



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2747/2016\*, \*\*, \*\*\*

<i>Submitted by:</i>	Sonia Yaker (represented by counsel, Roger Kallas)
<i>Alleged victim:</i>	The author
<i>State party:</i>	France
<i>Date of communication:</i>	22 February 2016 (initial submission)
<i>Document references:</i>	Decision on admissibility of 26 July 2017
<i>Date of adoption of Views:</i>	17 July 2018
<i>Subject matters:</i>	Right to freedom of religion; discriminatory treatment of a religion and of its members
<i>Procedural issues:</i>	Admissibility, other procedure of international investigation or settlement; exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of religion; non-discrimination
<i>Articles of the Covenant:</i>	18 and 26
<i>Articles of the Optional Protocol:</i>	5 (2) (a) and (b)

1.1 The author of the communication is Sonia Yaker, a French national born in 1974 and domiciled in Saint-Denis, France. She claims to be a victim of a violation by France of her rights under articles 18 and 26 of the Covenant.<sup>1</sup> She is represented by counsel, Roger Kallas.

\* Adopted by the Committee at its 123rd session (2–27 July 2018).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. Pursuant to Rule 90 of the Committee's rules of procedure, Olivier de Frouville, member of the Committee, did not participate in the consideration of the communication.

\*\*\* The following are annexed to the present report: joint opinion of Committee members Ilze Brands Kehris, Sarah Cleveland, Christof Heyns, Marcia V.J. Kran and Yuval Shany (concurring); joint opinion of Committee members Ilze Brands Kehris and Sarah Cleveland (concurring); individual opinion of Committee member Yadh Ben Achour (dissenting); and individual opinion of Committee member José Manuel Santos Pais (dissenting).

<sup>1</sup> Although she does not invoke it directly, the author also makes reference to article 12 of the Covenant.



1.2 The first Optional Protocol to the Covenant entered into force for France on 17 May 1984. France has entered a reservation.<sup>2</sup>

1.3 On 5 September 2016, the Special Rapporteur on new communications and interim measures informed the State party and the author of his decision to consider the admissibility of the communication separately from the merits, pursuant to rule 97, paragraph 3, of the Committee's rules of procedure.

#### **The facts as submitted by the author**

2.1 The author is a Muslim and wears a niqab (full face veil). On 6 October 2011, she was stopped for an identity check while wearing her niqab on the street in Nantes. She was then prosecuted and convicted of the minor offence of wearing a garment to conceal her face in public.

2.2 Consequently, the author was convicted on 26 March 2012 and was ordered by the community court in Nantes<sup>3</sup> to pay a fine of 150 euros, the maximum penalty for the offence in question, which was established by Act No. 2010-1192 of 11 October 2010. Article 1 of the Act stipulates that: "No one may, in a public space, wear any apparel intended to conceal the face." Article 2 of the Act, which specifies where the law is applicable, provides that "a public space shall mean public streets and walkways and places open to the public or designated for a public service". It also establishes that "the prohibition set out in article 1 does not apply if such clothing is prescribed or authorized by legislative or regulatory provisions ..., is justified for health reasons or on professional grounds, or is part of sporting, artistic or traditional festivities or events".

2.3 Article 3 of the Act sets out the penalties for this minor offence: "a fine corresponding to offences of category two" and/or "mandatory attendance at a citizenship course". The Act has also established the more serious offence of forcing a person to conceal the face, which has been included in article 225-4-10 of the Criminal Code, as follows: "The act, by any person, of forcing one or several other persons to conceal the face, by means of threats, violence, coercion, abuse of authority or of power, by reason of their sex, shall be punishable by one year of imprisonment and a fine of 30,000 euros. When such an act is committed against a minor, the penalties shall be increased to two years' imprisonment and a fine of 60,000 euros."

2.4 The author is challenging, on the basis of article 18 of the Covenant, the prohibition against concealing the face in public areas, which deprives those wishing to wear a full-face veil of the possibility to do so.

2.5 As for the steps taken by the author, as the decision of the community court judge was not subject to appeal, she filed an application for cassation with the criminal chamber of the Court of Cassation. She argued that Act No. 2010-1192, which prohibited the wearing in public places of garments to conceal the face and established the legal basis for the offence for which she had been convicted, was contrary to article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which protected the right to manifest one's religion. On the merits, she also invoked a claim that the law was discriminatory in nature, inviting the Court of Cassation to ascertain whether it "undermined pluralism by discriminating against a minority practice of the Muslim religion".

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<sup>2</sup> Upon ratification, France issued the following reservation: "France makes a reservation to article 5, paragraph 2 (a), specifying that the Human Rights Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement."

<sup>3</sup> Community court judges have jurisdiction to hear civil cases involving disputes of up to 4,000 euros. For criminal cases, community courts can hear cases involving minor offences of the first four categories. Article 15 of the Act modernizing the justice system of the twenty-first century called for the community courts to be eliminated by 1 July 2017. On that date, for civil cases, ongoing proceedings that were before the community courts were transferred to a court of minor jurisdiction (*tribunal d'instance*).

2.6 The application was rejected by the criminal chamber of the Court of Cassation in a decision of 3 April 2013, on the grounds that “the invocation of a violation of the European Convention on Human Rights, since it was not brought before the trial judge and includes additional factual evidence, is new and thus inadmissible”. The decision is final. The author claims that she has exhausted all domestic remedies.

2.7 The author points out that she was not assisted by counsel at the community court in Nantes, that the procedure is an extremely expedited one, with a single judge who is generally not even a judge by profession and that the procedure is not subject to an appeal during which she would have been able to put forth arguments related to her religious freedom and the discriminatory nature of the law.

2.8 The author adds that the Court of Cassation, by holding that “the invocation of a violation of the European Convention on Human Rights, as it was not brought before the trial judge and includes additional factual evidence, is new and as such is inadmissible”, incorrectly applied article 619 of the Code of Civil Procedure, which provides that: “New grounds will not be admissible before the Court of Cassation. Nevertheless, the following may be raised for the first time, unless otherwise provided: (1) purely legal grounds; and (2) grounds based on the impugned decision.”

2.9 According to the author, as the ground invoked, that is, the incompatibility of a law, constitutes “purely legal grounds”, the challenge against the prohibition of the full-face veil brought before the Court of Cassation was completely admissible, notwithstanding the fact that the argument introduced a new element. The author cites the example of a posteriori monitoring of constitutionality; since 2010, initial monitoring has been possible by means of an application for judicial review in cassation. She adds that an objective assessment of whether a law is constitutional is by nature an abstract “purely legal ground”, without any consideration of the circumstances of a given case. According to the author, the same holds when the conformity of a domestic law is assessed, with just as much objectivity, against a treaty obligation.

2.10 The author thus invites the Committee to find that inadmissibility cannot be cited against her in this case, as the grounds invoked before the Court of Cassation did not constitute additional evidence of fact and law, but “purely legal grounds”.

2.11 The author submitted an application to the European Court of Human Rights on 24 June 2013, calling for it to find violations of articles 6 (1) and 9 of the European Convention on Human Rights. The application was declared inadmissible by the Court, which met between 21 August 2014 and 4 September 2014, with a single judge, on the grounds that “the conditions of admissibility laid down in articles 34 and 35 of the Convention [had] not been met”.

### **The complaint**

3.1 According to the author, the prohibition against concealing the face in public areas and the fact that she was convicted for wearing the niqab violate her rights under articles 18 and 26 of the Covenant.

3.2 Regarding article 18, wearing the niqab or the burqa amounts to wearing a garment that is customary for a segment of the Muslim faithful. It is an act motivated by religious beliefs. Consequently, it is the performance of a rite or practice of a religion, and freedom to manifest that religion is guaranteed by article 18 of the Covenant, notwithstanding the fact that wearing the niqab or the burqa is not a religious requirement common to all practising Muslims. The author refers to the Committee’s general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, according to which the observance and practice of religion or belief may include not only ceremonial acts, but also such customs as the observance of dietary regulations, and the wearing of distinctive clothing or head coverings. Wearing the niqab or the burqa amounts to wearing a garment that is customary for a segment of the Muslim faithful, an act motivated by religious belief that is indeed the performance of a rite and practice of a religion, and freedom to manifest a religion is guaranteed by article 18 of the Covenant.

