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THE MISSING POST-HOLOCAUST TRACES IN RECENT CASE LAW OF THE EUROPEAN COURTS

For in the end, it is all about memory, its sources and its magnitude, and, of course, its consequences.

Elie Wiesel[1]

Abstract*: The Holocaust constitutes one of the most powerful symbols in the history of humankind. Its memory, and in particular its irrefutable relationship with anti-Semitism, should trigger strict scrutiny every time anti-Semitic attitudes re-emerge, even if disguised as seemingly harmless words or actions. This applies also to legal measures, neutral on their face but which, in their consequences, may have an adverse effect on Jews, and thus raise the suspicion of anti-Semitic implications. Such implications are visible in the recent phenomena that serve as the two case studies for the present article: boycotts of Israel and bans on ritual slaughter (Shechita). While in the case of anti-Israeli boycotts, the core arguments relate to international anti-discrimination law and policies, in relations to the Shechita bans claims about violation of the religious freedom of observant Jews prevail. At the same time, in both cases strong references to the Holocaust and the memory of its victims are being invoked, allowing one to raise objections as to the status of the relevant legal developments. Here again history and memory enter into the public and legal discussions, legislative processes, and courtrooms.*

Keywords: Holocaust, boycotts, ritual slaughter bans, anti-discrimination law, religious freedom

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[1] E. Wiesel, *Night*, Macmillan, New York: 2006, p. 110.

INTRODUCTION

As noted by Saul Friedländer, the Holocaust raises problems that have so far not been resolved and constitute "the unease of the historian."[2] Even though in a different context, the same can be claimed in the case of lawyers and legal scholars, as the Holocaust to a great extent influenced the post-World War II legal universe that eventually led to the creation of international systems of human rights protection and international human rights law. Among other motivations, human rights law was implemented in order to prevent future genocides; to guarantee the rights and freedoms of minorities; and to tackle manifestations of discrimination, hatred and prejudice. While imperfect and too often ineffective, these guarantees should still be seen as the aftermath and the proof of the victory of the Holocaust memory, which can be encapsulated in the simple but powerful call: "Never again!"[3]

At the same time, and as a result of the sometimes turbulent changes in the social, political and economic spheres, this heritage has become somewhat problematic. Thus the question arises as to whether the arguments about the *Shoah* and anti-Semitism – the latter phenomenon closely related to this genocide, could counterbalance the claims and rights of those supporting the *Boycott, Divestment, Sanctions* movement (BDS), demanding the right to boycott Israel politically as a state (including also Israel's goods, services or academia[4]), and those seeking to introduce statutory prohibitions of ritual slaughter. At first glance, these two issues may seem to be completely different from each other: one is about an individual decision not to transact with some other people or institutions; and the other seems to be about a clash between religious freedom and humanitarian concern for animal welfare. But a closer reflection illustrates a common thread. The commonality is discernible in the underlying criteria of identifying groups and individuals in the society and the legal and moral principles about mutual respect between groups and in the society, and how they relate to each other. Their mutual relations often (in fact, more often than not) involve and engage with something about the past, and this "something" may be troubling or dramatic. The path dependence triggers dilemmas. The dilemma is, seemingly, much easier to realize in case of the boycotts.

[2] As referred to by Yehuda Bauer in Y. Bauer, *Rethinking the Holocaust,* Yale University Press, New Haven: 2000, p. 12.

[3] "Never again" is a phrase commonly associated with the Holocaust and other genocides. It is said to be used by liberated prisoners at the Buchenwald concentration camp to express their anti-fascist sentiment. Philogos, *What Is the Source of the Phrase "Never Again"?*, Mosaic, 21 June 2017, available at: https://bit.ly/3Pewt3t (accessed 30 June 2022).

[4] On the academic dimension of the BDS movement, *see*: M.D. Garasic, S. Keinan, *Boycotting Israeli Academia: Is Its Implementation Anti-Semitic?*, 15(3) International Journal of Discrimination and the Law 189 (2015).

As powerfully stated by Anthony Julius (famous attorney for Deborah Lipstadt in the court trial initiated against her by one of the most notorious Holocaust deniers, David Irwing):

> What happens when people are boycotted? The ordinary courtesies of life are no longer extended to them. They are not acknowledged in the street; their goods are not bought; their services are not employed; invitations they hitherto could rely upon dry up; they find themselves isolated in company. The boycott is an act of violence, although of a paradoxical kind – one of recoil and exclusion rather than assault. The boycotted person is pushed away by the 'general horror and common hate'.[5]

Leaving aside all the legal technicalities involved in assessing the discriminatory character of a given action or words, the above statement on the very nature of boycotting provokes reflections which are at the same time ethical, political, and legal. But also so does the most recent EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), whereby the European Commission explicitly undertakes to enhance support for various forms of strengthening Jewish presence in the EU Member States.[6] However, can this be done when the highest judicial body in the EU approves the ban on ritual slaughter,[7] which constitutes *a sine qua non* condition for the very existence of the Jewish religious community?

The underlying assumption of this article is simple: when a particular legal ban or authorization of a conduct raises even a slight suspicion that it may have been motivated by anti-Semitic views; or when the suspicion is that, even in the absence of such motivations, it may foster anti-Semitism, the rule should be subjected to a very strict legal scrutiny. This means that only a very strong proof of a pressing social need (to use the language of the European Court of Human Rights (ECtHR, or the Court), or a compelling purpose (to use the language of the Supreme Court of the United States) may redeem such a rule as legitimate, and this under a rigorous requirement of "necessity", i.e. upon a showing that such a rule is necessary to attain such a purpose or meet such a social need. This is a very demanding requirement when both criteria are taken together. Still, many regulations which

[5] A. Julius, *Trials of the Diaspora: A History of Anti-Semitism in England*, Oxford University Press, New York: 2010, pp. 482-483, quoted after: J.S. Fishman, *The BDS message of anti-Zionism, anti-Semitism, and incitement to discrimination*, 18(3) Israel Affairs 412 (2012), p. 413.

[6] European Commission, *Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030)*, Strasbourg, 5 October 2021, COM(2021) 615 final, available at: https://bit.ly/3Lic3DH (accessed 30 June 2022).

[7] *See generally* J.A. Rovinsky, *The Cutting Edge: The Debate over Regulation of Ritual Slaughter in the Western World*, 45(1) California Western International Law Journal 79 (2014) and W. Sadurski, A. Gliszczyńska-Grabias, *The Law of Ritual Slaughter and the Principle of Religious Equality*, 4 Journal of Law, Religion and State 233 (2016).

may be suspected of wrongful motives or reasons will pass the test: a strict scrutiny does not mean an unconditional invalidation. But also many regulations will have to be abandoned. Two such types of regulations to be subjected to this degree of scrutiny will be discussed in this article, and their common denominator is that both raise a strong suspicion of impropriety. The suspicion in both cases is moored in the tragic legacy of the Holocaust. In this way, the past radiates in the legal present.

