



**EUROPEAN AGUDAS YISROEL**

EUROPEAN JEWISH CENTRE FOR EDUCATION IN EUROPE  
EUROPEAN JEWISH CENTRE FOR LAWS AND PUBLIC AFFAIRS  
EUROPEAN JEWISH SOCIAL NETWORK

**JEWISH CEMETERIES AND MASS GRAVES  
IN EUROPE:  
PROTECTION AND PRESERVATION**

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***European and International Law***

Pr. Louis-Léon CHRISTIANS

*Law and Religion Chair, University of Louvain-la-Neuve*

*Expert, Religious Freedom, Council of Europe*

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# Draft for a Recommendation on the Protection and Preservation of Jewish Cemeteries and Mass Graves in Europe

Recalling the statutory mission of the Council of Europe to safeguard and realise the spiritual and moral values which are the common heritage of the member states,

Considering that the Shoah annihilated much of Europe's Jewish population and in many countries, none were left to care for the communal properties that represent a historic culture in the area and constitute an integral part of the Jewish religion,

Considering that the right to rest in peace is a common principle for humanity,

Considering the UN Covenant on civil and political rights, article 18,

Considering the European Convention of Human Rights, article 8, 9, and 14,

Considering the particular importance of this principle for Jewish law, particularly the holy status of burial sites,

Considering that the recurrence of desecration and abuse of Jewish cemeteries is a concern for international community and imposes certain legal and moral obligations on national governments,

Considering that the negative effect of unplanned economic expansion on Jewish cemeteries should be curbed urgently.

Considering that the protection and the preservation of Jewish cemeteries and mass graves in Europe becomes more and more essential as time goes by and the number of survivors declines

Considering the necessity to fight against any kind of religious discrimination

## **Article 1 - *Purposes of the Recommendation***

The purposes of the recommendation are :

- (a) to protect and to preserve the Jewish cemeteries and mass graves;
- (b) to ensure respect for and inviolability of the Jewish cemeteries and mass graves in Europe;

- (c) to raise awareness at the local, national and international levels of the importance and holiness of the Jewish cemeteris and mass graves, and of ensuring mutual appreciation thereof;
- (d) to provide for international cooperation and assistance;
- (e) to raise public awareness of the legal and humanitarian need to protect and to preserve Jewish cemeteries and mass graves in danger.

## **Article 2 - Definitions**

For the purpose of this recommendation,

- 2.1. A "cemetery " means any organised space where a community buries its deceased, whatever the nature of the grave
- 2.2. A "Jewish cemetery " or burial site means any space where a Jewish community buries its deceased
- 2.3. "Jewish burial sites " means either Jewish burial places or Jewish mass graves or Jewish individual grave
- 2.4. "Mass graves" means any space where human remains are buried collectively
- 2.5. "Inviolability " means the absolute intangibility *de jure* and *de facto*. It includes the inalienability, the inaccessibility and the imprescriptibility of the burial site. It guarantees also free access to the graves.
- 2.6. "Protection " means the guarantee by States against any violation *de jure* and *de facto* by public authorities or individuals, including against adverse possession, donation and sale.
- 2.7. "Preservation " means the positive obligations of States, public authorities and individuals to ensure the material maintenance of cemeteries and graves as well as the search for them and their identification using appropriate techniques.
- 2.8. A "fence " means any kind of material protection surrounding a cemetery, like a surrounding wall e.g.

## **Article 3 - Inviolability of Jewish Cemeteries and Mass Graves**

- 3.1. The inviolability of Jewish cemeteries and mass graves should be protected by law *de jure* and *de facto*. This protection takes into consideration the definition of Jewish religious law and has to be approved by rabbinical orthodox authorities recognized by the IAPPJCE.
- 3.2. The inviolability of Jewish cemeteries and mass graves generally aims at absolute and permanent respect, without alteration or displacement:

- of the human remains
- of the soil around the human remains
- of tombstones
- of the fence surrounding the cemetery

#### **Article 4 - *Preservation of Jewish cemeteries and Mass Graves***

- 4.1. States pledge to organise a programme for the material support for the location and preservation of Jewish cemeteries and mass graves
- 4.2. The preservation of Jewish cemeteries and mass graves includes at least:
  - the using, *de jure* and *de facto*, of non invasive technical devices for the location of graves (e.g. ground penetrating radar)
  - the using of technologies respecting Jewish religious law
  - the building of a surrounding wall funded by public authorities.

#### **Article 5 - *Access to Jewish cemeteries and Mass Graves***

- 5.1. The access to Jewish cemeteries and mass graves should be ensured by a free and reasonable way at any time while respecting Jewish practices governing access to cemeteries.
- 5.2. The access to presumed Jewish cemeteries or mass graves should be guaranteed at any time for all technical investigations and indentifications, (e.g. ground penetrating radar) with the purpose to ensure the preservation of the graveyard.

#### **Article 6 - *Implementation***

- 6.1. The public authorities, in consultation with rabbinical orthodox authorities recognized by the IAPPJCE shall make every possible effort to call all religious and juridical interpretation tools provided by public or private law which allow the sustainable protection and preservation of Jewish cemeteries and mass graves.

#### **Article 7 - *International Agency for the Protection and Preservation of Jewish cemeteries and Mass Graves in Europe***

- 7.1. An International Agency for the Protection and Preservation of Jewish Cemeteries in Europe - hereinafter referred to as "the IAPPJCE" - is hereby established within Council of Europe in order to establish a platform for follow-up and dialogue on the protection and preservation of Jewish cemeteries and mass graves.

## **Article 8 - Composition of the IAPPJCE**

The composition of the IAPPJCE shall be composed of representatives of European Agudas Yisroel [UN NGO] associated with :

- The Committee of Preservation of Jewish Cemeteries in Europe - CPJCE
- The World Association of Orthodox Jewish Rabbinic and Communal Leaders (European section)
- The European Jewish Center for Laws and Public Affairs
- Representatives of Council of Europe and European historical experts

## **Article 9 - Functions of the IAPPJCE**

The functions of the IAPPJCE shall be to:

- (a) promote the objectives of the recommendation, and to encourage and monitor the implementation thereof;
- (b) provide guidance on best practices and make recommendations on measures for the protection and preservation of Jewish cemeteries,
- (c) these measures aimed at ensuring the inviolability of the Jewish cemeteries and mass graves, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.
- (d) to appoint competent orthodox rabbis to consult with local and public authorities regarding issues of Jewish religious law affecting Jewish cemeteries and gravesites;
- (e) to raise public awareness of the legal and humanitarian need to protect and to preserve Jewish cemeteries and burial sites.

## **Article 10 - List of the Jewish Cemeteries and Mass Graves**

In order to ensure better visibility of the Jewish cemeteries and mass graves and awareness of their significance, and to encourage dialogue which respects cultural diversity, the IAPPJCE shall establish, keep up to date and publish a List of the Jewish cemeteries and mass graves .

## **Article 11 - International Cooperation**

Without prejudice to the provisions of their national legislation and customary law and practices, the Member States recognize that the protection and preservation of Jewish cemeteries and mass graves are of general interest to humanity, and to that

end undertake to cooperate at the bilateral, subregional, regional and international levels.

### **Article 12 - *Reports***

The IAPPJCE shall submit to the Council of Europe reports on the legislative, regulatory and other measures taken for the implementation of this recommendation.

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## Legal Executive Summary

1. The cemetery called 'the House of the Living' possesses thus a dimension that does not exist in many other traditions. Jewish cemeteries have even a higher holy religious status (Kedusha) than of synagogues as a result of their eternal dimension. The protection, access to and the preservation of Jewish cemeteries, due to the sacred status (Kedusha) conferred by their religious character, constitutes a central part of Jewish faith and are entitled to the international guarantee of religious freedom (art. 9 ECHR)
2. The Jewish law ascertains that the deceased person's wish is to have a perpetual burial place. The perpetuity of Jewish burial place is neither optional nor disputed. It is a unanimously recognized principle. The early purchase of a specific burial place is clear evidence of this wish for perpetual ownership.
3. The Jewish tradition of purchasing funeral ground, in order to guarantee their perpetuity, merits additional protection under the article on private property (art. 1 Prot ECHR)
4. The significance of Jewish cemeteries and mass graves also warrants their protection by right of the article on private and family life (art. 8 ECHR)
5. Ancient cemeteries, their apparent abandonment or their condition do not diminish the relevant guarantees mentioned above.
6. The historical responsibility of States concerning all expulsions of Jews and particularly in the aftermath of the Shoah reinforces their responsibility for the protection and preservation of Jewish cemeteries, burial grounds and mass graves, and makes them bear the corresponding positive obligations.
7. Violation of burial sites by individuals can be imputed to public authorities due to the recurrent character of such violation and makes them bear the corresponding positive obligations.
8. National measures - concerning management of Jewish cemeteries or with repercussions on their protection and their preservation - cannot be arbitrary, discriminatory or contrary to the principle of proportionality.

