



LEGAL COMMENT

Bans on the Full Face Veil and Human Rights

A Freedom of Expression Perspective

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Contents

I. INTRODUCTION	4
II. BANNING THE FULL FACE VEIL	6
A. A growing trend	6
B. Justifications for and against full face veil bans	10
III. FULL FACE VEIL BANS AND INTERNATIONAL HUMAN RIGHTS LAW ...	12
A. The relevance and engagement of human rights.....	13
B. Assessing restrictions on limited rights to freedom of religion and expression.....	15
i. Legality.....	15
ii. Legitimacy of aims - freedom of expression	16
iii. Legitimacy of aims - freedom of religion	19
iv. Necessity and Proportionality	22
v. Non-discrimination and equal treatment	24
vi. Margin of appreciation.....	26
IV. GENERAL CRITERIA OF THE SPECIAL RAPPOREUR ON FREEDOM OF RELIGION OR BELIEF	26
V. THE PROMOTION OF HUMAN RIGHTS: THE POSITIVE OBLIGATIONS OF STATES	29
VI. THE ROLE OF EU LAW	30
VII. CONCLUSIONS AND RECOMMENDATIONS	32

I. INTRODUCTION

1. **In this Comment, ARTICLE 19 assesses the legality of bans on the full face veil from the perspective of international human rights law on the right to freedom of expression, in particular. The bans that have been recently proposed, and in some cases adopted, restrict the rights to freedom of expression and also freedom of religion, as well as other rights. They must therefore, under international and European human rights law, fulfil the following requirements: they must be prescribed or provided for by law; they must pursue a legitimate aim; and they must be necessary in a democratic society. Furthermore, they must be proportionate and not be imposed for discriminatory purposes or applied in a discriminatory manner. In ARTICLE 19's opinion, although the bans on the full face veil may fulfil the legality and legitimacy of aim, and in certain circumstances may be deemed to be necessary in a democratic society, they are not proportionate. It is also likely that they will be applied in a discriminatory manner and are likely to have disproportionate impact upon Muslim women.**
2. The wearing of the veils has sparked widespread political attention in recent months, particularly but not only within Europe.¹ These contemporary debates have focussed on proposal of new laws banning the wearing of Islamic veils, particularly veils that cover the face partly or entirely – the *niqab*² or the *burqa*³ – rather than the *hijab*, the more commonly worn headscarf covering. The proponents and opponents of such bans have relied upon a diverse range of arguments for their positions and in doing so have frequently relied upon the language of human rights. On the one hand, such laws and regulations have been justified on the grounds that they protect the dignity and equal rights of women, help preserve public security and reflect national values, such as official secularism. On the other hand, such laws have been attacked on the basis that they undermine women's rights to equal treatment, freedoms of expression and of religion and are counterproductive to their purported aims of promoting integration. In this highly contested debate, the full face veil has come to be portrayed both as a symbol of oppression and a “feminist statement”,⁴ whereas the fact that Islamic veils mean different things to different Muslim women has largely been ignored.
3. At the outset, it is important to note that two premises upon which this Comment is based. *First*, this statement will not deal engage in the contemporary debate on whether or not the wearing of veils – whether the *burqa*, *niqab* or *hijab* – is compulsory for Muslim women as part of their Islamic faith. It has been widely noted that the Qur'an instructs women (and men) to dress in a modest way.

¹ “The Islamic veil across Europe,” *BBC News*, 22 April 2010, <http://news.bbc.co.uk/1/hi/world/europe/5414098.stm>

² The *niqab* is a full body covering with a veil that covers a woman's hair and face leaving only the eyes visible.

³ The *burqa* is a loose enveloping garment, worn outside the home, covering a woman's body including her face which is hidden from view by a mesh of fabric.

⁴ In July 2010, Caroline Spelman, the UK's Environment Secretary, controversially remarked that the burka could be seen as a feminist statement and possibly “empowering”. Rosa Prince, “Caroline Spelman: Wearing the burka can be empowering”, *Telegraph*, 19 July 2010, <http://www.telegraph.co.uk/news/newstoppers/religion/7897848/Caroline-Spelman-wearing-burka-can-be-empowering.html>

Islamic authorities and scholars differ as to whether the veil should be required on women in public. For purposes of this Comment, however, it is accepted that veils, including the *niqab* and *hijab*, are viewed by those women who wear them as fundamentally part of their religious identity and their culture.

4. *Second*, debates on bans on wearing of the full face veil need to be seen within the context of broader regional and international debates on prohibitions or regulations on religious symbols, which are part of debates concerning the position of religion in the public sphere.⁵ A different, albeit related, issue to the *wearing* of religious symbols concerns the *display* of religious symbols and *construction* of religious buildings in public places, an issue which has attracted particular legal and political controversy in Europe recently – particularly after the constitutional amendment in Switzerland banning the construction of minarets and the ongoing case at European Court of Human Rights (“European Court”), *Lautsi v Italy*, concerning crucifixes in Italian public schools.⁶ However, such developments indicate that far-reaching restrictions on religious symbols are permissible under the European Convention on Human Rights (“European Convention” or the “ECHR”) and also sends out a message that Europe is intolerant of its Muslim populations – which may be used to undermine the universality, indivisibility and interdependence of international human rights, as well as justify directly repressive measures against religious minorities in states beyond Europe.
5. Furthermore, such bans on the full face veil, together with bans on minarets in Switzerland, create an impression around the world and, in particular, in majority Muslim states that Europe is intolerant of its Muslim populations. This may have, in turn, broader geopolitical consequences at intergovernmental fora on human rights issues, including and notably the UN Human Rights Council.
6. This Comment seeks to examine bans on the full face veil from the perspective of international human rights law, in particular the International Covenant on Civil and Political Rights (“ICCPR”).⁷ Since the most recent controversies have involved bans on the *burqa* and the *niqab*, these shall be the focus of the analysis below – although the human rights and principles discussed are relevant to the wearing of other religious garments and ornaments such as the *hijab*, Sikh turbans

⁵ See Michael Wiener, “Wearing of Religious Symbols” (A comparative table on the prohibition of wearing religious symbols in public schools, at universities, in public, on ID photographs, at the workplace, for civil servants and for military personnel in 36 selected countries) <http://www.univ-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/International/ReligiousSymbols.pdf>

⁶ More specifically, the European Court of Human Rights (Chamber) ruled that crucifixes in Italy public schools were contrary to parents’ right to educate their children in line with their convictions and to children’s right to freedom of religion, under Article 2 of the 1st protocol and Article 9 of the European Convention on Human Rights, *Lautsi v Italy* Application No 30814/06 Chamber Judgment of the European Court of Human Rights 3 November 2009. In March 2010, the case was referred to the Grand Chamber of the European Court of Human Rights. A number of states, MEPs and NGOs were authorised as third parties to intervene in the case. The Grand Chamber is due to give a ruling in the case, which “may prove a flashpoint in the religious history of Europe” according to some, in the autumn; Gerald J Russello, “Will Europe Admit to Being Christian” *National Catholic Register* 19 July 2010.

⁷ As of 13 August 2010 the International Covenant on Civil and Political Rights has 166 States parties. The education- and health-related impacts of the full face veil are also discussed below. The principal instrument for the protection of the rights such as education and health is the International Covenant on Economic, Social and Cultural Rights. As of 13 August 2010, this instrument has 160 States parties.

and kirpans, Jewish yarmulkes, Christian crucifixes, collars and nuns' habits, Hindu bindis and Buddhist saffron robes.

7. ARTICLE 19 believes that general prohibitions on the wearing of the full face veil violate the rights to freedom of expression and freedom of religion of those women who choose to wear a full face veil as an expression of their religious, cultural, political or personal identity or beliefs. States should ensure that restrictions are necessary and proportionate for purposes recognised as legitimate in international human rights law, and do not have a negative impact on the exercise of women's human rights.
8. This structure of this statement Comment is as follows. The first part of Part III recognises a growing trend across a number of European and other states which have recently adopted laws or are considering legislative proposals banning the full face veil. The second part of Part III goes on to consider the various justifications for and against banning full face veils. Part IV will then examine the bans on the *burqa* and the *niqab* through the lens of international human rights law. In doing so, Part IV assesses whether the bans restrict human rights and the relevance and engagement of human rights. It then looks at whether the restrictions imposed by the bans on human rights may be justified under international human rights law, particularly in relation to freedom of expression and freedom of religion. Part V then looks at the criteria set out by the UN Special Rapporteur on freedom of religion or belief on the wearing of religious symbols as an authoritative, international-law based set of criteria on the issue. Part VI then emphasises the positive obligations on states to implement the rights to freedom of expression, freedom of religion and equal treatment and non-discrimination. Finally, Part VII sets out ARTICLE 19's conclusions and recommendations.

II. BANNING THE FULL FACE VEIL

A. *A growing trend*

9. A variety of national laws banning the full face veil in the public sphere have been proposed in recent months and some of them have been adopted. There is a sense of momentum surrounding these bans which may well inspire other states to consider adopting their own restrictions on the wearing of the full face veil.
10. At the **European level**, Silvana Koch Mehrin, a German MEP, called for a Europe-wide ban on full face veils in May 2010.⁸ The leaders of the European Union, specifically Commission president Jose Manuel Barroso and European Council president Herman von Rompuy, have declined to comment on the issue however. Mr Barroso has indicated “[t]his is not a European Union competence ... so as president of the commission I will not take a position on this issue,” said Mr

⁸ “MEP Koch-Mehrin calls for Europe-wide burka ban”, *The Local*, 1 May 2010 <http://www.thelocal.de/national/20100501-26911.html>. See also <http://www.bild.de/BILD/news/standards/kommentar/2010/05/02/gast-kommentar/kommentar.html>

Barroso in July 2010. Relying on a “legal reading” of EU treaties, he has said “we believe it is a national competence.”⁹

11. Proposals for bans on the wearing of the full face veil have prompted considerable and growing interest at the national European level. Most notably, in **France**, the National Assembly voted on 13 July 2010 overwhelmingly to approve a ban on the wearing of *voiles intégrales*, veils that cover the face, in public places.¹⁰ The Senate approved the legislation on 14 September in an almost unanimous vote.¹¹ The legislation makes it illegal to wear garments such as the *niqab* or *burqa* anywhere in public. On 7 October, France’s Constitutional Court ruled that the ban on veil does not impinge upon civil liberties.¹² The court made a change however to the law as it was passed by the French legislature: the law will now not apply to public places of worship where it may violate religious freedom.¹³
12. The French vote, follows the decision of the lower house of the legislature in **Belgium** in April 2010 to endorse a nationwide ban full face veils in public. There are municipal level bans on the wearing of veils in public in the country. The law is apparently neutral in criminalising any covering of the face that would prevent identification.¹⁴
13. A ban on wearing the full face veil in the **Netherlands** is part of the new Dutch coalition government’s programme. The Liberal Party (VVD) and Christian Democrats (CDA) needed the support of Geert Wilders’ Freedom Party which insisted on the ban.¹⁵

⁹ Honor Mahony, “EU leaders dodge Islamic veil ban issue” *EUobserver* 19 July 2010 <http://euobserver.com/9/30502>

¹⁰ The bill was adopted by 335 votes to 1 in the 557 seat National Assembly with mostly abstentions from the main opposition Socialist Party. Steven Erlanger, “Parliament moves France closer to a ban on face veils” 13 July 2010 http://www.nytimes.com/2010/07/14/world/europe/14burqa.html?_r=1# France has already banned head scarves from public schools by banning all forms of religious identification, including turbans, crosses and Jewish stars.

