 In the present case, the public interest does not only consist in limiting the publicity given to the [applicant] association's website, in view of the reservations expressed above about public order and morality; it is even more important to ensure that the State does not provide any support for such publicity by making public space available for it, which might suggest that it endorses or tolerates the opinions or conduct in question. From that perspective, the prohibition of the posters is appropriate to the aim pursued. Furthermore, the measure criticised by the [applicant] is confined to the display of posters in public spaces. The [applicant] association remains free to express its beliefs by many other means of communication at its disposal (see the *Murphy* judgment of 10 July 2003, ECHR 2003-IX, p. 33, § 74).

5.7.3 The [applicant] takes the view that the authority should have suggested that it make changes to the poster in order to make the content acceptable. However, even though it was aware of the objections raised against its poster campaign, the [applicant] itself never proposed a version of the poster that was likely to be authorised. The Administrative Court, for its part, found that the poster should be prohibited even without the reference to the website, but this seems questionable; there is no doubt, however, that the removal of the address in question would deprive the poster campaign of its object, which, as has been shown, is essentially to advertise the website itself. It is therefore difficult to see what comprehensible meaning the poster could have had without that reference to the website and to the telephone number.

5.7.4 The impugned measure therefore respects the principle of proportionality, in all its aspects. It constitutes, for the same reasons, a restriction that is necessary 'in a democratic society', in particular for the protection of morals, within the meaning of Article 9 § 2 and Article 10 § 2 of the ECHR."

C. The applicant association's poster campaigns in other Swiss cities

22. Posters of a similar design to that concerned by the present case – also containing the Raelian Movement's website address and a telephone number but a different text, namely "The true face of God" – were authorised in December 1999 in a number of Swiss cities such as Zurich and

Lausanne. The applicant association was also able to conduct further campaigns with posters of other designs – some of which indicated the Raelian Movement's website address – between 2004 and 2006 in various Swiss towns and cities other than Neuchâtel. However, in October 2004, the town council of Delémont refused to authorise a poster that the applicant association wished to display with the wording "God does not exist".

II. RELEVANT LAW AND PRACTICE

A. Domestic law

1. The Constitution

23. Article 119 of the Federal Constitution of 18 April 1999 concerns reproductive medicine and gene technology involving human beings. That provision reads as follows:

> "Human beings shall be protected against the misuse of reproductive medicine and gene technology.
>
> The Confederation shall legislate on the use of human reproductive and genetic material. In doing so, it shall ensure the protection of human dignity, privacy and the family and shall adhere in particular to the following principles:
>
> (a) All forms of cloning and interference with the genetic material of human reproductive cells and embryos are unlawful.
>
> (b) Non-human reproductive and genetic material may neither be introduced into nor combined with human reproductive material.
>
> (c) Methods of medically assisted reproduction may be used only if infertility or the risk of transmitting a serious illness cannot otherwise be overcome, but not in order to conceive a child with specific characteristics or for research purposes; the fertilisation of human egg cells outside a woman's body is permitted only under the conditions laid down by the law; no more human egg cells may be developed into embryos outside a woman's body than are capable of being immediately implanted.
>
> (d) The donation of embryos and all forms of surrogate motherhood are unlawful.
>
> (e) Trade in human reproductive material and in products obtained from embryos is prohibited.
>
> (f) The genetic material of a person may be analysed, registered or made public only with the consent of the person concerned or if the law so provides.
>
> (g) Everyone shall have access to data relating to their ancestry."

24. In a response of 21 May 2003 to a Swiss National Council Member, who had asked whether measures should be taken against the Raelian Movement under paragraph (a) of that Article, the Federal Council stated:

> "As, in Switzerland, the Raelian Movement is merely calling for the social recognition of cloning techniques – or for the lifting of the ban on cloning – its activity falls within the freedom of opinion ..."

2. Neuchâtel Administrative Regulations

25. In Neuchâtel, as in other Swiss municipalities, the management of posters in public areas is entrusted to a private company. The municipal council granted such company a concession for this purpose under the Administrative Regulations of 17 January 2000, of which the relevant provisions read as follows:

Article 18

"1. The installation of billboards and advertising panels in public areas, and in private areas visible from public areas, shall be subject to authorisation.

2. Such authorisation shall be granted only if the urban-planning and safety conditions are satisfied."

Article 19

"1. The Police may prohibit posters that are unlawful or immoral.

2. Flyposting shall be prohibited."

Article 20

"An exclusive right in respect of posters displayed within the area of the municipality may be granted by the municipal council."

B. International law

26. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, also known as the "Convention on Human Rights and Biomedicine", opened for signature on 4 April 1997 in Oviedo (the "Oviedo Convention"), entered into force on 1 December 1999. It has applied to Switzerland since 1 November 2008.

27. The Additional Protocol to the Oviedo Convention, opened for signature on 12 January 1998 in Paris, entered into force on 1 May 2006 and has been applicable to Switzerland since 1 March 2010. It prohibits "any

intervention seeking to create a human being genetically identical to another human being, whether living or dead".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

28. The applicant association claimed that the measures taken by the Swiss authorities to prohibit the display of its posters had breached its right to freedom of expression as guaranteed by Article 10 of the Convention. That provision reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The Government's preliminary objection

29. In their written and oral observations before the Grand Chamber, the Government requested the Court to declare the application inadmissible as manifestly ill-founded. In the Government's submission, the Court could declare manifestly ill-founded a complaint which had been examined in substance by the competent national bodies in proceedings that met all the conditions of fairness and were not arbitrary. The Government emphasised that, in such a case, the Court should not substitute its own assessment of the facts for that of the numerous national authorities which had given decisions during the proceedings in question.

30. The Court reiterates that, in the context of Article 43 § 3 of the Convention, the "case" referred to the Grand Chamber covers all the aspects of the application that have been declared admissible by the Chamber (see, among other authorities, *K. and T. v. Finland* [GC], no. 25702/94, § 141, ECHR 2001-VII). However, even after the decision of a Chamber to declare a complaint admissible, the Grand Chamber may also examine, where appropriate, issues relating to the admissibility of the application, for

example by virtue of Article 35 § 4 *in fine* of the Convention, which empowers the Court to "reject any application which it considers inadmissible ... at any stage of the proceedings", or where such issues have been joined to the merits or where they are otherwise relevant at the merits stage (see *K. and T. v. Finland,* cited above, § 141, and *Perna v. Italy* [GC], no. 48898/99, §§ 23-24, ECHR 2003-V).

31. In the present case, the Grand Chamber would point out that the Chamber took the view in its judgment that the application was not "manifestly ill-founded within the meaning of Article 35 § 3 of the Convention" (see paragraph 22 of the Chamber judgment). It does not see any reason to depart from that conclusion, especially as the issues raised by the Government in this connection are more relevant to the examination of the merits.

32. Accordingly, the Court dismisses the Government's preliminary objection.

B. Compliance with Article 10 of the Convention

1. The Chamber judgment

33. In its judgment of 13 January 2011 the Chamber first found that the prohibition of the posters in question constituted an interference with the applicant association's freedom of expression. In the Chamber's view, such interference was prescribed by law and pursued the legitimate aims of prevention of crime, protection of health and morals and protection of the rights of others. Turning then to the necessity of the interference, the Chamber, after noting that it found itself confronted for the first time with the question whether the domestic authorities should allow an association, by making public space available to it, to disseminate its ideas through a poster campaign, emphasised that whilst it was not in dispute that the poster in question contained nothing unlawful or shocking, either in its text or in its illustrations, it had displayed the applicant association's website address. Taking into account the general context of the poster, and in particular the ideas imparted by the website and the links to other sites from that website, the Chamber pointed out that this modern means of conveying information and the fact that it was accessible to everyone, including minors, would have multiplied the impact of the poster campaign. Observing that the Swiss courts had carefully reasoned their decisions, and also taking into account the limited scope of the impugned ban, which did not extend to the association itself or to its website, the Chamber took the view that the competent authorities had not overstepped the wide margin of appreciation afforded to them as regards regulation of the extended use of public space. The Chamber thus held that there had been no violation of Article 10 of the Convention.

2. Submissions of the parties and the third-party intervener

(a) The applicant association

34. The applicant association emphasised at the outset that, in finding that Switzerland had such a wide margin of appreciation in regulating the extended use of public space, the Chamber had endorsed a discretionary policy on the part of the relevant authorities. It would thus suffice for a city or a State to say that it did not wish its name to be associated with certain non-majority but lawful ideas in order to justify a systematic refusal and oppose the expression of such ideas in public on a permanent basis. The applicant association referred, in this connection, to the position adopted by the Court in *Women On Waves and Others v. Portugal* (no. 31276/05, 3 February 2009), where the Court had criticised a ban on disseminating ideas contrary to those of the majority. Similarly, in a judgment of 22 February 2011 (no. 1 BvR 699/06), the German Constitutional Court had rejected the argument that a ban on the distribution in an airport of leaflets criticising deportation policy was justified by a concern to maintain a pleasant atmosphere. That court had further held that it could not accept prohibitions intended to prevent the expression of opinions not shared by the authorities.

35. The applicant association asserted that it was a lawfully constituted association under Swiss law and that there had never been any criminal sanctions against it or any measures taken to have it banned. In its submission, since it was not disputed that the impugned poster did not in itself contain anything that was illegal or might offend the public, the basis of the poster ban stemmed from the fact that the poster referred to the Raelian Movement's website and thus made a link with the ideas expressed on that site. The applicant association argued that it found itself in a situation where it was prevented from disseminating its ideas through posters on the ground that there were other means of communication it could use, in particular the Internet, but when it displayed the address of its website on a poster, it was prohibited from doing so on the pretext that this created a link with its ideas, which were allegedly dangerous for the public. In the applicant association's submission, the approach taken by the Swiss authorities, and endorsed by the Chamber, was tantamount to complicating excessively, or even preventing, any publicity for or dissemination of its ideas.

36. As regards those ideas, which the Swiss authorities and the Chamber had found to be capable of justifying the poster ban, the applicant association reiterated that there was nothing illegal in expressing favourable views about cloning or "geniocracy". It pointed out that, whilst it had expressed opinions in favour of cloning, it had never taken part in any therapeutic or experimental acts related to human cloning. As regards the concept of "geniocracy", it stated that the interference with its rights was all

the more serious as neither the impugned poster nor the Raelian Movement's website referred to it. The applicant association explained that this concept came from a book advertised on the website that contained philosophical opinions and that everyone was free to agree or disagree with them.

37. Turning to the allegations that the Raelian Movement's ideas had given rise to sexual abuse, the applicant association claimed that no police or judicial authority had ever had to act on any case of paedophilia or sexual abuse connected in any way to the movement or one of its members. On the contrary, it claimed that it had always, without hesitation, expelled any member against whom there had been even the slightest suspicion of conduct contrary to the law on the protection of minors.

38. The applicant association concluded that there was no pressing need to prohibit the poster just because it mentioned a website address. Pointing out that Article 10 of the Convention also protected the form in which ideas were conveyed (it cited *Thoma v. Luxembourg*, no. 38432/97, § 45, ECHR 2001-III), and sharing the opinion of the dissenting judges Rozakis and Vajić, according to whom the authorities' margin of appreciation was narrower when it came to negative obligations (*Women On Waves and Others*, cited above, § 40), the applicant association argued that there had, in the present case, been a violation of Article 10 of the Convention.

(b) The Government

39. The Government unreservedly agreed not only with the fundamental principles of freedom of expression reiterated by the Chamber but also with its application of those principles. In their submission, the Chamber had correctly balanced the interests at stake. They argued that the following points should be taken into account.

40. As regards, first, the provision of public space, the Government argued that individuals did not have an unconditional right to the extended use of such space, in particular for the purpose of advertising involving activity of a certain scale and duration, and excluding any similar use of that space by third parties. Pointing out that the impugned poster was not of a political nature, the Government agreed with the findings of the domestic authorities, especially the view that it was necessary to examine not only the advertisement's message as such, but also its content, thus including the website reference. In this connection the Government endorsed the Chamber's reasoning that the impact of the posters in question would have been multiplied as a result of the reference to the Raelian Movement's website address.

41. As regards the extent of the margin of appreciation, the Government emphasised that the ideas disseminated in the various publications obtainable through the Raelian Movement's website were capable of offending the religious beliefs of certain persons, and that the authorities

had a wide margin of appreciation in that sphere (they cited *Murphy v. Ireland*, no. 44179/98, § 67, ECHR 2003-IX). In that connection, the Government criticised the dissenting opinion annexed to the Chamber judgment, considering that it placed too much weight on the distinction between positive and negative obligations in determining the extent of the margin of appreciation. In the Government's submission, the present case fell into the category of cases where the characterisation of the obligation as negative or positive depended on how the question was formulated: whether the authorities were criticised for having done something or for failing to do something. They admitted that it would be different if, unlike the situation in the present case, access to public space were not subjected to any restriction or authorisation.

42. Turning to the examination of the legitimate aims pursued by the disputed restriction, the Government agreed with the analysis of the Chamber, which had approved the arguments of the four national authorities called upon to examine the refusal issued by the police to the applicant association. As regards the applicant association's opinions about the "sensual awakening" of children, the Government referred to various proceedings brought against members of the Raelian Movement for acts of sexual abuse (Vaucluse Assize Court, Lyons and Colmar Courts of Appeal, investigating judge in Versailles). In their view, that list of decisions strongly suggested that certain passages of publications obtainable through the movement's website could lead adults to commit acts of sexual abuse against children.

43. As to the question of cloning, the Government drew attention to the relationship between the applicant association and the company Clonaid, set up by Raël, which they alleged offered various practical and fee-paying services in the area of cloning, a practice prohibited by the Federal Constitution and criminal legislation. The presence of a link to the Clonaid website contributed to the promotion of an unlawful activity, thus going further than the mere expression of an opinion.

44. As regards "geniocracy", the Government pointed out that, without as such specifically undermining public order or safety, this concept might offend the democratic and anti-discriminatory beliefs on which the principle of the rule of law was based. They agreed with the Federal Court that, even though "geniocracy" could be seen as a utopia and not as a real political project, it appeared to be inspired largely by eugenics and was at odds with democratic principles.

45. The Government lastly observed that the scope of the prohibition was limited. Agreeing with the position of the Chamber in this connection, they took the view that the applicant association was not prevented from disseminating its doctrine by the numerous other means of communication available to it, including the Internet. The Government emphasised in this connection that there had never been any question of banning the Raelian

Movement's website or the movement itself. They took the view, however, that a distinction should be drawn between the purpose of the association, which could be quite lawful, and the means used to achieve it, which could for their part be unlawful.

46. For all these reasons, the Government requested the Grand Chamber to confirm the Chamber's judgment and find that there had been no violation of Article 10.

(c) The third party

47. The organisation Article 19 requested the Court to make a careful examination of the margin of appreciation that was to be afforded to States for restrictions on freedom of expression in cases involving the dissemination of information on the Internet. In its view, the importance of freedom of expression on the Internet under international law meant that the State's margin of appreciation in this area should be a narrow one. As regards, more specifically, the question of hyperlinks to other sites, the organisation Article 19 referred to comparative-law material concerning judicial decisions in the United Kingdom, Germany and the United States, in particular, showing that a measure requiring the removal of a link without first addressing the source of the allegedly illegal content would always be a disproportionate step.

