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## Unveiling the Complexities Surrounding the Right to Take Part in Cultural Life: The Effect of General Comment no. 21 on the Legality of the French Burqa Ban Under the ICESCR

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## COMMENT

# UNVEILING THE COMPLEXITIES SURROUNDING THE RIGHT TO TAKE PART IN CULTURAL LIFE: THE EFFECT OF GENERAL COMMENT NO. 21 ON THE LEGALITY OF THE FRENCH BURQA BAN UNDER THE ICESCR

ALISON DEAN\*

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## INTRODUCTION

“The problem of the burka is not a religious problem, it’s a problem of liberty and women’s dignity. It’s not a religious symbol, but a sign of subservience and debasement. I want to say solemnly, the burka is not welcome in France. In our country we cannot accept women prisoners behind a screen, cut off from all social life, deprived of all identity. That’s not our idea of freedom.”

Nicolas Sarkozy, President of the Republic of France<sup>1</sup>

“Assuming that all women who wear the burka or the niqab are wearing it under duress, it doesn’t follow that men, like the French President Nicolas Sarkozy, ought to command a woman not to wear it.”

Zehra Rizavi, writer<sup>2</sup>

“This is what I want to do to get closer to Allah. I’m not harming anyone. I won’t take it (my niqab) off. It’s very important to me. I won’t take it off.”

- Aminah Delgado, niqab wearer<sup>3</sup>

The September 2010 French ban on burqas<sup>4</sup> and niqabs<sup>5</sup> in public places ignited an international debate about balancing Western ideals

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1. Nicolas Sarkozy, *quoted in* Angelique Chrisafis, *Nicolas Sarkozy Says Islamic Veils are Not Welcome in France*, GUARDIAN (Paris), June 22, 2009, <http://www.guardian.co.uk/world/2009/jun/22islamic-veils-sarkozy-speech-france>.

2. Zehra Rizavi, *quoted in* Melissa Bell, *Niqabs and Hot Pants: French Women Protest the Burqa Ban*, WASH. POST. BLOG (Oct. 4, 2010, 12:27 PM), [http://voices.washingtonpost.com/blog-post/2010/10/niqab\\_and\\_hot\\_pants\\_french\\_wom.html](http://voices.washingtonpost.com/blog-post/2010/10/niqab_and_hot_pants_french_wom.html).

3. Aminah Delgado, *quoted in* Selma Chalabi, ‘Apprehension’ Among Muslim Women, BBC NEWS (Mar. 15, 2010), [http://www.bbc.co.uk/go/pr/fr/-/2/hi/uk\\_news/wales/8564109.stm](http://www.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/wales/8564109.stm).

4. *See In Graphics: Muslim Veils*, BBC NEWS, [http://news.bbc.co.uk/2/shared/spl/hi/pop\\_ups/05/europe\\_muslim\\_veils/html/2.stm](http://news.bbc.co.uk/2/shared/spl/hi/pop_ups/05/europe_muslim_veils/html/2.stm) (follow “NEXT” hyperlink to see page two) (last visited Feb. 1, 2011) (describing the burqa as a veil

of secularism and gender equality with traditional Muslim practices; a debate fueled by the rising number of Muslims in the Western world.<sup>6</sup> The French government justifies the ban by claiming it promotes gender equality, protects national security, and preserves the French ideals of maintaining a secular society and promoting a unified French culture.<sup>7</sup> Opponents of the ban reject these justifications, instead claiming the ban violates several human rights and is only meant to further marginalize the Muslim population in France.<sup>8</sup>

Only about 2,000 women in France are believed to wear a burqa or niqab.<sup>9</sup> Many in the French Muslim community, however, are apprehensive about the possibility that the ban will lead to an increase in discrimination of Muslims in France.<sup>10</sup> Furthermore, many are concerned that instead of granting these women greater freedoms, the ban will instead force them to withdraw from public life and remain in the home.<sup>11</sup> In addition to arguments in opposition

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that “covers the entire face and body” and includes a mesh screen that covers the eyes).

5. See *id.* (describing the niqab as a veil that covers the face, but leaves an opening for the eyes).

6. See David Gauthier-Villars & Charles Forelle, *French Parliament Passes Law Banning Burqas*, WALLST.J., Sept. 15, 2010, <http://online.wsj.com/article/SB10001424052748703376504575492011925494780.html> (finding that many European countries including France are exploring ways to reconcile the “values of modern Europe with more assertive expressions of Islamic faith,” but noting that a ban might not be compatible with human rights commitments).

7. See discussion *infra* Part III.A (arguing that France’s justifications for the burqa ban correspond with its understanding of the right to take part in cultural life prior to the issuance of General Comment No. 21).

8. See discussion *infra* Part II.C (articulating that despite some international support for the ban, there is widespread opposition by individuals, states, and international organizations).

9. See Thierry Leveque, *French Woman on Trial for “Burqa Assault”*, REUTERS, Oct. 14, 2010, available at <http://www.reuters.com/article/idUSTRE69D57620101014> (noting that the approximate number of women in France that wear a full face veil is marginal compared with France’s Muslim community of five million—Western Europe’s largest).

10. See, e.g., *id.* (discussing an incident where a French woman ripped off the full face veil of an Emirati tourist and then assaulted the tourist when the tourist put the face veil back on).

11. See Gauthier-Villars & Forelle, *supra* note 6 (reporting that some Muslim women living in France do not go out in public with their faces uncovered, but instead get friends to run errands for them while they stay hidden at home).

to the ban and concerns of the French Muslim population, General Comment No. 21, issued by the Committee on Economic, Social and Cultural Rights (“CESCR”) in December 2009,<sup>12</sup> illustrates that the burqa ban is a violation of the right to take part in cultural life,<sup>13</sup> a right that France is obligated to uphold as a state party to the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).<sup>14</sup>

This Comment analyzes the significance of General Comment No. 21 in protecting the right “to take part in cultural life,” granted in Article 15(1)(a) of the ICESCR.<sup>15</sup> The CESCR issued General Comment No. 21 to clearly define the parameters of this right, so states parties would be better equipped to effectively protect their citizens’ right to take part in cultural life.<sup>16</sup> This Comment argues that General Comment No. 21 is successful because it clarifies the definition and scope of the right to take part in cultural life, imposes stricter obligations upon states parties, and limits the opportunities for states parties to legally restrict this right. Additionally, this Comment illustrates the significance of General Comment No. 21 by demonstrating that if not for the guidance offered in General Comment No. 21, France’s ban on burqas could be considered compliant with France’s obligations under the ICESCR.<sup>17</sup> Through

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12. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life*, U.N. Doc. E/C.12/GC/21, Dec. 21, 2009 [hereinafter *General Comment No. 21*].

13. See discussion *infra* Part III.B (arguing that General Comment No. 21 indicates that the French burqa ban is inconsistent with France’s obligations under the ICESCR); see also International Covenant on Economic, Social and Cultural Rights art. 15(1)(a), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (granting everyone the right “to take part in cultural life”).

14. See *Status of the International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (last visited Mar. 22, 2011) [hereinafter *ICESCR Status*] (identifying France as a party to the ICESCR since Nov. 4, 1980).

15. ICESCR, *supra* note 13, art. 15(1)(a).

16. See discussion *infra* Part II.A (describing the ambiguity surrounding the right to take part in cultural life that necessitated the issuance of General Comment No. 21 for clarification purposes).

17. See discussion *infra* Part II.A (suggesting that France could argue the burqa ban protects the right of oppressed women to take part in the cultural life of French society or that the right to take part in cultural life does not encompass minority cultural practices).

its elaboration on the meaning and scope of the right to take part in cultural life, however, the CESCR clearly establishes that the burqa ban is a violation of this right.<sup>18</sup>

Part I of this Comment provides an overview of the right to take part in cultural life as granted by Article 15(1)(a) of the ICESCR and discusses the background of General Comment No. 21.<sup>19</sup> Part I then addresses the French interpretation of the right to take part in cultural life and examines France's ban on burqas and niqabs.<sup>20</sup> Part II analyzes the strengths and weaknesses of the ICESCR and the right to take part in cultural life, as well as the effectiveness of General Comment No. 21 by examining the legality of the French ban on burqas both before and after its issuance.<sup>21</sup>

Part III recommends that the CESCR encourage states to ratify the Optional Protocol to the ICESCR to foster further development of the rights protected by the ICESCR through case law.<sup>22</sup> Additionally, Part III recommends that the CESCR amend General Comment No. 21 to add language that additionally clarifies how the right to take part in cultural life should be protected when a cultural practice infringes upon other human rights.<sup>23</sup> Lastly, Part III recommends that the CESCR strengthen the rights granted in the ICESCR by adding language to General Comment No. 21 that imposes repercussions for violations of these rights.<sup>24</sup>

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18. See discussion *infra* Part II.B (demonstrating that the clarity provided by General Comment No. 21 makes France unable to effectively argue the ban on burqas is not a violation of the right to take part in cultural life).

19. See discussion *infra* Part I.A (discussing the vague nature of the right to take part in cultural life, which necessitated the adoption of General Comment No. 21).

20. See discussion *infra* Part I.B-C (explaining that the French pursuit of a ban on burqas is related to its narrow interpretation of the right to take part in cultural life).

21. See discussion *infra* Part II.A-B (arguing that General Comment No. 21 effectively eliminated the confusion surrounding the right to take part in cultural life and precludes France from claiming its burqa ban is not a violation of this right).

22. See discussion *infra* Part III.A (indicating that the adoption of a complaints mechanism would provide legitimacy and strength to the rights granted in the ICESCR).

23. See discussion *infra* Part III.B (suggesting that a balancing test be used to abate confusion over when limitations on the right to take part in cultural life are considered either necessary or permissible).

24. See discussion *infra* Part III.C (noting that repercussions are necessary to

## I. BACKGROUND

Vague wording in the ICESCR created great uncertainty regarding the meaning and scope of the right to take part in cultural life. Moreover, the similar rights to culture granted in the Universal Declaration of Human Rights (“UDHR”)<sup>25</sup> and the International Covenant on Civil and Political Rights (“ICCPR”)<sup>26</sup> further exacerbate this confusion because all three instruments state the right differently.<sup>27</sup> It is unclear whether the ICESCR’s right to take part in cultural life encompasses the more narrow rights granted in the UDHR and ICCPR or whether it is its own, completely distinct right. This uncertainty allowed states to interpret the right in the manner that best suited their interests, often leading to a failure to protect the right altogether.<sup>28</sup> As a result of this confusion, the creation of General Comment No. 21 was necessary to provide clarity on the meaning and scope of the right to take part in cultural life.

Prior to General Comment No. 21, France interpreted the right to take part in cultural life as granting only a right to take part in the cultural life of the state.<sup>29</sup> This interpretation allowed France to

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encourage states to devote as many resources to protecting the right to take part in cultural life as they devote to protecting other rights).

25. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, arts. 22, 27(1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

26. International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

27. See *id.* (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”); ICESCR, *supra* note 13, art. 15(1)(a) (“The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life . . .”); UDHR, *supra* note 25, art. 27 (“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”); see also discussion *infra* Part I.A (suggesting that the subtle differences in wording of the right to culture stated in each instrument left states confused about what the ICESCR’s right to take part in cultural life entails).

28. See YVONNE M. DONDERS, TOWARDS A RIGHT TO CULTURAL IDENTITY? 149-50 (2002) (explaining that some countries, influenced by the United Nations Educational, Scientific and Cultural Organization, considered ICESCR Article 15 in a broader context without interpreting the concept of “cultural life”); see also discussion *infra* Part II.A.1 (stating that the lack of clarity surrounding the right to take part in cultural life allowed France to form a self-interested, policy-oriented interpretation of the right).

