

## European Court of Human Rights - *Missaoui and Akhandaf v. Belgium* (App No 54795/21)

### Third party intervention by the Human Rights Centre of Ghent University

This intervention summarizes some of the findings and insights that result from many years of research at Ghent University on the topics raised in the case of *Missaoui and Akhandaf v. Belgium*. In a first part (1), we present several highly relevant elements of the legal and societal context of the case: the situation regarding bans on body-covering swimwear in swimming pools in Belgium (1.1), the broader context of bans on religious signs/dress in Belgium (1.2), the broader context of hostility against Muslims in Belgian society (1.3), and the treatment of bans on religious signs/dress in international human rights law (1.4). This will be followed by a second part (2), suggesting pathways of legal reasoning under the Convention in this type of cases, with a focus on Article 14 ECHR, read in conjunction with Article 9 ECHR.

These written comments are prepared and submitted by the Human Rights Centre of Ghent University (Belgium), pursuant to the leave granted by the President of the Third Section of the European Court of Human Rights on 24 August 2022, in accordance with Rule 44, §3 of the Rules of the Court.<sup>1</sup>

## **1 Legal and Societal Context**

### **1.1 Bans on body-covering swimwear in swimming pools in Belgium**

The issue of a national ban on body-covering swimwear in public areas, such as beaches and public swimming pools, attracted attention in Belgium in the summer of 2016, when several French local governments adopted a ban on body-covering swimwear on public beaches following the terrorist attacks in Nice.<sup>2</sup>

Although several Belgian politicians spoke in favour of a ban, no concrete measures were adopted in light of a ruling by the French *Conseil d'État* in which a local ban on body-covering swimwear was suspended for breaching fundamental rights.<sup>3</sup> Nevertheless, a 2017 study by the Human Rights Centre at Ghent University, focused on Flanders (the Dutch-speaking Northern part of Belgium), revealed that regulations concerning the wearing of body-covering swimwear were commonplace in public swimming pools.<sup>4</sup>

#### *1.1.1 Prevalence*

In the aforementioned study of 2017, the Human Rights Centre analysed the dress rules of all Flemish municipal swimming pools. This included all swimming pools that are managed either by the municipality or a collective of municipalities, or by public-private cooperation. The researchers scrutinized the texts of the pool regulations, followed by telephonic interviews on their practical applications, with a focus on rules regarding the so-called 'burkini'. The results of this research project were extensively set out in a paper written by Eva Brems, Saïla Ouald-Chaib and Katrijn Vanhees.<sup>5</sup> Among the 128 pools about which information could be obtained, only 30 responded that they allowed or would allow body-covering swimwear.<sup>6</sup> It turned out that, in 11 cases, the issue was theoretical because, according to the interviewee, no one had ever wanted to swim with body-covering swimwear in that pool. For 13 pools, it was clear that at least one woman has been able to swim in practice with body-covering swimwear. For 76 pools, a clear answer was received that body-covering swimwear is or would be banned. This number includes 25 pools that have never received a request to wear such swimwear. Of these 25 "theoretical banners", 4 have explicit bans in the rules, 10 have implicit bans, and 11 have unclear rules. For no less than 50 pools, the interviewee indicated that the issue of body-

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<sup>1</sup> For the Human Rights Centre, the team consisted of Eva Brems, Pieter Cannoot, Sarah Ganty, Tobias Mortier, Saïla Ouald-Chaib, Sarah Schoentjes, and Cathérine Van de Graaf.

<sup>2</sup> As Brems et al. note, the municipal regulations did not explicitly ban the "burkini" as such, but rather banned swimwear that did not respect the principle of *laïcité*. See E. Brems, S. Ouald-Chaib and K. Vanhees, "Burkini" bans in Belgian municipal swimming pools: Banning as a default option' (2018) 36(4) *Netherlands Quarterly of Human Right* 270.

<sup>3</sup> *Conseil d'État*, 26 August 2016, no. 402742.

<sup>4</sup> E. Brems, S. Ouald-Chaib and K. Vanhees, "Burkini" bans in Belgian municipal swimming pools: Banning as a default option' (2018) 36(4) *Netherlands Quarterly of Human Right* 270.

<sup>5</sup> E. Brems, S. Ouald-Chaib and K. Vanhees, *op cit*. See also E. Brems, 'Discrimination against Muslims in Belgium' in M. Saral and Ş. Bahçecik (eds.), *State, religion and Muslims: between discrimination and protection at the legislative, executive and judicial levels* (2020) Leiden, Brill/Nijhoff, pp. 66-108.

<sup>6</sup> It should also be noted that dress rules that specifically or implicitly target typically male swimwear are also very common. Among the swimming pools that were examined, no less than 104 require swim shorts to be short, that is not longer than the knees. In addition, a total of 79 pools require swim shorts to be tight; 34 pools combine both requirements.

covering swimwear had arisen in practice at least once, meaning that at least one person has been refused access on this ground. These 50 pools include 10 pools that have an explicit ban in their rules, 26 that have an implicit ban, and 14 with rules that are unclear. In 9 pools in which the ‘burkini’ was either banned or its status was unclear, the researchers found that it was nevertheless allowed either during specific “women-only swimming hours” targeting minority women, which were often organized by a club renting the pool (7 cases), and/or during school swimming (3 cases).

In the 76 cases where ‘burkinis’ were not allowed, interviewees were asked what the reason was for the bans. 50 interviewees replied to that question. Hygiene was by far the most cited reason with 36 mentions, in addition to 3 mentions of ecology/water quality and 2 interviewees stating that it is difficult to distinguish the ‘burkini’ from ordinary clothing which is banned. Apart from 2 interviewees who believed that underwear was worn under a ‘burkini’, the researchers did not receive further explanation on the restriction on grounds of hygiene. Safety was mentioned by 13 interviewees. Among those who explained this ground, some referred to the risk of loose clothes that may get stuck in filters and others to a “parachute effect” that would hinder other swimmers. Brems, Ouald-Chaib and Vanhees underlined that such lines of reasoning may however to some extent be based on misperceptions on the looseness of a ‘burkini’. Finally, 7 interviewees referred to reasons that the researchers grouped as ‘majority morals’, which favour uncovering rather than covering in the context of swimming pools. Three interviewees stated that the ‘burkini’ was “offensive”, and the concepts of neutrality, integration, tradition, and gender equality were all mentioned by one interviewee.

