The International Association of Jewish Lawyers and Jurists (“IJL”) wishes to make the following comments:

A. **Background**

1. The IJL is an international non-governmental organisation ("NGO") comprising legal practitioners and academic jurists in more than 15 countries. Among its founders were Israeli Supreme Court Justice Haim Cohn of Israel, US Supreme Court Justice and US ambassador to the United Nations Arthur Goldberg, and Nobel Peace Prize laureate René Cassin of France, the main author of the Universal Declaration of Human Rights.

2. The IJL has Category II Status as an NGO at the United Nations, enabling it to participate in the deliberations of various UN bodies, including the Human Rights Council, which assesses compliance with international standards for human rights protection across UN Member States. The IJL presents opinions on international legal matters that are critical to protecting the rights and freedoms of individuals.

3. In this capacity, the IJL concentrates on a wide range of issues related to human rights protection, with particular emphasis on fighting anti-Semitism by law, promoting peace and preventing genocide and war crimes, in addition to international cooperation based on the rule of law and democracy.
B. Introduction

4. In the interest of animal welfare, some jurisdictions require that prior to slaughtering for the purpose of human consumption of certain animals (e.g. cattle, sheep, swine) they be ‘stunned’. Stunning is performed in a variety of ways including electric shock or shooting of a metal bolt through the brain of the beast. Said stunning renders the animal insensate before knife is put to flesh and the actual butchering takes place. The stunning procedure itself causes pain to the animal but it is of a very short duration.

5. Jewish (and Muslim) religious law prohibit such stunning prior to the actual act of slaughtering. The animal to be slaughtered must be alive, whole and without blemish. Stunning prior to the slaughter would compromise all three requirements. An animal which is not slaughtered in the required manner may not be consumed. The slaughtering, which must be performed by a person specifically trained for such, consists of single incision which severs, *inter alia*, the carotid arteries. When performed correctly, the massive drainage of blood from the head of the animal also renders it insensate, though this will occur over a longer period of time compared to stunning. Veterinary authorities dispute that period of time with estimates ranging from a few seconds to a few minutes, as well as the degree of suffering caused as a result, compared to the degree of suffering caused as result of stunning.

6. Applying by law the pre-stunning requirement would, thus, violate the strictures of Jewish and Islamic law and amount to a de jure and de facto outlawing of religiously permitted slaughtering. It would have the collateral effect of a measure of forced vegetarianism (fish may still be consumed) on these communities of faith, and may force these communities to eventually emigrate, leading to the end of Jewish life in Member States which will impose such ban.

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1 Throughout this Brief we refer mostly to Jewish law though most of the considerations presented would apply, mutatis mutandis, to Islamic law too.

2 Meeting this argument by claiming that such communities could import their meat from countries without such a ban, is no more than another instance of hypocritical ‘moral dumping’ onto other societies, long denounced in the context of, say, environmental policy. ‘We will ban coal burning in our society, but import our electricity from countries which allow such’. Furthermore, there are no adequate solutions for the importation of fresh meat to all Jewish (and Muslim) communities.
7. It will have a secondary collateral effect of publicly branding Judaism and Islam as inhumane. This secondary effect is not to be trivialised given, first, the history of such bans oftentimes driven by overtly Anti-Semitic motives and, second, the current rise in Antisemitism (and Islamophobia) in Europe. The Court should not lightly approve such.

8. Freedom of religion is a fundamental human right guaranteed by all European constitutions as well as the principal European instruments such as the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms. To forbid a community of faith to prepare their food in accordance with their religious obligations is thus a prima facie violation of such.

9. In addition, the requirement of pre-stunning, is discriminatory in nature. Though formulated as addressed to all slaughtering regardless of its nature, it is clearly directed at these two communities of faith thus raising the specter of direct discrimination. Even if one accepts that the aim was not to target Jews (and Muslims), but indeed driven by a genuine concern for animal welfare, it is beyond dispute that it produces a disparate impact on these two communities and thus, constitutes a classical case of indirect discrimination, a per se additional violation of human rights as well as an additional hurdle in justifying the primary violation of freedom of religion. The fact that the indirect discrimination affects minority groups requires particular vigilance by the Court. One of the foundations of the empowerment of courts in democratic societies to review the constitutionality even of parliamentary legislation is precisely to protect, where appropriate, minorities against dictates or whims of majorities.