3.3 According to the author, there can be no disputing that the State is interfering in the religious freedom of the minority of Muslim women who wear the full-face veil (according to a parliamentary commission that studied the matter, fewer than 2,000 women are reportedly concerned). The author recalls, in this regard, the reservation entered by the French Constitutional Council regarding places of worship in its decision of 7 October 2010:<sup>4</sup> “The prohibition against concealing the face in public areas cannot, without excessively undermining article 10 of the Declaration of 1789, restrict the exercise of religious freedom in places of worship open to the public.” According to the author, it must be admitted as a counterpoint that the exercise of religious freedom in the rest of public areas has indeed been restricted by the legislature.

3.4 The author refers to the jurisprudence of the Committee, in particular the *R. Singh v. France* ruling,<sup>5</sup> in which the Committee found a violation of article 18 in a case of one-time interference, when a person was photographed bareheaded for the renewal of a residence permit. According to the author, the prohibition against wearing a full-face veil in public areas is all the more so a type of interference in her freedom of religion, as she is at all times being forced to appear without her full-face veil.

3.5 The author adds that the limitations to article 18 have not been justified on permissible grounds, such as those mentioned in article 18 (3) of the Covenant. While limitations are provided by the law, they are neither necessary nor proportionate to the objective. First of all, the objective has not been clearly defined by the legislature. Act No. 2010-1192 contains no statement of purpose and provides no information on its legal basis; it does not even refer to a parliamentary resolution of 11 May 2010 in which the National Assembly expressed the view that wearing a full-face veil went against the principles of the French Republic.<sup>6</sup> A quick look at the origins of the Act shows that it was justified exclusively by a political desire to ban, as a matter of principle, the wearing of the full-face veil;<sup>7</sup> the law thus had no legitimate objective in the sense intended under article 18 (3) of the Covenant. The lack of a legitimate objective undermines the argument that the law was even necessary.

3.6 Even if such an objective were established, such a limitation could not possibly be considered as necessary and proportionate. The State has put forward the argument<sup>8</sup> that Act No. 2010-1192 pursued two main objectives: equality between men and women and the protection of public order. Such objectives, however, cannot justify an infringement of the right to manifest one’s religion.

3.7 First, the objective of equality between men and women cannot per se be associated with any of the purposes set out in article 18 (3). The Committee has stated, in its general comment No. 22 (para. 8), that restrictions were not allowed on grounds not specified in paragraph 3. The author adds that forcing women who wish to wear full-face veils in public to remove them constitutes the imposition of a dress code on women, and that presumptions relating to their attitudes towards gender inequality are based solely on prejudices held by some people about the way of life of certain groups. No woman wearing a full-face veil has ever advocated inequality between men and women.

3.8 As for the protection of public order, which is the only basis that could have been retained if the legislature had chosen, in accordance with the opinion of some members of

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<sup>4</sup> The parliament brought the case before the Constitutional Council on 14 September 2010, in accordance with the conditions set by article 61 (2) of the Act prohibiting the concealment of the face in public areas. In its decision of 7 October 2010, the Council declared the Act to be in conformity with the Constitution, while making a reservation in respect of places of worship open to the public.

<sup>5</sup> *R. Singh v. France* (CCPR/C/102/D/1876/2009), para. 8.4. The author also refers to the cases of *B. Singh v. France* (CCPR/C/106/D/1852/2008), para. 8.7; and *S.M. Singh v. France* (CCPR/C/108/D/1928/2010), para. 9.5.

<sup>6</sup> National Assembly resolution of 11 May 2010 on the commitment to uphold republican values in the face of the development of radical practices that undermine them.

<sup>7</sup> The author notes that, on 22 June 2009, before a joint session of the French parliament held at Versailles, Nicolas Sarkozy, then President of the Republic, stated that “the burqa is not welcome in the French Republic”.

<sup>8</sup> The author refers to the fifth periodic report of France to the Committee (CCPR/C/FRA/5), paras. 429 ff.

parliament, to limit the prohibition against wearing a full-face veil to certain places or occasions, or to establish an obligation to temporarily uncover the face for the purpose of identification. That, however, was not what the Government of France opted to do.

3.9 The author notes that it has never been claimed that women wearing the burqa or the niqab, who incidentally are a tiny minority, threaten public safety or create public unrest. While it can be legitimately argued that, in certain specific circumstances, it must be possible to identify persons in public places with their faces uncovered, it is unimaginable that such an obligation to “unveil” could be permanent and absolute. Only specific restrictions could be tolerated. Because it is general in nature, the prohibition established by Act No. 2010-1192 cannot be described as necessary for the protection of public order.

3.10 In any event, the prohibition is not proportionate to its objective, as the prohibition is permanent, it covers all public spaces and its violation is a criminal offence. The author further notes that the wearing of the full-face veil, the means of concealment of the face specifically referred to by the draft and in the debate that preceded the adoption of the Act, apparently cannot ever be authorized under the exceptions set out in article 2 (II).<sup>9</sup>

3.11 The European Court of Human Rights, in its judgment in the case of *S.A.S. v. France*, dismissed the objective of protecting public order and safety invoked by France, applying the principle of proportionality.<sup>10</sup> The author concludes, therefore, that the prohibition against concealing the face in public is not necessary to protect public order and safety, insofar as the prohibition is clearly disproportionate to the stated objective.

3.12 With regard to the claim under article 26, the author submits that the application of Act No. 2010-1192 was indirectly discriminatory, as it effectively compromised her exercise of freedom of religion and freedom of movement. The Act does not treat the author in the same way as it treats the rest of the population. It obliges her, if she does not wish to risk a criminal penalty, to refrain from wearing the full-face veil in public, while for her, doing so is a religious duty. As the only way for her to wear the veil is to avoid going out and moving about in public, her liberty of movement, specifically guaranteed by article 12 of the Covenant, is restricted.

3.13 While Act No. 2010-1192 is supposed to apply without distinction to any person who conceals their face in public, the fact remains that it has the effect of indirectly discriminating against women who wear the full-face veil. The discussions preceding the adoption of the Act clearly attest to the fact that it was considered a general solution in the law, designed to prohibit specifically the full-face veil. This indirect discrimination is also confirmed by the figures relating to the implementation of the Act, which nonetheless is supposed to cover any type of facial concealment, including helmets or ski masks.<sup>11</sup>

3.14 Lastly, the author reiterates that there are 2,000 women who wear the full-face veil in France. They account for more than half of the persons subjected to checks under the Act, which demonstrates that they are disproportionately subjected to checks.

3.15 The author therefore calls for a finding that articles 18 and 26 of the Covenant have been violated.

<sup>9</sup> Article 2 (II) stipulates that the prohibition does not apply “if such clothing is prescribed or authorized by legislative or regulatory provisions ..., is justified for health reasons or on professional grounds, or is part of sporting, artistic or traditional festivities or events”. The circular of 2 March 2011 subsequently clarified, to a certain extent, the implementation of the Act. With regard to the legal exceptions, it stipulates that “religious processions, to the extent that they are of a traditional nature, are covered by the scope of the exceptions to the article 1 prohibition”. However, the word “religious procession” is not defined.

<sup>10</sup> *S.A.S. v. France* [GC] (application No. 43835/11), judgment of 1 July 2014, para. 139.

<sup>11</sup> It is noted in the 2013 report of the Observatory of Secularism, a body under the office of the French Prime Minister, that “from the beginning of implementation of the Act up until 21 February 2014, 1,111 checks were carried out, the vast majority being performed on women wearing full face veils. Some were checked on several occasions. In all, 1,038 police reports were issued recording the offence and 61 offenders received warnings. Among the 594 women who were fully veiled and subjected to checks, 461 had been born in France and 133 abroad. The foreigners came mainly from the Maghreb (97) and the Middle East (9). Nine were from the sub-Saharan African community.”

**State party's observations on admissibility**

4.1 On 17 May 2016 the State party submitted its observations on admissibility and requested the Committee to reject the communication as inadmissible.