9. The right to rest in peace has been recognized by the European Court of Human Rights as a legitimate State principle, allowing contracting States to limit other fundamental rights.
10. National policies that guarantee the right to rest in peace, *de façon supérieure*, cannot be restricted by invoking the ECHR.
11. States that have such legislation are internationally bound to ensure its effective, non discriminatory and non arbitrary implementation.
12. States cannot be opposed to the use of legitimate techniques to locate possible burial sites desecrated in contradiction with international commitments or national standards. More specifically, the use of surface penetrating radar cannot be prohibited by States.
13. National modalities of protection and preservation must take into account the religious traditions stating the sacred character of these sites. Protection with a surrounding wall must be considered as an example of good practice.
14. The convergence of the national applications of the principle of protection and preservation of Jewish cemeteries and mass graves in Europe must lead to the progressive reinforcement of international protection levels.
15. International progress on the protection and the preservation of ancient cemeteries as cultural heritage must take into account the specific religious characteristics of Jewish burial sites and the religious prescriptions involved. It should not unduly reduce them to a 'patrimonial' or 'cultural' dimension.
16. The historical and collective aspect of the preservation of Jewish cemeteries, especially those that have been abandoned, calls for measures which are also collective and not only individual.
17. Present local Jewish communities cannot be considered as the only concerned by the protection and preservation of pre-war Jewish cemeteries but rather a large panel of national and international partners.

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## Introduction

The increasing number of violations of Jewish cemeteries in Europe, mainly in central Europe, has become more and more alarming. These violations represent a serious infringement of the principle of peace for the deceased, widely recognized by national laws. Not only do they constitute a violation of the common right to burial, right to ownership or violation of the protection of cultural heritage, but they also represent a violation of the fundamental rights guaranteed internationally, especially the freedom of faith on account of the specifically religious nature which Jewish Law confers to the perpetuity of Jewish graves, to their protection and preservation.

The responsibility of Jewish communities is most probably, in the first place, ensuring and enforcing the respect of this religious law through the various legal ways provided by national laws. However, leaving the burden of protection to Jewish communities is unlawful from the beginning, not only because ensuring religious freedom and fighting abuse are the responsibility of the States themselves but also because of the objective responsibility of the latter towards the historical context of the extermination, displacement or depletion of local Jewish communities.

Abuse against Jewish cemeteries in Europe is not limited to the recurrent violation of graves or mass graves. It also involves, in a more insidious way, the recurrent exploitation of disused cemeteries that were abandoned after the Shoah or after the exodus and/or expulsion of their founders. The inadequate management of town planning by public authorities and, more specifically in Central Europe, various forms of property misappropriation and/or the violation of the laws of protection of burial sites should also be criticized.

Ancient cemeteries are often simply destroyed and the land is used for lucrative purposes. Unplanned land development and ill-managed and speedy reorganisation easily lead to abuse, all the more so as the deceased's descendents are scattered all over the world and the local communities are weakened and destitute. The judicial status of these cemeteries can turn out to be a complex issue considering the variety of judicial situations of the burial sites and of Jewish communities. This status may also have been simply disregarded or forgotten due to a succession of political regimes.

Finally, we should not ignore the fact that the violation of cemeteries due to land development abuse could sometimes be linked with expressions of latent anti-Semitism.

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In the following pages we will focus on the international guarantees for the protection of rights within the European Council regulations and also in relation to the United Nations laws. These guarantees should also be considered through the convergence of *national* protection legislations, which will be underlined further on.

National legislation is indeed important in international law as an interpretation tool and as a stand still effect. Article 53 of the European Convention stipulates that 'none of the dispositions of the present Convention should be interpreted as restricting or affecting human and fundamental rights that could be recognized in accordance with the laws of any contracting party or any other convention to which the contracting party is bound.' Furthermore, the convergence of European legislation is a factor of reinforcement of international control.

We will successively examine the violation of Jewish cemeteries as an infringement of international guarantees:

- the freedom of religion
- the right to privacy
- the right of property
- the protection of cultural heritage
- and if need be, the right to non discrimination

The difficulties inherent to the protection of Jewish cemeteries do not only involve substantial issues concerning protected rights. They also involve procedural issues such as the administrative or judicial modes which allow rights to be claimed or opposed in practical terms. Therefore, the question of the 'personae materiae' admissibility of procedures (which can act or complain) is crucial: the disappearing local communities or the deceased' successors require a more global approach.

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## The protection of Jewish burial sites as a guarantee of religious freedom

According to Halachic laws (code of Jewish law), a body cannot be moved from its burial place. As soon as a grave has been closed, whether in private or common grounds, old or new, it is strictly forbidden to open it even with the intention of closing it again straight away. The earth around the body is also sacred. To ensure respect of this obligation and of perpetuity, Jewish law recommends the purchase of the grave. If there are no heirs or if they are not solvent the grave will be bought with community funds. 'Talmud' prohibits in general all graves transfers <sup>1</sup> except in a very few limited cases (for example in danger of flooding)

According to Jewish law, the soul of the deceased person remains in direct relation with the body and does not leave it. The promised resurrection will take place in the body of the man who hosted it in the last days before his death. The cemetery, called 'the house of the living' thus possesses a dimension that does not exist in many other traditions. Jewish cemeteries have even a higher holy religious status (Kedusha) than of synagogues as a result of their eternal status. For this reason, Jewish cemeteries unlike synagogues cannot be sold.

This radical specificity of Jewish graves or mass graves encourages the principle of protection of religious freedom in particular under article 18 of the UN Covenant on civil and political rights <sup>2</sup> and under article 9 of the European Convention of Human Rights<sup>3</sup>.

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<sup>1</sup> Cfr. Rabbi Elyokim Schlesinger, *La survie de l'âme après la mort selon la foi juive*.

<sup>2</sup> Art. 18 – 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

<sup>3</sup> Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

## Within the Framework of the Council of Europe

The ECHR has used various options in order to restrict the scope of 'expressions' of religious freedom. The status of Jewish cemeteries and burial sites has obviously 'passed' the different tests.

The notion of 'practices' should only apply to the '**part nécessaire**' of faiths or religions, their common and accepted expression or their 'actual' expression. The notion of 'practice' opens a wider space than that of 'cult' but does not include 'any behaviour motivated, inspired or influenced by religion'.

Judicial literature finds in a lot of judgements the idea that "required" behaviours or imposed by a religious prescription should be included in the protection scope of the Convention and not behaviours simply 'inspired' or 'motivated'. The imperative quality of a religion should determine its own specific field of relevance. The 'objective' aspect of this approach (as the Court puts it) presupposes an external religious corpus.

Thus the Court has already had the opportunity to turn their attention to the certification (authentication) of Jewish standards set by competent rabbinical authorities<sup>4</sup>.

Jurisprudence also shows that restricting a religion to its imperative character is not enough for their 'practical' expressions to be taken into account. In many cases, it is not the 'non imperative' nature of the religious practice which was referred to but what could be primarily referred to as 'lack of centrality'. The Arrowsmith decision founded the European jurisprudence in 1978.<sup>5</sup>

The status of Jewish cemeteries and burial sites unquestionably complies with the different tests mentioned above, as the specifically sacred status of human remains gives the **intangibility** of Jewish graves both central and imperative quality. The European court jurisprudence demonstrates this *a contrario* through the arguments it used to deal with other types of disputes concerning cemeteries.

In a decision dated 10 July 2001, *Johannische Kirche, Peters v. Allemagne*, n° 41754/98, about Protestant cemeteries the Court stipulated that contentious decisions could be analysed « as a restriction of the right to express your religion *due to the fact that they involved funeral rites* ».

