

ORAL SUBMISSION BY PROFESSOR JHH WEILER ON BEHALF OF ARMENIA,
BULGARIA, CYPRUS, GREECE, LITHUANIA, MALTA, THE RUSSIAN
FEDERATION AND SAN MARINO – THIRD PARTY INTERVENING STATES IN
THE LAUTSI CASE BEFORE THE GRAND CHAMBER OF THE EUROPEAN
COURT OF HUMAN RIGHTS

JUNE 30TH, 2010

May it please the Court,

1. My name is Joseph H.H. Weiler, Professor of Law at New York University and Honorary Professor at London University. I have the honour to represent the Governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, The Russian Federation and San Marino. All Third Parties are of the opinion that the Second Chamber erred in its reasoning and interpretation of the Convention and its subsequent conclusions.
2. I have been instructed by the President of the Grand Chamber that the Third Parties must not address the specifics of the case and be limited to the general principles underlying the case and its possible resolution. Time allocated is 15 minutes. I will, thus, only mention the most essential arguments.
3. In its Decision the Chamber articulated three key principles with two of which the Intervening States strongly agree. They strongly dissent from the third.
4. They strongly agree that the Convention guarantees to individuals Freedom of Religion and Freedom from Religion (positive and negative religious freedom) and they strongly agree on the need for a class room that educates towards tolerance and pluralism.
5. The Chamber also articulates a principle of “neutrality:”

“The State's duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions.
[paragraph 47]

6. From this premise the conclusion is inevitable: Having a crucifix on the walls of classrooms was obviously found as expressing an assessment of the legitimacy of religious conviction – Christianity – and hence violative.

7. This formulation of “neutrality” is based on two conceptual errors which are fatal to the conclusions.

8. First, under the Convention system all Members must, indeed, guarantee individuals freedom of religion but also freedom from religion. This obligation represents a common constitutional asset of Europe. It is, however, counter balanced by considerable liberty when it comes to the place of religion or religious heritage in the collective identity of the nation and the symbology of the State.

9. Thus, there are Members in which *laïcité* is part of the very definition of the State, such as France and in which, indeed, there can be no State endorsed or sponsored religious symbol in a public space. Religion is a private affair.

10. But no State is not required under the Convention system to espouse *laïcité*. Thus, just across the Channel there is England (and I use this term advisedly) in which there is an Established State Church, in which the Head of State is also the Head of the Church, in which religious leaders, are members, *ex officio*, of the legislative branch, in which the flag carries the Cross and in which the National Anthem is a prayer to God to save the Monarch, and give him or her Victory and Glory.

[Sometimes God does not listen as in a certain football match a few days some days ago...]

11. In its very self definition as a State with such an established Church, in its very ontology, England would appear to violate the strictures of the Chamber for how could it be said that with all those symbols there is not some kind of assessment of the legitimacy of religious belief?

12. There is a huge diversity of State-Church arrangement in Europe. More than half the population of Europe lives in States which could not be described as *laïque*. Inevitably in public education, the State and its symbols have a place. Many of these, however, have a religious origin or contemporary religious identity. In Europe, the Cross is the most visible example appearing as it does on endless flags, crests, buildings etc. It is wrong to argue, as some have, that it is *o n l y* or *m e r e l y* a national symbol. But it is equally wrong to argue, as some have,

that it has only religious significance. It is both – Given history that is part of the national identity of many European States. [There are scholars who claim that the 12 Stars of the Council of Europe has this very duality too!]

13. Consider a photograph of the Queen of England hanging in the classroom. Like the Cross, that picture has a double meaning. It is a photo of the Head of State. It is, too, a photo of the Titular head of the Church of England. It is a bit like the Pope who is a Head of State and Head of a Church. Would it be acceptable for someone to demand that the picture of the Queen may not hang in the school since it is incompatible with their religious conviction or their right to education since – they are Catholics, or Jews, or Muslims? Or with their philosophical conviction – they are atheists? Could the Irish Constitution or the German Constitution not hang on a class room wall or be read in class since in their Preambles we find a reference to the Holy Trinity and the Divine Lord Jesus Christ in the former and to God in the latter? Of course the right of freedom from religion must ensure that a pupil who objects may not be required actually to engage in a religious act, perform a religious ritual, or have some religious affiliation as a condition for state entitlements. He or she should certainly have the right not to sing God Save the Queen if that clashes with their world view. But can that student demand that no one else sing it?

14. This European arrangement constitutes a huge lesson in pluralism and tolerance. Every child in Europe, atheist and religious, Christian, Muslim and Jew, learns that as part of their European heritage, Europe insists, on the one hand on their individual right to worship freely – within limits of respecting other people's rights and public order – and their right not to worship at all. At the same time, as part of its pluralism and tolerance, Europe accepts and respects a France and an England; a Sweden and a Denmark, a Greece and an Italy all of which have very different practices of acknowledging publically endorsed religious symbols by the State and in public spaces.

15. In many of these non- *laïque* States, large segments of the population, maybe even a majority are no longer religious themselves. And yet the continued entanglement of religious symbols in its public space and by the State is accepted by the secular population as part of national identity and as an act of tolerance towards their co-nationals. It may be, that some day, the British people, exercising their constitutional sovereignty, will divest themselves of the Church of England, as did the Swedes. But that is for them, not for this distinguished Court, and certainly the Convention has never been understood as forcing them to do so.