4.2 The State party notes that the author was on two occasions found guilty of wearing a garment to conceal her face in public, specifically a niqab. On the two occasions, she was sentenced by the community court in Nantes to pay fines of 140 and 150 euros on 21 November 2011 and 26 March 2012, respectively. The author was indeed sentenced to pay a fine of 140 euros on 21 November 2011 for wearing a garment to conceal her face in public, an infraction under Act No. 2010-1192. The offence was noted during a traffic check. On 26 March 2012, the community court judge once again sentenced the author to pay a fine of 150 euros for the same offence after she refused to remove her full face veil at the security checkpoint for entry into the court that was due to rule on her first offence. The author did not appear at either of the two hearings.

4.3 The author filed two applications for review before the criminal chamber of the Court of Cassation to challenge these rulings. It was only before the Court of Cassation that she argued that Act No. 2010-1192, the legal basis for the convictions in question, was contrary to articles 9 and 14 of the European Convention on Human Rights.

4.4 The State party submits that the Committee has already indicated that the condition requiring the exhaustion of domestic remedies has not been met, as it was in cassation that the author for the first time put forward the claim invoked before the Committee. Those grounds were declared inadmissible by the highest domestic court because they had not been invoked before the ordinary court.<sup>12</sup>

4.5 The author's application before the European Court of Human Rights related to the same facts as those presented before the Committee and on 11 September 2014 the author was informed that her application was inadmissible under articles 34 and 35 of the European Convention on Human Rights. The State party recalls the reservation that it entered upon ratification of the Optional Protocol, relating to article 5 (2) (a). It recalls the Committee's practice according to which a matter cannot be considered as being "examined" by another international body if the case has been dismissed on purely procedural grounds. Conversely, a decision of inadmissibility based on even limited consideration of the merits of a case constitutes an examination within the meaning of article 5 (2) (a).

4.6 In the present case, the decision of the European Court of Human Rights addressed to Ms. Yaker declaring her application inadmissible does not cite the grounds for inadmissibility. However, articles 34 and 35 of the European Convention on Human Rights set out six grounds for inadmissibility: (a) if the six-month period for the submission of the application is exceeded, as counted from the date on which the final domestic decision is taken; (b) if the complaint is anonymous; (c) if the matter is already being examined under another procedure of international investigation or settlement; (d) if domestic remedies have not been exhausted; (e) if the application is manifestly ill-founded or an abuse; and (f) if the applicant has not suffered a significant disadvantage.

4.7 In the light of the fact that the application was submitted within six months, exclusively and not anonymously to the European Court of Human Rights, and also that the alleged disadvantage was significant according to the meaning outlined in article 35 of the Convention, the State party considers that it follows implicitly, but also necessarily, that the application could be denied by the European Court only for a failure to exhaust domestic remedies or because it was considered to be manifestly ill-founded or an abuse.

4.8 In the first situation, the Committee can only reach the same conclusion as the European Court of Human Rights, noting that it was in cassation that the author for the first time invoked the complaint of violation of articles 18 and 26 of the Covenant. Consequently, as it did in the *B. Singh* case, the Committee should declare the application inadmissible owing to non-exhaustion of domestic remedies.

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<sup>12</sup> The State party refers to the case of *B. Singh v. France*, para. 7.4.

4.9 In the second situation, if the European Court of Human Rights has rejected an application that it considers manifestly ill-founded, then it must have carried out an examination of the claims put forward by the applicants, which means that it has reviewed the merits of the case. That too would leave the Committee without jurisdiction, because of the reservation filed by France.

4.10 The argument that the case in question is not the same case cannot be accepted. The application relates to the same facts and the same circumstances as that submitted to the European Court of Human Rights. What is more, the issues raised are the same. In conclusion, the Committee should declare the communication inadmissible.

#### **Author's comments on the State party's observations on admissibility**

5.1 On 20 July 2016, the author stated that she had no further comments to make, having developed at length the legal argument for admissibility in her initial communication.

5.2 She noted, however, the cynicism of the State party, which, while emphasizing that the disadvantage was significant within the meaning of article 35 of the European Convention on Human Rights, requested the Committee not to consider the merits of the complaint, while the author had already been the victim of a denial of justice before the European Court of Human Rights and the French Court of Cassation.

#### **Decision of the Committee on admissibility**

6.1 On 26 July 2017, the Committee considered the admissibility of the communication.

6.2 The Committee observed that the author had presented an application relating to the same events before the European Court of Human Rights, and that she had been informed by a letter of 11 September 2014 that a single judge had decided to declare "the application inadmissible on the grounds that the conditions of admissibility laid down in articles 34 and 35 of the Convention had not been met". The Committee recalled that, in ratifying the Optional Protocol, France had introduced a reservation excluding the competence of the Committee in relation to cases that had been or were being examined under another procedure of international investigation or settlement. However, the Committee noted from the letter from the Court that the author's application appeared not to have been declared inadmissible on purely procedural grounds and that, from the succinct nature of the reasoning by the Court, no argument or clarification regarding the inadmissibility decision had apparently been provided to the author to justify a rejection of the application based on the merits. Consequently, the Committee considered that it was not possible for it to determine with certainty that the case presented by the author had already been the subject of a consideration, even limited, of the merits,<sup>13</sup> in the meaning of the reservation filed by France. For those reasons, the Committee considered that the reservation entered by France relating to article 5 (2) of the Optional Protocol was not, in itself, an obstacle to the consideration of the merits by the Committee.

6.3 With regard to the requirement for the exhaustion of domestic remedies established by article 5 (2) (b) of the Optional Protocol, the Committee noted that the author for the first time had raised the substantive complaint of violation of her rights, currently invoked before the Committee, only during the application before the criminal chamber of the Court of Cassation, which found the grounds inadmissible owing to the fact that they should have been invoked before the lower court. However, the Committee also noted the author's submission that the only opportunity she had had to raise her claims before bringing them to the Court of Cassation had been to bring them before the community court. In that regard, the author pointed out that the proceedings before the community court had been extremely expedited, that the court had a single judge who was generally not a judge by profession, that the procedure was not subject to appeal and that she had not had the assistance of counsel. The author further contended that it was proper for her claims to be brought before the Court of Cassation, since, as in cases of a posteriori monitoring of constitutionality, they

<sup>13</sup> See also the Committee's Views in *A.G.S. v. Spain* (CCPR/C/115/D/2626/2015), para. 4.2.

were based on “purely legal” grounds in the sense of article 619 of the Code of Civil Procedure.

6.4 The Committee observed that the State party had not rebutted these allegations, and specifically those concerning the proceedings before the community court and their availability and effectiveness in the author’s case. The Committee further noted that the community court was a public place where, under the Act, it would be a criminal offence to wear a niqab, and that the State party had indicated in its submission that when the author had tried to attend the hearing before the community judge she had been fined a second time for refusing to remove her full-face veil during the security check, and that ultimately she had not attended the hearing. The Committee also noted that the *B. Singh v. France* case invoked by the State party did not involve a criminal procedure in which the right of appeal had to be guaranteed, and that the author in that case had had the opportunity to raise his complaints with two lower courts before trying to raise new ones before the Court of Cassation. By contrast, in the present case the Committee considered that the author had been unable to have her complaints reconsidered on appeal before a court other than the Court of Cassation<sup>14</sup> and concluded that reasonably available domestic remedies had been exhausted.

6.5 The Committee declared that the communication was admissible, insofar as it raised issues with respect to articles 18 and 26 of the Covenant.

#### **State party’s observations on the merits**

7.1 In its observations on the merits of the communication dated 16 September 2016, the State party submits that Act No. 2010-1192 was adopted by the National Assembly and the Senate with only one vote against, after a broad democratic debate. In that context, a parliamentary commission was set up, bringing together elected representatives from across the political spectrum, and proceeded to hear the different views of many persons within civil society, including Muslims and non-Muslims.

