alternative ways of ascertaining whether there was compliance with the assurances. These conclusions were not irrational. The contention that the assurances did not, on their true construction, protect against inhuman treatment was not well founded.

125. For these reasons the irrationality challenge to SIAC's conclusions does not succeed. I would reject the appeals brought by RB and U.

Was SIAC's decision in relation to Mr Othman's article 3 challenge irrational?

126. The attack made by counsel for Mr Othman on SIAC's conclusions in relation to article 3 was essentially founded on the weight that SIAC had given to the assurances in the MOU. Just as in the case of Algeria, these assurances were agreed in principle at the highest level in discussions between the Prime Minister and the King of Jordan and between the Foreign Secretary and the Jordanian Foreign Minister. SIAC considered in depth the way that Mr Othman was likely to be treated before his trial, during the trial process and after it. The conclusion reached was that there were not substantial grounds for believing that there was a real risk that Mr Othman would be subjected to inhuman treatment. The MOU was not critical to this conclusion. SIAC commented that the political realities in Jordan and the bilateral diplomatic relationship mattered more than the terminology of the assurances. The former matters, and the fact that Mr Othman would have a high public profile, were the most significant factors in SIAC's assessment of article 3 risk. Study of SIAC's lengthy and detailed reasoning discloses no irrationality.

The European Court of Human Rights appears to accept that diplomatic assurances may be relevant to the evaluation of the seriousness of the risk taken in returning a person to a country where that person alleges he or she will be subjected to forms of treatment contrary to Article 3 ECHR, or will be sentenced to death. In fact, it may even be said that the practice of the Court itself is to accept diplomatic assurances. In the case of *Shamayev and others* v. *Georgia and Russia* for instance, the Court was asked to decide whether the extradition from Georgia to Russia of a number of individuals accused of committing terrorist acts in Chechenya would be in violation of Article 3 ECHR. When it received the application, the Court decided to indicate to the Georgian Government, in application of Rule 39 of its Rules of Procedure, that it would be in the interests of the parties and the proper conduct of the proceedings before the Court not to extradite the eleven applicants to Russia until it had an opportunity to examine the application in the light of the information which the Georgian Government would provide. The Court invited Georgia to submit information on the measures that the Russian Government intended to take in their regard should the extradition go ahead. The interim measure was lifted after the Russian Government gave undertakings to the Court in connection with the applicants, promising in particular that the death penalty would not be applied to them; that their safety and health would be protected; and that they would be guaranteed unhindered access to the Court and free correspondence with it. The Court approaches as follows the weight to be given to such assurances:

European Court of Human Rights, *Shamayev and others* v. *Georgia and Russia* (Appl. No. 36378/02), judgment of 12 April 2005, paras. 343–53:

343. As to the assurances, the Court notes that they were submitted in respect of each of the applicants ... by the Acting Procurator-General, the highest prosecuting authority in criminal cases in Russia. The parties do not dispute that the Georgian Procurator-General also obtained verbal assurances from his Russian colleagues ... In the above-mentioned letters of guarantee, the Acting Russian Procurator-General formally assured the Georgian authorities that the applicants would not be sentenced to death and pointed out that, in any case, application of the death penalty had been forbidden in Russia since the 1996 moratorium. The letter of 27 September 2002 also included specific assurances, ruling out 'torture [and] treatment or punishment that was cruel, inhuman or contrary to human dignity'.

344. In assessing the credibility which the Georgian authorities could have attributed to those assurances, the Court considers it important that they were issued by the Procurator-General, who, within the Russian system, supervises the activities of all prosecutors in the Russian Federation, who, in turn, argue the prosecution case before the courts ... It is also appropriate to note that the prosecution authorities fulfil a supervisory role in respect of the rights of prisoners in the Russian Federation, and that this role includes, *inter alia*, the right to visit and supervise places of detention without hindrance ...

345. In fact, the Court finds nothing in the evidence submitted by the parties and obtained by its delegation in Tbilisi which could reasonably have given the Georgian authorities grounds to doubt the credibility of the guarantees provided by the Russian Procurator-General during the decision-making process. However, the merits of the Georgian authorities' reasoning and the reliability of the assurances in question must also be assessed in the light of the information and evidence obtained subsequent to the applicants' extradition, to which the Court attaches considerable importance.

346. It notes, firstly, that the Georgian authorities clearly agreed only to the extradition of those applicants whose identity could be substantiated ... and who had been in possession of Russian passports at the time of their arrest ...

348. The Court also takes into consideration the photographs of the extradited applicants and of their cells, together with the video recording made in the SIZO in town B and various medical certificates submitted by the Russian Government ... Even if, in certain respects, ... those documents are to be treated with caution, it does not appear that the extradited applicants have been detained in conditions which are contrary to Article 3 or that they have been subjected to treatment prohibited by that provision. In this regard, it is also appropriate to note that Mr Khadjiev and Mr Aziev, the only applicants to have been in correspondence with the Court following their extradition ..., have not complained at any time that they have been subjected to ill-treatment in Russia. Nor have they submitted any information about previous convictions in that country.

349. However, the Court does not overlook the fact that, following their extradition, with the exception of a few written exchanges with the Court, the applicants were deprived of an opportunity to express their version of the facts of the case freely and to inform the Court about their situation in Russia ... In those circumstances, the applicants themselves cannot be entirely blamed for not providing sufficient evidence after their extradition.

350. Nevertheless, it remains the case that the applicants' representatives, in alleging the existence of a risk to the applicants in Russia, have also failed to submit sufficient information as to the objective likelihood of the personal risk run by their clients as a result of extradition. The documents and reports from various international bodies to which they referred provide detailed but general information on acts of violence committed by the Russian Federation's armed forces against civilians in the Chechen Republic ... However, they do not establish that extradition would have imposed a personal threat on the extradited applicants (see *Čonka and others* v. *Belgium* (dec.), no. 51564/99, 13 March 2001, and also, *mutatis mutandis*, *H.L.R.* v. *France* [judgment of 29 April 1997], §42).

351. The applicants' representatives never referred to the manner in which the death sentence is executed in Russia, the conditions of detention while awaiting execution or other circumstances capable of bringing this punishment within the scope of Article 3 ... At no point did they indicate whether the applicants had previously been subjected to treatment that was contrary to this provision, nor did they refer to the applicants' personal experiences in connection with their ethnic origin or their previous political or military experience in the Chechen Republic. The lawyers merely referred to the general context of the armed conflict which is raging in this region and the extreme violence from which their clients all wished to flee. Supposing that the applicants did fight against federal troops within the context of that conflict, the Court has no information about their role and position within their community prior to August 2002, which prevents it from assessing the likelihood of personal risk arising from the applicants' previous history. It notes that the applicants heard by it in Tbilisi had all submitted that neither they nor the extradited applicants had been carrying weapons when they crossed the border ... Some of them even claimed to have been leading a peaceful civilian life in Chechnya or in the border regions of Georgia adjacent to Chechnya ... However, it does not appear from the judicial decisions in Georgia that this was really the case ... Whatever the truth, there is nothing in the evidence before it which enables the Court to consider the applicants as warlords, political figures or individuals who were well-known for other reasons in their country (contrast *Chahal*, cited above, p. 1861, §106), all factors which could have served to render tangible or increase the personal risk hanging over the applicants after they had been handed over to the Russian authorities.

352. Thus, in the absence of other specific information, the evidence submitted to the Court by the applicants' representatives concerning the general context of the conflict in the Chechen Republic does not establish that the applicants' personal situation was likely to expose them to the risk of treatment contrary to Article 3 of the Convention. The Court does not rule out the possibility that the applicants ran the risk of ill-treatment, although they submitted no evidence of previous experience in this connection (contrast *Hilal* v. *United Kingdom*, no. 45276/99, §64, ECHR 2001–II, and *Vilvarajah and others* [judgment of 26 September 1991] §§10, 22 and 33). A mere possibility of ill-treatment in such circumstances, however, is not in itself sufficient to give rise to a breach of Article 3 ..., especially as the Georgian authorities had obtained assurances from their Russian counterparts against even that possibility.

353. In consequence, the Court concludes that, in the light of the evidence in its possession, the facts of the case do not support 'beyond any reasonable doubt' the assertion that, at the time when the Georgian authorities took the decision, there were real or well-founded grounds

to believe that extradition would expose the applicants to a real and personal risk of inhuman or degrading treatment, within the meaning of Article 3 of the Convention. There has accordingly been no violation of that provision by Georgia.

3.4. Question for discussion: diplomatic assurances

Are there any conditions under which diplomatic assurances should be considered to render acceptable, under international human rights law, the return of certain foreigners to their country of origin or to a third country, in circumstances where such return would not be allowed in the absence of such assurances? Imagine a case in which a removal is made possible thanks to diplomatic assurances being obtained from the authorities of return, but where (a) the final decision to remove a person following the reception of these assurances can be challenged before an independent court, prior to its execution; (b) an independent monitoring system is established, allowing the person concerned to return to the State from which he/she is refouled if it appears that the commitments made by the authorities of the State where that person is removed are not complied with. Would this be acceptable? Could such a system be plausibly set up?

3 THE REGIME OF RIGHTS WHICH MAY BE RESTRICTED

3.1 The acceptability of limitations on human rights

Rights of an absolute character are the exception. In general, limitations may be imposed on human rights, provided three conditions are satisfied. First, any interference with a right should be prescribed by law (condition of legality). Second, it must be justified by the pursuance of a legitimate aim (condition of legitimacy). Third, the interference must be limited to what is necessary for the fulfilment of that aim, which means that it must be appropriate to pursuing the objective, and that it may not go beyond what is required in order to effectively achieve that aim – or, at a minimum, that all the interests involved should be carefully balanced against one another (condition of proportionality). The principles to which restrictions to rights should conform have been summarized thus by a group of eminent international law experts:

UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, E/CN.4/1984/4 (1984) (also reproduced in *Human Rights Quarterly*, 7 (1985), 1–57):

A. General Interpretative Principles Relating to the Justification of Limitations

1. No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.

2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.
4. All limitations shall be interpreted in the light and context of the particular right concerned.
5. All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.
6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.
7. No limitation shall be applied in an arbitrary manner.
8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.
9. No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1.
10. Whenever a limitation is required in the terms of the Covenant to be 'necessary', this term implies that the limitation:

    (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
    (b) responds to a pressing public or social need,
    (c) pursues a legitimate aim, and
    (d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.
12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.
13. The requirement expressed in Article 12 of the Covenant, that any restrictions be consistent with other rights recognized in the Covenant, is implicit in limitations to the other rights recognized in the Covenant.
14. The limitation clauses of the Covenant shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding upon the state.

Article 18 ICCPR provides that 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'; a similar formulation may be found in Article 12 para. 3 ICCPR as regards the right to liberty of movement and freedom to choose his residence, and the right to leave any country, which rights 'shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'. Even where the Covenant is less explicit, the same requirements have been identified by the Human

Rights Committee in other provisions of this instrument. For instance, whereas Article 17 ICCPR merely provides for the right of every person to be protected against 'arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation', this has been read by the Committee to include the following requirements:

Human Rights Committee, General Comment No. 16, *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (Art. 17) (8 April 1988):

3. The term 'unlawful' means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

4. The expression 'arbitrary interference' is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression 'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances ...

7. As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant. Accordingly, the Committee recommends that States should indicate in their reports the laws and regulations that govern authorized interferences with private life.

8. Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed de jure and de facto. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited. Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.

The requirements thus formulated in the specific context of the International Covenant on Civil and Political Rights in fact may be generalized to all human rights treaties, whose regimes of limitations follow a same basic structure. For instance, Article 30 of the American Convention on Human Rights states:

> The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

These requirements are by no means limited to interferences with civil and political rights. In concluding the International Covenant on Economic, Social and Cultural Rights, the States Parties recognized that, 'in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society' (Art. 4 ICESCR):

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights adopted in Maastricht on 2–6 June 1986:

46. Article 4 was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.

47. The article was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person.

'determined by law'

48. No limitation on the exercise of economic, social and cultural rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

49. Laws imposing limitations on the exercise of economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory.

50. Legal rules limiting the exercise of economic, social and cultural rights shall be clear and accessible to everyone.

51. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition on application of limitations on economic, social and cultural rights.

'promoting the general welfare'

52. This term shall be construed to mean furthering the well-being of the people as a whole.

'in a democratic society'

53. The expression 'in a democratic society' shall be interpreted as imposing a further restriction on the application of limitations.

54. The burden is upon a State imposing limitations to demonstrate that the limitations do not impair the democratic functioning of the society.

55. While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.

'compatible with the nature of these rights'

56. The restriction 'compatible with the nature of these rights' requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned.

While the different human rights expert bodies or courts have applied this test in a variety of ways, and while their approach is not in all respects uniform, the basic grammar used in order to examine the acceptability of restrictions being imposed to fundamental rights is essentially the same throughout all jurisdictions. A typical formulation is provided by the Human Rights Committee in the following General Comment:

Human Rights Committee, General Comment No. 27, *Freedom of Movement* (Art. 12) (2 November 1999) (CCPR/C/21/Rev.1/Add. 9):

11. Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant ...

12. The law itself has to establish the conditions under which the rights may be limited. State reports should therefore specify the legal norms upon which restrictions are founded. Restrictions which are not provided for in the law or are not in conformity with the requirements of article 12, paragraph 3, would violate the rights guaranteed by paragraphs 1 and 2.