¹¹ The French Senate voted on 14 September, 261-1 votes in favour of the ban. The legislation envisages fines of 150 euros (£119) for women who break the law and 30,000 euros and a one-year jail term for men who force their wives to wear the burqa. “French Senate votes to ban Islamic Veil in public,” *BBC News*, 14 September 2010 <http://www.bbc.co.uk/news/world-europe-11305033> A French Muslim woman was fined for wearing a full face veil while driving a car in the Nantes on the grounds that the veil restricted her vision and could have caused an accident. “French police fine Muslim driver for wearing veil,” *BBC News*, 23 April 2010 <http://news.bbc.co.uk/1/hi/8641070.stm>. The National Assembly Information Committee on the full Muslim Veil on National Territory, which recommended a partial ban on women wearing full face veils. “France report backs full face veil ban,” *BBC News*, 26 January 2010 <http://news.bbc.co.uk/1/hi/8480161.stm>

¹² The French Constitutional Council ruled that the bill making it illegal to wear the Islamic burqa, niqab or other full face veils in public, conforms with the Constitution. See decision of 7 October 2010 <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2010613dc.pdf>

¹³ “French ban clears last legal battle,” *BBC News* 7 October 2010 <http://www.bbc.co.uk/news/world-europe-11496459>

¹⁴ 141 parliamentarians voted for the measure, two abstained and none opposed it. The law makes it a crime to be in a public space with one’s face partially or wholly concealed in a way that would identification impossible. Individuals who violate the law are subject to a fine of €15-25 and/or a prison sentence of one to seven days. Vanessa Mock and John Lichfield, “Belgium passes Europe’s first ban on wearing the burka in public,” *The Independent*, 1 May 2010 <http://www.independent.co.uk/news/world/europe/belgium-passes-europes-first-ban-on-wearing-burka-in-public-1959626.html>

¹⁵ “Islamic veil ban in Dutch coalition deal” *BBC News*, 30 September 2010 <http://www.bbc.co.uk/news/world-europe-11448088>

14. In **Italy**, where restrictions on the wearing of the full face veil already exist at the municipal level, a draft bill to ban burqas has been introduced by the right-wing Northern League, a member of Prime Minister Silvio Berlusconi's ruling coalition. The bill would amend a 1975 anti-terrorism law which stipulates fines and up to two years in jail for people who cover their face with anything that prevents their identification by police. Until now there have been religious exemptions, but some local authorities have started to fine women under the old law.¹⁶ An Interior Ministry report currently being considered by the Constitutional Affairs Commission says that if introduced the law should make clear burqas and other face coverings were being banned not for "religious reasons but for security reasons." The Constitutional Affairs Commission is expected to report back later in 2010 and the law is unlikely to go through parliament until 2011 at the earliest.¹⁷
15. In **Spain**, the parliament rejected a proposal for a complete ban on women wearing *burqas* in public in July 2010. Although a number of municipalities currently ban the veil in public buildings, including Barcelona, the *Generalitat* (Catalonian parliament) rejected a proposal to ban the *burqa* across the region in on 23 July.¹⁸ The *Generalitat* has since recommended that the full face veil should not be worn in educational establishments as they could impede pupil learning.¹⁹ *El Pais* believes that although the issue of the full face veil does not concern the majority of the people in Spain, any ban that the government might wish to impose should be justified on the basis of security concerns.²⁰
16. In **Austria**, the Freedom Party, who gained 27.1% of the vote at the provincial elections held on 10 October 2010, has called for a national ban on veils and minarets. It had previously called for a special vote on the subject in the Austrian parliament.²¹ Prominent politicians in **Switzerland** have also indicated that they

¹⁶ In Italy, a €500 fine was imposed on Amel Marmouri, a Tunisian woman, who was stopped by carabinieri for wearing a veil that completely covered her features. The fine was reportedly imposed under a municipal bylaw passed in January 2010. John Hooper, "Veiled Muslim women in Italy 'uphold tradition of the Madonna'" *The Observer* 9 May 2010 <http://www.guardian.co.uk/world/2010/may/09/muslim-women-italy-veil>.

¹⁷ Nick Pisa, "Italy to become next European country to ban burka after government report recommends forbidding it in public," *Daily Mail*, 7 October 2010 <http://www.dailymail.co.uk/news/article-1318498/Italy-European-country-ban-burka-government-recommendation.html>

¹⁸ The mayor of Barcelona indicated that the ban was put in place out of a concern for public safety and was not aimed at any particular religious group. The ban affects public buildings as well as schools and market districts. Barcelona is the first major city in Spain to ban face coverings in municipal areas, although several smaller cities have already imposed or are considering similar restrictions. *Jurist* 14 July 2010 <http://jurist.org/paperchase/2010/06/spain-city-bans-use-of-face-veil-in-public-areas-managed-by-the-city.php> Reuters, 14 July 2010 <http://www.reuters.com/article/idUSTRE65D4K620100614>

¹⁹ "Cataluña acepta el velo en la escuela si no es integral" *El Pais* 21 October 2010 http://www.elpais.com/articulo/sociedad/Cataluna/acepta/velo/escuela/integral/elpepisoc/20101021elpepisoc_9/Tes

²⁰ "Afrontar el debate" *El Pais* 5 June 2010 http://www.elpais.com/articulo/opinion/Afrontar/debate/elpepiopi/20100605elpepiopi_2/Tes

²¹ "Conservative Austria party calls for vote to ban minarets, face veils", *Jurist*, 25 August 2010 <http://jurist.org/paperchase/2010/08/conservative-austria-party-calls-for-vote-to-ban-minarets-face-veils.php>

may see a need for a ban on full face veils in public spaces in the future.²² In **Germany**, restrictions on the *hijab* already exist in public employment.²³

17. The issue of the Islamic veil has emerged in other European states which have so far not adopted any legislation on the matter. In **Denmark**, in January 2010, the government issued a statement stating the full face veil is out of sync with Danish values, but decided against legislation to prohibit its wearing partly because so few women wear such garments.²⁴
18. The **UK** immigration minister, Damian Green, has said that trying to pass a law banning women wearing the Islamic full would be “un-British” and at odds with the UK’s tolerant and mutually respectful society.²⁵ However, Philip Hollobone, a British member of parliament, has introduced a private members’ bill entitled the “Face Coverings Regulations Bill” which would make it illegal for people to cover their faces in public.²⁶ The same parliamentarian has also indicated that he would refuse to meet constituents wearing the veil. This has reignited a national debate on banning wearing of the veil in the UK, even though there is less popular support for such a ban in the country than in other European states.²⁷ The bill received its second reading in the House of Commons on 3 December 2010.
19. Legal commentators have predicted that European bans on the *burqa* and *niqab* if adopted will face inevitably legal challenge at the European Court of Human

²² “The burka, the law and other EU countries”, *France 24*, 26 January 2010 <http://www.france24.com/en/20100126-burqa-law-other-eu-countries>

²³ Eight of Germany’s sixteen states have restrictions on the wearing of the *hijab*. See Human Rights Watch, “Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany” February 2009 <http://www.hrw.org/en/reports/2009/02/25/discrimination-name-neutrality-0>

²⁴ “Burqa and niqab have no place in Denmark, says PM”, *The Times of India*, 21 January 2010, <http://timesofindia.indiatimes.com/world/europe/Burqa-and-naqab-have-no-place-in-Denmark-says-PM/articleshow/5482347.cms>

²⁵ Allegra Stratton, “Copying French ban on burqa would be un-British, says minister” Sunday 18 July 2010 <http://www.guardian.co.uk/uk/2010/jul/18/burqa-ban-unbritish-immigration-minister>; Patrick Hennessey, “Burka ban ruled out by minister” *The Telegraph*, 17 July 2010 <http://www.telegraph.co.uk/news/newstopping/politics/7896751/Burka-ban-ruled-out-by-immigration-minister.html>

²⁶ Two Muslim women have also claimed that they were refused a bus ride because one had covered her face with a *niqab*. The other was wearing a *hijab*. “Muslim woman wearing veil ‘refused bus ride’ in London” *BBC News* 23 July 2010 <http://www.bbc.co.uk/news/uk-england-berkshire-10728912>

²⁷ Helen Pidd, “Niqab-ban Tory MP told he is breaking the law” *Guardian* 25 July 2010 <http://www.guardian.co.uk/global/2010/jul/25/niqab-ban-mp-philip-hollobone> Andrew Grice, “Champion of UK burka ban declares war on veil-wearing constituents” *The Independent* 17 July 2010. <http://www.independent.co.uk/news/uk/politics/champion-of-uk-burka-ban-declares-war-on-veilwearing-constituents-2028669.html> Arguably, the most high profile case involving the *niqab* in the UK to date was the 2006 case of Aishah Azmi, a Yorkshire teacher, who lost her case for discrimination at an employment tribunal after she was dismissed for refusing to remove her veil in the classroom. She was willing to remove her *niqab* in front of her children, but not when male colleagues were present. Another 2006 case involved a Muslim schoolgirl, Shabina Begum, who was excluded from Denbigh High School after she insisted on wearing the *jilbab* (a long coat like garment) in violation of the dress codes imposed by the school. The House of Lords decided that the school was justified in acting as it did. These cases prompted a national debate on multiculturalism and integration in Britain. In 2006, Jack Straw, the ten leader of the House of Commons, was criticised for revealing that he asked his constituents to uncover their faces if they came to see him. Jack Straw, “I felt uneasy talking to someone I couldn’t see” *Guardian* 6 October 2006 <http://www.guardian.co.uk/commentisfree/2006/oct/06/politics.uk>

Rights in Strasbourg once they are implemented, notwithstanding the political and public support they attract in certain European states.²⁸