The remainder of this article is organized as follows. Section 2 lists the most important examples of the memory of the Holocaust impacting international human rights law. Next, Section 3 discusses the legal implications of the anti-Israeli boycotts, including the wavering attitude of the ECtHR *vis-à-vis* this phenomenon. Section 4 offers an analysis of the recent legal controversies over *Shechita* bans, including the 2020 dictum of the Court of Justice of the European Union (CJEU), in light of the guarantees of religious freedom. The final section offers conclusions.

1. THE HOLOCAUST AND THE EMERGENCE OF THE INTERNATIONAL HUMAN RIGHTS PROTECTION SYSTEMS

The establishment of the universal system of protection of human rights within the UN was inextricably linked with the history of the Second World War and with the Holocaust. It is important to note that the leading Jewish organisations based in the United States, and in particular the American Jewish Conference, played an active role in focusing the UN on human rights issues, including the issue of countering racial discrimination.[8] This involvement was partly motivated by a conviction that the best protection of the rights of Jewish people is assured by making it part and parcel of a larger project of universal protection of human rights. As the then-President of the American Jewish Committee, Judge J.M. Proskauer noted, after the years of Nazi rule the whole world realized that violations of the rights of Jews are inevitably an attack of rights of all humankind.[9] Much later, in 2004, during the first ever conference of the United Nations devoted to the problem of anti-Semitism, Secretary General Kofi Annan recalled that the United Nations was named precisely in order to characterize a unity of the world's nations struggling against a murderous system, and that the UN was born after the world found out about the terror in the death camps. He added that the UN was raised "from the

[8] *See* American Jewish Committee, *The Jewish Position at the United Nations Conference on International Organization. A Report to the Delegates of the American Jewish Conference*, American Jewish Congress, New York: 1945; American Jewish Committee, *A World Charter for Human Rights. The Story of the Consultants to the American Delegation to the United Nations Conference on International Organization and their Historic Achievement – The Inclusion of Human Rights Provisions in the Charter of the New World Organization*, New York: 1948.

[9] J.M. Proskauer, *A Segment of My Times*, Farrar, New York: 1950, p. 216.

ashes of the Holocaust" and that no human rights system which overlooks anti-Semitism is faithful to the history of rights-related concerns.[10]

The same point can be made about the philosophical and political sources of the European human rights system. The orgins of the Council of Europe for the Council of Europe (CoE) are related to the reaction against Nazism, fascism and Stalinism, i.e. the totalitarian regimes which wrought unspeakable horrors, including genocide and mass repressions. In contrast, the CoE was based on the principles of the rule of law, respect for human rights, and democratic mechanisms of governance in modern European states. The CoE may be seen as providing a supranational guarantee for these ideals.

It is thus not surprising that the aftermath of the Holocaust was translated into the whole system of human rights and freedoms, including those enshrined in the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or the Convention). The protection of racial, ethnic and religious minorities; the prohibition of incitement to genocide and hatred; and general bans on discriminatory treatment can be seen as the response to the call of "Never again". All the legal instruments of international human rights law that are being used to counteract public manifestations of anti-Semitism should also be seen as an important part of this special legacy of concern.[11]

Obviously, there is also a certain risk embedded in this perspective: invoking the Holocaust and the need to fight anti-Semitism cannot be abused in order to restrict the rights and freedoms of others. The fight against anti-Semitism should never serve as an argument for enforcing interpretations of international human rights law which would breach the principle of balancing rights and freedoms and proper consideration of the facts of a given case. However it is argued herein that since the systems of human rights protection contain a number of tools which can and should be used also in the struggle against anti-Semitism, they thus can and should be used in all cases where boycotts against Israel can be characterized as actions motivated by anti-Semitism. Moreover, these tools can be also used even when the manifestly anti-Semitic character of the utterances accompanying boycotts is absent, but when its consequences adversely affect individual and group rights and freedoms protected in the human rights systems. In turn, when it comes to the *Shechita* bans, even though the anti-Semitic traces are much less visible than in the case of the anti-Israeli boycotts, the fact that such bans were traditionally

[10] The text of the speech is available at: http://www.un.org/press/en/2004/sgsm9375.doc.htm (accessed 30 June 2022).

[11] A. Gliszczyńska-Grabias, *Przeciwdziałanie antysemityzmowi. Instrumenty prawa międzynarodowego* [Combating antisemitism. International law instruments], Wolters Kluwer, Warszawa: 2014.

used against the Jews,[12] as well as that their introduction may lead to the whole or partial elimination of the presence of Jews in particular states and societies, should be given due attention and argumentation based on the legal guarantees aimed at protecting religious freedom should be invoked.

2. ANTI-ISRAELI BOYCOTTS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Boycotting Jews and Israel is not a phenomenon that has emerged recently. On the contrary: when it comes to the boycott of Jews both as a nation and as Jewish individuals, the history of such exclusion reaches back to the very beginning of the history of the Jewish people and their exclusion in Europe is as old as 'Europe' itself.[13] As a result, boycotting Jews in the political, social, and economic life of many pre-war European states was an element of the "prelude" to the genocide of the European Jewry. While some of the boycotts had an economic dimension, it is beyond dispute that they were mainly motivated by anti-Semitic sentiments, and resulted in deeply anti-Semitic actions with equally profound effects. This was most visible in Nazi-ruled Germany, where Jews were prevented from participating in various public activities. From the early 1930s militants of the SA (*Sturmabteilung*) formation barred customers from entry to Jewish-owned stores, the shops were plundered, and shop owners beaten up. Jews were denied access to employment in German firms, and in particular in big companies such as banks or insurance firms. However, other states used similar methods of exclusion and intimidation. Between the two world wars the Polish legislator adopted many legal provisions which, while ostensibly based on economic grounds, in fact were propelled by strong anti-Semitic convictions.[14] For instance, as a result of such convictions laws came into force which permitted punishing those students who would not comply with university rules about the segregation of Jews and non-Jews in classrooms, and also rules which made it virtually impossible for Jews to practice law.[15]

[12] *See e.g.* R. Fraser, *Anti-Shechita Prosecutions in the Anglo-American World, 1855-1913*, Academic Studies Press, Boston: 2018.