In a decision dated 7 October 1987, *Daratsakis v. Grèce*, n°12902/87, the European Commission stipulated that: the applicant complains that he has to move

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2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

<sup>4</sup> Eur. Comm. H.R., 6th December 1983 (*Cohen v. France*), n° 10180/82, D.R., 35, p. 199

<sup>5</sup> Eur. Comm. H.R., 12th October 1978 (*Arrowsmith v. United Kingdom*), n° 7050/75, D.R. 19, 5

his father's grave, which is contrary to his religious convictions (...) the Commission reiterates its jurisprudence according to which no behaviour influenced or motivated by a religion or a conviction can be considered as protected under article 9 (art 9). Even if the behaviour of the applicant is a sign of a strong personal motivation, the Commission cannot consider it to be an expression of religion inasmuch as it could be interpreted as the coherent and essential expression of the applicant's religious convictions. The Commission also stresses that other people of orthodox Christian faith had voluntarily moved their family graves within the cemetery and that on the other hand, the Greek orthodox ecclesiastical authorities the applicant had turned to refused to act in his favour. Moreover, the applicant complained that he could not practise the rites and duties imposed by his convictions. However, the Commission states that the applicant failed to prove that moving the grave prevented him from accomplishing these religious duties, or how fulfilling his duties was a condition for keeping the grave in its original location. Under these terms, the Commission considers that his request, as it was put forward, does not prove any violation of the rights and freedoms recognized by the Convention, more precisely under article 9. (art 9)

The criterias adopted in the Daratsakis case are sufficient to demonstrate, on the contrary, the inclusion of Jewish burial sites in the scope of the European guarantee of religious rights. The protection of Jewish cemeteries is central and necessary because of their consecrated nature in Jewish law. Thus the negative appreciation of the European commission towards "individual convictions" concerning burial sites does not apply. Besides, the potential inertia of some local Jewish communities should not be so basically opposable to the admissibility of a request **on the grounds** of the socio-historical context of this inertia. The latter should not in fact imply the denial of the imperative nature of a religious prescription where it can be explained by the struggle for survival of these local communities, precisely after historical events that explain both the origin of the difficulties of ancient cemeteries and the present communities' fight for survival.

## Within the Framework of United Nations

As early as 1961 the Arcot Krishnaswami Report, *Study of Discrimination in the matter of religious Rights and Practices*, underlined how in the UN framework the issue of funeral rites, burial sites and religious cemeteries was an inherent part of international guarantees<sup>6</sup>.

(...) (v) *Arrangements for disposal of the dead*

*Burial grounds or cemeteries are normally operated by public authorities, by the Established Church or State religion, by recognized religious groups, or by private individuals. Regulation by public authorities of these grounds and of the burial,*

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<sup>6</sup> U.N. Doc. E/CN.4/Sub.2/200/Rev.1, U.N. Sales No. 60. XIV.2

*cremation, or other methods for the disposal of the dead is legitimate and unavoidable in the interests of morality, public order and the general welfare – including, of course, considerations of public health. However, in certain cases such regulation may lead to abuse, or be so unreasonable as to be discriminatory.*

*Where public authorities are responsible, burial grounds and cemeteries are usually equally accessible to all. But this very fact of equal accessibility may cause the followers of certain religions or beliefs to complain that such an arrangement is contrary to their faith and hence discriminatory. This objection is met, in many instances, by allotting separate cemeteries or burial grounds to various faiths, and reserving space for those willing to bury their dead in common ground. In addition, in some instances, the families of deceased persons are permitted to display the symbols of their faith, and to participate in their own religious ceremonies, at the common cemeteries or burial grounds.*

*Where the Established Church or State religion is responsible for the grounds, and its authorities have the discretion to refuse to bury certain individuals in sacred ground, either because they do not belong to that religion or because of the circumstances of their death, serious discrimination can occur unless alternative facilities for burial are made available. Moreover, where these authorities prohibit the ceremonies of other faiths, or the display of their symbols, discrimination ensues. But such instances are rare. Many countries having an Established Church or State religion provide special cemeteries or burial places for dissidents, where ceremonies according to their own faith may be performed.*

*Where separate burial grounds or cemeteries are operated by the various recognized religious groups, a problem arises when a person dies who belongs to none of those faiths. This dilemma is sometimes resolved by providing that, where there are no cemeteries or burial grounds available for members of a particular religion or belief, other groups must relax their restrictions. However, such groups may then feel that the prescriptions of their own faith are being disregarded, and that they are being discriminated against.*

*Where cemeteries or burial grounds are privately operated, religious or non-sectarian groups are usually free to establish and maintain their own, either directly or through a trust or a corporation. Here no problem arises except perhaps in the case of groups so small that they are not in a position to operate a cemetery.*

***In many areas funeral or commemorative rites are protected, either by law or by administrative action, against interference by outsiders, and cemeteries and burial grounds are protected against desecration. Criminal penalties are often visited upon those who disregard such laws. But if equal protection in this respect is not afforded to all faiths, either in law or in fact, discrimination results.***

*As a general rule the prescriptions of the religion or belief of a deceased person should be followed in the assignment of places for burial, cremation or other methods of disposal of the dead, in the display in such places of religious or other symbols, and in the performance of funeral or commemorative rites. Equal protection against desecration should be afforded to all places for burial, cremation or other methods of disposal of the dead, as well as to religious and other symbols displayed in these places, and equal protection against interference by outsiders should be afforded to the funeral or commemorative rites of all religions and beliefs.*

The special UN Rapporteur on Religious Freedom has maintained this position. In a 2004 Report<sup>7</sup>, he specifically included the protection of religious cemeteries in the 2004/36 resolution of the UN commission on Human Rights concerning the elimination of any form of religious intolerance “(e) To exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights standards, to ensure that religious *places, sites and shrines* are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction;” Point 48 of the Report precises :

*During the period under review, an important number of communications were related to situations or cases where either a place of worship or a religious building or property had been attacked or otherwise subjected to other forms of restriction. States to which such a communication has been transmitted are disparate and no region is spared this form of human rights violation. Moreover, the Special Rapporteur notes that in addition to places of worship, different types of buildings or properties that have more than a material signification for the religious community that is attached to it, such as cemeteries, monasteries or community headquarters, have been targeted. Finally, while attacks on such places have usually been committed by non-State actors, other forms of harm or restrictions were usually committed or imposed by State authorities.*

The UN Rapporteur’s position has been integrated in his *General framework for Communication, section “places of worship”*<sup>8</sup>. It has been reiterated in the report on religious rights at the 6<sup>th</sup> session of the UN Council of Human Rights on 20 July 2007 (A/HRC/6/5) and obviously applies to Jewish cemeteries, due to the sacred character conferred to them by their religious status.

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<sup>7</sup> E/CN.4/2005/61, Report submitted by Asma Jahangir, Special Rapporteur on freedom of religion or belief , 20 December 2004 COMMISSION ON HUMAN RIGHTS Sixty-first session Item 11 (e) of the provisional agenda CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF RELIGIOUS INTOLERANCE

<sup>8</sup> <http://www.ohchr.org/english/issues/religion/I3b.htm>

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## **The protection of graves and the right to rest in peace from the point of view of the protection of private and family life.**

The right to rest in peace is a general principle of humanity which further can be reinforced by the international protection of private and family life.

### **Whithin the Framework of the Council of Europe**

The right to rest in peace, interpreted as a right to privacy, is only admitted by the European Court of Human Rights as a right to be relied on by individuals who are alive (ECtHR, *Estate of Kresten Filtenborg Estate Of Kresten Filtenborg Mortensen c. Denmark*, 2006) . There seems to be no direct right to private life for the deceased himself that would guarantee the peaceful rest of their corpses but that on the other hand, the protection of the right to private and family life of the living applicants could be envisaged within their relation with deceased people.

*In Pannullo and Forte v. France, no. 37794/97, ECHR 2001-X, the Court found that a delay by the judicial authority in issuing a burial certificate and returning the body of a four-year-old daughter to the applicant parents constituted interference with the latter's right to respect for their private and family life.*

*In Znamenskaya v. Russia, no. 77785/01, 2 June 2005, the Court found that the domestic courts' refusal to establish the paternity of the applicant mother's stillborn baby and change its name accordingly violated her right to respect for her private and family life.*

*(In application no. 8741/79, decision of 10 March 1981, DR 24, p. 137, the former Commission found that the applicant's wish to have his ashes spread out over his own land was so closely connected to private life that it fell within the sphere of the said provision. The Commission found, however, that not every regulation on burials constituted an interference with the exercise of that right.*

The protection of the deceased person is confirmed within the right of private and family life invoked by a living person, as is the case in some of the cases mentioned above, e.g. *Panullo and Forte v. France*. The parents were awarded the right not to be separated from the corpse of their deceased child.