20. Beyond the European Union, tensions concerning the veil have also been evident in some Muslim majority states. Notably, **Turkey** has traditionally banned the wearing of the *hijab* in the public sphere, including by students in universities, on the basis of the state's official secularism although this has been challenged in the courts, including at the European Court of Human Rights.²⁹ Furthermore, in July 2010, **Syria's** Minister of Education issued a directive forbidding the *niqab* (rather than the more commonly worn *hijab*) for students and teachers at state and private universities on the basis that it contradicts university ethics and academic traditions.³⁰ Hundreds of primary school teachers wearing the *niqab* at government-run schools have also been transferred to administrative jobs. In October 2009, **Egypt's** then foremost Muslim cleric, Sheikh Mohammed Sayed Tantawi barred female students from wearing the full face veil at the al-Azhar University, Sunni Islam's centre of learning and scholarship.³¹ **Algeria's** government has decided, not without controversy, that women should pose for passport photographs without their veil in line with international aviation rules.³² In **Jordan**, there has been a mounting public debate about the use of the *niqab* by some men as a cover to commit crimes.³³
21. Further afield, in **Canada**, the state of Quebec introduced in March 2010 a bill which would ban women wearing the full face veil from public services, a proposal that the Canadian federal government has defended.³⁴ In May 2010, the Legislative Council of the Parliament of **New South Wales, Australia** voted to end debate on a bill that would have banned the wearing of the *burqa* or other face veils in public.³⁵

B. *Justifications for and against full face veil bans*

22. This section sets forth the various legal and policy-based arguments which have been raised for and against laws banning full face veils.

²⁸ See discussion on the blog Strasbourg Observers on "Would a Niqab or Burqa ban pass the Strasbourg test?" <http://strasbourgobservers.com/2010/05/04/burqa-and-niqab-ban/>

²⁹ See *Leyla Sahin v Turkey*, Application No 44774/78, judgment of the Grand Chamber of the European Court of Human Rights of 10 November 2005.

³⁰ See "Syria bans niqabs from universities" *Guardian* 20 July 2010; <http://www.guardian.co.uk/world/2010/jul/20/syria-bans-niqab-from-universities>; Ann Riley, "Syria government bans full face veils from universities" *Jurist* 19 July 2010 <http://jurist.org/paperchase/2010/07/syria-bans-full-face-veils-from-universities.php>

³¹ "Lawmaker wants Tantawi to step down over veil" 9 October 2009 *Arab News* <http://archive.arabnews.com/?page=4§ion=0&article=127173&d=8&m=10&y=2009>

³² "Headscarf row opens new wounds for Algerians" *The Jordan Times* 15 April 2010 <http://www.jordantimes.com/?news=25734>

³³ "Criminals hiding behind veils trigger controversy" *The Jordan Times* 29 July 2009 <http://www.jordantimes.com/?news=18749>

³⁴ "Quebec niqab bill would make Muslim women unveil," *The Star*, 25 March 2010 <http://www.thestar.com/news/canada/article/785036--quebec-niqab-bill-makes-women-unveil-to-get-public-services>; "Ignatieff backs Quebec veil ban," *The Globe and Mail*, 26 March 2010 <http://www.theglobeandmail.com/news/politics/ottawa-notebook/ignatieff-backs-quebec-veil-ban/article1513537/>

³⁵ Hillary Stemple, "Australia lawmakers defeat bill to ban burqa" 20 May 2010 *Jurist* <http://jurist.org/paperchase/2010/05/new-south-wales-lawmakers-defeat-bill-to-ban-burqas.php>

23. Bans on the full face veil have been justified on various grounds in different contexts.³⁶ It has been claimed that such bans:

- (a) Protect the rights of women since the wearing of the full face veil represents an infringement of the autonomy, dignity and rights of women (including the rights to equal treatment, freedom of expression and freedom of religion),³⁷ particularly the rights of women who would not like to wear the veil but who are pressurised or face violence if they refuse to do so;³⁸
- (b) Protect public security and public order since the full face veil may be used as a disguise by criminals, and more generally may be seen as a destabilising threat;
- (c) Preserve aspects of the national identity of states, such as respect for “republican values” and state secularity (e.g. in France and Syria);
- (d) Promote the integration of Muslims into society on the basis that veils have a negative effect on community cohesion and the majority of Muslims do not believe the wearing of the veil is a religious obligation;
- (e) Discourage fundamentalist Islam taking root in Europe;³⁹
- (f) Are supported by evidence that they attract public support in many countries.⁴⁰

³⁶ See also Willy Fautré, “Intersectionality of Freedom of Religion or Belief and Women’s Rights: the ‘Burqa Issue’ in the EU”, paper presented at the “Women – Religion or Belief – Human Rights Panel” during the 13th session of the UN Human Rights Council, 12 March 2010, www.hrwf.net/uploads/0315%20Paolo.doc; Judith Sutherland, “How Not To Liberate Women”, *The Guardian*, 24 April 2010 <http://www.guardian.co.uk/commentisfree/belief/2010/apr/24/belgium-niqab-islam-women>

³⁷ For example, Nicholas Sarkozy has said: “The burqa is not welcome in France because it is contrary to our values and contrary to the ideals we have of a woman’s dignity”.

³⁸ In relation to headscarves generally, the Special Rapporteur on freedom of religion or belief, Asma Jahangir, in her 2006 report on France indicated that movements such as *Ni putes, ni soumises* claim that most young women of Muslim background wear the headscarf because they are forced to do so by their family and, in particular, by the male members. She stated that “these associations argue that an increasing proportion of young French citizens of Muslim background want to emancipate themselves from the religion to which they are associated. They are of the opinion that Law 2004-228 [on “laïcité” which prohibits the wearing of conspicuous religious symbols in schools] has provided them with a legitimate means of reaching this goal”. Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief, Mission to France (18-29 September 2005) E/CN.4/2006/Add.4 8 March 2006 paras 55-56.

³⁹ The French Justice Minister, Alliot-Marie to the National Assembly when she presented the bill.

⁴⁰ A Pew Research Center Poll in April and May 2010 found that 82% of French voters supported a ban, as well as more than 71% of German voters, 62% of British voters and 59% of Spanish voters. However, only 28% of American voters supported such a ban. See <http://pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe/> A You Gov poll in the UK indicated that 67% of Britons want the full face veils outlawed. However, although the majority of UK adults agree that the *burqa* should be banned, over a quarter (27%) disagree that it should be completely outlawed in Britain. And interestingly, there is far less support for a ban amongst younger adults, with nearly half (46%) of 18-24 year olds and 37% of 25-34 year olds saying that they disagree with a ban on the *burqa*. This is compared to 30% of 35-44 year olds, 22% of 45-54 year olds and 16% of those aged 55 and over. See results of You Gov poll released 21 July 2010 <http://today.yougov.co.uk/sites/today.yougov.co.uk/files/YG-Archives-Pol-Channel5-burkhas-160710.pdf>

24. On the other hand, a range of arguments have been put forward **against prohibitions on the full face veil**. It has been claimed that the bans:
- (a) Infringe the human rights of women to freedom of religion or belief (in particular the right to manifest their religion through how they dress), freedom of expression and equal treatment;
 - (b) Conflict with the national identities and democratic values of states which are based on a respect for diversity and pluralism⁴¹ and undermine attempts to build more cohesive societies on such a basis;⁴²
 - (c) Discriminate against and stigmatise Muslim women who wear the full face veil and also those who wear other veils;
 - (d) Are disproportionate given only a tiny minority of Muslim women wear the full face veil (eg in France, only 2,000 women out of a Muslim population of 5-6 million, in a country of 64 million).
 - (e) Alienate and demoralise Muslim women and communities generally and are counterproductive to the apparent aims of promoting the integration of Muslims into society (with the potential that that wider population will come to associate any Islamic dress, including the *hijab*, with gender inequality and oppression) and do not support the promotion of intercultural understanding upon universal values;
 - (f) Are politically motivated to attract the far right, to distract attention from unwelcome economic cuts⁴³ or to serve as a smokescreen from allegations of state corruption;⁴⁴
25. The above arguments for and against bans on the full face veil are relevant to the legal analysis and based upon international human rights law that follows below. ARTICLE 19 also presents some key legal principles which policy-makers and adjudicators ought to apply when considering the legality of the bans.

III. FULL FACE VEIL BANS AND INTERNATIONAL HUMAN RIGHTS LAW

26. The framework for assessing whether bans on the full face veil are compatible with international human rights law involves assessing whether: *first*, the bans restrict human rights; *second*, whether these restrictions may be justified under international human rights law.

⁴¹ The UK's Immigration Minister, Damian Green, said trying to pass a law banning women wearing the Islamic full would be "un-British" and at odds with the UK's tolerant and mutually respectful society. Allegra Stratton, "Copying French ban on burqa would be un-British, says minister" Sunday 18 July 2010 <http://www.guardian.co.uk/uk/2010/jul/18/burqa-ban-unbritish-immigration-minister>

⁴² Sara Silvestri, "France votes on the burqa" *The Guardian* 13 July 2010 <http://www.guardian.co.uk/commentisfree/belief/2010/jul/13/france-burqa-ban-veil>

⁴³ See Sarah Silvestri above.

⁴⁴ Nabila Ramdani, "French burqa debate is a smokescreen" *The Guardian* 8 July 2010 <http://www.guardian.co.uk/commentisfree/2010/jul/08/france-burqa-ban-sarkozy-political-distraction>

A. *The relevance and engagement of human rights*

Recommendation:

- States should examine a range of human rights – both civil and political and economic, social and cultural rights including freedom of religion or belief, freedom of expression, the rights to non-discrimination and equal treatment, the right to liberty of movement, the right to privacy, the right to education, the rights of the child and the right to health – that are relevant to the issue of the wearing the full face veil or other religious clothing when considering laws and regulations.

27. It is recalled that the Human Rights Committee indicated that rules on clothing potentially violate human rights guarantees in General Comment No 28 (2000) on the equality of rights between men and women:⁴⁵

The Committee stresses that such regulations [on clothing to be worn by women in public] may involve a violation of a number of rights guaranteed by the Covenant, such as: article 26, on non-discrimination; article 7, if corporal punishment is imposed in order to enforce such a regulation; article 9, when failure to comply with the regulation is punished by arrest; article 12, if liberty of movement is subject to such a constraint; article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim.

