Diritti civili e politici

The Use of Boycott as a Tool to Protect Fundamental Norms of International Law: the *Baldassi* Decision

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European Court of Human Rights, *Baldassi and Others v. France,* Application nos. 15271/16 and 6 more, Judgment *of* 11 Juin 2020 (www.echr.coe.int)

1. On 26 September 2009 and again on 22 May 2010, 14 activists and human rights defenders belonging to the militant group *Collectif Palestine 68* staged a protest at the *Carrefour* supermarket of Illzach in north-eastern France. They distributed flyers reporting information on the Boycott Divestment Sanction (BDS) movement and calling for the boycott of certain products originating from Israel sold in the supermarket. The demonstrators were prosecuted on charges of 'incitement to economic discrimination' under Article 24(8) of the French law on freedom of press of 1881, on the basis of the Ministry of Justice's circular of February 2010 that urged all French public prosecutors to prosecute boycott actions on that legal basis (the so-called 'Alliot-Marie' circular, CRIM-AP, n. 09-900-A4). The accusations were first rejected on first instance and then upheld by the Appeal Court and the Supreme Court. In early 2016, upon the exhaustion of internal remedies, eleven activists decided to file an application against France to the European Court of Human Rights (ECtHR, the Court), alleging the violation of Article 7 (principle of legality) and 10 ECHR (freedom of expression).

On 11 June 2020 the ECtHR delivered its decision on the *Baldassi and Others* case, establishing France's infringement of the demonstrators' freedom of expression and upholding its Article 10 ECHR case law in relation to political ideas (European Court of Human Rights, *Baldassi and Others v. France,* Application nos. 15271/16 and 6 more, Judgment of 11 June 2020). In the absence of the State's 'appeal', the decision has now gained definitive *status* and deserves some further considerations. The ruling is indeed the very first by an international human rights court on the BDS movement (Boycott, Divestment, Sanctions, see www.bdsmovement.org) and, arguably, on the general practice of boycott as a form of freedom of expression and political dissent (on the general practice of boycott, see the statement by Richard Falk, former UN Special Rapporteur on the situation of Human Rights in the Occupied Palestinian Territory (2012), available at www.un.org. On freedom of expression, see V. Zagrebelsky, R. Chenal, L. Tomasi, *Manuale dei diritti fondamentali in Europa*, Bologna, 2016; R.B. Gisbert, "The Right to Freedom of Expression in a Democratic Society (Art. 10 ECHR)", in *Europe of Rights: A Compendium of the European Convention of Human Rights*, P. Santolaya Machetti, J. García Roca (eds), Leiden, 2012, p. 371 ff.; D. Golash, *Freedom of Expression in a Diverse World*, New York, 2010). After illustrating the Court's arguments and decision in Section II below, Section III takes a look at the broader political background surrounding the *Baldassi* decision, whereas Sections

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IV. and V. provide further reflections on the ECtHR's judiciary dialogue respectively with the Court of Justice of the EU and with its own past rulings. Section VI concludes.

2. The Court's analysis concerned the alleged violation of the principle of legality set out in Article 7 ECHR and of the freedom of expression under Article 10 ECHR. The judges voted 6 to 1 against the breach of Article 7 (see Justice O' Leary's dissenting opinion), while unanimously upheld the breach of Article 10 ECHR. They dealt with the first rather quickly, endorsing the State's arguments based on a precedent regarding an analogous case issued by the French Supreme Court in September 2004 (French Supreme Court (criminal section), Judgement n. 03-87450 of 28 September 2004). Any discussion on the validity of the Court's reasoning related to the non-violation of the principle of legality goes beyond the purpose of this commentary, therefore it will not be further analysed.