### 1.1.2 Jurisprudence

In July 2017, the Belgian inter-federal equality body, Unia, issued an advice on body-covering swimwear.<sup>7</sup> The advice states that a ban on body-covering swimwear is discriminatory against those who wear such swimwear for religious reasons, and that it affects individual autonomy and religious freedom. The advice relied on expert advice regarding the implications of allowing body-covering swimwear for hygiene and safety in pools, as well as for gender equality, drafted by the Flemish Agency for Care and Health<sup>8</sup> and the Flemish Ombudswoman for gender.<sup>9</sup> Whereas the Flemish Agency found that a ban on wearing ‘burkinis’ – when clean and entirely made of swimwear material – was not necessary for reasons of hygiene and safety, the Ombudswoman for gender stated that the protection of gender equality cannot justify a restriction on a woman’s free choice to wear body-covering swimwear.

Three local ‘burkini bans’ have been challenged in court. The Court of First Instance of Ghent held in two judgments of July 2018 that such a ban violates the prohibition of discrimination based on religion. Moreover, the court held that it could not be required of users of a public service to be dressed in a ‘neutral’ way. In the first judgment, which concerned an explicit ban on ‘burkinis’ in the swimming pool regulation of the municipality of Merelbeke, the court ruled that the ban resulted in a direct discrimination on grounds of religion which could not be justified on the basis of considerations of hygiene or safety.<sup>10</sup> In the second judgment, which concerned an implicit ban on ‘burkinis’ in the swimming pool regulation of the city of Ghent, the court ruled that the ban resulted in an indirect discrimination on grounds of religion which could not be justified on the basis of considerations of hygiene or safety.<sup>11</sup> The court’s decision in the first case was affirmed by the Court of Appeal of Ghent in June 2021.<sup>12</sup> The second judgment was never challenged.

However, the Court of First Instance of Antwerp ruled in a judgment of December 2018 that an implicit ‘burkini’ ban in a public swimming pool in the city of Antwerp did not amount to an indirect discrimination on grounds of religion, since it was justified on the basis of considerations of hygiene

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<sup>7</sup> Available at <https://www.unia.be/fr/criteres-de-discrimination/convictions-religieuses-ou-philosophiques/signes/biens-et-services/maillots-couvreur-lentierete-du-corps>.

<sup>8</sup> Available at [https://www.unia.be/files/Documenten/Aanbevelingen-advies/Advies\\_Agentschap\\_Zorg\\_en\\_Gezondheid.pdf](https://www.unia.be/files/Documenten/Aanbevelingen-advies/Advies_Agentschap_Zorg_en_Gezondheid.pdf).

<sup>9</sup> The advice of the Flemish Ombudswoman for gender of 17 October 2016 is available at: <https://www.vlaanderen.be/vlaamse-ombudsdienst/gender-en-grensoverschrijdend-gedrag>.

<sup>10</sup> Available at [https://www.unia.be/files/Documenten/Rechtspraak/Rechtbank\\_van\\_eerste\\_aanleg\\_Gent\\_5\\_juli\\_2018\\_\(zwembad\\_Merelbeke\).pdf](https://www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_(zwembad_Merelbeke).pdf).

<sup>11</sup> Available at [https://www.unia.be/files/Documenten/Rechtspraak/Rechtbank\\_van\\_eerste\\_aanleg\\_Gent\\_5\\_juli\\_2018\\_\(zwembad\\_Van\\_Eyck\).pdf](https://www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_(zwembad_Van_Eyck).pdf).

<sup>12</sup> Available at <https://www.unia.be/nl/rechtspraak-alternatieven/rechtspraak/hof-van-beroep-gent-24-juni-2021>.

and safety.<sup>13</sup> The court considered that whereas the proper use of a ‘burkini’ would not necessarily lead to concerns in terms of hygiene, a check on such proper use can impossibly be easily performed in reality. Moreover, the court considered that a ‘burkini’ created safety hazards in a pool, both for the pool staff and the individual, due to its ‘loose parts’ and layers. The judgment was affirmed by the Court of Appeal of Antwerp in November 2020.<sup>14</sup> Both Antwerp courts set aside the advice by the Flemish Agency for Care and Health and Unia.

In light of this diverging case law by courts in Ghent and Antwerp, local governments are thus confronted with legal uncertainty. Moreover, this uncertainty is exacerbated by the way courts rely on available expert advice regarding the absence of risk for hygiene and safety: some courts rely on them while others consider they are not ‘concrete’ enough to take them into account.

## 1.2 The broader context of bans on religious signs/dress in Belgium

We want to draw the attention of the Court to the wider Belgian context in which the ban on body-covering swimwear needs to be situated. In Belgium, bans on veiling are “spreading like an oil spill” across the various sectors of society: when confronted with any manifestation of Islamic veiling, banning has become the default option in Belgian society.<sup>15</sup> Overall, this attitude has resulted in a growing marginalisation of Muslim women.<sup>16</sup> The bans on body-covering swimwear are just the more recent example of this phenomenon. For instance, limitations on the wearing of religious signs/dress in the workplace occur both in the public and private sector. This is particularly the case for Muslim women who wear a hijab. The Flanders Government Agreement 2019-2024, stipulates a zero tolerance on the presence of visible religious symbols (including the headscarf) in schooling and employment on the grounds of neutrality.<sup>17</sup> De facto, several public institutions already prohibit the wearing of religious signs by their employees. Similar bans are proliferating in the private sector.<sup>18</sup>

The ban on body-covering swimwear case is an example of a particularly disturbing trend where Muslims wearing a hijab are denied access to services and facilities which other persons can make use of without any impediments. We find cases where women were refused to enter an ice-cream bar,<sup>19</sup> the terrace of a restaurant,<sup>20</sup> the gym,<sup>21</sup> a bowling alley<sup>22</sup> and now a public swimming pool<sup>23</sup> because they wore religious clothing. In result, Muslim religion is becoming increasingly absent from the public sphere, which causes a feeling of incomprehension and rejection for Muslim citizens, especially for Muslim women who are excluded from a growing number of social spaces.<sup>24</sup> As such, veiling – whether it is in the form of a headscarf or as part of a swimsuit – is *de facto* de-normalized and almost automatically problematized. In a study conducted by the EU Fundamental Rights Agency, out of all Muslim respondents in Europe (10 527), 31% of Muslim women who at least sometimes wear religious clothing in public reported experiencing harassment 12 months before the survey.<sup>25</sup> We respectfully submit that the Court must be conscious about these kind of persisting attitudes in society, as Tess Heirwegh and Cathérine Van de Graaf showed that the decision-making processes over the ‘burkini’

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<sup>13</sup> Available at [https://www.unia.be/files/Documenten/Rechtspraak/Rechtbank\\_van\\_eerste\\_aanleg\\_Antwerpen\\_18\\_december\\_2018.pdf](https://www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Antwerpen_18_december_2018.pdf).