28. Most international judicial or quasi-judicial bodies consider the display of religious symbols *as a manifestation of religion or belief*, rather than being part of internal conviction which is not subject to limitation. Several international and regional human rights instruments refer to the freedom “to manifest his religion or belief in worship, *observance, practice* and teaching” (emphasis added).⁴⁶ According to the Human Rights Committee’s General Comment No 22 on Article 18 of the ICCPR, “[t]he observance and practice of religion or belief may include not only ceremonial acts but also such customs as ... the wearing of distinctive clothing or head coverings (para 4), a viewpoint shared by the Special Rapporteur on freedom of religion or belief.⁴⁷

29. At the same time, when considering the legal compatibility of national and local bans on the wearing of the full face veil, it is necessary to consider the range of

⁴⁵ Human Rights Committee, General Comment No 28, Equality of rights between men and women (Article 3) CCPR/C/21/Rev.1/Add.10, 29 March 2000, para 13.

⁴⁶ See Article 18 of the Universal Declaration of Human Rights, Article 18(1) of the International Covenant on Civil and Political Rights, Article 12(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 1(1) of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and Article 9(1) European Convention on Human Rights.

⁴⁷ Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5 9 January 2006 para 40.

competing human rights and public interests put forward by states, including children's rights.⁴⁸

30. In 2006, the Special Rapporteur on freedom of religion or belief recognised the complexity of human rights' arguments which may be advanced both in favour and against wearing of religious symbols.

Freedom of religion or belief may be invoked both in terms of the positive freedom of persons who wish to wear or display a religious symbol and in terms of the negative freedom of persons who do not want to be confronted with or coerced into it. Another competing human right may be the equal right of men and women to the enjoyment of all civil and political rights, as well as the principle of the right to be protected from discrimination of any kind, including on the basis of race, colour sex, religion, political or other opinion, national or social origin, property, birth or other status. The right of everyone to education may be invoked by pupils who have been expelled for wearing religious symbols in accordance with their religion or belief. Furthermore, the rights of parents or legal guardians to organize life within the family in accordance with their religion or belief and bearing in mind the moral education which they believe should inform the child's upbringing (see article 5(1) of the Declaration)."⁴⁹

31. Although the health impact of the wearing of the full face veil has not been prominent in arguments in favour of bans, it is worthwhile pointing out that there is evidence to indicate that the wearing of the *burqa* may contribute to health problems for women.⁵⁰ Women's rights to health therefore were violated as a

⁴⁸ The Committee on the Rights of the Child in its concluding observations on the second periodic report of France was concerned at the alleged rise in discrimination, including based on religion, and that the new legislation on wearing religious symbols and clothing in public schools may neglect the principle of the best interests of the child and the right of the child to access to education. The Committee recommended that the State party "consider alternative means, including mediation, of ensuring the secular character of public schools, while guaranteeing that individual rights are not infringed upon and that children are not excluded or marginalized from the school system and other settings as a result of such legislation. The dress code of schools may be better addressed within the public schools themselves, encouraging participation of children". The Committee recommended that "the State party continue to closely monitor the situation of girls being expelled from schools as a result of the new legislation and ensure that they enjoy the right of access to education." CCPR/C/15/Add.240, paras 25-26. Concerning the ban on schoolteachers wearing headscarves see the Committee's Concluding Observations on the second periodic report of Germany, CRC/C/15/Add.226, paras 30-31.

⁴⁹ The Special Rapporteur goes on: "On the other hand, the State may try to invoke the 'denominational neutrality of the school system' and the desire to '[preserve] religious harmony of schools' (see the Swiss Federal Court in the *Dahlab* case)." Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5 9 January 2006 paras 52.

⁵⁰ In response to a question in the Physicians for Human Rights survey in Afghanistan in 1998, a female paediatrician noted the following: "My activities are restricted. Walking with the burqa is difficult; it has so many health hazards. You can't see well and there is a risk of falling or getting hit by a car. Also, for women with asthma or hypertension, wearing a burqa is very unhealthy."... A doctor also informed PHR that the garment may cause eye problems and poor vision, poor hearing, skin rash, headaches, increased cardiac problems and asthma, itching of the scap, alopecia (hair loss), and depression. Another respondent noted that the "burqa is another reason for not wanting to go outside the house. I am not used to wearing the burqa and it is a risk for me every time I wear it. I can fall and break my leg or neck, also, it is not good for the eyes." After taking control of Kabul on 26 September 1996, the Taliban issued edict directed at women, including one directing women to be covered from head to toe in a burqa, not permitted to wear white, socks or shoes or shoes that make noise while they are walking. Before the Taliban few women owned a burqa. PHR interview, K19 Kabul, Afghanistan. Physicians for Human Rights, *The Taliban's War on Women: A Health and Human Rights Crisis in Afghanistan* (Physicians for Human Rights, 1998); available at <http://physiciansforhumanrights.org/library/the-talibans-war-on-women.html>.

result of edicts imposing the *burqa* in Taliban-governed Afghanistan, according to a 1998 report by Physicians for Human Rights. In the context of contemporary Europe, it may be argued that some Muslim women may feel pressurised to wear the full face veil because of social and cultural norms in their communities – and that this has a detrimental impact upon their health.

32. Against the complex myriad of human rights arguments that may be raised in support of and against the bans on the full face, two questions should be borne in mind:

What is the significance of wearing a religious symbol and its relationship with competing public interests, and especially with the principles of secularism and equality? Who is to decide ultimately on these issues e.g. should it be up to the individuals themselves, religious authorities, the national administration and courts, or international human rights mechanism?⁵¹

33. For the purposes of the following analysis, this Comment focuses on the rights to freedom of expression and freedom of religion and belief as the principal rights at issue in considering bans on the full face veil. It is also important to examine the key principles of necessity, proportionality and non-discrimination. This section will also consider the role of the margin of appreciation.

B. Assessing restrictions on limited rights to freedom of religion and expression

i. Legality

34. Under international human rights law, the rights to freedom of expression and freedom of religion or belief are limited rights and may be subject to restrictions in certain circumstances. Any limitation on the rights to freedom of religion and freedom of expression must be: *first*, provided by law; *second*, be based on specific legitimate aims which differ in relation to different rights; and *third*, be necessary and proportionate to that aim.⁵²

Recommendation:

- As restrictions on freedom of expression and freedom of religion, bans on the full face veil must be prescribed or provided by law.

35. In relation to the *first* general criterion, the **interference must be “prescribed” or “provided for by law”**⁵³, ARTICLE 19 notes that the European Court has indicated that the terms “prescribed by law” in the context of the European Convention requires that the impugned measure should have a basis in domestic law. It should also require that it be accessible to the persons concerned and formulated with sufficient precision to enable them to foresee to a degree that is reasonable in the circumstances, the consequences which a given action may

⁵¹ SR report 2006 at para?

⁵² See Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4 Annex para 10.

⁵³ Article 18 of the ICCPR refers to “prescribed by law” whereas Article 19 of the ICCPR refers to “provided by law”; Articles 9 and 10 of the ECHR refers to “prescribed by law”.

entail and to regulate their conduct.⁵⁴ The Court has understood the term in a substantive sense, rather a formal sense, encompassing statutes and regulatory measures taken by professional regulatory bodies under independent, delegated rule-making powers, as well as judge-made law or jurisprudence.⁵⁵

36. As for the *second* criterion for restrictions on the rights to freedom expression and freedom of religion or belief – the **fulfilment of “legitimate aims”**, as specified under international human rights law – ARTICLE 19 considers the application of key legal principles of necessity, proportionality and non-discrimination in relation to restrictions imposed on freedom of religion and freedom of expression through the adoption of bans on full face veil. In doing so, ARTICLE 19 highlights key recommendations emerging from international authorities and jurisprudence relevant to current debates on the legal compatibility of bans on the full face veil with international human rights law.

ii. Legitimacy of aims - freedom of expression

37. Bans on the wearing of the full face veil may be challenged from the perspective of freedom of expression under Article 19 of the of the Universal Declaration of Human Rights (“UDHR”), Article 19(3) of the ICCPR, Article 10(2) of the ECHR and Article 13(3) of the American Convention on Human Rights (“the American Convention” or the “ACHR”).⁵⁶ The wearing of religious symbols is clearly a form of religious expression as well as a manifestation of one’s religious beliefs.

Recommendation:

- As restrictions on freedom of expression, bans on the full face veil must explicitly pursue the respect of the rights or reputations of others, the protection of national security or of public order (order public), or of public health or morals in order to be compatible with Article 19 (3) of the ICCPR.

38. It is important to note that international legal protection of the right to freedom of expression differs from the protection of freedom of religion. Articles 18(3) and Article 19(3) of the ICCPR and similar regional provisions such as Articles 9(2) and 10(2) on freedom of religion or belief provide overlapping but different justifications for any infringement of the rights that they guarantee. Article 19 of the ICCPR is broader allowing for limitations for the respect of the rights or reputations of others and for the protection of “national security or of public order (order public), or of public health or morals. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Similarly, Article 10(2) of the ECHR allows restrictions on freedom of expression in the interests of

⁵⁴ *Gorzelik and others v Poland* Application No 44158/98 judgment of the Grand Chamber of the European Court of Human Rights, para 64.

⁵⁵ *Leyla Sahin v Turkey*, Application No 44774/78, judgment of the Grand Chamber of the European Court of Human Rights of 10 November 2005, at paras 81-98.

⁵⁶ The UN Special Rapporteur on Freedom of Religion or Belief, in her report focussing on “Religious Symbols”, indicated that preventing individuals from identifying themselves through the display of religious symbols restricted the positive exercise of their freedom of religion or belief. Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5 9 January 2006 paras 36.

national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁵⁷

39. The analytical approach of the relevant international provisions suggests that the analysis of violations of freedom of religion and freedom of expression under international and regional human rights law should be treated as essentially the same. Broadly speaking, that the issue at stake is whether there is an infringement of the right and can it be justified.
40. To date international jurisprudence dealing with the wearing of religious symbols has overwhelmingly focused on freedom of religion or belief, even though other rights, notably freedom of expression, are relevant and have been raised.

Recommendation:

- In considering the compatibility of bans on full face veils with international human rights law, policy-makers, courts and other adjudicative bodies should consider bans comprehensively under international and regional human rights law on freedom of expression and other rights whose importance has tended to be overlooked in relevant jurisprudence and policy discussions to date.