The Jewish law ascertains that the deceased person's wish is to have a perpetual burial place. The perpetuity of Jewish burial is neither optional nor disputed. It is a unanimously recognized principle. The early purchase of the ownership of a specific burial place is clear evidence of this wish for perpetuity. This wish is also a family wish. The right to rest in peace is therefore a clear family right for living persons along Jewish law. (see Jewish Law quotations).

### Within the Framework of United Nations

The UN committee on Human Rights, in a judgement against France on 29 December 1997 has expressly applied the guarantee of private and family life to the protection of ancient community burial sites in opposition to real estate plans.<sup>9</sup>

*10.3 The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life. The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.*

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<sup>9</sup> HRC Communication No. (CCPR/C/60/D/ 549/1993/Rev.1) [1997] UNHRC 40 (29 December 1997).

This decision establishes a clear link between the protection of cemeteries of individual communities and the protection of family life along a cultural approach. This protection is stated in favour of ancient or apparently abandoned burial grounds, even in a case where there was no relevancy of any religions. Furthermore, the human remains age exempts applicants from proving a direct line of descent with each deceased person.

This is even more the case regarding Jewish burial sites which very often contain the remains of leading personalities in Jewish life, history and culture. Such places are considered central religious sites for all Jews, even if there is no direct family lineage to the deceased person, since such personalities are considered as towering leaders of the Jews of all communities and Jews from all over the world still today refer to them and their written legacy.

For the UN committee, the age of the burial site does not affect the *wide* definition of familial relations. In accordance with the beliefs invoked by the applicants, the age of the human remains does not reduce the family relation but on the contrary, it *enlarges* it.

A larger family circle, increased over the years, provides a guarantee of its relation with the deceased of the community, who are presumed to have personal ancestors.

Moreover, the presumed descent of the deceased person and the faith that bound him to his original community widely surpasses the scope of the local religious community that would survive now. This is important for guaranteeing any Jew the right of access to any burial place even if the local Jewish community present today does not recognise or not understand that right. Such communities are not the legal heirs of the ancient communities which have purchased the burial ground for ever, and have therefore no right to dispose of such areas.

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## International status of national convergent principles relating to the right of the deceased to rest in peace

The importance of national legislations for the protection of the deceased's right to rest in peace, more specifically concerning private burial sites, has several international repercussions.

The Council of Europe, jointly with the OSCE, issued guidelines to that effect in 2004 (OSCE-ODHIR - Panel of Experts and Venice Commission, Guidelines for review of legislation pertaining to religion and belief, Venice, 18-19 June 2004, OSCE Parliamentary assembly, 5-6 July 2004, 58 pp).

*Guidelines CoE-OSCE, n°28: "States have a variety of practices involving the relationship between religion and cemeteries. In some cases, the State exercises complete control over the subject, and in others a great deal of responsibility is held by religious institutions. Although there are no clear rules governing the subject, the State should avoid discrimination among religious groups and permit, within reasonable grounds (particularly public health), the right to manifest religion and belief in this phase of the human condition".*

Among other international obligations are:

1. Article 53 of the ECHR: the Convention cannot be interpreted as a restriction of national more efficient guarantees.
2. The convergence test recognized by the European Court calls for reflection: where the principle of the right to rest in peace is generally recognized by national states, its authority must be progressively reinforced **within** the Court.
3. Obligation of effectiveness. The ECHR, in the case *Tysiac v. Poland*, n°5410/03 linked the guarantee of private and family life to the absence of arbitrary procedures from the State, even within the rights not explicitly guaranteed by the European Convention. The national principles of respect of the right of the deceased to rest in peace must therefore comply with the international obligation to be taken seriously by the State which invokes it, i.e. not to let the claims or internal policies be uncertain or arbitrary.

4. The ECHR has expressly recognized the deceased's right to rest in peace may be considered by national States as a legitimate limitation to some individual rights within the framework of a particularly wide assessment margin. The State itself must deal with the principles it evokes very seriously and coherently.

Where private and family life were opposed by individual parties against the perennity of graves or the deceased's right to rest in peace, the States are afforded by the ECHR the right to privilege the intangibility of cemeteries.

Even if the deceased persons can no longer be entitled by themselves to a subjective right of respect of their corpse, their protection can be ensured by a decision of the State on its own, against any trouble due to persons, whether it be family, fellow believers or third parties.

In a 17 January 2006 judgement *Poluhas Dobso c. Suède*, n°61654/00, the Court explicitly stated that "This assessment entails balancing the individual's interest in having a burial transfer against society's role in ensuring the sanctity of graves. In the Court's view, this is such an important and sensitive issue that the States should be afforded a wide margin of appreciation".

*« 1. The Government did not dispute that the refusal to grant permission to remove the urn from one burial place to another involved an interference with the applicant's private life. They maintained, however, that the interference was in accordance with the law, that it served legitimate aims and that it was justified under Article 8 § 2 of the Convention.*

*2. As to the legitimate aims, the Government observed that the principle of the sanctity of graves has a longstanding tradition and is founded on reverence for the deceased, common to all mankind and existing in most cultures. Thus, the strict approach taken by the law, and by the public authorities in its application, serves to prevent disorder and to protect morals in society at large. In addition, the Government submitted that this restrictive approach is also important in order to prevent conflicts arising amongst relatives on the subject. Moreover, cemeteries and burial places should not be regarded as temporary repositories for the deceased's remains or ashes. In other words, it may be said that what is at stake is the right of the living to be assured that, after death, their remains will be treated with respect. Thus, in the present case, the interference also served to protect the right of others.*

*1. As to the issue of necessity, the Government submitted that States should be afforded a wide margin of appreciation in cases of this kind, where the authorities and the courts have to balance the interests of the person requesting the removal with society's role in ensuring that graves are not disturbed. In addition, in the present case there were no indications that the applicant's husband had not been buried in accordance with his wishes; he was buried in the region where he had lived and worked for 25 years; he had settled in Fagersta with his wife at the start of their marriage and raised five children there; the burial site was a family grave, large enough for his entire family, eventually. It*

should also be noted that, after her husband's death in 1963, the applicant continued to live in Fagersta until 1980. Moreover, in the present case there was no obstacle to the applicant having her final resting place in the same cemetery as that of her husband.

2. The applicant disagreed with the Government and maintained that the burial plot in Stockholm is the "real" family burial plot, which is shown *inter alia* by the fact that the contract on it is irrevocable, whereas that in Fagersta is only temporary. In addition, the applicant's children have a connection with Stockholm but not with Fagersta any longer.

3. The Court reiterates that the concepts of "private and family life" are broad terms not susceptible to exhaustive definition (see, for example, *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III and *Pannullo and Forte v. France*, no. 37794/97, §35, ECHR 2001-X). It notes the findings of the former Commission that an applicant's wish to have his ashes spread over his own land fell within the sphere of the former notion (see application no. 8741/79, decision of 10 March 1981, DR 24, p. 137). However, in that case, the Commission also found, given the personal choices involved, that not every regulation on burials constituted an interference with the exercise of this right, and thus it declared the application inadmissible.

4. In the present case the Government have not disputed that the refusal to allow the removal of the urn involved an interference with the applicant's private life. The Court does not consider it necessary to determine whether such a refusal involves the notions of "family life" or "private life", cited in Article 8 of the Convention, but will proceed on the assumption that there has been an interference, within the meaning of Article 8 § 1 of the Convention.

5. Accordingly, it must be determined whether that interference was justified under Article 8 § 2 of the Convention, or more specifically whether the domestic authorities and courts were entitled to consider that the refusal to move the urn was "necessary in a democratic society" for the prevention of disorder, for the protection of morals, and/or for the protection of the rights of others. This assessment entails balancing the individual's interest in having a burial transfer against society's role in ensuring the sanctity of graves. In the Court's view, this is such an important and sensitive issue that the States should be afforded a wide margin of appreciation.