29. See Yael Barbibay, Note, *Citizenship Privilege or the Right to Religious*



refuse to recognize the rights of minorities to engage in their own culture.<sup>30</sup> Consequently, the French ban on burqas stems from France's desire to promote a unified, singular French culture and to reduce the presence of minority cultures within its territory.<sup>31</sup>

## A. THE RIGHT TO TAKE PART IN CULTURAL LIFE

### 1. *An Overview of Article 15(1)(a) and the Uncertainty Surrounding its Meaning*

In 1966 the United Nations ("U.N.") adopted two separate covenants that when joined with the UDHR created the International Bill of Rights.<sup>32</sup> The ICESCR grants economic, social, and cultural rights, while its twin, the ICCPR, grants civil and political rights.<sup>33</sup> Though adopted together, the differences between the two covenants

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*Freedom: The Blackmailing of France's Islamic Women*, 18 CARDOZO J. INT'L & COMP. L. 159, 160 (2010) (attributing France's idiosyncratic struggle to preserve cultural uniqueness and revolutionary ideals to efforts to maintain the cultural life of the state).

30. See Sarah Bienkowski, Note, *Has France Taken Assimilation Too Far? Muslim Beliefs, French National Values, and the June 27, 2008 Conseil D'état Decision on MME M.*, 11 RUTGERS J. L. & RELIGION 437, 437 (2010) (crediting France's long established assimilationist tradition for favoring "integration with its national culture over any particularized group identities"); see also discussion *infra* Part I.B (discussing France's interpretation of the right to take part in cultural life as only applying to the cultural life of France itself).

31. See Bienkowski, *supra* note 30, at 439-40 (explaining the French constitutional principle that "the public sphere should be strictly secular" and that based on this idea, identities centering on individual characteristics are "associated with subversion and disloyalty"); see also discussion *infra* Part I.C (chronicling the history of France's focus on encouraging a single cultural identity within its borders).

32. See ICCPR, *supra* note 26; ICESCR, *supra* note 13; Asbjørn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 15, 15 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 1995) (stating that the General Assembly decided to divide the rights of the UDHR into two separate covenants, leading to the development of two distinct categories of human rights).

33. See ICCPR, *supra* note 26; ICESCR, *supra* note 13; WILLIAM KURT BARTH, ON CULTURAL RIGHTS: THE EQUALITY OF NATIONS AND THE MINORITY LEGAL TRADITION 88-89 (2008) (noting the ideological split between East and West was decided after a bitter debate between the Western allies who opposed the inclusion of economic, social, and cultural rights into a human rights covenant and the Eastern bloc states who claimed dividing the rights would create a hierarchy between them).

generated uncertainties in the international community about the validity, scope, and enforceability of the rights granted by the ICESCR, resulting in less respect for and adherence to these rights.<sup>34</sup>

The international community's response to the right of everyone to take part in cultural life is particularly illustrative of the uncertainty that surrounds the scope of the rights in the ICESCR.<sup>35</sup> Due to the broad language used in Article 15(1)(a), states could follow their own interpretations of what the right to take part in cultural life actually encompasses.<sup>36</sup> Scholars believe, however, that the original drafters of the right envisioned Article 15(1)(a) to provide all citizens greater access to and participation in the cultural life of the state.<sup>37</sup> The drafters considered "cultural life" to denote "high culture," meaning art, theater, museums, and other tangible elements of culture.<sup>38</sup>

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34. *E.g.*, Cour de Cassation [Cass.] [Court of Cassation], May 26, 2008, No. S 06 0105 F/2008, ILDC 1114 (Belg.) (declining to acknowledge that the ICESCR directly affects Belgium because of the general nature of the obligation to progressively realize its recognized rights); *see* MARY DOWELL-JONES, CONTEXTUALISING THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ASSESSING THE ECONOMIC DEFICIT 2 (2004) (suggesting that states believed the rights in the ICCPR were immediately guaranteed and enforced, while the rights in the ICESCR were subject to state discretion and incapable of judicial enforcement); *cf.* Christian Groni, *The Right to Take Part in Cultural Life*, submitted to U.N. Comm. on Econ., Soc. & Cultural Rights, at 2, U.N. Doc. E/C.12/40/3 (May 9, 2008) (expressing surprise that cultural rights were neglected by the international community, given the cultural focus of international law); Int'l Comm'n of Jurists, *Right to Take Part in Cultural Life (Article 15(1)(a) of the Covenant)*, submitted to U.N. Comm. on Econ., Soc. & Cultural Rights, ¶ 1, 4 U.N. Doc. E/C.12/40/7 (May 9, 2008) (remarking that economic, social, and especially cultural rights were ignored when compared to civil and political rights).

35. *See* Int'l Comm'n of Jurists, *supra* note 34, ¶ 4 (suggesting that due to vagueness or lack of a definition of normative content, critics of economic, social, and cultural rights often consider the right to take part in cultural life as a right that lacks necessary clarity).

36. *Cf.* Groni, *supra* note 34, at 23 (noting that states tend to interpret the scope of "article 15.1 (a) in a very extensive way to cover [their own] needs, wishes or political claims").

37. *See* DONDERS, *supra* note 28, at 150 (noting that the drafters' rejection of a proposal to include language in Article 15(1)(a) acknowledging cultural communities apart from the national culture demonstrated that the right was meant to grant participation in only the national culture).

38. *See id.* at 157 (characterizing three different concepts of culture: the classic culture concept, culture as a plural form, and culture as the life of society, but acknowledging that the drafters of the right to take part in cultural life focused on

In recent years, however, increases in immigration and globalization contributed to more cultural diversity in states that are parties to the ICESCR.<sup>39</sup> This diversity facilitated the emergence of a modern interpretation of the right to take part in cultural life; one that seeks to protect cultural diversity and includes within the concept of “cultural life” intangible elements of culture, such as language, customs, traditions, and land.<sup>40</sup>

## 2. *The Differences in the Monitoring Bodies and in the Treatment of Minorities and Minority Cultures in the ICESCR, ICCPR, and UDHR*

The confusion and complexity surrounding the right to take part in cultural life is further exacerbated by the differences between the right granted in the ICESCR and the similar rights to culture granted in the UDHR and the ICCPR.<sup>41</sup> While the right to take part in cultural life is stated broadly in the ICESCR, the right to culture is narrowly tailored in the UDHR and the ICCPR.<sup>42</sup> Article 27(1) of the

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the classic culture concept, indicative of high culture).

39. See Elissavet Stamatopoulou, *The Right to Take Part in Cultural Life*, submitted to U.N. Comm. on Econ., Soc. & Cultural Rights, at 9, U.N. Doc. E/C.12/40/9 (May 9, 2008) (arguing that as a result of the “unprecedented mass movement of migrants and refugees around the globe,” cultures were forced together too quickly, making it difficult for societies to adjust without profound ramifications); cf. Barbibay, *supra* note 29, at 160 (noting significant changes to the demographic and religious landscape created by the consistently growing population of Islamic immigrants throughout European states).

40. Cf. DONDERS, *supra* note 28, at 157 (suggesting that the concept of culture has evolved and that in 1992 the CESCR debated considering culture “in its anthropological form as a way of life”); Dominic McGoldrick, *Culture, Cultures, and Cultural Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION* 447, 449-52 (Mashood A. Baderin & Robert McCorquodale eds., 2007) (discussing that the idea of a state or individual identifying with a single culture is no longer valid and that a more realistic understanding of the contemporary world acknowledges that states are made of multiple cultures and sub-cultures).

41. Cf. BARTH, *supra* note 33, at 89 (noting that the ICESCR is weaker than the ICCPR because it “requires progressive implementation and is not yet internationally justiciable”); DONDERS, *supra* note 28, at 160 (finding that Article 15 of the ICESCR does not include language protecting the right to participate in the cultural life of “the community” as does Article 27 of the UDHR, and that Article 15 never received attention from states parties until the CESCR began to expand upon its meaning).

42. Compare ICESCR, *supra* note 13, art. 15(1)(a) (stating generally the right of everyone to take part in cultural life), with ICCPR, *supra* note 26, art. 27 (providing only the right of minorities to participate in their own culture), and

UDHR grants a right to participate in only the culture of the community,<sup>43</sup> while Article 27 of the ICCPR extends a right specifically to minorities to practice their own culture.<sup>44</sup>

The Human Rights Committee (“HRC”), the monitoring body for the ICCPR, possesses the power to hear complaints regarding alleged violations of enumerated ICCPR rights.<sup>45</sup> Alternatively, the CESCR, the monitoring body for the ICESCR, does not possess the power to hear individual complaints and instead can only review state reports and issue recommendations.<sup>46</sup> However, the CESCR drafted an Optional Protocol that will give the CESCR the same power as the HRC to hear claims from individuals based on violations of their ICESCR rights.<sup>47</sup> Currently, only three states have ratified the

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UDHR, *supra* note 25, art. 27(1) (granting everyone the right only to participate in the culture of the community). *See* Groni, *supra* note 34, at 7 (finding that the UDHR and ICCPR present more restrictive versions of the right to culture than is presented in the ICESCR).

43. *See* UDHR, *supra* note 25, art. 27(1) (“Everyone has the right freely to participate in the cultural life of the community . . .”); *see also* Stamatopoulou, *supra* note 39, at 10 (noting that the language of Article 27 of the UDHR assumes that cultural participation would take place only in the culture of the nation-state); Patrick Thornberry, *Cultural Rights and Universality of Human Rights, submitted to U.N. Comm. on Econ., Soc. & Cultural Rights*, at 7, U.N. Doc. E/C.12/40/15 (May 9, 2008) (citing JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 269 (1999)) (arguing that by failing to include language granting a person the right to participate in the cultural life of “his or her” community, Article 27(1) “assume[s] that ‘the community’ one participates in and with which one identifies culturally is the dominant community of the nation-State”).

44. *See* ICCPR, *supra* note 26, art. 27 (“persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture . . .”).

45. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302 (granting to the Human Rights Committee the responsibility of hearing complaints from individuals claiming to be victims of ICCPR violations).

46. *See* MELIK ÖZDEN WITH FRANÇOIS NDAGIJIMANA, *THE CASE FOR A PROTOCOL TO THE ICESCR!: WHAT IS AT STAKE IN THE PROPOSED INTERNATIONAL INSTRUMENT FOR COMPLAINTS AND COMMUNICATION AND FOR EFFECTIVE MONITORING OF THE IMPLEMENTATION OF THE “INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS”* 3, 15, *available at* <http://www.cetim.ch/en/documents/bro3-pidesc-A4-an.pdf> (encouraging the adoption of a complaints mechanism for the ICESCR to afford economic, social, and cultural rights the same status and respect internationally as is given to civil and political rights).

47. *See* Optional Protocol to the International Covenant on Economic, Social

Optional Protocol, and it will not go into effect until three months after ten states have signed and ratified.<sup>48</sup>

The credibility of civil and political rights is bolstered by the ability of individuals to lodge complaints with the HRC, leading many states to undervalue the legitimacy of economic, social, and cultural rights by claiming the ICESCR lacks enforceability.<sup>49</sup> Moreover, without a complaints mechanism, the CESCR is unable to develop the meaning of the right to take part in cultural life as it applies in individual situations, leaving states with little guidance in determining the applicability of this right within their domestic legal systems.<sup>50</sup> The ICCPR further demands greater compliance because it provides fewer opportunities for its recognized rights to be limited by states<sup>51</sup> and imposes more demanding obligations upon states parties than does the ICESCR.<sup>52</sup>

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and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008) (delineating the scope of the CESCR's power to hear claims and describing the complaints process).

48. See *id.* art. 18; *Status of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (select link "3.a." in table) (last visited May 19, 2011) (showing that Ecuador, Mongolia, and Spain are the only states to ratify the Optional Protocol).