<sup>14</sup> Available at [https://www.unia.be/files/Documenten/Rechtspraak/2020\\_Arrest\\_burkiniverbod.pdf](https://www.unia.be/files/Documenten/Rechtspraak/2020_Arrest_burkiniverbod.pdf).

<sup>15</sup> E. Brems, S. Ouald-Chaib, K. Vanhees, *op cit.*; C. Van de Graaf, ‘Perceptions of Discrimination of Muslim Women in Belgium: A Study of Discriminatory Incidents Across Public and Private Organizations Reported to the National Equality Body’ (2021) 6(2) *Islamophobia Studies Journal*, p. 227.

<sup>16</sup> J. Ringelheim, ‘Les interdictions de port du foulard visant les femmes adultes’, *Analyse de la ligue des droits de l’homme* (updated on 16 Octobre 2017), p. 18

<sup>17</sup> Flemish Government, *Vlaamse Regering 2019-2024: Regeerakkoord*, 10.

<sup>18</sup> In 2020 alone, Unia received 66 complaints involving prohibitions on the wearing of a hijab in the workplace. Amnesty International likewise reported cases of women who are not allowed to wear a hijab (or alternative such as a sterile cap) in medical laboratories, a call-center or a cleaning company. (Numbers to be published in UNIA, *Jaarverslag Discriminatie/Diversiteit 2020.*; Amnesty International, o.c. )

<sup>19</sup> Court of Appeal of Ghent, 8 October 2015, nr. 2014/RK/173.

<sup>20</sup> Court of First Instance of Brussels, 22.12.2009, unpublished and Court of First Instance of Huy, 26 May 2010, nr. 09/928/B

<sup>21</sup> Court of First Instance of Brussels, 4 February 2020; Court of First Instance Liège, 1 September 2020.

<sup>22</sup> Court of First Instance of Brussels 25 January 2011, L. and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding.

<sup>23</sup> Court of First Instance of Ghent, 5 July 2018, nr. 17/3312/A.

<sup>24</sup> J. Ringelheim, *op. cit.*, p.18

<sup>25</sup> European Union Agency for Fundamental Rights (FRA), ‘Second European Union Minorities and Discrimination Survey: Muslims – Selected findings’ (2017), Luxembourg, Publications Office, p.45 (Figure 24).

took place at a local level with often very limited actors involved.<sup>26</sup> As such, there is ample room for the personal biases of these actors to come into play.<sup>27</sup>

Finally, it is also worth noting that swimming pools constitute a site where human rights have been historically negotiated and fought for by minorities and discriminated groups, as explained by Heirwegh and Van de Graaf.<sup>28</sup> Several examples can be found in recent history: race, class, and gender segregation in American swimming pools during the twentieth century, the prohibition to Indigenous Australians to enter local pools until the 1960s as well as the segregation between black and white people in South Africa during Apartheid. In other words, swimming pools imply a political symbolism by crystallizing some exclusion dynamics and ‘reflect broader societal discussions on the in- or exclusion of groups throughout history’.<sup>29</sup> The bans on body-covering swimwear, not only in Belgium but also in the Netherlands and in France, constitute a contemporary illustration of it.

We respectfully submit that the present case offers an opportunity for the Court to address this phenomenon of a continuously widening sphere in which limitations are placed on Muslim women and their freedom to take part in society. Limitations on that freedom should remain exceptional and require evidence of necessity and proportionality in accordance with human rights law.

### 1.3 The broader context of hostility against Muslims in Belgian society

We submit that the targeting of Muslim women who want to swim in body-covering swimwear, cannot be detached from the context of rising Islamophobia.<sup>30</sup> In public debate in Belgium, Islam is often framed as a problem and Muslims are represented as a threat to society.<sup>31</sup> Feelings of irrational hostility, fear or hatred toward Muslims have exacerbated in recent years by the rise of populist nationalist politicians and the terrorist attacks in Brussels.<sup>32</sup> An absolute majority of individuals of Turkish and Moroccan descent feel that Belgians are very negative towards Islam.<sup>33</sup> This negative attitude seems to have resulted in a growth of explicit and measurable physical and verbal attacks toward Muslims.<sup>34</sup> Concrete examples include vandalism of mosques, flyers and posters with discriminatory content,<sup>35</sup> and messages on social networks with the intent to incite violence.<sup>36</sup> Hate crimes are often heavily gendered.<sup>37</sup> It is clear that Muslim women who wear a hijab, experience more negative or discriminatory incidents than Muslim women who dress in a more ‘Western’ fashion.<sup>38</sup> It is easier to single them out and identify them as the ‘other’, with the hijab as a targetable symbol of otherness.<sup>39</sup> Examples of such crimes are, for instance, stabbings<sup>40</sup> and the forced removal of the headscarf.<sup>41</sup>

We invite the Court to be mindful of how the myriad of above-mentioned bans facilitate and legitimatise Islamophobic discourse by the general public.<sup>42</sup>

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<sup>26</sup> T. Heirwegh and C. Van de Graaf, ‘The local swimming pool as a space of rights contestation – an analysis of ‘burkini’ policies in Belgian local public swimming pools’ (2019) 51(2) *The Journal of Legal Pluralism and Unofficial Law* 1, p. 4.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> See the [observations made by the former Commissioner of Human Rights](#); EUAFR, [European Union Minorities and Discrimination Survey](#), 2010.

<sup>31</sup> S. Zemni, ‘The shaping of Islam and Islamophobia in Belgium’ (2011) 53(1) *Race & Class* 28, p. 29.

<sup>32</sup> See [OSF 2019](#); Amnesty International 2012.

<sup>33</sup> 70% of respondents in a study on migration and integration from the Flemish government ([VMIM 2018](#)). This survey from the Flemish government revealed that many interviewees do not wish to live next to Muslims. (VMIM 2018).