13. In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. art. 5, para. 1); the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.

14. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

15. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.

16. States have often failed to show that the application of their laws restricting the rights enshrined in article 12, paragraphs 1 and 2, are in conformity with all requirements referred to in article 12, paragraph 3. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of 'State secrets', or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities.

The next sections offer certain clarifications on the three conditions which apply to restrictions to fundamental rights: legality (section 3.2.), legitimacy (section 3.3), and proportionality (section 3.4.). In order to illustrate the regime applicable to restrictions of rights, we then turn to a number of cases – respectively from the European Court of Human Rights, from the Human Rights Committee, and from the Canadian Supreme Court – which concern the imposition of vestimentary codes which, in different circumstances, were denounced as resulting in a violation of freedom of religion (section 3.5.).

3.2 The condition of legality

As we have seen, the condition of legality requires that the relevant legislation, on the basis of which the restriction is imposed, must specify in detail the precise circumstances in which such interferences may be permitted. The Inter-American Court of Human Rights has developed a particularly demanding interpretation of the requirement according to which any restriction or suspension of rights should be established according to the principle of legality. It takes the following view:

Inter-American Court of Human Rights, *The Word 'Laws' in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-06/86, of 9 May 1986, paras. 22 and 24:

In order to guarantee human rights, it is ... essential that state actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired. Perhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution ...

Such a procedure not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement, propose different initiatives, participate in the shaping of the political will, or influence public opinion so as to prevent the majority from acting arbitrarily. [The law thus enacted] must [not only be] formally proclaimed but there must also be a system that will effectively ensure their application and an effective control of the manner in which the organs exercise their powers.

Similar requirements are not imposed under other international instruments. Far more common is the understanding of the principle of legality adopted under the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, which state that the expression 'prescribed by law' in that treaty must be seen as imposing a requirement of transparency and accessibility, and as a protection from arbitrariness. 'Law', in that sense, is understood in the material, rather than in the formal sense:

UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, E/CN.4/1984/4 (1984):

15. No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

16. Laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.

17. Legal rules limiting the exercise of human rights shall be clear and accessible to everyone.

18. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights.

This is also in substance the position adopted by the Human Rights Committee:

Human Rights Committee, *Pinkney* v. *Canada*, Communication No. 27/1978, final views of 29 October 1981 (CCPR/C/OP/1 at 95):

31. Mr Pinkney [serving a prison sentence in Canada] complains that while detained at the Lower Mainland Regional Correction Centre he was prevented from communicating with outside officials and was thereby subjected to arbitrary or unlawful interference with his correspondence contrary to article 17(1) of the Covenant. In its submission of 22 July 1981 the State party gives the following explanation of the practice with regard to the control of prisoners' correspondence at the Correction Centre:

Mr Pinkney, as a person awaiting trial, was entitled under section 1.21(c) of the Gaol Rules and Regulations, 1961, British Columbia Regulations 73/61, in force at the time of his detention to the 'provision of writing material for communicating by letter with (his) friends or for conducting correspondence or preparing notes in connexion with (his) defence'. The Government of Canada does not deny that letters sent by Mr Pinkney were subject to control and could even be censored. Section 2.40(b) of the Gaol Rules and Regulations, 1961 is clear on that point:

2.40(b) Every letter to or from a prisoner shall (except as hereinafter provided in these regulations in the case of certain communications to or from a legal adviser) be read by the Warden or by a responsible officer deputed by him for the purpose, and it is within the discretion of the Warden to stop or censor any letter, or any part of a letter, on the ground that its contents are objectionable or that the letter is of excessive length.

Section 42 of the Correctional Centre Rules and Regulations, British Columbia Regulation 284/78, which came into force on 6 July 1978 provides that:

42(1) A director or a person authorized by the director may examine all correspondence other than privileged correspondence between an inmate and another person where he is of the opinion that the correspondence may threaten the management, operation, discipline or security of the correctional centre.

(2) Where in the opinion of the director, or a person authorized by the director, correspondence contains matter that threatens the management, operation, discipline or security of the correctional centre, the director or person authorized by the director may censor that matter.

(3) The director may withhold money, or drugs, weapons, or any other object which may threaten the management, operation, discipline, or security of a correctional centre, or an object in contravention of the rules established for the correctional centre by the director contained in correspondence, and where this is done the director shall

(a) Advise the inmate,
(b) In so far as the money or object is not held as evidence for the prosecution of an offence against an enactment of the province or of Canada, place the money or object in safe-keeping and give it to the inmate on his release from the correctional centre, and
(c) Carry out his duties under this section in a manner that, in so far as is reasonable, respects the privacy of the inmate and person corresponding with the inmate.

(4) An inmate may receive books or periodicals sent to him directly from the publisher.

(5) Every inmate may send as many letters per week as he sees fit.

32. Although these rules were only enacted subsequent to Mr Pinkney's departure from the Lower Mainland Regional Correction Centre, in practice they were being applied when he was detained in that institution. This means that privileged correspondence, defined in section 1 of the regulations as meaning 'correspondence addressed by an inmate to a Member of Parliament, Members of the Legislative Assembly, barrister or solicitor, commissioner of corrections, regional director of corrections, chaplain, or the director of inspection and standards', were not examined or subject to any control or censorship. As for non-privileged correspondence, it was only subject to censorship if it contained matter that threatened the management, operation, discipline, or security of the correctional centre. At the time when Mr Pinkney was detained therein, the procedure governing prisoners' correspondence did not allow for a general restriction on the right to communicate with government officials. Mr Pinkney was not denied this right. To seek to restrict his communication with various government officials while at the same time allowing his access to his lawyers would seem a futile gesture since through his lawyers, he could put his case to the various government officials whom he was allegedly prevented from contacting ...

34. No specific evidence has been submitted by Mr Pinkney to establish that his correspondence was subjected to control or censorship which was not in accordance with the practice described by the State party. However, article 17 of the Covenant provides not only that 'No one shall be subjected to arbitrary or unlawful interference with his correspondence' but also that 'Everyone has the right to the protection of the law against such interference.' At the time when Mr Pinkney was detained at the Lower Mainland Regional Correction Centre the only law in force governing the control and censorship of prisoners' correspondence appears to have been section 2.40(b) of the Gaol Rules and Regulations, 1961. A legislative provision in the very general terms of this section did not, in the opinion of the Committee, in itself provide satisfactory legal safeguards against arbitrary application, though, as the Committee has already found, there is no evidence to establish that Mr Pinkney was himself the victim of a violation of the Covenant as a result. The Committee also observes that section 42 of the Correctional Centre Rules and Regulations that came into force on 6 July 1978 has now made the relevant law considerably more specific in its terms.

In United States constitutional law, a criminal provision that is vague can be found invalid on its face 'for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement' (*City of Chicago* v. *Morales et al.*, 527 U.S. 41 (1999) (finding a loitering ordinance unconstitutionally vague); see also, for a very explicit statement in this regard, *Grayned* v. *City of Rockford*, 408 U.S. 104 at 108–9 (1972)). These are also the two values that are protected by the requirement of legality in international human rights law. Vagueness can lead the individual to abstain from exercising certain freedoms, out of fear that he or she might be subject to certain penalties or sanctions, when the conduct that is prohibited is not defined with sufficient clarity. It creates, in other terms, a 'chilling effect' on the exercise of these freedoms. In addition, vagueness creates a risk of arbitrariness and, hence, discrimination, in the enforcement of the law, in violation of the principle of equality before the law (on this principle, see chapter 7, section 2.1.).

However, the requirement of legality in the interference with human rights has not been interpreted uniformly throughout all situations in which it was invoked. The European Court of Human Rights for instance, has occasionally insisted on the 'quality of the law' providing for a restriction to the individual right, thus adding a new set of requirements concerning the guarantees provided by the legal framework. This is illustrated by the two following cases, which concern respectively the right to respect for private life and freedom of association:

European Court of Human Rights (GC), *Rotaru* v. *Romania* (Appl. No. 28341/95), judgment of 4 May 2000:

[In 1989, after the communist regime had been overthrown in Romania, Legislative Decree No. 118/1990 was passed, granting certain rights to those who had been persecuted by the communist regime and who had not engaged in Fascist activities. In accordance with this legislation, the applicant sought to have a prison sentence that had been imposed in a 1948 judgment for political activities taken into account in the calculation of his length of service at work. He also sought payment of the corresponding retirement entitlements. However, in the course of those proceedings, the Ministry of the Interior submitted to the Court a letter of 19 December 1990 that it had received from the Romanian Intelligence Service (RIS), stating that Aurel Rotaru had been a member of the Romanian extreme-right legionnaire movement and that he had no criminal record and, contrary to what he maintained, was not imprisoned during the period he mentioned. This, Mr Rotaru considered to be defamatory, and he sued for damages. The Romanian courts found that the information that the applicant had been a legionnaire was false. The claim for damages was dismissed, however, on the ground that the RIS could not be held to have been negligent as it was merely the depositary of the impugned information, and that in the absence of negligence the rules on tortious liability did not apply. Before the European Court of Human Rights, Mr Rotaru complained that the RIS held and could at any moment make use of information about his private life, some of which was false and defamatory. He alleged a violation of Article 8 of the Convention, which guarantees the right to respect for private life.]

52. The Court reiterates its settled case law, according to which the expression 'in accordance with the law' not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects ...

53. In the instant case the Court notes that Article 6 of Legislative Decree No. 118/1990, which the Government relied on as the basis for the impugned measure, allows any individual to prove that he satisfies the requirements for having certain rights conferred on him, by means of official documents issued by the relevant authorities or any other material of evidential value. However, the provision does not lay down the manner in which such evidence may be obtained and does not confer on the RIS any power to gather, store or release information about a person's private life.

The Court must therefore determine whether Law No. 14/1992 on the organisation and operation of the RIS, which was likewise relied on by the Government, can provide the legal basis for these measures. In this connection, it notes that the law in question authorises the RIS to gather, store and make use of information affecting national security. The Court has doubts as to the relevance to national security of the information held on the applicant. Nevertheless, it reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law ... and notes that in its judgment of 25 November 1997 the Bucharest Court of Appeal confirmed that it was lawful for the RIS to hold this information as depositary of the archives of the former security services.

That being so, the Court may conclude that the storing of information about the applicant's private life had a basis in Romanian law.

54. As to the accessibility of the law, the Court regards that requirement as having been satisfied, seeing that Law No. 14/1992 was published in Romania's Official Gazette on 3 March 1992.

55. As regards the requirement of foreseeability, the Court reiterates that a rule is 'foreseeable' if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct. The Court has stressed the importance of this concept with regard to secret surveillance in the following terms (see the *Malone* v. *United Kingdom* judgment of 2 August 1984, Series A No. 82, p. 32, §67 ...):

'The Court would reiterate its opinion that the phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the 'law', requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention ... The phrase thus implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ...

... Since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.'

56. The 'quality' of the legal rules relied on in this case must therefore be scrutinised, with a view, in particular, to ascertaining whether domestic law laid down with sufficient precision the circumstances in which the RIS could store and make use of information relating to the applicant's private life.

57. The Court notes in this connection that section 8 of Law No. 14/1992 provides that information affecting national security may be gathered, recorded and archived in secret files.

No provision of domestic law, however, lays down any limits on the exercise of those powers. Thus, for instance, the aforesaid Law does not define the kind of information that may be recorded, the categories of people against whom surveillance measures such as gathering and keeping information may be taken, the circumstances in which such measures may be taken or the procedure to be followed. Similarly, the Law does not lay down limits on the age of information held or the length of time for which it may be kept.

Section 45 of the Law empowers the RIS to take over for storage and use the archives that belonged to the former intelligence services operating on Romanian territory and allows inspection of RIS documents with the Director's consent.

The Court notes that this section contains no explicit, detailed provision concerning the persons authorised to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained.

58. It also notes that although section 2 of the Law empowers the relevant authorities to permit interferences necessary to prevent and counteract threats to national security, the ground allowing such interferences is not laid down with sufficient precision.

59. The Court must also be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it ...

In order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure ...

60. In the instant case the Court notes that the Romanian system for gathering and archiving information does not provide such safeguards, no supervision procedure being provided by Law No. 14/1992, whether while the measure ordered is in force or afterwards.

61. That being so, the Court considers that domestic law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities.

62. The Court concludes that the holding and use by the RIS of information on the applicant's private life were not 'in accordance with the law', a fact that suffices to constitute a violation of Article 8. Furthermore, in the instant case that fact prevents the Court from reviewing the legitimacy of the aim pursued by the measures ordered and determining whether they were – assuming the aim to have been legitimate – 'necessary in a democratic society'.