49. See ÖZDEN WITH NDAGIJIMANA, *supra* note 46, at 14 (arguing that the lack of an international mechanism to rebuke violations of economic, social, and cultural rights necessitates the adoption of a complaints mechanism for the ICESCR to reinforce the equal importance of all human rights).

50. Cf. ELSA STAMATOPOULOU, *CULTURAL RIGHTS IN INTERNATIONAL LAW: ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND BEYOND* 107 (2007) (suggesting that vagueness in the normative content of the right to participate in cultural life made it difficult to hold states accountable); ÖZDEN WITH NDAGIJIMANA, *supra* note 46, at 8 (indicating that complaints procedures help to clarify the scope of rights that the international oversight bodies oversee, because by considering the applicability of the rights in various factual situations, the rights are developed and their scope is better understood).

51. Compare ICESCR, *supra* note 13, art. 4 (permitting the limitation of rights to promote the general welfare of a democratic society, so long as the limitation is compatible with the nature of the rights in the ICESCR), with ICCPR, *supra* note 26, art. 4(1) (allowing states to limit certain rights during an official state emergency to the extent required by the exigencies of the situation, so long as the limiting measures do not discriminate solely on the basis of race, color, sex, language, religion, or social origin).

52. See DOWELL-JONES, *supra* note 34, at 2 (suggesting that the differences between the obligations of states under the ICESCR and the ICCPR encourages states to view civil and political rights as rights that should be immediately

A particular area of confusion concerning the right to take part in cultural life is its relationship with the rights of minorities.<sup>53</sup> Unlike rights that are overseen by monitoring bodies with complaints procedure mechanisms, the relationship between the right to take part in cultural life and the rights of minorities did not develop through case law.<sup>54</sup> The jurisprudence of the HRC regarding Article 27 of the ICCPR proves helpful, however, in demonstrating the developing views within the international community related to minorities and their right to culture.<sup>55</sup> In *Äärelä v. Finland*, the HRC articulated a test that establishes whether cultural rights of minority groups were violated by determining whether the challenged action or restriction made an impact that was so substantial that it effectively denied the complainants the right to enjoy their culture.<sup>56</sup> The absence of a common understanding of the right to take part in cultural life leaves unanswered whether such a test would be relevant in enforcing Article 15(1)(a) of the ICESCR and makes the obligations of states

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guaranteed and enforced, but economic, social, and cultural rights as rights that need only be promoted under the discretion of the state and that are not capable of judicial enforcement). Compare ICESCR, *supra* note 13, art. 2(1) (articulating that states are only obligated to take steps to progressively achieve the full realization of the recognized rights), with ICCPR, *supra* note 26, art. 2 (requiring states parties to respect and ensure the recognized rights to all individuals subject to state jurisdiction and to provide an effective remedy to individuals whose rights were violated).

53. See generally STAMATOPOULOU, *supra* note 39, at 163-29 (discussing the status of minorities in various legal instruments, including the ICESCR).

54. See ÖZDEN WITH NDAGIJIMANA, *supra* note 46, at 8 (articulating how international committees with complaint procedure mechanisms are able to clarify the scope of the rights they oversee by hearing cases).

55. See ICCPR, *supra* note 26, art. 27. See generally Int'l Comm'n of Jurists, *supra* note 34, at 8 (looking to the jurisprudence of the HRC for examples of the adjudication of cultural rights); DONDEERS, *supra* note 28, at 176-88 (presenting HRC case law that clarifies the content and scope of Article 27 of the ICCPR and illustrates the types of claims made under the provision).

56. See U.N. Human Rights Comm., *Äärelä v. Finland*, Comm. No. 779/1997, U.N. Doc. CCPR/C/73/D/779/1997 (Nov. 7, 2001) (finding insufficient information to determine whether Finland's logging practices so substantially interfered with the reindeer husbandry practices of the complainants as to deny the complainants the right to enjoy their own culture); see also U.N. Human Rights Comm., *Mavlonov v. Uzbekistan*, Comm. No. 1334/2004, U.N. Doc. CCPR/C/95/D/1334/2004 (Apr. 29, 2009) (holding that by refusing re-registration to the only newspaper specifically tailored to the Tajik minority group, Uzbekistan unlawfully interfered with the right of that minority group to enjoy its own culture under Article 27).

regarding the protection of minority cultures unclear.<sup>57</sup>

### *3. The Incorporation of General Comment No. 21 Into the Understanding of the Right to Take Part in Cultural Life*

As a response to the confusion surrounding the right to take part in cultural life, the CESCR issued General Comment No. 21 on Article 15(1)(a) in December 2009.<sup>58</sup> Through General Comment No. 21, the CESCR attempts to clarify the appropriate interpretation of the right to take part in cultural life. The CESCR adopts a broad definition of culture<sup>59</sup> and specifically states that Article 15(1)(a) conveys to minorities both the right to take part in the cultural life of society and the right to participate in their own culture.<sup>60</sup>

General Comment No. 21 also discusses the permissible limitations to the right to take part in cultural life.<sup>61</sup> Specifically, General Comment No. 21 emphasizes that cultural rights may be limited if they infringe upon other guaranteed human rights.<sup>62</sup> Additionally, General Comment No. 21 further clarifies the obligations of states parties to respect, protect, and fulfill the right to take part in cultural life.<sup>63</sup> While General Comment No. 21 attempts

57. Cf. ÖZDEN WITH NDAGIJIMANA, *supra* note 46, at 8 (noting that a complaints procedure would clarify the scope of the obligations of states parties under the ICESCR).

58. Cf. U.N. Comm. on Econ., Soc. & Cultural Rights, Rep. on the 7th Sess., Nov. 13-Dec. 11, 1992, ¶ 49, U.N. Doc. E/C.12/1992/2 (1993) [hereinafter Report on the 7th Sess.] (remarking that the purpose of general comments is to provide clarity to states parties about the rights granted in the ICESCR with the aim of further promoting the implementation of the covenant). See generally *General Comment No. 21*, *supra* note 12, ¶¶ 4-5 (stating that General Comment No. 21 addresses the right to take part in cultural life and that the CESCR gained experience on the subject through considering reports, communicating with states, and through two general discussion sessions on the topic).

59. See *General Comment No. 21*, *supra* note 12, ¶ 11 (defining culture as a “broad, inclusive concept encompassing all manifestations of human existence”).

60. See *id.* ¶ 32 (declaring that minorities as a group and as individuals are afforded the right to participate in any culture they choose and that this right includes a right to manifest their cultural identity and membership).

61. See *id.* ¶ 19 (explaining that any limitations must pursue a legitimate goal, be compatible with the nature of the right to take part in cultural life, be necessary to promote the general welfare, and be the least restrictive measure available).

62. See *id.* (acknowledging that limitations to the right to take part in cultural life may be necessary, particularly in cases of negative cultural practices that infringe upon other human rights).

63. See *id.* ¶¶ 44-55 (articulating the obligations of states parties relating to the

to resolve the confusion surrounding the right to take part in cultural life,<sup>64</sup> the efficacy of General Comment No. 21 has yet to be tested.

## B. THE FRENCH INTERPRETATION OF THE RIGHT TO TAKE PART IN CULTURAL LIFE

Because of the broad wording of Article 15(1)(a), states developed and followed their own interpretations of the right to take part in cultural life.<sup>65</sup> France interprets Article 15(1)(a) of the ICESCR as granting its citizens a right to take part in the cultural life of the community, synonymous with Article 27(1) of the UDHR.<sup>66</sup> France demonstrated this interpretation when it issued a reservation to the ICCPR, stating that France refuses to acknowledge Article 27 and thereby refuses to grant minorities the right to take part in their own culture.<sup>67</sup>

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right to take part in cultural life, including minimum core obligations: guaranteeing non-discrimination and gender equality, respecting the right of everyone to choose to identify or not identify with any culture, respecting the right of everyone to engage in their own cultural practices, eliminating obstacles that inhibit a person's access to his own culture, and allowing the participation of persons belonging to minority groups in the design and implementation of laws and policies that affect them).

64. *Cf.* Report on the 7th Sess., *supra* note 58, ¶ 49 (stating that the CESCR uses general comments to help states parties implement the ICESCR by sharing with states the experience the CESCR gains through examining state reports).

65. *See* Yvonne Donders, *Cultural Life in the Context of Human Rights*, submitted to U.N. Comm. on Econ., Soc. & Cultural Rights, at 2, U.N. Doc. E/C.12/40/13 (May 9, 2008) (noting that there is no consensus on which rights constitute "cultural rights" and how best to implement them); *cf.* Thornberry, *supra* note 43, at 2-3 (suggesting that the concept of culture is particularly complicated, and states need guidance on what the right to take part in cultural life actually entails).

66. *See* UDHR, *supra* note 25, art. 27(1) (stating that "[e]veryone has the right freely to participate in the cultural life of the community").

67. *Status of the International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsgno=IV-4&chapter=4&lang=en> (last visited Mar. 22, 2011) [hereinafter *ICCPR Status*] (displaying France's reservation to the ICCPR, which states that France refuses to recognize Article 27 because it believes Article 27 conflicts with the French Constitution); *cf.* ICCPR, *supra* note 26, art. 27 (granting minorities the right to take part in their own culture); U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: France, ¶ 15, U.N. Doc. E/C.12/1/Add.72 (Nov. 30, 2001) [hereinafter *Concluding Observations*] (expressing concern about the French government's refusal to officially recognize the existence of minorities



France's view on minorities stems from its belief that its Constitution and commitment to equality and secularism do not permit an official recognition of minority classifications.<sup>68</sup> The French Constitution guarantees the "equality of all citizens before the law without distinction of origin, race or religion."<sup>69</sup> Because France does not acknowledge minority groups within its territory,<sup>70</sup> minorities in France are not given special measures or protections and are instead encouraged to assimilate into French society.<sup>71</sup>

### C. AN OVERVIEW OF THE FRENCH BAN ON BURQAS

France's history is one of promoting secularism and encouraging a singular cultural identity within its territory.<sup>72</sup> The recent increases in globalization and immigration throughout Europe, however, threaten this ideal.<sup>73</sup> France is currently host to around five

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within French territory). *See generally* DONDERS, *supra* note 28, at 187 (arguing that by declaring a reservation to Article 27 and denying the existence of minorities within its territory, France greatly interfered with minority rights and such reservations today "would no longer be permissible" because denying the existence of minorities is contrary to "customary international law and peremptory norms").

68. *See* 1958 CONST. art. 1 (Fr.), *translated in* ASSEMBLÉE NATIONALE, <http://www.assemblee-nationale.fr/english/8ab.asp> (last visited May 2, 2011); U.N. Econ. & Soc. Council, Third Periodic Rep. of France on Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶ 44, U.N. Doc. E/C.12/FRA/3 (Mar. 15, 2007) [hereinafter Third Periodic Report] (declaring that to recognize the collective rights of minority groups would be to distinguish those citizens on the basis of origin, race, or religion, violating Article 1 of the French Constitution).

69. 1958 CONST. art. 1 (Fr.), *translated in* ASSEMBLÉE NATIONALE, <http://www.assemblee-nationale.fr/english/8ab.asp> (last visited May 2, 2011).

70. *See* Third Periodic Report, *supra* note 68, ¶ 44 (explaining that while public expressions of diversity are legal, the rights of minority groups cannot be legally recognized under the French Constitution).

71. *Cf.* DONDERS, *supra* note 28, at 186 (suggesting that by officially refusing to recognize minorities, a state interferes with minority rights because the denial implies that there is no need for special measures or protections for minorities since they will automatically be assimilated).

72. *See* Bienkowski, *supra* note 30, at 437 (arguing that France's strong assimilationist and secular tradition relegates religion to the private sphere and reserves the public sphere for unique French culture and values).