[13] As noted by Marc A. Greendorfer: "Before there was a BDS Movement, or even an Arab League or a State of Israel, there were boycotts against Jews, especially those advocating for the establishment of a modern state of Israel. (...) During the Ottoman rule of the land of Israel, which was commonly referred to as Palestine at that time, there were numerous calls for Arab boycotts of Jews. (...) Once the British succeeded the Ottoman Empire in the early 20th century and began to recognize the rights of Jews to their historic homeland, the Arab boycott of Jews in Palestine intensified (...) and quickly became a pan-Arab movement that threatened to expand into a boycott of British goods generally (...)". *See* M.A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, By Any Other Name, Is Still Illegal*, 22(1) Roger Williams University Law Review 1 (2017), p. 5.

[14] For a detailed analysis, *see*: S. Rudnicki, *Anti-Jewish Legislation in Interwar Poland*, in: R.E. Blobaum (ed.), *Antisemitism and its Opponents in Modern Poland*, Cornell University Press, Ithaca and London: 2005.

[15] *Ibidem*, pp. 162-166.

Inevitably, the association of the present BDS movement with the concept of "boycott" in the context of anti-Jewish attitudes from the Nazi era renders BDS morally problematic, to say the least. And even though the pre-Second World War slogans "Don't buy from Jews!" do not automatically translate into today's "Don't buy from the Israelis!", the highly negative impact – in some cases violations of human rights – on the Jewish people (whether referred to as "Israelis", "Zionists" or "Jews") caused by the boycotts serves as a common denominator.[16]

2.1. Anti-Israeli boycotts and the international human rights protection standards

For centuries Jews have been targeted by anti-Semitic hatred and discrimination, both as individuals and as a group. While such attacks often target particular persons, it is due to their membership in Jewish communities and of an ethnic, national, cultural or religious nature. Additionally, worldwide Jews are seen as a group which is associated with the state of Israel, irrespective of their own convictions and views. The protection of individuals against this "community-oriented" character of hatred and discrimination (clearly manifested in many boycott actions) remains a challenge for the international systems of human rights protection.

On one hand, the position according to which every criticism of Zionism or policy of Israeli authorities is a manifestation of anti-Semitism should be rejected as unfounded, and all guarantees of freedom of expression embodied in international law have to be respected. At the same time however, quite often such criticism is clearly, if not unambiguously, motivated by anti-Semitism. The extremely violent protests against Israel's military operation in Gaza staged by particular Scandinavian movements in January 2009 in Oslo – which turned into riots of an intensity unheard of in Norway for decades – are an example of this phenomenon.[17] It is thus not possible to make an *a priori* assumption that anti-Zionism or criticism of Israel have never been and cannot be interpreted as manifestations of anti-Semitism, especially when in the context of the Middle East conflict Jews are called "Zionist Nazis", "filthy germ", "blood-thirsty barbarians" and "the source of rottenness", while Israel is the "cancer of the world" or a "stinking corpse".[18] This is how this problem was approached in a "Le Monde" editorial of 6 November 2003:

[16] For a comprehensive report addressing the issue of how the BDS movement is engaged in an ongoing campaign of delegitimization against Israel; one which includes the use of antisemitic rhetoric and images, *see* Ministry of Strategic Affairs and Public Diplomacy of Israel, *Behind the Mask. The Antisemitic Nature of BDS Exposed*, 2019, available at: https://4il.org.il/wp-content/uploads/2019/09/MSA-report-Behind-the-Mask.pdf (accessed 30 June 2022).

[17] E. Eiglad, *The Anti-Jewish Riots in Oslo*, Communalism Press, Porsgrunn: 2010.

[18] Examples quoted by Alvin Rosenfeld and Irwin Cotler in: A. Rosenfeld, *The Holocaust and Beginning of a New Antisemitism*, in: A. Rosenfeld (ed.), *Resurgent Atisemitism. Global Perspectives*, Indiana University Press,

> Those who practice a discourse of systematic and one-sided denunciation consisting in demonizing Israel, as is customary in some European circles, do so beyond the area of criticism of government policy. With this rhetoric we are led to believe that a state of such a criminal character should be excluded from the family of nations. This is an almost unnoticeable transition from the criticism of government to the refusal of its right to exist. (...) It is a fact that anti-Israeli anger is excellent food for new anti-Semitism.[19]

It is for such reasons that coordinated, organized actions of boycotts of Israel and Israeli products, academics, or institutions – which are often represented as protests against drastic violations of human rights by Israel – can lead to multiple breaches of the human rights of persons who are not directly associated with the state of Israel, but rather identified through their Jewish background, which in turn is viewed in its national, ethnic or religious dimensions. As a result of the boycotts, these individuals of Jewish heritage – and entire groups – may experience discrimination, persecution, exclusion and intimidation. Their rights to personal dignity, safety, and often to freedom of expression, assembly and association may be violated. Frequently, prohibitions on hate speech contained in international human rights law are breached, and often boycott actions have the character of incitement to hatred based on ethnic or national origins – which is forbidden under various international treaties, including the International Convention against All Forms of Racial Discrimination.[20]

When considering various boycott actions against Israel which in fact target the Jews regardless of their connections with the state of Israel, one can draw an analogy with the theory of "harm in hate speech", as developed by Jeremy Waldron.[21] Waldron attaches special significance to various signs and symbols present in the public sphere, such as posters, graffiti, leaflets etc., which may constitute a constant and hostile element of the environment. Such elements are clear ingredients of boycotts, even (or especially) if they take the form of an official position of a particular institution or authority. Waldron concludes his book with strong statements which should be applied to the general debate about the limits of freedom of speech. He claims that we are often too lenient towards hate speech, putting it merely in the category of an "offense", thus forgetting or ignoring the real harms that it produces, which range from exclusion and insult to pogroms and purges. All these consequences violate human dignity and the right of vulnerable minorities to equal treatment.

Bloomington: 2013, pp. 525-529; I. Cotler, *Combating State-Sanctioned Incitement to Genocide: A Legal and Moral Imperative*, in: R. Provost, P. Akhavan (eds.), *Confronting Genocide*, Springer, New York: 2011, p. 141.

[19] Quoted after A. Glucksmann, *Rozprawa o nienawiści,* Czytelnik, Warszawa: 2008, p. 82. Translation by the author.

[20] Ministry of Strategic Affairs and Public Diplomacy of Israel, *supra* note 15.

[21] J. Waldron, *The Harm in Hate Speech*, Harvard University Press, Cambridge, MA: 2012.