Concerning the alleged violation of Article 10 ECHR, the qualification of the criminal prosecution as State 'interference' in the demonstrators' freedom of expression was not subject to dispute between the parties. Instead, the ECtHR assessed the lawfulness of such an intrusion on the basis of the three conditions set forth in Article 10(2) ECHR, namely its lawfulness, legitimacy and necessity in a democratic society. The judges quickly dealt with the first two conditions and found that the interference complied with both (European Court of Human Rights, *Baldassi et autres c. France*, cit., paras. 59-60). By contrast, they developed a thorough analysis on the third condition, recalling the *Perinçek* principles (*Ibid.*, para. 61, i-ii-iii; European Court of Human Rights, *Perinçek v. Switzerland*, Application no. 27510/08*,* Judgment of 17 December 2013, para. 196) and upholding the protection of boycott as a particular means to exert freedom of expression that combines both *protesting* and *incitement to a differential treatment.* Most interestingly for the present case, the Court found that calling for a differential treatment does not necessarily come with incitement to discrimination (European Court of Human Rights, *Baldassi et autres c. France*, cit., paras. 63-64). In this respect, the ECtHR analysed the facts of the case and drew a distinction with its 2009 *Willem* decision (European Court of Human Rights, *Willem v. France*, Application no. 10883/05, Judgment of 16 July 2009), which concerned a town mayor's incitement to boycott Israeli goods. Unlike the mayor in *Willem*, the demonstrators in *Baldassi* were «simples citoyens» and, as such, were not subject to the duty of neutrality (European Court of Human Rights, *Baldassi and Others v. France*, cit., para. 70). Also, the Court acknowledged that their action was specifically meant to trigger the debate among consumers (*Ibid.*) on a question of general interest, *i.e.*, «Israel's respect of international law and the human rights situation in the Occupied Palestinian Territory» (*Ibid.*, para. 78).

Ultimately, the ECtHR observed that the French law on freedom of press, as interpreted and applied by the national judges, would prohibit *any* call for the boycott of products on the basis of their geographic origin, regardless of the circumstances of the case (*Ibid.*, para. 75). This is in contrast with the finding in *Perinçek* (European Court of Human Rights, *Perinçek v. Switzerland*, cit., para. 231), according to which political speech retains its character of matter of public interest as long as it does not exceed the limit of incitement to discrimination, hatred and violence. The same holds true also for the call for differential treatment, which therefore should not be restricted without first paying due regard to the circumstances of the case (European Court of Human Rights, *Baldassi and Others v. France*, cit., para. 79; this view finds further support also in the 2019 UN Special Rapporteur on Freedom of Religion's 2019 annual report of activity to the General Assembly of 20 September 2019, UN Doc. A/74/358, available at www.undocs.org). Hence, by omitting to consider the actions and the objectives pursued

by the demonstrators, the Appeal Court failed to properly evaluate whether the State interference was necessary in a democratic society, thus violating Article 10 ECHR (European Court of Human Rights, *Baldassi and Others v. France*, cit., paras. 80-81).

3. The judges in *Baldassi* did not make any reference to other courts' decisions on boycott. Notably, the January 1958's *Lüth* judgment of the German Supreme Court for the first time afforded protection to the right to boycott as a form of freedom of expression, to be understood both in its negative meaning – *i.e.*, the right to express an opinion free from any State interference – and in its positive one – *i.e.*, the right to actively engage and influence others (outside of the European jurisdictions, the right to boycott received a further confirmation also by the US Supreme Court's decision in the *NAACP v. Claiborne Hardware* case).