10. Council Regulation 1099/2009 capably and comprehensively regulates the protection of animals at the time of killing and thus preempts individual Member State action in this field. The Regulation is binding in its entirety and directly applicable in all Member States. Specifically, it provides in Article 4(4) an exemption for ritual slaughtering and sets out a single condition for such. The Regulation as a whole as well as Article 4(4) are clear, precise and unconditional thus producing direct effect. Member State measures in conflict with the Regulation violate, thus, also the principles of Direct Effect and

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Supremacy of Union Law threatening the uniform application of Union Law in all Member States. Any change to this condition may only be effected by the Union itself.

11. The fact that we have here a prima facie case of violation of freedom of religion and of the non-discrimination principle, both enshrined in the above-mentioned constitutional and international instruments, combined with a Union Regulation directly applicable and binding in its entirety providing for the specific exception for slaughter prescribed by religious rites, mandates finding that applying the pre-stunning requirement in the context of religious slaughter cannot survive judicial review.

12. However, even if one is of the view that the pre-stunning requirement is not, in and of itself, irredeemably illegal and unconstitutional, a careful analysis of the competing considerations will lead to the same conclusion.

13. Few human rights, if any, are absolute in nature and this applies, too, to freedom of religion. It is a common place that there can be compelling public reasons which may permit the compromising of fundamental human rights.

14. The point of departure, however, is that every effort must be made by society to honor fundamental rights such as freedom of religion and non-discrimination as fully and capaiously as possible, and the corresponding legal presumption is that violation of such is absent justification unconstitutional. Often times, as in the case of, say, offensive speech, the exercise of such right may provoke popular indignation. We do not need to protect speech we like. We protect speech we do not like. It is for this reason that we empower our courts, the independence of which is at the heart of the Rule of Law, removed from the pressures of popular and populist electoral pressures, to ensure that only under the most compelling of circumstances, fundamental human rights, including freedom of religion, be compromised. The onus of proof must be on the public authority which seeks to compromise such rights. And the burden of proof must be high. Fundamental human rights may not be compromised lightly.

15. Under what conditions may the banning of Jewish (and Muslim) slaughtering in accordance with religious strictures be allowed? (If one does not accept our argument that due to the unique regulatory framework, such banning should not be allowed at all). One must follow here the well-trodden proportionality analysis applied in cases of fundamental human rights.
16. In the first case, the Court would have to be satisfied that the effective ban of religious slaughtering by insisting on pre-stunning is enacted in the general interest and is in pursuit of a legitimate public policy.

17. Even should this be the case, it would then have to be satisfied that, within the limits of reasonable practice, said measure is the least restrictive to the exercise of freedom of religion in pursuing the legitimate public policy and that the discriminatory effect is unavoidable.

18. Finally, it would have to decide, in what is sometimes termed as ‘balancing’ or ‘proportionality strictu sensu’, whether the values enshrined in the public policy, in this case animal welfare, outweigh the values enshrined in the protected fundamental right, in this case freedom of religion.

19. One further consideration is germane in applying the last stage of the analysis. When the measure in question – in this case the ban on religiously mandated slaughtering – results in discrimination, as is the case here, the scales in the balancing act should be tilted even further on the side of protecting the fundamental human right.

C. Applying the Method of Analysis to Ritual Slaughtering

20. Is the de jure and de facto outlawing of Jewish (and Muslim) ritual slaughtering in pursuit of a legitimate public policy? The answer to this must be affirmative. Even without entering into the jurisprudentially complex issue of ‘animal rights’, a concern for animal welfare in the raising and the slaughtering of animals intended for human consumption is widespread and entirely legitimate, as evidenced by an array of laws in many States and in legislation of the European Union itself. Given that pre-stunning reduces the length of suffering in the slaughtering of animals, such a requirement would fall naturally within such a policy.