63. There has consequently been a violation of Article 8.

Box 3.1. **The right to respect for private life and the processing of personal data**

It is noteworthy that the *Rotaru* judgment concerns information related to public demonstrations in which the author had allegedly taken part, or to writings he was initially said to have authored, rather than to elements belonging to his 'private life'. Indeed, the judgment delivered by the European Court of Human Rights in this case is the first in which Article 8 ECHR, which guarantees the right to respect for private life, is explicitly applied to the processing of personal data, *whether or not such data relate to the private life of the individual*. Historically, the two guarantees have developed separately, and they initially pursued two quite different objectives. In its original definition, the right to respect for private life seeks to protect a sphere of intimacy for individuals and families: it has been described famously as 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others' (A. F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967), p. 1). It was this dimension of privacy that Samuel D. Warren and Louis D. Brandeis sought to define as protected under the common law doctrine of torts in their seminal article of 1890, where they wrote: 'Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone". Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops" ' (S. D. Warren and L. D. Brandeis, 'The Right to Privacy', *Harvard Law Review*, 4 (1890), 193)

But the emergence of computerization and databanks in the 1970s has led to new threats to the freedom of individuals, quite different from these – although they too were anticipated, in part, by Westin. The systematic processing of information related to the individual – whether or not that information relates to his/her private life – may encourage decisions based on automatic processes; it may lead to the establishment of 'profiles'; and thus, to systematic stereotyping. Originally, the new threats to individual freedom that stemmed from the power of computers to process information were seen as distinct from infringements into the 'privacy' of individuals, understood as the information they had a right not to divulge. For instance, the Council of Europe adopted a Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS, No. 108), signed on 28 January 1981, which was based on the recognition that it was 'desirable to *extend* the safeguards for everyone's rights and fundamental freedoms, and in particular the right to the respect for privacy, taking account of the increasing flow across frontiers of personal data undergoing automatic processing' (Preamble – emphasis added). Article 8 ECHR was not considered to be sufficient in this regard, since it was interpreted, both by the Court and by commentators, as only shielding individuals from the risks of unwanted intrusion into a sphere of intimacy. In contrast, 'personal data', the automated processing of which was seen to call for regulation, is 'any information relating to an identified or identifiable individual' (Art. 1 of the Convention for the Protection

of Individuals with regard to Automatic Processing of Personal Data), whether such information relates to the 'private life' of the individual (i.e. which he/she could reasonably expect not to be in the public domain), or whether it relates to his/her 'public' life: for instance, birthdates, addresses, social security numbers, but also bibliographies or the list of public events in which an individual took part, are all 'personal data' that cannot be processed without certain principles being complied with.

At the time of its adoption in 1981, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was the most advanced international instrument in this area – although it was inspired primarily by the French law of 1978 'Informatique et libertés' (loi No. 78–17 relative à l'informatique, aux fichiers et aux libertés, 6 January 1978). The Council of Europe Convention established the main principles that have since been structuring the protection of the individual *vis-à-vis* the processing of personal data. These principles relate, first, to the quality of the data: data may only be processed if they are obtained and processed fairly and lawfully (it is here that the protection of privacy *vis-à-vis* the processing of personal data intersects with the traditional protection of privacy as intimacy – data obtained in violation of privacy rights cannot be processed); they must be stored for specified and legitimate purposes and not used in a way incompatible with those purposes; they must be adequate, relevant and not excessive in relation to the purposes for which they are stored; they must be accurate and, where necessary, kept up to date; and they must be preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored. In addition, the Convention provides that 'special categories' of personal data (those revealing racial origin, political opinions or religious or other beliefs, those concerning health or sexual life, or those related to criminal convictions) require specific safeguards. The Convention also guarantees certain rights of the data subject, such as the right to be informed about the existence of an automated personal data file, its main purposes, as well as the identity of the controller of the file, and the right to have data rectified or erased if they have not been processed in accordance with the principles of the Convention. Most of these principles have inspired the United Nations Guidelines for the Regulation of Computerized Personal Data Files, adopted by General Assembly Resolution 45/95 of 14 December 1990.

European Court of Human Rights (GC), *Gorzelik and others* v. *Poland* (Appl. No. 44158/98), judgment of 17 February 2004:

[The applicants, who describe themselves as 'Silesians', decided together with 190 other persons to form an association called 'Union of People of Silesian Nationality'. They sought to have their association registered in accordance with section 8(2) of the Law on Associations of 7 April 1989. The Polish authorities refused this, however, on the grounds that the memorandum of association used such terms as 'Silesian nation' and 'Silesian national minority', whereas such a national minority was denied to exist. In rejecting the final appeal of the applicants, the Polish Supreme Court noted in particular: '"National minority" is a legal term (see Article 35

of the Constitution of 2 February 1997), although it is not defined either in Polish law or in the conventions relied on in the appeal on points of law. However, the explanatory report to the [Council of Europe Framework Convention for the Protection of National Minorities] states plainly that the individual's subjective choice of a nation is inseparably linked to objective criteria relevant to his or her national identity. That means that a subjective declaration of belonging to a specific national group implies prior social acceptance of the existence of the national group in question ... An individual has the right to choose his or her nation but this ... does not in itself lead to the establishment of a new, distinct nation or national minority. There was, and still is, a common perception that a Silesian ethnic group does exist; however, this group has never been regarded as a national group and has not claimed to be regarded as such. Registration of the association, which in paragraph 30 of its memorandum of association states that it is an organisation of a [specific] national minority, would be in breach of the law because it would result in a non-existent "national minority" taking advantage of privileges conferred on [genuine] national minorities. This concerns, in particular, the privileges granted by the 1993 Elections Act.' Before the European Court of Human Rights, the applicants subsequently alleged a violation of their freedom of association. One of the questions submitted to the Court was whether, despite the absence of a definition of the notion of 'national minority', this criterion could be relied upon by the Polish authorities in order to refuse to register an association.]

64. The Court reiterates that the expression 'prescribed by law' requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct.

However, it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice (see *Rekvényi* v. *Hungary* [GC], No. 25390/94, §34, ECHR 1999-III, and, as a recent authority, *Refah Partisi (the Welfare Party) and others* v. *Turkey* [GC], Nos. 41340/98, 41342/98,41343/98 and 41344/98, §57, ECHR 2003–II, with further references).

65. The scope of the notion of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.

It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of 'foreseeability' for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (see *Refah Partisi (the Welfare Party) and others* and *Rekvényi*, cited above).

66. Turning to the circumstances of the present case, the Court observes that the applicants' arguments as to the alleged unforeseeablity of Polish law do not concern the legal provisions on which the refusal to register their association was actually based, namely Article 32 of the Constitution and various provisions of the Law on associations and the Civil Code ...

The Court notes in this respect that the Law on associations gives the courts the power to register associations (section 8) and in this context to verify, *inter alia*, the conformity with the law of the memorandum of association (section 16), including the power to refuse registration if it is found that the conditions of the Law on associations have not been met (section 14) ...

In the present case the Polish courts refused registration because they considered that the applicants' association could not legitimately describe itself as an 'organisation of a national minority', a description which would give it access to the electoral privileges conferred under section 5 of the 1993 Elections Act ..., as the Silesian people did not constitute a 'national minority' under Polish law.

The applicants essentially criticised the absence of any definition of a national minority or any procedure whereby such a minority could obtain recognition under domestic law. They contended that that lacuna in the law made it impossible for them to foresee what criteria they were required to fulfil to have their association registered and left an unlimited discretionary power in that sphere to the authorities ...

67. It is not for the Court to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention.

With regard to the applicants' argument that Polish law did not provide any definition of a 'national minority', the Court observes firstly, that ... such a definition would be very difficult to formulate. In particular, the notion is not defined in any international treaty, including the Council of Europe Framework Convention (see ... for example, Article 27 of the United Nations International Covenant on Civil and Political Rights, Article 39 of the United Nations Convention on the Rights of the Child and the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities).

Likewise, practice regarding official recognition by States of national, ethnic or other minorities within their population varies from country to country or even within countries. The choice as to what form such recognition should take and whether it should be implemented through international treaties or bilateral agreements or incorporated into the Constitution or a special statute must, by the nature of things, be left largely to the State concerned, as it will depend on particular national circumstances.

68. While it appears to be a commonly shared European view that, as laid down in the preamble to the Framework Convention, 'the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace on this continent' and that respect for them is a condition *sine qua non* for a democratic society, it cannot be said that the Contracting States are obliged by international law to adopt a particular concept of 'national minority' in their legislation or to introduce a procedure for the official recognition of minority groups.

69. In Poland the rules applicable to national or ethnic minorities are not to be found in a single document, but are divided between a variety of instruments, including the Constitution, electoral law and international agreements. The constitutional guarantees are afforded to both

national and ethnic minorities. The Constitution makes no distinction between national and ethnic minorities as regards their religious, linguistic and cultural identities, the preservation, maintenance and development of their language, customs, traditions and culture, or the establishment of educational and cultural institutions ... In contrast, electoral law introduces special privileges only in favour of 'registered organisations of national minorities' ... It does not give any indication as to the criteria a 'national minority' must fulfil in order to have its organisation registered.

However, the Court considers that the lack of an express definition of the concept of 'national minority' in the domestic legislation does not mean that the Polish State was in breach of its duty to frame law in sufficiently precise terms. Nor does it find any breach on account of the fact that the Polish State chose to recognise minorities through bilateral agreements with neighbouring countries rather than under a specific internal procedure. The Court recognises that, for the reasons explained above, in the area under consideration it may be difficult to frame laws with a high degree of precision. It may well even be undesirable to formulate rigid rules. The Polish State cannot, therefore, be criticised for using only a general statutory categorisation of minorities and leaving interpretation and application of those notions to practice.

70. Consequently, the Court does not consider that leaving to the authorities a discretion to determine the applicable criteria with regard to the concept of 'registered associations of national minorities' underlying section 5 of the 1993 Elections Act was, as the applicants alleged, tantamount to granting them an unlimited and arbitrary power of appreciation. As regards the registration procedure, it was both inevitable and consistent with the adjudicative role vested in them for the national courts to be left with the task of interpreting the notion of 'national minority', as distinguished from 'ethnic minority' within the meaning of the Constitution, and assessing whether the applicants' association qualified as an 'organisation of a national minority' ...

71. In reviewing the relevant principles, the [Polish courts] took into consideration all the statutory provisions applicable to associations and national minorities as well as social factors and other legal factors, including all the legal consequences that registering the applicants' association in the form they proposed might entail ...

Contrary to what the applicants have alleged, those courts do not appear to have needlessly transformed the registration procedure into a dispute over the concept of Silesian nationality. Rather, it was the statement in paragraph 30 of the memorandum of association that made it necessary to consider that issue in the proceedings ... The applicants must have been aware, when that paragraph was drafted, that the courts would have no alternative but to interpret the notion of 'national minority' as it applied in their case.

Having regard to the foregoing, the Court is satisfied that the Polish law applicable in the present case was formulated with sufficient precision, for the purposes of paragraph 2 of Article 11 of the Convention, to enable the applicants to regulate their conduct.

The following case is also instructive, for two reasons. First, it illustrates how the requirement of legality may apply to interferences committed by private parties – in this case, a private employer monitoring communications by its employee. Second, it shows the added value of this requirement. In the absence of clear and accessible

regulations stipulating under which conditions interferences may take place, individuals may be reluctant to exercise their freedoms, since they cannot know in advance when such freedoms may be restrictioned and which sanctions may be imposed on them; this produces the 'chilling effect' referred to above, which the requirement of legality seeks to avoid.

European Court of Human Rights (4th sect.), *Copland* v. *United Kingdom* (Appl. No. 62617/00), judgment of 3 April 2007:

[The applicant was employed since 1991 by Carmarthenshire College. During her employment, and up to November 1999, the applicant's telephone, e-mail and internet usage were subjected to monitoring at the Deputy Principal (DP)'s instigation. According to the Government, this monitoring took place in order to ascertain whether the applicant was making excessive use of College facilities for personal purposes. The Government stated that the monitoring of telephone usage consisted of analysis of the College telephone bills showing telephone numbers called, the dates and times of the calls and their length and cost. The applicant also believed that there had been detailed and comprehensive logging of the length of calls, the number of calls received and made and the telephone numbers of individuals calling her. She stated that on at least one occasion the DP became aware of the name of an individual with whom she had exchanged incoming and outgoing telephone calls. The applicant's internet usage was also monitored by the DP. This monitoring took the form of analysing the web sites visited, the times and dates of the visits to the web sites and their duration. At the relevant time there was no general right to privacy in English law. The Regulation of Investigatory Powers Act 2000 provided for the regulation of, *inter alia*, interception of communications. The Telecommunications (Lawful Business Practice) Regulations 2000 were promulgated under the 2000 Act and came into force on 24 October 2000. The Regulations set out the circumstances in which employers could record or monitor employees' communications (such as e-mail or telephone) without the consent of either the employee or the other party to the communication. Employers were required to take reasonable steps to inform employees that their communications might be intercepted.]

45. The Court recalls that it is well established in the case law that the term 'in accordance with the law' implies – and this follows from the object and purpose of Article 8 – that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by Article 8 §1. This is all the more so in areas such as the monitoring in question, in view of the lack of public scrutiny and the risk of misuse of power ...

46. This expression not only requires compliance with domestic law, but also relates to the quality of that law, requiring it to be compatible with the rule of law (see, *inter alia, Khan* v. *United Kingdom*, judgment of 12 May 2000, *Reports of Judgments and Decisions* 2000–V, §26; *P.G. and J.H.* v. *United Kingdom*, No. 44787/98, ECHR 2001–IX, §44). In order to fulfil the requirement of foreseeability, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are empowered to resort to any such measures (see *Halford*, [judgment of 25 June 1997] §49 and *Malone*, [judgment of 2 August 1984] §67).