<sup>34</sup> Collectif contre L’Islamophobie en Belgique (CCIB), [“Rapport des Chiffres 2018”](#); CCIB, [“Rapport des Chiffres 2019”](#).

<sup>35</sup> Court of First Instance of East-Flanders sect. Ghent, 2015, GE56.L2.3657/14/sw3.

<sup>36</sup> Court of First Instance Brussels, 31 May 2016; Court of First Instance of East-Flanders sect. Ghent, 16 October 2018, GE56.RL.100116/2018.

<sup>37</sup> See Unia, [“Statistical report 2019”](#), June 2020.

<sup>38</sup> Å. Sander, ‘Experiences of Swedish Muslims after the terror attacks in the USA on 11 September 2001’ (2006) 32(5) *Journal of Ethnic and Migration Studies* 809, p. 821.

<sup>39</sup> L. Berg and M. Lundahl, ‘(Un-) veiling the west: Burkini-gate, Princess Hijab and dressing as struggle for postsecular integration’ (2017) 8(3) *Journal of Current Cultural Research* 263-, p. 264.

<sup>40</sup> SudInfo, [“Une femme poignardée devant ses trois enfants à Anderlecht”](#), 2 April 2019.

<sup>41</sup> GVA, [“Dronken vrouw valt moslima aan in Deurne”](#), 6 July 2019.

<sup>42</sup> This has been demonstrated in the context of burqa bans in both France and Belgium. (N. Bouteldja, ‘After the Ban: The experiences of 35 women of the full-face veil in France’ (2013), Open Society Foundations, p. 17; E. Brems et al., ‘Wearing the face veil in Belgium’ (2012), p. 20.); C. Van de Graaf, ‘Perceptions of Discrimination of Muslim Women in Belgium: A Study of Discriminatory Incidents Across Public and Private Organizations Reported to the National Equality Body’ (2021) 6(2) *Islamophobia Studies Journal* 221.

## 1.4 Bans on religious signs/dress in international human rights law

In 2016, when multiple French municipalities banned body-covering swimsuits on their beaches, the United Nations Office of the High Commissioner for Human Rights expressed its support for the French *Conseil d'État's* decision to overturn the ban in one of those municipalities, and urged other municipalities to repeal their bans as well, calling them 'a grave and illegal breach of fundamental freedoms' and 'highly discriminatory'<sup>43</sup>. Beyond the ban on body-covering (religious) swimwear specifically, several United Nations bodies have addressed issues regarding religious dress commonly worn by Muslim women in other contexts. Their conclusions unanimously express concern about banning such forms of dress.

The UN Human Rights Committee (UNHRC) has been particularly prolific on this particular topic. It found a violation of the right to freedom of religion and of the right to non-discrimination in two individual communications concerning Muslim women who wore headscarves, the first of whom was refused enrolment at university<sup>44</sup>, and the second of whom was fired from her job as a childhood educator<sup>45</sup>. Even more relevantly for the topic at hand, the UNHRC has ruled twice on the French niqab ban, which prohibits the wearing of a full-face veil in public. In both these individual communications, the UNHRC also found violations of the right to freedom of religion and the right to non-discrimination. A main aspect of their reasoning was that the 'living together' invoked by the French authorities was not a legitimate objective that could justify limiting the right to freedom of religion with such a ban. Notably, it stated that this concept of 'living together' was too vague and abstract, and there existed no right to interact with another person in a public space or to not be disturbed by someone wearing a face veil<sup>46</sup>. Even if such a legitimate aim had existed, the Government had not sufficiently argued why a complete ban on face veils was proportional to the aim they invoked<sup>47</sup>. These arguments can similarly be applied to the question of 'burkini bans'.

Several UN bodies have also specifically raised issues about the context surrounding Muslim religious dress in Belgium. While this concerned mainly the context of education, their concerns nevertheless paint a relevant picture of Belgian attitudes towards Muslim religious dress in the public sphere. In the context of the reporting procedure regarding Belgium, the UNHRC expressed its concern about the prohibition against the wearing of religious symbols in Belgian public schools, which it said could result in discrimination and marginalisation<sup>48</sup>. The Committee on the Rights of the Child (CRC), in its concluding observations on Belgium, likewise drew attention to the fact 'that schools are allowed to ban wearing religious symbols, such as Islamic headscarves, which stigmatizes and discriminates against children, particularly girls of Muslim faith, and may influence their choice of school, further studies and employment'<sup>49</sup>.

The Committee on the Elimination of Discrimination Against Women (CmEDAW), in 2008, expressed 'its concern that the ban on headscarves in schools may increase the discrimination faced by girls from ethnic and religious minorities and may impede equality of access to education'<sup>50</sup>. In 2014, the CmEDAW again expressed concern 'about the lack of information on the impact of the ban on wearing headscarves on women and girls', and urged Belgium to monitor this impact<sup>51</sup>. Also in 2008, the Committee on the Elimination of Racial Discrimination (UNCERD) pointed out the effects of headscarf bans in schools about the equal enjoyment of the right to education by all girls in Belgium<sup>52</sup>. In 2014, it put into question 'the decision of the autonomous board of Flemish Community Education to prohibit the wearing of symbols of belief in all schools under its authority, as well as the decision of the French Community to leave that decision to each school,' which 'may constitute a basis for discrimination

<sup>43</sup> Available at <https://news.un.org/en/story/2016/08/537672-un-human-rights-office-welcomes-frances-court-ruling-suspend-seaside-ban>

<sup>44</sup> UNHRC, *Seyma Türkan v. Turkey*, 22 October 2018.

<sup>45</sup> UNHRC, *F.A. v France*, 24 September 2018.

<sup>46</sup> UNHRC, *Miriana Hebbadj v. France*, §7.10; *Sonia Yaker v. France*, §8.10.

<sup>47</sup> *Ibid.*, resp. §7.11 and §8.10.

<sup>48</sup> UNHRC concluding observations on the sixth periodic report of Belgium, 6 December 2019, CCPR/C/BEL/CO/6, § 17.

<sup>49</sup> UNCRC concluding observations on the combined fifth and sixth periodic reports of Belgium, 28 February 2019, CRC/C/BEL/CO/5-6, § 21.

<sup>50</sup> CEDAW concluding observations on Belgium, 7 November 2008, CEDAW/C/BEL/CO/6, § 35.