3. The Court's assessment

(a) General principles

48. The fundamental principles concerning freedom of expression are well established in the Court's case-law. The Chamber judgment, referring to the cases of *Stoll v. Switzerland* ([GC], no. 69698/01, § 101, ECHR 2007-V) and *Steel and Morris v. the United Kingdom* (no. 68416/01, § 87, ECHR 2005-II), reproduced them as follows (§ 49):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give

the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10**.**

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ...."

(b) Application of the above principles to the present case

(i) Whether there has been an interference

49. It is not in dispute that the applicant association sustained a restriction of its right to freedom of expression on account of the banning of the poster campaign it wished to conduct. The parties argued before the Grand Chamber, however, about whether such a restriction could be regarded in terms of negative obligations or positive obligations.

50. The Court would reiterate in this connection that in addition to the primarily negative undertaking by the State to abstain from any interference with the rights guaranteed by the Convention, there "may be positive obligations inherent" in such rights (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31). The boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, § 82, ECHR 2009); in both situations – whether the obligations are positive or negative – the State enjoys a certain margin of appreciation (see, for example, *Keegan v. Ireland*, 26 May 1994, §§ 51-52, Series A no. 290).

51. In the present case the Court takes the view that it is not necessary to examine further whether Article 10 imposed a positive obligation on the Swiss authorities. As the impugned ban constituted, in any event, an interference, it will not be acceptable unless it fulfils the requirements of paragraph 2 of that Article.

(ii) Justification for the interference

52. Such an interference with the applicant association's right to freedom of expression must be "prescribed by law", have one or more legitimate aims in the light of paragraph 2 of Article 10, and be "necessary in a democratic society".

53. The Court would first note that it is not in dispute between the parties that the restriction at issue was based on Article 19 of the Administrative Regulations of the City of Neuchâtel (see paragraph 25 above).

54. As to the legitimate aims pursued by the restriction, the Government indicated that it had sought to prevent crime, to protect health or morals and to protect the rights of others.

55. The Grand Chamber observes, like the Chamber, that the applicant association has not denied that the measure in question was taken to fulfil those legitimate aims. The Grand Chamber thus accepts that the restriction at issue pursued the above-mentioned legitimate aims.

56. It follows that the main question to be addressed in the present case is whether the impugned measure was necessary in a democratic society.

57. As the Chamber noted, the present case is singular in the sense that it raises the question whether the national authorities were required to permit the applicant association to disseminate its ideas through a poster campaign by making certain public space available to it for that purpose. In this connection the Court notes that in two Turkish cases it found a breach in respect of a poster ban imposed on a political party. However the Court's finding in those cases was based on the fact that the regulations permitting such a ban were "not subject to any strict or effective judicial supervision" (see *Tüzel v. Turkey*, no. 57225/00, § 15, 21 February 2006, and *Tüzel v. Turkey (no. 2)*, no. 71459/01, § 16, 31 October 2006).

58. The present case can also be distinguished from that of *Appleby and Others v. the United Kingdom* (no. 44306/98, ECHR 2003-VI), which concerned the use of space belonging to a private company, and from the *Women On Waves* case concerning the denial of authorisation for a ship to enter a State's territorial waters – space that was "public and open by its very nature" (cited above, § 40). In the present case there has been no general ban on imparting certain ideas, only a ban on the use of regulated and supervised facilities in public space. As the Chamber noted, like the Swiss Federal Court before it, individuals do not have an unconditional or unlimited right to the extended use of public space, especially in relation to facilities intended for advertising or information campaigns (see paragraphs 14 and 51 of the Chamber judgment).

(α) Margin of appreciation

59. The Court would draw attention to its established case-law to the effect that Contracting States enjoy, under Article 10, a certain margin of appreciation in assessing the need for and extent of an interference in the freedom of expression protected by that Article (see *Tammer v. Estonia*, no. 41205/98, § 60, ECHR 2001-I).

60. However, this margin goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it,

even those given by an independent court (see *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 38, ECHR 2004-X, and *Flinkkilä and Others v. Finland*, no. 25576/04, § 70, 6 April 2010). In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied upon (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 86, 7 February 2012).

61. The breadth of such a margin of appreciation varies depending on a number of factors, among which the type of speech at issue is of particular importance. Whilst there is little scope under Article 10 § 2 of the Convention for restrictions on political speech (see *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999-IV), a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion (see *Murphy*, cited above, § 67). Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising (see *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 33, Series A no. 165, and *Casado Coca v. Spain*, 24 February 1994, § 50, Series A no. 285-A).

62. In the present case, the Court observes that it can be reasonably argued that the poster campaign in question sought mainly to draw the attention of the public to the ideas and activities of a group with a supposedly religious connotation that was conveying a message claimed to be transmitted by extraterrestrials, referring for this purpose to a website address. The applicant association's website thus refers only incidentally to social or political ideas. The Court takes the view that the type of speech in question is not political because the main aim of the website in question is to draw people to the cause of the applicant association and not to address matters of political debate in Switzerland. Even if the applicant association's speech falls outside the commercial advertising context – there is no inducement to buy a particular product – it is nevertheless closer to commercial speech than to political speech *per se*, as it has a certain proselytising function. The State's margin of appreciation is therefore broader.

63. In such cases, the national authorities are in principle, by reason of their direct and continuous contact with the vital forces of their countries, in a better position than the international judge to give an opinion on the "necessity" of a "restriction" or "penalty" intended to fulfil the legitimate aims pursued thereby (see *Müller and Others v. Switzerland*, 24 May 1988, § 35, Series A no. 133).

64. For this reason the management of public billboards in the context of poster campaigns that are not strictly political may vary from one State to

another, or even from one region to another within the same State, especially a State that has opted for a federal type of political organisation. In this connection, the Court would point out that certain local authorities may have plausible reasons for choosing not to impose restrictions in such matters (see *Handyside v. the United Kingdom*, 7 December 1976, § 54, Series A no. 24). The Court cannot interfere with the choices of the national and local authorities, which are closer to the realities of their country, for it would thereby lose sight of the subsidiary nature of the Convention system (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, p. 35, § 10, Series A no. 6).

65. The examination by the local authorities of the question whether a poster satisfies certain statutory requirements – for the defence of interests as varied as, for example, the protection of morals, road traffic safety or the preservation of the landscape – thus falls within the margin of appreciation afforded to States, as the authorities have a certain discretion in granting authorisation in this area.

66. Having regard to the foregoing considerations concerning the breadth of the margin of appreciation in the present case, the Court finds that only serious reasons could lead it to substitute its own assessment for that of the national authorities.

(β) Reasons given by the domestic courts

67. The Court must accordingly examine the reasons given by the authorities for banning the poster campaign at issue, together with the scope of that ban, in order to ascertain whether those reasons were "relevant" and "sufficient" and thus whether, having regard to the margin of appreciation afforded to the national authorities, the interference was proportionate to the legitimate aims pursued and whether it corresponded to a "pressing social need". It would point out in this connection that, unlike the above-mentioned cases where the Court found a breach in respect of decisions banning poster campaigns on account of the lack of any strict or effective judicial scrutiny (see *Tüzel*, cited above, § 15, and *Tüzel (no. 2)*, cited above, § 16), no question arises in the present case as to the effectiveness of the judicial scrutiny exercised by the domestic courts.

68. The parties have discussed whether it was appropriate for the purposes of examining the necessity of the disputed measure to take into consideration, as the domestic courts did, the content of the Raelian Movement's website, whose address was indicated on the poster in question. Having regard to the principle that the Convention and its Protocols must be interpreted in the light of present-day conditions (see *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26, and *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII), the Chamber took the view that the website did have to be considered because, as it was accessible to everyone, including minors, the impact of the posters on the

general public would have been multiplied on account of the reference to the website address.

69. The Court reiterates its general principle that the impugned interference has to be examined in the light of the case as a whole in order to determine whether it is "proportionate to the legitimate aim pursued" and whether the reasons given by the national authorities to justify it appear "relevant and sufficient" (see paragraph 48 above). It observes that the impugned poster clearly had the aim of attracting people's attention to the website: the address of that site was given in bold type above the slogan "The Message from Extraterrestrials" (see paragraph 14 above). It would thus be illogical for the Court to look solely at the poster itself; it is necessary for it, like the domestic courts, to examine the content of the website in question.

70. As regards the reasons as such, the Court would first note, like the Chamber, that the five national authorities which examined the case (the police administration, the municipal council, the Neuchâtel Land Management Directorate, the Administrative Court and the Federal Court) gave detailed reasons for their decisions, explaining why they considered it appropriate not to authorise the poster campaign. The Federal Court, which is the highest domestic court, referred in particular to Article 10 of the Convention and to the Court's case-law in that area, and examined the proportionality of the impugned measure.

71. In finding the refusal to authorise the campaign in question to be justified, the Federal Court successively examined each of the reasons relied on by the lower courts as justifying such refusal, namely the promotion of human cloning, the advocating of "geniocracy" and the possibility that the Raelian Movement's literature and ideas might lead to sexual abuse of children by some of its members.

72. Even though some of these reasons, taken separately, might not be capable of justifying the impugned refusal, the Court takes the view that the national authorities were reasonably entitled to consider, having regard to all the circumstances of the case, that it was indispensable to ban the campaign in question in order to protect health and morals, protect the rights of others and to prevent crime. The Chamber found, in particular, as follows (paragraphs 55-57 of the judgment):

> "55. ... First, the association's website contained a link to that of Clonaid, via which that company was proposing specific cloning-related services to the general public, and on which it had announced, in early 2003, the birth of cloned babies. Secondly, the Administrative Court referred to a judgment of the District Court of La Sarine, which mentioned possible sexual abuse of minors. Thirdly, the propaganda in favour of 'geniocracy', namely the doctrine according to which power should be entrusted to people with the highest level of intelligence, and the resulting criticism directed at contemporary democracies, was capable of undermining public order, safety and morals.

> 56. The Court finds that the domestic authorities' accusations against certain members of the applicant association, as regards their sexual activities with minors, are of particular concern. ... Admittedly, it is not within the Court's remit, in principle, to review the facts established by the domestic bodies or the proper application of domestic law; therefore, it is not called upon to ascertain whether the authorities' accusations are proven. However, the Court is of the opinion that, having regard to the circumstances of the present case, the authorities had sufficient reason to find it necessary to deny the authorisation requested by the applicant association.
>
> 57. Similar considerations are called for as regards the question of cloning. The Court observes that the domestic authorities may in good faith have considered it indispensable, for the protection of health and morals and for the prevention of crime, to prohibit the poster advertising campaign, given that the applicant association displayed, on its website, a link to that of Clonaid, a company that it had itself set up ... Moreover, as the association itself admitted, it had a favourable opinion of cloning, an activity that was clearly prohibited by Article 119 paragraph 2 (a) of the Federal Constitution ..."

The Grand Chamber does not see any reason to depart from the Chamber's considerations in this connection. Accordingly, the Court finds that the concerns expressed by the national authorities were based on relevant and sufficient reasons.

73. The Chamber lastly took the view that the impugned measure was ultimately limited in scope, as the applicant association remained free "to express its beliefs through the numerous other means of communication at its disposal"; the Chamber also pointed out that "there was never any question of banning the applicant association itself or its website" (see paragraph 58 of the Chamber judgment).

74. The applicant association claimed that this position of the Chamber was contradictory and was tantamount to complicating excessively any dissemination of its ideas, since it was prohibited from imparting information using posters on the ground that it had a website, but when it displayed the address of its website on a poster it was barred from doing so on the pretext that this created a link with its ideas, which were allegedly dangerous for the public.

75. In the Court's view, however, such a contradiction is no more than apparent. Like the Government, it finds that a distinction must be drawn between the aim of the association and the means that it uses to achieve that aim. Accordingly, in the present case it might perhaps have been disproportionate to ban the association itself or its website on the basis of the above-mentioned factors (see, in this connection, *Association Rhino and Others v. Switzerland*, no. 48848/07, §§ 66-67, 11 October 2011). To limit the scope of the impugned restriction to the display of posters in public places was thus a way of ensuring the minimum impairment of the applicant association's rights. The Court reiterates in this connection that the authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in

question (see *Women On Waves*, cited above, § 41). In view of the fact that the applicant association is able to continue to disseminate its ideas through its website, and through other means at its disposal such as the distribution of leaflets in the street or in letter-boxes, the impugned measure cannot be said to be disproportionate.

(c) Conclusion

76. The Court concludes that the national authorities did not overstep the broad margin of appreciation afforded to them in the present case, and the reasons given to justify their decisions were "relevant and sufficient" and met a "pressing social need". The Court does not therefore see any serious reason to substitute its own assessment for that of the Federal Court, which examined the question at issue with care and in line with the principles laid down by the Court's case-law.

77. Accordingly, there has been no violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

78. The applicant association further relied on Article 9 of the Convention in support of its allegations, finding that the impugned prohibition had infringed its right to freedom of religion.

79. In its judgment, the Chamber took the view that it was not required to examine separately the complaint under Article 9 (see paragraph 61 of the Chamber judgment).

80. The Court is of the view that there is no reason to depart from the Chamber's approach on this point. Accordingly, it concludes that it is not required to examine whether Article 9 of the Convention applies to the impugned ban and, if so, whether there has been a violation of that provision.

FOR THESE REASONS, THE COURT

1. *Dismisses,* unanimously, the Government's preliminary objection;

2. *Holds,* by nine votes to eight, that there has been no violation of Article 10 of the Convention;

3. *Holds,* unanimously, that it is not required to examine the complaint under Article 9 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 July 2012.

Michael O'Boyle	Nicolas Bratza
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Bratza;

(b) joint dissenting opinion of Judges Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić and Yudkivska;

(c) joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić ;

(d) dissenting opinion of Judge Pinto de Albuquerque.

N.B.
M.O'B.

CONCURRING OPINION OF JUDGE BRATZA

1. With some hesitation I have voted with the majority of the Court in finding that there was no violation of Article 10 of the Convention in the present case. My eventual view has essentially been based on four features of an unusual case.

a) The nature of the interference

2. The applicant association's complaint relates to the refusal of authorisation to conduct a poster campaign in public areas of the city of Neuchâtel. The use of such public space was governed by the Administrative Regulation of 17 January 2000, which provided, *inter alia*, that the installation of billboards and advertising panels in public areas should be subject to authorisation, that the police administration might prohibit posters that were unlawful or immoral and that an exclusive right in respect of posters displayed within the area of the municipality might be granted by the municipal council. The refusal of authorisation was successively upheld on appeal by the municipal council of the city, by the Neuchâtel Land Management Directorate, by the Administrative Court for the Canton of Neuchâtel and by the Federal Court.

3. The parties were in dispute as to whether the refusal of authorisation was to be seen as amounting to a direct interference with the applicant's rights under Article 10, and thus as involving the negative obligations of the State under Article, or as giving rise to the positive obligations of the State to secure the association's right to freedom of expression. The Grand Chamber, in common with the Chamber, has preferred to treat the case as one of a direct interference requiring justification under paragraph 2 of Article 10, while correctly observing that the boundaries between the negative and positive obligations under the Convention do not lend themselves to precise definition and that in both circumstances States enjoy a certain margin of appreciation.