7.2 The State party reports that, on 11 May 2010 — prior to the adoption of the Act — the National Assembly adopted a resolution stating that “radical practices undermining dignity and equality between men and women, one of which is the wearing of the full veil, are incompatible with the values of the Republic” and calling for all appropriate means to be implemented “to ensure the effective protection of women who suffer duress or pressure, in particular those who are forced to wear a full veil”.<sup>15</sup>

7.3 The State party points out that the general prohibition set forth in the Act is extremely limited in its aim, since it only concerns the concealment of the face. Furthermore, the measure is essential for the defence of the principles that motivated its adoption, and the accompanying penalties are proportionate, the legislature having prioritized an educational approach. The Act thus achieves, according to the State party, a reasonable balance between the preservation of essential principles in a democratic society and the freedom to dress in accordance with one’s religious or other beliefs.

7.4 The State party stresses that it is not the only one to have prohibited the wearing of garments that conceal the face in public places. The Federal Parliament of Belgium has approved an identical ban, while the lower house of the Parliament of Italy has also passed a bill for that purpose.

7.5 The State party adds that the prohibition established under the Act covers all garments intended to conceal the face in public, regardless of how or why this is accomplished. No special treatment is applied in respect of clothes worn for religious or cultural reasons. However, since certain garments intended to conceal the face are worn for

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<sup>14</sup> In paragraph 48 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Committee sets out that the State party has a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.

<sup>15</sup> National Assembly resolution on the commitment to uphold republican values in the face of the development of radical practices that undermine them.

religious reasons, the prohibition may be seen as a “restriction” on the freedom to manifest one’s religion or belief (external forum).

7.6 The State party submits that, in this case, the restriction in question is prescribed by law, has a legitimate objective and is proportionate in the pursuit of that legitimate objective. The ban and the exceptions thereto are laid down in clear and precise terms. The State party adds that a circular of 2 March 2011 provides a comprehensive explanation of the scope and the implementing arrangements of the Act, accompanied by an information campaign in public places, the distribution of leaflets in administrative premises and an educational website. The State party further stresses that the Act provided for a period of six months between its enactment and its entry into force; therefore it met the requirement of foreseeability and the author knew that she risked a penalty.

7.7 The legitimate objectives of the contested law are the protection of the rights and freedoms of others and the protection of public order, which are objectives set forth in article 18 (3) of the Covenant. According to the State party, these aims are clearly defined in the statement of purpose of the Act, which reaffirms the values of the Republic and the requirements of living together. In this regard, the European Court of Human Rights, in its judgment in the case of *S.A.S. v. France*, found that the prohibition could be justified only insofar as it sought to guarantee the conditions for “living together”, described by the Government of France as respect for the minimum requirements of life in society. The State party argues that public spaces are the main place in which social life happens and people come into contact with others. In such social interactions, the face plays a significant role, since it is the part of the body that reflects one’s shared humanity with an interlocutor. Showing one’s face not only signals a person’s readiness to be identified as an individual by the other party, but also not to unfairly conceal the frame of mind in which they interact with him or her, and is thus a manifestation of the minimum degree of trust that is essential for living together in an egalitarian and open society such as France. The concealment of the face prevents the identification of the person and is likely to impair interaction between individuals and undermine the conditions for living together in diversity.

7.8 The State party submits that to ensure public safety and public order it must be able to identify all individuals when necessary in order to avert threats to the security of persons or property and to combat identity fraud. That implies that people reveal their faces, a requirement that is all the more crucial in the context of the global threat of terrorism.<sup>16</sup>

7.9 The State party contests the claim that the Act forbids Muslim women from manifesting their religious beliefs through the wearing of the veil and stresses that it prohibits only the full concealment of the face, regardless of the motive for doing so, and allows any individual to wear in public clothes intended to express a religious belief, such as headscarves or turbans, provided that they reveal the face. The problem here is very different to that relating to the wearing of religious symbols by civil servants in the exercise of their duties and the wearing of such symbols in schools, which concern the requirement that the public service must be neutral. In the present instance, the prohibition is not based on the religious connotation of the clothes in question, but on the simple fact that they fully conceal the face. Only the extremely radical form of clothing, which results in the public effacement of the person, is affected. It would not be difficult for the author to access the public space wearing a veil that would demonstrate her religious beliefs without concealing her face. In addition, the Constitutional Council has clarified that the prohibition should not restrict the exercise of religious freedom in places of worship open to the public. Therefore, the measure is proportionate to the objective pursued and the State party has not exceeded its margin of appreciation in the present case, as stated by the European Court of Human Rights in the aforementioned case of *S.A.S. v. France*. Moreover, the Court of Cassation ruled in a judgment of 5 March 2013 that the Act was in conformity with article 9 of the European Convention on Human Rights (freedom of thought, conscience and religion). Lastly, the State party notes that the penalties provided in the Act, a maximum fine of 150

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<sup>16</sup> The State party cites the Committee’s Views in the case of *R. Singh v. France*, para. 8.4, in which the Committee recognized the State party’s need to ensure and verify, for the purposes of maintaining security and public order, that the person appearing in the photograph on a residence permit was the rightful holder of that document.

euros for a category two offence, are moderate and proportionate to the aims pursued. The stipulated alternative penalty of attendance at a citizenship course is one that is typically applied in French criminal law and may concern various offences; it is designed to remind offenders of the republican values of tolerance and respect for human dignity and to make them aware of their criminal and civil liability and of the obligations that life as a member of society entails.

7.10 The Prime Minister's circular of 31 March 2011, addressed to prefects, describes the procedures whereby the offence may be dealt with by the police or the gendarmerie, and indicates that under no circumstances does the Act grant officers the power to force an individual to uncover his or her face. Accordingly, there is no question of a disproportionate limitation of the right to religious freedom.

7.11 With regard to the author's complaint of a violation of articles 12 and 26 of the Covenant, the State party submits that the author has not established that the prohibition introduced under the Act applies only to women who wear the full face veil and that persons who conceal their faces by other means are not subjected to checks. On the contrary, the Act provides for a general prohibition, is not aimed at any particular item of clothing and makes no distinction between men and women. Moreover, the ban established under the Act cannot in itself be discriminatory or prejudicial to freedom of movement because it has an objective and reasonable justification.

### **Issues and proceedings before the Committee**

#### *Consideration of the merits*

8.1 The Committee has considered the present communication in the light of all the information submitted by the parties, in accordance with article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claim that the criminal prohibition against concealing the face in public areas, introduced under Act No. 2010-1192, and her conviction for wearing the niqab violate her rights under article 18 of the Covenant. The Committee notes the State party's argument that the Act imposes a general ban on any article of clothing intended to conceal the face in public spaces, regardless of the form it takes or the reason for wearing it, and that the Act does not specially treat religious clothing. The Committee notes, however, that article 2 (II) broadly exempts from the Act clothing worn for "health reasons" or on "professional grounds", or that is "part of sporting, artistic or traditional festivities or events", including "religious processions", or clothing that is prescribed or legally authorized by legislative or regulatory provisions. The Committee further notes the author's submission, not contested by the State party, that fewer than 2,000 women wear the full-face veil in France, and that the vast majority of checks under the Act have been performed on women wearing the full-face veil.<sup>17</sup>

8.3 The Committee recalls its general comment No. 22, in which it stated that the freedom to manifest religion or belief may be exercised either individually or in community with others and in public or private. The observance and practice of religion or belief may include not only ceremonial acts, but also such customs as the wearing of distinctive clothing or head coverings.<sup>18</sup> The author's statement that the wearing of the full veil is customary for a segment of the Muslim faithful and that it concerns the performance of a rite and practice of a religion is not in question. It is also undisputed that Act No. 2010-1192, prohibiting garments intended to conceal the face in public, is applicable to the niqab worn by the author, who as a result is forced to renounce the clothing that corresponds to her religious approach or risk penalties. Accordingly, the Committee considers that the ban introduced under the Act constitutes a restriction or limitation of the author's freedom to manifest her beliefs or religion — by wearing her niqab — within the meaning of article 18 (1) of the Covenant.

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<sup>17</sup> See the report of the Observatory of Secularism mentioned above.

<sup>18</sup> General comment No. 22, para. 4.