6. In the present case, on the one hand, the removal of the urn appears, in practical terms, to be quite easy and no public health interests seem to be involved. On the other hand, there are no indications that the applicant's husband was not buried in accordance with his wishes, on the contrary. In principle, it must be assumed that account was taken of any such wish when the burial took place. Moreover, at the relevant time, although having no connection to Stockholm, the applicant's husband, the applicant, or both together, could have chosen that he be buried with his in-laws at the family burial plot in Stockholm, established in 1945. Instead, in 1963 when the applicant's husband died, the family burial plot in Fagersta was established and he was buried there, in the town where he had lived for 25 years, since his arrival to Sweden, and the town where he had worked and raised his family.

7. Finally, nothing prevented the applicant from having her final resting place in the same burial ground as that of her husband, albeit in Fagersta, the town where she continued to live until 1980, 17 years after her husband's death.

8. *The Court finds that the Swedish authorities took all relevant circumstances into consideration and balanced them carefully; the reasons given by them for refusing the transfer of the urn were relevant and sufficient; and the national authorities acted within the wide margin of appreciation afforded to them in such matters.*

9. *Accordingly, there has been no violation of the applicant's rights under Article 8 of the Convention. »*

The observations concerning the stable and consecrated character of burial sites are made by the Swedish state and not by the European court but the latter recognizes them explicitly as legitimate limits to any individual rights to transfer human remains.

We can also note that the applicant attempted to oppose the deceased person's wish to the principle of intangibility of burial sites. The court stresses the role of this wish. It also takes into account the deceased person's choice of their first burial site.

Concerning Jewish cemeteries, the wish of deceased Jews is clear and not to be disputed: the very fact that their human remains are in a religious cemetery is the confirmation of their primary wish for perpetuity manifested through the purchase of religious burial grounds. According to Jewish law there is no way to move the human remains from their resting place and that the wishes of the deceased must be honoured. Even if such wishes were not explicitly made –as it would be the case with burial grounds from the time of war – the sanctity of Jewish graves and the pivotal religiosity of the deceased persons buried there gives it a status as immutable as if it were a purchased burial plot.

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## The protection of graves of deceased persons due to war (Conventions of Geneva)

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

« **Art. 130.** The detaining authorities shall ensure that internees who die while interned are honourably buried, if possible according to the rites of the religion to which they belonged and that their graves are respected, properly maintained, and marked in such a way that they can always be recognized.

Deceased internees shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his expressed wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased. The ashes shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request.

As soon as circumstances permit, and not later than the close of hostilities, the Detaining Power shall forward lists of graves of deceased internees to the Powers on whom deceased internees depended, through the Information Bureaux provided for in Article 136. Such lists shall include all particulars necessary for the identification of the deceased internees, as well as the exact location of their graves. »

### Official Commentary CICR :

Respect for the dead is one of the most ancient ideas of civilization. In codifying humanitarian law, the 1929 Convention relative to the Treatment of Prisoners of War proclaimed this principle in Article 76, paragraph 3 Database 'IHL - Treaties & Comments', View '1. All treaties \1.2. Articles'. The present text, however, adds two notions to the text of 1929: the recommendation that the dead should be buried according to the rites of the religion to which they belonged and the obligation to mark graves in such a way that they can always be found again.

The first idea is the subject of a recommendation only, since it may happen that the observation of some rites may be particularly difficult (2), or that the

maintenance of public order might be made difficult if certain rites are carried out which may provoke hostile reactions among the people. However, tolerance is the very spirit of the Geneva Conventions, and it may be hoped that with encouragement from Governments (3), this spirit will spread more and more among the masses so that this recommendation, on a point very important for the honour of families, can always be observed.

The necessity to put clear and permanent markings on places of burial corresponds to the just desire of the relatives of the deceased to visit the grave or to remove the mortal remains as soon as circumstances permit. The Convention does not state how graves should be marked. The practice of placing individual markings on the grave [p.507] showing the surname, first name and date of birth of the dead person in detail and in a durable fashion, is, however, particularly to be recommended to belligerents wishing to fulfil their obligations. The same applies to ashes in the case of cremation, as mentioned in the following paragraph.

#### PARAGRAPH 2. -- COLLECTIVE GRAVES. CREMATION

However desirable it may be to have individual graves properly marked, advocated as the general practice by the Convention, the Article does allow for exceptions. These would be valid for reasons of 'force majeure', during an epidemic, for example, if the death of an excessively large number of persons created a danger of infection which did not allow time for the digging of individual graves, or again if warlike operations obliged the Detaining Power to retreat and before retreating and for lack of time it undertook collective burials in the interests of public health.

Similarly, the general rules for burial do not apply in case of cremation. The preparatory work on the Convention shows, however, that cremation is thought of as an exceptional measure, since the opinion of the experts was in general against the practice (4). For that reason, cremation is only compatible with respect for the Convention if certain very strict conditions are observed. It must be based on reasons of public health, or the expressed will of the deceased person, or the customs of his religion. The reasons must be explicitly stated on the death certificate. In the same way as the previous paragraph provides for the maintenance and marking of graves, the Detaining Power must preserve and mark ashes, which must be kept for transfer to the family of the deceased. Ashes in general will be placed in urns which will bear, clearly marked, all the information which should normally be placed on a grave. These urns will be placed in a suitable spot and protected against any sacrilegious act.

#### PARAGRAPH 3. -- EXCHANGE OF INFORMATION

This Article is designed to give effect to the previous two paragraphs. The 1929 Convention relative to the Treatment of Prisoners of War did not provide for information being transmitted until after the end of hostilities, whereas the present text states that the information must be transmitted as soon as circumstances allow. This sanctions the practice during the Second World War, when information [p.508] was generally transmitted during hostilities, sometimes even by telegraph, when the slowness of mail and the distance of places of internment justified such a measure (5).

The services of the Information Bureaux provided for in Article 136 Database 'IHL - Treaties & Comments', View '1. All treaties \1.2. Articles' are particularly useful for notifying families of the distinguishing features of the graves. It will be understood that notification of death through diplomatic channels will only contain very brief information concerning the grave. It is for the Power of which the members of the family are nationals to inform them, with the help of the Agency, so that the provisions of the Convention on the marking and maintenance of the graves can be observed. »

### Prot. Add. I (1977) Art 34. Remains of deceased

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.

2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:

(a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;

(b) to protect and maintain such gravesites permanently;

(c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.

3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country or such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

4. A High Contracting Party in whose territory the grave sites referred to in this Article are situated shall be permitted to exhume the remains only:

(a) in accordance with paragraphs 2 (c) and 3, or

(b) where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country or its intention to exhume the remains together with details of the intended place of reinterment.

Official Commentary by the ICRC :

“1193 In principle the Parties to the Protocol are only required to apply it in order to resolve problems relating to the consequences of conflicts breaking out between them or relating to the aftermath of such conflicts. Obviously we would not wish to defend the idea of retroactive application of the Protocol, but even so it is to be hoped that Parties bound by it will refer to it to resolve problems still unresolved at the end of a conflict which had ended before they had become bound by the Protocol. Questions relating to missing persons, and to an even greater extent, those concerning the remains of the deceased, actually pose problems well after the end of an armed conflict. »

« 1195 The question whether some provisions of this Section should impose obligations on a Party to the conflict vis-à-vis its own nationals was discussed repeatedly in Committee II. The Committee's intentions, as clearly expressed, were ultimately not to impose any such obligations: in fact, the report of the Working Group on this Section adopted by Committee II contained a paragraph in square brackets (Article 20 quater, paragraph 5), which provided that: "this Section does not impose on any High Contracting Party or Party to a conflict obligations with regards to its own nationals". Although this paragraph was later deleted by consensus, this was, according to the report by Committee II, "because it was self-evident that the article did not apply to a Party's own nationals". (13) »

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## The protection of Jewish Cemeteries through the international protection of property or heritage

This concerns both the protection of the private ownership of individual assets and the protection of heritage considered as collective interest. Jewish cemeteries can claim both aspects.

### 1. Guaranteeing the right to property

Most Jewish cemeteries enjoy the status of private property. Thus, jurisprudence on expropriations are pertinent to oppose certain spoliatory facts or misuses. Permanent plots in public cemeteries should enjoy the same status.

In both cases, the state can only in very limited cases and under very strict and binding rules violate the rights guaranteed under this Article”.