4. I can accept this approach. Nevertheless, there are elements in the case which suggest that it was the positive obligations of the State which were primarily at stake. In this regard, I consider it to be of importance that the applicant's complaint relates not to a general restriction imposed on the association's activities or on its freedom to disseminate or impart information to the general public about its existence or its aims and beliefs. This, as is pointed out in the judgment, the association remained free to do by displaying its posters on private property or by distributing leaflets or by using other means of publicity, such as the print or broadcast media or through the medium of the association's own internet website. The complaint is a much more specific one, namely the refusal of the municipal authorities to authorise, in the exercise of its regulatory powers, the use by

the association of public billboards in the city to display a particular poster for a specified period as part of an extensive poster campaign. In this respect the case has certain similarities to that of *Appleby and Others v. the United Kingdom* (no. 44306/98, ECHR 2003-VI), in which the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of a shopping mall and in which the Court's conclusion that the State was not in breach of its positive obligations under Article 10 was in part founded on the fact that the applicants had not been prevented from disseminating those views in other parts of the town or by other means. It is true that, in the *Appleby* case, the mall in question belonged to a private company, while the billboards in the present case were erected in public areas within the exclusive control of the municipality. Nevertheless, Article 10 cannot in my view be interpreted as imposing an obligation on national authorities to provide unconditional and unrestricted access to the use of public facilities to impart information or ideas. The case of *Women on Waves and Others v. Portugal* (no. 31276/05, 3 February 2009), on which reliance is placed by the applicant association, is no authority to the contrary, involving as it did the extreme measure of a general prohibition on a ship entering the State's territorial waters, a space which was, as the Court found in that case, "public and open by its very nature".

5. Even accepting that the refusal of authorisation is properly to be seen as an interference with the applicant's freedom of expression, it was one of a limited nature. The applicant association relies on the fact that it was able to impart its ideas through its own website without restriction but not to display the address of the website on posters as indicating a contradictory stance on the part of the municipal authorities and as undermining the necessity of the measures taken by those authorities. I do not agree. I find nothing contradictory in a decision to refuse permission for public facilities to be used for the purposes of advertising a website, while at the same time taking no steps to close down or restrict access to the website. Like the majority of the Court, I consider that the limited nature of the measures in question served, if anything, to confirm the proportionality of the measures. I am similarly unpersuaded by the applicant's argument that the lack of necessity of the measures is demonstrated by the fact that in other States, and even other regions of Switzerland, the poster campaign was accepted by the authorities - an argument which has, as noted in paragraph 64 of the judgment, been rejected by the Court in its previous case-law.

b) The nature of the speech

6. As is pointed out in the judgment, the breadth of the margin of appreciation afforded to the national authorities varies depending on a number of factors, among which the type of speech is of particular importance. While there is little scope under Article 10 for restrictions on political speech, a broad margin of appreciation is in general afforded for the regulation of speech in commercial matters, including forms of advertising.

7. I am unable to accept that the association's poster can be equated to political speech or that it can be seen as designed to address matters of political or public debate in Switzerland. The poster, with its reference to the association's website address, was exclusively intended to give publicity to its existence and to draw attention to its activities, a description of which was to be found on that website. In this respect, the poster was, in its essentials, a mode of advertising even if, in contrast to commercial advertising with which the Court's case-law has previously been concerned, it was not intended to induce the public to buy a particular product or service and may not have had any directly financial purpose. The margin of appreciation afforded to the national authorities was in my view accordingly a broader one.

c) The content of the posters

8. Emphasis is placed by the association on the fact that there was nothing objectionable on the face of the poster itself. This was accepted by the Federal Court which noted that the poster did not contain anything in its text or in its illustrations that was unlawful or likely to offend the general public. However, the Federal Court went on to note that the poster as a whole could clearly be seen as an invitation to visit the website of the association or to contact it by telephone and that it was thus legitimate to ascertain whether the website might contain information, data or links capable of causing offence or of infringing the law. Like the Federal Court, I consider that it would be too narrow an approach to examine the poster in isolation and that, in assessing the justification for any interference, it is necessary and appropriate to examine the content of the website which the public was being invited in the poster to consult.

d) The grounds for the refusal of authorisation

9. In carrying out such an assessment, I attach considerable weight to the fact that four domestic authorities, including the Administrative Court and the Federal Court, examined the case and the justification for refusing authorisation to the poster campaign. The detailed judicial review of the

decision by the two courts is of special significance, affording as it did an effective safeguard against arbitrariness, discriminatory treatment and abusive power in the decision-making process leading to the refusal of authorisation.

10. Three aspects of the association's aims and activities, as appearing from its website, attracted particular attention – the promotion of human cloning through the link to Clonaid; the promotion of the concept of "geniocracy"; and the encouragement, through the literature and ideas of the association and its founder, of sexual abuse of children by some of its members.

11. Although the doctrine of "geniocracy" was found to be largely inspired by eugenics and, as the Federal Court found, to be manifestly capable of offending democratic and anti-discriminatory convictions, the doctrine was not in that court's view such as to undermine public order or safety or to justify on its own the refusal of authorisation of the poster campaign.

12. The link of the association with Clonaid and the risk of encouraging sexual abuse of children were found to be of greater concern. As to the latter, the national courts found not only that numerous members of the movement had been investigated and prosecuted on account of their sexual practices but that, as a judgment of the Lyons Court of Appeal clearly showed, acts of sexual abuse had been committed by leaders of the movement against minors and that those leaders had advocated a broad sexual freedom strongly encouraging commission of such acts and had corrupted young teenagers. In addition, certain passages in the works of the founder of the association on the practice of "sensual meditation" which could be downloaded from the website could lead adults to commit acts of sexual abuse against children, a fact which the Federal Court found had not been disputed by the association itself. Since acts of abuse had indeed been recorded on the part of certain members of the movement, the argument that paedophilia was strongly condemned by the movement's official doctrine was not, in view of the Federal Court, decisive.

13. As to the first of the objections, it was not the opinions expressed by the association in favour of cloning practices and which appeared in the association's website that were found to justify the refusal of authorisation but, rather, the express link on the website to the company Clonaid, which had been established by the association itself and which offered various practical services in this area for payment. The issue, as the Federal Court put it, was "not simply... the expression of a favourable opinion of cloning protected under Article 16 of the Constitution, but the practice of that activity, in breach of its prohibition under Article 119 § 2 (a) of the Constitution". It could not, in the view of the Federal Court, be seriously contested that this link to the Clonaid website "contributed to the promotion

of an unlawful activity" and went further than the mere expression of an opinion.

14. As the dissenting opinions demonstrate, views will undoubtedly differ as to the adequacy of the reasons given by the Federal Court for upholding the refusal of authorisation. In the particular circumstances of the present case and having regard to the margin of appreciation afforded to the national authorities, I find those reasons to have been both relevant and sufficient and accordingly conclude that Article 10 of the Convention was not violated.

JOINT DISSENTING OPINION OF JUDGES TULKENS, SAJÓ, LAZAROVA TRAJKOVSKA, BIANKU, POWER-FORDE, VUČINIĆ AND YUDKIVSKA

(Translation)

1. We do not share the position of the majority, which found that there had been no violation of Article 10 of the Convention in the present case. We will set out the reasons for our dissent as regards the central question of the necessity, in a democratic society, of the ban imposed on the poster campaign that the applicant association wished to conduct in the Swiss city of Neuchâtel. The right to freedom of expression under Article 10 is an essential provision because it underpins the democracy that lies at the heart of the Convention. Any restriction of that freedom must be strictly justified by a pressing social need and narrowly circumscribed by relevant and sufficient reasons.

Reasons for the ban

2. In the present case, it was not so much the poster itself that justified the ban, because it did not contain anything unlawful either in its text or in its illustrations. The ban was "indirect", in so far as it was based on the association's opinions and on the conduct attributed to some of its members. To establish the concrete "connection" between the poster and the said opinions and conduct, the Court noted that the poster indicated, in bold type, the Raelian Movement's website and telephone number. With that in mind, in order to justify the interference with the applicant association's right to freedom of expression, the reasons given related not only to the association's positions on scientific atheism that are apparent from the posters but also to its opinions on human cloning and "geniocracy", as well as to the possibility of sexual abuse on the part of its members. In fact there was a patchwork of reasons relating to "speech" of a hybrid nature, not being commercial or political, but concerning a subject of public interest.

3. As regards scientific atheism, the national authorities accepted that the applicant association's anti-religious messages – in particular the wording on the impugned poster about a message supposedly from extraterrestrials or claiming that science would replace religion – were not particularly provocative, even though they were capable of offending part of Swiss society. In this connection, it should be observed that the freedom of thought, conscience and religion guaranteed by the Convention also entail freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I).

4. As regards cloning, the Swiss authorities' review in this connection was doubly indirect. It concerned first a reference on the impugned poster to the applicant association's website and, when the case came to be examined by the domestic courts, also a link from that site to the website of the company Clonaid, which is accessible throughout Switzerland. The applicant association acknowledged that it had expressed opinions in favour of human cloning, but claimed that it had never participated in therapeutic or experimental acts in that field. Even supposing that "the link to the Clonaid website contribute[d] to the promotion of an unlawful activity", as the Federal Court found, the Swiss Government did not allege that such "promotion" constituted *per se* an unlawful act punishable under domestic law. Whilst the expression of an opinion in favour of human cloning might shock or offend the majority of people, it is "precisely in the case of ideas that offend, shock and challenge the established order that freedom of expression is the most precious" (see *Women On Waves and Others v. Portugal*, no. 31276/05, § 42, 3 February 2009).

5. As regards "geniocracy", the idea put forward by the applicant association undeniably runs counter to democratic principles. However, as the Government themselves have admitted, this idea is not presented by the applicant as a real political project but rather as a utopia. The situation is thus different from those where the Court has found restrictions on freedom of expression to be proportionate in respect of organisations defending political projects that were incompatible with the concept of a "democratic society" (see, for example, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 132, ECHR 2003-II).

6. Lastly, as regards certain passages from publications available through the Raelian Movement's website and devoted to the notions of "sensual meditation" and the "sensual awakening" of children, potentially leading members of the movement to sexually abuse children, it is clear that any convictions for acts committed in the context of such an association's activities could justify the banning not only of a poster campaign but also of the association itself and, if appropriate, of its website. In the present case – and this is essential in our view – the facts set out by the Federal Court were not regarded by the domestic authorities as capable of justifying the banning of the applicant association itself. In those circumstances, it may be questioned whether there was a "pressing social need" to ban a poster campaign without at the same time banning the applicant association, which had existed since 1977, especially where the prevention of particularly serious criminal offences, such as those against children, was at stake. The reasons put forward in this connection by the domestic courts, whilst probably being "relevant", do not however appear "sufficient" to justify the impugned interference with the applicant association's freedom of expression; the Federal Court indeed failed to explain how, why and to what

extent that ban was proportionate to and necessary for the legitimate aim of preventing crime. Moreover, neither in the reasons given by the domestic courts, nor in the Government's observations before the Court, do we find any indication that there was a clear and imminent danger which justified the impugned interference (see *Gül and Others v. Turkey*, no. 4870/02, § 42, 8 June 2010, and *Kılıç and Eren v. Turkey*, no. 43807/07, § 29, 29 November 2011).

7. In this connection, some further clarification is called for. It is true that in Switzerland the Cantons may have different laws and policies in certain areas, and this explains why the posters banned in Neuchâtel may be authorised elsewhere. In itself, we obviously do not find that this situation raises any issue. Our Court has acknowledged that sensitivities may legitimately differ within a single State, even if this should entail diversified policies in terms of restrictions on fundamental rights. In the Court's view, "[w]here there are disparate cultural communities residing within the same State, it may well be that different requirement[s], both moral and social, will face the governing authorities"[1]. This idea of a "federal margin of appreciation", as it could be called, was used for example in *Handyside* to explain and justify the variable nature of the proceedings brought against the publisher of the *Little Red Schoolbook* in different parts of the United Kingdom[2]. It can also be perceived as an underlying idea in *Müller v. Switzerland*[3] and *Otto-Preminger-Institut v. Austria*[4]. However, this situation considerably weakens the legitimacy of the aim that justifies the interference, as well as the compelling social need, namely the prevention of crime, in this case sexual abuse of children, and the risk of danger. Danger, if it exists, does not disappear with borders, wherever they may be.

Scope of the ban

8. The majority found that to limit the scope of the impugned restriction to the display of posters in public places was a way of ensuring the minimum impairment of the applicant association's rights. They further pointed out that, as the applicant association was able to continue to disseminate its ideas through its website, and through other means at its disposal such as the distribution of leaflets in the street or in letter-boxes, the impugned measure could not be said to be disproportionate (paragraph 75 of the judgment).

9. We are not convinced by this reasoning. To prohibit the applicant association from displaying posters mainly on account of the content of its website, whilst arguing that the scope of such a ban remains limited because

---

[1] *Dudgeon v. the United Kingdom*, 22 October 1981, § 56, Series A no. 45.
[2] *Handyside v. the United Kingdom*, 7 December 1976, § 54, Series A no. 24.
[3] *Müller and Others v. Switzerland*, 24 May 1988, § 36, Series A no. 133.
[4] *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 50, Series A no. 295-A.

the association remains free to communicate via that very same website is singular, if not paradoxical. Whilst in certain situations a limited ban may be justified on the ground that there are alternative means of communication, that is obviously not the case where the ban is based on the same criticisms as those levelled at the alternative means.

10. Moreover, the Court has always observed in its case-law that it is not its role to cast judgment on the manner in which individuals choose to express themselves, because Article 10 of the Convention also protects the form in which ideas are conveyed (see *Thoma v. Luxembourg*, no. 38432/97, § 45, ECHR 2001-III). Applicants are free to use the means of expression of their choosing and it is not for the Court to scrutinise them or suggest other forms or arrangements. Ultimately that would be tantamount to imposing on applicants the burden of proving the necessity of the means of communication used and therefore of reversing the logic of Article 10.

11. Lastly, the finding of the Grand Chamber that there has been no violation of Article 10 of the Convention enshrines a particular view of advertising in public space, suggesting that this facility benefits from special status (see paragraph 57 of the judgment). We believe, by contrast, that such status should require increased neutrality on the part of the public authorities, with equal access for all individuals and entities that are not expressly prohibited. It is certainly necessary to combat the dangers and excesses of sects and a State may have to ban associations that seriously contravene democratic values. However, it is difficult to accept that a lawful association, with a website that has not been prohibited, should be prevented from promoting its ideas through posters that are not unlawful in themselves. As to the argument whereby, in accepting a poster campaign in public space, the municipal authorities would be endorsing or tolerating the opinions at issue, we find this not only rather unrealistic in relation to the current role of such authorities, but also dangerous. That would be tantamount to arguing, *a contrario*, that freedom of expression in public space could be restricted solely for the reason that the authorities disagree with the ideas conveyed. Article 10 of the Convention would then risk becoming inoperative.