8.4 The Committee must therefore determine whether this restriction is authorized by article 18 (3) of the Covenant. The Committee recalls that article 18 (3) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.<sup>19</sup> The Committee also recalls that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.<sup>20</sup>

8.5 In the present case, the Committee notes that it is undisputed that the prohibition against wearing the niqab falls clearly within the scope defined under article 1 of Act No. 2010-1192. It is therefore incumbent upon the Committee to assess whether the restriction, which is prescribed by law, pursues a legitimate objective, is necessary for achieving that objective, and is proportionate and non-discriminatory.

8.6 The Committee notes that the State party has indicated two objectives that the Act is intended to pursue, namely the protection of public order and safety, and the protection of the rights and freedoms of others.

8.7 With respect to protection of public order and safety, the State party contends that it must be possible to identify all individuals when necessary to avert threats to the security of persons or property and to combat identity fraud. The Committee recognizes the need for States, in certain contexts, to be able to require that individuals show their faces, which might entail one-off obligations for individuals to reveal their faces in specific circumstances of a risk to public safety or order, or for identification purposes. The Committee observes, however, that the Act is not limited to such contexts, but comprehensively prohibits the wearing of certain face coverings in public at all times, and that the State party has failed to demonstrate how wearing the full-face veil in itself represents a threat to public safety or order that would justify such an absolute ban. Nor has the State party provided any public safety justification or explanation for why covering the face for certain religious purposes — i.e., the niqab — is prohibited, while covering the face for numerous other purposes, including sporting, artistic, and other traditional and religious purposes, is allowed. The Committee further observes that the State party has not described any context, or provided any example, in which there was a specific and significant threat to public order and safety that would justify such a blanket ban on the full-face veil. No such threats are described in the statement of purpose of Act No. 2010-1192 or in the National Assembly resolution of 11 May 2010, which preceded the adoption of the Act.

8.8 Even if the State party could demonstrate the existence of a specific and significant threat to public safety and order in principle, it has failed to demonstrate that the prohibition contained in Act No. 2010-1192 is proportionate to that objective, in view of its considerable impact on the author as a woman wearing the full-face veil. Nor has it attempted to demonstrate that the ban was the least restrictive measure necessary to ensure the protection of the freedom of religion or belief.<sup>21</sup>

8.9 With regard to the second objective presented by the State party, understood as the protection of the fundamental rights and freedoms of others under article 18 (3), the Committee notes the State party's argument based on the concept of "living together" or respect for the minimum requirements of life in society, public spaces being the main place in which social life happens and people come into contact with others. According to the State party, showing one's face signals a person's readiness to be identified as an individual by the other party and not to "unfairly" conceal one's frame of mind, this being "the minimum degree of trust that is essential for living together in an egalitarian and open

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<sup>19</sup> Ibid., para. 8.

<sup>20</sup> Ibid.

<sup>21</sup> E/CN.4/2006/5, para. 58.

society”. The Committee also notes the author’s claim that the legislature did not clearly define such an objective, either in the Act itself or in the statement of purpose. The Committee recognizes it may be in a State’s interest to promote sociability and mutual respect among individuals, in all their diversity, in its territory, and thus that the concealment of the face could be perceived as a potential obstacle to such interaction.

8.10 However, the Committee observes that the protection of the fundamental rights and freedoms of others requires identifying what specific fundamental rights are affected, and the persons so affected. Article 18 (3) exceptions are to be interpreted strictly and not applied in the abstract.<sup>22</sup> In the present case, the Committee observes that the concept of “living together” is very vague and abstract. The State party has not identified any specific fundamental rights or freedoms of others that are affected by the fact that some people present in the public space have their face covered, including fully veiled women. Nor has the State party explained why such rights would be “unfairly” obstructed by wearing the full-face veil, but not by covering the face in public through the numerous other means that are exempted from the Act. The right to interact with any individual in public and the right not to be disturbed by other people wearing the full-face veil are not protected by the Covenant and therefore cannot provide the basis for permissible restrictions within the meaning of article 18 (3).

8.11 Even assuming that the concept of living together could be considered a “legitimate objective” in the sense of article 18 (3), the Committee observes that the State party has failed to demonstrate that the criminal ban on certain means of covering of the face in public, which constitutes a significant restriction of the rights and freedoms of the author as a Muslim woman who wears the full-face veil, is proportionate to that aim, or that it is the least restrictive means that is protective of religion or belief.

8.12 In the light of the foregoing, the Committee considers that the State party has failed to demonstrate that the limitation of the author’s freedom to manifest her religion or beliefs, through the wearing of the niqab, was necessary and proportionate within the meaning of article 18 (3) of the Covenant. The Committee therefore concludes that the ban introduced by Act No. 2010-1192 and the conviction of the author under said Act for wearing the niqab violated the author’s rights under article 18 of the Covenant.

8.13 As to the author’s claims under article 26 of the Covenant, namely that the law in question had the effect of indirectly discriminating against the minority of Muslim women who wear the full-face veil, the Committee notes the State party’s argument that the prohibition introduced by the Act is not based on the religious connotation of the clothes in question, but on the fact that they conceal the face. According to the State party, only “the extremely radical form of clothing, which results in the public effacement of the person” is affected, meaning that for the author “it would not be difficult to access the public space wearing a veil that would demonstrate her religious beliefs without concealing her face”. The Committee notes, however, that the French National Assembly, in its resolution on the commitment to uphold republican values in the face of the development of radical practices that undermine them, considers that “radical practices detrimental to human dignity and equality between men and women, including the wearing of a full-face veil, are contrary to the values of the Republic” and that it would like “the fight against discrimination and the promotion of equality between men and women to be priorities of public policy”. The Committee further observes that Act No. 2010-1192, despite being drafted in general terms, includes exceptions for most contexts of face-covering in public, thus limiting the applicability of the ban to little more than the full-face Islamic veil, and that the Act has been primarily enforced against women wearing the full-face veil. Hence, from the text of the Act, the debate preceding its adoption and its implementation in practice, the Committee observes that the Act is applied mainly to the full-face Islamic veil, which is a form of religious observance and identification for a minority of Muslim women.

8.14 The Committee recalls its general comment No. 22 (para. 2), in which it viewed with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they represented religious minorities that could be the subject of

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<sup>22</sup> General comment No. 22, para. 8.

hostility on the part of a predominant religious community. A violation of article 26 may result from the discriminatory effect of a rule or measure that is apparently neutral or lacking any intention to discriminate.<sup>23</sup> Yet, not every differentiation based on the grounds listed in article 26 amounts to discrimination, as long as it is based on reasonable and objective criteria,<sup>24</sup> in pursuit of an aim that is legitimate under the Covenant.<sup>25</sup> The Committee must therefore decide whether the differential treatment of the author, who wears the full Islamic veil, with regard to other forms of face covering authorized under the exceptions established by article 2 of Act No. 2010-1192 meets the criteria of reasonableness, objectivity and legitimacy of the aim.

8.15 The Committee notes that the State party has provided no explanation why the blanket prohibition on the author's veil is reasonable or justified, in contrast to the exceptions allowable under the Act.<sup>26</sup> The Committee further notes that the blanket ban on the full-face veil introduced by the Act appears to be based on the assumption that the full veil is inherently discriminatory and that women who wear it are forced to do so. While acknowledging that some women may be subject to family or social pressures to cover their faces, the Committee observes that the wearing of the full veil may also be a choice — or even a means of staking a claim — based on religious belief, as in the author's case.<sup>27</sup> The Committee further considers that the prohibition, rather than protecting fully veiled women, could have the opposite effect of confining them to their homes, impeding their access to public services and exposing them to abuse and marginalization. Indeed, the Committee has previously stated its concern that the Act's ban on face coverings in public places infringes the freedom to express one's religion or belief, has a disproportionate impact on the members of specific religions and on girls, and that the Act's effect on certain groups' feeling of exclusion and marginalization could run counter to the intended goals.<sup>28</sup> The Committee further notes that a separate provision of the Act, article 225-4-10 of the Criminal Code, criminalizes the serious offence of forcing an individual to conceal the face, and thus specifically addresses that stated concern.

8.16 Finally, although the State party contends that the sanctions imposed on women who decide to wear the full veil in public are “measured”, the Committee notes that the penalties have a criminal nature and have been applied against some women, including the author, on multiple occasions. Such sanctions necessarily negatively impact the author's right to manifest her religion through wearing the veil and potentially other rights.