21. However, there is empirical difficulty in comparing the suffering of the animal under the two methods of slaughtering, since it is undisputed that the animal still suffers even with pre-stunning. Hence, even enforcement of a full ban on slaughtering without pre-stunning will not eliminate concerns for animal welfare.

22. On the other hand, the assessment of the offense to religious liberty by instituting such a ban may not be obvious and clear to everyone. Sometimes the importance of the religious ritual is not self-evident. For non-Catholics,
the sacrament of the Eucharist might appear to be a baffling ritual. For a Catholic, its spiritual significance, the possibility of feeling the real presence of the Divine, cannot be overstated.

23. The religious law governing ritual slaughter, including the prohibition on pre-stunning, is an inseparable part of the broad and elaborate matrix of Jewish ‘Table Law’ – governing Kosher and Non-Kosher foods (and Halal) which to the observant Jew or Jewess (and Muslim) has a similarly deep spiritual and religious meaning and in accordance with such law may only be compromised to save human life.

24. While not every legal norm carries the same weight, the legal norm with respect to slaughter is of the highest importance: no observant Jew will eat non-Kosher meat, unless, as just noted, it is a matter of life or death of a human subject.

25. And yet, it is precisely that part of Judaism and Islam which appears the least comprehensible, the most baffling, and the one most destitute of any spiritual religious meaning to outside observers. Why, one might almost naturally think, should an animal be made to suffer even one minute more, to honor such ritualistic ‘mumbo jumbo’?

26. More generally, whereas Jewish moral law, the Ten Commandments, Love Thy Neighbor and the like, which are similar to Christian moral law, are seen as compelling and profound, the entire corpus of ritual law, of which Kosher law is a central part, appear as a black box at best and worthy of derision at worst. And yet the religious significance of ritual slaughtering consists in being part and parcel, inseparable, from the general matrix of that black box of ritual law, as shall be explained below.

27. That the dense matrix of ritual law should be incomprehensible is not surprising in Western civilization. A massive civilisational force – the Christian tradition which defined the West for close to two millennia – conditioned contemporary sensibilities on these issues. One central feature of the Christian Revolution was the teaching (in the Sermon on the Mount, for example) that the Law was accomplished and that the nature of the Covenant between God and (Wo)man had eternally changed. That the function of the prior law was now accomplished through Jesus Christ. To give but one emblematic example, it was not important what man put into his mouth, but rather the words that came out of a man’s mouth. Few teachings of Jesus
resonate to Western ears, whether religious or secular, more powerfully than these. And with that, the intricate matrix of rituals which was and remains one central feature of Jewish law, its Nomos, was consigned to the dustbin of Christian religious understanding and practice as a relic of an earlier and more primitive stage in God’s world.

28. A normative judgment was associated with this feature of the Christian Revolution, Ritualistic Nomos was the peel. The core of the religious fruit was the interior of the human subject. You do not circumcise your penis, as do Jews and Muslims, but your heart. This normative judgment was (and is) often accompanied by contempt for the primitiveness of those aspects of Islam and Judaism and, even as contempt dissipated – or at least as we learnt to conceal it – a total incomprehension of the profound spiritual significance of Nomos set in.

29. And yet, in order successfully to balance the competing values of religious freedom manifest in ritual slaughtering on the one hand and the concern for animal welfare on the other, the Court simply must fully understand the religious significance of the set of Kosher norms of which the rules on ritual slaughter are an integral and inseparable part.

30. What then is this significance? For this purpose, one cannot avoid a brief theological excursus.

D. A theological excursus – the religious significance of Kosher observance

31. The point of departure in answering this question is that there is no intrinsic functional explanation for Kosher observance – and this is of considerable significance.

32. Kosher food is not healthier, nor did it develop from ancient considerations of physical wellbeing. And this is true not only for the overall complex system of Kosher observance but also to the specificities of its internal intricate rules. Shellfish, as manifest in Japanese cuisine, are among the most nutritious and healthy elements of a diet. They are non-Kosher. There have, of course, been many attempts to rationalise the rules of Kosher observance in such material functional ways – they are not simply unconvincing and forced, but in some ways negate the deeper meanings of such observance.