47. The Court is not convinced by the Government's submission that the College was authorised under its statutory powers to do 'anything necessary or expedient' for the purposes of providing higher and further education, and finds the argument unpersuasive. Moreover, the Government do not seek to argue that any provisions existed at the relevant time, either in general domestic law or in the governing instruments of the College, regulating the circumstances in which employers could monitor the use of telephone, e-mail and the internet by employees. Furthermore, it is clear that the Telecommunications (Lawful Business Practice) Regulations 2000 (adopted under the Regulation of Investigatory Powers Act 2000) which make such provision were not in force at the relevant time.

48. Accordingly, as there was no domestic law regulating monitoring at the relevant time, the interference in this case was not 'in accordance with the law' as required by Article 8 §2 of the Convention. The Court would not exclude that the monitoring of an employee's use of a telephone, e-mail or internet at the place of work may be considered 'necessary in a democratic society' in certain situations in pursuit of a legitimate aim. However, having regard to its above conclusion, it is not necessary to pronounce on that matter in the instant case.

49. There has therefore been a violation of Article 8 in this regard.

3.5. Questions for discussion: the function of the requirement of legality

1. Is there any added value to the requirement imposed by the Inter-American Court of Human Rights, that any restriction to human rights be imposed by a law adopted through parliamentary procedures? Is this superfluous, since any such restriction in any case must comply with the principle of proportionality? Are there any disadvantages associated with this requirement?
2. How do you interpret the insistance of the European Court of Human Rights, in the 2000 case of *Rotaru* v. *Romania*, on the 'quality of the law' restricting the right to respect for private life? Is this judicial law-making? Could it be defended on the grounds that it imports, within Article 8 ECHR, certain of the requirements of the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, also adopted within the framework of the Council of Europe (see box 3.1.)?
3. Should the requirement that the law (in the material sense) restricting a fundamental right of the individual be sufficiently precise, apply equally across all human rights? Or are the risks associated with insufficiently precise wording more or less important, depending on the nature of the right which is regulated? Could you explain the different attitude of the European Court of Human Rights in *Rotaru* and in *Gorzelik* by the nature of the respective rights at stake in these cases?
4. Does the requirement of legality raise specific questions in the context of relationships between private parties? For example, should it influence the way rights may be restricted through private contracts? How could it apply to situations where two freedoms are in conflict with one another, and where the relationships between individuals are thus characterized, not as the right of A corresponding to a duty of B, but as two opposing 'privileges', in the terminology of W. N. Hohfeld (W. N. Hohfeld in W. W. Cook (ed.), *Fundamental Legal Conceptions* (New Haven,

Conn.: Yale University Press, 1919)? Imagine for example that the freedom of expression of A is being nullified, neither by State censorship nor by any contractual obligation owed, for instance, to her employer, but by the use others make of their freedom of expression, opposing the ideas of A.

3.3 The condition of legitimacy

The 1984 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights include a detailed discussion of the different aims which may justify a restriction being imposed on the rights of the Covenant, thus limiting the freedom of States to impose such restrictions simply for reasons of expediency:

UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, E/CN.4/1984/4 (1984):

B. Interpretative Principles Relating to Specific Limitation Clauses

...

iii. 'public order (ordre public)' 22. The expression 'public order (ordre public)' as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

23. Public order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

24. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

iv. 'public health' 25. Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

26. Due regard shall be had to the international health regulations of the World Health Organization.

v. 'public morals' 27. Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.

28. The margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.

vi. 'national security' 29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

32. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

vii. 'public safety' 33. Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.

34. The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

viii. 'rights and freedoms of others' or the 'rights or reputations of others' 35. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant.

36. When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the Covenant.

37. A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism.

ix. 'restrictions on public trial' 38. All trials shall be public unless the Court determines in accordance with law that:

(a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open court showing that the interest of the private lives of the parties or their families or of juveniles so requires; or

(b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order (ordre public), or national security in a democratic society.

The condition of legitimacy should in principle allow supervisory bodies to scrutinize the motives behind particular restrictions being imposed on fundamental rights, and to screen out, in particular, illegitimate motives, such as where restrictions are animated by prejudice against certain groups. However, due probably to the open-ended formulations by which the admissible aims are described, these bodies have generally exercised a rather minimal degree of scrutiny on the aims pursued by such restrictions. It is remarkable, for instance, that when it was confronted by a policy in the UK armed forces excluding homosexuals from the army's ranks, the European Court of

Human Rights contented itself with observing that 'the essential justification offered by the Government for the policy and for the consequent investigations and discharges is the maintenance of the morale of service personnel and, consequently, of the fighting power and the operational effectiveness of the armed forces ... The Court finds no reason to doubt that the policy was designed with a view to ensuring the operational effectiveness of the armed forces or that investigations were, in principle, intended to establish whether the person concerned was a homosexual to whom the policy was applicable. To this extent, therefore, the Court considers that the resulting interferences can be said to have pursued the legitimate aims of "the interests of national security" and "the prevention of disorder"' (Eur. Ct. H.R. (3d sect.), *Smith and Grady* v. *United Kingdom* (Applications Nos. 33985/96 and 33986/96), judgment of 27 September 1999, para. 74). The reality was that, as implicitly acknowledged by the Court itself, the alleged 'threat to the fighting power and operational effectiveness of the armed forces [which would result from the acceptance of homosexuals in the armed forces] were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation', and that such attitudes should not constitute an adequate justification for restrictions to the right to respect for private life of the individuals concerned. Indeed, as the Court emphasized when examining the necessity of the impunged measures: 'these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour' (para. 97).

The determination of the objective pursued by the restriction to a fundamental right may be decisive for the examination of the question whether the interference may be considered 'disproportionate' or – as in the terminology of the European Convention on Human Rights – 'necessary in a democratic society' (a requirement examined in greater detail below, in section 3.4.). Consider the following case:

European Court of Human Rights (plen.), *Open Door and Dublin Well Woman* v. *Ireland*, judgment of 29 October 1992, Series A No. 246–A:

[The applicants in this case are two non-profit organizations: (a) Open Door Counselling Ltd, engaged, *inter alia*, in counselling pregnant women in Dublin and in other parts of Ireland; and (b) Dublin Well Woman Centre Ltd, providing similar services at two clinics in Dublin; as well as four individuals: (c) Bonnie Maher and Ann Downes, who worked as trained counsellors for Dublin Well Woman; (d) Mrs X, born in 1950 and Ms Maeve Geraghty, born in 1970, who join in the Dublin Well Woman application as women of child-bearing age. The applicants complained of an injunction imposed by the Irish courts on Open Door and Dublin Well Woman to restrain

them from providing certain information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland. The two associations concerned provided non-directive counselling, understood as 'counselling which neither included advice nor was judgmental but ... was a service essentially directed to eliciting from the client her own appreciation of her problem and her own considered choice for its solution' (as according to the description offered by Mr Justice Finlay CJ the Supreme Court of Ireland (judgment of 16 March 1988 [1988] *Irish Reports* 618 at 621)). The injunction followed a private action brought by the Society for the Protection of Unborn Children (Ireland) Ltd (SPUC). It was based on Article 40.3.3º of the Irish Constitution (the Eighth Amendment), which came into force in 1983 following a referendum, and which protects the life of the unborn child. Under this provision: 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.' In their applications, the applicants complained in particular that the injunction in question constituted an unjustified interference with their right to impart or receive information, in violation of Article 10 of the European Convention on Human Rights. Article 10 ECHR guarantees freedom of expression, including 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers' Article 10 para. 2 ECHR states: '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.' Before the Court, the applicants alleged that the Supreme Court injunction, restraining them from assisting pregnant women to travel abroad to obtain abortions, infringed the rights of the two applicant associations and the two counsellors to impart information, as well as the rights of Mrs X and Ms Geraghty to receive information.]

[Did the restriction have aims that were legitimate under Article 10 para. 2?] 61. The Government submitted that the relevant provisions of Irish law are intended for the protection of the rights of others – in this instance the unborn –, for the protection of morals and, where appropriate, for the prevention of crime.

62. The applicants disagreed, contending *inter alia* that, in view of the use of the term 'everyone' in Article 10 para. 1 and throughout the Convention, it would be illogical to interpret the 'rights of others' in Article 10 para. 2 as encompassing the unborn.

63. The Court cannot accept that the restrictions at issue pursued the aim of the prevention of crime since ... neither the provision of the information in question nor the obtaining of an abortion outside the jurisdiction involved any criminal offence. However, it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum ... The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect. It is not necessary in the light of this conclusion to decide whether the term 'others' under Article 10 para. 2 extends to the unborn.

[Was the restriction necessary in a democratic society?] 64. The Government submitted that the Court's approach to the assessment of the 'necessity' of the restraint should be guided by the fact that the protection of the rights of the unborn in Ireland could be derived from Articles 2, 17 and 60 of the Convention. They further contended that the 'proportionality' test was inadequate where the rights of the unborn were at issue. The Court will examine these issues in turn.

1. Article 2 65. The Government maintained that the injunction was necessary in a democratic society for the protection of the right to life of the unborn and that Article 10 should be interpreted *inter alia* against the background of Article 2 of the Convention which, they argued, also protected unborn life. The view that abortion was morally wrong was the deeply held view of the majority of the people in Ireland and it was not the proper function of the Court to seek to impose a different viewpoint.

66. The Court observes at the outset that in the present case it is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2. The applicants have not claimed that the Convention contains a right to abortion, as such, their complaint being limited to that part of the injunction which restricts their freedom to impart and receive information concerning abortion abroad ...

Thus the only issue to be addressed is whether the restrictions on the freedom to impart and receive information contained in the relevant part of the injunction are necessary in a democratic society for the legitimate aim of the protection of morals as explained above (see paragraph 63). It follows from this approach that the Government's argument based on Article 2 of the Convention does not fall to be examined in the present case ...

2. Proportionality 67. The Government stressed the limited nature of the Supreme Court's injunction which only restrained the provision of certain information ... There was no limitation on discussion in Ireland about abortion generally or the right of women to travel abroad to obtain one. They further contended that the Convention test as regards the proportionality of the restriction was inadequate where a question concerning the extinction of life was at stake. The right to life could not, like other rights, be measured according to a graduated scale. It was either respected or it was not. Accordingly, the traditional approach of weighing competing rights and interests in the balance was inappropriate where the destruction of unborn life was concerned. Since life was a primary value which was antecedent to and a prerequisite for the enjoyment of every other right, its protection might involve the infringement of other rights such as freedom of expression in a manner which might not be acceptable in the defence of rights of a lesser nature.

The Government also emphasised that, in granting the injunction, the Supreme Court was merely sustaining the logic of Article 40.3.3° of the Constitution. The determination by the Irish courts that the provision of information by the relevant applicants assisted in the destruction of unborn life was not open to review by the Convention institutions.

68. The Court cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable (see, *mutatis mutandis*, for a similar argument, the *Norris* v. *Ireland* judgment of 26 October 1988, Series A No. 142, p. 20, para. 45).

It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them (see, *inter alia*, the *Handyside* v. *United Kingdom* judgment of 7 December 1976, Series A No. 24, p. 22, para. 48, and the *Müller and others* v. *Switzerland* judgment of 24 May 1988, Series A No. 133, p. 22, para. 35).

However this power of appreciation is not unlimited. It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention.

69. As regards the application of the 'proportionality' test, the logical consequence of the Government's argument is that measures taken by the national authorities to protect the right to life of the unborn or to uphold the constitutional guarantee on the subject would be automatically justified under the Convention where infringement of a right of a lesser stature was alleged. It is, in principle, open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights. However, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions. To accept the Government's pleading on this point would amount to an abdication of the Court's responsibility under Article 19 'to ensure the observance of the engagements undertaken by the High Contracting Parties ...'.

70. Accordingly, the Court must examine the question of 'necessity' in the light of the principles developed in its case law (see, *inter alia*, *The Observer and Guardian* v. *United Kingdom* judgment of 26 November 1991, Series A No. 216, pp. 29–30, para. 59). It must determine whether there existed a pressing social need for the measures in question and, in particular, whether the restriction complained of was 'proportionate to the legitimate aim pursued' (*ibid.*).

71. In this context, it is appropriate to recall that freedom of expression is also applicable to 'information' or 'ideas' that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society' (see, *inter alia*, the above-mentioned *Handyside* judgment, Series A No. 24, p. 23, para. 49).

72. While the relevant restriction, as observed by the Government, is limited to the provision of information, it is recalled that it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion. Furthermore, the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman's health and well-being. Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.

73. The Court is first struck by the absolute nature of the Supreme Court injunction which imposed a 'perpetual' restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. The sweeping nature of this restriction has since been highlighted by the case of the *Attorney General* v. *X and others* and by the concession made

by the Government at the oral hearing that the injunction no longer applied to women who, in the circumstances as defined in the Supreme Court's judgment in that case, were now free to have an abortion in Ireland or abroad ...

74. On that ground alone the restriction appears overbroad and disproportionate. Moreover, this assessment is confirmed by other factors.