8.17 In the light of the foregoing, the Committee considers that the criminal ban introduced by article 1 of Act No. 2010-1192 disproportionately affects the author as a Muslim woman who chooses to wear the full-face veil, and introduces a distinction between her and other persons who may legally cover their face in public that is not necessary and proportionate to a legitimate interest, and is therefore unreasonable. The Committee hence concludes that this provision and its application to the author constitutes a form of intersectional discrimination based on gender and religion, in violation of article 26 of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the State party has violated the author's rights under articles 18 and 26 of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. In the present case, the

<sup>23</sup> See *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 10.2.

<sup>24</sup> See, for example, *Broeks v. Netherlands* (CCPR/C/29/D/172/1984), para. 13; and *Zwaan-de Vries v. Netherlands* (CCPR/C/29/D/182/1984), para. 13.

<sup>25</sup> See *O'Neill and Quinn v. Ireland* (CCPR/C/87/D/1314/2004), para. 8.3.

<sup>26</sup> See, in this regard, *C v. Australia* (CCPR/C/119/D/2216/2012), para. 8.6.

<sup>27</sup> Similarly, the European Court of Human Rights found, in *S.A.S. v. France* (para. 119), that “a State Party cannot invoke gender equality in order to ban a practice that is defended by women — such as the applicant — in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.”

<sup>28</sup> CCPR/C/FRA/CO/5, para. 22.

State party is obliged, *inter alia*, to provide the author with appropriate measures of satisfaction and financial compensation for the injury suffered. The State party is also under an obligation to prevent similar violations in the future, including by reviewing Act No. 2010-1192 in the light of its obligations under the Covenant, in particular articles 18 and 26.<sup>29</sup>

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them widely disseminated.

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<sup>29</sup> *Ibid*, para. 22.

## Annex I

### **Joint opinion of Committee members Ilze Brands Kehris, Sarah Cleveland, Christof Heyns, Marcia V.J. Kran and Yuval Shany (concurring)**

1. We agree with the majority of the Committee that France, the respondent State, did not adequately explain a security rationale that could justify the blanket ban on Muslim religious full-face coverage, especially in the light of the exceptions for other forms of full-face coverage made under Act No. 2010-1192. We also agree with the majority that the State party has not persuasively explained how the interest of “living together” could justify compelling individuals belonging to a religious minority, under threat of criminal sanction, to dress in a manner conducive to “normal” social interaction.

2. We are more receptive, however, to the implicit claim that the full veil is discriminatory (para. 8.15), as we consider the wearing of the full veil to be a traditional practice that has allowed men to subjugate women in the name of preserving their “modesty”,<sup>1</sup> which results in women not being entitled to occupy public space on the same terms as men. We would therefore have no difficulty in regarding France as entitled — and, in fact, under an obligation, pursuant to articles 2 (1), 3 and 26 of the Covenant, as well as article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women — to take all appropriate measures to address this pattern of conduct so as to ensure that it does not result in discrimination against women.

3. The question remains, however, whether the introduction of a blanket ban on the full-face veil in public, enforced through a criminal sanction imposed on the very women such a ban would purport to protect, is an appropriate measure in the circumstances of the present case — that is, whether it was a reasonable and proportional measure directed against the author and other Muslim women. On this matter, we are of the view that the State party has not demonstrated to the Committee that less intrusive measures than the blanket ban, such as education and awareness-raising against the negative implications of wearing the full-face veil, criminalizing all forms of pressure on women to wear such a veil and a limited ban enforced through appropriate non-criminal sanctions on wearing the full veil in specific social contexts, underscoring the State’s opposition to the practice (such as prohibiting the full-face veil for teachers in public schools or government employees addressing the public), would not have resulted in sufficient modification of the practice of wearing the full veil, while respecting the rights to privacy, autonomy and religious freedom of the women themselves, including those who choose to wear the veil.

4. Given the harsh consequences of the full ban on the ability of women who choose to wear the veil to move freely in public, we are not in a position to accept Act No. 2010-1192 as a reasonable and proportionate measure compatible with the Covenant. We believe that our position on the high threshold for justifying a ban on clothing chosen by women is generally consistent with the relevant parts of the European Court of Human Rights in its judgment in *S.A.S. v. France*, in which the Court rejected a justification of the ban on the grounds of, among others, anti-discrimination.<sup>2</sup>

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<sup>1</sup> See A/HRC/29/40, para. 19, in which the Working Group on the issue of discrimination against women in law and in practice stated that conservative religious extremist movements imposed strict modesty codes in order to subjugate women and girls in the name of religion.

<sup>2</sup> *S.A.S. v. France* (application No. 43835/11), judgment of 1 July 2014, paras. 118–120.

## Annex II

### Joint opinion of Committee members Ilze Brands Kehris and Sarah Cleveland (concurring)

1. We concur with the majority opinion. Regarding the stated aim of promoting public safety and order, we consider that the State party has not only failed to establish a comprehensive, significant and specific threat that would justify a blanket ban on wearing the full-face veil in public (para. 8.7), but has also not explained in which ways the State party's previously existing legislation providing for uncovering one's face in public space for specific purposes or at specific times, such as security checks and identity checks, or in specific locations, such as schools and hospitals — which are not contested here — is not adequate to ensure public safety and order. Thus, in addition to the criminal nature of the sanction and its effect on the author and those Muslim women who, like her, choose to wear the full-face veil, which is not proportionate to the stated aim (para. 8.11), this blanket ban has not been shown to be either necessary or proportionate to its stated legitimate aim of promoting public safety.

2. With respect to protecting the fundamental rights and freedoms of others and the concept of "living together" that the State party relates to this aim, there is a lack of clarity regarding which fundamental rights are specifically intended to be protected (para. 8.10). The State party's position is also unclear on how respect for the rights of persons belonging to minorities, including religious minorities, are taken into account in this concept in order to safeguard the value of pluralism and avoid the abuse of a dominant position by the majority.<sup>1</sup> This reinforces the doubts about the claim that the concept of "living together" constitutes a legitimate aim under the fundamental rights and freedom of others in article 18 (3) of the Covenant.

3. Although the State party does not explicitly refer to equality between men and women in its arguments, in the background documents from the national debates and the preparatory work in the National Assembly, equality figured as a significant factor in the adoption of this legislation. In this regard, the argument that the full-face veil is inherently oppressive and stems from the patriarchal subjugation of women, which intends to prevent them from participating as equals in society, is relevant. However, in view of the fact that another criminal provision in article 4 of the same law, which is not contested, penalizes the serious offence of compelling a person to wear such a veil, the argument as applied to the comprehensive ban on wearing the veil seems to imply that whenever a woman dons a full-face veil it cannot be her own informed and autonomous decision, which may reinforce a stereotype that Muslim women are oppressed. Penalizing wearing the full-face veil in order to protect women could thus, instead of promoting gender equality, potentially contribute to the further stigmatization of Muslim women who choose to wear the full-face veil, as well as more broadly of Muslims, based on a stereotypical perception of the role of women among Muslims. In any case, the State or the majority's view that the practice is oppressive must accommodate the author's own explicit choice to wear certain clothing in public to manifest her religious belief.<sup>2</sup> The equality argument is thus not convincing as a legitimate aim for a blanket prohibition of full-face veils in all public spaces in France.

4. Finally, the present Views take into account the specific context of the case in France, including the fact that a very small number of women have chosen to wear the full veil. Apart from the inherent vulnerability to negative stereotyping of members of a

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<sup>1</sup> See European Court of Human Rights, *S.A.S. v. France* (application No. 43835/11), judgment of 1 July 2014, para. 127.

<sup>2</sup> See A/68/290, para. 74 (d), in which the Special Rapporteur on freedom of religion or belief stated that policies designed to empower individuals exposed to gender-related discrimination could not claim credibility unless they paid careful attention to the self-understandings, interests and assessments voiced by the concerned persons themselves, including women from religious minorities. That principle should always be observed, in particular before setting legislative or jurisdictional limits to a right to freedom, for example the right to wear religious garments.

minority — indeed a minority within a minority — the disproportionality of the legislative measures that were adopted and implemented purportedly to promote respect for the rights of others is thus particularly acute in a context in which there is a very low likelihood that any person would encounter a fully veiled woman in a public space. For the same reason, disseminating awareness-raising leaflets to the general public regarding the law and criminalizing the wearing of the niqab and burka may have the unintended effect of increasing prejudice and intolerance towards this minority group.