<sup>51</sup> CEDAW concluding observations on the seventh periodic report of Belgium, 14 November 2014, CEDAW/C/BEL/CO/7, §§ 18-1.

<sup>52</sup> CERD concluding observations on Belgium, CERD/C/BEL/CO/15, 11 April 2008.

against members of some ethnic groups'<sup>53</sup>. The Committee on Economic, Social and Cultural Rights (CESCR), in its observations on Belgium in 2020, expressed concern at 'the risk of school dropout caused by the ban on wearing religious symbols in public educational establishments'<sup>54</sup>.

The consensus among these UN treaty bodies is therefore clearly that the practice of bans on religious dress in public spaces, particularly those affecting Muslim women, reveal problematic attitudes towards Muslim women in Belgium, and violate those women's right to freedom of religion as well as right to non-discrimination.

It may also be of relevance to note that bans on body-covering swimwear remain few. They occur almost exclusively in only three European countries – France, the Netherlands and Belgium – and even in those countries, they are only implemented on an individual basis, by a minority of swimming pools and municipalities.<sup>55</sup> This suggests the existence of a European consensus *against* the practice of bans on body-covering swimwear. More importantly, even within these three countries there is no consensus on such bans: Belgian courts are divided (see section 1.1.2), the French *Conseil d'État* has overturned such a ban or upheld decisions overturning such bans (and did so very recently<sup>56</sup>) and the Dutch Institute for Human Rights has ruled against a prohibition on body-covering swimwear considering it disproportionate.<sup>57</sup>

## 2 Legal Reasoning under the European Convention on Human Rights

In part 2 of our intervention, we respectfully submit that (explicit and implicit) bans on body-covering swimwear in public swimming pools are not in conformity with Article 9 ECHR taken alone, and read in conjunction with Article 14 ECHR. Since it is clear that Muslim women wear body-covering swimwear for religious reasons, there can be no doubt that the issue falls within the ambit of Article 9 ECHR. In view of the limited scope of our intervention, we will particularly focus on the context of legal uncertainty that surrounds bans on body-covering swimwear bans, which impacts the legality test under Article 9 ECHR (2.1), and the discriminatory nature of these bans (2.2).

### 2.1 Legality Test under Article 9 ECHR

Any interference with Article 9 ECHR ought to be prescribed by law (legality requirement), needs to pursue a legitimate aim and must be necessary in a democratic society.<sup>58</sup> First, besides having a basis in domestic law, the element 'prescribed by law' also demands that this basis is accessible and foreseeable as to its effects.<sup>59</sup> The Court has held on multiple occasions that only a standard stated with sufficient precision to enable a person to regulate their conduct can be considered a 'law'.<sup>60</sup> As mentioned before (in 1.1.1), in the context at hand, vague provisions are not uncommon and – as the present case also demonstrates – their interpretation or application to a concrete case is often left to the person working at the ticket desk. If people working within the swimming pool have doubts about how certain rules should be applied, a person visiting the swimming pool will *a fortiori* be unable to regulate their conduct. As such, it cannot be said that the rule in question had reached the level of foreseeability that the Court requires for a legal basis to fulfil the requirements defined under the Convention. As demonstrated by the research conducted by the Human Rights Centre, such unclarity exists in many of the swimming pools which have been contacted.

Then, it is very difficult to justify to citizens who want to gain access to a swimming pool that there are such differences in applicable regulation across swimming pools. Yet, what is more problematic is the fact that two Belgian Courts of Appeal arrive at diametrically opposing verdicts as to the discriminatory

<sup>53</sup> CERD concluding observations on Belgium, CERD/C/BEL/CO/16-19, 14 March 2014.

<sup>54</sup> CESCR concluding observations on the fifth periodic report of Belgium, 26 March 2020, E/C.12/BEL/CO/5.

<sup>55</sup> Open Society Justice Initiative, 'Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom Current Law, Recent Legal Developments, and the State of Play' (2022). Available at: <https://www.justiceinitiative.org/uploads/0b300685-1b89-46e2-bcf6-7ae5a77cb62c/policy-brief-restrictions-on-muslim-women-s-dress-03252022.pdf>

<sup>56</sup> Conseil d'État, 21 June 2022, n° 464648.

<sup>57</sup> Open Society Justice Initiative, 'Restrictions on Muslim Women's Dress in the 27 EU Member States and the United Kingdom Current Law, Recent Legal Developments, and the State of Play' (2022). Available at <https://www.justiceinitiative.org/uploads/0b300685-1b89-46e2-bcf6-7ae5a77cb62c/policy-brief-restrictions-on-muslim-women-s-dress-03252022.pdf>

<sup>58</sup> Article 9, para 2 ECHR.

<sup>59</sup> ECtHR (GC), *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finlande*, 27 June 2017 no. 931/13, § 142.

<sup>60</sup> ECtHR, *Lachiri v. Belgium*, 18 September 2018, no. 3413/09, § 33.

nature of the bans (as mentioned in 1.1.2). The Court has earlier found in the case of *Lachiri v. Belgium* that the fact that parties in court cannot foresee how a particular judge will apply a legal provision (*in casu* – the now amended – Article 759 of the Judicial Code) leads to legal uncertainty.<sup>61</sup>

## 2.2 Discriminatory Nature of Bans on Body-Covering Swimwear

### 2.2.1 Difference in Treatment Resulting from Bans on Body-Covering Swimwear

A general policy can constitute a case of indirect discrimination if it causes ‘disproportionately prejudicial effects’ which discriminate against a group, in spite of its ostensibly neutral phrasing.<sup>62</sup> Some swimming pool regulations do explicitly mention body-covering swimwear, or even ‘burkini’s, as banned, whilst dress code regulations in other swimming pools solely contain a more generally formulated dress code, from which a ban on body-covering swimwear is subsequently deduced. In the present application, the latter is the case. Hence, whilst Muslim women are not denied entry to swimming pools on the grounds of their religion as such, the swimming pool regulations do institute a difference in treatment on account of the prejudicial effect which they inflict onto them.