The same conclusions can be drawn regarding the effects of boycott-related actions: they stigmatize the Jewish people as a whole, regardless of their real connections with the state of Israel. As such, it is an instance of unacceptable group responsibility imposed upon individuals who are completely innocent of any wrongdoing. It should be stressed that international human rights law, both in its universal and regional dimensions, does not allow such discriminatory treatment of individuals and groups identified on the basis of their ethnic, national or religious background.[22] Anti-discrimination law is very clear in finding the effects of a particular act or statement – when these effects may lead to discriminatory treatment – as determinative of a discriminatory intent (in a direct, indirect, or "discrimination by association" sense). As rightly pointed out by Walter Laqueur, in the case of the BDS movement a thorny issue concerns drawing the borderline between a legitimate criticism of the Israeli state, authorities and society (or even Zionism), and a concealed manifestation of anti-Semitism.[23] Therefore, in addition to advocating considerable caution before statements or actions hostile to Israel or Zionism are classified as anti-Semitic, it is also necessary to boldly take notice of and legally condemn those discriminatory human rights violations which are consequences of anti-Israeli boycotts.

2.2. Anti-Israeli boycotts in the view of the European Court of Human Rights

One of the most characteristic features of the CoE's system in the area of anti-discrimination and anti-hatred attitudes is its stance against anti-Semitism, racism, and xenophobia, deeply embedded in the entire European human rights protection system.[24] The strong connection between the commitments of the CoE and the Holocaust memory in Europe is visibly reflected in the jurisprudence of the ECtHR, to the extent that it allows letting the Holocaust memory and past influence the reasoning of the Strasbourg judges and their position towards historical disputes and interpretations.[25] So far, none of the complaints by Holocaust deniers

[22] *See generally* E. Heinze, *The Logic of Equality: A Formal Analysis of Non-Discrimination Law*, Routledge, London: 2018.

[23] W. Laquere, *The Changing Face of Anti-Semitism: From Ancient Times to the Present Day*, Oxford University Press, New York: 2008.

[24] The CoE strongly signalled its commitment to counteracting all forms of prejudice, including anti-Semitism, at the First Summit of Heads of State and Government of the member states of the CoE, held in October 1993 in Vienna. The then-adopted declaration and action plan "Combating racism, xenophobia, antisemitism and intolerance" allowed the CoE and each of its member states to set priorities in the fight against racism. Both documents are available here: https://bit.ly/3KZlYgZ (accessed 30 June 2022).

[25] For a detailed analysis of this phenomenon, *see* A. Gliszczyńska-Grabias, *Never Again as a cornerstone of the Strasbourg system: the traces of the Holocaust in the jurisprudence of the European Court of Human Rights*, in: H. Aust, E. Demir-Gürsel (eds.), *The European Court of Human Rights: Current Challenges in Historical Perspective*, Edward Elgar Publishing, Cheltenham: 2021.

or individuals publicly manifesting anti-Semitic statements or actions have been accepted by the ECtHR as legitimate, while the Court consistently refers to the Holocaust heritage and stresses the obligation to counteract all forms of anti-Semitism.[26] However, the attitude of the ECtHR towards the anti-Israeli boycotts cannot be perceived as belonging to the same category of the Court's case-law, but rather as concentrating on other aspects, including the freedom to participate in an open debate on important social issues. At the same time, the two judgments on the boycotts issued so far differ widely, and it seems that the Court's finding in the first case, *Willem v. France*[27] of a violation of the rights and freedoms guaranteed in the Convention, while not finding such in the second case, *Baldassi v. France*,[28] was based not only on the different circumstances in these cases, but also on the evolving position of the ECtHR.

The ECtHR's *Willem* judgment has for many years now been seen as the main proof of the thesis that various calls for the boycotting of Israeli products or citizens may be seen as acts which breach international human rights law. In 2002 the mayor of the French municipality of Seclin, Jean-Claude Willem, declared during a meeting of the Municipal Council, observed by the press, that he intended to boycott Israeli products in Seclin. He presented his decision as a protest against what was, in his opinion, the anti-Palestinian policy of Israel. Members of the local Jewish community lodged a complaint to the public prosecutor, who subsequently charged the later applicant to the ECtHR (i.e. Willem) with incitement to discrimination on national, racial, and religious grounds, as prohibited by the Press Act of 1881. Willem was acquitted by the Criminal Court in Lille, but later found guilty on appeal on 11 September 2003, and fined EUR 1,000. Subsequently he unsuccessfully appealed this conviction. In the complaint filed to the ECtHR Willem defended his action of calling for the boycott of Israeli products by his intention to participate in a public debate on the Palestinian-Israeli conflict, which was an issue of public interest. He claimed that his conviction in France was a violation of his right to freedom of expression as protected under Art. 10 of the European Convention.

However, the ECtHR found no violation by France of Willem's right to freedom of expression. While in general the Court always adopts special scrutiny whenever the restriction in a given case applies to political speech, and such state regulations have little chance of being approved by the Court in Strasbourg, nevertheless the Court determined that Willem was not punished for the substance of his political

[26] For examples of this attitude, *see* A. Gliszczyńska-Grabias, *Memory Laws or Memory Loss? Europe in Search of its Historical Identity through the National and International Law*, 34 Polish Yearbook of International Law 161 (2014).

[27] ECtHR, *Willem v. France* (App. No. 10883/05), 10 December 2009.

[28] ECtHR, *Baldassi and Others v. France* (App. No. 15271/16), 11 July 2020.

expression, but rather for an act of incitement to discrimination.[29] The Court observed that the target of mayor's criticism was not confined to Ariel Sharon's government, but involved an express call for a boycott of food coming from Israel. The Court also observed that the discriminatory character of Willem's conduct was further confirmed by the fact of posting a similar notice on the municipality's website, in addition to making such a call at the council meeting. The Court established that as a town mayor Willem was under an obligation to be in many ways neutral.[30] This was all the more so since he was administering a public budget, and so as far as public funds are concerned he should not have "advocate[d] spending them along the lines of a discriminatory logic."[31] The Court also rejected the claim that by his action Willem encouraged the free discussion of an issue of general interest. Inasmuch as he only presented his statement at a Municipal Council meeting, and with no debate or vote on the matter, Willem could not claim to have been encouraging the free discussion on a subject of general interest.[32]

The ECtHR's *Willem* decision also included an important dissenting opinion written by Judge Jungwiert. In it he strongly emphasized that freedom of speech in the context of public debate is of the highest importance and can only be limited for "compelling reasons" (*des raisons impérieuses*) which, according to the dissenting Judge, the Court failed to find. Judge Jungwiert produced some hypothetical examples: e.g. those of town majors calling for boycotting US products as protests against the US military intervention in Iraq; or Russian products as reactions to the conflict in Chechnya; or Chinese goods in order to protest the Chinese policies in Tibet. Judge Jungwiert emphasized that he was a firm believer in the principle that a democratic society must accept that such a debate must be carried out. This view, however, was not shared by the majority of the Court and remained an isolated one.