73. *See* Barbibay, *supra* note 29, at 160 (explaining that due to a growing population of Islamic immigrants in France, the country is strained by conflicting demands of protecting the individual human rights of the Islamic immigrants and preserving its own cultural uniqueness).

million Muslims, the largest Muslim population in Europe.<sup>74</sup> As a result of the increasing Muslim population in France, the French government is concerned about the threat that overt expressions of Islam, such as wearing the burqa or niqab, pose to the French ideals of secularism and gender equality.<sup>75</sup>

In 2004, France banned the hijab<sup>76</sup> from being worn in schools; an act that potentially further marginalized French Muslim schoolgirls, even forcing some to be homeschooled.<sup>77</sup> The French government cited preserving secularism as a justification for the ban on the hijab.<sup>78</sup> France, however, is not alone in its disdain for the Muslim garments, as citizens in several other states also support banning the

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74. See *Hundreds in Pakistan Protest France's Burqa Ban*, ASSOCIATED PRESS, July 19, 2010, available at <http://www.ndtv.com/article/world/hundreds-in-pakistan-protest-france-s-burqa-ban-38407> (noting that many people are especially concerned about the French ban on burqas because of France's high Muslim population).

75. See Barbibay, *supra* note 29, at 160-61 (arguing that France associates Islamic clothing with issues of gender equality, assimilation, and the threat of religious fundamentalism, and that as France's Islamic population grows, these issues have been thrust into the forefront of French politics).

76. See *In Graphics: Muslim Veils*, *supra* note 4 (defining the hijab as a headscarf that covers the head and neck, but leaves the face visible).

77. See *Loi 2004-228 du mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics* [Law No. 2004-228 of March 15, 2004 regulating, in accordance with the principle of secularism, the wearing of symbols or clothing denoting religious affiliation in schools, colleges and high schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190; Oriana Mazza, Note, *The Right to Wear Headscarves and Other Religious Symbols in French, Turkish, and American Schools: How the Government Draws a Veil on Free Expression of Faith*, 48 J. CATH. LEGAL STUD. 303, 304, 306 (2009) (suggesting that despite claims the ban would protect girls from oppressive males and would free the girls from pressure while at school, the ban would actually cause many girls to leave school altogether, leading to a lack of education and to further opportunities for male oppression at home).

78. See Mazza, *supra* note 77, at 309-10 (noting that French secularism, which relegates religion to the private sphere, conflicts with many Islamic immigrants who perceive Islam as a way of life that permeates both the public and private spheres); see also Caroline Wyatt, *French Headscarf Ban Opens Rifts*, BBC NEWS (Feb. 11, 2004), <http://news.bbc.co.uk/2/hi/3478895.stm> (identifying UMP deputy, Jérôme Rivière, as saying that a minority of "hardline Islamists" were challenging French secular nature and that the ban is not about suppression of freedom but is a political answer to a political problem).

burqa, niqab, and hijab.<sup>79</sup>

Since 2004, France has continued its practice of discouraging any expression of Muslim culture and religion based on France's policy of promoting a singular French culture and identity.<sup>80</sup> In September 2010, the French Senate adopted a law that in effect, imposed a complete ban on wearing the burqa and niqab in all public places.<sup>81</sup> On October 7, 2010 the French Constitutional Council, the top constitutional authority in France, ruled that the law was legal, and the ban went into effect April 11, 2011.<sup>82</sup>

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79. See, e.g., James Joyner, *French Burqa Ban Widely Supported in Europe*, ATLANTIC COUNCIL (Mar. 1, 2010), [http://www.acus.org/new\\_atlanticist/french-burqa-ban-widely-supported-europe](http://www.acus.org/new_atlanticist/french-burqa-ban-widely-supported-europe) (indicating that the majority of citizens in the United Kingdom, Italy, Spain, and Germany support the imposition of a ban on the burqa in their own states, while the majority of citizens in the United States disapprove of such a ban); Chalabi, *supra* note 3 (noting that Turkey, Egypt and Tunisia all banned burqas and niqabs to prohibit the influence of Islamic party politics); *Hundreds in Pakistan Protest France's Burqa Ban*, *supra* note 74 (stating that Spain and Belgium are working on imposing similar bans on Islamic coverings).

80. See, e.g., Bienkowski, *supra* note 30, at 438-39 (describing France's refusal to grant citizenship to a woman in 2008 because France claimed that by continuing to wear a niqab, she did not fulfill "the condition of assimilation necessary for attainment of French citizenship").

81. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Prohibiting the Concealment of the Face in Public], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344; see also *Burqa Ban Passes French Lower House Overwhelmingly*, CNN (July 13, 2010), <http://www.cnn.com/2010/WORLD/europe/07/13/france.burqa.ban/index.html> (explaining that the ban passed almost unanimously, indicating that French lawmakers believe the full-face veil is contrary to the laws of France).

82. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. 18345 (Fr.) (holding the ban was not "disproportionate between safeguarding public order and guaranteeing constitutionally protected rights"); see also *French Burqa Ban Clears Last Legal Obstacle*, CNN (Oct. 7, 2010), <http://articles.cnn.com/2010-10-07/world/france.burqa.ban/french-burqa-ban-ban-last-year-full-face-veil?s=PM:WORLD> (stating that the French constitutional authorities determined the "law did not impose disproportionate punishments or prevent the free exercise of religion in a place of worship," and therefore, the law is legal under the French Constitution); Russell Goldman, *Muslim Women Arrested for Defying France's Ban on Wearing Veils*, ABCNEWS (Apr. 11, 2011), <http://abcnews.go.com/International/french-muslim-women-arrested-defying-ban-wearing-veils/story?id=13347753> (reporting that on the day the ban went into effect, two Muslim women were arrested after wearing their veils in public while protesting the ban).

The law prohibits all face coverings in public, but through the inclusion of several exceptions it is clear that the law is aimed at prohibiting burqas and niqabs.<sup>83</sup> The law imposes either a small fine or citizenship course as punishment for wearing the burqa or niqab and imposes a year prison sentence or a € 30,000 fine, approximately \$43,287 USD, on anyone who forces someone else to wear a burqa or niqab.<sup>84</sup> The ban is controversial, but the French government claims it is necessary to protect the rights of its citizens and to protect French society.<sup>85</sup> While many European states support the ban, other states and many international organizations oppose or condemn the law as a violation of human rights and international treaties.<sup>86</sup>

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83. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Prohibiting the Concealment of the Face in Public], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344; *see also* Angela Doland, *France Burqa Ban: French Parliament Approves Ban on Face Veils*, HUFFINGTON POST (July 13, 2010), [http://www.huffingtonpost.com/2010/07/13/france-burqa-ban-french-p\\_n\\_644433.html](http://www.huffingtonpost.com/2010/07/13/france-burqa-ban-french-p_n_644433.html) (commenting that although the law generally prohibits concealing one's face in public, the inclusion of exceptions for *inter alia*, motorcycle helmets and masks worn for health reasons, for fencing, for skiing, or for carnivals, clearly demonstrates that the primary purpose of the ban is to prohibit the wearing of burqas and niqabs).

84. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Prohibiting the Concealment of the Face in Public], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344; *see also* *French Burqa Ban Clears Last Legal Obstacle*, *supra* note 82 (noting that the law imposes a much harsher punishment upon those who force a woman to wear a niqab or burqa than the fine on those women caught wearing it willingly, and that the French government referred to the burqa and niqab as "a new form of enslavement").

85. *See France Burqa Ban Passes Last Legal Hurdle*, AGENCE FRANCE-PRESSE, Oct. 7, 2010, *available at* <http://www.newsmax.com/Newsfront/franceburqabanveil/2010/10/07/id/372997> (suggesting that while France claims that the ban protects women's rights and affirms respect for freedoms of conscience and religion, the ban is criticized as stigmatizing Muslims and as possibly violating the French Constitution and religious freedoms protected by the European Court of Human Rights).

86. *E.g., Indonesia Ulema Council Opposes French Burqa Ban*, JAKARTA GLOBE, Sept. 15, 2010, <http://www.thejakartaglobe.com/home/indonesia-ulema-council-opposes-french-burqas-ban/396230> (reporting the opposition of the Indonesia Ulema Council to France's ban on burqas, and its belief that if France "wants to champion human rights, it should allow women to wear the veils in public" because most Muslim women wear the "veils as a part of their culture and

## II. ANALYSIS

In General Comment No. 21, the CESCR significantly elaborates on the meaning and scope of the right to take part in cultural life.<sup>87</sup> The clarity offered by General Comment No. 21 effectively provides states parties with a better understanding of their obligations related to this right.<sup>88</sup> The previously ambiguous nature of the right to take part in cultural life provided too many opportunities for states to encroach upon the cultural rights of their citizens, including enabling France to ban the wearing of burqas in public.<sup>89</sup> Through General Comment No. 21, however, the CESCR firmly establishes not only that the right extends to minority cultures, but also that wearing a burqa is a practice that is considered part of a person's "cultural life," and therefore, must be protected.<sup>90</sup> The clarity offered by General Comment No. 21 reveals that France cannot both enact the burqa ban and still remain in compliance with its obligations under the ICESCR.<sup>91</sup>

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religious belief"); *French Burqa Ban Clears Last Legal Obstacle*, *supra* note 82 (stating that Amnesty International accuses the ban of violating European human rights law); Zeenat Umar, *France Approves Burqa Ban*, ILLUME, Sept. 15, 2010, <http://www.illumemag.com/zine/articleDetail.php?France-Approves-Burqa-Ban-13317> (noting that President Obama implied that telling people what to wear is not in line with the United States' culture and values).

87. See generally *General Comment No. 21*, *supra* note 12, ¶¶ 6-43 (expounding upon the definition and scope of the right to take part in cultural life and ensuring that it grants everyone the right to take part in the cultural life of their choosing).

88. See *General Comment No. 21*, *supra* note 12, ¶ 19 (requiring a legitimate purpose for any limitation, use of the least restrictive measures available, and that the limitation imposed be proportionate to the situation); discussion *infra* Part II.B (demonstrating how General Comment No. 21 illustrates the appropriate scope of the right to take part in the cultural life and better enables states to protect this right for their citizens).

89. See discussion *infra* Part II.A (explaining how the ambiguity of the ICESCR would have allowed France to prohibit people from engaging in minority cultural practices).

90. See *General Comment No. 21*, *supra* note 12, ¶ 16(a) (describing necessary conditions for the full realization of the right of everyone to take part in cultural life, including the availability of intangible elements of culture); discussion *infra* Part II.B.1 (articulating how General Comment No. 21 specifically grants the right to take part in cultural life to minorities and specifically expands "cultural life" to include intangible elements of culture and cultural practices).

91. See discussion *infra* Part II.B.2 (describing the specific obligations stated in General Comment No. 21 that preclude intrusions upon cultural rights such as the ban on burqas).

A. THE NEED FOR GENERAL COMMENT NO. 21: THE VAGUE LANGUAGE OF THE ICESCR PROVIDES LEGITIMATE JUSTIFICATIONS FOR THE FRENCH BURQA BAN

Many legal scholars believe the burqa ban violates several international legal instruments that recognize a variety of human rights.<sup>92</sup> In response, the French government invoked various philosophical, political, and moral justifications for its ban on burqas in public.<sup>93</sup> If not for the introduction of General Comment No. 21, France could argue that the ban fulfills France's obligation under Article 15(1)(a) of the ICESCR to guarantee the equal right of Muslim women forced to wear the burqa to take part in French cultural life.<sup>94</sup>

*1. The Failure of Article 15(1)(a) to Adequately Define the Right to Take Part in Cultural Life Allows France to Claim that the Right Does Not Extend to Protecting Cultural Practices of Minorities and that Burqas Do Not Fall Within the Concept of "Cultural Life"*

Before General Comment No. 21, the definition of the right to take part in cultural life and its resulting obligations on states party to the

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92. See *Burqa Ban Passes French Lower House Overwhelmingly*, *supra* note 81 (quoting John Dalhuisen of Amnesty International as stating that "[a] complete ban on [burqas] would violate the rights to freedom of expression and religion of those women who wear the burqa or the niqab in public as an expression of identity or beliefs," and explaining that the French Council of State warned the French government "that the ban could be incompatible with international human rights and the country's own constitution").