JOINT DISSENTING OPINION OF JUDGES SAJÓ, LAZAROVA TRAJKOVSKA AND VUČINIĆ

I

For reasons explained in the joint dissenting opinion of Judges Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić and Yudkivska, this case clearly falls under the test laid down in The Sunday Times *v. the United Kingdom (no. 1)* (26 April 1979, Series A no. 30) and in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24). The ban by the Neuchâtel police regarding the applicant association's posters on public billboards does not satisfy the condition of showing a pressing social need, as required by the *Handyside* test. The opposite conclusion of the majority relies on the introduction of a new category of "lower-level" speech. Accordingly, a so-called "non-political", "quasi-commercial" speech that "has a certain proselytising function"[1] is deprived of the protection granted to speech in general.

This new standard runs counter to the Court's well-established case-law and diminishes the protection of speech, without offering compelling reasons. In view of this development we find it necessary to add a few considerations to the above-mentioned joint dissenting opinion.

It is particularly regrettable to see the protection of freedom of expression being diminished in respect of the world view of a minority. Moreover, at least the original justification for the ban given by the local police reflects the fact that the poster contained ideas and opinions which were at odds with the prevailing opinions of the local authorities and, perhaps, the majority of citizens of Neuchâtel. The accommodation of such sentiments as a ground for the restriction of freedom of expression is incompatible with the goals of the Convention.

II

"In order to assess the necessity for restraining ... the prohibited declarations must be placed in their proper context and examined in the light of the particular circumstances of the case" (*Barthold v. Germany*, 25 March 1985, § 56, Series A no. 90).

The nature of the expression. As understood by the Swiss Federal Court, the expression in the present case is composed of several elements: (a) a poster on a public billboard, taken together (b) with the information on a website operated by the applicant association that was advertised on the poster and (c) the content of a second website which was accessible via a hyperlink from the applicant's website. While the ban concerned billboards alone, the whole communication process was taken into consideration. The

[1] On the Convention protection granted to proselytising, see *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A.

Federal Court's approach reflects a profound understanding of the communication process in the age of the Internet.

The poster is both an expression of specific content (consider, for example, the line on the poster: "Science at last replaces religion" or the reference to extraterrestrials) and a medium for additional information to be found on or via the website. In this context, to use the words of McLuhan, the medium is the message.

1. Is this an advertisement? According to the Court's case-law it cannot be regarded as an advertisement in the sense of commercial expression. As the Court has previously found "... for the citizen, advertising is a means of discovering the characteristics of services and goods offered to him" (see *Stambuk v. Germany*, no. 37928/97, § 39, 17 October 2002)[2]. No services or goods are offered in the present case, nor does the Court argue that this is a commercial advertisement. The intended effect is to make people think about the applicant association's ideas and perhaps change their world view (see *Barthold*, cited above, § 58).

It follows that the poster is not a commercial advertisement. The Court has already considered similar situations, in particular where a television commercial "indubitably fell outside the regular commercial context inciting the public to purchase a particular product. Rather, ... the commercial reflected controversial opinions pertaining to modern society in general and also lying at the heart of various political debates." (see *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 57, ECHR 2001-VI, where the *Handyside* test was found to be applicable).

Arguably, even in the case of the "most protected" speech, namely that of a political nature, a somewhat wider margin of appreciation than that normally accorded is applicable to advertisements (see *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, § 67, ECHR 2008). It should be noted, however, that this exception was found applicable in the context of an election campaign in *television broadcasting*, where the reason for the restriction was related to the powerful and pervasive impact of this type of medium (ibid*.,* § 70.) That is not the case here and the Court's case-law that has been developed in respect of other non-commercial communication should apply. In any event, even restrictions on commercial advertising must "be closely scrutinised by the Court, which must weigh the requirements of [the] particular features [of such advertising] against the advertising in question" (see *Casado Coca v. Spain*, 24 February 1994, § 51, Series A no. 285-A, and *Stambuk*, cited above, § 39).

[2] Compare with the definition quoted by the US Supreme Court: " 'Advertising displays [*sic*] signs' include any sign that 'directs attention to a product, service or activity, event, person, institution or business.'" (*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 494 (1981)).

2. The installation of billboards and advertising panels in public areas is subject to authorisation, although in Neuchâtel the management of posters in such areas has been entrusted to a private company. On 29 March 2001 the police prohibited the poster in question for being unlawful and immoral. The Federal Court considered that the use of the billboards amounted to the (extended) use of public space.

2.1. The freedom of expression issue in the present case concerns the nature of the public space that is accessible to all for the display of posters. According to US, Canadian and (in some regards) German constitutional jurisprudence, government property opened to the public for expressive purposes, like a billboard, becomes a public forum open to all speakers[3]. All speakers have an equal right of use; the government must not exercise censorship and should apply otherwise permissible restrictions in a way that respects neutrality[4]. In democratic Europe, in the context of using publicly owned frequencies for the communication of ideas, it is expected (especially where the State controls broadcasting as a monopoly) that the management of the public service will be fair and impartial, allowing pluralism (i.e. respecting neutrality), precisely because general public access is not possible (see *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Series A no. 276, and *Manole and Others v. Moldova*, no. 13936/02, § 101, ECHR 2009).

These considerations are relevant in the present case, as they were in *Appleby and Others v. the United Kingdom* (no. 44306/98, ECHR 2003-VI). As is the case in the United States of America, outdoor signs play an important role in the communication of ideas in Europe too, and, as has been found in Canada, they are an effective and inexpensive means of communication for individuals and groups that do not have sufficient economic resources to use other media. These considerations are relevant even if there might be differences in the level of protection granted to speech between the various democracies. These principles do not, however, find application in the Swiss Federal Court's judgment (see § 5.2, quoted in paragraph 21 of the present judgment), which did not consider billboard access rights unconditional and found such access to be "subject to substantive content analysis".

---

[3] Comparative jurisprudence indicates that billboards are public fora for compelling reasons related to freedom of expression. See the Appendix.

[4] This issue was addressed in regard to access to private space in *Appleby and Others v. the United Kingdom* (no. 44306/98, ECHR 2003-VI), with reference to the positions of the US Supreme Court and the Supreme Court of Canada. Given that the present judgment does not reflect such comparative-law aspects, though the prevailing trend is of relevance, an overview is given in the Appendix.

The assumption that "acceptance of a poster advertising campaign could suggest that [the State is] endorsing, or at least tolerating, the opinions and conduct in question" as admitted by the Chamber (*Mouvement Raëlien Suisse v. Switzerland*, no. 16354/06, § 52, 13 January 2011), is contrary to the function and nature of the public forum. Such fora exist to allow all opinions to be imparted, while official notices have their own dedicated place for display. Access is denied purely because of identification with some ideas and denial of others. The idea that the State is endorsing expression when it is made in regulated public communication space open to all is based on a misunderstanding, at odds with the tolerance and broadmindedness that are fundamental to democracy. Such fear of endorsement was historically one of the sources of the belief that elevated censorship into a governmental duty.

Of course, there are grounds for restricting access to public fora. Such grounds will be in conformity with the Convention if they do not signal partisanship or bias. A lower-level demonstration of a pressing social need in this context has been recognised (see *Murphy v. Ireland*, no. 44179/98, ECHR 2003-IX). This exception has been applied in the case of an attack on religious sentiments related to the free exercise of religion, in particular circumstances, such as where the issue is politically or socially divisive to the extent that it may result in unrest, and where the effects of the media used are more immediate and invasive. In the absence of a violation of intimate personal convictions it is hard to see what would turn the alleged sensitivities of Neuchâtel into a proper ground for restriction under Article 10 § 2, "given ... the risks of excessive interferences with freedom of expression under the guise of action taken against allegedly offensive material" (ibid., § 68).

It is thus perhaps not surprising that the majority of the Grand Chamber, in their finding of no violation, do not rely on the above argument of sensitivity accepted by the Chamber.

2.2 In the present case, Swiss law has recognised the existence of public space for display purposes that is open to all. The administration of such public space is, of course, subject to time, place and manner restrictions. Contrary to the Swiss position, as endorsed by the majority, the authorities do not have a "certain discretion" in the administration of these fora, though they have the power to ensure that the request for use satisfies statutory requirements serving the legitimate purposes of Article 10 § 2 or necessitated by requirements of fairness (as scarcity of billboard space may require a fair and neutral system of allocation).

In the Swiss system applicable here, the administration of billboards was under private management and the display of the poster was subject to prior authorisation.

As the Court has previously found, "the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court" (see Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 60, Series A no. 216). The Court held it to be "especially so as far as the press is concerned, for news is a perishable commodity" (ibid., emphasis added). However, timeliness is an issue even in the present case, as the posters were intended to be displayed as part of a planned, coordinated campaign. Moreover, the general rule of the Court refers primarily to "dangers inherent in prior restraints" which exist outside the area of journalism, and are related to the historical abuse of censorship and (in more practical terms) to the speculative nature of the restrictions applied in any prior restraint system; speculative, because the authorities have to evaluate future events and impacts. Reasonable foresight has its legitimate place in the handling of the affairs of the State, and hypotheticals about possible harm to children, democracy and moral sensitivity did in fact play a major role in the present case.

Of course, the State is expected to prevent crime and, in that context, speech-restrictive preventive measures may serve pressing social needs. However, the Swiss authorities did not demonstrate that the expression "privileged sexual object" had actually encouraged paedophilia, a crime that is expressly and actively condemned by the Movement. There had been a few convictions of members of the Movement, but there is no evidence that their number is statistically significantly higher than convictions of members of other denominations. Religious organisations are not banned in a democracy just because some of their members commit crimes. The reference to criminal convictions resembles guilt by association. Such assumptions cannot be found "convincing" for the purposes of showing the existence of a pressing social need with regard to the applicant organisation.

III

Among the reproachable elements of the website "propagated" on the poster, and turning the ban into one that would serve a pressing social need, the Swiss Federal Court found that the Raelian Movement's website contained a link to the Clonaid website, therefore "contribut[ing] to the promotion of an unlawful activity, and go[ing] further than the mere expression of an opinion" (Federal Court judgment, § 5.5.1., quoted at paragraph 21 of the judgment).

Unfortunately, the case file does not contain a printout of the impugned website as of March 2001 and we do not know what text (if any) accompanied the hyperlink. Currently there is no hyperlink available on the homepage of the Raelian Movement's website[5] but the Federal Court affirmed that it had existed at an unspecified time and that it led to the

[5] http://national.rael.org/index.php?[fr] (Last visited 15 May 2012).

website of an organisation that offered a service that was considered criminal in Switzerland.

We have no information concerning the offers of activity available on the Clonaid website in March 2001. In the absence of facts, their assessment cannot be convincing, irrespective of due deference to the superior local knowledge of local authorities.

It is at least curious that the police ban had been imposed on 29 March 2001, while the first announcement that Clonaid had successfully performed the first human reproductive cloning dates from 27 December 2002. It is not clear how a link in 2001 could have promoted an illegal activity that was made possible only in 2002. The original police ban of 2001 did not contain reference to the hyperlink leading to Clonaid and the issue of the hyperlink is first mentioned in the 27 October 2003 decision of the Neuchâtel Land Management Directorate. *Ex post* findings and events do not contribute to a convincing establishment of the need for the ban.

Assuming, for the sake of argument, that Clonaid was praising (illegal) cloning research already at the material time, it is still hard to see how reading about such advocacy of illegal research would have turned the good people of Neuchâtel into criminal participants in unlawful scientific activity. Abstract advocacy of criminalised behaviour in the form of requesting legalisation is not an inducement to crime.

Furthermore, to what extent does information concerning a third party connected to the applicant association via a hyperlink constitute a relevant fact for the evaluation of a pressing social need?

A hyperlink points to a whole document or to a specific element within a document[6]. By clicking on the link the user moves to the other document. Its availability certainly facilitates access to information that will advocate and, to some extent, provide an opportunity to commit the prohibited act. However, there are a number of independent decisions to be taken by the user of the first website: the user has to click on the link, read the second site, find the relevant advocacy on the site, take a decision to contact Clonaid, and finally, after such contact, decide to participate in criminal activity. The relationship is simply too remote. A user facing a hyperlink already remains free to decide whether or not to move to the next website. To attribute responsibility to the applicant (as content-provider) for the choices of the user requires careful analysis. Without such analysis it is arbitrary and disproportionate to impose a ban on a poster that serves as a non-electronic "link" to a website (thereby indirectly sanctioning the content-provider).

A reference is not an endorsement or an identification, and even an endorsement would not create a clear danger of committing a crime.

[6] For a review of the emerging jurisprudence on hyperlinks, see Article 19's third-party intervention.

Otherwise the "referring" person would be obliged to distance himself all the time and that would impose a considerable burden on freedom of speech in the world of the Internet. A hyperlink certainly facilitates the dissemination of an idea (by making it more accessible) but not all dissemination gives rise to responsibility. As the Supreme Court of Canada held in a defamation case, hyperlinks are essentially different from publication and are by themselves content-neutral. Like references, they communicate the existence of something, but do not, by themselves, communicate its content (*Crookes v. Newton*, 2011 SCC 47). Where a specific website can most easily be found with the help of a search engine, it would be unrealistic to assume, without additional consideration, that the "referring" person shares responsibility for unlawful content referred to by means of a hyperlink. Moreover, the Clonaid website is accessible in Switzerland without the intermediary of the applicant's website or poster.

As mentioned above, the case file does not contain information regarding the specific position of the first website as to the content that opens up with the help of the link. It is most likely that in the present case the applicant association did know of the content of the second website, but the relationship between the two website operators remains contested. This cannot be a convincing demonstration of the need for restriction by relevant facts, as is required by the *Handyside* test. In reality, while the Court may find that it has to follow the fact-finding and related assessment given by the national court as to the relationship in question, in the absence of such analysis there can be no talk of "assessment". No facts, no assessment – therefore no acceptability.

The content of web pages is subject to constant change. A regulation of the Internet that respects freedom of expression should not disregard the changing content. Moreover, a website operator who inserts a link cannot foresee what the content will be on the linked site at any given point in time. To impose liability on someone providing hyperlink access in respect of <u>future</u> content on the second website, to which the link continues to lead, would undermine the "basic grammar" of the Internet, except where it can be clearly demonstrated that the first website operator has control over the second. In that case, however, its liability is not vicarious; for such liability to exist, the control would have to be convincingly established.

In view of the above doubts, it is all but evident that such an indirect relationship creates a pressing social need with regard to the applicant association's website. These doubts, of course, are even stronger when it comes to the banned poster, which is a further step away. Moreover, neither the poster nor the hyperlink would have a compelling effect on the reader.

IV

The majority concluded that "some of these reasons [i.e. that the website stands for anti-democratic ideas, or promotes crime], taken separately,

might not be capable of justifying the impugned refusal" (paragraph 72). The majority do not specify which reasons would be capable of such justification, nor do they find this necessary, as they rely on a "mosaic theory"[7] to show the indispensability of the ban, "having regard to all the circumstances of the case" (ibid.). This brings us to the new standard applicable to the use of public billboards in the context of poster campaigns that are not strictly political (see paragraph 64), a category of speech which can be described as "undefined".