*Article 1 Prot. Add. 1 : Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

Bearing in mind that the judicial status of ancient cemeteries might be totally different from one country to the next, more specifically concerning the regime of private property or public allocation, the scope of potential guarantees should be further increased. It is of utmost urgency that general rules of protection be implied and enforced.

As we mentioned earlier, the implicit anti-semitic character of numerous abuses of Jewish cemeteries calls for reflection in terms of non-discrimination on the one hand and of limitations of illiberal practices on the other. This must lead to

renewed general policies supporting and strengthening the rights of property of Jewish cemeteries.

The apparent abandonment of many cemeteries does not modify in any way the scope of the rights mentioned in this resolution. Moreover, the abandonment of Jewish cemeteries is in itself the consequence of the historical suffering undergone by Jewish people in particular during the past centuries, for example after the Jewish banishment from Spain, and especially during the Shoah, hence the individual responsibility of the States is augmented. This should also be stressed in the case of the localisation of the cemeteries which have suffered unlawful infringement. This localisation can prove difficult due to the wide scope of infringement or desecrations, in particular regarding the theft of tombstones, generally stolen for use as building material. Technical devices should be used (for example surface detection with georadars) in order to locate cemeteries whose very aspect has disappeared through reorganisation carried out since World War II. The States should bear responsibility to cover the cost of these technical investigation devices – or at least allow and support the use of those devices.

Should public authorities prohibit or oppose the use of technical devices to investigate these sites, properties and graves protected by international regulations, they are in breach of and violate the international agreements referred to above.

## 2. Burial ground as cultural heritage.

Further guarantees should be granted in terms of the protection of cultural rights and cultural heritage. This category allows the inclusion of historical contexts of the situation of ancient Jewish cemeteries, as well as the collective nature of the Jewish Diaspora's expectations towards them: Article 27 of the UN Pact of Civil Rights (1966) along with the Framework agreement of the Council of Europe on the value of cultural heritage (2005 - not in force) and at least by analogy the framework Agreement of the European Council on national minorities (1995)

*Article 27 UNCCPP : 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 practice their own religion, or to use their own language.*

*Article 2 Framework Convention Cultural Heritage : For the purposes of this Convention, - cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time; - a heritage community consists of people who value specific aspects of cultural heritage*

*which they wish, within the framework of public action, to sustain and transmit to future generations.*

**Article 5 Framework Convention National Minorities :** 1. *The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.*

2. *Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.*

The European Convention for the protection of archaeological heritage (1969) could be applicable in many cases: “following the present Convention, are considered as archaeological assets the remains, objects or any other traces of human manifestations, which constitute a testimony of eras and civilisations whose main - or one of the main - scientific sources of information comes from excavations or discoveries”.

The European Convention on violations of cultural assets (1985) established a list of infringements (destruction, degradation, misappropriation, etc...) but limits its scope of application (annex 2.1 f), where funeral matters are concerned, to funeral remains older than 100-year. Article 2.3 of the Convention stipulates that: “Any contracting State may at any time declare that it also considers as a cultural asset one or several categories of personal or real estate assets of an artistic, historical, archaeological, scientific or any other cultural interest not mentioned in annexe II.”

Recommendation R (96) 6 of the Ministers’ Committee of the Council of Europe on the protection of cultural heritage (19 June 1996) recommends a global prevention plan:

1. *The formulation of plans to protect the cultural heritage should begin with a systematic analysis of risks. This involves two stages:*
  - *identifying the risks for the heritage item studied;*
  - *assessing the probability of identified risks and their consequences.*
2. *The calculation of the damage likely to result from any particular risk should take into account:*
  - *the probability of the risk occurring;*
  - *the seriousness of the risk's harmful consequences.*
3. *Various factors should be considered in determining the probability of any particular unlawful act:*
  - *physical conditions: the type of heritage item concerned, the nature of the building (museum, cathedral, etc.), the place and characteristic of its location, existing protection, etc.;*
  - *conditions of use of the building (opening hours, number of visitors);*
  - *the heritage item's historical, cultural and social value and its intrinsic financial value;*
  - *sociological data, such as the frequency of unlawful acts, crime statistics, etc.;*
  - *knowledge of the modus operandi of the authors of unlawful acts and of the specific equipment used;*
  - *means of intervention by public services: location, importance, priority, etc.;*

4. a. According to the commonly used methods of risk analysis, each potential unlawful act should be classified on a four point probability scale (unlawful act highly unlikely, unlikely, probable, very probable).

b. To determine the seriousness of an act's consequences it is necessary to estimate the impact which any loss would have from the historical, cultural, economic and social points of view. Such impact should be classified on a four point scale of seriousness (minor consequences, significant, very serious, disastrous).

5. By combining the degree of probability of an unlawful act and the degree of loss (4.a and 4.b), the risk involved can be classified into four levels of risk (low risk, medium risk, high risk, catastrophic risk).

6. Once the level of risk is determined, a multidisciplinary working party (including those responsible for the heritage item concerned, security specialists such as civil security, police, firemen, and representatives of public services) shall determine the measures of protection to be implemented.

The 2005 Framework Agreement, not in force up to now, indicates various relevant options for the protection of religious sites. The 'framework' character of this convention shows in all potential cases the evolutionary and participative nature of the protection plan. The objective is to combine national policies and common perspectives. The multi-centred character of the Convention should be stressed: are considered not only the formal aspects of protection but also their economic, political and procedural characteristics, like the participation of the different communities involved. These various aspects and their articulation should inspire a European plan of action for the conservation of Jewish cemeteries.

Some provisions are of particular interest:

*Article 7 – Cultural heritage and dialogue : The Parties undertake, through the public authorities and other competent bodies, to: a) encourage reflection on the ethics and methods of presentation of the cultural heritage, as well as respect for diversity of interpretations; b) establish processes for conciliation to deal equitably with situations where contradictory values are placed on the same cultural heritage by different communities; c) develop knowledge of cultural heritage as a resource to facilitate peaceful co-existence by promoting trust and mutual understanding with a view to resolution and prevention of conflicts; d) integrate these approaches into all aspects of lifelong education and training.*

*Article 8 – Environment, heritage and quality of life : The Parties undertake to utilise all heritage aspects of the cultural environment to: a) enrich the processes of economic, political, social and cultural development and land-use planning, resorting to cultural heritage impact assessments and adopting mitigation strategies where necessary; b) promote an integrated approach to policies concerning cultural, biological, geological and landscape diversity to achieve a balance between these elements; c) reinforce social cohesion by fostering a sense of shared responsibility towards the places in which people live; d) promote the objective of quality in contemporary additions to the environment without endangering its cultural values.*

*Article 9 – Sustainable use of the cultural heritage : To sustain the cultural heritage, the Parties undertake to: a) promote respect for the integrity of the cultural*

*heritage by ensuring that decisions about change include an understanding of the cultural values involved; b) define and promote principles for sustainable management, and to encourage maintenance; c) ensure that all general technical regulations take account of the specific conservation requirements of cultural heritage; d) promote the use of materials, techniques and skills based on tradition, and explore their potential for contemporary applications; e) promote high-quality work through systems of professional qualifications and accreditation for individuals, businesses and institutions.*

*Article 10 – Cultural heritage and economic activity : In order to make full use of the potential of the cultural heritage as a factor in sustainable economic development, the Parties undertake to: a) raise awareness and utilise the economic potential of the cultural heritage; b) take into account the specific character and interests of the cultural heritage when devising economic policies; and c) ensure that these policies respect the integrity of the cultural heritage without compromising its inherent values.*

*Article 11 – The organisation of public responsibilities for cultural heritage : In the management of the cultural heritage, the Parties undertake to: a) promote an integrated and well-informed approach by public authorities in all sectors and at all levels; b) develop the legal, financial and professional frameworks which make possible joint action by public authorities, experts, owners, investors, businesses, non-governmental organisations and civil society; c) develop innovative ways for public authorities to co-operate with other actors; d) respect and encourage voluntary initiatives which complement the roles of public authorities; e) encourage non-governmental organisations concerned with heritage conservation to act in the public interest.*

This cultural dimension of the protection of collective heritage should integrate - and not exclude or ignore - the other major aspects of this heritage. In the case of Jewish burial sites, it is a question of the dignity of the human corpse in general, and more fundamentally its sacred status from the point of view of the religious faiths involved, Jewish faith in this particular case.