41. In ARTICLE 19's view, the European Court of Human Rights has not taken this comprehensive analytical approach by declining to examine cases involving religious expression under the spotlight of Article 10 of the ECHR from the freedom of expression perspective. It is possible to highlight this point by examining the Court's jurisprudence on limitations to rights based on public order and public morals, which are both stated as legitimate aims in Articles 9 and 10 of the ECHR as well as Articles 18 and 19 of the ICCPR. In *Kokkinakis v Greece*, the Court considered its Article 9 analysis to be sufficient and dispositive of the case, although the applicant in that case also submitted claims under Article 10 for freedom of expression, as well as other provisions of the ECHR.⁵⁸ In *Sahin*, the Court found it necessary to consider only an applicant's right to freedom of thought, conscience and religion under Article 9 of the ECHR and simply declined to scrutinise the facts for infringement of freedom of expression under Article 10.⁵⁹
42. The paucity of consideration of freedom of expression in human rights jurisprudence, particularly of the European Court of Human Rights on religious

⁵⁷ Article 10(2) of the ECHR.

⁵⁸ In *Kokkinakis*, the European Court on Human Rights invalidated the conviction of a Jehovah's Witness for proselytism as an impermissible infringement of Article 9. The applicant however claimed that his conviction was in breach of Articles 7, 9 and 10. The Court examined only Articles 9 and 7, however, noting that it found that "no separate issue arose under Article 10". *Kokkinakis v Greece* [1994] 17 EHR 397 paras 25 and 26.

⁵⁹ Although Leyla Sahin's main argument was put on the basis of Article 9 of the ECHR, the Fourth Section nor the Grand Chamber dismissed her Article 10 claim without adequate consideration. Although her request for a referral to the Grand Chamber after the Fourth Section's 2004 decision, Sahin did not make any legal submissions with regard to Article 10, she did clearly continue to allege a violation of Article 10.

expression, has resulted in impoverished analyses by courts of the human rights issues involved in relation to the wearing of religious garments. This can be illustrated by comparing the European Court's long-standing jurisprudence on restrictions on freedom of expression based on morality, on the one hand, with the Court's determinations that restrictions on religious garments service legitimate aims and are necessary.

43. It is recalled that in relation to public morals, the jurisprudence of the European Court does not permit restrictions to be imposed on the wearing of full face veils because a proportion of the population – even a majority – finds it objectionable. The European Court has emphasised on numerous occasions that the right to freedom of expression includes the right to express forms of expression that some people might find shocking or offensive.⁶⁰ In the seminal case of *Handyside v the United Kingdom*, the European Court stated:

Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.⁶¹

44. The resounding judgment in this case was echoed by the European Court Grand Chamber judgement in the *Sahin* case which referred to the need to “preserve public order and to secure civil peace and true religious pluralism, which is vital to the survival of a democratic society”. However, it seems that the presumed offensive, shocking or disturbing nature of the wearing of the *hijab* was one of the justifications that was accepted by the European Court of Human Rights in *Sahin* case for the restriction on the *hijab* at university. The “protection of the rights of others”, a legitimate aim in both Articles 9 and 10 of the ECHR, was one of the two interests Turkey argued it sought to promote by implementing the headscarf ban. Yet, the European Court engaged in virtually no discussion of exactly what “rights and freedoms” Turkey sought to protect. It may be “[assumed] that the Court feared that headscarf-wearing students might pressure, render uncomfortable, or even coerce other students into wearing the headscarf – although no evidence that pressure or coercion actually existed among students was ever provided”.⁶² Thus, according to its own standards on the right to freedom of expression, the Court should not have allowed Turkey to suppress the headscarf under Article 9 on this basis.⁶³ This does not simply have personal consequences for individuals, but also negative social and political consequences.⁶⁴

⁶⁰ *Handyside v the United Kingdom*, judgment of 7 December 1976, Application No 5493/72.

⁶¹ Above paragraph 49.

⁶² Jennifer Westerfield, “Behind the Veil: An American Legal Perspective of the European Headscarf Debate” 54 (2006) *American Journal of Comparative Law* 637 at 672.

⁶³ Judge Tulkens emphasised that “in the sphere of freedom of expression (Article 10), the Court has never accepted that interference with the exercise of the right to freedom of expression can be justified by the fact that the ideas or views concerned are not shared by everyone and may not even offend some people.” Dissent of Judge Tulkens in *Sahin v Turkey*.

⁶⁴ Steven Gey states: the “combined imposition on religious and political rights [in *Sahin*] makes the prohibition of headscarves among adults in universities doubly problematic because it restricts essential political discourse ... Restricting either form of discourse to avoid social and political turmoil is deeply troubling from a free speech perspective and goes far beyond what is required to protect a healthy

45. The European Court tends to afford a significantly lower level of protection to religious expression than in relation to political and journalistic expression, on the basis that the latter is vital to the democratic process.⁶⁵ The disadvantage this puts individuals who wish to exercise their right to express their religious beliefs through their clothing has been pointed out by Peter Cumper and Tom Lewis:

The canonical position of democracy under the ECHR means that aspects of rights that are regarded as being vital for its protection – even if only tangentially so – receive enhanced protection from the Court. But where an applicant merely wishes to invoke Article 9 in support of her form of religious dress, the absence of a clear nexus with the democratic process apparently condemns her to almost certain defeat at the hands of the state, which is given the benefit of a wide margin of appreciation. It appears that those claiming the right to religious expression and the right to manifest their religion through the clothes they wear are systemically disadvantaged under the Court’s jurisprudence as compared to those claiming rights that have a clear and unambiguous connection to the principles of autonomy and democracy.⁶⁶

46. If the European Court had taken an Article 10 analysis in the *Sahin* case, “it would have been forced to articulate just what ‘rights and freedoms of others’ the headscarf ban protects in order to distinguish these rights from the desire to be free from shock, offense or disturbance”. As indicated earlier, there is no evidence that the headscarf ban has actually proved disruptive in Turkish schools.⁶⁷ Moreover, a freedom of expression approach also exposes the failure of courts to support the assumptions underlying restrictions on the wearing of religious symbols. In *Sahin*, it would have required the European Court to cite evidence supporting its conclusions and it may have even been prompted to consider Ms Sahin’s claim on the basis of freedom of religion more favourably. Analysing bans on the headscarf from a freedom of expression perspective therefore allows more comprehensive and rigorous analysis of whether the bans are compatible with human rights.

iii. Legitimacy of aims - freedom of religion

47. Current legal controversies surrounding the bans on the wearing of the full face veil have tended to focus on whether such bans are legitimate limitations on the freedom to manifest one’s religion or belief – according to Article 29(2) of the

political system”. Steven Gey, “Free Will, Religious Liberty, and a Partial Defense of the French” 42 (2005) *Houston Law Review* 58-59.

⁶⁵ *Lingens v Austria* ref; Peter Cumper and Tom Lewis, “‘Taking Religion Seriously?’ Human Rights and Hijab in Europe – Some Problems of Adjudication”, 24 *Journal of Law and Religion* 2008-2009 599-627, at 618. Andrew Geddis, “You Can’t Say ‘God’ on the Radio: Freedom of Expression, Religious Advertising and the Broadcast Media after *Murphy v Ireland*” 2 *European Human Rights Law Review* (2004) 181; See also Tom Lewis, “What Not To Wear: Religious Rights, the European Court and the Margin of Appreciation” 45 *International and Comparative Law Quarterly* (2007) 395, 398-399. Andrew Geddis explains it is “because religious expression is not thought to generate as great an externalised benefit for society as a whole when compared to political expression that there is less of a ‘thumb on the scale’ when it comes to weighing the value of the speech against the possible harms it may engender”. Andrew Geddis, above at 189.

⁶⁶ Peter Cumper and Tom Lewis, “‘Taking Religion Seriously?’ Human Rights and Hijab in Europe – Some Problems of Adjudication”, 24 *Journal of Law and Religion* 2008-2009 599-627, at 622.

⁶⁷ See *Leyla Sahin v Turkey*, Application No 44774/78, judgment of the Grand Chamber of the European Court of Human Rights of 10 November 2005. Tulkens dissent at 1.

UDHR, Article 18(3) of the ICCPR, Article 1(3) of the Declaration on All Forms of Intolerance and Discrimination Based on Religion or Belief, Article 9(2) of the ECHR and Article 12(3) of the ACHR.⁶⁸ International and regional human rights jurisprudence on the wearing of religious symbols has also mostly focussed upon the right to freedom of religion or belief.

Recommendation:

- As restrictions on freedom of religion, bans on the full face veil must explicitly pursue the protection of public safety, order, health or morals or the fundamental rights and freedoms of others in order to be compatible with Article 18 (3) of the ICCPR and Article 9(2) of the ECHR.

48. Any interference with freedom of religion under Article 18(3) of the ICCPR must pursue one of the above aims. The list of legitimate aims in Article 9(2) of the ECHR is practically identical. It covers public safety, the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

49. It should be noted that the list of permissible reasons for intervention in freedom of religion or belief does not include additional grounds stipulated for Article 19, such as national security or the reputation of others. Furthermore, Article 4(2) of the ICCPR and Article 27 of the ACHR prescribe that, even in time of public emergency or war, no derogation from the freedom of conscience is permissible.

50. The Human Rights Committee has stated:

[R]estrictions 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.⁶⁹

51. Bans on the full face veil need to be justified specifically under at least one of the criteria in Article 18(2) of the ICCPR. In the case of *Hudoyberganova v Uzbekistan*, the Human Rights Committee considered the case of an author who refused to remove her headscarf at a university in the face of a ban.⁷⁰ The Committee expressly stated that “the freedom to manifest one’s religion encompasses the right to wear clothes or attire in public which is in conformity with the individual’s faith or religion”, and that “to prevent a person from wearing religious clothing in public or private may constitute a violation of Article 18, paragraph 2, which prohibits any coercion that would impair the individual’s freedom to have or adopt a religion”. The state simply sought to justify the expulsion of the author from the university because of her refusal to comply with

⁶⁸ The UN Special Rapporteur on Freedom of Religion or Belief, in her report focussing on “Religious Symbols”, indicated that preventing individuals from identifying themselves through the display of religious symbols restricted the positive exercise of their freedom of religion or belief. Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5 9 January 2006 paras 36.

⁶⁹ Human Rights Committee, General Comment No 22, 30 July 1993, CCPR/C/21/Rev.1/Add.4 para 8.

⁷⁰ *Hudoyberganova v Uzbekistan* Communication No 931/2000, CCPR/C/82/D/931/2000, final views of 18 January 2005.

the ban. In the absence of any justification provided by the state, the committee held that there had been a violation of Article 18 paragraph 2.⁷¹

52. In the case of *Ahmet Arslan and others v Turkey*, the European Court of Human Rights decided that the conviction of members of a Muslim religious group for wearing their distinctive religious headgear and dress in public other than for religious ceremonies had *not* been based on sufficient reasons and had therefore violated Article 9 of the ECHR on freedom of religion.⁷²

Recommendation:

- The scope of permissible limitations to freedom of religion (and freedom of expression) should be strictly interpreted.