However, 2020 marked a significant change with the Court's judgment in *Baldassi*. The applicants were members of a local collective supporting BDS. They were prosecuted for calling on customers in a hypermarket not to purchase products from Israel, under the same provisions used in the case of *Willem,* i.e. the subsection of the Law on Freedom of the Press prohibiting incitement to discrimination against a group of persons on account of, *inter alia*, their origin or belonging to a specific nation. The applicants were acquitted in the first instance, but on appeal a suspended fine of 1.000 EUR was imposed, and they were ordered to pay damages to the Jewish associations appearing as civil parties. This time, more than 10 years after the judgment in *Willem*, the ECtHR found a violation of Art. 10 of the Convention.

[29] *Willem v. France*, para. 35.
[30] *Ibidem*, para. 37.
[31] *Ibidem.*
[32] *Ibidem*, para. 38.

It observed in particular that a boycott is primarily a means of expressing protest, and that a call for a boycott, as performed by the applicants, is thus covered by the protection set out in the guarantees of free expression. At the same time, as the Court stressed, incitement to discrimination is a form of incitement to intolerance which, together with incitement to violence and hatred, is not covered by the protection of free speech considered in the light of the standard of the Convention as developed by the Court.[33] Nevertheless the Court concluded that incitement to differential treatment is not necessarily the same as incitement to discrimination. Another point strongly marked by the Court was that the applicants had not been punished for making anti-Semitic remarks or for inciting to hatred or violence, and also that the store had not claimed any damages in the domestic courts.[34] What's more – and highly important in the context of the Court's assessments in cases concerning free speech – the actions and remarks imputed to the applicants had concerned a subject of public interest: Israel's respect for international law and the human rights conditions in the occupied territories.[35] Thus the Court found that the actions and remarks in question fell within the ambit of political expression, strongly protected under the Convention.

The core decisive aspects of the cases that allowed for the different conclusions reached by the ECtHR can be summarized as follows: in *Willem* the applicant had been acting in his capacity as mayor and using mayoral powers regardless of his obligations of neutrality and discretion. He had made the announcement of a boycott without a prior debate or vote in the Municipal Council, which meant that he could not claim to have encouraged free discussion on a subject of public interest. In contrast, in *Baldassi* the applicants were ordinary citizens who were not restricted by any duties and responsibilities arising from a public mandate and whose influence over consumers was not comparable to that of a mayor over his municipal services. The reason why the applicants had issued the calls for a boycott had been to trigger or stimulate debate among supermarket customers. At the same time however, no clear answer can be given to the question of why the Court confirmed, in its *Baldassi* dictum, that the issue of Israeli policies towards Palestinians and anti-Israeli boycotts falls within the purview of public interest debated by the French society, while such was not the case in *Willem*.

In particular, while the Court in *Baldassi* did address the question of a possible correlation between the boycott action of the applicants and its anti-Semitic undertone, it seems to have wrongly concluded that no such correlation had been detected in the *Baldassi* case. However, the most important missing element in both

[33] *Baldassi and Others v. France*, para. 46.
[34] *Ibidem*, para. 71.
[35] *Ibidem*, para. 78.

judgments issued by the ECtHR on anti-Israeli boycotts is the implementation of its well-established case law wherein it has repeatedly confirmed that contributing to an atmosphere of intimidation and exclusion of a particular national or ethnic group constitutes a blatant violation of the rights and freedom of members of such a group.[36] While this collective dimension of the harm caused by anti-Semitic discourse being freely circulated in public has recently been strongly emphasized in the Court's judgment in *Behar and Gutman v. Bulgaria*,[37] the Court nevertheless seems to overlook this aspect of the boycotts in its current reasoning. At the same time, it is yet to be seen how it would address the same phenomenon if a boycott was directed against a particular, individual Jewish person.

3. *SHECHITA* BANS AND THEIR IMPLICATIONS FOR THE GUARANTEES OF HUMAN RIGHTS AND FREEDOMS.

Despite decades-long efforts to counteract anti-Jewish attitudes throughout Europe and elsewhere in the world, Jews are still facing constraints on their religious freedom and other forms of discrimination and hatred. According to a survey conducted by the EU Fundamental Rights Agency between 2013 and 2018 in 12 EU Member States, more than one third of Jewish people living there said they were considering emigration because they no longer felt safe as Jews.[38] At the same time, half of respondents (49%) stated that they at least sometimes wear, carry, or display religious items that could identify them as Jewish. However, of those respondents who at least sometimes carried or displayed such items, over two thirds (71%) occasionally specifically avoided doing so in particular circumstances. As shockingly stated by one of the respondents, a woman aged 40-44 years old from Sweden: "I never wear any Jewish symbols publicly and I always look over my shoulder when I attend a Jewish event. (...) I only want to be left in peace and be able to practice my religion."[39]

There is no doubt that Jews wishing to observe their customs and traditions encounter various barriers and obstacles. Even if it is not the case that such obstacles are always motivated by anti-Semitic sentiments (despite clear historical analogies with obvious anti-Semitism[40]), they evoke various practices of restrict-

[36] *See* in particular: ECtHR, *Garaudy v. France* (App. No. 65831/01, decision on inadmissibility), 23 June 2003; *M'Bala M'Bala v. France* (App. No. 25239/13), 20 October 2015.

[37] ECtHR, *Behar and Gutman v. Bulgaria* (App. No. 29335/13), 16 February 2021.

[38] *Experiences and perceptions of antisemitism. Second survey on discrimination and hate crime against Jews in the EU*, EU Fundamental Rights Agency Report 2018, available at: https://bit.ly/3kX0wil (accessed 30 June 2022).

[39] *Ibidem*, p. 8.

[40] In Nazi Germany *Shechita* was banned, and Jews were persecuted for practicing it. Anti-Semitic motives were central in its vilification. *See* generally T. Kushner, *Stunning Intolerance: A Century of Opposition to Religious Slaughter,* 36 The Jewish Quarterly 216 (1989).

ing the religious freedom of Jews in Europe. For example, there has recently been a good deal of public outrage regarding circumcision, which many critics have found inhumane and called for its ban for persons under 18 years old.[41] A similar phenomenon arose regarding kosher animal slaughter, which has become one of the main battle cries of animal rights groups, but is very frequently based on firm political or ideological sentiments. In recent years ritual slaughter has been legally (sometimes partly) banned in the Netherlands, Belgium, Denmark, and outside Europe in New Zealand. Active campaigns addressed at banning either or both of these religious practices are currently taking place also in Germany, Switzerland, Luxemburg, Sweden, Norway, Finland, Poland, Australia, Canada, and even the United States.[42] At the same time, and more significantly, the question of kosher slaughter received an authoritative interpretation by the highest EU court, which declared that some bans are consistent with the EU law. This may be seen as a real challenge to the collective life of Jewish communities in Europe.