33. For most, the meaning of the Monotheistic Revolution introduced by the Abrahamic religions was the move from polytheism, the belief in many gods,
to the belief in one God only, the Holy One Blessed be He. But for the
initiated, Monotheism signifies much more than the oneness of the Lord. It is
his transcendent nature. Belief in the Sun as the one and only God is
monotheistic. It is not transcendent – and thus idolatrous in the eyes of
Abrahamic Monotheism. The Transcendent God is neither a stone nor a river,
nor the sun nor the moon. She or He or It are not of this world. When we
try to describe such a God with human, material imagery and allusion, a
limitation of our human condition, we inevitably compromise the
transcendence of The Transcendent God.

34. The problem transcendence creates is immediately apparent. The Abrahamic
God is also the God of Love – a love that flows in both directions between
God and humanity. How can one experience a fully transcendent God, let
alone love Him? How can one feel the presence of the fully transcendent God
in one’s life? There must, therefore, be an immanent dimension to the
Abrahamic God. This takes the form of what we call Revelation, whereby the
Transcendence is breached and Immanence established. But there is a problem
with Revelation: it is a one-off event, the knowledge of which might persist
for millennia, but not the experience. And religion is not epistemic but
experiential. It is not about knowing that there is a God – the God who created
the world and did other amazing things thousands of years ago. It is about
experiencing such, individually and collectively, from one generation to the
next.

35. The revelation of God to the Jews and the enduring manifestation of his
immanence was through The Law, Nomos.

36. How does the Law, Nomos, overcome the momentary nature of revelation and
constitute a means for an enduring presence in the life of believing Jews and
Jewesses? Let us once more dispel one of the most common anti-Semitic
tropes – that Jewish law is all about arid rituals, such as circumcision, rules
about shaving, head covering for men and women and, yes, Kosher observance.

37. The Moral law in both faiths is the same: Love Thy Neighbor is to be found
in both Testaments and the Ten Commandments are to be found in the
Pentateuch.

38. What differentiates the two traditions, Christian and Jewish, is that the Jewish
Nomos retains the dense matrix of ritual law, of which Kosher observance is
a central part, as normative and binding. And paradoxically, it is the ‘arid’, mindless, irritating ritualistic part of Nomos which is central to the Jewish approach to solving the Transcendence, the theological dilemma of Monotheism.

39. There are two key features of Kosher observance, one so obvious it may escape notice: Kosher observance concerns food and eating. We all have to eat, the sine qua non for material survival.

40. There is, of course, much more to food and eating in our culture than merely keeping alive. Cookery books are best sellers, restaurants are more popular than theatres or concert halls, and food and eating and cuisine is ubiquitous in both low, middlebrow and high culture. What to eat, how much to eat, when to eat, where to eat, and with whom to eat are a central part of daily existence.

41. For those Jews who observe Kosher, all that patchwork of food practice which imbibes our life, from breakfast to that glass of wine before bedtime, is imbued with the thick matrix of Kosher practice. Nomos, the immanent manifestation of the transcendent God, is thus omnipresent in one’s daily life in every meal, every bite, every invitation. The sacred is part of the most common practice of living, shared by rich and poor, old and young, woman and man.

42. And the very absence of intrinsic functional meaning to Kosher rules can suddenly be evaluated differently, as determinative. The homo religiosus may not kill because so commanded by God in the Ten Commandments. But you do not need that divine command, Nomos, to refrain from killing. But absent Nomos what would connect a Jew in his or her living experience to the presence of the Divine and the moment of Revelation?

43. There is a second dimension which explains the deep significance of Kosher observance (alongside Sabbath observance and the ritualistic rules of sex). They are often referred to as the yoke of Nomos. A constant set of restrictions on what may or may not be eaten (the Kosher rules) on the world of work and career (the Sabbath rules) and the limitations on sexual practice – covering thus the most fundamental aspects of material human experience. There is a constant temptation to free oneself from the chains of those ritualistic rules, which impinge so dramatically on such important dimensions of the human experience.
44. There is however another side to the freedom coin. But for the rules of Kosher eating, a person, in the Jewish view, is but a slave to his natural condition: eating when and what and how much he or she desires – a slave to his or her desires. You may now also consider the way we are enslaved, in this sense of enslavement, to our careers and to our carnal lusts – and get an analogous insight into the ritualistic aspect of Sabbath and sexual ritual laws. They produce the same liberating result.