16. In today's Europe countries have opened their gates to many new residents and citizens. We owe them all the guarantees of the Convention. We owe the decency and welcome and non discrimination. But the message of tolerance towards the Other should not be translated into a message of intolerance towards one's own identity, and the legal imperative of the Convention should not extend the justified requirement that the State guarantee negative and positive religious freedom, to the unjustified and startling proposition that the State divest itself of part of its cultural identity simply because the artefacts of such identity may be religious or of religious origin.

17. The position adopted by the Chamber is not an expression of the pluralism manifest by the Convention system, but an expression of the values of the *laïque* State. To extend it to the entire Convention system would represent, with great respect, the Americanization of Europe. Americanization in two respects: First a single and unique rule for everyone, and second, a rigid, American style, separation of Church and State, as if the people of those Members whose State identity is not *laïque*, cannot be trusted to live by the principles of tolerance and pluralism. That again, is not Europe.

18. The Europe of the Convention represents a unique balance between the individual liberty of freedom of and from religion, and the collective liberty to define the State and Nation using religious symbols and even having an established Church. We trust our constitutional democratic institutions to define our public spaces and our collective educational systems. We trust our courts, including this august court, to defend individual liberties. It is a balance that has served Europe well over the last 60 years.

19. It is also a balance which can act as a beacon to the rest of the world since it demonstrates to countries which believe that democracy would require them to shed their religious identity that this is not the case. The decision of the Chamber has upset this unique balance and risks to flatten our constitutional landscape robbing of that major asset of constitutional diversity. This distinguished Court should restore the balance.

20. I turn now to the second conceptual error of the Chamber – the conflation, pragmatic and conceptual, between secularism, *laïcité*, and neutrality.

21. Today, the principal social cleavage in our States as regards religion is not among, say Catholics and Protestants, but among the religious and the 'secular'. Secularity, *Laïcité* is not an empty category which signifies absence of faith. It is

to many a rich world view which holds, inter alia, the political conviction that religion only has a legitimate place in the private sphere and that there may not be any entanglement of public authority and religion. For example, only secular schools will be funded. Religious schools must be private and not enjoy public support. It is a political position, respectable, but certainly not “neutral.” The non-laique, whilst fully respecting freedom of and from religion, embrace some form of public religion as I have already noted. Laïcité advocates a naked public square, a classroom wall bereft of any religious symbol. It is legally disingenuous to adopt a political position which splits our society, and to claim that somehow it is neutral.

22. Some countries, like the Netherlands and the UK, understand the dilemma. In the educational area these States understand that being neutral does not consist in supporting the secular as opposed to the religious. Thus, the State funds secular public schools and, on an equal footing, religious public schools.

23. If the social pallet of society were only composed of blue yellow and red groups, than black – the absence of color – would be a neutral colour. But once one of the social forces in society has appropriated black as its colour, than that choice is no longer neutral. Secularism does not favour a wall deprived of all State symbols. It is religious symbols which are anathema.

24. What are the educational consequences of this?

25. Consider the following parable of Marco and Leonardo, two friends just about to begin school. Leonardo visits Marco at his home. He enters and notices a crucifix. What is that?, he asks. ‘A crucifix – why, you don’t have one? Every house should have one.’ Leonardo returns to his home agitated. His mother patiently explains: ‘They are believing Catholics. We are not. We follow our path. Now imagine a visit by Marco to Leonardo’s house. ‘Wow!’, he exclaims, ‘no crucifix? An empty wall?’ “ We do not believe in that nonsense” says his friend. Marco returns agitated to his house. ‘Well’, explains his mother, ‘We follow our path.’ The next day both kids go to school. Imagine the school with a crucifix. Leonardo returns home agitated: ‘The school is like Marco’s house. Are you sure, Mamma, that it is okay not to have a crucifix?’ That is the essence of Ms. Lausti’s complaint. But imagine, too, that on the first day the walls are naked. Marco returns home agitated. ‘The school is like Leonardo’s house,’ he cries. ‘You see, I told you we don’t need it.’

26. Even more alarming would be the situation if the crucifixes, always there, suddenly were removed.

27. Make no mistake: A State-mandated naked wall, as in France, may suggest to pupils that the State is taking an anti-religious attitude. We trust the curriculum of the French Republic, to teach their children tolerance and pluralism and dispel that notion. There is always an interaction between what is on the wall and how it is discussed and taught in class. Likewise, a crucifix on the wall, might be perceived as coercive. Again, it depends on the curriculum to contextualize and teach the children in the Italian class tolerance and pluralism. There may be other solutions such as having symbols of more than one religion or finding other educationally appropriate ways to convey the message of pluralism.

28. It is clear that given the diversity of Europe on this matter there cannot be one solution that fits all Members, all classrooms, all situations. One needs to take into account the social and political reality of the locale, its demographics, its history and the sensibilities and sensitivities of the Parents.

30. There may be particular circumstances where the arrangements by the State could be considered coercive and inimical but the burden of proof must rest on the individual and the bar should be set extremely high before this Court decides to intervene, in the name of the Convention, in the educational choices made by the State. A one rule fits all, as in the decision of the Second Chamber, devoid of historical, political, demographic and cultural context is not only inadvisable, but undermines the very pluralism, diversity and tolerance which the Convention is meant to guarantee and which is the hall mark of Europe.