One could argue that in certain Belgian swimming pools where full-body swimwear is banned, we see tracks of direct discrimination as exceptions are made for certain groups, yet prohibit the types of body-covering swimwear preferably worn by Muslim women (‘burkinis’).<sup>63</sup> As such, we can find examples of pools where for persons with a specific disability for instance (or for someone taking a diving class) exceptions could be made on the rule.<sup>64</sup>

### 2.2.2 Objective Justification for Difference in Treatment Vulnerability and margin of appreciation

The Court’s jurisprudence grants particular importance to the concept of vulnerability and acknowledges that several social groups have been – and still are – subject to more frequent marginalisation, rejection, stigmatisation and stereotyping than others (Roma minority, people with mental health issues, people living with HIV, asylum-seekers).<sup>65</sup> Such groups are in greater need of protection, and the Court distinctly stated that: ‘[i]f a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question’.<sup>66</sup>

The context outlined above, and the multiple studies carried out on the situation of Muslim women in Belgium and elsewhere in Europe,<sup>67</sup> indicate that they suffer increasing and intense marginalisation, rejection, stigmatisation and misrecognition in Europe. In addition to physical or verbal aggressions, multiple laws, regulations, company policies and school policies are adopted in order to reject them, as they are, with their (religious) integrity. Despite the often *prima facie* neutral character of such rules, they lead to both public and private spaces being ‘neutralised’ in reaction to their presence and with an effect of exclusion. We respectfully submit that Muslim women (who wear body-covering swimwear) constitute a vulnerable group, because they clearly appear today as a minority group that is suffering ‘from widespread stigma and exclusion’.<sup>68</sup> We submit that the jurisprudence on vulnerable groups should therefore apply, and ‘very weighty reasons’ should be required to justify a *prima facie* case of discrimination in the exercise of the freedom of religion. In this section, we discuss the objectives that have been relied upon by municipalities according to a study carried out by Unia, the Belgium’s inter-

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<sup>61</sup> *Ibid*. This case is about Mrs. Lachiri being told, at a hearing at the Court of Appeal, that she would not be allowed to enter the courtroom if she did not remove her headscarf. This decision was taken in accordance with Article 759 of the Belgian Judicial Code which states that anyone who attends hearings must remain uncovered. The exact wording of the Article was (at that time): “anyone who attends hearings must remain uncovered, respectful and silent; anything that the judge orders to maintain order must be carried out promptly and in a timely manner”.

<sup>62</sup> ECtHR (GC), *D.H. and Others v. the Czech Republic*, 13 November 2007, no. 57325/00, § 184.

<sup>63</sup> E. Brems, S. Ouald Chaïb and K. Vanhees, *op cit.*, p. 277; T. Heirwegh and C. Van de Graaf, *op. cit.*, pp. 9-11.

<sup>64</sup> T. Heirwegh and C. Van de Graaf, *op. cit.*, pp. 9-1.

<sup>65</sup> ECtHR, *D.H. and Others v the Czech Republic*, 13 November 2007, no. 57325/00, § 182; ECtHR, *Alajos Kiss v Hungary*, 20 May 2010, no. 38832/06, § 42; ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, no. 30696/09, § 251; ECtHR, *Kiyutin v Russia*, 10 March 2011, no. 2700/10, § 63.

<sup>66</sup> ECtHR, *Kiyutin v Russia*, 10 March 2011, no. 2700/10, § 63.

<sup>67</sup> Open Society Justice Initiative, ‘Restrictions on Muslim Women’s Dress in the 27 EU Member States and the United Kingdom Current Law, Recent Legal Developments, and the State of Play’ (2022). Available at: <https://www.justiceinitiative.org/uploads/0b300685-1b89-46e2-bcf6-7ae5a77cb62c/policy-brief-restrictions-on-muslim-women-s-dress-03252022.pdf>

<sup>68</sup> ECtHR, *Kiyutin v Russia*, 10 March 2011, no. 2700/10, para 63.

federal equality body<sup>69</sup>, and submit that none of these can be qualified as sufficiently weighty reasons capable of justifying a blanket (implicit) ban on body-covering swimwear in swimming pools.

#### *Legitimate aim and proportionality*

Even if the Court would not apply the ‘very weighty reasons’-test, we respectfully submit that blanket bans on body-covering swimwear are in any case disproportionate. In Flanders, most dress codes in swimming pools have been put in place out of concerns for water quality and hygiene in the pool.<sup>70</sup> The argument would be that body-covering swimwear would affect the quality of the water. However, as mentioned above (section 1.1.2), the Flemish Agency for Care and Health has rebutted this in an advisory opinion. Provided that the swimwear is made from the same materials as other swimwear and used ‘correctly’, meaning that the person wearing it is not wearing any undergarments underneath and solely wears it for the purpose of swimming indoors, body-covering swimwear complies perfectly with the hygienic standards set for swimming pools in Flanders. Whilst the Agency did remark that the verification of the cleanliness of swimwear might be quite challenging in practice, it noted that this complexity applies to other types of swimwear as well and in itself therefore cannot justify a blanket ban on body-covering swimwear.<sup>71</sup> In this respect it is particularly relevant to note that these controls do not take place in practice, rendering this argument of a predominantly hypothetical nature.<sup>72</sup> In light of such expert evidence, we submit that, in spite of their legitimacy, neither hygiene concerns, nor concerns pertaining to the alleged complexity of verifying the correct use constitute sufficiently weighty reasons in this respect.

With respect to the protection of safety, we respectfully argue that, whilst this objective is, in theory, legitimate, it cannot justify the ban either. This argument is traditionally supported by referencing the ‘loose’ nature of the swimwear, which might cause the wearer to get stuck and/or which might hinder other swimmers.<sup>73</sup> Whilst the safeguarding of safety is an important priority in swimming pools, restrictive measures cannot be put in place due to hypothetical safety concerns that have not been proven in practice. In this respect, we refer to the aforementioned advisory opinion of the Flemish Agency for Care and Health, which stated that there have not been any cases of ‘unsafe situations’ that involve body-covering swimwear in any way.<sup>74</sup> Should the authorities wish to invoke the protection of safety, we contend that, in any event, the burden of proof must be with them to show that this kind of swimwear does indeed constitute a safety hazard.<sup>75</sup> However, in light of the current absence of any concrete evidence in this regard, we submit that the argument regarding the protection of safety remains purely hypothetical and consequently does not constitute a (sufficiently weighty) reason capable of justifying a ban on body-covering swimwear.