53. The competing human rights of others and public interest limitations in relation to freedom of religion and also freedom of expression should be applied restrictively. This is important not only to ensure the protection of human rights in any given case, but also in order to refute claims challenging the value of human rights norms, principles and discourse to the resolution of contemporary issues.

Recommendation:

- Real evidence should be shown to support states' justifications for restricting freedom of expression, freedom of religion and other rights through bans on the full face veil.

54. In the leading case on the wearing of the veil in Europe, *Leyla Sahin v Turkey*, Judge Tulkens underlined that only “indisputable facts and reasons whose legitimacy is beyond doubt” were capable of justifying interference with a right guaranteed by the Convention.”⁷³ In such cases as *Sahin* and *Dahlab v Switzerland*, however, the European Court of Human Rights declined to adopt an evidence-based approach towards whether the justifications for prohibitions on veils in the sphere of education are really necessary or meet a “pressing social need”. Indeed, there is no evidence that the headscarf ban has actually proved disruptive in Turkish schools.⁷⁴ It may be argued that the European Court has seemed to be more inclined to allow states to *limit* individuals' positive freedom of religion or belief by relying on assumptions and conclusions about denominational neutrality,⁷⁵ secularism,⁷⁶ equality⁷⁷ and children's rights.⁷⁸

⁷¹ In *Bhinder v Canada*, the Human Rights Committee held that the requirement for Sikhs to wear safety headgear during work was justified under Article 18(3) of the ICCPR, without further specifying which of the grounds for limitation it thought to be in question. In addition, the Committee did not find de facto discrimination against persons of the Sikh religion violating Article 26 of the ICCPR because the legislation was to be “regarded as reasonable and directed towards objective purposes that are compatible with the Covenant”. *Bhinder v Canada* Communication No 208/1986, CCPR/C/37/D/208/1986, para 6.2.

⁷² Application no 41135/98, judgment of 23 February 2010.

⁷³ *Leyla Sahin v Turkey*, Application No 44774/78, judgment of the Grand Chamber of the European Court of Human Rights of 10 November 2005.

⁷⁴ Tulkens dissent at 73-74.

⁷⁵ In a much criticised decision, *Dahlab v Switzerland*, the European Court of Human Rights rejected the application of a primary school teacher who had been barred from wearing the Islamic headscarf whilst carrying out her professional duties. The court found that this decision of the Swiss authorities was justified and proportionate to the stated aim of protecting the rights and freedoms of others, public

iv. Necessity and Proportionality

55. Limitations on freedom of religion and freedom of expression through restrictions on the wearing of full face veils may be justified when necessary in a democratic society. In assessing bans on the full face veil, there is a justifiably severe burden on states to demonstrate that restrictions on human rights imposed through bans on the full face veil are really necessary.⁷⁹

Recommendation:

- Any restriction on freedom of expression or freedom of religion must be necessary to secure one of the legitimate aims in the sense that there must be a “pressing social need” for the restriction.⁸⁰

order and public safety. The wearing of a “powerful external symbol” such as the headscarf might have had some kind of proselytizing effect on young children. The Court therefore concurred with the view of the Swiss Federal Court that the prohibition of wearing a headscarf in the context of the applicant’s activities as a teacher was “justified by the potential interference with the religious beliefs of her pupils, other pupils at the school and the pupils’ parents, and by the breach of denominational neutrality in schools”. *Dahlab v Switzerland*, Application No 42393/98, decision of the European Court of Human Rights of 15 February 2001.

⁷⁶ The protection of the beliefs of others and of public order was stressed in the case of *Refah Partisi (the Welfare Party) and Others v Turkey*. In that case, however, the Grand Chamber of the European Court of Human Rights stated that “measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9 of the Convention”. This judgment, which was based on the Turkish principle of secularism, was deeply criticised by human rights groups for its lack of consistency. *Refah Partisi (The Welfare Party) and Others v Turkey* Application Nos 41340/98, 41342/98, 41343/98 and 41344/98, Judgment of the Grand Chamber of the European Court of Human Rights of 13 February 2003 para 95. Human Rights Watch, “Party Case Shows Need for Reform” 30 July 2008 <http://www.hrw.org/english/docs/2008/07/31/turkey19521.htm>

⁷⁷ In *Sahin v Turkey* the Grand Chamber of the European Court of Human Rights considered restrictions on the right to wear the Islamic headscarf in universities was necessary in a democratic society, as it was based on the particular principles of secularism and equality, which may be considered essential to protect the democratic system in Turkey and were consistent with the values underpinning the Convention. The Court also noted that other forms of religious attire were prohibited on the premises of Istanbul University and that bans on the Islamic headscarf were not directed against the applicant’s religious affiliation. Having regard to Turkey’s margin of appreciation in this sphere, the Court decided that the interference in issue was justified in principle and proportionate to the aim pursued. With regard to Article 9 of the ECHR, the “Court considered that, when examining the question of the Islamic headscarf in the Turkish context, there had to be borne in mind the impact which wearing such a symbol, which was presented or perceived as a compulsory religious duty, may have on those who chose not to wear it” (para 115). *Leyla Sahin v Turkey*, Application No 44774/78, judgment of the Grand Chamber of the European Court of Human Rights of 10 November 2005. Paragraphs 106-123.

⁷⁸ The Court also considered the measure prohibiting Ms Dahlab from wearing the headscarf as “necessary in a democratic society”. The Court held that, in the “circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was not unreasonable”.

⁷⁹ See Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5 9 January 2006 para 53.

⁸⁰ *Handyside v the United Kingdom*, judgment of 7 December 1976, Application No 5493/72 at para 49.

56. The reasons given by the State to justify any restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued. In other words, it “must be the least intrusive measure to achieve the intended legitimate objective and the specific interference in any particular instance must be directly related and proportionate to the need on which they are predicated”.⁸¹
57. In evaluating whether bans on the full face veil are proportionate, however, any possible legal review should consider whether *all reasonable measures* that could have been taken to accommodate the specific needs of the women concerned have been taken in the case. In doing so, the proportionality requirement demands that policy-makers and adjudicators balance individual rights against the general interests of the community. Some regulations on clothing may be justified as being appropriate and necessary to the achievement of certain legitimate objectives when considered at the general level. Yet they may not seem so appropriate and necessary when they are considered in context, in the specific instance in which the implementation of the measure is alleged to result in a violation of the rights of the individual.⁸²
58. As indicated above, ARTICLE 19 recognises that there *may* be situations where restrictions on the wearing of full face veils may meet these stringent criteria and be viewed as objectively necessary.

Recommendation:

- Targeted requirements upon individuals to lift their veils when requested may be necessary if there is a demonstrable link between the wearing of the full veil and a genuine threat to the preservation of national security or public order.

Recommendation:

- The burden of justifying limitations on the freedoms of expression and religion and equal treatment lies with the State.

59. Prohibitions on wearing the full face veil must not be based on mere speculation or presumption, but rather than on demonstrable facts. Otherwise it should be regarded as a violation of the individual’s freedom expression and freedom of religion.
60. Wholesale bans on the full face veil, which are clearly not the least intrusive measure to achieve the objectives of public safety and security, would therefore be considered disproportionate to the objectives of public safety or security. In ARTICLE 19’s view, restrictions on the wearing of the full face veil may be necessary for security purposes in particular situations (for example, at airports) or where public or professional functions of individuals require that their face can be seen (for example, in relation to the employment of primary school teachers, social workers, lawyers and court staff). However, a general prohibition of

⁸¹ Human Rights Committee, General Comment No 22 (1993) para 8.

⁸² Olivier de Schutter, *International Human Rights Law: Cases, Materials and Commentary* (CUP: Cambridge, 2010) at REF

wearing the *burqa* and the *niqab* would disproportionate measure that would deny women, who genuinely and freely desire to do so, their rights to cover their face.⁸³

v. Non-discrimination and equal treatment

Recommendation:

- Restrictions on the wearing of the full face veil must not be imposed for discriminatory purposes or applied in a discriminatory manner.

61. Bans on the wearing of the full face veil must not violate international human rights law on the right to equal treatment, and should respect the human rights of everyone without discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, states should protect individuals against the abuses of those rights by third parties, including by private actors and members of their families and communities, and ensure that they are able to exercise their rights in practice.⁸⁴ Under international human rights law, restrictions on religious symbols may not be imposed for discriminatory *purposes* or applied in a discriminatory *manner*.⁸⁵

62. In a recent resolution and recommendation, the Parliamentary Assembly of the Council of Europe (PACE) recognised that religious traditions of full-veiling, which may leave women feeling that they ought to wear the full-veil, are not compatible with the equality and dignity of women.

63. PACE Recommendation 1743 (2010) states:

[T]he Assembly calls on all Muslim communities to abandon any traditional interpretations of Islam which deny gender equality and limit women's rights, both within the family and in public life. This is not compatible with human dignity and democratic standards; women are equal to men in all respect and must be treated accordingly, with no exceptions. Discrimination of women, whether based on religious traditions or not, goes against Articles 8, 9 and 14 of the ECHR, Article 5 of its Protocol No 7 as well as its Protocol No 12. No religious or cultural relativism may be invoked to justify violations of personal integrity. The Parliamentary Assembly therefore urges member states to take all necessary measures to stamp out radical Islamism and Islamophobia, of which women are the prime victims.

In this respect, the veiling of women, especially full veiling through the burqa or the niqab is often perceived as a symbol of subjugation of women to men, restricting the role of women within the society, limiting their professional life and impeding their social and economic activities. Neither the full veiling of women, nor even the headscarf is recognised by all Muslims as a religious obligation of Islam, but they are seen by many as a social and cultural tradition. The Assembly considers that this tradition could be a threat to women's dignity and freedom. No woman should be compelled to wear religious apparel by her community or family. Women victims of

⁸³ Resolution 1743 (2010), the Parliamentary Assembly of the Council of Europe, para 16.