75. In the first place, it is to be noted that the corporate applicants were engaged in the counselling of pregnant women in the course of which counsellors neither advocated nor encouraged abortion, but confined themselves to an explanation of the available options ... The decision as to whether or not to act on the information so provided was that of the woman concerned. There can be little doubt that following such counselling there were women who decided against a termination of pregnancy. Accordingly, the link between the provision of information and the destruction of unborn life is not as definite as contended. Such counselling had in fact been tolerated by the State authorities even after the passing of the Eighth Amendment in 1983 until the Supreme Court's judgment in the present case. Furthermore, the information that was provided by the relevant applicants concerning abortion facilities abroad was not made available to the public at large.

76. It has not been seriously contested by the Government that information concerning abortion facilities abroad can be obtained from other sources in Ireland such as magazines and telephone directories ... or by persons with contacts in Great Britain. Accordingly, information that the injunction sought to restrict was already available elsewhere although in a manner which was not supervised by qualified personnel and thus less protective of women's health. Furthermore, the injunction appears to have been largely ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain ...

77. In addition, the available evidence, which has not been disputed by the Government, suggests that the injunction has created a risk to the health of those women who are now seeking abortions at a later stage in their pregnancy, due to lack of proper counselling, and who are not availing themselves of customary medical supervision after the abortion has taken place ... Moreover, the injunction may have had more adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information (see paragraph 76 above). These are certainly legitimate factors to take into consideration in assessing the proportionality of the restriction ...

4. Conclusion 80. In the light of the above, the Court concludes that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued. Accordingly there has been a breach of Article 10.

3.6. Questions for discussion: policy choices and 'legitimate ends' pursued in the restriction of rights

1. Human rights treaties either list exhaustively the legitimate grounds which may justify imposing restrictions on the rights they codify, or they use broader and vaguer expressions such as 'general welfare' or 'general interest'. Whichever the wording used, the general purpose of imposing

this condition is that the human rights of the individual may not be restricted merely because this corresponds to the preferences of the majority. Not only may such preferences not embody prejudices against a certain category of persons; in addition, they must be related to some objective which it is legitimate (and rational) for the majority to pursue. How should the legitimacy of the ends pursued by the majority be assessed? In assessing the legitimacy of the aims pursued, are courts necessarily crossing the line between applying the law and imposing their own policy preferences? Which objective benchmarks do they have in exercising this control?

2. There is a range of possibilities between clearly irrational choices (or choices which are tainted by an element of prejudice against a disadvantaged or politically disempowered group) at one end, and choices that are justified in the name of the overall realization of human rights, at the other end. Should all choices which cannot be justified against the full range of human rights (i.e. as serving the realization of other human rights) be dismissed as illegitimate and, thus, the restrictions based on such choices be counted as violations? Consider for instance land-use policies that restrict the possibilities for the Roma/Gypsies having maintained a traditional nomadic lifestyle to circulate across the territory in caravans (see in this respect the case of *Chapman* v. *United Kingdom* before the European Court of Human Rights, discussed in chapter 7, section 5.2., b)). If the only purpose of land-use policies is an aesthetic one – which corresponds to the tastes of a majority of the population, but has no further instrumental purpose – is this a legitimate objective?
3. Most of the restrictions imposed on human rights are the result of decisions adopted through democratic processes, typically by elected parliamentary assemblies. Some may be adopted by the executive, with less democratic control. Some still may be the result of judicial decisions, and are thus insulated, by design, from democratic accountability. Should the legitimacy of the objectives pursued by these different branches of government be assessed differently? Would it be justified to take into consideration the process through which the measure imposing a restriction has been adopted, in addressing the question of legitimacy?
4. Echoing the notion of 'compelling state interest' used in US constitutional law, the European Court of Human Rights sometimes refers to the need for the restriction imposed on the rights and freedoms of the Convention to correspond to a 'pressing social need'. What does this terminology add to our understanding of the requirement of legitimacy?

3.4 The condition of proportionality

(a) The general principle

In order for an interference with a protected right to be justified, the measure creating the interference (i) must be appropriate to the fulfilment of the legitimate aim pursued (a condition referred to as 'appropriateness' or 'rational connection'); and (ii) it must not go beyond what is strictly required by the need to achieve that aim, i.e. it must be necessary to attain the objective justifying the interference (condition of 'necessity' or 'minimal impairment'). However, this second condition is sometimes described instead as requiring that the balance of interests has been respected. This alternative

test – a balancing of interests, instead of a 'strict necessity' test – will in particular be preferred where the aim pursued by the restriction was the protection of other fundamental rights, so that two values, of presumptively equal weight, come into conflict. Occasionally too, instead of being relaxed, the necessity test will be reinforced by the additional requirement that the aim pursued has a sufficient weight justifying the restriction.

A violation of the requirement of proportionality may have its source in the fact that the authorities have not acted with the requisite caution in interfering with the right of the individual. In the following cases, for instance, house searches which took place created an unnecessary trauma, which the authorities could easily have avoided:

Human Rights Committee, *Rojas García* v. *Colombia*, Communication No. 687/1996, final views of 3 April 2001 (CCPR/C/71/D/687/1996 (2001)):

[On 5 January 1993 at 2 a.m. a group of armed men, wearing civilian clothes, from the Public Prosecutor's office, forcibly entered the author's house through the roof, apparently in the belief that in the house were murderers of the local mayor. The group carried out a room-by-room search of the premises, terrifying and verbally abusing the members of the author's family, including small children. One of the officials fired a gunshot in the course of the search. It appeared later that the search hit the wrong house (No. 2–44 in the street instead of No. 2–36).]

10.3 The Committee must first determine whether the specific circumstances of the raid on the Rojas García family's house (hooded men entering through the roof at 2 a.m.) constitute a violation of article 17 of the Covenant. By submission of 28 December 1999, the State party reiterates that the raid on the Rojas García family's house was carried out according to the letter of the law, in accordance with article 343 of the Code of Criminal Procedure. The Committee does not enter into the question of the legality of the raid; however, it considers that, under article 17 of the Covenant, it is necessary for any interference in the home not only to be lawful, but also not to be arbitrary. The Committee considers, in accordance with its General Comment No. 16 [see above, section 3.1. in this chapter] that the concept of arbitrariness in article 17 is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. It further considers that the State party's arguments fail to justify the conduct described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, insofar as there was arbitrary interference in the home of the Rojas García family.

European Court of Human Rights (4th sect.), *Keegan* v. *United Kingdom* (Appl. No. 28867/03), judgment of 18 July 2006 (final on 8 October 2006), paras. 29–36:

[The applicants are a family whose house was raided on 21 October 1999, at 7 a.m., by police officers who were briefed that the previous tenant of the house was linked to a number of

robberies in the neighborhood. The police knew that the robberies had involved the use of firearms. The police used a metal ram to make a hole in the door. The noise of the battering ram awoke and frightened the applicants. The search led to no result. The subsequent proceedings against the Chief Constable of Merseyside Police for the tort of maliciously procuring a search warrant, unlawful entry and false imprisonment, failed, although the Keegan family alleged that they had been caused terror, distress and psychiatric harm. Medical reports indicated that the applicants were suffering from varying degrees of post-traumatic stress disorder. The English courts found on the facts that the police, who were investigating serious and violent offences, had not acted with reckless indifference to the lawfulness of their acts, which element was necessary for the tort of maliciously procuring a search warrant. They held that the entry was made subject to a lawful search warrant and also under the powers of section 17 of the Police and Criminal Evidence Act 1984, which allowed entry without warrant where intending to arrest a person for an arrestable offence. They found that the method of forcible entry was justified as the police had foremost in their minds the potential danger from the use of firearms by the suspect robber and in particular that the sergeant had no cause to suspect that innocent people were the only ones on the premises.]

29. It is not disputed that the forcible entry by the police into the applicants' home interfered with their right to respect for their home under Article 8 paragraph 1 of the Convention and that it was 'in accordance with the law' on a domestic level and pursued a legitimate aim, the prevention of disorder and crime, as required by the second paragraph of Article 8. What remains to be determined is whether the interference was justified under the remaining requirement of paragraph 2, namely whether it was 'necessary in a democratic society' to achieve that aim.

30. According to the Court's settled case law, the notion of necessity implies that the interference corresponds to a 'pressing social need' and, in particular that it is proportionate to the legitimate aim pursued (see e.g. *Olsson* v. *Sweden*, judgment of 24 March 1988, Series A No. 130, §67). The Court must accordingly ascertain whether, in the circumstances of the case, the entry of the applicants' home struck a fair balance between the relevant interests, namely their right to respect for their home balance, on the one hand, and the prevention of disorder and crime on the other (see *McLeod* v. *United Kingdom*, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998–VIII, §53).

31. While a certain margin of appreciation is left to the Contracting States, the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly and the need for measures in a given case must be convincingly established (see *Funke* v. *France*, judgment of 25 February 1993, Series A No. 256–A, §55). The Court will assess in particular whether the reasons adduced to justify such measures were relevant and sufficient and whether there were adequate and effective safeguards against abuse (see e.g. *Buck* v. *Germany*, judgment of 28 April 2005, §§44–45).

32. Turning to the present case, the Court recalls that domestic law and practice regulates the conditions under which the police may obtain entry to private premises, either with or without a warrant. In the event, the police obtained a warrant from a Justice of the Peace, giving information under oath that they had reason to believe the proceeds of a robbery were at the address which had been used by one of the suspected robbers. No doubt was cast, in the domestic proceedings or before the Court, on the genuineness of the belief of the officers who obtained the warrant or those who executed it. If this belief had been correct, the Court does not doubt that the entry would have been found to have been justified.

33. However, the applicants had been living at the address for about six months and they had no connection whatsoever with any suspect or offence. As the County Court judge noted, it is difficult to conceive that enquiries were not made by the police to verify the residents of the address which the suspected robber had been known to give and that if such enquiries had been properly made (via the local authority or utility companies) they would not have revealed the change in occupation. The loss of the police notes renders it impossible to deduce whether it was a failure to make the proper enquiries or a failure to transmit or properly record the information obtained that led to the mistake that was made. In any event, as found by the domestic courts, although the police did not act with malice and indeed with the best of intentions, there was no reasonable basis for their action in breaking down the applicants' door early one morning while they were in bed. Put in Convention terms, there might have been relevant reasons, but, as in the circumstances they were based on a misconception which could, and should, have been avoided with proper precautions, they cannot be regarded as sufficient (see, *mutatis mutandis*, *McLeod*, cited above, where the police did not take steps to verify whether the applicant's ex-husband had the right to enter her house, notwithstanding his genuine belief, and did not wait until her return).

34. The fact that the police did not act maliciously is not decisive under the Convention which is geared to protecting against abuse of power, however motivated or caused (see, *mutatis mutandis*, *McLeod*, cited above, where the police suspected a breach of the peace might occur). The Court cannot agree that a limitation of actions for damages to cases of malice is necessary to protect the police in their vital functions of investigating crime. The exercise of powers to interfere with home and private life must be confined within reasonable bounds to minimise the impact of such measures on the personal sphere of the individual guaranteed under Article 8 which is pertinent to security and well-being (see, e.g. *Buckley* v. *United Kingdom*, judgment of 25 September 1996, *Reports* 1996–IV, §76). In a case where basic steps to verify the connection between the address and the offence under investigation were not effectively carried out, the resulting police action, which caused the applicants considerable fear and alarm, cannot be regarded as proportionate.

35. As argued by the applicants, this finding does not imply that any search, which turns out to be unsuccessful, would fail the proportionality test, only that a failure to take reasonable and available precautions may do so.

36. The Court accordingly concludes that the balance has not been properly struck in the present case and that there has been a violation of Article 8 of the Convention.

(b) The importance of procedures for weighing all relevant interests

It is noteworthy that, increasingly, the procedures followed in the course of the adoption of a measure alleged to constitute a disporportionate interference with a protected right are considered decisive in the assessment of the question of proportionality. In the case of *Hatton and others* v. *United Kingdom*, the applicants challenged before the European Court of Human Rights the implementation in 1993 of the new scheme for regulating night flights at Heathrow. The scheme replaced the earlier system of movement limitations with a regime which gave aircraft operators a choice, through a quota count, as to whether to fly fewer noisier aircraft, or more less noisy types. The 1993

scheme accepted the conclusions of the 1992 sleep study that found that, for the large majority of people living near airports, there was no risk of substantial sleep disturbance due to aircraft noise, and that only a small percentage of individuals (some 2–3 per cent) were more sensitive than others. On this basis, disturbances caused by aircraft noise were regarded as negligible in relation to overall normal disturbance rates. It was agreed, nevertheless, that the new scheme was susceptible of adversely affecting the quality of the applicants' private life and the scope for their enjoying the amenities of their respective homes, and thus their rights protected by Article 8 of the Convention. The Court described the problem it faced thus:

European Court of Human Rights (GC), *Hatton and others* v. *United Kingdom* (Appl. No. 36022/97), judgment of 8 July 2003:

103. The Court is thus faced with conflicting views as to the margin of appreciation to be applied: on the one hand, the Government claim a wide margin on the ground that the case concerns matters of general policy, and, on the other hand, the applicants' claim that where the ability to sleep is affected, the margin is narrow because of the 'intimate' nature of the right protected. This conflict of views on the margin of appreciation can be resolved only by reference to the context of a particular case.

104. In connection with the procedural element of the Court's review of cases involving environmental issues, the Court is required to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available.