93. See, e.g., *Coexistence Means Fighting Cultural Frictions*, THE DAILY YOMIURI, Sept. 18, 2010, available at 2010 WLNR 18492579 (reporting that proponents of the burqa ban argue that wearing burqas is contrary to the principle of separation of church and state and contrary to the emancipation of women); *French Senate Approves Burqa Ban*, CNN (Sept. 15, 2010), <http://www.cnn.com/2010/WORLD/europe/09/14/france.burqa.ban/index.html?hpt=T1> (quoting an official statement of the French government that wearing the burqa cannot be tolerated in public even if it is voluntary because of the "damage it produces on those rules that allow the life in the community, ensure the dignity of the person and equality between the sexes," and because the burqa is a "new form of enslavement" that France cannot accept).

94. Cf. ICESCR, *supra* note 13, arts. 2-3 (requiring that states parties "undertake to guarantee that the rights enunciated in the [ ] [ICESCR] will be exercised without discrimination" on the basis of sex, and that states parties ensure that men and women have equal opportunity to enjoy all the rights set forth in the ICESCR).

ICESCR was unsettled.<sup>95</sup> Free to determine their own definition of the right to take part in cultural life, many states, including France, interpreted the right to be in line with Article 27(1) of the UDHR, providing everyone with the right to participate in the cultural life of the community.<sup>96</sup> This interpretation is supported by the absence of any mention of minorities or minority cultures in Article 15 of the ICESCR<sup>97</sup> and in the fact that the drafters of Article 15 originally intended the right to apply only to the culture of the state.<sup>98</sup>

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95. See Groni, *supra* note 34, at 4 (stating that “[t]here is still no generally accepted definition of ‘culture’,” but under Article 15 ‘culture’ should be understood in the anthropological sense rather than just as the works and knowledge accumulated or created by a group of elites); Int’l Comm’n of Jurists, *supra* note 34, ¶¶ 1, 4 (noting that economic, social, and cultural rights are criticized for being vague, and the adoption of a general comment would “help to clarify the content and legal implications of the right to participate in cultural life”); Int’l Women’s Rights Action Watch, *Equality and the Right to Participate in Cultural Life*, submitted to U.N. Comm. on Econ., Soc. & Cultural Rights, ¶ 2, U.N. Doc. E/C.12./40/10 (May 9, 2008) (suggesting that “the right to equal participation in cultural life” is one of the most hotly contested and misunderstood rights enumerated in the ICESCR).

96. See UDHR, *supra* note 25, art. 27(1) (“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”). Compare U.N. Econ. & Soc. Council, Combined Initial, Second and Third Periodic Rep., Under Articles 16 and 17 of the Covenant, of Angola on the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶¶ 308-12, U.N. Doc. E/C.12/AGO/3 (Apr. 28, 2008) (discussing Angola’s efforts to promote its national culture under the right to participate in cultural life but failing to address minority cultural rights), and Third Periodic Report, *supra* note 70, ¶ 44 (suggesting that under the French Constitution, the French government cannot distinguish people based on origin, race, or religion, and therefore, collective rights of minorities are not recognized under the right to cultural life), with U.N. Econ. & Soc. Council, Initial Rep. of Albania on the Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶¶ 574-76, U.N. Doc. E/1990/5/Add.67 (Apr. 11, 2005) (describing efforts of the Albanian government to explicitly promote and protect minority cultures under the right to take part in cultural life).

97. Cf. ICESCR, *supra* note 14, art. 15(1)(a) (including only the right “to take part in cultural life,” the right “to enjoy the benefits of scientific progress,” and the right “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production”); DONDERS, *supra* note 28, at 152 (citing Samba Cor Konaté, Working Paper on Cultural Rights, U.N. Doc. E/C.12/1992/WP.4 (Nov. 25, 1992)) (indicating that the drafters of the ICESCR limited their interpretation of “culture” to its tangible manifestations, e.g. museums, libraries, and art).

98. See Donders, *supra* note 65, at 4 (noting that at the time of adoption of Article 15(1)(a), the right to take part in cultural life was meant to protect

Additionally, since Article 27 of the ICCPR specifically grants to minorities the right to participate in their own culture, it would be redundant for Article 15(1)(a) to grant the same right.<sup>99</sup> It is clear that France subscribed to this argument because it registered a reservation to Article 27 of the ICCPR, but did not declare a similar reservation to Article 15(1)(a).<sup>100</sup> If France believed Article 15(1)(a) also granted minorities the right to take part in their own culture, it follows that it would make a reservation to Article 15(1)(a) to ensure the relevance of its reservation to Article 27.<sup>101</sup> Therefore, France could claim that the right of the Muslim minority in France to wear the burqa is not protected under the right to take part in cultural life by suggesting Article 15(1)(a) only protects the right to take part in the cultural life of the state, not the right to engage in the cultural life of the minority Muslim community.<sup>102</sup>

Moreover, because there was no clear definition of what constituted “cultural life,” France could argue that the practice of wearing the burqa does not fall within the concept of culture protected by Article 15(1)(a), and therefore, a limitation upon this practice does not violate the ICESCR. Many scholars consider the text of Article 15(1)(a) to only grant rights to take part in “high culture,” meaning cultural activities or items such as artwork, theater, or museums.<sup>103</sup> Before General Comment No. 21, it was unclear

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participation in the cultural life of the nation, not to protect participation in every cultural activity).

99. See Groni, *supra* note 34, at 10 (suggesting that due to the existence of Article 27, one could conclude that the scope of Article 15(1)(a) does not protect the right of minority groups or their individual members to take part in their own culture).

100. Compare *ICCPR Status*, *supra* note 67, at 6 (exhibiting France’s registered reservation denying recognition of Article 27 of the ICCPR), with *ICESCR Status*, *supra* note 14, at 4 (lacking a French reservation to Article 15(1)(a) of ICESCR).

101. Cf. Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331 (defining “reservation” as a unilateral statement that “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”).

102. Cf. DONDERS, *supra* note 28, at 157 (citing Roger O’Keefe, *The “Right to Take Part in Cultural Life” Under Article 15 of the ICESCR*, 47 INT’L & COMP. L.Q. 904, 912-13 (1998)) (noting that the drafters of Article 15(1)(a) did not intend for the right to take part in cultural life to imply that the masses could determine in which cultural activities Article 15(1)(a) granted them a right to take part).

103. See *id.* at 150 (noting that at the time of its adoption, Article 15 was primarily meant to make more broadly available the “high” material aspects of



whether “cultural life” also referred to intangible cultural elements such as language, traditions, or practices.<sup>104</sup> Therefore, France could claim that because wearing a burqa was not an element of high culture, such a practice does not fall within the originally intended definition of “cultural life” and consequently did not need to be protected under Article 15(1)(a).<sup>105</sup>

*2. The Language of the ICESCR Allows France to Claim the Burqa Ban Helps Fulfill France’s Obligations Under the ICESCR and is an Acceptable Limitation of the Right to Take Part in Cultural Life*

Based on the French belief that the right to take part in cultural life refers only to the cultural life of French society,<sup>106</sup> France could justify its ban on burqas using Article 15(1)(a). The ICESCR instructs states parties to provide their citizens with the ability to exercise their right to take part in cultural life.<sup>107</sup> France perceives the burqa as a restriction on the rights of its female Muslim citizens to fully participate in French society.<sup>108</sup> Under the ICESCR, the French

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culture”); *cf.* Int’l Comm’n of Jurists, *supra* note 34, ¶ 6 (describing “high culture” as the narrower of two definitions traditionally applied to the notion of “culture,” and urging the CESCR to adopt the broader definition, which includes the aspects of high culture as well as “language, traditions, folklore, institutions, practices, and shared views of the world which determine the way in which communities define their identity”).

104. *See* Int’l Comm’n of Jurists, *supra* note 34, ¶ 6 (encouraging the CESCR to adopt a broad definition of “culture” that includes intangible cultural elements so that the definition “is more appropriate for a right which is predicated of ‘everyone’ and not only of authors of scientific, literary or artistic production”).

105. *Cf.* DONDERS, *supra* note 28, at 152 (citing Samba Cor Konaté, Working Paper on Cultural Rights, U.N. Doc. E/C.12/1992/WP.4 (Nov. 25, 1992)) (noting that the drafters of Article 15(1)(a) intended a conception of culture that focused on external manifestations of national heritage, such as libraries, museums, and artwork).

106. *See* Third Periodic Report, *supra* note 68, ¶ 44 (refusing to grant minorities the right to take part in their own culture because France does not recognize minority cultures).

107. *See* ICESCR, *supra* note 13, arts. 2(1)-(2), 15(1)(a) (instructing states to take progressive steps to fully realize all of the rights recognized in the Covenant, including cultural rights).

108. *See* Doland, *supra* note 83 (presenting the French view that burqas reinforce the inequality between men and women and are, therefore, contrary to French ideology and tradition); *cf.* *French a Step Closer to Banning the Burqa*, ADVERTISER, Sept. 16, 2010, available at 2010 WLNR 18289865 (remarking that other European countries, such as Belgium, are following the French lead and considering similar bans on burqas because burqas are seen as conflicting with

government is obligated to prevent such a restriction.<sup>109</sup> Therefore, France could argue that the burqa ban fulfills its obligations, under the ICESCR, to protect the right to take part in cultural life by removing an impediment to the ability of French Muslim women to enjoy full and equal participation in French culture.

Additionally, even if France viewed wearing the burqa as a part of cultural life that is afforded protection under Article 15(1)(a), it still could limit that right under the ICESCR.<sup>110</sup> Before General Comment No. 21, the ICESCR allowed states to limit the rights recognized in the ICESCR when the limitation was compatible with the nature of the rights and was used to promote the “general welfare” in a democratic society.<sup>111</sup> France suggested such justifications for its ban,<sup>112</sup> including claims that the burqa ban protects the general welfare of French society by reinforcing French ideals and protecting national security.<sup>113</sup>

The absence of a complaints mechanism for the ICESCR means there are no recognized parameters on this limitation.<sup>114</sup> While states can use the case law of the HRC to determine the scope of the rights

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local culture).

109. See ICESCR, *supra* note 13, arts. 2(1)-(2), 15(1)(a) (requiring states to “guarantee” that the rights set forth in the ICESCR are exercised without discrimination based on sex).

110. See *generally id.* art. 4 (allowing states to limit the rights granted by the ICESCR “for the purpose of promoting the general welfare in a democratic society”).

111. See *id.* (determining that the meaning of “general welfare” is left up to the states).

112. *Burqa Ban Passes French Lower House Overwhelmingly*, *supra* note 81 (reflecting on the French government’s assertion that the burqa, even if voluntarily worn, cannot be tolerated in public because it negatively affects the rules governing French life by degrading the dignity of women and denying equality between sexes).

113. See Doland, *supra* note 83 (indicating that the burqa is viewed as a “gateway to extremism and an attack on secularism”); *Burqa Ban Passes French Lower House Overwhelmingly*, *supra* note 81 (analogizing the burqa to slavery and calling for its prohibition); *Hundreds in Pakistan Protest France’s Burqa Ban*, *supra* note 74 (commenting that supporters of the burqa ban argue that burqas do not coincide with the French ideals of gender equality and secularism).