The fact that the advertisement is paid for does not change the nature of the ideas advertised and does not deprive it of the protection granted to expression in general; nor does it make it a commercial or quasi-commercial advertisement, as there is no interest in influencing consumer behaviour or promoting products[8]. It is not by accident that the Convention expressly includes within the right to freedom of expression the freedom to "receive and impart information and ideas without interference by public authority and regardless of frontiers". Ideas are to be protected not in the sterility of their production but in the process of their communication. The Swiss authorities – and this Court too – considered the poster as existing in conjunction with, and as being interrelated with, the website as part of the same communication chain, and the applicant association's ideas were evaluated with regard to the poster's effect through the communication

---

[7] The "mosaic theory" is an approach that pieces together information that is in itself irrelevant for the finding, for example the piecing together of publicly available information to disclose classified information (see the *Der Spiegel* Case (20 BVerfGE 162 (1966)) where the German Federal Constitutional Court held that a suspicion a newspaper was guilty of treason could not be based on a mosaic theory, as this was an unconstitutional violation of freedom of expression).

[8] Compare this with the opposite approach in *TV Vest AS and Rogaland Pensjonistparti* (cited above, § 64), where the Court said that "[i]rrespective of the fact that it was presented as a paid advertisement … the content of the speech in question was indisputably of a political nature. Thus, …, the impugned advertisement obviously fell outside the commercial context of product marketing, an area in which States traditionally have enjoyed a wide margin of appreciation."

The relationship between (commercial) advertising and business goals is considered crucial. According to the Audiovisual Media Services Directive (2010/13/EU): "... 'audiovisual commercial communication' means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement; ... 'television advertising' means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods and services including immovable property, rights and obligations, in return for payment; ...".

process. The form of expression is protected not only because it can be essential to, or inseparable from, the content, but also because it is essential for imparting ideas.[9]

V

One cannot disagree with the Court's case-law to the effect that "national authorities are in principle, by reason of their direct and continuous contact with the vital forces of their countries, in a better position than the international judge to give an opinion on the 'necessity' of a 'restriction'" (see paragraph 63). Whatever these "vital forces" might be (and they do, in fact include forces which do not stand for human rights), the same direct contact (or vicinity) may have a distortive impact on their judgment. We have voiced our concern in that regard above (Section I). It is for that reason (among others) that the States Parties to the Convention found it necessary to institutionalise an international Court to supervise the myopia of localism. Accordingly, the Court's function is to exercise a "supervisory function", hand in hand (i.e. in proper dialogue) with, and with full respect for, domestic authorities. In supervising the presence of a restrictive pressing social need, "supervision" cannot mean passive acceptance of domestic speculation about the capacity of an idea to undermine public order, safety and morals. The undeniably better knowledge of local circumstances and sensitivities that militate in favour of the choices of national authorities must not become a fig-leaf for acquiescence in bigotry.

The doctrine of margin of appreciation is a valuable tool for the interaction between national authorities and the Convention enforcement mechanism; it was never intended to be a vehicle of unprincipled deferentialism. Even a broad margin of appreciation does not diminish the need for relevant and sufficient explanation, though it may well be that what has to be demonstrated will be different (e.g. a lower level of likelihood of a risk).

The natural respect for domestic fact-finding and correctness of the interpretation of domestic law cannot exempt the Court from requiring that accusations by authorities against applicants which dictate restrictions on freedom of expression must be proven. Furthermore, the Court has clearly stated that "applying a restriction in good faith" is insufficient; the fact that in the present case the authorities considered the restrictive measures indispensable is irrelevant, irrespective of the number of instances involved.

As Judge Malinverni observed:

> "Be that as it may, one thing is certain: the doctrine of the margin of appreciation should not in any circumstances exempt the Court from the duty to exercise the

[9] Article 10 is applicable "not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information." (*Autronic AG v. Switzerland*, 22 May 1990, § 47, Series A no. 178).

function conferred on it under Article 19 of the Convention, which is to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto." (dissenting opinion of Judge Malinverni, joined by Judge Kalaydjieva, § 1, in *Lautsi and Others v. Italy* [GC], no. 30814/06, ECHR 2011)

One should not forget the societal effects on minority positions of such a police ban. The applicant organisation is undeniably in a minority position precisely because of its unpopular views. While it has continued to have opportunities to express its views (though in the absence of the posters the likelihood of effective communication has been diminished) the ban and its reasons expressed an official legal position on the views of the applicant association, with obvious additional censorial effect. In the context of demonstrations, the Court has recognised that refusals to give authorisation could have had a chilling effect on the applicants (and others participating in the movement and sharing similar convictions). It could also have discouraged other persons from making themselves acquainted with those ideas on the grounds that they did not have official authorisation (see *Bączkowski and Others v. Poland*, no. 1543/06, § 67, 3 May 2007). It was the authorities' fear of being seen to be associated with an unpopular, even offensive, view that resulted in the disregard of the governmental obligation of neutrality, a fundamental principle that must apply in matters of world views. Freedom of expression cannot be left to strive under the dictates of governmental fear of public sensitivities.

APPENDIX

Following the methodology adopted in the comparable *Appleby* case (cited above), it is useful to provide a summary of the approach taken in comparable situations in some jurisdictions. In *Appleby* it was stated that "The United States Supreme Court has accepted a general right of access to certain types of public places, such as streets and parks, known as 'public fora' for the exercise of free speech (*Hague v. Committee for Industrial Organisation*, 307 U.S. (United States: Supreme Court Reports) 496 (1939))." Where the government opens property for expressive activity, it thereby creates a public forum.

According to Canadian and US law, billboards constitute "public fora". In *Metromedia, Inc. v. City of San Diego* (453 U.S. 490, 494 (1981)) the Supreme Court of the United States quoted Justice Clark in agreement:

" 'The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or "broadside" to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes.' (26 Cal. 3d, at 888...)." (ibid. at 501).

Metromedia also stated (ibid. at 514-15) that "the city [i.e. government] does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. See *Carey v. Brown*, 447 U.S., at 462 ...; *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 ... (1972). With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: 'To allow a government the choice of permissible subjects for public debate

would be to allow that government control over the search for political truth.' *Consolidated Edison Co.*, 447 U.S., at 538 ..." The same judgment referred (at 516) to *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (425 U.S., at 77), concluding that outside the sphere of commercial speech "it cannot be assumed that 'alternative channels' [for communication of information] are available, for the parties stipulated to just the opposite: 'Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive.'"

Once a public forum has been created the government cannot discriminate between different speakers or messages (see *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980); *Widmar v. Vincent*, 454 U.S. 263 (1981); and *Niemotko v. Maryland*, 340 U.S. 268 (1951). In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, (1969), Justice Stewart for the Court stated that "holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional." (ibid. at 150-51).

Canadian jurisprudence shows similar concerns with regard to the posting of signs. *R. v. Guignard* (2002 SCC 14, [2002] 1 SCR (Canada Supreme Court Reports) 472) referred back to *Ramsden v. Peterborough (City)* ([1993] 2 SCR 1084), where the Canadian Supreme Court "stressed the importance of signs as an effective and inexpensive means of communication for individuals and groups that do not have sufficient economic resources. Signs, which have been used for centuries to communicate political, artistic or economic information, sometimes convey forceful messages. Signs, in various forms, are thus a public, accessible and effective form of expressive activity for anyone who cannot undertake media campaigns. (See *Ramsden*, at pp. 1096-97; see also *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139, at p. 198.)." A further authority is *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295.

Likewise, the German Constitutional Court recognises the application of all the guarantees of freedom of opinion in public, communication-serving fora (*Schutzbereich nach auf öffentliche, der Kommunikation dienende Foren*). The same guarantees apply even beyond classical public fora, to other situations (places) that serve other public functions (see BVerfG, 1 BvR 699/06, 22.2.2011, Absatz-Nr. (1-128), http://www.bverfg.de/entscheidungen/rs20110222_1bvr069906.html).

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

The *Mouvement raëlien suisse* case is about the freedom of expression of a minority. This case concerns the banning of a poster campaign by the Swiss authorities to the detriment of the applicant association. The parties agreed that the ban on the display of the applicant association's posters was "prescribed by law", inasmuch as it was provided for in Article 19 of the Administrative Regulations of the City of Neuchâtel. The parties also agreed that it pursued the legitimate aims of the prevention of crime, the protection of health and morals, and the protection of the rights of others. The disputed question in the present case is that of the proportionality and necessity of the poster ban. Behind it lies the old question of State control of communication in the public arena, especially in view of what John F. Kennedy once called "alien philosophies"[1].

I respectfully dissent from the findings of the majority. The reasons for my dissent will be presented in three parts. The first part deals with the justification for the Court's supervision of the interference with the applicant's freedom of expression and the value of the "public forum" doctrine in European human rights law. The second part establishes the criteria for the Court's supervision. I will study the nature of the interference, using a two-pronged test to differentiate between negative and positive obligations; consider the form of the speech, with a view to establishing the ambit of freedom of expression on public billboards and the Internet, with its hyperlinks; and evaluate the nature of the speech in question, stressing the differences between commercial, religious and philosophical speech. After establishing the criteria of the supervision, I will proceed, in the third part, to the application in the instant case of the proportionality test, having in mind the reasons given by the domestic courts for the interference, i.e., scientific atheism, cloning, "geniocracy" and "sensual meditation", together with the necessity test, assessing the scope of the ban.

The Court's supervision of the interference

The present case provided the Court with an opportunity to rule on the State's margin of appreciation in respect of the use of public space for the exercise of freedom of expression. The Court's case-law is scarce but enlightening in this regard. In *Appleby and Others v. the United Kingdom*,

1. President John F. Kennedy: "We are not afraid to entrust the American people with unpleasant facts, foreign ideas, alien philosophies, and competitive values. For a nation that is afraid to let its people judge the truth and falsehood in an open market is a nation that is afraid of its people."

where the applicants had been refused permission to collect signatures for a petition in a private shopping centre, the Court found that it could not be inferred from Article 10 of the European Convention on Human Rights that the State had a positive obligation to create rights of entry to private property or even to all publicly owned property, such as government offices and ministries, in order to assert the right to freedom of expression, if there were alternative and effective means for those concerned to convey their message. The Court did not exclude that such a positive obligation could arise, however, where the bar on access to property had the effect of preventing the effective exercise of freedom of expression or where it could be said that the essence of this right had been destroyed[2]. In *Murphy v. Ireland* the Court accepted that a provision which allowed the filtering by the State or any organ designated by it, on a case-by-case basis, of unacceptable or excessive religious advertising would be difficult to apply fairly, objectively and coherently. Thus, State action in this regard should be "impartial, neutral and balanced"[3]. In *Women On Waves and Others v. Portugal*, the Court dealt with an interference with the exercise of freedom of expression in the respondent State's territorial waters, which were open by their very nature, with the consequence that any interference with freedom of expression within such space should be exceptional. Moreover, the Court reaffirmed that Article 10 protected not only the substance of the ideas and information expressed but also the form in which they were conveyed[4].

This question has, however, been examined for some time by the United States Supreme Court, which has construed the public-forum doctrine under the First Amendment to the US Federal Constitution[5]. The public-forum doctrine has been refined over the years, culminating in *Perry Education Association v. Perry Local Educators' Association*, where the Supreme Court established a three-tier categorisation of public fora. The first category is the traditional public forum, which includes places which by long tradition or by government *fiat* have been devoted to assembly and debate[6]. In a traditional public forum, the State may not restrict speech

2. *Appleby and Others v. the United Kingdom*, no. 44306/98, §§ 47-49, ECHR 2003-VI, referring to *Marsh v. Alabama*, 326 US [United States Supreme Court Reports] 501.
3. *Murphy v. Ireland*, no. 44179/98, §§ 76-77, ECHR 2003-IX.
4. *Women On Waves and Others v. Portugal*, no. 31276/05, §§ 39-40, 3 February 2009.
5. See the reference in *Appleby and Others*, cited above, § 26.
6. In the foundational case *Hague v. CIO*, 307 US 496 (1939), the US Supreme Court decided that a municipal ordinance requiring a permit for a public assembly in or upon the public streets, highways, public parks or public buildings of the city was void. The principle established by the Supreme Court was that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions". Other cases of public fora concern the area outside the Supreme Court building (*United States v. Grace*, 461 US 171 (1983)), or

based on content, unless it can show that its regulation is necessary to serve a compelling State interest and is narrowly tailored to achieve that interest. The second category is the limited public forum, defined as public property which the State has opened for use by the public as a place for expressive activity. Although the State need not indefinitely keep a limited public forum open to the public, while the forum is open any State restriction of speech in that forum will be under the same rules as those applicable to a traditional public forum[7]. The third category is the non-public forum, which, by tradition or design, is not an appropriate platform for unrestrained communication. Here the State is granted much greater latitude in regulating freedom of expression. In addition to applying time, place and manner regulations, the State may reserve the forum for its intended purposes, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view[8]. Thus, "the existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue"[9]. In the particular case of

---

sidewalks (*Frisby v. Schultz*, 487 US 474 (1988)).

7. Among designated or limited public fora are a municipally owned theatre open for private productions (*Southeastern Promotions Ltd. v. Conrad*, 420 US 546 (1975)), open school-board meetings (*City of Madison v. Wisconsin Employment Relations Comm'n*, 429 US 167 (1976)), state fairgrounds opened to different community groups (*Heffron v. International society for Krishna Consciousness*, 452 US 640 (1981)) and university meeting facilities (*Widmar v. Vincent*, 454 US 263 (1981)).

8. In *Perry Education Association v. Perry Local Educators' Association*, 460 US 37 (1983), a very thin majority considered that an interschool mail system and teacher mail folders were non-public fora. The court established a distinction between, on the one hand, content discrimination, i.e., discrimination against speech because of its subject matter – which may be permissible if it preserves the limited forum's purposes, and, on the other, viewpoint discrimination, i.e., discrimination because of the speaker's specific motivating ideology, opinion, or perspective, which is presumed impermissible when directed against speech otherwise within the forum's limitations. Other non-public fora are, according to the Supreme Court, jails (*Adderlewy v. Florida*, 385 US 39 (1966)), schools (*Grayned v. City of Rockford*, 408 US 104 (1972)), city buses (*Lehman v. City of Shaker Heights*, 418 US 298 (1974)), military bases (*Greer v. Spock*, 424 US 828 (1976)), residential mailboxes (*US Postal Service v. Council of Greenburgh Civil Associations*, 453 US 114 (1981)), an annual charity drive created by the federal government to target federal employees (*Cornelius v. NCAACP Legal Defense and Education Fund*, 473 US 788 (1985)), postal premises, in particular a postal sidewalk near the entrance to a US post office (*United States v. Kokinda*, 497 US 720 (1990)), and airport terminals (*International Society for Krishna Consciousness v. Lee*, 505 US 672 (1992)). Public, designated or non-public fora may also include virtual fora, such as funding and solicitation schemes (*Rosenberger v. Rector and Visitors of the University of Virginia*, 515 US 819 (1995)), public access channels required by local cable franchise authorities (*Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 US 727 (1996)) and a candidate debate on a State-owned television network (*Arkansas Educational Television Commission v. Forbes*, 523 US 666 (1998)).