There are many animal slaughter procedures that religions and cultures practice around the world.[43] The two that are most commonly used and known are the *halal* and *kosher* methods practiced by Muslims and Jews, respectively. Both religious practices have been conducted by Jews and Muslims for centuries, and perceived as fundamental elements of the religious identities of the followers of these religions. In Judaism, *Shechita* is defined as the slaughtering of certain mammals and birds for food according to *kashrut* edicts. The origins of the obligation to respect the rules of *kashrut* and to observe *kosher* stem from the general principles of keeping kosher in the Torah. It includes commandments – called *mitzvahs* – to be followed as ways to obey God. Keeping kosher is one of them. Thus, for an observant Jew wishing to practice his/her religion in this particular aspect, it is of crucial and fundamental importance to have free access to food produced according to his or her religious demands. Denying such free access or imposing limitations that *de facto* lead to a lack of such free access translates into a direct violation of the rights and freedoms of individuals and groups. While eating meat has no spiritual or religious value in itself, the only meat religious and observant Jews can eat must be kosher meat. A vegetarian Jew does not violate *halakhah* in any way, but preventing access to kosher meat not only deprives religious Jews of the possibility of making

[41] In 2018 Iceland commenced a legislative process to introduce a male circumcision ban (other than for medical reasons), making it an offence with a penalty of up to six years imprisonment. Z. Caldwell, *Bill to criminalize male circumcision is still alive in Iceland*, Aleteia, 29 May 2018, available at: https://bit.ly/3FDTLvb (accessed 30 June 2022).

[42] For more details *see Legal Restrictions on Religious Slaughter in Europe*, The Law Library of Congress, Global Legal Research Center 2018.

[43] *See generally* Z.A. Aghwan, J. M. Regenstein, *Slaughter practices of different faiths in different countries*, 61(3) Journal of Animal Science and Technology 111 (2019).

a choice, but also imposes dietary restrictions on them which others are free of, and thus it introduces inequality before the law. Given that religiously observant Jews are obliged to kosher eating, preventing them from fulfilling their religious duties would limit such religious Jews' opportunity for religious fulfillment, in the sense of being forced to act against their religion.

3.1. *Shechita* bans and human rights protection

Religious freedom, of which the right to obey religious orders is one of the essential elements, belongs to the cornerstone of the entire history of establishing both a universal and European system of the human rights protection. In particular, in the context of the establishment of the CoE and the adoption of the ECHR, it should be noted again that they were aimed, *inter alia*, at introducing such protection of the fundamental rights and freedoms of vulnerable groups, which would thus make it impossible to repeat the crimes that took place during Second World War and the Holocaust (which were also motivated by religious considerations). The ECHR therefore contains explicit guarantees regarding the freedom of religion and conscience[44] and relating to non-discrimination,[45] as well as abuse of rights under the Convention and limitations on the use of restrictions,[46] for example by invoking freedom of expression to promote religious hatred. Also the EU Charter of Fundamental Rights (the Charter),[47] i.e. the document enforced by the CJEU in its judgment on *Shechita* bans, contains direct references to guarantees of religious freedom,[48] as well as to the rights of religious minorities[49] and the prohibition of discrimination.[50]

A whole series of arguments speak in favor of recognizing that *Shechita* bans most probably violate the Convention's rights on both religious freedom and discrimination on the basis of religion and belief;[51] despite the fact that in the only case of religious slaughter considered so far by the ECtHR (in 2000) it did not find a violation of the Convention as a result of the introduction of certain restrictions.[52] In that case the applicant association complained that the refusal of its application for approval infringed upon its freedom to manifest its religion through obser-

[44] Art. 9 of the Convention.
[45] Art. 14 of the Convention.
[46] Art. 17 of the Convention.
[47] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.
[48] Art. 10 of the Charter.
[49] Art. 22 of the Charter.
[50] Art. 21 of the Charter.
[51] *See e.g.* ECtHR, *Dimitras and Others v. Greece* (App. Nos. 42837/06, 3269/07, 35793/07 and 6099/08); 3 June 2010; *Jehovah's Witnesses of Moscow v. Russia* (App. No. 302/02), 3 June 2010; *Perry v. Latvia* (App. No. 30273/03), 8 November 2007.
[52] ECtHR, *Cha'are Shalom Ve Tsedek v. France* (App. No. 27417/95), 27 June 2000.

vance, as guaranteed by Art. 9 of the Convention. The applicants further asserted that they were victims of discrimination under Art. 14 of the Convention because the approval to obtain access to slaughterhouses that they sought was granted only to the Paris Central Consistory, the organization representing the majority of French Jews in France, and whose ritual slaughterers, the complaint argued, failed to examine the meat properly in order to certify it as kosher. In its decision finding a non-violation of the rights and freedom of the applicant, the ECtHR stated that there would have been a restriction upon the applicant's freedom of religion only if the bans on ritual slaughter in question would have prevented ultra-orthodox Jews from consuming properly kosher meat, which was not the case in *Cha'are Shalom Ve Tsedek,* as at that time it was still possible to import kosher meat from Belgium. The ECtHR's reasoning presented in the judgment was met with justifiable criticism. As observed by G. van der Schyff, "This type of reasoning makes for bad law and should consequently be rejected." [53] According to him, an undue burden was placed on the claimant of a right under Art. 9(1) ECHR, while such a claimant should enjoy maximum protection under said Art. 9(1), with any restrictions upon that right requiring a justification under the categories of derogation listed in Art. 9(2). According to van der Schyff, the Court's argument "neutralises the protection of religious freedom with little difficulty."

Despite the *Cha'are Shalom Ve Tsedek* decision, on the basis of the aforementioned international human rights law regulations it can be claimed that the rights and freedoms of the followers of Judaism who obey religious orders to eat meat only from kosher slaughter have a very strong basis in the European human rights law. Applicable restrictions on these rights and freedoms may not violate the foundation of religious freedom, which is the case when access to religious practices is effectively blocked by legal provisions and/or the application of a law in force. The problem of violations of the rights of individuals and groups affected by bans similar to those imposed in Belgium should be thus considered in several fundamental dimensions: violation of religious freedom; violation of the right to privacy; violation of the prohibition of discrimination; violation of the proportionality requirement; and the necessity to limit rights and freedoms in democratic societies. It also indicates the context of the protection of the rights of religious minorities, guaranteed under the relevant provisions of EU law and the national laws of individual EU Member States.