⁸⁴ See, in particular, Articles 2, 14 and 26 of the ICCPR and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

⁸⁵ See Human Rights Committee, General Comment No 22 30 July CCPR/C/21/Rev.1/Add.4, para 8.

these crimes must be protected by member states whatever their status, and benefit from support and rehabilitation measures.⁸⁶

64. At the same time that bans on the full face veil may be counterproductive to one of the main justifications submitted for such bans, the promotion of gender equality. There will arguably be *more* women who wear the veil as a response to family or community pressure than before in the absence of such a ban. Alternatively, bans on the full face veil may lead to the restriction of social interactions and such women's rights as liberty of movement, association and education as a consequence of the responses of their families and communities to the ban. General prohibitions on full-veils may well result, for example, in the confinement of women who choose or are compelled to wear the full face veil. In Italy, for instance, the husband of a woman who had been fined under municipal law bylaw for wearing a full veil in public has indicated that the fine meant she could no longer leave the house.⁸⁷ Thus, general bans on full face veils are likely to impede Muslim women's human rights such as their freedoms of movement and association and rights to education and work.
65. In addition, the disproportionate impact of full face veil bans upon Muslim women specifically may lead to further discontent and alienation amongst Muslim women and groups who already feel detached from mainstream society. Such bans may well put women wearing the full face veil or even headscarves at risk from overt forms of discrimination, but also threats or actual physical attacks from individuals outside their community who view the state's apparent sanctioning of the veil as justification for their behaviour. Thus, the full face veil could instigate an increase in multiple or intersectional discrimination against Muslim women – as women, as Muslims and as members of a minority group.
66. Consequently, bans on the full face veil risk increasing intolerance towards Muslims in Europe, at a time when greater intercultural and interfaith understanding is needed.⁸⁸ These consequences of full face veil bans are recognised by the recent PACE resolution.

[A] general prohibition might have the adverse effect of generating family and community pressure on Muslim women to stay at home and confine themselves to contacts with other women. Muslim women could be further excluded if they were to leave educational institutions, stay away from public places and abandon work outside their communities, in order not to break with their family tradition.⁸⁹

67. In line with its resolution, PACE Recommendation 1927 (2010) on *Islam, Islamism and Islamophobia in Europe* of the asks the Committee of Ministers to:

[C]all on member states not to establish a general ban of the full veiling or other religious or special clothing, but to protect women from all physical and psychological duress as well as their free choice to wear religious or special clothing and to ensure equal opportunities for Muslim women to participate in public life and pursue education and professional activities; legal restrictions on this freedom may be justified where necessary in a democratic society, in particular for security purposes

⁸⁶ Resolution 1743 (2010), Recalling its Resolution 1464 (2005) para 14-15.

⁸⁷ John Hooper, "Veiled Muslim women in Italy 'uphold tradition of the Madonna'" *The Observer* 9 May 2010.

⁸⁸ See EU Fundamental Rights Agency, Report on Discrimination against Muslims in Europe 28 May 2010 http://194.30.12.221/fraWebsite/attachments/EU-MIDIS-2-MR280509_EN.pdf

⁸⁹ Resolution 1743 (2010), Recalling its Resolution 1464 (2005) para 17.

or where public or professional functions of individuals require their religious neutrality or that their face can be seen.⁹⁰

68. ARTICLE 19 supports these provisions of the PACE recommendation and resolution. They recognise that there is a “huge gulf of toleration between respect and banning”: although full face veils should not be banned, that does not mean that they are a good thing or should be supported.⁹¹

vi. Margin of appreciation

Recommendation:

- The margin of appreciation should not be used to impose limitations on rights which are incompatible with international human rights law and the principles.

69. The doctrine of the margin of appreciation has often been relied upon in the European context by the European Court of Human Rights in cases involving the wearing of religious symbols, notably headscarves in universities in the *Sahin* case.⁹² It appears that the European Court employs a *wider* margin of appreciation when it considers a form of expression as religious expression rather than political expression (see above). Yet, that which will “likely cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations”.⁹³

70. While acknowledging that the doctrine of “margin of appreciation” may accommodate ethnic, cultural or religious peculiarities, this approach should not lead to questioning the international consensus that “[a]ll human rights are universal and interdependent and interrelated”, as proclaimed by the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993.⁹⁴

IV. GENERAL CRITERIA OF THE SPECIAL RAPPOREUR ON FREEDOM OF RELIGION OR BELIEF

71. This section recalls and outlines the criteria set out by the UN Special Rapporteur on freedom of religion or belief on the wearing of religious symbols as an authoritative set of guidelines for states considering adopting bans on full face veils and those who have already adopted them where they may well face legal challenge.

⁹⁰ Recommendation 1927 (2010), para 3.13.

⁹¹ David Mitchell, “If Britain decides to ban the burqa I might just start wearing one” *The Observer* 25 July 2010 <http://www.guardian.co.uk/commentisfree/2010/jul/25/david-mitchell-burqa-ban-tattoos>

⁹² See *Leyla Sahin v Turkey*, Application No 44774/78, judgment of the Grand Chamber of the European Court of Human Rights of 10 November 2005 paras 110-122.

⁹³ *Murphy v Ireland*, Application No 44179/98, judgment of the European Court of Human Rights of 10 July 2003 at para 67.

⁹⁴ Paragraph 5 of the Vienna Declaration and Programme of Action, 12 July 1993 A/CONF.157/23.

Recommendation:

- National and international bodies, including courts, should consider and follow the general criteria developed by the Special Rapporteur on freedom of religion and belief in relation to the wearing of religious symbols in balancing the competing human rights and interests concerning bans on the wearing of full face veils.

72. The “general criteria” developed by the UN Special Rapporteur on freedom of religion or belief support many of the principles indicated above and offer a way to balance the competing human rights and interests at issue in relation to bans on the wearing of full face veils. The aim of these general criteria is to assist “national and international bodies in their analyses and reviews of laws and draft legislation pertaining to freedom of religion or belief.”⁹⁵ These criteria are clearly extremely relevant for evaluating full face bans from an international human rights legal perspective.⁹⁶

The following “aggravating indicators” show legislative and administrative actions which typically are incompatible with international human rights law whereas the subsequent “neutral indicators” by themselves do not tend to contravene these standards.

Aggravating indicators:

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

⁹⁵ Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5 9 January 2006 para 51.

⁹⁶ Above paragraphs 51-60.

Neutral indicators:

- The language of the restriction or prohibition clause is worded in a neutral and all-embracing way;
- The application of the ban does not reveal inconsistencies or biases vis-à-vis certain religious or other minorities or vulnerable groups;
- As photographs on ID cards require by definition that the wearer might properly be identified, proportionate restrictions on permitted headgear for ID photographs appear to be legitimate, if reasonable accommodation of the individuals religious manifestation are foreseen by the State;
- The interference is crucial to protect the rights of women, religious minorities or vulnerable groups;
- Accommodating different situations according to the perceived vulnerability of the persons involved might in certain situations also be considered legitimate, e.g. in order to protect underage schoolchildren and the liberty of **parents or legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.**⁹⁷

73. The Special Rapporteur goes on to recommend that:

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

- **Was the interference, which must be cable of protecting the legitimate interest that has been at risk appropriate?**
- **Is the chosen measure the least restrictive of the right or freedom concerned?**
- **Was the measure proportionate i.e. balancing of the competing interest?**
- **Would the chosen measure be likely to promote religious intolerance?**
- **Does the outcome of the measure avoid stigmatizing any particular religious community?**⁹⁸

Recommendation:

- Governments should seek advice from the Office of the High Commissioner for Human Rights if they are considering the adoption of measures restricting the wearing of the full face veil.

74. In the same 2006 report, the Special Rapporteur invited "Governments that intend to regulate the wearing of religious symbols to consider seeking advisory services from the Office of the High Commissioner for Human Rights". It is striking, however, that four years after their submission, a spokesman for the OHCHR's

⁹⁷ It is likely that different categories of permissible limitations will be controversial. In general, according to the Special Rapporteur, schoolchildren are generally considered vulnerable in view of their age, immaturity and the compulsory nature of education. In addition, parental rights are also put forward as justification for limiting teachings' positive freedom to manifest their religion or belief. In all actions concerning children, the best interests of the child shall be the primary consideration. University students, however, have normally reached the age of majority and are generally considered to be less easily influenced than schoolchildren, and parent rights are no longer involved.

⁹⁸ Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5 9 January 2006 at para 58.

office has indicated was “not aware that any government has sought advisory services further to [the Special Rapporteur’s] 2006 report with regard to the regulation of wearing religious symbols”. This suggests that states have been ignorant or unconcerned about the possibilities of the guiding position that the OHCHR’s office may be able to offer when considering or formulating restrictions on the wearing of veils.

V. THE PROMOTION OF HUMAN RIGHTS: THE POSITIVE OBLIGATIONS OF STATES

Recommendation:

- States should implement their positive obligations to promote freedom of expression, freedom of religion and equal treatment and other rights, in line with their international human rights obligations.

75. In order to safeguard the negative freedom not be forced to wear the full face veil, states need to also safeguard positive dimensions of the rights to freedom of religion and expression, as well as equal treatment and non discrimination.⁹⁹
76. It should be recognised that these positive rights may be manifested in religious observance and the practice of *voluntarily* wearing or displaying religious symbols.¹⁰⁰
77. States should aim towards creating a culture in which every woman can make the choice about how to dress free of coercion, intimidation, harassment or discrimination. This requires states to protect women from the imposition of strict dress requirements on them by third parties including family members and peers, to implement their positive human rights duties to ensure that the criminal or family law systems can adequately address such cases and ensure that victims have access to an adequate remedy. In addition, there are positive duties on states to combat gender stereotypes and discriminatory behaviour and attitudes against women through a range of social, public policy and education programmes.
78. In this regard, PACE Resolution 1743 (201) has recently called on:

...[M]ember states to develop targeted policies intended to raise awareness of the right of Muslim women, help them to take part in public life and offer equal opportunities to pursue a professional life and gain social and economic independence. In this respect, the education of young Muslim women as well as of their parents and families is crucial. It is especially necessary to remove all forms of discrimination against girls and to develop education on gender equality, without stereotypes and at all levels of the education system.¹⁰¹

⁹⁹ On the need for positive state action to achieve the right to equality, the *Declaration on the Principles of Equality*, Article 3
<http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>

¹⁰⁰ See Report of Asma Jahangir, Special Rapporteur on freedom of religion or belief, E/CN.4/2006/5 9 January 2006 at para 60.

¹⁰¹ Resolution 1743 (2010), Recalling its Resolution 1464 (2005) para 17.

79. Furthermore, the PACE Recommendation 1927 (2010) has recommended states to:

5.14. step up efforts to ensure that a convention to combat violence against women, including domestic violence, comes into being as swiftly as possible;

5.15. invite states to guarantee women's freedom of expression by penalising, on the one hand, all forms of coercion, oppression or violence that compel women to wear the veil or the full veil, and by creating on the other hand, social and economic conditions enabling women to make informed choices through the promotion of genuine policies on equal opportunities for women and men which embody access to education, training and housing.