9. This doctrine has been much criticised, *inter alia*, for failing to address the values

billboards, the Supreme Court decided that an ordinance which permitted on-site commercial advertising (a sign advertising goods or services available on the property where the sign was located), but forbade other commercial advertising and non-commercial advertising using fixed-structure signs, unless permitted by specified exceptions, such as temporary political-campaign signs, breached the freedom of expression of companies that were engaged in the outdoor advertising business[10].

The Canadian Supreme Court also takes the view that restrictions on freedom of expression in public places must be interpreted strictly. In the case *Committee for the Commonwealth of Canada v. Canada*, the Supreme Court found that the provisions of airport concession regulations prohibiting the conducting of any business or undertaking, commercial or otherwise, and any advertising or soliciting in an airport, except as authorised in writing by the Minister, were inconsistent with the freedom of expression guaranteed in section 2(b) of the Canadian Charter of Rights and Freedoms[11]. In the specific case of billboards and posters, the Supreme Court censured as unconstitutional the absolute prohibition of postering on public property[12] and affirmed the right to post political advertisements on the sides of buses belonging to the public transportation system[13].

The public-forum doctrine was recently adopted by the German Federal Constitutional Court, which held that the administration of Frankfurt Airport was not entitled to prohibit, in the check-in area, the distribution of leaflets criticising the government's deportation policy. Ruling on whether there had been a breach of freedom of expression, the court found, in accordance "with the model of the public forum" (*nach dem Leitbild des öffentlichen Forums*), that the wish to create a "pleasant atmosphere" (*Wohlfühlatmosphäre*) for travellers, free from political or social debate,

---

involved in finding a proper balance between the competing individual and public interests or to provide a true judicial review in cases where the reasonableness standard is applicable (see, for example, Jakab, "Public Forum Analysis After Perry Education Association v. Perry Local Educators' Association – A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property", *Fordham L. Rev.*, 54 (1986), 545; and Dienes, "The Trashing of the Public Forum: Problems in First Amendment Analysis", *Geo. Wash. L. Rev.*, 55 (1986), 109).

10. *Metromedia, Inc. v. City of San Diego*, 453 US 490 (1981).

11. *Committee for the Commonwealth of Canada v. Canada*, (1991) 1 SCR [Canada Supreme Court Reports] 139. In her opinion, Justice L'Heureux-Dubé stated as follows: "If the government had complete discretion to treat its property as would a private citizen, it could differentiate on the basis of content, or choose between particular viewpoints, and grant access to sidewalks, streets, parks, the courthouse lawn, and even Parliament Hill only to those whose message accorded with the government's preferences. Such a standard would be antithetical to the spirit of the Charter, and would stultify the true import of freedom of expression."

12. *Ramsden v. Peterborough (City)*, (1993) 2 SCR 1084.

13. *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, (2009) 2 SCR 295.

could not justify banning the leaflets in question in a public space such as an airport check-in area. Nor could content-based reasons, namely that the distribution of leaflets had been prohibited because the airport administration did not share the opinions expressed, disapproved of them or considered them capable of harming its activities, justify any restriction on freedom of expression. The German Federal Constitutional Court was nonetheless willing to admit restrictions on freedom of expression in some sensitive public places where there was "a concrete fear that serious incidents will occur" (*ernsthafte Störungen konkret zu befürchten sind*)[14].

As the above-mentioned Supreme and Constitutional Courts have repeatedly expressed, the public-forum doctrine is of paramount importance for democratic regimes, because it is based on the principle of content-neutrality of State regulation of expression in the public arena. According to this principle, the State is not assumed to support all the messages that are communicated in public facilities and spaces. When a certain message is circulated in public space there is no presupposition that the State endorses tacitly or expressly the content of that message. This principle derives directly from the principle of equality of all citizens before the law and the corresponding prohibition of discrimination of citizens by public authorities.[15]

The Court's case-law, and especially *Women On Waves and Others* (cited above), already hints at this same principle. The freedom of

14. See judgment of the German Federal Constitutional Court, 22 February 2011, § 106.

15. The political philosophy underlying this case-law was formulated in *Abrams v. United States*, 250 US 616 (1919) by Justice Oliver Wendell Holmes with these words: "When men have realised that time has upset many fighting faiths, they may come to believe ... that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." Imbedded in the Socratic method, the "marketplace of ideas" theory holds that truth arises out of the competition of widely various ideas in free, transparent public discourse. The concept is rooted in John Milton's *Areopagitica: A speech for the Liberty of Unlicensed Printing to the Parliament of England*, 1644, and was later developed by John Stuart Mill's *On Liberty*, 1859. Milton's speech could be summarised in his much-quoted sentence: "Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse in a free and open encounter?" In continental philosophy, the same theory was put forward first by Immanuel Kant's article on political enlightenment entitled "Beantwortung der Frage : Was ist Aufklärung?", published by the newspaper *Berlinische Monatsschrift*, in December 1784. Four years later, Mirabeau published *De la liberté de la presse, imité de Milton*, which adapted Milton's work to the French political situation on the eve of the Estates-General. More recently, this fundamental idea was placed at the heart of the philosophical debate by the non-metaphysical approach of John Rawls' redefined theory of a "well-ordered society" and the role of "public reason" therein and the post-metaphysical approach of Jürgen Habermas' theory of the "public sphere" and its "communicative rationality" (see respectively, Rawls' *Political Liberalism*, New York, 1993, and Habermas's *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt, 1992).

expression that *Women On Waves* guaranteed in the open maritime space of a State should also be acknowledged in its public space on land. The instant case provided an occasion to affirm that principle explicitly. In fact, the Court has constantly recognised that Article 10 § 2 leaves to the Contracting States a margin of appreciation, which is afforded both to the domestic legislature and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. However, this margin goes hand in hand with a European supervision[16]. The Court has to satisfy itself that the interference in issue is "necessary in a democratic society", that is to say, that it corresponds to a "pressing social need" and is "proportionate to the legitimate aim pursued", the reasons given by the national authorities to justify the interference therefore being "relevant and sufficient" for the purposes of paragraph 2 of Article 10 of the Convention[17]. Thus, the interference with freedom of expression is justified if it complies with a two-tier test: the test of necessity and the test of proportionality. The test of necessity assesses whether the interference with the right or freedom adequately advances the "social need" (social interests and rights and freedoms of others) pursued and reaches no further than necessary to meet said "social need"[18]. The test of proportionality evaluates whether a fair balancing of the competing rights, freedoms and interests has been achieved, whilst ensuring that the essence (or minimum core) of the right or freedom is respected[19]. The formal characterisation of a place as a public forum in view of its principal function does not *per se* resolve the matter, but it is certainly a valuable element, among others, to ascertain the prevailing right, freedom or interest. In addition to this space element, the balancing also takes into consideration the nature, form and timing of the speech, the status of the speaker, the nature and degree of the interference and the nature of the social need to be met. Subject to the restrictions imposed by the social interests and "rights and freedoms of others" foreseen in Article 10 § 2 of the Convention, freedom of expression in a public forum is applicable not only to ideas that are favourably received or regarded as

16. See *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24.

17. See The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 59, Series A no. 30. This judgment clarified the initial formulation of the principle in § 49 of the *Handyside* judgment.

18. The "adequacy" test verifies whether there is a "rational connection" between the interference and the social need, by establishing a plausible instrumental relationship between them, as the Court first stated in *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93. The test of the less intrusive measure envisages the minimal impairment of the right or freedom at stake, by asking if there is an equally effective but less restrictive means available to further the same social need.

19. On the protection of the "essence" or the minimum core of the Article 10 freedom, see *Appleby*, cited above, § 47, which reiterates the principle established in *Ashingdane*, cited above, § 57. Thus, the test of proportionality (or "reasonableness" or "fair balance") does not overlap entirely with the protection of the minimum core (or the "essence") of the rights and freedoms at stake.

inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the majority. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"[20]. To use the words of George Orwell, "If liberty means anything at all, it means the right to tell people what they do not want to hear"[21].

The Government claimed that the approval of the poster would mean that there was an implicit authorisation of the applicant's ideas by the State[22]. This argument sits ill with a modern democratic society. In a pre-modern society, for ideas to be published in the public forum, a prior *nihil obstat et imprimatur* (literally, "there is no obstacle and you may print") acceptance from the authorities was required, this authorisation being in certain cases express and in others tacit. The State had to approve the content of every single book, every single piece of creative work, every single speech communicated in the public space. Europe's history bears witness to the long and hard fight against this form of State control, that fight having been accomplished with the grandiose acknowledgment that "the free communication of ideas and opinions is one of the most precious of the rights of man", as Article 11 of the Declaration of the Rights of Man and of the Citizen foresaw[23]. Any sort of State *nihil obstat* in respect of the content of the message communicated in a public space would nowadays mean an inadmissible civilisational regression to pre-modern times. As Immanuel Kant wrote, a government seeking to impose such *nihil obstat et imprimatur* control on the public dissemination of controversial ideas should be reproached, since *Caesar non est supra grammaticos*[24].

---

20. See *Handyside*, cited above, § 49, and *Women On Waves and Others*, cited above, § 42.

21. Eric Arthur Blair wrote a preface to the first edition of his *Animal Farm* (1945), where this sentence was included. The preface was not published and was only discovered in the author's original typescript some years later. It was published in *The Times Literary Supplement*, 15 September 1972.

22. Like the Government, the domestic courts decided the matter based essentially on this same argument (see the decision of the Administrative Court of 22 April 2005, p. 11, and especially the Federal Court's judgment of 20 September 2005, p. 11: "it is even more important to ensure that the State does not provide any support for such publicity by making public space available for it, which might suggest that it endorses or tolerates the opinions or conduct in question."

23. The most arduous of these fighters on the European continent was Voltaire, who wrote in his *Dictionnaire Philosophique*, 1764: "We have a natural right to make use of our pens as of our tongue, at our peril, risk and hazard." But well before him, the publication in England of the illuminating *Areopagitica* of John Milton, itself a banned work, marked the beginning of the philosophical and political opposition to pre-publication censorship of the content of speech as a logical consequence of the freedom of expression.

24. Referring to the powers of the State, Kant wrote that the monarch did not have the power to rule over ideas and therefore could not submit the public discussion of opinions to prior governmental content-control: "It indeed detracts from His Majesty if he interferes in these affairs by subjecting the writings in which his subjects attempt to clarify their ideas to governmental supervision, when he does so acting upon his own highest insight – in which

The nature of the interference

The boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition[25]. The answer to this question does not simply depend on the way the latter is formulated, as the Government maintained in their memorial. This is not a mere linguistic question.

There is a double logic test for the purpose of ascertaining whether the Court is in the presence of positive or negative obligations. On the one hand, the Court should ask itself if the absence of any action by the national authorities would have resulted in a violation of the Convention. Had the Neuchâtel police and administrative authorities omitted to take any decision regarding the poster, there would be no case at all. Therefore, the issue at stake is the action of interference (i.e., the refusal of authorisation) by the respondent State with a Convention right, rather than failure by the State to take positive measures to protect a Convention right.

On the other hand, the Court should consider whether, in the event that there has been a violation of the Convention, a complementary action by the government would be required to restore the applicant to the situation in which he found himself prior to that violation. If a finding of a violation does not imply the need for any restorative action by the government, that indicates a negative obligation. If a finding of a violation does imply the need for additional restorative action by the government, that indicates a positive obligation. In the case at hand, the domestic authorities took the initiative to prohibit the impugned posters allowed by the company Société Générale d'Affichage in 2001 and reiterated the prohibition in July 2004. No restorative action would now be possible, and the State would simply have to stop prohibiting similar campaigns by the applicant association in the future. Thus, the State had an obligation to refrain from restricting the applicant association's freedom of expression by refusing to permit the poster campaign.

To sum up, the present case is to be analysed in terms of the negative obligations arising from Article 10 of the Convention. That conclusion will affect the margin of appreciation afforded to the State in the present case, since the Court takes the view that this margin is narrower in the case of negative obligations arising from the Convention[26].

---

case he exposes himself to the reproach: *Caesar non est supra grammaticos …*" ("*Es tut selbst seiner Majestät Abbruch, wenn er sich hierin mischt, indem er die Schriften, wodurch seine Untertanen ihre Einsichten ins reine zu bringen suchen, seiner Regierungsaufsicht würdigt, sowohl wenn er dieses aus eigener höchsten Einsicht tut, wo er sich dem Vorwurfe aussetzt : Caesar non est supra grammaticos, …"*); Immanuel Kant, "Beantwortung der Frage : Was ist Aufklärung?", 1784.

25. See, for example, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 82, ECHR 2009.

26. See *Women On Waves and Others*, cited above, § 40.

The form of the speech

First and foremost, the domestic authorities censured the requested poster campaign that the applicant association wished to conduct in the streets and parks of Neuchâtel. By tradition and design, public billboards on the streets and parks are public fora. The same applies to public billboards administered by a private entrepreneur on behalf of municipal authorities. Thus, expression in this privileged public space is incompatible with content-based censorship and leaves a narrow margin of appreciation to the State.

It is noteworthy that the Swiss authorities examined not only the content of the applicant association's website mentioned on the poster but also that of other sites – in particular of the Clonaid site and the apostasie.org site – that were accessible via hyperlinks on the applicant's site, as well as books of the Movement and by its leader and the magazine *Apocalypse*. The Court could not establish the exact state of the websites visited by the domestic authorities at the material time and the Government did not present evidence in this connection. The parties discussed whether it was appropriate for the purposes of examining the proportionality and necessity of the disputed measure to take into consideration the content of the various websites referred to by the domestic authorities.

The Court exercises its supervision in the light of the case as a whole[27]. Accordingly, a global examination of the context of the case also requires looking at the content of the websites in question. Such an examination should consider, in particular, the fact that the Internet is the most open and dynamic network in history. If streets and parks of a city are the historical quintessential public fora, the Internet is today's global marketplace of ideas[28].

---

27. See *Handyside*, cited above, § 50, and The Sunday Times *(no. 1)*, cited above, § 60.

28. The open and non-discriminatory access to and use of the Internet has been a major concern of the Parliamentary Assembly of the Council of Europe, which approved Resolution 1877 (2012) on the protection of freedom of expression and information on the Internet and online media, and Recommendation 1906 (2010) on rethinking creative rights for the Internet age, and the Committee of Ministers, which approved, among others, CM/Rec(2007)16 on measures to promote the public service value of the Internet, CM/Rec(2008)6 on measures to promote the respect for freedom of expression and information with regard to Internet filters, together with a Declaration on network neutrality, a Declaration on the management of the Internet protocol address resources in the public interest and a Declaration on the digital agenda for Europe, all of 29 September 2010 and inspired by the Granada Ministerial Declaration on the European Digital Agenda, of 19 April 2010. The same concern has been felt on the other side of the Atlantic. In response to the Federal Government's interest in regulating the content of speech on the Internet in order to promote its growth, the US Supreme Court stated in *Reno v. American Civil Liberties Union*, 521 US 844 (1997): "We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of

Consequently, in the light of an effective, and not illusory, guarantee of the freedom of expression enshrined in Article 10, and bearing in mind the crucial public-service value of the Internet, users must have the greatest possible access to Internet-based content, applications and services of their choosing, whether or not they are offered free of charge, using suitable devices of their choosing[29]. This principle of Internet neutrality imposes on both public and private Internet stakeholders (access providers, content-sharing platforms, search engines) an obligation not to refuse, provide or terminate in a discriminatory manner access to the Internet, with governments having the additional duty to ensure that all stakeholders are held accountable for violations of their users' freedom of expression and information. Therefore, users must not be subjected to any licensing or other requirements having a similar effect, nor any general blocking or filtering measures by public authorities, or restrictions that go further than those applied to other means of content delivery. When exceptional circumstances justify the blocking of unlawful content, it is necessary to avoid targeting users who are not part of the group for whose protection a filter has been activated.