Furthermore, the argument of the preservation of the neutrality principle is frequently raised in relation to the ban on body-covering swimwear as well. We concede that the Court has previously accepted that public facilities need to bear an appearance of neutrality<sup>76</sup> and that a duty of neutrality or discretion may be imposed onto public officials as well.<sup>77</sup> However, the freedom to manifest one’s religion is a fundamental right enshrined in Article 9 of the Convention. Whilst neutrality may be a relevant argument to restrict the expression of said religion of public officials, we wish to emphasise that, in a pluralist democratic society, private citizens who wish to make use of public facilities that are open to all are not subjected to such a duty. Indeed, in the broader context of the neutrality of public services, the behaviour

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<sup>69</sup> Unia, ‘Juridisch advies gericht tot de verantwoordelijken van overheidszwembaden in Vlaanderen over lichaamsbedekkende zwemkledij’ (Legal advice directed at the persons responsible for public swimming pools in Flanders regarding body-covering swimwear), 10 July 2017, available on [https://www.unia.be/files/Documenten/Aanbevelingen-advies/Advies\\_lichaamsbedekkende\\_zwemkledij2.pdf](https://www.unia.be/files/Documenten/Aanbevelingen-advies/Advies_lichaamsbedekkende_zwemkledij2.pdf), 7.

<sup>70</sup> E. Brems, S. Ouald Chaïb and K. Vanhees, *op cit.*, p. 287.

<sup>71</sup> Agentschap Zorg & Gezondheid, ‘Advies verbod op het dragen van een boerkini’ (Advice on the prohibition of the wearing of a burqini), available on [https://www.unia.be/files/Documenten/Aanbevelingen-advies/Advies\\_Agentschap\\_Zorg\\_en\\_Gezondheid.pdf](https://www.unia.be/files/Documenten/Aanbevelingen-advies/Advies_Agentschap_Zorg_en_Gezondheid.pdf), 1.

<sup>72</sup> Court of First Instance of East-Flanders (section Ghent), 5 July 2018, [https://www.unia.be/files/Documenten/Rechtspraak/Rechtbank\\_van\\_eerste\\_aanleg\\_Gent\\_5\\_juli\\_2018\\_\(zwembad\\_Merelbeke\).pdf](https://www.unia.be/files/Documenten/Rechtspraak/Rechtbank_van_eerste_aanleg_Gent_5_juli_2018_(zwembad_Merelbeke).pdf), para 4.9; M Spinoy, ‘Het boerkiniverbod: discriminatierechtelijke troebele wateren’ (2019) 1 *Tijdschrift Jeugd- en Kinderrechten* 118, p. 123.

<sup>73</sup> E. Brems, S. Ouald Chaïb and K. Vanhees, *op cit.*, p. 277.

<sup>74</sup> Agentschap Zorg & Gezondheid, ‘Advies verbod op het dragen van een boerkini’ (Advice on the prohibition of the wearing of a burqini), available on [https://www.unia.be/files/Documenten/Aanbevelingen-advies/Advies\\_Agentschap\\_Zorg\\_en\\_Gezondheid.pdf](https://www.unia.be/files/Documenten/Aanbevelingen-advies/Advies_Agentschap_Zorg_en_Gezondheid.pdf), 1.

<sup>75</sup> See *mutatis mutandis* ECtHR, *Perinçek v Switzerland*, 15 October 2015, no. 27510/08, §§ 152-154.

<sup>76</sup> ECtHR, *Lautsi v. Italy*, 18 March 2011, no. 30814/06, §72.

<sup>77</sup> See among others ECtHR, *Pitkevich v. Russia*, 8 February 2001, no. 47936/99; ECtHR, *Eweida and Others v the United Kingdom*, 15 January 2013, nos. 48420/10 and others, § 106; *Ebrahimian v France*, 26 November 2015, no. 64846/11, § 68.



of the users is generally not considered to pose a potential threat to the neutrality of the State. This has previously been recognised by the Court in the cases of *Hamidović v. Bosnia and Herzegovina* and *Lachiri v. Belgium*.<sup>78</sup> We therefore respectfully ask the Court to follow the conclusions it reached in these cases and not to accept the neutrality principle as a principle capable of outweighing the interest of Muslim women in manifesting their religion as private citizens who wish to make use of public swimming pools.

In addition, certain swimming pools have invoked the fact that body-covering swimwear might be considered offensive by fellow swimmers by way of justification. The Court, too, has in the past accepted that a Government can legitimately adopt a ban on face-covering veils in order to accommodate those feelings of uncomfortableness.<sup>79</sup> However, the crux of the Court's reasoning here pertained to the coverage of the face, due to the face 'playing an important role in social interaction'. The same can hardly be said about a swimmer's arms and legs. Instead, feelings of uncomfortableness or offense triggered by body-covering swimwear in public swimming pools appear to be predominantly inspired by Islamophobia.<sup>80</sup> The State has a duty to ensure pluralism in a democratic society, but this must be achieved by promoting tolerance amongst its citizens – and not by eliminating said pluralism.<sup>81</sup> Besides, the Court has already indicated that the wearing of a burkini is an instrument that actually enhances the integration of Muslim women.<sup>82</sup> We therefore submit that the argument of 'living together' cannot be legitimately relied upon in order to justify a blanket ban on body-covering swimwear.

Lastly, a 'burkini' is often presented as an oppressive clothing restriction in popular media, imposed by the patriarchy onto Muslim women. However, this argument obviates the fact that the practice of wearing body-covering swimwear is actually defended by women. Accepting gender equality as an argument capable of justifying a restriction on the freedom of women without taking into account the opinion of the latter would therefore be tantamount to depriving Muslim women of their agency. The Court has previously confirmed this in *S.A.S. v. France* too.<sup>83</sup> Consequently, we respectfully ask the Court to not to accept the aim of gender equality when it is not accompanied by concrete evidence of the alleged oppression of women, and to allow women to regulate their own appearance in the swimming pool.

### 2.2.3 Intersectional Discrimination

Lastly, we submit that the present case offers a perfect opportunity for the Court to engage with intersectionality, which is increasingly recognized as a necessary dimension for supranational human rights bodies to engage with. Intersectional oppression refers to the situation in which multiple grounds of oppression interact to create a new situation that cannot be reduced to the simple sum of its parts.<sup>84</sup> The absence of an intersectional approach of inequalities and oppressions can lead to a lack of attention for the least privileged members of a marginalized community, and to inadequate redress for the human rights violations they suffer<sup>85</sup>. In order to avoid this, it is important to pay attention to patterns of sameness and difference between individuals and communities<sup>86</sup>.