As has been indicated, freedom of religion and belief is admittedly not absolute and unlimited. The possibility of limiting it is specified both in international and national law, as well as in the relevant jurisprudence. When determining the premises

[53] G. van der Schyff, *Reviewing the recent Ban on Ritual Slaughter in Flanders*, Verfassungsblog, 16 August 2017, available at: https://verfassungsblog.de/reviewing-the-recent-ban-on-ritual-slaughter-in-flanders/ (accessed 30 June 2022).

for the introduction of restrictions, the most frequently indicated prerequisites are the obligation to expressly proscribe such restrictions in the applicable law, and to apply them only when they are necessary in a democratic society and state for its safety or public order, for the protection of the environment, public health and morals, or for protection of the freedoms and rights of others. Most importantly however, no restrictions may be imposed that violate the very essence of a given freedom or right. Notably, in the case of *Shechita* bans this very core element of religious freedom seems to be taken away from the observant members of the Jewish minorities. An additional and very important element at the centre of the issue at stake is the evolution of the legal and social perception of animal rights, which has been evolving for several decades now. One of the expressions of this approach was, *inter alia*, the adoption of the European Convention for the Protection of Animals for Slaughter.[54] Against this background, the question of how a society should balance competing values when a minority's religious rights conflict with animal protection is of utmost relevance. Through a mixture of legal and scientific arguments, such a balancing results in the conclusion that *Shechita* bans can violate rights and freedoms of observant Jews in a disproportionate way that is in contradiction with the standards of European human rights law.

3.2. CJEU Grand Chamber judgment in Case C-336/19

The judgment of the Grand Chamber of the CJEU issued in December 2020 in case C-336/19[55] came in response to a request for a preliminary ruling under Art. 267 of the Treaty on the Functioning of the European Union from the Constitutional Court of Belgium (*Grondwettelijk Hof*). The initial complaint was filed by the Coordinating Committee of Jewish Organizations in Belgium (CCOJB) against laws in Flanders and Wallonia mandating stunning before slaughtering, which is forbidden under Jewish religious law. It was alleged that the law, which was imposed in both the Flemish and the Walloon Regions and prohibits slaughtering without pre-stunning, amounts to a *de jure* and *de facto* ban on religious slaughtering. The CJEU decision results not only in the fact that these two major Belgian regions can in effect implement a ban on kosher slaughter, but that similar bans affecting Jewish minorities may be imposed throughout the EU.[56] Surprisingly, the decision issued was in contradiction to the arguments presented in the case by Advocate General

[54] The European Convention for the Protection of Animals for Slaughter, 10 May 1979, ETS No. 102.

[55] C-336/19 *Centraal Israëlitisch Consistorie van België e.a. and Others v. Vlaamse Regering* [2020], EU:C:2020:1031.

[56] For a broader context of religious freedom protection under EU law *see* N. Doe, *Law and Religion in Europe. A Comparative Introduction*, Oxford University Press, Oxford: 2011.

Hoogan,[57] who had recommended the CJEU to adopt a different conclusion (as further described below).

The case, as already indicated, raised the question of whether the laws introduced by the Flemish and Walloon Regions in Belgium which prohibit slaughter without pre-stunning – even in the context of slaughter conducted as a religious practice (including the Jewish *Shechita*) – is compatible with EU law. Jewish organisations advocated against what was alleged as the imposition of an outright ban on Jewish (and Muslim) religious slaughter, while acknowledging the need for less restrictive measures to ameliorate and minimize animals' suffering. They stressed that to forbid a community of faith to prepare their food in accordance with their religious obligations is *prima facie* a violation of the freedom of religion, and that the requirement of pre-stunning is discriminatory in nature, since it does not affect the majority of the citizens of the European Union but rather only specific minority communities.[58] Advocate General Hoogan, in his Opinion, recommended that the relevant legal rules to be considered by the Court of Justice should be understood as demanding that the states must not enact provisions which prohibit the slaughter of non-stunned animals when the slaughter is done as part a religious practice and, on the other hand, "for an alternative stunning procedure for the slaughter carried out in the context of a religious rite, based on reversible stunning and on the condition that the stunning should not result in the death of the animal."[59]

These arguments however were not shared by the Grand Chamber of the CJEU.[60] It found, in essence, that based on the concerns for animal welfare in the circumstances of ritual slaughter, Member States of the EU may require a reversible stunning procedure and this will not infringe upon the rights declared in the EU Charter of Fundamental Rights. On this basis the CJEU found that Regulation 1099/2009,[61] interpreted in the light of Art. 13 TFEU and Art. 10(1) of the Charter, does not ban national legislation which requires a reversible stunning procedure which cannot result in the animal's death in the circumstances of ritual slaughter. The argument of the Court relied on the determination that Regulation 1099/2009

[57] Advocate General's Opinion in Case C-336/19 *Centraal Israëlitisch Consistorie van België e.a. and Others*, 10 September 2020, ECLI:EU:C:2020:695.

[58] *See* the Statement by the World Jewish Congress, 17 December 2020, available at: https://bit.ly/3La97sl (accessed 30 June 2022).

[59] Advocate General's Opinion in Case C-336/19, para. 77.

[60] For an overview of argumentation against the bans, which was not shared by the CJEU, as well as a critical assessment of the judgment, *see* J.A. Rovinsky, *Don't have cow, Flanders: Guidance for the European Court of Justice as it considers the Flemish parliament's ban on ritual slaughter*, 97(2) University of Detroit Mercy Law Review 353 (2020) and L. Hehemann, *Religious Slaughtering, a Stunning Matter: Centraal Israëlitisch Consistorie van België and Others*, 6(1) European Papers 111 (2021).

[61] Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing OJ L 303, 18.11.2009, p. 1.

does not prohibit Member States from imposing a duty to stun animals prior to their slaughter which is also valid in the circumstances of ritual slaughter; under the condition however that in enacting such laws the States comply with the Charter's fundamental rights.

The CJEU acknowledged that by requiring, in the context of ritual slaughter, reversible stunning contrary to the religious precepts of Jewish and Muslim believers, the Belgian bans entail a limitation on the exercise of the right of those believers to freely manifest their religion. However, when assessing whether such a limitation under the Belgian laws is permissible, the CJEU found that the restriction upon the freedom of religion resulting from the law is indeed provided for by law and that it complies with the essence of Art. 10 of the Charter because it is confined to one aspect of the slaughter only, and that an act of ritual slaughter is not *per se* prohibited.[62] The CJEU then noted that the interference at stake meets an objective of general interest recognized by the European Union, namely the promotion of animal welfare. At the same time, in referring to the question of proportionality of the limitation the CJEU concluded that the measures included in the Belgian law strike a proper balance between the value of animal welfare and the importance of religious freedom for Jewish and Muslim believers.[63]

Serious legal consequences of the CJEU's position can already be noted. On 30 September 2021 the Constitutional Court of Belgium, after receiving and analyzing the response of the CJEU issued in case C-336/19 referred to above, decided to uphold two decrees adopted in the regions of Flanders and Wallonia banning religious slaughter.[64] The judgment is now final and the only further option for legal steps challenging these bans is to file an individual complaint to the ECtHR or to the UN Human Rights Committee, with a claim of multiple violations of human rights arising from the judgment of the Belgian Constitutional Court, including the violation of religious freedom, the principle of non-discrimination, and the right to privacy. Additionally, on 27 October 2021, Greece's supreme administrative court nixed the slaughter permit then currently binding in Greece, which had been issued by a ministerial decision that exempted ritual slaughter from the general requirement to stun animals prior to killing them.[65] It seems clear that such a conclusion by the

[62] C-336/19 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering,* para. 61.