[Turning to this second dimension, the Court notes as follows:]

128. On the procedural aspect of the case, the Court notes that a governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake. However, this does not mean that decisions can only be taken if comprehensive and measurable data are available in relation to each and every aspect of the matter to be decided. In this respect it is relevant that the authorities have consistently monitored the situation, and that the 1993 Scheme was the latest in a series of restrictions on night flights which stretched back to 1962. The position concerning research into sleep disturbance and night flights is far from static, and it was the government's policy to announce restrictions on night flights for a maximum of five years at a time, each new scheme taking into account the research and other developments of the previous period. The 1993 Scheme had thus been preceded by a series of investigations and studies carried out over a long period of time. The particular new measures introduced by that scheme were announced to the public by way of a Consultation Paper which referred to the results of a study carried out for the Department of Transport, and which included a study of aircraft noise and sleep disturbance. It stated that the quota was to be set so as not to allow a worsening of noise at night, and ideally to improve the situation. This paper was published in January 1993 and sent to bodies representing the aviation industry and people living near airports. The applicants and persons in a similar situation thus had access to the Consultation

Paper, and it would have been open to them to make any representations they felt appropriate. Had any representations not been taken into account, they could have challenged subsequent decisions, or the scheme itself, in the courts. Moreover, the applicants are, or have been, members of HACAN [an association of inhabitants of the Heathrow Airport region], and were thus particularly well-placed to make representations.

129. In these circumstances the Court does not find that, in substance, the authorities overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by those regulations to respect for their private life and home and the conflicting interests of others and of the community as a whole, nor does it find that there have been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.

This does not constitute an isolated example. In the case of *Chapman* v. *United Kingdom* for instance – a case more fully presented in chapter 7, section 5.2. (Eur. Ct. H.R. (GC), *Chapman* v. *United Kingdom* (Appl. No. 27238/95), judgment of 18 January 2001) – the applicant, Ms Sally Chapman, was a Gypsy by birth, who had been travelling constantly with her family during her youth, and continued to live in caravans with her husband and children after her marriage. After she finally decided to leave the itinerant life and bought a piece of land with the intention of living on it in a mobile home, she was denied the permission to station caravans on the land due to land planning requirements: the area was located within a 'Green Belt' in which, for environmental reasons, the stationing of caravans was not allowed. The European Court of Human Rights agreed that 'the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle', and that therefore '[m]easures affecting the applicant's stationing of her caravans ... have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition' (para. 73). Nevertheless, the Court concluded that Article 8 of the European Convention on Human Rights had not been violated, since the national authorities had not exceeded their margin of appreciation in seeking to achieve a balance between environmental concerns and right to respect for private life. The care with which such balance was sought at national level appears to have decisively influenced the Court, which notes in para. 114 that 'proper regard was had to the applicant's predicament both under the terms of the regulatory framework, which contained adequate procedural safeguards protecting her interests under Article 8 and by the responsible planning authorities when exercising their discretion in relation to the particular circumstances of her case. The decisions were reached by those authorities after weighing in the balance the various competing interests. It is not for this Court to sit in appeal on the merits of those decisions, which were based on reasons which were relevant and sufficient, for the purposes of Article 8, to justify the interferences with the exercise of the applicant's rights.'

At the same time, the imposition of procedural safeguards, such as were prescribed in the case of *Hatton and others* and such as were taken into consideration by the Court in *Chapman*, should not be separated from the obligation to comply with the substantive requirements of the Convention. This is well illustrated by the controversy that surrounded the *Denbigh High School* case in the United Kingdom. Shabina Begum, a Muslim girl, who was 14 years old at the material time, was excluded from the Denbigh High School in Luton after she insisted on wearing a long coat-like garment known as a *jilbab*, in violation of the dress codes imposed by the school. She felt that this was in violation of her freedom of religion, as recognized under Article 9 ECHR, and that it violated her right not to be denied education under Article 2 of the First Additional Protocol to the Convention. Her contentions were initially rejected by the Administrative Court, but they were subsequently upheld on appeal (see [2004] EWHC 1389 (Admin) (Bennett J.), [2004] E.L.R. 374, followed by the decision of the Court of Appeal (Brooke, Mummery and Scott Baker L.JJ.) [2005] EWCA Civ 199, [2005] 1 W.L.R. 3372 (judgment of 2 March 2005)). The Court of Appeal's decision, however, was based on the consideration that the decision-making procedure by the direction of the school had been inadequate. The leading judgment by Brooke L.J. took the view that, since the premiss of the decision by the school should be that freedom of religion and the right to education should allow Shabina Begum access to the school, the school authorities should have explained why the exclusion was justified in the light of those principles. Remarkably, the judgment emphasized that it should not be taken to mean that it would be impossible for the school to justify its stance if it were to reconsider its uniform policy in the light of the judgment and decide not to alter it in any significant respect; and indeed, in paragraph 81 of the judgment, the Court of Appeal explicitly provides guidance on the matters the school would need to consider. This approach was criticized by legal commentators as introducing a new kind of formalism, signifying a retreat of the courts from substance to procedure and an abandonment of the kind of scrutiny required by the principle of proportionality prescribed under the Convention (G. Davies, 'Banning the Jilbab: Reflections on Restricting Religious Clothing in the Light of the Court of Appeal in *SB v Denbigh High School*', *European Constitutional Law Review*, 1–3 (2005) 511).

The House of Lords agreed with these critiques. In his leading judgment for the House of Lords, Lord Bingham of Cornhill put forward three reasons why the Court of Appeal had erred in adopting a purely procedural approach to the issue it was presented with.

House of Lords (United Kingdom), *R. (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants)*, (judgment of 22 March 2006) [2006] UKHL 15, leading judgment per Lord Bingham of Cornhill:

29. I am persuaded that the Court of Appeal's approach to this procedural question was mistaken, for three main reasons. First, the purpose of the Human Rights Act 1998 [providing

that the UK courts would apply the European Convention on Human Rights] was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg ... But the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated. In considering the exercise of discretion by a national authority the court may consider whether the applicant had a fair opportunity to put his case, and to challenge an adverse decision, the aspect addressed by the court in the passage from its judgment in *Chapman* [on the case of *Chapman v. the United Kingdom*, see above in this section]. But the House has been referred to no case in which the Strasbourg Court has found a violation of Convention right on the strength of failure by a national authority to follow the sort of reasoning process laid down by the Court of Appeal. This pragmatic approach is fully reflected in the 1998 Act. The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act.

30. Secondly, it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting ... There is no shift to a merits review, but the intensity of review is greater than [the 'manifestly irrational' test that] was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R.* v. *Ministry of Defence, Ex p Smith* [1996] Q.B. 517, 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time ... Proportionality must be judged objectively, by the court ... As Davies observed in his article cited above, 'The retreat to procedure is of course a way of avoiding difficult questions.' But it is in my view clear that the court must confront these questions, however difficult. The school's action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action could very well be maintained and properly so.

31. Thirdly, ... I consider that the Court of Appeal's approach would introduce 'a new formalism' and be 'a recipe for judicialisation on an unprecedented scale'. The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.

32. It is therefore necessary to consider the proportionality of the school's interference with the respondent's right to manifest her religious belief by wearing the jilbab to the school. In doing so we have the valuable guidance of the Grand Chamber of the Strasbourg court in [the case of *Leyla Sahin v. Turkey*, paras. 104–11: see below, section 3.5. in this chapter]. The court there recognises the high importance of the rights protected by article 9; the need in some situations to restrict freedom to manifest religious belief; the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance; the role of the state in deciding what is necessary to protect

the rights and freedoms of others; the variation of practice and tradition among member states; and the permissibility in some contexts of restricting the wearing of religious dress.

33. The respondent criticised the school for permitting the headscarf while refusing to permit the jilbab, for refusing permission to wear the jilbab when some other schools permitted it and for adhering to their own view of what Islamic dress required. None of these criticisms can in my opinion be sustained. The headscarf was permitted in 1993, following detailed consideration of the uniform policy, in response to requests by several girls. There was no evidence that this was opposed. But there was no pressure at any time, save by the respondent, to wear the jilbab, and that has been opposed. Different schools have different uniform policies, no doubt influenced by the composition of their pupil bodies and a range of other matters. Each school has to decide what uniform, if any, will best serve its wider educational purposes. The school did not reject the respondent's request out of hand: it took advice, and was told that its existing policy conformed with the requirements of mainstream Muslim opinion.

34. On the agreed facts, the school was in my opinion fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way. The rules laid down were as far from being mindless as uniform rules could ever be. The school had enjoyed a period of harmony and success to which the uniform policy was thought to contribute. On further enquiry it still appeared that the rules were acceptable to mainstream Muslim opinion. It was feared that acceding to the respondent's request would or might have significant adverse repercussions. It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision. After the conclusion of argument the House was referred to the recent decision of the Supreme Court of Canada in *Multani* v. *Commission scolaire Marguerite-Bourgeoys* [2006] SCC 6 [see below, section 3.5. in this chapter]. That was a case decided, on quite different facts, under the Canadian Charter of Rights and Freedoms. It does not cause me to alter the conclusion I have expressed.

This opinion may in fact exaggerate the difference between the approach of the Court of Appeal on the one hand, and that of the House of Lords on the other hand. The Court of Appeal insisted on the school authorities complying with certain procedural requirements in the course of devising their policy. But although it condemns this shift to procedure and away from the substantial requirements of the Convention, the House of Lords does insist on 'detailed consideration of the uniform policy' which preceded the introduction of the uniform policy; it emphasizes that the school 'took advice' about the compatibility of this policy with Muslim opinion; and that the uniform policy is not 'mindless'. Such insistance on procedural requirements is in fact entirely predictable, once it is agreed that such decisions should be adopted at the local level, on the basis of considerations related to the specific context in which they are taken: it then becomes imperative to impose certain conditions on the decision-making process of local authorities.

(c) The importance of contextual assessments

The requirement to take all reasonable measures that could accommodate specific needs on a case-by-case basis may become increasingly relevant in the evaluation of the condition of proportionality, for the same reasons it matters in the evaluation of compliance with the requirement of non-discrimination (see chapter 7, section 3.2.). While certain measures may be justified as both appropriate and necessary to the achievement of certain legitimate objectives when considered at a *general* level, they may appear less so when it is asked whether, in the *specific* instance in which the implementation of the measure is alleged to result in a violation of the rights of the individual, certain exceptions could have been introduced to the general rule. While this question is discussed in the section below in further detail on the basis of the cases of *Leyla Sahin* and *Multani*, respectively decided by the European Court of Human Rights and by the Supreme Court of Canada, it is appropriate to provide here an illustration of the usefulness of this notion by referring to the judgment of the Supreme Court of Canada in the case of *Rodriguez* v. *Attorney General of Canada* [1993] 3 S.C.R. 519. This case was already briefly addressed above (chapter 1, section 3). In his dissent, Lamer, C.J. took the view that the prohibition of assistance to suicide under section 241(b) of the Criminal Code resulted in a discrimination against persons with disabilities, in violation of section 15(1) of the Canadian Charter of Rights and Freedoms. He reasoned that unlike persons capable of causing their own deaths, persons with disabilities who are or will become unable to end their lives without assistance are deprived of the option of choosing suicide. This resulted in a violation of the equality clause of the Canadian Charter. In the course of explaining this position, he noted:

Supreme Court of Canada, *Rodriguez* v. *Attorney General of Canada* [1993] 3 S.C.R. 519, Lamer C.J. dissenting:

It was argued that if assisted suicide were permitted even in limited circumstances, then there would be reason to fear that homicide of the terminally ill and persons with physical disabilities could be readily disguised as assisted suicide and that, as a result, the most vulnerable people would be left most exposed to this grave threat ...

The principal fear is that the decriminalization of assisted suicide will increase the risk of persons with physical disabilities being manipulated by others. This 'slippery slope' argument appeared to be the central justification behind the Law Reform Commission of Canada's recommendation not to repeal this provision ...

While I share a deep concern over the subtle and overt pressures that may be brought to bear on such persons if assisted suicide is decriminalized, even in limited circumstances, I do not think legislation that deprives a disadvantaged group of the right to equality can be justified solely on such speculative grounds, no matter how well intentioned. Similar dangers to the ones outlined above have surrounded the decriminalization of attempted suicide as well. It is impossible to know the degree of pressure or intimidation a physically able person may have been under when deciding to commit suicide. The truth is that we simply do not and cannot know the range of

implications that allowing some form of assisted suicide will have for persons with physical disabilities. What we do know and cannot ignore is the anguish of those in the position of Ms Rodriguez. Respecting the consent of those in her position may necessarily imply running the risk that the consent will have been obtained improperly. The proper role of the legal system in these circumstances is to provide safeguards to ensure that the consent in question is as independent and informed as is reasonably possible.

The fear of a 'slippery slope' cannot, in my view, justify the over-inclusive reach of the *Criminal Code* to encompass not only people who may be vulnerable to the pressure of others but also persons with no evidence of vulnerability, and, in the case of the appellant, persons where there is positive evidence of freely determined consent. Sue Rodriguez is and will remain mentally competent. She has testified at trial to the fact that she alone, in consultation with her physicians, wishes to control the decision-making regarding the timing and circumstances of her death. I see no reason to disbelieve her, nor has the Crown suggested that she is being wrongfully influenced by anyone. Ms Rodriguez has also emphasized that she remains and wishes to remain free *not* to avail herself of the opportunity to end her own life should that be her eventual choice. The issue here is whether Parliament is justified in denying her the ability to make this choice lawfully, as could any physically able person.