80. Public comment, debate and education about the impact of the full face veil on the rights of women and the various (and shifting) perspectives of different Muslims towards the wearing of veils would serve to promote both inter- and intra-religious and intercultural understanding.¹⁰² The positive dimensions of the right to freedom of expression are clearly demonstrated by the *Camden Principles on Freedom of Expression and Equality* which set out how these may be implemented in practice as indivisible and interdependent human rights. The principles recommend a public policy framework for the promotion of pluralism and equality, the imposition of obligations on state actors and media responsibilities to promote equality and intercultural understanding.¹⁰³

VI. THE ROLE OF EU LAW

81. A final substantive point to make in this Comment relates to the role of the EU in the debates on restrictions on the wearing of the full face veil. As indicated earlier, EU leaders have denied that the EU has any competence to deal with the issue. Yet the EU does have competence in the field of human rights, even though the precise limits of the scope of this competence are contested.¹⁰⁴ The European Court of Justice has long declared that fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the common constitutional traditions of member states, are part of the general principles of Community law.

Recommendation:

- In their consideration of bans on the wearing of the full face veil, EU Member States should remember the increasingly close relationship between the system of the European Convention on Human Rights and the EU, which now has the competence to accede to the former. Even in the absence of formal accession, however, the rights and principles of the European Convention on Human Rights apply through existing EU law and policies, including the EU Charter which is now binding as a matter of EU law.

¹⁰² See the *Camden Principles on Freedom of Expression and Equality* (ARTICLE 19, 2009) <http://www.article19.org/advocacy/campaigns/camden-principles/index.html>

¹⁰³ See Principles 5-10 in particular.

¹⁰⁴ See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (Oxford: OUP, 2008) 4th edition at pp 379-427.

82. Since December 2009 with the entry into force of the Lisbon Treaty, the EU Charter on Fundamental Rights has had binding legal effect equal to the Treaties of the EU.¹⁰⁵ (The EU Charter had gradually entered “the constitutional practice of the EU” with institutional and judicial approval over the years since its declaration in December 2000.)¹⁰⁶ The EU Charter protects rights including freedom of expression and information,¹⁰⁷ freedom of thought, conscience and religion,¹⁰⁸ equality between men and women¹⁰⁹ and non-discrimination on the grounds of religion or belief.¹¹⁰ In terms of its formal scope, the EU Charter applies to the European institutions, subject to the principle of subsidiarity, and may under no circumstances extend the powers and tasks conferred on them by the Treaties. The EU Charter also applies to EU countries when they implement EU law.¹¹¹ Nonetheless, all addressees are expressly required to promote the rights contained within the EU Charter.
83. The relationship between the rights contained in the ECHR - whose relevance and engagement has been noted in the above discussion on bans on the full face veil – and the protection of fundamental rights in EU law has been reaffirmed and consolidated through the Lisbon Treaty and the EU Charter. Under Article 6 of the Lisbon Treaty, the EU has the competence to accede to the European Convention on Human Rights. Furthermore, Article 53 of the EU Charter makes it clear that the level of protection provided under its terms must be *at least* as high as that of the European Convention on Human Rights. These features of the EU’s constitutional basis reflect an intention on the part of the EU institutions to

¹⁰⁵ Article 6 of the Lisbon Treaty states: “1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”

¹⁰⁶ See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (Oxford: OUP, 2008) 4th edition at 418.

¹⁰⁷ Article 11 of the EU Charter states: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.”

¹⁰⁸ Article 10 of the EU Charter states: “1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.”

¹⁰⁹ Article 23 of the EU Charter states: “Equality between women and men must be ensured in all areas, including employment, work and pay.”

¹¹⁰ Article 21 of the EU Charter states: “1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”

¹¹¹ Protocol (No) 30 to the Treaties on the application of the EU Charter to Poland and the United Kingdom restricts the interpretation of the EU Charter by the Court of Justice and the national courts of these two countries, in particular regarding rights relating to solidarity (chapter IV).

promote harmony with the Convention system and to “develop a coherent system of fundamental rights protection throughout the continent.”¹¹²

84. In the absence of EU accession to the European Convention, any decision which the European Court of Human Rights may deliver concerning a legal ban on the wearing of the full face veil imposed by an EU Member State should be respected by the EU institutions, including the European Court of Justice, notwithstanding the particularly controversial nature of the human rights issue involved. In the absence of such a decision on one of the controversial bans is delivered, the norms and principles of the European Convention on Human Rights continue to infuse EU law and policies as general principles of EU law and through the EU Charter.
85. Furthermore, the EU has developed a range of human rights policies, including internal human rights policies, most notably in the field of anti-discrimination law pursuant to Article 13 of the EC Treaty.¹¹³ These policies include directives (EU legislation) that prevent people in the European Union from being discriminated against on the grounds of race and ethnic origin (the “Racial Equality Directive”¹¹⁴), and on grounds of religion or belief, disability, age or sexual orientation in the sphere of employment (the “Employment Framework Directive”¹¹⁵). The EU Commission has also proposed a directive prohibiting discrimination on grounds of age, disability, sexual orientation and religion or belief outside the employment sphere.¹¹⁶ There is a large body of EU legislative texts is dedicated to the implementation of the principle of equality between women and men.

Recommendation:

- EU Member States should ensure that any national bans they seek to impose on the wearing of the full face veil do not infringe the EU Charter of Fundamental Rights, EU legislation on the prohibition of discrimination and on the principle of equality between men and women.

VII. CONCLUSIONS AND RECOMMENDATIONS

¹¹² See Viviane Reding, “The EU’s access to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe”, Speech at the Hearing of the European Parliament’s Constitutional Affairs Committee, Brussels, 18 March 2010.

¹¹³ Article 13 EC states: “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

¹¹⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L 180, 19.7.2000, p 22–26.

¹¹⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2.12.2000, p 16–22.

¹¹⁶ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM/2008/426 final - CNS 2008/0140.

86. General prohibitions on wearing the *burqa* and the *niqab* – such as those adopted or proposed across a number of states, notably France and Belgium – are incompatible with states’ human rights obligations in relation to freedom of expression and also freedom of religion and the right to equal treatment and non-discrimination, in particular.¹¹⁷ States considering adopting restrictions on full face veils should make sure that they are provided by law, are based on a specific legitimate aim (such as the protection of national security) and are necessary and proportionate to achieve that aim. Furthermore, restrictions should not be discriminatory in their purposes or their implementation. Restrictions should also follow the general criteria developed by the UN Special Rapporteur on Freedom of Religion or Belief on the wearing of religious symbols as an authoritative set of guidelines. States should adopt targeted policies to promote the women’s human rights to non-discrimination and equal treatment in order to tackle some of the underlying social and cultural norms which lead to women making the choice to wear the full face veil.¹¹⁸

87. On the basis of these conclusions, ARTICLE 19 makes the following recommendations.

88. State legislatures should:

- Review and repeal any existing laws banning the wearing of full face veils in public on the basis of the principles indicated below;
- Refrain from adopting legislation prohibiting or restricting the wearing of full face veils in public on the same basis;
- Adopt a range public policy, social and education measures to ensure that all women are able to exercise their human rights without coercion, harassment or discrimination.

89. Policy-makers and courts reviewing the legality of bans on the full face veil should consider and apply the following principles:

- A range of human rights – both civil and political and economic, social and cultural rights including freedom of religion or belief, freedom of expression, the rights to non-discrimination and equal treatment, the right to liberty of movement, the right to privacy, the right to education, the rights of the child and the right to health – are relevant to the regulation of the wearing of the full face veil or other religious clothing.
- Since bans on the full face veil represent interferences of the right to freedom of expression and freedom of religion, they should be prescribed or provided for by law.
- As restrictions on freedom of expression, bans on the full face veil must explicitly pursue the respect of the rights or reputations of others, the protection of national security or of public order (order public), or of public health or morals in order to be compatible with Article 19 (3) of the ICCPR.
- In considering the compatibility of bans on full face veils with international human rights law, policy-makers, courts and other adjudicative bodies should

¹¹⁷ Resolution 1743 (2010), the Parliamentary Assembly of the Council of Europe, para 16.

¹¹⁸ As Judge Tulkens stated in the Sahin case, “[a]bove all, the message that needs to be repeated over and over again is that the best means of preventing and combating fanaticism and extremism is to uphold human rights.” *Leyla Sahin v Turkey*, Application No 44774/78, judgment of the Grand Chamber of the European Court of Human Rights of 10 November 2005, dissenting opinion of Judge Tulkens para 20.

consider such bans comprehensively under international and regional human rights law on freedom of expression and other rights whose significance has been overlooked in jurisprudence and policy discussions to date.

- As restrictions on freedom of religion, bans on the full face veil must explicitly pursue the protection of public safety, order, health or morals or the fundamental rights and freedoms of others in order to be compatible with Article 18 (3) of the ICCPR.
- The scope of permissible limitations to freedom of expression and freedom of religion should be strictly interpreted.
- Real evidence should be shown to support states justifications for restricting freedom of religion and other rights through bans on the full face veil.
- Any restriction on freedom of expression or freedom of religion must be necessary to secure one of the legitimate aims in the sense that there must be a “pressing social need” for the restriction.
- Targeted requirements upon individuals to lift their veils when requested may be necessary if there is a demonstrable link between the wearing of the full veil and a genuine threat to the preservation of national security or public order.
- The burden of justifying limitations on the freedoms of expression and religion and equal treatment lies with the State.
- Restrictions on the wearing of the full face veil must not be imposed for discriminatory purposes or applied in a discriminatory manner.
- The margin of appreciation should not be used to impose limitations on rights which are incompatible with international human rights law and the principles.
- National and international bodies, including courts, should consider and follow the Special Rapporteur on freedom of religion and belief’s general criteria on the wearing of religious symbols in balancing the competing human rights and interests concerning bans on the wearing of full face veils.
- Governments should seek advice from the Office of the High Commissioner for Human Rights if they are considering the adoption of measures restricting the wearing of the full face veil.
- States should implement their positive obligations to promote freedom of religion or belief, freedom of expression and equal treatment and other rights, in line with their international human rights obligations.
- In their consideration of bans on the wearing of the full face veil, EU Member States should remember the increasingly close relationship between the system of the European Convention on Human Rights and the EU, which now has the competence to accede to the former. Even in the absence of formal accession, however, the rights and principles of the European Convention on Human Rights apply through existing EU law and policies, including the EU Charter which is now binding as a matter of EU law.
- EU Member States should ensure that any national bans they seek to impose on the wearing of the full face veil do not infringe the EU Charter on Fundamental Rights, EU legislation on the prohibition of discrimination and on the principle of equality between men and women.

FURTHER INFORMATION:

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- ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the Universal Declaration of Human Rights, which guarantees free speech.