The Internet being a public forum par excellence, the State has a narrow margin of appreciation with regard to information disseminated through this medium. This is even more the case as regards hyperlinks to web pages that are not under the *de facto* or *de iure* control of the hyperlinker[30]. In this

---

evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." A narrow majority confirmed this laudable approach in *Reno*'s follow-up, *Ashcroft v. American Civil Liberties Union*, 542 US 656 (2004). One year before, the Supreme Court had made a step backwards, by refusing public-forum status to Internet access in public libraries (see *United States v. American Library Association*, 539 US 194 (2003)), based on an unconvincing parsimonious interpretation of the traditionality component of the public-forum doctrine and an unfortunate categorisation of the Internet as a technological extension of a book stack, thus overlooking the fact that if libraries had the right to curtail the public's receipt of already available Internet information, that would equate to the right to prevent access to books already available on the stack, in other words, the right to censorship. As the far-sighted dissenting opinions of Justices Stevens and Souter note, the majority admit the risks of overblocking the access of adults to a substantial amount of non-obscene material harmful to children but lawful for adult examination, and a substantial quantity of text and pictures harmful to no one.

29. This so-called principle of "Internet neutrality", recently affirmed by the Committee of Ministers of the Council of Europe, shares the exact same ideological grounds as the public-forum doctrine. The Committee adds that traffic management and filtering of illegal content should not be seen as a departure from the principle of network neutrality, since exceptions to this principle should be considered with great circumspection and need to be justified by "overriding public interests".

30. An eloquent justification of this was given by Justice Abella of the Supreme Court of Canada in *Wayne Crookes, et al. v. Jon Newton*, (2011) 3 SCR 269, 2011 SCC 47: "The Internet cannot, in short, provide access to information without hyperlinks. Limiting their

case, the narrow margin of appreciation of the State is determined by the principle that no liability may be imputed to the "hyperlinker" based on the illegal content of the hyperlinked web pages, except when the hyperlinker has *de iure* or *de facto* control of the hyperlinked web page or has endorsed the illegal content of the hyperlinked web page. Linking by itself cannot be understood as a tacit expression of approval, additional elements being necessary to evidence the deliberate *mens rea* of the hyperlinker.

The nature of the speech

The Court has acknowledged that a wide margin of appreciation is afforded to the Contracting States when regulating expression in relation to matters of private interest, such as those within the sphere of religious[31] and commercial matters[32]. However, there is little scope under Article 10 § 2 of

---

usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential 'chill' in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control."

31. See *Murphy*, cited above, § 67. Nonetheless, the Court stated clearly that its assessment was restricted to the question whether a prohibition of a certain type (advertising) of expression (religious) through a particular means (the broadcast media) could be justified in the particular circumstances of the case. Anyway, the compatibility of this line of reasoning with the Court's own interpretation of the freedom of religion and the neutral role of the State in religious matters is problematic, as will be demonstrated.

32. See *markt intern Verlag GmbH and Klaus Beermann v. Germany*, 20 November 1989, § 33, Series A no. 165; *Groppera Radio AG and Others v. Switzerland*, § 72, 28 March 1990, Series A no. 173; *Casado Coca v. Spain*, 24 February 1994, § 50, Series A no. 285-A; *Demuth v. Switzerland*, no. 38743/97, § 42-43, ECHR 2002-IX; and *Krone Verlag GmbH & Co. KG v. Austria (no. 3)*, no. 39069/97, § 30, ECHR 2003-XII. The Court's task has been confined in these cases to ascertaining whether the measures taken at the national level are "justifiable in principle and proportionate", which in fact leaves room for full Convention supervision. Added to this quite broad criterion of supervision, the Court's justification of the alleged wide margin of appreciation in regard to commercial speech is problematic. In fact, the "complex and fluctuating area" of trade, competition and advertisement should not be a cover for a lesser protection of consumer rights, especially in view of the growing international consensus on standards of fairness in business and advertisement. At this juncture, it is also relevant to stress that the Court itself has significantly diminished the impact of the *markt intern* jurisprudence, in so far as it has admitted that commercial statements, i.e., commercially motivated or otherwise commercial in their origin, may also be involved in a debate of general interest and thus the margin of appreciation should be concomitantly reduced (see *Hertel v. Switzerland*, 25 August 1998, § 47, *Reports of Judgments and Decisions* 1998-VI, and *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, §§ 69-71, ECHR 2001-VI). The distinction between "purely commercial speech" and commercial speech with political overtones shows the intrinsic weakness of the apparently generous standard of margin of appreciation established by a minimum majority of the Court in *markt intern*.

the Convention for restrictions on political speech or any other matters of general interest[33].

Taking into consideration not only the contested poster, but also the website to which the poster referred and those other websites to which the first site was hyperlinked and the literature referred to by the domestic authorities, it is difficult to define the type of speech in issue in the present case. One thing is clear: the speech of the Movement falls outside the commercial context, in which members of the public are induced to buy a particular product. Three reasons can be put forward to support this assessment. Firstly, profit was not a relevant purpose, let alone the main purpose, of the message of the Movement displayed on the poster or in its website. What was at stake in this communication was not the applicant association's "purely commercial" interest[34]. In fact, the applicant association does not even have a statutory profit-making purpose, since it is a non-profit association *(association à but non lucratif*, according to Article 1 of its Constitution, *statuts révisés de la religion raëlienne en Suisse*). In addition, no sale was proposed on the poster and the products which were proposed for sale on the website, such as books, had an informational function, in accordance with the alleged pedagogical purpose (*renseigner le grand public*) of the Movement foreseen in Article 2 of the same Constitution. Secondly, the fact that the applicant association paid for the poster to be posted on the public billboards of the City of Neuchâtel is immaterial. Expression does not lose Convention protection to which it would otherwise be entitled simply because it appears in the form of a paid advertisement.[35] Thirdly, the linking to the Clonaid website is also irrelevant, since the applicant association and Clonaid were at the material time – and still are – different legal entities. No evidence whatsoever was provided to the Court that the applicant association ever gained or even could have gained any profit from the cloning services made available by a third party.

The speech in issue seems to be close to philosophical debate, since the applicant association claims to be discussing the relationship between

33. See *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103; *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236; and *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239.

34. To use the exact words of *VgT Verein gegen Tierfabriken* and *Demuth* (both cited above), the applicant association's speech was not "purely commercial", or "primarily commercial". This same conclusion was reached in the decision of the Land Management Directorate of 27 October 2003 (p. 8): "Indeed, the poster in issue does not advertise the sale of books, courses or other items. Some works may be obtained via the above-mentioned website, but this is an item of information among others."

35. As Justice Brennan wrote in the landmark case of New York Times *v. Sullivan*, 376 US 255 (1964), "that the *Times* was paid for the advertisement is immaterial in this connection as is the fact that newspapers and books are sold". The same rationale applies to rented public billboards in the City of Neuchâtel.

science and religion and to be disclosing a message purportedly transmitted by extraterrestrials in this connection. The applicant association not only purports to convey a message on the future of mankind, but also on the way today's men and women should live, from which ethical implications derive. If in addition one takes into consideration, as did the domestic courts, the references on the applicant association's website to geniocracy and the campaign for women's rights, the speech in issue also takes on a clear political connotation, which is reinforced by a general criticism of the present-day model of social, political and economic structures of Western societies. Regardless of the intrinsic philosophical value of the speech, which is obviously not under the Court's jurisdiction, it is undeniable that it portrays a "general perspective of the world", a *Weltanschauung*[36]. Consequently, the encompassing and mixed nature of the applicant association's speech, involving several issues of general interest, narrows the breadth of the margin of appreciation afforded to the State.

The proportionality test

Having clarified the applicable assessment criteria, the impugned interference now has to be examined in the light of the case as a whole in order to determine whether it is "proportionate to the legitimate aim pursued" and corresponds to a "pressing social need", the specific reasons given by the national authorities therefore having to appear "relevant and sufficient" for those purposes. Thus, a thorough analysis of the reasons put forward by the domestic authorities in the light of the necessity and proportionality tests is required. Those reasons were related to the applicant association's positions in matters of scientific atheism, defence of cloning and "geniocracy", and to the possibilities of sexual abuse allegedly stemming from the content of the Raelian Movement's website and literature.

36. The domestic authorities admitted the existence of a "spiritual conception of life". The decision of the Land Management Directorate of 27 October 2003 (p. 7) refers to a "global conception of the world", which is based on "a new vision of the universe that gives us keys to awaken our potential and values to revolutionise society, ... to enable humanity to change war into peace, work into leisure, poverty into self-fulfilment and money into love". The Directorate also noted the political connotation of the Movement's speech, highlighting their campaign against female genital mutilation in African countries and in favour of the protection of women's rights in Afghanistan and Africa. The same characterisation is found in the judgment of the Administrative Court of 22 April 2005 (p. 8): "this vision corresponds to a global vision of the world."

Scientific atheism

The Federal Court admitted that the applicant association's anti-clerical ideas and especially its wording on the poster about a message supposedly transmitted by extraterrestrials or its remark that science was replacing religion were not particularly provocative in nature, even if they might be offensive for part of Swiss society[37]. The freedom of thought, conscience and religion guaranteed by the Convention entails freedom to hold or not to hold religious beliefs and to practise or not to practise a religion[38]. The State may not unduly suppress or restrict free communication of all believers, agnostics, atheists and sceptics, under the guise of respecting the religious sentiment of the majority. Consequently, freedom of expression allows for criticism of religion, churches, religious institutions and the clergy, as long as it does not derail into defamation (i.e., deliberate insult of persons and institutions)[39], or hate speech (i.e., promotion of hatred against a religious group)[40] or blasphemous speech (i.e., wilful deprecation of a particular religion by denigrating its doctrine or its deities)[41]. The line between criticism in religious matters and blasphemy is a very thin one, as European history has shown. In drawing that line, the Court departs from a civil libertarian doctrine, according to which freedom of expression should always prevail over freedom of religion, as well as from an opposite State-centred view, which would defer to public authorities unlimited power to regulate expression in public space according to the religious sentiment of the majority. Neither one nor the other extreme view is in accordance with the spirit of tolerance which is a feature of a democratic society. Only an approach that seeks to balance free speech and the freedom of others to hold religious beliefs is compatible with the Convention[42]. Indeed, the Court has

37. Federal Court judgment of 20 September 2005, p. 8.
38. See the leading case *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A, and the later case of *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I.
39. See *Giniewski v. France*, no. 64016/00, ECHR 2006-I.
40. See *Norwood v. the United Kingdom* (dec.), no. 23131/03, ECHR 2004-XI.
41. See *Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A no. 295-A; *Wingrove v. the United Kingdom*, 25 November 1996, *Reports* 1996-V; and *İ.A v. Turkey*, no. 42571/98, ECHR 2005-VIII.
42. Also pointing in this direction, see the Parliamentary Assembly of the Council of Europe Resolution 1510 (2006) on freedom of expression and respect for religious beliefs, according to which freedom of expression should not be further restricted to meet increasing sensitivities of certain religious groups, but at the same time hate speech against any religious group is not compatible with the fundamental rights and freedoms; Recommendation 1804 (2007) on State, religion, secularity and human rights, which reiterated that freedom of expression could not be restricted out of deference to certain dogmas or the beliefs of a particular religious community; and Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion, which underlined that religious groups must tolerate, as must other groups, critical

frequently emphasised the State's fundamental role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed[43]. Thus, tolerance requires a content-neutral stance on the part of the State with regard to different forms of expression with a religious connotation.

In the present case, since the speech of the applicant association on the replacement of religions by an alleged "scientific atheism" and its criticism of established churches did not constitute, at the material time, a form of hate speech, nor a form of denigration of religion or religious institutions or the clergy[44], it was not proportionate to prohibit the contested poster on such basis.

Cloning

The Federal Court concluded that the linking of the applicant association's website to that of the company Clonaid "contribute[d] to the promotion of an illicit activity and went further than a simple statement of an opinion"[45]. In fact, human cloning is prohibited by the Additional Protocol to the Oviedo Convention of 12 January 1998, ratified by twenty-one of the forty-seven member States of the Council of Europe, including Switzerland. At the material time, Switzerland had not yet ratified the Protocol, since it only took that step on 24 July 2008. Nevertheless,

---

public statements and debate about their activities, teachings and beliefs, provided that such criticism did not amount to intentional and gratuitous insults or hate speech and did not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion.

43. See *Manoussakis and Others v. Greece*, 26 September 1996, § 47, *Reports* 1996-IV; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 91, ECHR 2003-II; and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 107, ECHR 2005-XI. From this point of view, the suppression of all kinds of religious or anti-religious speech in public space or in public means of communication is not a Convention compatible, non-discriminatory form of regulation of expression. As Justice Kennedy put it, it is "simply wrong" to say that debate is not skewed so long as multiple voices are silenced: the debate is skewed in multiple ways (see *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 US 819).

44. In a judgment of the Federal Court of 16 September 2003, the Movement's criticism of paedophile priests was found to be in conformity with Swiss law, with the argument: "It is indeed public knowledge that there are paedophile priests and that their hierarchy have not always taken the necessary steps to prevent those who have committed such acts from continuing."

45. Federal Court's judgment of 20 September 2005, p. 9.

Article 119, paragraph 2 (a), of the Federal Constitution, on the prohibition of human cloning, was already in force in March 2001.

The domestic authorities' review in this connection was doubly indirect, because it concerned a reference on the impugned poster to the applicant's website and, in turn, a hyperlink on that website to the website of Clonaid. The applicant association has not denied expressing opinions in favour of cloning, but claims that it has never participated in therapeutic or experimental acts in the field of human cloning. No evidence was presented before the Court or the domestic authorities of any such participation or of any *de iure* or *de facto* control by the applicant association over the Clonaid website. In addition, no evidence was produced as to the state of the websites of both the applicant and Clonaid at the material time. Nevertheless, in view of the explicit endorsement given to Clonaid by the applicant, the question whether the illegality of Clonaid's cloning services could potentially taint the legality of the applicant association's own website must be raised.