The concept of intersectionality has been increasingly recognised by international human rights monitoring bodies in the last few years. The CmEDAW, for example, stressed the importance of intersectionality in gendered discrimination in its General Recommendation no. 28 on general State

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<sup>78</sup> ECtHR, *Hamidović v Bosnia and Herzegovina*, 5 December 2017, no. 57792/15, para 40; ECtHR, *Lachiri v. Belgium*, 18 September 2018, no. 3413/09, § 44.

<sup>79</sup> ECtHR, *S.A.S. v France*, 1 July 2014, no. 43835/11, §122.

<sup>80</sup> See with respect to the recurring argument that Muslim women just need to 'adapt' themselves: T Heirwegh and C Van de Graaf, *op cit.*, p. 10-11; E. Brems, S. Ouald Chaïb and K. Vanhees, *op cit.*, p. 277.

<sup>81</sup> ECtHR, *Serif v. Greece*, 14 December 1999, no. 38178/97, §53.

<sup>82</sup> ECtHR, *Osmanoğlu and Kocabaş v. Switzerland*, 10 January 2017, no. 29086/12, § 101.

<sup>83</sup> ECtHR, *S.A.S. v France*, 1 July 2014, no. 43835/11, § 119.

<sup>84</sup> K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 1, Article 8.

<sup>85</sup> J. Bouchard and P. Meyer-Bischoff, 'Intersectionality and Interdependence of Human Rights: Same or Different?' (2016) *Equal Rights Review* 16, p. 186.

<sup>86</sup> S. Atrey, 'Beyond Universality: An Intersectional Justification of Human Rights', in S. Atrey and P. Dunne (ed.), *Intersectionality and Human Rights Law* (2020) Oxford: Hart Publishing, pp. 17–38.

obligations, as well as in several decisions on individual communications<sup>87</sup>. In its 2020 concluding observations on Belgium's fifth periodic report, the CESCR Committee specifically expressed strong concern at Belgium's 'lack of recognition of the situations of intersectionality affecting women in the most marginalized segments of society'<sup>88</sup>. The Inter-American Court of Human Rights explicitly insisted upon the role of intersectionality in the human rights violations suffered by a young girl living with HIV in a situation of poverty<sup>89</sup>.

We respectfully submit that the situation of Muslim women who prefer to wear body-covering swimwear in a country such as Belgium exemplifies the relevance of intersectionality analysis. Their gender, religion and race interact in a way that places them in a unique position and subjects them to a variety of vulnerabilities at all levels of society. Legal analyses that artificially limit their cases to the religious aspect consequently ignore the ways in which 'burkini bans' impact Muslim women not just based on their religion, but on its specific intersection with their gender<sup>90</sup> and race<sup>91</sup>. The UNHRC embraced such an analysis in no less than four decisions on individual communications on headscarf bans. It has explicitly found that bans on head coverings do indeed constitute a form of intersectional discrimination based on gender and religion<sup>92</sup>. This analysis could be extended, by analogy, to the banning of body-covering swimwear.

The importance of intersectionality is beginning to emerge in the Court's case law. In *B.S. v Spain*, the Court stressed that the vulnerability of a person or a group may result from the interaction of several characteristics such as gender, social and ethnic origins<sup>93</sup>. Moreover, the Court considered an intersectional subject of a prima facie case of discrimination in *S.A.S. v France* when stating that a ban on headscarves 'has specific negative effects on the situation of Muslim women'<sup>94</sup>. Finally, in *Carvalho Pinto de Sousa Morais v. Portugal*, the Court clearly tackled an intersectional stereotype based on age and gender<sup>95</sup>. These developments offer a promising basis to develop a case law that does justice to intersectional vulnerability.

At the same time, in the precedents at the intersection of gender and religion, the Court has consistently ignored the gender dimension of the claims of female religious applicants<sup>96</sup>. What is more, scholarly analysis has uncovered striking patterns in the case law under Article 9 ECHR. Neither the religion nor the gender of the applicant serves as an outcome predictor. Yet when these factors are combined – in other words, once intersectionality is taken into account, – troublesome conclusions emerge. A study conducted by Castillo-Ortiz and al. shows that, while cases brought by Muslim men and Christian women had a high success rate, Muslim women systematically lose their cases before the Court.<sup>97</sup> This is an important finding: while it is not explicitly tackled by the ECtHR, the intersection of gender and religion clearly plays a role in its assessment of Muslim women's cases. We therefore respectfully invite the Court to address the importance of this combined dimension of inequalities for bans on body-covering swimwear.

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<sup>87</sup> CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. CEDAW, *Alyne da Silva Pimentel Texeira v. Brazil*, 25 July 2011, no 17/2008, § 7.7; *Cécilia Kell v. Canada*, 28 February 2012, no 19/2008, § 10.2; *R. P. B. v. The Philippines*, 21 February 2014, no 34/2011, § 8.3.

<sup>88</sup> CESCR, Concluding observations on the fifth periodic report of Belgium, 6 March 2020, §§ 26-27.

<sup>89</sup> IACtHR, *Gonzales Lluy Et Al. V. Ecuador*, Judgment of 1 September 2015, § 290.

<sup>90</sup> The Brussels transport company (STIB), an autonomous public company that had rejected the application of a veiled woman because of an exclusive neutrality policy, was convicted on 3 May 2021 of direct religious discrimination and indirect gender discrimination. This First Instance Labour Court ruling ([no. 19/1755/A](#)) is the first one to take into account gender in this type of case in Belgium.

<sup>91</sup> P. Chow, 'Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence' (2016) *Human Rights Law Review* 16, p. 453.

<sup>92</sup> HRC, *Seyma Türkan v. Turkey*, §7.8; *Sonia Yaker v. France*, §8.17; *Miriana Hebbadj v. France*, §7.17; *Fatima Afif v. France*, §8.13

<sup>93</sup> "The decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute" (§ 62).

<sup>94</sup> *S.A.S. v. France*, § 161 ; See E. Brems, 'Hidden under Headscarves? Women and Religion in the case law of the European Court of Human Rights', *Religion & Human Rights*, op. cit.

<sup>95</sup> *Pinto Carvalho de Sousa Morais v. Portugal*, § 52-56.

<sup>96</sup> E. Brems, op. cit.

<sup>97</sup> P. Castillo-Ortiz, A. Ali and N. Samanta, 'Gender, intersectionality, and religious manifestation before the European Court of Human Rights' (2019) *Journal of Human Rights*.