114. See ÖZDEN WITH NDAGIJIMANA, *supra* note 46, at 3-6 (suggesting that a complaints procedure would constrain countries that do not comply with their ICESCR commitments and would provide citizens recourse in situations of alleged violations).

or obligations under the ICCPR,<sup>115</sup> there is no case law that provides examples of what state actions do or do not constitute acceptable limitations of the right to take part in cultural life under the ICESCR.<sup>116</sup> Moreover, unlike the HRC, which supplied the “so substantial” test,<sup>117</sup> the CESCR does not supply states with a balancing test to measure the importance of restrictions on a cultural right against the value of that cultural right.<sup>118</sup> States are not required to consult with any individual, agency, or community before limiting the cultural rights of its citizens.<sup>119</sup> Therefore, prior to the existence of General Comment No. 21, France could, without being in violation of the ICESCR, use its broad discretion to impose the ban on burqas and claim the ban actually fulfills France’s obligations under the ICESCR by protecting the rights of Muslim women to fully participate in French culture.

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115. See, e.g., U.N. Human Rights Comm., *Länsman v. Finland*, Comm. No. 671/1995, ¶¶ 1, 2.1, 11, U.N. Doc. CCPR/C/58/D/671/1995 (Nov. 22, 1996) (holding that the government’s logging activities were not so severe as to violate the plaintiff’s rights under Article 27 of the ICCPR); U.N. Human Rights Comm., *Mavlonov v. Uzbekistan*, Comm. No. 1334/2004, ¶¶ 2.1, 2.6, 9, U.N. Doc. CCPR/C/95/D/1334/2004 (Apr. 29, 2009) (finding that a state’s denial of registration to the only newspaper specifically tailored to a particular culture sufficiently interfered with the rights of that community to enjoy its own culture and that the state’s actions were a violation of ICCPR Articles 19 and 27).

116. See MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 100-01 (1995) (discussing how the adoption of a complaints mechanism for the ICESCR would produce case law that states could use to determine the specific actions required of them).

117. See U.N. Human Rights Comm., *Äärelä v. Finland*, Comm. No. 779/1997, ¶¶ 4.3, 7.5, U.N. Doc. CCPR/C/73/D/779/1997 (Nov. 7, 2001) (articulating that the appropriate test is whether the imposition on the plaintiff’s rights was “so substantial” as to unlawfully interfere with the plaintiff’s right to enjoy his culture).

118. Cf. Groni, *supra* note 34, at 5-6 (noting that the CESCR guidelines are ambiguous as to what is protected by the right to take part in cultural life, and suggesting that the right should be evaluated against the extent a restriction violates human dignity and individual identity).

119. See ICESCR, *supra* note 13, art. 2(1)-(3) (lacking any requirements of consultation in the obligatory provisions of the ICESCR).

B. IMPOSING CLARITY: THROUGH GENERAL COMMENT NO. 21, THE CESCR NEGATES THE PREVIOUS JUSTIFICATIONS FOR THE FRENCH BURQA BAN AND ESTABLISHES THAT THE BAN IS A VIOLATION OF THE RIGHT TO TAKE PART IN CULTURAL LIFE

While the burqa ban would not likely violate the ICESCR pre-General Comment No. 21, the guidance and clarity provided by General Comment No. 21 make the illegality of the French burqa ban more readily apparent under Article 15(1)(a). The clarification provided by the CESCR related to the obligations of states under the ICESCR demonstrates that the burqa ban is inconsistent with France's obligations under Article 15(1)(a).<sup>120</sup> Moreover, the more specific descriptions of the scope and meaning of the right to take part in cultural life further establish the illegality of the French burqa ban under Article 15(1)(a) of the ICESCR.<sup>121</sup>

*1. General Comment No. 21 Establishes that the Right to Take Part in Cultural Life Does Extend to Protecting the Cultural Practices of Minorities and that Wearing a Burqa is a Practice Included Within the Concept of "Cultural Life"*

General Comment No. 21 elaborates on the definition and scope of the right to take part in cultural life.<sup>122</sup> In General Comment No. 21 the CESCR defines the right to take part in cultural life as encompassing the scope of both the right to participate in the cultural life of society, provided by Article 27(1) of the UDHR, and the right of minorities to take part in their own culture, granted in Article 27 of the ICCPR.<sup>123</sup> According to General Comment No. 21, Article

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120. See discussion *infra* Part II.B.2 (describing the inconsistency of the burqa ban and the simultaneous obligation to provide citizens with an environment that enables them to participate in the culture of their choice).

121. See discussion *infra* Part II.B.1 (discussing the CESCR's extension of the right to take part in cultural life to minorities and minority cultures).

122. See generally *General Comment No. 21, supra* note 12, ¶¶ 6-43 (flushing out the scope in four primary ways: (1) by defining the components, elements, and limitations of the right to take part in cultural life; (2) by describing special topics of broad application; (3) by identifying persons and communities requiring special protection; and (4) by discussing cultural diversity and its relation to the right to take part in cultural life).

123. See *id.* ¶ 3 (referencing other international agreements that recognize the right of all people to take part in cultural life, including the UDHR and the ICCPR); see also ICCPR, *supra* note 26, art. 27 (granting minorities the right to develop and take part in their own culture); UDHR, *supra* note 25, art. 27(1)

15(1)(a) grants everyone, including minorities, the right to take part in the cultural life of their choice, whether it is the majority culture of society, a minority culture, or both.<sup>124</sup>

Additionally, General Comment No. 21 defines “everyone” as comprising not only the individual, but also the collective.<sup>125</sup> Consequently, not only do people possess the right to take part in the cultural life of their choice as an individual, but also as part of a group or community of people who are exercising their cultural rights together.<sup>126</sup> As a result, France cannot refuse to recognize minority groups or the collective rights of minorities, and still remain in compliance with its obligations under the ICESCR.<sup>127</sup>

General Comment No. 21 also expresses concern about protecting cultural diversity during an era of increasing globalization.<sup>128</sup> The CESCR recognizes that globalization necessitates the coexistence of different cultures.<sup>129</sup> This is the antithesis of the position of the French government, which denies recognition to minority groups and instead promotes a unified, singular culture French culture.<sup>130</sup> By directly encouraging the preservation of cultural diversity, General Comment No. 21 supplies a modern understanding of the right to

(proclaiming the right of everyone to participate in the cultural life of society).

124. *See General Comment No. 21, supra* note 12, ¶¶ 15(a), 32 (stating that every person, regardless of his or her status as a minority, is afforded the right to engage in the political and cultural life of society, as well as the right to engage in the cultural practices of any culture in which he or she chooses to participate).

125. *See id.* ¶ 9 (concluding that cultural rights can be exercised by individuals, associations of people, or persons within a group or community).

126. *See id.* (maintaining that the collective expression of cultural rights focuses on the right of “a person” to exercise his cultural rights “in association with others” or “within a community,” but does not grant those rights directly to the community as a separate entity).

127. *See id.* ¶ 32 (proclaiming that states party to the ICESCR are obligated to “recognize, respect and protect minority cultures as an essential component of the identity of the States themselves”).

128. *See id.* ¶¶ 40-43 (arguing that states must protect cultural diversity from the negative effects of globalization by enabling “all cultures to express themselves and make themselves known”).

129. *Id.* ¶ 42.

130. *See Barbibay, supra* note 29, at 173-74 (noting that France refuses to recognize a Muslim “minority” because it perceives itself as “indivisible based on its aspiration” for a legally, socially, and culturally unified Republic); Bienkowski, *supra* note 30, at 437-39 (arguing that France’s tradition of assimilation aims to establish a singular cultural identity and “requires assimilation as a pre-condition to obtaining citizenship”).

take part in cultural life that seeks to emphasize the importance of protecting minority cultures.<sup>131</sup> Consequently, if France wants to be in harmony with the ICESCR, it cannot deny recognition of the Muslim minority in France or refuse the Muslim minority the right to take part in and preserve its own cultural practices, including wearing the burqa.

Moreover, the CESCR also supports an inclusive definition of “cultural life” in General Comment No. 21.<sup>132</sup> Under General Comment No. 21, “cultural life” is not limited to “high culture” but instead includes intangible elements of culture as well.<sup>133</sup> General Comment No. 21 defines culture as encompassing any practice or object through which individuals, groups, or communities express the “meaning they give to their existence” and through which they “build their world view.”<sup>134</sup>

Culture encompasses ways of life, religion or belief systems, clothing, customs and traditions, and others according to General Comment No. 21.<sup>135</sup> The burqa, a piece of clothing worn by women as a custom or tradition, to express a religion or a belief system, to demonstrate a way of life, or for many other reasons,<sup>136</sup> clearly falls within the concept of culture articulated in General Comment No. 21.<sup>137</sup> Therefore, the clarity offered by General Comment No. 21 forecloses France’s ability to claim its ban does not affect an element

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131. See *General Comment No. 21*, *supra* note 12, ¶¶ 32-33, 40-43 (characterizing the protection of cultural diversity as an ethical imperative).

132. See *id.* ¶ 11 (including “all manifestations of human existence” within the concept of culture).

133. See *id.* ¶ 13 (indicating that cultural life includes, *inter alia*, ways of life, language, religion or belief systems, rites and ceremonies, food, clothing, and customs and traditions).

134. *Id.*

135. *Id.*

136. See Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L’Affaire Du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUM. J. GENDER & L. 199, 223-26 (2007) (citing a variety of reasons that Muslim women choose to wear head coverings, including: “to assert the identity and existence of a ‘confident Muslim community in the West and to demand fuller social and political recognition’”; to express personal religious conviction; to assert an ethno-cultural identity; as a political protest; and as a rebellion against parents).

137. See *General Comment No. 21*, *supra* note 12, ¶ 13 (including clothing, “customs and traditions,” and “religion or belief systems” in the list of things protected by the right to take part in cultural life).

of culture that is protected by the right to take part in cultural life.<sup>138</sup>

*2. General Comment No. 21 Establishes More Specific Obligations that Demonstrate the Burqa Ban is No Longer an Acceptable Limitation of the Right to Take Part in Cultural Life and that Require France to Allow its Citizens to Participate in the Culture of Their Choice*

Another obstacle France faces as a result of General Comment No. 21 relates to the specific obligations imposed upon states parties. Though obligations on states under the ICESCR—to take steps to progressively achieve the full realization of the rights—could be satisfied fairly easily,<sup>139</sup> General Comment No. 21 requires much more of states parties.<sup>140</sup> General Comment No. 21 leaves fewer opportunities for states to ignore the right to take part in cultural life by thoroughly establishing the obligations to respect,<sup>141</sup> protect,<sup>142</sup> and fulfill<sup>143</sup> this right.

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138. See discussion, *supra* Part II.A.1 (explaining that before the introduction of General Comment No. 21 France could argue that the right to take part in cultural life only granted a right to high culture, not a right to wear a particular piece of clothing).

139. See DOWELL-JONES, *supra* note 34, at 2 (positing that the ICESCR obligation to protect socio-economic rights “progressively as resources allow” gives states wide discretion in allocating the proper resources to ensure those rights). See generally ICESCR, *supra* note 13, art. 2(1) (directing states to use “all appropriate means” to ensure the protection of rights under the ICESCR).

140. See generally *General Comment No. 21*, *supra* note 12, ¶¶ 44-59 (presenting not just general obligations, but also numerous specific, core, and international legal obligations of states party to the ICESCR under the right to take part in cultural life).

141. See *id.* ¶ 49 (indicating that the obligation to respect includes adopting specific measures to allow individuals or groups to “freely choose their own cultural identity,” “to have access to their own cultural” heritage and to the cultural heritage of others, and to take part in any “decision-making process that may have an impact” on their way of life).

142. See *id.* ¶ 50 (stating that the obligation to protect requires states to “take measures to prevent third parties from interfering in the exercise of” the right to take part in cultural life by protecting cultural heritage and “cultural productions of indigenous people,” such as traditional knowledge, folklore, etc., and requires states to “enforce legislation to prohibit discrimination based on cultural identity”).