While s. 241(*b*) restricts the equality rights of all those people who are physically unable to commit suicide without assistance, the choice for a mentally competent but physically disabled person who additionally suffers from a terminal illness is, I think, different from the choice of an individual whose disability is not life-threatening; in other words, for Ms Rodriguez, tragically, the choice is not whether to live as she is or to die, but rather when and how to experience a death that is inexorably impending. I do not, however, by observing this distinction, mean to suggest that the terminally ill are immune from vulnerability, or that they are less likely to be influenced by the intervention of others whatever their motives. Indeed, there is substantial evidence that people in this position may be susceptible to certain types of vulnerability that others are not. Further, it should not be assumed that a person with a physical disability who chooses suicide is doing so only as a result of the incapacity. It must be acknowledged that mentally competent people who commit suicide do so for a wide variety of motives, irrespective of their physical condition or life expectancy.

The law, in its present form, takes no account of the particular risks and interests that may be at issue in these differing contexts ... However, I fail to see how preventing against abuse in one context must result in denying self-determination in another. I remain unpersuaded by the government's apparent contention that it is not possible to design legislation that is somewhere in between complete decriminalization and absolute prohibition.

In my view, there is a range of options from which Parliament may choose in seeking to safeguard the interests of the vulnerable and still ensure the equal right to self-determination of persons with physical disabilities ... I find that an absolute prohibition that is indifferent to the individual or the circumstances in question cannot satisfy the constitutional duty on the government to impair the rights of persons with physical disabilities as little as reasonably possible. Section 241(*b*) cannot survive the minimal impairment component of the proportionality test.

Box 3.2. Competing versions of the necessity/proportionality test and the problems of 'balancing'

Although it is fair to say that most human rights cases ultimately are decided on the basis of the question whether the restriction which is challenged is proportionate to the legitimate objective pursued, the methodology relied upon by human rights bodies often remains vague and ad hoc. A 'strict necessity' test would oblige the author of the measure to choose, from the various ways through which the objective could be achieved, the least restrictive alternative, i.e. the route that imposes on the right or freedom at stake the minimal impairment. But this version of the proportionality requirement essentially negates the margin of appreciation for the author of the measure, and it leads the judge (or the quasi-judicial body performing such a test) to second-guess the wisdom of the solutions chosen, in a way that may be questionable, particularly insofar as the impunged measure has been adopted through democratic means.

As a result, most human rights bodies prefer to rely on a vaguer, but more flexible 'balancing of interests', in which the weight of the various public and private interests involved is evaluated and the reasonableness of the measure tested against the interference it causes with the rights or freedoms of the individual. However, the difficulties with this method are equally considerable:

1. When national security concerns are weighed against the right to respect for private life, or the economic well-being of the country is measured against the right to property, there arises the problem known by legal theorists as the problem of incommensurability (see, *inter alia*, R. Chang (ed.), *Incommensurability, Incomparability and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1997)). The very image of having to 'weigh' one right against another value or interest presupposes that there would exist some common scale according to which their respective importance (or 'weight') could be measured. But this, as famously remarked by Justice Scalia, 'is more like judging whether a particular line is longer than a particular rock is heavy' (*Bendix Autolite Cort.* v. *Midwesco Enterprises, Inc., et al.*, 486 U.S. 888 at 897 (1988) (Scalia, J., diss.)).
2. In addition, there may be the temptation for the judge, in his/her eagerness to proceed with such a balancing objectively – to the point even of striving towards mathematical exactitude – to confuse the balancing of fundamental rights with the cost-benefit analysis in use in the evaluation of public policies. This in turn may lead to undervalue the 'worth' of rights which are not susceptible of economic measurement or which the right-holders, due to their vulnerable position, may be ready to waive against a relatively modest compensation, while, in contrast, interests to which economic value can be attached, or which are invoked by actors who can demonstrate the 'worth' these interests present to them or to the collectivity, will be overvalued. More specifically, there are three difficulties involved with such a balancing test developing into a cost-benefit analysis. First, both 'revealed preference' and 'hypothetical markets' methods, which are used in cost-benefit analyis in order to value interests (or rights), fail to take into account that the willingness of the individual to pay for a certain advantage is a function, not only of the importance of that advantage to that individual (the extent to which that advantage may contribute to the self-fulfilment of that individual), but also to

his/her ability to pay (or the economic necessities and other priorities for the individual with limited resources) (on the difference between actual consent and hypothetical consent and the resulting critique of the willingness-to-pay approaches in cost-benefit analysis, see H. M. Hurd, 'Justifiably Punishing the Justified', *Michigan Law Review*, 90 (1992), 2203 *et seq.* at 2305; and M. Adler, 'Incommensurability and Cost-Benefit Analysis', *University of Pennsylvania Law Review, 146* (1998), 1371 *et seq.*). Second, such valuations, whether they are 'contingent valuations' based on surveys of the 'willingness to pay' in the absence of markets or whether they are based on the preferences exhibited by economic agents through the choices they make in the market, have been demonstrated to be strongly baseline-dependent, in the sense that the position already occupied by any individual will shape his/her estimation of the value of any regulatory benefits or sacrifices (see E. Hoffman and M. L. Spitzer, 'Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications', *Washington University Law Quarterly*, 71 (1993), 59 *et seq.*; M. Adler, 'Incommensurability and Cost-Benefit Analysis', cited above, at 1396–8). A third, related, difficulty is that we value not only our position in absolute terms, but also relative to the position of others (see R. H. Frank and C. R. Sunstein, 'Cost-Benefit Analysis and Relative Position', *University of Chicago Law Review*, 68 (2001), 323 *et seq.*).

3. The balancing test is typically performed in a procedural setting in which one of the interests in conflict is endorsed by the State, facing the interest of the individual in the preservation of his/her right or freedom. But the State is presumed to embody a broad collective interest whose weight, in comparison to that of the individual right-holder, will necessarily appear considerable, at least until we realize that this individual might well be representative, in his/her claims, of far wider societal interests, which the State may have paid insufficient consideration to. 'When it comes to weighing or valuing claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance of our very way of putting it' (R. Pound, 'A Survey of Social Interests', *Harvard Law Review*, 57 (1943) (study initially written in 1921), 1 *et seq.* at 2). This is also the danger which C. Fried and L. Frantz first pointed at when, in 1959, the balancing test first made its appearance in the First Amendment case law of the US Supreme Court (*Barenblatt* v. *United States*, 360 U.S. 109 at 126 (1959) ('Whether First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown')): see C. Fried, 'Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test', *Harvard Law Review*, 76 (1963), 755 *et seq.*; L. Frantz, 'Is the First Amendment Law? A Reply to Professor Mendelson', *California Law Review*, 51 (1963), 729 at 747–9).
4. A final difficulty is in the obligation for the judge to circulate, uncomfortably, between purely ad hoc balancing, seeking to define, in the specific circumstances of each case, which of the two rights in conflict should be recognized more weight in the balance, on the one hand; and 'definitional' balancing on the other hand, according to which the judge provides certain reasons for choosing one right over the other and, therefore, imports into his/her reasoning considerations not limited to the specific case at hand, but including anticipated future

cases where the same conflict might recur (see M. Nimmer, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy', *California Law Review*, 56 (1968), 935 *et seq.* at 942; J. H. Ely, 'Flag Desecration: a Case Study in the Roles of Categorization and Balancing in First Amendment Analysis', *Harvard Law Review*, 88 (1975), 1482 *et seq.* at 1500–2; L. Henkin, 'Infallibility Under Law: Constitutional Balancing', *Columbia Law Review*, 78 (1978), 1022 *et seq.* at 1027–8; T. A. Aleinikoff, 'Constitutional Law in the Age of Balancing', *Yale Law Journal*, 96 (1987), 943 at 948; K. M. Sullivan, 'Post-Liberal Judging: the Roles of Categorization and Balancing', *University of Colorado Law Review*, 63 (1992), 293). At the most superficial level, the dilemma between ad hoc and definitional balancing is between two judicial attitudes, one in which the judge seeks to identify the solution most adequate for the case at hand and the equity of which the parties will recognize – this is the judge as arbitrator – and another in which the judge is to clarify the requirements of the law, thus contributing for the future to legal certainty and to developing principles for the solution of future like cases – this is the judge as law-giver, or at least, as *expositor* of the law – (see P. McFadden, 'The Balancing Test', *Boston College Law Review*, 29 (1988), 585 *et seq.* at 642–51). At a deeper level, the dilemma relates to the fundamental question whether the act of balancing really may be reconciled with the definition of the judicial function itself, as consisting in the application, to certain facts, of certain pre-existing rules and principles, in order to arrive at a conclusion justified on the basis of such rules and principles. Which rules or principles guide the act of balancing itself? If such rules or principles exist, why should they not be expressed and made explicit? If they cannot be made explicit, what is the nature of the constraints facing the judge having to provide a reasoning justifying his or her conclusions?

3.7. Questions for discussion: the necessity test, balancing, and dilemmas facing human rights bodies

1. It has sometimes been argued that 'balancing' should simply be seen as any other rule applied by courts: as has been remarked by V. Luizzi, '[w]hen courts balance interests, they are, in effect, bringing their activity under a rule – that in certain cases, courts are to resolve the dispute by balancing the interests of the parties' (V. Luizzi, 'Balancing of Interests in Courts', *Jurimetrics Journal*, 20, No. 4 (1980), 373 *et seq.* at 402). Is this argument – that 'balancing' is, after all, a mode of decision-making like any other, a 'rule' followed by the judge – an answer to the concern that such a 'rule' may be unpredictable in its outcome, and thus does not allow those affected to plan their activities accordingly? If, as suggested by Luizzi, courts are in fact applying a rule when performing a balancing test, to which extent should we require from them that they make explicit the criteria they use in balancing, both in the interest of legal certainty and in order to improve the accountability of judicial decision-making?
2. If neither the 'strict necessity' test nor the 'balancing' test are fully adequate or easy to reconcile with the judicial function (see box 3.2.), what are the alternatives? Should human rights

bodies prefer a more procedural approach, focused on the process through which a particular measure interfering with human rights has been adopted, rather than on its substantive content? Which elements should characterize such a procedural approach, (a) when the measure is of a general nature, such as a land planning policy or a regulation applicable to a range of situations, and (b) when the measure is of an individual nature, such as the decision to remove a child from his/her family or to prohibit a particular public demonstration?

3. One of the difficulties of balancing individual rights or freedoms against wider societal interests is that the framing of the issue – the individual interest being pitted against the collective interest represented by the State – may prejudge the outcome of the test (see box 3.2.). Is the requirement of reasonable accommodation an answer to this concern? Could this requirement be described as imposing on the author of a general measure interfering with the right of the individual that the measure be justified not only in the generality of cases to which the measure applies, but also with respect to the specific situation of the individual?

3.5 Case study: restrictions to freedom of religion in vestimentary codes

In order to illustrate the above principles and, in particular, the difficulties facing courts or human rights expert bodies when asked to balance individuals rights against the general interests of the community, this section explores in depth the question of the prohibition of the wearing of religious symbols. The positions adopted by various judicial or quasi-judicial bodies, or by independent experts, are presented here in chronological fashion, particularly since these decisions or statements often refer to each other.

This series of cases begins with *Dahlab* v. *Switzerland*, presented to the European Court of Human Rights in 1998, but which the Court dismissed in 2001. The applicant was appointed as a primary school teacher by the Geneva Cantonal Government on 1 September 1990. She subsequently abandoned the Catholic faith and converted to Islam in March 1991. On 19 October 1991 she married an Algerian national. She began wearing an Islamic headscarf in class towards the end of the 1990–1 school year, her stated intention being to observe a precept laid down in the Koran whereby women are enjoined to draw their veils over themselves in the presence of men and male adolescents. In May 1995 the schools inspector for the Vernier district informed the Canton of Geneva Directorate General for Primary Education that the applicant regularly wore an Islamic headscarf at school; the inspector added that she had never had any comments from parents on the subject. In July 1996, however, the Director General requested the applicant to stop wearing the headscarf while carrying out her professional duties, as such conduct was incompatible with section 6 of the 1940 Public Education Act, which provides that the public education system 'shall ensure that the political and religious beliefs of pupils and parents are respected'. After she was formally prohibited from wearing a headscarf during her professional duties, Ms Dahlab challenged the decision, but her appeals were dismissed: the Federal Court upheld the

Geneva Cantonal Government's decision in a judgment of 12 November 1997. In her application to the European Court of Human Rights, Ms Dahlab submitted that the measure prohibiting her from wearing a headscarf in the performance of her teaching duties infringed upon her freedom to manifest her religion, as guaranteed by Article 9 of the Convention. The Court rejected the application as inadmissible because manifestly ill founded.