The necessity to integrate the above mentioned approaches is far reaching: the intervention patterns the States will have to develop must take into account the particularities - religious in the present case - of the sites to protect. Thus, the methods of analysis used to date burial sites by excavating bones might be seen through the prescriptions of Jewish law - as a desecration of the graves in itself. Less intrusive methods must be used, such as surface detection devices (e.g. geo-raders).

Similarly, religious traditions can encourage protection initiatives. The Jewish tradition of protecting cemeteries with a surrounding wall could serve as an example for non-intrusive, effective and also non-expensive public projects on protection.

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## Assessment of the limits and barriers to the respect of the right to rest in peace

As a general rule the right to religious freedom may only be limited under the following restrictions:

- stated by law
- which are necessary and commensurable (in a democratic society)
- designed for the protection of security, public order and welfare, of moral values or freedoms and fundamental rights of others (art 9, al. 2 ECHR)
- which are established and implemented without discrimination (art 14 ECHR prot. 12)

Accepting the religious centrality of Jewish funeral laws leads therefore to the conclusion that any restrictions may only be implied if all of these conditions are fulfilled.

### 1. Private or Public Cemeteries

The limits set by international conventions are not only those issued directly by public authorities but also those caused by persons, where the State can be accused of lack of action towards private behaviours. This will be the case in chronic or recurrent conflicts, such as persons' violations of Jewish cemeteries in a number of countries.

A comparative study of private burial sites national legislation shows that private burial sites, which were often related with prior judicial systems<sup>10</sup>, enjoy maximum protection.. The inalienability and inapplicability of the principle of adverse possession of private burial sites often guarantee a status of unquestionable perpetuity<sup>11</sup>. But despite this national guarantee it seems that the older the burial sites, the more frequently they are violated.

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<sup>10</sup> See in French Law, Meidinger, I, "Laïcisation and the Jewish Cemeteries in France: The Survival of Traditional Jewish Funeral Practices", *Journal of Modern Jewish Studies*, Volume 1, Number 1, 2002, pp. 36-48

<sup>11</sup> See in French Law, a leading case by the Cour de cassation 11 april 1938, still in force in

As for public cemeteries, more specifically temporary burial grounds, they come under national policies which international conventions are more reluctant to oppose. The appreciation margin recognised by the states often impairs control. Thus, in a 7 October 1976 judgement, *X. c. Allemagne*, n°6125/73, the ECommHR ruled that the restriction of time of a burial plot grant decided by public authorities could be seen as necessary in order to regulate the use of assets in conformity with general interest. It was then legitimate to reject the request in accordance with § 2 of article 1 of the first additional protocol.

However, this case was not about a Jewish or even religious burial plot. More particularly, the growing public recognitions through all European Countries of some specificities of religious graves, e.g. by attributing them some particular places within public cemeteries, should progressively lead to a more positive attitude to religious specificities about graves and funerals, even within a public cemetery.

## 2. The State Margin of Appreciation

In the already mentioned decision of ECourtHR, 10 July 2001, *Johannische Kirche et Peters c. Allemagne*, n° 41754/98, the ECourtHR

*“notes in the instant case that the authorities justified their refusal to authorise construction of the cemetery on the basis of provisions relating to planning, environmental protection and services, and particularly by the fact that there was no other building in the zone in question.*

*It is true that the administrative authority and the Bayreuth Administrative Court did not make any allusion to the fact that the first applicant was a religious*

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2007, PLATEAU, P., “Les caractères inaliénable et incessible d'une sépulture installée sur un terrain privé et l'imprescriptibilité du droit d'usage et de jouissance sur celle-ci”, *Recueil Dalloz* 1993 p. 370 et le dossier constitué en annexe. For US Law, BROPHY, A.L., "Grave Matters: The Ancient Rights of the Graveyard", *Brigham Young University Law Review*, 2006, pp. 1469-1516. McEvoy, K., The Dead, the Law, and the Politics of the Past, *Journal of Law and Society*, 31, 4, pp. 539-562; Nwabueze, R.N., “The concept of sepulchral rights in Canada and the US in the age of genomics : hints from Iceland” 31 *Rutgers Computer & tech. Law Journal*, 2005, 217; Zablotsky, P., “‘Curst be he that moves my bones’. The surprisingly controlling role of religion in equitable disinterment decisions”, 83 *N. Dakota Law Review* 361 (2007); Olexa, M. T., Hodge, N.C, Owens, T.L., « No grave like home : protecting the deceased and their final resting places frm destruction without going six feet under », 11 *Drake Journal for Agriculture Law* 51 (2006).. For a comparaison with traditional and native cemeteries : HUTT, s., « If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans, 24 *N. Ill. U. L. Rev.* 527 (2003-2004). See also Bruzzese,-P., « Distributing the past: Jewish cultural property in Lithuania ». *New York University Journal of International Law and Politics*, 145-176 (1998-1999); DeAnna Marie Rivera, « Taino sacred sites : an internationa comparative analysis for domestic solution », 20/2 *Arizona Journal of International and Comparative Law* 444 (2003); Riley, A., « Indian Remains, human rights : reconsidering entitlement under the native american graves protection and repatriation Act », 34 *Columbia Human Rights Law Review* 49 (2002-2003).

*community, and it was only before the Bavaria Administrative Court of Appeal that a possible interference with the first applicant's right to religious freedom was examined.*

*However, the Administrative Court of Appeal noted that the status of the first applicant did not give it the right to build a cemetery on a site specially protected by the legislative decree on the creation of Franconian Switzerland Wildlife Park. With regard to the federal courts, the Court notes that they duly explained how and to what extent a right to freedom of religion, guaranteed by the Basic Law without express restrictions, was limited by the rights of others and constitutional values such as the protection of life's natural sources, as declared in section 20(a) of the Basic Law. These decisions show that the German authorities did not aim their decision to dismiss the application at the first applicant as a religious community; the prohibition on building applied to any person applying for a building permit in the zone in question.*

*In the light of the foregoing, and having regard to the wide margin of appreciation of the Contracting States in planning matters (see, mutatis mutandis, the Sporrang and Lönnroth v. Sweden judgment of 23 September 1982, Series A no. 52, p. 26, § 6, and application no. 20490/92, Iskcon and Others v. the United Kingdom, Commission decision of 8 March 1994, DR 76, p. 91), the Court considers that the measure complained of amounts to a restriction of the first applicant's right to freedom to manifest its religion which is justified in principle and proportionate to the aim pursued (protection of the rights and freedoms of others) and, accordingly, to an interference which is in conformity with Article 9 § 2 of the Convention. It follows that the application is manifestly ill-founded ».*

Land development and planning legislation are indeed often invoked as general neutral standards which can represent a potential cause of the limitation of human rights. In order to reverse this type of presumptive evidence in favour of land development regulations, the behaviour of the authorities and the administrative basis of their positions should be analysed case by case.

### 3. The implementation of national standards must be proportionate

State decisions have to be justified not only by a state compelling interest, but also as the least intrusive way to enforce this interest.

In most cases, the preservation of Jewish cemeteries can be guaranteed along this standard.

The objective is on the one hand, to be aware of the intrusive alternative solutions, and on the other hand, to prove that the land development low cost/impact of alternative options cancels the necessity of the initial policy. It should also be taken into account in the assessment of the scope and variety of available solutions vis-à-vis Jewish law itself (e.g. by building surrounding walls)

This is how, in a different cultural context, the UNHR in a December 1997 judgement, *X. v. France*, already mentioned above, came to the conclusion that a blatant discrepancy existed between the desecration of a cemetery and the implantation of a hotel complex.

A Swiss case, *Jaggis v. Switzerland*, n° 58757/00, about a DNA test request which required the opening of a grave, shows *a contrario* the role of a religious prescription in order to work out the cost/profit balance strictly imposed by the principle of necessity.