The promotion of cloning by the applicant association and its endorsement of Clonaid's activity did not constitute *per se* an unlawful act punishable under domestic law. In fact, the Swiss Criminal Code provides for the offence of public incitement to commit a crime (*Öffentliche Aufforderung zum Verbrechen* – see Article 259 of the Criminal Code), but this provision requires as a constitutive element of the criminal conduct that the incitement must have taken place in an unequivocal way in relation to a crime, whose form and content are sufficiently precise to be recognised by common citizens and to influence them, the mere endorsement of an idea being irrelevant for the purposes of the provision[46]. The Swiss Federal Council itself acknowledged twice, in its response of 10 September 1997[47] and in its response of 21 May 2003 (see paragraph 24 of the judgment) to questions from members of parliament, the lawfulness of the Movement's

46. See to this effect the Federal Court judgment of 5 July 1985 (BGE 111 IV 152: *von einer gewissen Eindringlichkeit, die nach Form und Inhalt geeignet ist, den Willen der Adressaten zu beeinflussen*) and, among legal scholars, Stratenwerth and Wohlers, *Schweizerisches Strafgesetzbuch Handkommentar*, Berne, 2007, p. 649; Stratenwerth and Bommer, *Schweizerisches Strafrecht, Besonderer Teil II: Straftaten gegen Gemeininteressen*, Berne, 2008, pp. 194-95; and Fiolka, in Niggli/Wiprächtiger, *Baseler Kommentar Strafgesetzbuch, II*, Basle, 2007, annotations 10-13 to Article 259. Similar provisions are to be found, for instance, in the Austrian Criminal Code (§ 282), the German Criminal Code (§ 111), the French Law of 29 July 1881 (section 23), the Italian Criminal Code (Article 414) and the Portuguese Criminal Code (Article 297).

47. According to the Federal Council's response of 10 September 1997, the activities of the Movement should not even be – and in fact were not – covered by police prevention ("In accordance with the directives of the [Federal Department of Justice and Police] – as approved by the Federal Council – dated 9 September 1992 on the implementation of State protection, it is not in principle for the Federal Police, in its capacity as police prevention authority, to deal with such organisations. Consequently, the Federal Police have no information concerning the area of activity of the Raelian sects").

activity of promotion of cloning. Since the applicant association was not engaged in any unlawful cloning activity, not even as a moral or material accomplice, it was not proportionate to prohibit the mere statement of an opinion favourable to cloning.

"Geniocracy"

The applicant association advocates "geniocracy", which represents government by an intellectual elite. The Federal Court considered that this ideology was "capable of offending the democratic and anti-discriminatory convictions that underpin the rule of law"[48]. Geniocracy undeniably runs counter to democratic principles, since it breaches the principle of equality of all citizens. However, as the Federal Court also admitted, the idea of geniocracy is not presented by the applicant as a "real political project" but rather as a "utopia" which would be fulfilled voluntarily[49]. This situation is distinct from those cases where the Court has found restrictions on freedom of expression to be proportionate in respect of organisations defending political projects that were incompatible with the concept of a "democratic society"[50]. Hence, it was not proportionate to prohibit a mere utopian speech.

"Sensual meditation"

The Federal Court laid great emphasis on the fact that a number of criminal cases of sexual abuse of children involved members of the Raelian Movement. It pointed out that certain passages from the publications accessible via the Movement's website concerning the notions of "sensual meditation" or "sensual awakening" of children could "seriously shock its readers" and "lead adults to commit acts of sexual abuse"[51].

The Movement's official position, as expressed on its website, is total condemnation of paedophilia. It even founded an organisation called "Nopedo", which reports cases of paedophilia to the authorities[52].

An objective assessment of this sensitive issue requires a distinction between two situations:

(a) Final criminal convictions of members of the Raelian Movement for sexual abuse of children committed outside the context of the organisation's activities could hardly be regarded as a relevant and sufficient reason for which to ban the poster campaign in question, in view of the tenuous and

48. See the judgment of the Federal Court of 20 September 2005, p. 9.
49. Ibid.
50. See, for example, *Refah Partisi (the Welfare Party) and Others*, cited above, § 132.
51. See the judgment of the Federal Court of 20 September 2005, pp. 9-11.
52. In its judgment of 16 September 2003, the Federal Court decided that Nopedo's reporting action did not breach the law.

remote connection between any such convictions, related to conduct in the sphere of the private life of the persons concerned, and the content of the Raelian Movement's website.

(b) Final criminal convictions of members of the Raelian Movement for sexual abuse of children committed within the context of the organisation's activities could potentially justify banning the Movement as such, and *a fortiori* the poster campaign in issue.

The Government were asked to inform the Grand Chamber of all final convictions of members of the Raelian Movement for sexual abuse of children within and outside the context of the organisation's activities. In fact, the only final criminal convictions definitely proven to date are the following.

(i) A judgment of the Colmar Court of Appeal, dated 5 April 2005, pronouncing a conviction and a six-year prison sentence for "sexual assault on a minor under 15 by a parent or person with authority" as a result of sexual contact between a member of the Movement and his children in the years 1995 to 1997. These facts occurred within the boundaries of the private life of this member and should not be imputed to the Movement itself or its website.

(ii) A judgment of the Lyons Court of Appeal of 24 January 2002 sentencing four members of the Movement to prison sentences of up to eighteen months (with and without suspension), for "*corruption de mineures*" (inciting female minors to engage in unlawful sexual activity). These crimes consisted in consensual sexual relationships with minors of 15 or more years of age within the context of meetings organised by the Movement in 1996 and 1997.

Both these judgments were published after 2001, which means that at the material time of the poster ban there were no final criminal convictions on which the Neuchâtel police and the municipal council could base their decision against the applicant association. Even after the publication of the above-mentioned convictions, the Administrative Court concluded "it is true that the Movement cannot be found to advocate paedophilia"[53]. Meanwhile, fourteen years have passed since the facts described in the criminal judgments occurred and no other convictions have followed. The publications mentioned by the domestic courts were released more than thirty years ago and no proceedings have ever been opened to withdraw them from the market. In such a situation the question is whether the reasons given by the authorities to justify the ban on the poster campaign suffice.

No criminal actions were ever proven in Switzerland and those which were proven in France are not sufficient to show a pattern of behaviour of sexual abuse of minors within the applicant association. One criminal

53. Judgment of the Administrative Court of 22 April 2005, p. 12.

conviction for illicit consensual sexual practices committed within the context of the organisation's activities in over thirty years is certainly no evidence of a dangerous pattern of behaviour attributable to the Movement, especially if one considers that the allegedly "dangerous" publications have been available to the general public during that same period of time. Moreover, neither in the reasons given by the domestic courts, nor in the Government's observations before the Court, is there any indication whatsoever that there was a clear and imminent danger which justified the impugned interference at the precise time it was undertaken. Yet, the Court has established that measures interfering with freedom of expression which purport to safeguard public order, prevent crime and defend the rights of others require evidence of a clear and imminent danger. This standard has been ignored by the domestic authorities[54]. In those conditions, one cannot but conclude that it was not proportionate to ban the contested poster campaign in Neuchâtel.

The necessity test

The Government argued that the poster ban was limited in its scope, as the applicant association remained free to "express its beliefs through the numerous other means of communication at its disposal" and "there was never any question of banning the applicant association itself or its website"[55]. There are two logical contradictions in this line of reasoning.

54. This standard was established in *Gül and Others v. Turkey*, no. 4870/02, § 42, 8 June 2010, and reiterated in *Kılıç and Eren v. Turkey*, no. 43807/07, § 29, 29 November 2011. A similar test was first used by the US Supreme Court when it upheld the convictions of anti-war socialists under the 1917 Espionage Act (*Schenk v. United States*, 249 US 47 (1919)). Writing the opinion of the court, Justice Oliver Wendell Holmes reasoned that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent". In his dissent in *Abrams v. United States*, 250 US 616 (1919), Holmes refined the standard by saying that the State may punish speech "that produces or is intended to produce a clear and imminent danger that will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent". In *Brandenburg v. Ohio*, 395 US 444 (1969), the Supreme Court substituted the clear and present danger test for a direct incitement test, which coincides with the immediacy test of Holmes. This same standard was established by the United Nations Human Rights Committee in *Coleman v. Australia*, Communication No. 1157/2003, UN Doc CCPR/C/87/D/1157/2003 (10 August 2006), on criminal punishment for taking part in a public address in a pedestrian mall without a permit, on issues such as bills of rights, land rights and freedom of speech, without being threatening or unduly disruptive or otherwise likely to jeopardise public order in the mall. The test of a "concrete fear of serious damage" of the German Federal Constitutional Court, although not referring directly to the immediacy requisite, presupposes it, in view of the "concreteness" that the fear is required to have.

55. Judgment of the Federal Court of 20 September 2005, p. 11.

Firstly, there is a contradiction between the prohibition of the poster, which referred to the website, and the official tolerance of the website itself. If the website is accepted by the Swiss authorities, it is because the ideas it imparts do not breach Swiss law. The website being lawful, the poster which simply refers to it is necessarily lawful. This is a simple question of logic[56].

Secondly, there is a contradiction between the prohibition of the poster and the official tolerance of the applicant association itself. The statutory purposes of the applicant association include the advertising of a message supposedly communicated by extraterrestrials[57]. If the applicant's statutory purposes are in accordance with Swiss law, as the domestic authorities and the respondent Government admit, a poster bearing a mere reference to the association and its website is also legal. In the absence of a legal decision of dissolution of the association, taken under Article 78 of the Swiss Civil Code, it is illegitimate to prohibit the dissemination of the applicant association's website.

The Government claimed that the particular danger of the poster lay in the fact that it allowed the broader public to look at the site. This contradictory line of argument does not stand up. It cannot at the same time be said that the website remained a good alternative by which to impart ideas of the Movement and that the same website should be hidden from the broader public because of the ideas that it imparted. Furthermore, the mere evidence of facts suffices to show that the Internet has a much larger audience than any poster would have. Even assuming that the message of the website was the evil to avoid, there is no possible justification for prohibiting a lesser evil (a poster referring to the website) and permitting the greater evil (the website itself).

Lastly, the poster ban in Neuchâtel was all the less "necessary" in that a host of similar posters of the applicant association had been duly authorised in other Swiss municipalities, without any knowledge of public inconvenience or disorder being recorded. Thus the prohibition of the poster was not the least possible prejudice chosen by the domestic authorities. It was an ineffective and useless means of restricting in a particular city of Switzerland a lawful speech which had a nationwide and even worldwide audience. Given the uncontested presence of the Movement and its message

---

56. In logical terms, a simple argument *maiore ad minus* describes an obvious inference from a claim about a stronger entity, greater quantity, or general class to one about a weaker entity, smaller quantity, or specific member of that class. The reasoning from greater to smaller is imperative, as in the example "If a door is big enough for a person two metres high, then a shorter person may also come through". If the applicant association's website is in accordance with the Swiss law, the poster which merely refers to it is also lawful.

57. See Article 2 of the *statuts révisés de la religion raëlienne en Suisse*.

throughout the country and the world, the poster ban was a futile measure, and futile measures cannot be necessary.

The *Murphy* case-law does not support the domestic authorities' conduct either, contrary to what the Federal Court concluded. In fact, in *Murphy* the Court admitted the general prohibition of religious advertising on television owing to the circumstance that television advertising had a "more immediate, invasive and powerful impact" on the passive recipient[58]. But in the present case the respondent Government did not produce evidence that the City of Neuchâtel had a policy of prohibiting all religious advertising through poster campaigns and, even if they had done so, that evidence would not prove valid for an association with a broader message such as that of the Raelian Movement. In addition, even if the applicant association's message was restricted to its religious aspects and its website was considered a mere religious advertisement, *Murphy* would still not be applicable to the current case, since a website is not analogous to broadcasting. It is self-evident that the website does not have the same "immediate, invasive and powerful impact" on the general public that television broadcasting has[59].

Be that as it may, the existence of alternative means of communication available to the applicant association could not by itself justify the interference with its freedom of expression[60]. The limited scope of the interference does not free the State of the duty to provide a sufficient reason for it, which it did not do in the present case. The mere fact that public authorities choose to interfere with a limited means of communication does not excuse them from having to provide a convincing argument to support the pressing social need for the interference. Moreover, since the poster ban was based on the content of the website, the applicant association can legitimately fear that questions concerning the legality of the site itself will arise later on and that this alleged alternative will be suppressed in the near future. This places the applicant association in a situation of uncertainty that is hardly compatible with the spirit of Article 10 of the Convention. It would thus suffice for a city or a State to decide that it did not wish its name to be associated with certain non-majority but lawful ideas in order to justify a systematic denial and oppose the expression of such ideas in public on a permanent basis. In fact, that was exactly what happened in the instant case, as the subsequent sequence of events demonstrates.

The Government's argument is definitely prejudiced by the fact that the Neuchâtel authorities refused not once, not twice, but three times to allow the applicant access to the public forum. In June 2004, another poster

58. See *Murphy*, cited above, § 74.
59. See, along the same line, *Reno v. American Civil Liberties Union*, 521 US 844 (1997), stating that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden".
60. See *Women On Waves and Others*, cited above, § 39.

campaign proposed by the applicant association was prohibited in Neuchâtel. Prior to these rejections of 2001 and 2004, a request to publish on a billboard in the public space of Neuchâtel had already been refused in 1999. These facts show an inadmissible pattern of content-based discriminatory conduct of public authorities towards a minority. The systematic prohibition of any expression through billboards and posters in a public area casts strong doubt on the objectiveness and impartiality of the State conduct. And where there is no objective or impartial judgment, there is no proportionality assessment, but rather arbitrariness. Content-based expression control ends up as pure speaker-based discrimination. Such State conduct inevitably produces a chilling effect not only in regard to the applicant association, but also in regard to any person wishing to communicate ideas not shared by the majority[61].

Individuals do not have an unconditional or unlimited right to the extended use of public space, especially in relation to State facilities intended for advertising or information campaigns. That being said, the State has a duty to respect freedom of expression when it is called upon to supervise the terms of use of a concession such as that in issue in the present case. Such limitations or restrictions must in particular respect the principle of equality of all citizens. In other words, the public authorities must above all refrain from reserving different treatment for groups or organisations with whose actions or opinions they do not agree.

Conclusion

The very purpose of Article 10 of the Convention is to preclude the State from assuming the role of watchman for truth and from prescribing what is orthodox in matters of opinion. The State must strictly adhere to the principle of content-neutrality when it decides how to make a public space available, refraining from banning a campaign on the pretext that authorisation could imply approval or tolerance of the opinions in question. Such prohibitions are not compatible with the pluralism inherent in democratic societies, where ideas are freely exchanged in a public space and truth and error emerge from an unrestricted confrontation of ideas. As John Stuart Mill put it, "The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error"[62].

---

61. See *Women On Waves and Others*, cited above, § 43, and *Bączkowski and Others v. Poland*, no. 1543/06, § 67, 3 May 2007.

In the instant case, having regard to the State's negative obligation to refrain from interfering with the applicant association's freedom of expression, the mixed nature of the association's speech, the legality of the speech, the association's website and statutory purposes at the material time, the inexistence of any clear and imminent danger resulting from this speech and the contradictory and arbitrary scope of the poster ban, and after examining the decisions given by the competent authorities in the light of the narrow margin of appreciation applicable to the case, I cannot but conclude that the reasons on which the impugned ban was based were not sufficient and that the interference did not correspond to a pressing social need.

62. John Stuart Mill, *On Liberty*, 1859.