European Court of Human Rights (2nd sect.), *Lucia Dahlab v. Switzerland* (Appl. No. 42393/98), decision (inadmissibility) of 15 February 2001:

[T]he Court notes that the [Swiss] Federal Court held that the measure by which the applicant was prohibited, purely in the context of her activities as a teacher, from wearing a headscarf was justified by the potential interference with the religious beliefs of her pupils, other pupils at the school and the pupils' parents, and by the breach of the principle of denominational neutrality in schools. In that connection, the Federal Court took into account the very nature of the profession of State school teachers, who were both participants in the exercise of educational authority and representatives of the State, and in doing so weighed the protection of the legitimate aim of ensuring the neutrality of the State education system against the freedom to manifest one's religion. It further noted that the impugned measure had left the applicant with a difficult choice, but considered that State school teachers had to tolerate proportionate restrictions on their freedom of religion. In the Federal Court's view, the interference with the applicant's freedom to manifest her religion was justified by the need, in a democratic society, to protect the right of State school pupils to be taught in a context of denominational neutrality. It follows that religious beliefs were fully taken into account in relation to the requirements of protecting the rights and freedoms of others and preserving public order and safety. It is also clear that the decision in issue was based on those requirements and not on any objections to the applicant's religious beliefs.

The Court notes that the applicant, who abandoned the Catholic faith and converted to Islam in 1991, by which time she had already been teaching at the same primary school for more than a year, wore an Islamic headscarf for approximately three years, apparently without any action being taken by the head teacher or the district schools inspector or any comments being made by parents. That implies that during the period in question there were no objections to the content or quality of the teaching provided by the applicant, who does not appear to have sought to gain any kind of advantage from the outward manifestation of her religious beliefs.

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.

In the light of the above considerations and those set out by the Federal Court in its judgment of 12 November 1997, the Court is of the opinion that the impugned measure may be considered justified in principle and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety. The Court accordingly considers that the measure prohibiting the applicant from wearing a headscarf while teaching was 'necessary in a democratic society'.

It follows that this part of the application is manifestly ill-founded.

Human Rights Committee, *Hudoyberganova* v. *Uzbekistan*, Communication No. 931/2000 (CCPR/C/82/D/931/2000), final views of 18 January 2005:

6.2 The Committee has noted the author's claim that her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para. 5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as 'hijab' by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.

European Court of Human Rights (GC), *Leyla Sahin* v. *Turkey* (Appl. No. 44774/98), judgment of 10 November 2005:

[After the University of Istanbul issued a circular directing that students with beards and students wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials, the applicant was denied in March 1998 access to a written examination on one of the subjects she was studying because was wearing the Islamic headscarf. The University authorities subsequently refused on the same grounds to enrol her on a course, or to admit her to various lectures and a written examination. Before the Court, Ms Leyla Sahin complained under Article 9 (freedom of religion) that she had been prohibited from wearing the Islamic headscarf at University. She also complained of an unjustified interference with her right to education, within the meaning of Article 2 of Protocol No. 1 and of a violation of Article 14 (non-discrimination), taken together with Article 9, arguing that the prohibition on wearing the Islamic headscarf obliged students to choose between education and religion and discriminated between believers and non-believers.

These complaints are rejected by the Grand Chamber of the European Court of Human Rights, in a decision confirming the judgment delivered on 29 June 2004 by a Chamber of the Court. While agreeing that the circular in issue, adopted on 23 February 1998 by the Vice-Chancellor of the University of Istanbul, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion, the Court considers that such interference pursues the legitimate aims of protecting the rights and freedoms of others and of protecting the public order. It also considers that the interference is necessary, as it is based in particular on the principles of secularism and equality. The Court agrees with the Turkish Constitutional Court that the principle of secularism, which guides the State in its role of impartial arbiter, also serves to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements. It considers that upholding that principle may be considered necessary to protect the democratic system in Turkey. The Court also notes the emphasis placed in the Turkish constitutional system on the protection of the rights of women and gender equality. Taking into account the fact that in Turkey, the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adheres to the Islamic faith, and that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts, the Court takes the view that imposing limitations on the freedom to wear the headscarf can be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since that religious symbol has taken on political significance in Turkey in recent years. The Court notes also that practising Muslim students in Turkish universities remain free, within the limits imposed by educational organizational constraints, to manifest their religion in accordance with habitual forms of Muslim observance. In addition, a resolution adopted by Istanbul University on 9 July 1998 shows that various other forms of religious attire were also forbidden on the university premises. While agreeing that any institutions of higher education existing at a given time in a State party to the Convention come within the scope of the first sentence of Article 2 of Protocol No. 1, since the right of access to such institutions is an inherent part of the right to education set out in that provision, the ban on wearing the Islamic headscarf has not impaired the very essence of the applicant's right to education. The Court

therefore finds that there had been no violation of Article 2 of Protocol No. 1. Finally, examining the complaint under the non-discrimination clause of Article 14 of the Convention (see further chapter 7 on the requirement of non-discrimination), the Court simply notes that the regulations on the Islamic headscarf are not directed against the applicant's religious affiliation, but pursue, among other things, the legitimate aim of protecting order and the rights and freedoms of others and are manifestly intended to preserve the secular nature of educational institutions. The following excerpts encapsulate the main reasoning of the Court.]

[Whether the restriction was 'prescribed by law']

81. The applicant said that while university authorities, including vice chancellors' offices and deaneries, were unquestionably at liberty to use the powers vested in them by law, the scope of those powers and the limits on them were also defined by law, as were the procedures by which they were to be exercised and the safeguards against abuse of authority. In the instant case, the Vice Chancellor had not possessed the authority or power, either under the laws in force or the Students Disciplinary Procedure Rules, to refuse students 'wearing the headscarf' access to university premises or examination rooms. In addition, the legislature had at no stage sought to issue a general ban on wearing religious signs in schools and universities and there had never been support for such a ban in Parliament, despite the fierce debate to which the Islamic headscarf had given rise. Moreover, the fact that the administrative authorities had not introduced any general regulations providing for the imposition of disciplinary penalties on students wearing the headscarf in institutions of higher education meant that no such ban existed.

82. The applicant considered that the interference with her right had not been foreseeable and was not based on a 'law' within the meaning of the Convention ...

84. The Court reiterates its settled case law that the expression 'prescribed by law' requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct (*Gorzelik and others* v. *Poland* [GC], No. 44158/98, §64 [on this case, see above, section 3.2.]).

85. The Court observes that the applicant's arguments relating to the alleged unforeseeability of Turkish law do not concern the circular of 23 February 1998 on which the ban on students wearing the veil from lectures, courses and tutorials was based. That circular was issued by the Vice Chancellor of Istanbul University, who, as the person in charge in whom the main decision-making powers were vested, was responsible for overseeing and monitoring the administrative and scientific aspects of the functioning of the University. He issued the circular within the statutory framework set out in section 13 of Law No. 2547 ... and in accordance with the regulatory provisions that had been adopted earlier.

86. According to the applicant, however, the circular was not compatible with transitional section 17 of Law No. 2547, as that section did not proscribe the Islamic headscarf and there were no legislative norms in existence capable of constituting a legal basis for a regulatory provision.

87. The Court must therefore consider whether transitional section 17 of Law No. 2547 was capable of constituting a legal basis for the circular. It reiterates in that connection that it is

primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Kruslin* v. *France*, judgment of 24 April 1990, Series A No. 176–A, p. 21, §29) and notes that in rejecting the argument that the circular was illegal, the administrative courts relied on the settled case law of the Supreme Administrative Court and the Constitutional Court ...

88. Further, as regards the words 'in accordance with the law' and 'prescribed by law' which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term 'law' in its 'substantive' sense, not its 'formal' one; it has included both 'written law', encompassing enactments of lower ranking statutes (*De Wilde, Ooms and Versyp* v. *Belgium*, judgment of 18 June 1971, Series A No. 12, p. 45, §93) and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by parliament (*Bartold* v. *Germany*, judgment of 25 March 1985, Series A No. 90, p. 21, §46), and unwritten law. 'Law' must be understood to include both statutory law and judge-made 'law' (see, among other authorities, *Sunday Times* v. *United Kingdom* (No. 1), judgment of 26 April 1979, Series A No. 30, p. 30, §47; *Kruslin*, cited above, §29 *in fine*; and *Casado Coca* v. *Spain*, judgment of 24 February 1994, Series A No. 285–A, p. 18, §43). In sum, the 'law' is the provision in force as the competent courts have interpreted it.

89. Accordingly, the question must be examined on the basis not only of the wording of transitional section 17 of Law No. 2547, but also of the relevant case law.

In that connection, as the Constitutional Court noted in its judgment of 9 April 1991 ..., the wording of that section shows that freedom of dress in institutions of higher education is not absolute. Under the terms of that provision, students are free to dress as they wish 'provided that [their choice] does not contravene the laws in force'.

90. The dispute therefore concerns the meaning of the words 'laws in force' in the aforementioned provision.

91. The Court reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of 'foreseeability' for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (*Gorzelik and others*, judgment cited above, §65).

92. The Court notes in that connection that in its aforementioned judgment the Constitutional Court found that the words 'laws in force' necessarily included the Constitution. The judgment also made it clear that authorising students to 'cover the neck and hair with a veil or headscarf for reasons of religious conviction' in the universities was contrary to the Constitution ...

93. That decision of the Constitutional Court, which was both binding ... and accessible, as it had been published in the Official Gazette of 31 July 1991, supplemented the letter of transitional section 17 and followed the Constitutional Court's previous case law ... In addition, the Supreme Administrative Court had by then consistently held for a number of years that wearing the Islamic headscarf at university was not compatible with the fundamental principles

of the Republic, since the headscarf was in the process of becoming the symbol of a vision that was contrary to the freedoms of women and those fundamental principles ...

94. As to the applicant's argument that the legislature had at no stage imposed a ban on wearing the headscarf, the Court reiterates that it is not for it to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (*Gorzelik and others*, judgment cited above, §67).

95. Furthermore, the fact that Istanbul University or other universities may not have applied a particular rule – in this instance transitional section 17 of Law No. 2547 read in the light of the relevant case law – rigorously in all cases, preferring to take into account the context and the special features of individual courses, does not by itself make that rule unforeseeable. In the Turkish constitutional system, the university authorities may not under any circumstances place restrictions on fundamental rights without a basis in law (see Article 13 of the Constitution). Their role is confined to establishing the internal rules of the educational institution concerned in accordance with the rule requiring conformity with statute and subject to the administrative courts' powers of review.

96. Further, the Court accepts that it can prove difficult to frame laws with a high degree of precision on matters such as internal university rules, and tight regulation may be inappropriate (see, *mutatis mutandis*, *Gorzelik and others*, judgment cited above, §67).

97. Likewise, it is beyond doubt that regulations on wearing the Islamic headscarf existed at Istanbul University since 1994 at the latest, well before the applicant enrolled there ...

98. In these circumstances, the Court finds that there was a legal basis for the interference in Turkish law, namely transitional section 17 of Law No. 2547 read in the light of the relevant case law of the domestic courts. The law was also accessible and can be considered sufficiently precise in its terms to satisfy the requirement of foreseeability. It would have been clear to the applicant, from the moment she entered Istanbul University, that there were restrictions on wearing the Islamic headscarf on the university premises and, from 23 February 1998, that she was liable to be refused access to lectures and examinations if she continued to do so.

[The Court then finds that the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order, an issue which was not contested by the parties. It then continues:]

[Whether the restriction was 'necessary in a democratic society']

106. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected ... This follows both from paragraph 2 of Article 9 and the State's positive obligation under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention.

107. The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and 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 (see *Manoussakis and others* v. *Greece*, judgment of 26 September 1996, *Reports* 1996–IV, p. 1365, §47; *Hassan and Chauch* v. *Bulgaria* [GC], No. 30985/96, §78, ECHR 2000–XI; *Refah Partisi and others*, [judgment of 13 February 2003], §91) and that it requires the State to ensure mutual tolerance between opposing groups (*United Communist Party of Turkey and others* v. *Turkey*, judgment of 30 January 1998, *Reports* 1998–I, §57). Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other (*Serif* v. *Greece*, No. 38178/97, §53, ECHR 1999–IX).

108. Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (see, *mutatis mutandis*, *Young, James and Webster* v. *United Kingdom*, judgment of 13 August 1981, Series A No. 44, p. 25, §63; and *Chassagnou and others* v. *France* [GC], Nos. 25088/94, 28331/95 and 28443/95, §112, ECHR 1999–III). Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society (see, *mutatis mutandis*, *United Communist Party of Turkey and others*, judgment cited above, pp. 21–22, §45; and *Refah Partisi and others*, judgment cited above §99). Where these 'rights and freedoms' are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a 'democratic society' (*Chassagnou and others*, judgment cited above, §113).

109. Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance (see, *mutatis mutandis*, ... *Wingrove* v. *United Kingdom* judgment of 25 November 1996, *Reports* 1996–V, p. 1958, §58). This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially (as the comparative-law materials illustrate ...) in view of the diversity of the approaches taken by national authorities on the issue. It is not possible to discern throughout Europe a uniform conception of the significance of religion in society (*Otto-Preminger-Institut* v. *Austria*, judgment of 20 September 1994, Series A No. 295–A, p. 19, §50) and the meaning or impact of the public expression of a religious belief will differ according to time and context (see, among other authorities, *Dahlab* v. *Switzerland* (dec.) No. 42393/98, ECHR 2001–V [see above in this section]). Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order (see, *mutatis mutandis*, *Wingrove*, judgment cited above, p. 1957, §57). Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the domestic context concerned (see, *mutatis mutandis*, *Gorzelik*, judgment cited above, §67; and *Murphy* v. *Ireland* [judgment of 10 July 2003], No. 44179/98, §73 ...).

110. This margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the