*“ 10. The Court reiterates that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation (see Mikulić, cited above, §§ 57-58, and Odièvre, cited above, § 40).*

*11. The Court observes that in the instant case the Swiss authorities refused to sanction a DNA test which would have allowed the applicant to know for certain that A.H., his putative father, was indeed his biological father. That refusal affected the applicant's private life.*

*12. The Government justified the refusal to allow the DNA test by citing the need to preserve both legal certainty and the interests of others.*

*13. The Court reiterates that the choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring respect for private life, and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see Odièvre, cited above, § 46).*

*14. The extent of the State's margin of appreciation depends not only on the right or rights concerned but also, as regards each right, on the very nature of the interest concerned. The Court considers that the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests.*

*15. The Court considers that persons seeking to establish the identity of their ascendants have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity. At the same time, it must be borne in mind that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing (see Mikulić, cited above, § 64). The Court must examine whether a fair balance was struck between the competing interests in this case.*

16. *In weighing up the different interests at stake, consideration should be given, on the one hand, to the applicant's right to establish his parentage and, on the other hand, to the right of third parties to the inviolability of the deceased's body, the right to respect for the dead, and the public interest in preserving legal certainty.*

17. *Although it is true that, as the Federal Court observed in its judgment, the applicant, now aged 67, has been able to develop his personality even in the absence of certainty as to the identity of his biological father, it must be admitted that an individual's interest in discovering his parentage does not disappear with age, quite the reverse. Moreover, the applicant has shown a genuine interest in ascertaining his father's identity, since he has tried throughout his life to obtain conclusive information on the subject. Such conduct implies mental and psychological suffering, even if this has not been medically attested.*

18. *The Court notes that the Federal Court observed that the deceased's family had not cited any religious or philosophical grounds for opposing the taking of a DNA sample, a measure which is, moreover, relatively unintrusive. It should also be noted that it was thanks to the applicant that the lease on the deceased's tomb was renewed in 1997. Otherwise, the peace enjoyed by the deceased and the inviolability of his mortal remains would already have been disturbed at that time. In any event, the deceased's body will be exhumed when the current lease expires in 2016. The right to rest in peace therefore enjoys only temporary protection.*

19. *With regard to the deceased's own right to respect for his private life, the Court would refer to its position in Estate of Kresten Filtenborg Mortensen v. Denmark ((dec.), no. 1338/03, ECHR 2006-...), in which it found that the private life of a deceased person from whom a DNA sample was to be taken could not be adversely affected by a request to that effect made after his death.*

20. *The Court notes that the preservation of legal certainty cannot suffice in itself as a ground for depriving the applicant of the right to ascertain his parentage, seeing that the granting of a paternity suit constitutes an exception to a transitional law dating from the 1970s which would affect him alone. Indeed, the Government themselves asserted that recognition of biological paternity would have no effect on the register of births, deaths and marriages.*

21. *It follows that, having regard to the circumstances of the case and the overriding interest at stake for the applicant, the Swiss authorities did not secure to him the respect for his private life to which he is entitled under the Convention.*

In this particular case, the Court agrees to privilege the right to personal identity over peace of the deceased but careful reading of this jurisprudence is essential. The Court carefully states that the deceased person's relatives did not invoke any religious or philosophical ground to oppose the litigation. Assessing principles would take a different form when such religious interests were involved.

#### 4. The protection of religious sites and more specifically of Jewish burial sites display characteristics that raise the obligation level required from the States and national legislation

The religious and historical importance of the protection of Jewish cemeteries in Europe globally results in a increased obligation required from the States.

This takes us back to the specific approach of the *protection of consecrated sites*. Thus, the 55/254 of the UN General Assembly (31 May 2001) reiterates in a global way the international protection of religious sites not only against violent offences but also against any destruction or endangerment.

*1. Condemns all acts or threats of violence, destruction, damage or endangerment, directed against religious sites as such, that continue to occur in the world;*

*2. Calls upon all States to exert their utmost efforts to ensure that religious sites are fully respected and protected in conformity with international standards and in accordance with their national legislation and to adopt adequate measures aimed at preventing such acts or threats of violence, and invites relevant intergovernmental and non-governmental organizations to contribute to those efforts by developing appropriate initiatives in this field;*

*3. Encourages all States, relevant intergovernmental and non-governmental organizations and the media to promote, inter alia, through education, a culture of tolerance and respect for the diversity of religions and for religious sites, which represent an important aspect of the collective heritage of humankind;*

*4. Requests the Secretary-General to devote, in consultation with the relevant bodies of the United Nations system, attention to the issue of protection of religious sites in his forthcoming reports related to the United Nations Year of Dialogue among Civilizations;*

*5. Decides to continue consideration of the question of the protection of religious sites under the item entitled "United Nations Year of Dialogue among Civilizations"*

This resolution itself was reiterated by the UN Special (Rapporteur) ombudsman in favour of religious freedom in his report of the 6<sup>th</sup> session of the Human Rights Commission in July 2007

#### 5. No arbitrary decision by public administration

Public decisions should be clearly motivated and contextualized. The historical context of the case should be indicated (origin of the cemetery, of its potential escheat, unexpected rediscovery or, on the contrary, a cemetery that is still visible or recorded, etc...) In an already mentioned case, *Poluhas Dobso v. Sweden*, the ECourHR deemed admissible in 2004, considering that the State's refusal to grant a widow the right to move her husband's funeral urn, that a specific analysis should be called upon due to the fact, invoked by the applicant, that whereas the old site was granted a temporary plot, the new grave enjoyed a grant for a plot.

6. The implementation of land development standards must not be discriminatory.

*Article 14 ECHR : The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

From this point of view, the margin of appreciation of the contracting States could be reduced due to their objective historical responsibility vis-à-vis Jewish populations. More generally, following the court's jurisprudence, *Thlimmenos v. Greece*, 6 april 2000, it should be affirmed that « The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. (n°44). This will be the case for the particular historical origins which justify specific protection of Jewish burial sites.

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## Conclusions

1. The cemetery, called 'the House of the Living' possesses thus a dimension that does not exist in many other traditions. Jewish cemeteries have even a higher holy religious status (Kedusha) than of synagogues as a result of their eternal dimension. The protection, access to and the preservation of Jewish cemeteries, due to the sacred status (Kedusha) conferred by their religious character, constitutes a central part of Jewish faith and are entitled to the international guarantee of religious freedom (art.9 ECHR)
2. The Jewish law ascertains that the deceased person's wish is to have a perpetual burial place. The perpetuity of Jewish burial place is neither optional nor disputed. It is a unanimously recognized principle. The early purchase of a specific burial place is clear evidence of this wish for perpetual ownership.
3. The Jewish tradition of purchasing funeral ground, in order to guarantee their perpetuity, merits additional protection under the article on private property (art. 1 Prot ECHR)
4. The significance of Jewish cemeteries and mass graves also warrants their protection by right of the article on private and family life (art. 8 ECHR)
5. Ancient cemeteries, their apparent abandonment or their condition do not diminish the relevant guarantees mentioned above.
6. The historical responsibility of States concerning all expulsions of Jews and particularly in the aftermath of the Shoah reinforces their responsibility for the protection and preservation of Jewish cemeteries, burial grounds and mass graves, and makes them bear the corresponding positive obligations.
7. Violation of burial sites by individuals can be imputed to public authorities due to the recurrent character of such violation and makes them bear the corresponding positive obligations.
8. National measures - concerning management of Jewish cemeteries or with repercussions on their protection and their preservation - cannot be arbitrary, discriminatory or contrary to the principle of proportionality.

9. The right to rest in peace has been recognized by the European Court of Human Rights as a legitimate State principle, allowing contracting States to limit other fundamental rights.
10. National policies that guarantee the right to rest in peace, *de façon supérieure*, cannot be restricted by invoking the ECHR.
11. States that have such legislation are internationally bound to ensure its effective, non discriminatory and non arbitrary implementation.
12. States cannot be opposed to the use of legitimate techniques to locate possible burial sites desecrated in contradiction with international commitments or national standards. More specifically, the use of surface penetrating radar cannot be prohibited by States.
13. National modalities of protection and preservation must take into account the religious traditions stating the sacred character of these sites. Protection with a surrounding wall must be considered as an example of good practice.
14. The convergence of the national applications of the principle of protection and preservation of Jewish cemeteries and mass graves in Europe must lead to the progressive reinforcement of international protection levels.
15. International progress on the protection and the preservation of ancient cemeteries as cultural heritage must take into account the specific religious characteristics of Jewish burial sites and the religious prescriptions involved. It should not unduly reduce them to a 'patrimonial' or 'cultural' dimension.
16. The historical and collective aspect of the preservation of Jewish cemeteries, especially those that have been abandoned, calls for measures which are also collective and not only individual.
17. Present local Jewish communities cannot be considered as the only concerned by the protection and preservation of pre-war Jewish cemeteries but rather a large panel of national and international partners.