143. See *id.* ¶¶ 51-54 (finding that the obligation to fulfill includes: facilitating the realization of the right through financial support; promoting the right through education and public awareness; and providing whatever is necessary to assist individuals or communities when they are unable to realize the right for themselves).

Respecting the right to take part in cultural life prohibits states from interfering with its enjoyment by citizens,<sup>144</sup> while protecting the right requires states to prevent third parties from interfering with its enjoyment.<sup>145</sup> The French government claims the burqa interferes with the ability of women to participate in the cultural life of French society.<sup>146</sup> France, therefore, may try to argue that the burqa ban protects the right of these women to take part in French cultural life by preventing men or other third parties from interfering with a woman's enjoyment of this right by forcing her to wear a burqa or niqab.<sup>147</sup> By prohibiting women from wearing the burqa, however, France is also interfering with the rights of women who choose to wear the burqa to express their cultural identity, and is therefore not respecting their right to take part in the cultural life of their choice.<sup>148</sup>

The CESCR also uses General Comment No. 21 to articulate minimum core obligations of states party to the ICESCR regarding the right to take part in cultural life.<sup>149</sup> The CESCR emphasizes that

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144. *Id.* ¶ 48.

145. *Id.*

146. See Barbibay, *supra* note 29, at 161, 196-98 (characterizing France's view of the burqa and niqab as contrary to the French core value of gender equality and noting that France denied citizenship to a woman who wore a niqab based on her failure to assimilate into French culture); Bienkowski, *supra* note 30, at 438-39 (quoting France's immigration minister, Eric Besson, as saying that he wanted the wearing of the burqa or niqab to be "systematically considered as proof of insufficient integration into French society," which would pose a substantial obstacle to achieving French citizenship).

147. See Sophie Taylor, *Paris Imam Backs France's Burqa Ban*, THE TELEGRAPH, Jan. 22, 2010, <http://www.telegraph.co.uk/expat/expatnews/7053101/Paris-imam-backs-Frances-burqa-ban.html> (relaying the opinion of a French imam who criticizes the burqa as a tool of "sexist domination" and argues that when women cover their faces they cannot share anything with the rest of French society); cf. Ronald P. Sokol, Op-Ed., *Veiled Arguments*, N.Y. TIMES, July 14, 2010, <http://www.nytimes.com/2010/07/15/opinion/15iht-edsokol.html> (quoting French National Assembly majority leader, Jean-François Copé, as arguing that the niqab and burqa prevent women from establishing relationships and participating in French society because the garments "represent a refusal to exist as a person in the eyes of others").

148. Cf. Choudhury, *supra* note 136, at 200, 204 (noting that after France banned headscarves in schools in 2004 on the basis that the headscarf is a symbol of male oppression, many French Muslim women protested, chanting that they personally chose to wear the headscarf).

149. See *General Comment No. 21*, *supra* note 12, ¶ 55 (listing several core obligations that should be immediately effective, including: guaranteeing non-discrimination and gender equality; respecting the "right of everyone to identify or



Article 15(1)(a) at least imposes upon states the obligation to create an environment where people “can participate in the culture of their choice.”<sup>150</sup> France’s burqa ban deprives Muslim women of the ability to fully participate in a culture that advocates or encourages women to wear the burqa, regardless of whether they freely choose to be a part of that culture.<sup>151</sup> Therefore, General Comment No. 21 demonstrates that the burqa ban will preclude France from satisfying even its minimum core obligations as a state party to the ICESCR.<sup>152</sup>

Furthermore, General Comment No. 21 clarifies when a state party can limit cultural rights.<sup>153</sup> Before General Comment No. 21, states parties were given wide discretion under the ICESCR to determine when limiting cultural rights would be appropriate; the only requirements being that the limitation promote the general welfare and be compatible with the nature of the rights in the ICESCR.<sup>154</sup> General Comment No. 21, however, requires that any limitation of the right to take part in cultural life pursue a legitimate aim and be strictly necessary to promote the general welfare of society.<sup>155</sup>

In General Comment No. 21, the CESCR recognizes that some circumstances require the limitation of cultural rights to protect other

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not identify themselves with one or more communities, and the right to change their choice;” respecting the “right of everyone to engage in their own cultural practices;” eliminating “barriers or obstacles that inhibit a person’s access to the person’s own culture or to other cultures;” and allowing and encouraging the participation of minority members in the “design and implementation of laws and policies that affect them”, including obtaining their “free and informed prior consent when the preservation of their cultural resources . . . are at risk”).

150. *Id.*

151. *Cf. Burqa Ban Passes French Lower House Overwhelmingly*, *supra* note 81 (quoting Amnesty International’s expert on discrimination in Europe, John Dalhuisen, as arguing that a complete ban on the burqa would violate the rights of “those women who wear the burqa or the niqab in public as an expression of their identity or beliefs”).

152. *See General Comment No. 21*, *supra* note 12, ¶ 55 (requiring states parties to at least create an environment that, *inter alia*, promotes and respects the right of everyone to identify or not identify themselves with any community or communities, to “engage in their own cultural practices,” and to change the community or communities with which they choose to identify).

153. *See id.* ¶¶ 17-20 (emphasizing that internationally recognized human rights trump cultural rights, and thus states can restrict cultural rights that violate internationally guaranteed human rights).

154. ICESCR, *supra* note 13, art. 4.

155. *General Comment No. 21*, *supra* note 12, ¶ 19.

human rights.<sup>156</sup> In such cases, General Comment No. 21 only allows cultural rights to be limited if the limitation is proportionate; the least restrictive measures are taken; imposition upon other human rights are considered; cultural backgrounds of those involved are considered; and the state consults with the individual, group, or community potentially impacted prior to imposing the limitation.<sup>157</sup> France may try to argue that the burqa ban fulfills its obligation to protect fundamental rights under General Comment No. 21 because wearing the burqa violates the gender equality provision of the ICESCR.<sup>158</sup> However, it is unlikely France could successfully argue that the ban is an acceptable limitation of the right to take part in cultural life because a complete ban on wearing burqas and niqabs in public is not the least restrictive measure available to achieve these goals.<sup>159</sup>

While undoubtedly the ban will protect the rights of those women who only wear the burqa in public because they are forced to, the ban will simultaneously violate the rights of women who freely choose to wear the burqa in public.<sup>160</sup> Alternatively, France could, for example, impose a partial ban, make agencies more available to Muslim women in abusive situations, or create laws that specifically target the men who force women to wear burqas.<sup>161</sup> Instead, the burqa ban

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156. *See id.* (indicating that it may be necessary to limit cultural practices to protect internationally recognized human rights of people negatively affected by such cultural practices).

157. *Id.* ¶¶ 18-19, 55.

158. *See id.* ¶ 25 (stating that states are obligated to immediately ensure the “equal right of men and women to the enjoyment” of the rights granted by the ICESCR). *But see* Doland, *supra* note 83 (noting that in March 2010, France’s highest administrative body stated that the burqa ban could not be legally justified by concerns for women’s equality or human dignity).

159. *See General Comment No. 21, supra* note 12, ¶ 19 (requiring limitations to be proportionate, meaning that states must choose the option that is the least restrictive when there are multiple ways to achieve the limitation’s goal); *cf.* Doland, *supra* note 83 (indicating that some politicians do not support a complete ban, but instead would limit the ban only to certain places, including government buildings, hospitals, and public transportation).

160. *See* Doland, *supra* note 83 (citing an Islamic scholar who said that even though the burqa ban would not violate Islamic law, it would still violate a Muslim woman’s personal freedom).

161. *Cf. id.* (discussing some French politicians’ views that a partial ban should be implemented and that the government should pursue educational projects instead of instituting a complete ban on burqas).

extends beyond providing women forced to wear the burqa with the freedom to stop wearing it and instead infringes upon the rights of women who choose to wear the burqa. The ban deprives these women of the ability to freely engage in a chosen cultural practice and risks the possibility that, instead of liberating women, the ban will cause them to withdraw from public life.<sup>162</sup> The scope of the burqa ban is overly broad as it merely replaces one obstacle to the full realization of cultural rights – men forcing women to wear the burqa, thereby depriving those women of the ability to fully participate in French culture – with another – the French government forcing women not to wear the burqa, thereby depriving those women of the ability to fully participate in a particular Muslim culture.<sup>163</sup>

Finally, by directly discussing violations of Article 15(1)(a), General Comment No. 21 illustrates that France's burqa ban is, in fact, a violation of the right to take part in cultural life. To demonstrate compliance with the obligations of the right to take part in cultural life, General Comment No. 21 requires that states parties show that the right is enjoyed without discrimination.<sup>164</sup> While France refuses to acknowledge minority groups based on the

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162. See Choudhury, *supra* note 136, at 204-05 (discussing the concern that, by forcing Muslim girls to choose between their education and religious beliefs, the 2004 French ban on headscarves in schools would cause the girls to drop out of school); *Man Jailed for Ripping Niqab from Saudi Student in Scotland*, SAUDI GAZETTE, July 27, 2010, <http://www.saudigazette.com.sa/index.cfm?method=home.regcon&contentID=2010072779286> (reporting that after a man ripped off a woman's niqab, exposing her face in public, the woman effectively became housebound because she was afraid to go out in public on her own for fear that the incident might happen again).

163. Compare Elizabeth Farrelly, Op-Ed., *Feminists Should See Through a Garment that Crudely Defines Women*, SYDNEY MORNING HERALD, Sept. 23, 2010, <http://www.smh.com.au/opinion/society-and-culture/feminists-should-see-through-a-garment-that-crudely-defines-women-20100922-15mwa.html> (arguing that the burqa is an obstacle to the exercise of equal rights because it diminishes the female existence to that of the property of men), with Doland, *supra* note 83 (noting a complete burqa ban would present an obstacle for women choosing to wear the burqa to exercise their rights because they wear the burqa not out of religious obligation, but as a personal freedom).

164. See *General Comment No. 21*, *supra* note 12, ¶ 60 (demanding that states show they took "necessary steps towards the full realization of the right to take part in cultural life" and that they guaranteed equal enjoyment of the right between men and women).

argument that doing so is analogous to discrimination,<sup>165</sup> the CESCR maintains in General Comment No. 21 that the first step in the elimination of discrimination is to “recognize the existence of diverse cultural identities.”<sup>166</sup> The French government interprets its commitment to equality and secularism as prohibiting the government from making distinctions based on race, religion, or origin.<sup>167</sup> Consequently, France does not recognize distinct cultural identities based on these factors.<sup>168</sup>

The CESCR is clear in General Comment No. 21, however, that violations occur when a state party fails to take the necessary measures to comply with its obligations under the right to take part in cultural life.<sup>169</sup> The inconsistency between the French position — denying recognition of minority cultures — and the position of the CESCR in General Comment No. 21 — requiring recognition of minority cultures — demonstrates that the CESCR will likely consider France’s refusal to recognize the Muslim minority culture and the right of Muslim women to wear a burqa or niqab as a part of their cultural life to be a violation of Article 15(1)(a).<sup>170</sup> In addition, a ban on burqas prevents access to a cultural practice, which is an

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165. See Third Periodic Report, *supra* note 68, ¶ 44 (refusing to recognize minorities as holders of collective rights because the French Constitution prohibits distinction among citizens based on origin, race or religion).

166. *General Comment No. 21*, *supra* note 12, ¶ 23.

167. See Choudhury, *supra* note 136, at 236-37 (defining *laïcité* as a uniquely French concept of state secularism that is enshrined in the French Constitution and “seeks to generate equality through sameness in the public sphere by relegating linguistic, cultural, ethnic, or religious differences to the private sphere”).

168. Cf. Henri Astier, *The Deep Roots of French Secularism*, BBC NEWS (Sept. 1, 2004), <http://news.bbc.co.uk/2/hi/europe/3325285.stm> (noting that France recognizes the individual instead of the group and maintains that “a French citizen owes allegiance to the nation, and has no officially sanctioned ethnic or religious identity”).