45. Finally, in this brief excursus one must repeat the non-functional dimension of Kosher rules, their apparent arbitrary nature. We are meant to be left wondering. It is clear that no physical or material harm will ensue by disregarding them. But it is precisely this incomprehension and wondering which produces the liberating effect because there is really no earthly reason for the abstention, other than the command of the Divine. That is why the notion that one may dispense with the slaughtering dimension of the Kosher rules is fanciful. It is no less or more important than any other of this dense matrix, and abolishing it, for our convenience, including our ethical convenience, undermines the entire religious rationale of such divine rules.

46. It should have become clear that an outright ban on ritual slaughter affects a central and profound dimension of Jewish and Muslim faith – in this respect the logic of Jewish and Islamic law is similar – and should be allowed only for the most compelling of reasons. It should also be recalled that apart from the practical consequences of such a ban, the approval of such a ban would amount to public condemnation from the highest judicial authority of the very core of Judaism and Islam as divine Nomos based religions.

E. **Lesser Restrictive Measures – the Reality of Ritual Slaughtering**

47. What, then, may be measures which serve to diminish animal suffering without totally banning ritual slaughter given its religious and spiritual centrality in Judaism and Islam?

48. Even those who oppose ritual slaughtering on grounds of animal welfare would accept that one is debating the length of suffering, and that when executed properly the animal is rendered insensate within a brief period of time. The passion for banning ritual slaughter, if not motivated by Islamophobia and anti-Semitism, latent or overt, is in large measure based (as argued above) on the belief that the ritual ban on pre-stunning is arbitrary and senseless. In which case, there is no reason to allow animal suffering even one
second beyond that which is unavoidable. This Brief has attempted to dispel that notion.

49. And yet, the arguments above rest on the proposition that the ritual slaughter is executed properly. Nevertheless, in the reality of industrial, large scale slaughtering (which did not exist when the rules were formulated and consecrated), there may be cases in which the slaughtering is botched resulting in prolonged suffering. The harrowing images one sees in this context are typically the exceptional cases when such occurred.

50. It would be a totally reasonable and proportionate response of public authorities concerned with animal welfare to insist, whilst accepting ritual slaughtering, that guarantees and procedures be put in place to ensure that the slaughtering indeed be conducted as prescribed, avoiding or dramatically minimising the instance of botched cases. This can be achieved, for example, by a regime of State approved veterinary inspectors and inspections to supervise and ensure such, backed by hefty fines in cases of violation.

51. And in fact, this is indeed the approach which was already adopted by the Council Regulations, which allow slaughter prescribed by religious rights, provided that the slaughter takes place in a slaughterhouse, and while allowing Member States to put in place more extensive protection of animals at the time they are slaughtered.

F. Conclusion

52. A concern for animal welfare in the process of slaughtering is a legitimate public concern, and policies designed to minimise such are legitimate.

53. An outright ban would constitute an unjustified and unjustifiable grave violation of the religious liberty of Jews and Muslims, and result in addition in an egregious case of indirect discrimination.

54. Such a ban would, additionally, be in violation of directly effective European Union law.

55. In any event, alternative, lesser restrictive measures are available to ameliorate and minimise the suffering of the animal, which is slaughtered in conformity with the religious ritual rules. Once applied, the difference between the pre-stunning process and the ritual slaughtering, properly
executed, is reduced to the duration – measured in seconds at best, in minutes
at worst – of the animal suffering.

56. Given the centrality of ‘dietary rules’ (what may or may not be eaten) to the
ontology and theology of Judaism and Islam, and the transparent indirect
discriminatory effect, an outright ban is a disproportionate outcome in the
balancing of religious liberty and non-discrimination, as against the legitimate
policy of animal welfare.

We are thankful to the Court for considering our comments.

Respectfully submitted,

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