## Annex III

### **Individual opinion of Committee member Yadh Ben Achour (dissenting)**

1. In both cases set out in communications Nos. 2747/2016 and 2807/2016 the Committee notes that the State party, by adopting Act No. 2010-1192 of 11 October 2010, prohibiting the concealment of the face in public, has violated the rights of the authors under articles 18 and 26 of the Covenant. I regret that I am unable to share this opinion for the following reasons.

2. Firstly, I am surprised at the Committee's statement that "the State party has not demonstrated how wearing the full-face veil in itself poses a threat to public safety or public order that would justify such an absolute ban". I shall not dwell on the threat to public safety, which appears self-evident given the ongoing battle against terrorists, some of whom have carried out attacks and assassinations in France and elsewhere disguised with niqabs. Security considerations alone justify both prohibition and criminalization. I shall however spend more time on the meaning of the phrase "protect order" read conjointly with "protect the morals or the fundamental rights and freedoms of others" in article 18 (3) of the Covenant.

3. In that article, the term "order" clearly refers to that of the State at the origin of the restriction. In France, under its Constitution, the order is republican, secular and democratic. Equality between men and women is among the most fundamental principles of that order, just as it is among the most fundamental principles of the Covenant. The niqab in itself is a symbol of the stigmatization and degrading of women and as such contrary to the republican order and gender equality in the State party, but also to articles 3 and 26 of the Covenant. Defenders of the niqab reduce women to their primary biological status as females, as sexual objects, flesh without mind or reason, potentially to blame for cosmic and moral disorder, and in consequence obliged to remove themselves from the male gaze and thus be virtually banished from the public space. A democratic State cannot allow such stigmatization, which sets them apart from all other women. Wearing the niqab violates the "fundamental rights and freedoms of others", or, more precisely, the rights of other women and of women as such. Its prohibition is therefore not contrary to the Covenant.

4. I agree with the Committee that the restrictions provided for under article 18 (3) must be interpreted strictly. However, "strictly" does not mean that the restrictions need not respect the other provisions of the Covenant, or the spirit of article 18 itself, as we have explained in the preceding paragraph.

5. The Committee admits in both cases that "wearing the niqab or the burqa amounts to wearing a garment that is customary for a segment of the Muslim faithful and that it is the performance of a rite or practice of a religion". However, the Committee does not explain the mysterious transformation of a custom into a religious obligation as part of worship, within the meaning of article 18 of the Covenant. The truth is that the wearing of the niqab or the burka is a custom followed in certain countries called "Muslim countries" that, under the influence of political Islamism and a growing puritanism, has been artificially linked to certain verses from the Qur'an, in particular to verse 31 of the Surah of Light and verse 59 of the Surah of the Confederates. However, the most knowledgeable authorities on Islam do not recognize concealing the face as a religious obligation. Even allowing, as the Committee wishes to do, that the wearing of the niqab may be interpreted as an expression of freedom of religion, it must not be forgotten that not all interpretations are equal in the eyes of a democratic society that has founded its legal system on human rights and the principles of the Universal Declaration of Human Rights and of the Covenant, and that has enshrined the principle of secularism within its Constitution — all the more so given the particular historical and legal context of France. Certain interpretations simply cannot be tolerated.

6. The same holds true for polygamy, excision, inequality in inheritance, repudiation of a wife, a husband's right to discipline his wife, and levirate or sororate practices. All those

constitute, for their practitioners, religious obligations or rites, just as wearing the full-face veil does for followers of that custom. But the Committee has always considered the former practices to be contrary to the provisions of the Covenant and has consistently called on States to abolish them. Surely then it is contradictory to decide in one case that it is the prohibition of one such practice, which undermines equality between citizens and the dignity of women, that contravenes the Covenant, while deciding in another case that it is the practices that contravene article 18?

7. A more serious problem must be raised. It concerns the concept of “living together” championed by France and which led to the adoption of Act No. 2010/1102. I entirely disagree with the Committee that “the concept of ‘living together’ is presented by the State party in very vague and abstract terms” and that “the State party has not identified any specific fundamental rights or freedoms of others that are affected”. On the contrary, the preamble to the Act deals fully with this issue and clearly states that concealment of the face goes against the social contract, basic good manners, and the notions of fraternity and living together. Unfortunately, the Committee fails to note that the fundamental right that is violated in this instance is not that of a few individuals, nor of any particular group, but the right of society as a whole to recognize its members by their faces, which are also a token of our social and, indeed, our human, nature. Contrary to the Committee’s assertions, the concept of living together is neither vague nor abstract, but rather, precise and specific. It is founded on the very simple idea that a democratic society can only function in full view of all. More generally, as I have already suggested, the most basic human communication, preceding language of any other kind, is conveyed by the face. By totally and permanently concealing our faces in public, especially in a democratic context, we renounce our own social nature and sever our links with our peers. To prohibit the wearing of the full-face veil and penalize it with a small fine is therefore neither excessive nor disproportionate. In this connection, there can be no comparison between the hijab and the niqab. The two are essentially different.

8. By considering that “the criminal ban introduced by article 1 of Act No. 2010-1192 disproportionately affects Muslim women who, like the author, choose to wear the full-face veil and introduces a distinction between these women and other persons who may legally cover their face in public that is not necessary and proportionate to a legitimate interest, and is therefore unreasonable”, the Committee is simply turning rights upside down. It concludes from this reasoning that article 1 of the Act constitutes a kind of intersectional discrimination based on sex and religion that violates article 26 of the Covenant. Yet there is no doubt that prohibition is necessary, if only because of the threat to security (see para. 2 above); it is also proportionate, as shown by the light penalty: a fine of 150 euros and a course in citizenship, richly deserved given the seriousness of the infringement of equality between citizens and of the dignity of women.

9. Let us now turn to the question of those persons who, unlike women who wear the full-face veil, are authorized by Act No. 2010/1192 to cover their faces. This, according to the Committee’s Views, constitutes discrimination under article 26 of the Covenant. These are the persons referred to in article 2.II of the Act, which establishes exceptions to the prohibition. Can these exceptions be placed on an equal footing and compared with the practice of wearing the full-face veil? Is article 2 of Act No. 2010/1192 discriminatory within the meaning of article 26? I do not think so. These exceptions, generally speaking circumstantial and temporary, are for the most part made for recreational, festive, carnival or sporting purposes, or are required for service or security purposes, in particular road safety. They exist in all countries and in no way constitute discriminatory symbols or messages likely to trigger implementation of article 26 of the Covenant, as the full-face veil would.

10. I conclude that the prohibition of the wearing of the full-face veil and its penalization by fine, especially in the French context, is neither contrary to article 18 nor to article 26 of the Covenant.