[63] *Ibidem*, para. 65.

[64] H. Lyons, *Belgium's Jews lament ban on ritual slaughter*, Politico, 10 October 2021, available at: https://www.politico.eu/article/belgium-jewish-community-ritual-slaughter-ban-antwerp/ (accessed 30 June 2022).

[65] T. Joffre, *Greek court annuls permit for kosher, halal slaughter*, The Jerusalem Post, 27 October 2021, available at: https://www.jpost.com/diaspora/greek-court-annuls-permit-for-kosher-halal-slaughter-683274 (accessed 30 June 2022).

Greek court was reached under the new legal circumstances created by the CJEU's December 2020 judgment.

CONCLUSIONS

Undoubtedly the Holocaust, as the main symbol of the horrific genocidal past, still marks its presence today in numerous fields of social, cultural, economic and political life of the post-World War II world. Perhaps the most obvious evidence that the powerful call of "Never again" has been heard by the international community was the implementation of the international human rights law and creation of the international systems of human rights protection. These close relationships between the Holocaust past and contemporary legal developments have been emphasized in, *inter alia*, the jurisprudence of the ECtHR, in particular in the area of Holocaust denial and public manifestations of anti-Semitism. It seems, however, that the same connections were ignored when considering other issues related to the history of the Holocaust and the rights of people of Jewish origin, which are increasingly becoming the subject not only of public debates, but also of legal interference: i.e. with respect to anti-Israeli boycotts and *Shechita* bans.

In particular with regard to boycotts – which very often take the form of anti-Semitic demonstrations, the effects of which clearly violate the rights and freedoms of the Jews regardless of their real ties with the state of Israel – it is surprising and worrisome that the ECtHR has so far not addressed this aspect of boycotts when examining cases concerning this very issue. In turn, in the case of *Shechita* bans the arguments pointing to the legacy of the Holocaust as a commitment to support the rights of minorities, in particular in the context of their religious freedom, have not been taken into account, despite the fact that the common denominator of these issues seems to be the prohibition of discrimination, which is particularly firmly embedded in international human rights law. Thus one of the most important conclusions of the present article is that even if the Holocaust memory is omitted as an important aspect in considering the issues at stake, nevertheless the very standards of international human rights law suffice to argue that the anti-Israeli boycotts target Jews, both as individuals and as a group; as well as that *Shechita* bans violate the religious freedom of the observant Jews.

Simultaneously, other elements of the human rights protection framework developed within the EU and the CoE seem to take note of the continuing need of referring to the Holocaust, in particular while counteracting anti-Semitism. The EU's Fundamental Rights Agency continues to conduct valuable research and publish its reports on anti-Semitism in the EU Member States, including on its perception by the Jewish minorities. One of such reports, quoted above,

revealed that for 69% of Jewish respondents in 12 EU Member States a prohibition of traditional slaughter would be a problem and concern.[66] The same report states that among Jewish respondents who consider certain opinions or actions by non-Jews to be anti-Semitic (in terms of opinion and/or action), 82% indicated that they believe support for boycotts of Israel or Israelis are manifestations of anti-Semitism.[67] Also, the above-mentioned recent EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030) acknowledges not only the importance of Holocaust remembrance within the dimension of European human rights protection, but refers directly to the CJEU *Shechita* judgment and promises to facilitate "the exchange of practices between public authorities and Jewish and Muslim communities regarding slaughter based on religious traditions, drawing on the experience of international organisations such as the UN, OSCE-ODIHR and the Council of Europe."[68] It further addresses numerous instances of Israel-related antisemitism in the EU. Also the 2021 revised version of the CoE's European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 9 on preventing and combating anti-Semitism highlights the historical and moral heritage of the European commitment to fight anti-Semitism, In fact, it goes much further than the EU strategy by tackling the issue of anti-Zionism and anti-Israeli boycotts in a direct way.[69] The ECRI underscores, among other things, that the line between anti-Zionism and anti-Semitism is most often not clear-cut and that these two phenomena overlap. At the same time, it states that while anti-Zionists are not always anti-Semitic, the vast majority of anti-Semites are also anti-Zionists. Moreover, in its recommendations directed at CoE's governments, the ECRI calls for condemnation of "activities that promote boycotts of the State of Israel, its nationals or Israeli companies and institutions if such activities incite violence, hatred or intolerance,"[70] referring also directly to the ECtHR's *Baldassi* and *Willem* judgments.[71] However, one needs to stress that the above-mentioned positive developments lack the legal significance and authority of court judgments. Nonetheless the very fact that the complex character of issues such as the *Shechita* bans or the anti-Semitic dimension of some anti-Israeli boycotts is openly discussed is of great importance, as it keeps the discussion of these challenges going within the human rights protection discourse.

[66] EU Fundamental Rights Agency, *supra* note 38, p. 71.

[67] *Ibidem*, p. 29.

[68] European Commission, *supra* note 6, p. 15.

[69] ECRI General Policy Recommendation no. 9 (revised) on preventing and combating antisemitism, CRI(2021)28, para. 10, p. 8, available at: https://edoc.coe.int/en/racism/10309-ecri-general-policy-recommendation-no-9-revised-on-preventing-and-combating-antisemitism.html (accessed 30 June 2022).

[70] *Ibidem*, Recommendation no. 34, p. 14.

[71] *Ibidem*.

It is difficult to expect the law to meet all social needs or comprehensively address the issues of memory and historical heritage. In particular, one cannot demand that the law will always succeed in identifying and addressing deep connections between present practices and their underlying rationales which may or may not be questionable morally and politically. It seems however that in the examples discussed in this article these relationships are inseparable and the legal analysis should take into account a number of underlying rationales and assumptions which go beyond purely legal deliberations. However, this should be done with full respect for the legitimate rights and freedoms of those "on the other side" of the conflicting interests, worldviews and priorities; including both individuals and organizations calling for anti-Israeli boycotts as well as those defending animal welfare.