169. See *General Comment No. 21*, *supra* note 12, ¶¶ 60, 63 (stating that violations through omission include the failure to provide appropriate remedies to enable people to fully exercise their right to take part in cultural life).

170. Compare U.N. Human Rights Comm., Third Periodic Reps. of States Parties Due in 1992: Addendum (Fr.), ¶ 394, U.N. Doc. CCPR/C/76/Add.7 (May 15, 1997) (stating that “[s]ince the basic principles of [France’s] public law prohibit distinctions between citizens on grounds of origin, race or religion, France is a country in which there are no minorities”), with *General Comment No. 21*, *supra* note 12, ¶ 32 (emphasizing that the right to take part in cultural life “entails the obligation of States parties to recognize . . . minority cultures as an essential component of the identity of the States themselves”).

example of a violation of Article 15(1)(a) according to General Comment No. 21.<sup>171</sup> While France may have previously been able to use the ambiguity of the ICESCR to justify its ban on burqas, General Comment No. 21 clarifies that the ban is a violation of the right to take part in cultural life granted in Article 15(1)(a) of the ICESCR.

### III. RECOMMENDATIONS

The clarity provided by General Comment No. 21 does much to reinforce the importance and legitimacy of the right to take part in cultural life. Despite this progress, only with a functioning complaints mechanism can the rights granted by the ICESCR be fully afforded to individual citizens. By encouraging states to ratify the Optional Protocol, the CESCR would more quickly assure citizens of their states' compliance in guaranteeing these rights. While the progress made as a result of General Comment No. 21 is substantial, further clarification on the ability of states to limit the right to take part in cultural life would be useful to alleviate remaining confusion surrounding when such limitations are acceptable. Additionally, to further legitimize the gravitas of the rights granted in the ICESCR, the CESCR should impose specific repercussions to be faced by states when they violate their citizens' rights under the ICESCR.

#### A. THE CESCR SHOULD ENCOURAGE STATES PARTIES TO RATIFY THE OPTIONAL PROTOCOL AND SHOULD EMPHASIZE ITS IMPORTANCE IN ESTABLISHING THE SCOPE OF THE RIGHTS RECOGNIZED IN THE ICESCR

While General Comment No. 21 provides immense clarification on the scope and content of the right to take part in cultural life, a complaints mechanism for the ICESCR is necessary to truly legitimize the rights granted in the ICESCR and to demonstrate to states the appropriate ways to fulfill their obligations under the ICESCR.<sup>172</sup> The complaints mechanism created by the Optional

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171. See *General Comment No. 21*, *supra* note 12, ¶ 62.

172. See U.N. Preparatory Comm., World Conference on Human Rights, Geneva, Apr. 19-30, 1993, Contribution Submitted by the Comm. on Econ., Soc. & Cultural Rights, Annex I ¶¶ 32-34, 38 U.N. Doc. A/CONF.157/PC/62/Add.5 (Mar. 26, 1993) [hereinafter World Conference on Human Rights Submission]

Protocol will be instrumental in giving legal weight to the right to take part in cultural life.<sup>173</sup> With the threat of an international complaints forum, citizens will be afforded the legal support necessary to motivate states to better protect their citizens' cultural rights and to provide more effective domestic legal remedies for violations.<sup>174</sup>

The CESCR should encourage states parties to ratify the Optional Protocol and acknowledge the authority of the CESCR to hear complaints. This mechanism will allow for further development of economic, social, and cultural rights and will demonstrate the justiciability of these rights.<sup>175</sup> Through the use of a complaints mechanism, the CESCR could begin to encourage the international community to believe economic, social and cultural rights are equal to and require the same level of protection as all other human rights.

#### B. THE CESCR SHOULD AMEND GENERAL COMMENT NO. 21 TO CLARIFY THE ABILITY OF STATES TO LIMIT THE RIGHT TO TAKE PART IN CULTURAL LIFE

Despite General Comment No. 21's significant guidance for determining the legality of state limitations on cultural rights,<sup>176</sup> the

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(arguing that a complaints mechanism will provide: a concrete forum for individuals to seek relief; the development of case law and procedural processes; further insight into the complex issues that underlie the provisions; and a tangible outcome, all of which will promote a more widespread and detailed understanding of the ICESCR).

173. *See id.* ¶ 37 (positing that the possibility of an adverse "finding" by the CESCR would give economic, social, and cultural rights more legal weight because, while the CESCR's views would not be binding, they would be powerful legal opinions that the state could not ignore).

174. *See id.* ¶ 35 (suggesting that states prefer to handle claims domestically and the threat of an international forum encourages states to utilize local remedies).

175. *See* KITTY ARAMBULO, STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THEORETICAL AND PROCEDURAL ASPECTS 176 (1999) (arguing that the Optional Protocol of the ICCPR demonstrates that a complaints procedure clarifies the legal substance and scope of specific rights, while providing insight into the overall justiciability of socio-cultural rights); World Conference on Human Rights Submission, *supra* note 172, ¶ 33 (noting that a complaints procedure would produce a result from real conflicts relating to the rights granted by the ICESCR).

176. *See General Comment No. 21, supra* note 12, ¶ 19 (limiting the ability of states parties to restrict cultural rights by requiring that any state-imposed limitations embody a legitimate purpose, use the least restrictive measures

possibility for confusion and inconsistency remains in determining when a state can limit the right to take part in cultural life. The CESCR does not provide a standard or test for states to use when determining whether a cultural practice sufficiently infringes upon another human right to warrant the restriction of that practice.<sup>177</sup> The CESCR should adopt a balancing test that weighs the relative harm of the cultural practice against its relative value to those who participate in that practice.<sup>178</sup>

Under such a test, clearly harmful practices, like female genital mutilation, would be restricted while more contested issues, like the wearing of burqas, would be carefully weighed, examined, and determined to cause more harm than provide value before being restricted by the state.<sup>179</sup> To measure the relative harm and value of each practice, states could examine several factors including: whether the practice imposes upon individual freedoms, is physically harmful, is consented to by all parties involved, and whether it detrimentally affects third parties. Such a test would give states a concrete formula, minimizing confusion and encouraging the consistent application of Article 15(1)(a) throughout the international community.

### C. THE CESCR SHOULD AMEND GENERAL COMMENT NO. 21 TO IMPOSE REPERCUSSIONS FOR VIOLATIONS OF THE RIGHTS GRANTED IN THE ICESCR

General Comment No. 21 increases the understanding of which actions or inactions might constitute a violation of Article 15(1)(a),

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available, and be proportionate to the situation).

177. See *id.* ¶¶ 17-20 (requiring the least restrictive measures to be taken, but failing to supply a standard to inform states how to balance the interests involved).

178. Cf. U.N. Human Rights Comm., *Äärelä v. Finland*, Comm. No. 779/1997, ¶¶ 4.3, 7.5, U.N. Doc. CCPR/C/73/D/779/1997 (Nov. 7, 2001) (utilizing a test supplied by the HRC that finds a state action in violation of a community or an individual's cultural rights when the interference is "so substantial" as to effectively deny the complainants the right to enjoy their own culture); *General Comment No. 21*, *supra* note 12, ¶ 16 (stating that to respect the value that citizens place on their cultural practices, states must include individuals or communities in any decision-making process that may impact their cultural rights).

179. See *General Comment No. 21*, *supra* note 12, ¶ 64 (illustrating that failure to combat practices such as female genital mutilation would constitute a violation of Article 15(1)(a), thereby suggesting that the proposed balancing test would coincide with desired results).

but fails to elaborate on the consequences of such violations.<sup>180</sup> The CESCR needs to establish legitimate repercussions for violations of all the rights granted in the ICESCR.<sup>181</sup> Many states incorporated the provisions of the ICESCR into their domestic legal systems, providing individuals with the ability to bring claims in domestic courts.<sup>182</sup> Unfortunately, the courts in many of these states refuse to recognize the authority of the ICESCR,<sup>183</sup> which, when combined with the lack of an international complaints mechanism, effectively denies individuals relief for violations of their rights under the ICESCR.<sup>184</sup>

States will be further motivated to protect cultural rights when the Optional Protocol goes into effect.<sup>185</sup> Until then, the CESCR should amend General Comment No. 21 to impose repercussions upon states

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180. *See id.* ¶¶ 60-65, 72 (, leaving the responsibility for imposing consequences for violations solely to the state domestic system).

181. *Cf.* Audrey R. Chapman, *A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 23-24 (1996) (arguing that there is a need for a stronger method of monitoring economic, social, and cultural rights so they will be taken seriously and suggesting an approach that defines three categories of violations to the ICESCR: violations as a result of government policies or actions, violations regarding discrimination patterns, and violations due to a state failing to meet its minimum core obligations).

182. *E.g.*, 1958 CONST. art. 55 (Fr.) (stating that under the French Constitution, ratified treaties or agreements shall prevail over acts of Parliament). *But see Concluding Observations, supra* note 67, ¶ 13 (expressing concern that despite the French Constitution's affirmation of the primacy of international law, some French courts refuse to consider or apply the provisions of the ICESCR and have erected barriers to judicial remedies for violations of socio-economic and cultural rights). *See generally* Chapman, *supra* note 181, at 46-64 (detailing a list of countries that ratified or acceded to the ICESCR but categorizing years of specific violations by these countries).

183. *See* Chapman, *supra* note 181, at 49-65 (providing numerous examples of individual countries' failure to properly implement the ICESCR, including Sweden, Belgium, Hong Kong, Kenya, Canada, Iran, amongst others).

184. *Cf.* World Conference on Human Rights Submission, *supra* note 172, ¶¶ 33, 35 (concluding that a complaints procedure for the ICESCR would offer relief for tangible problems and suggesting that an international complaints forum would encourage states to ensure that domestic remedies are available so as to preempt international jurisdiction).

185. *See* ÖZDEN WITH NDAGIJIMANA, *supra* note 46, at 14 (articulating the benefits of adopting an optional protocol, including the development of case law, the "possibility of lodging a complaint against a violation," and the possibility of exacting punishment for violations).



it finds in violation of the ICESCR through the state reporting procedure instead of merely issuing recommendations to the violating state.<sup>186</sup> The CESCR should make violations more visible to the public and should disseminate information to international organizations and non-governmental organizations to place added pressure on these states to correct the violation.<sup>187</sup> The CESCR needs to, at the very least, hold states accountable for violations by ensuring that their reputations are at risk for violating the rights recognized in the ICESCR.

### CONCLUSION

The right to take part in cultural life is filled with complexity. France originally responded to this complexity by determining its own definition for the right, which was based on its ideals of secularism and its emphasis on a singular cultural identity. The ban on burqas and niqabs coincides with France's definition; however, the clarity provided by General Comment No. 21 rejects France's interpretation, and instead imposes a definition that encompasses the rights of minorities to take part in their own culture. Consequently, France's ban on burqas no longer fits within the internationally understood definition of the right to take part in cultural life. General Comment No. 21 makes violations of the right to take part in cultural life more easily identifiable, and therefore, the right may be better protected.

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186. See Chapman, *supra* note 181, at 27-29 (arguing that the failure of a majority of the states parties to the ICESCR to even comply with the reporting requirements demonstrates that the international community fails to exhibit the political will or capability to effectively monitor economic, social, and cultural rights).

187. Cf. Art Blaser, *Assessing Human Rights: The NGO Contribution*, in GLOBAL HUMAN RIGHTS: PUBLIC POLICIES, COMPARATIVE MEASURES, AND NGO STRATEGIES 261, 262 (Ved P. Nanda, James R. Scarritt & George W. Shepherd, Jr. eds., 1981) (discussing how NGOs play an important role in monitoring human rights violations because they do not wait for the development of implementation procedures, are independent of political forces, and are therefore able to "identify and criticize human rights violations wherever they may occur").