## Annex IV

### **Individual opinion of Committee member José Manuel Santos Pais (dissenting)**

1. I regret not being able to share the conclusion, reached by the majority of the Committee, that the State party violated the authors' rights under articles 18 and 26 of the Covenant.
2. Both cases concern the use of niqab and are the first of their kind to be considered by the Committee. The issue is a very sensitive one and a solution should therefore be reached thoughtfully, due to its far-reaching implications.
3. Significantly enough, the two complaints do not concern an Islamic State, but a European one with a strong democratic tradition and an impressive human rights record. Possible solutions are dilemmatic, since persuasive arguments can be invoked both for and against finding a violation of certain rights. Decisions in both cases will have, apart from the underlying legal issues, a significant political impact, not only for France, but for many other countries in Europe, Africa and Asia, where the problem of the use of the niqab may also arise. The question was thus to find a solution that minimized the harm, while taking into account all the relevant factors and preventing the risk of any unwarranted and abusive interpretation of the Committee's decision.
4. I tend to consider the complaints in both cases as mostly artificial, using the argument of a restriction of freedom of thought, conscience and religion as a means to address what is foremost a political problem. The authors never explain which religious prescriptions impose the use of the niqab on them or which part of the Qur'an they base their conclusions on. Yet they acknowledge that wearing the niqab or the burka amounts to wearing a garment that is customary for a segment of the Muslim faithful and is an act motivated by religious beliefs. Therefore, it concerns the observance and practice of a religion, notwithstanding the fact that wearing the niqab or the burka is not a religious requirement common to all practising Muslims (para. 3.2). We are therefore facing a religious custom, not an undisputed religious obligation.
5. The Committee has in the past refused to accept as violations of the provisions of the Covenant certain social or religious customs and practices that run counter to human rights (female genital mutilation, honour and ritual killings, attacks against persons with albinism and many others). Therefore, the fact that the authors invoke a violation of their religious beliefs does not necessarily lead to the conclusion that their rights have been violated.
6. Both authors are French nationals born and domiciled in France. Yet, they refuse to abide by the prevalent legislation of the State party concerned, although they acknowledge that they belong to a minority of Muslim women who wear the full-face veil. According to a parliamentary commission that studied the matter, fewer than 2,000 women are concerned (paras. 3.3 and 3.14), which constitutes a tiny minority (para. 3.9). They consider that such a tiny minority can impose their beliefs on the rest of the population, but do not wish to acknowledge the same right to the rest of the population, which, in terms of a proportionality test, seems quite disturbing, especially as both authors can use, still within the observance of their religious beliefs, other less rigorous and extreme forms of dressing, such as a headscarf. This extreme and radical form of religious belief should, in my view, be considered with caution so as to allow the Committee to reach a fair and reasonable decision, which unfortunately, in the present case, did not occur.
7. When one encounters a given society, the need for respecting its habits and customs should be a natural concern, as well as respect for social predominant values. Even more so, when one has a standing relationship with such a society, as is the case for both authors. Yet the authors refuse to accept this.
8. It falls within the legitimate powers of each State to democratically define the legislative framework of their societies, while respecting their international obligations. The State party has carefully done so. Act No. 2010-1192 was passed unanimously (bar one

vote) by the National Assembly and Senate after a wide-ranging democratic debate. A parliamentary task force was set up involving elected representatives from across the political spectrum, which proceeded to hear many persons of diverse opinions, including both Muslim and non-Muslim women and persons from civil society (para. 5.1).<sup>1</sup> On 11 May 2010 — prior to the adoption of the law — the National Assembly adopted a resolution in which it said that radical practices detrimental to human dignity and equality between men and women, including the wearing of a full-face veil, were contrary to the values of the Republic, and called for the implementation of all possible measures to ensure the effective protection of women subjected to violence or pressure, including by being forced to wear a full-face veil (para. 5.2).<sup>2</sup>

9. The general ban introduced by the Act is limited in scope, given that only the concealment of the face is prohibited. Sanctions are measured, lawmakers having prioritized the role of education (para. 5.3).<sup>3</sup> The ban covers any article of clothing intended to conceal the face in public spaces, regardless of the form it takes or the reason for wearing it (para. 5.5),<sup>4</sup> and does not target any specific article of clothing and makes no distinction between men and women (para. 5.11).<sup>5</sup> Therefore, no special treatment is reserved for garments worn for religious or cultural reasons and only the most radical form of clothing that makes the person invisible in public is affected. The ban cannot restrict the exercise of religious freedom in places of worship open to the public (para. 5.9).<sup>6</sup> Exemptions from the Act include clothing worn for health or professional reasons, part of sporting, artistic, or traditional festivities or events, including religious processions, or that otherwise is legally authorized (para. 7.2),<sup>7</sup> which confirm the general and reasonable character of the ban. A circular of 2 March 2011 provided a comprehensive explanation of the scope and modalities for the application of the law, complemented by a campaign in public places and a leaflet available in government offices, as well as an educational website. Moreover, the law provided for a period of six months from the time of its enactment to its entry into force to meet the predictability requirement (para. 5.6).<sup>8</sup>

10. The Act pursues a legitimate aim, the protection of the rights and freedoms of others and the protection of public order, as clearly defined in the Act's statement of purpose, which reaffirms the values of the Republic and the requirements of living together (para. 5.7).<sup>9</sup> The European Court of Human Rights, in its judgment in *S.A.S. v. France*, accepted the observance of the minimum requirements of life in society as part of the protection of the rights and freedoms of others, and so concluded that the ban imposed was proportionate to the aim pursued (paras. 140–159).

11. Public safety and public order require that everyone can be identified if need be, to prevent attacks on the security of persons and property and to combat identity fraud. This implies that people must show their faces, a vital concern in the context of current international terrorist threats (para. 5.8).<sup>10</sup> The Committee, failing to address the underlying problem properly, does not seem to have sufficiently weighed this last requirement (para. 7.7).<sup>11</sup>

12. It is true that the Court in the *S.A.S.* judgment dismissed the argument that the ban was necessary, in a democratic society, for public safety, since “a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety” (para. 139). However, since the judgment was delivered, France has experienced several terrorist attacks by Al-Qaida and Islamic State in Iraq and the Levant: Île-de-France in January 2015

<sup>1</sup> Para. 7.1 in *Yaker v. France*.

<sup>2</sup> *Ibid.*, para. 7.2.

<sup>3</sup> *Ibid.* para. 7.3.

<sup>4</sup> *Ibid.* para. 7.5.

<sup>5</sup> *Ibid.*, para. 7.11.

<sup>6</sup> *Ibid.*, para. 7.9.

<sup>7</sup> *Ibid.*, para. 8.2.

<sup>8</sup> *Ibid.*, para. 7.6.

<sup>9</sup> *Ibid.*, para. 7.7.

<sup>10</sup> *Ibid.*, para. 7.8.

<sup>11</sup> *Ibid.*, para. 8.7.

(20 killed, 22 injured), Paris in November 2015 (137 killed, 368 injured) and Nice in July 2016 (87 killed, 434 injured). In 2017, a total of 205 foiled, failed and completed terrorist attacks were reported by nine European Union member States (France experienced 54 attacks). In 2017, a total of 975 individuals were arrested in the European Union for terrorism-related offences. Most arrests (705 out of 791) were related to jihadist terrorism (123 women, of whom 64 per cent held the citizenship of a European Union member State and were born in the Union. France alone accounted for 411 arrests and 114 convictions. As for the number of suspects arrested for religiously inspired/jihadist terrorism (705), France accounted for 373.<sup>12</sup> In this context, it is of extreme importance to quickly identify and locate possible suspects, since they travel through different countries to arrive at their destination and may avail themselves of the niqab to go unnoticed. Therefore, in the current circumstances, the ban imposed seems proportionate to the aim pursued by the Act, although it should be subject to periodic risk assessments (art. 7 of the Act).

13. In contrast to the view of the majority of the Committee (para. 7.16), I believe that the sanctions are measured. Although they are of a criminal nature in France, in other countries they would probably be administrative fines. Sanctions comprise a category two fine (maximum €150), a moderate sanction that can, however, be replaced by a mandatory citizenship course. If, however, the person refuses to abide by the law, what should the State do? Accept such a behaviour? In the *Yaker* case, the author was sentenced twice, the second time because she refused to remove her full-face veil at the security checkpoint to enter the court. Is it reasonable to force a judge to accept a person that he or she is going to judge to have his or her face covered during the trial? Such a demand will probably not be accepted in any court, in whichever country. Furthermore, both cases were tried by a community court, which confirms, if need be, the minor gravity of the violation. Sanctions are thus not disproportionate.

14. Finally, as regards the allegation that penalties have been imposed in particular on Islamic women, the reason seems obvious: they violated the ban. Would one consider, for instance, the prosecution of drunk drivers or drug traffickers as disproportionately affecting them? Is this not just the result of law enforcement policy?

15. I would therefore conclude that articles 18 and 26 of the Covenant were not violated. Rejecting the ban could, regrettably, be seen by some States as just a step away from accepting the imposition of a full-face veil policy.

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<sup>12</sup> European Union Agency for Law Enforcement Cooperation, *European Union Terrorism Situation and Trend Report 2018* (The Hague, 2018).