Instead, the ECtHR firmly upheld the general principles on freedom of expression elaborated in its case law, borrowing its core arguments from the *Perinçek v. Switzerland* leading case of 2015. Freedom of expression constitutes one of the key pillars for a democratic society and «one of the basic conditions for its progress and for each individual's self-fulfilment» (European Court of Human Rights: *Perinçek v. Switzerland,* cit., para. 196; *Handyside v. the United Kingdom*, Application no. 5493/72, Judgment of 7 December 1976, para. 49). Nonetheless, it is not an absolute freedom and national authorities may restrict it, provided that the restriction or interference meets the three conditions under Article 10(2) ECHR. In this regard, whereas criminalising freedom of expression (*i.e.*, restricting it) falls under the State's margin of appreciation, the Court is merely left with the role of supervising the compliance of the criminal prosecution with Article 10(2) ECHR (European Court of Human Rights, *Perinçek v. Switzerland,* cit., para. 196). This is even more so in respect to matters of political debate or on questions of public interest (*Ibid*., para. 197; European Court of Human Rights: *Wingrove v. the United Kingdom*, Application no. 17419/90, Judgment of 29 November 2005, para. 58; *Ceylan v. Turkey* [GC], Application no. 23556/94, Judgment of 8 July 1999, para. 34; and *Animal Defenders International* [GC], Application no. 48876/08, Judgment of 22 April 2013, para. 102), whereby Article 10(2) ECHR leaves little room for restrictions on the freedom of expression so as to ensure the respect of «opinions that diverge from those of the *[national]* authorities or any sector of the population» (European Court of Human Rights, *Perinçek v. Switzerland,* cit., para. 271). Thus, starting from the *Perinçek* principles, the judges in *Baldassi* established a fundamental distinction between 'differential' and 'discriminatory' treatments, further enhancing the protection of non-conventional and controversial political opinions and ideas even when they intrinsically provoke or disturb the audience and generate shock, as long as they do not incite to violence, hatred and discrimination (*Ibid.,* paras. 196 and 231; see also European Court of Human Rights: *Erbakan v. Turkey*, Application no. 59405/00, Judgment of 6 July 2006, para. 59; *Faruk Temel v. Turkey*, Application no. 16853/05, Judgment of 1 February 2011, paras. 8 and 60; and *Otegi Mondragon v. Spain*, Application no. 2034/07, Judgment of 15 March 2011, paras. 10 and 53-54). Hence, the Court upholds the possible lawfulness of boycott as a legitimate means of protest and dissent when it stays within the boundaries of the incitement to differential treatment and ultimately sets the grounds for future and innovative case law on boycott.

In this regard, the judges dedicated considerable room to outlining the contents and principles at the basis of the BDS movement, with a view to highlighting the general public interest surrounding the 70-year-long Israel/Palestine dispute and the political nature of BDS ideas. The BDS call (Boycott, Divestment, Sanctions) was issued by more than 170 Palestinian civil society organizations on 9 July 2005, a year after the release of the

Advisory Opinion on the Israeli Separation Wall by the International Court of Justice (ICJ). Drawing inspiration from the international solidarity fight against the South African apartheid regime, the BDS movement speaks out against Israel's violations of fundamental rights against the Palestinian people as a whole: it condemns the abuses on Palestinians under military occupation in the West Bank, Gaza and East Jerusalem and the injustices suffered by those in forced exile since the 1948 and 1967 wars, and fights against the inequality regime to which the Arab-Palestinian population of Israel is subject (for further reference, see www.bdsmovement.net). Also, and most importantly, the BDS movement urges people, civil society groups, corporations and governments around the world to put pressure on Israel through non-violent means «until it recognizes the Palestinian right of self-determination and it complies with international la » (European Court of Human Rights, *Baldassi and Others v. France*, cit., para. 5).

In light of this, it should not come as a surprise that the Court viewed the BDS as a political movement pursuing general interest objectives and afforded it the maximum protection under Article 10 ECHR. It is the very first time that an international human rights court deals with the BDS movement, and numerous civil society groups belonging to the broad Palestine solidarity network praised the *Baldassi* decision for its great potential in protecting activists' freedom of expression. The Court did not deal directly with the question of the BDS movement's legitimacy in international law. However, first the acknowledgment of its underlying democratic principles and objectives and second, the conclusion distinguishing between differential and discriminatory treatment, suggest that the ECtHR would have not answered in the negative, had it been brave enough to address such a heated political question (on the BDS legitimacy in international law, see M. Bot, "The right to boycott: BDS, law, and politics in a global context", in *Transnational Legal Theory* 3-4/2019, p. 421 ff.; see *contra*, I. Mann, "Against the Day: On the Law, Politics, and Ethics of BDS", in *The South Atlantic Quarterly* 3/2015, p. 670 ff,; see also the BDS movement official position as laid out in the Legal Briefing by the BDS Boycott National Committee in May 2016, available at www.bdsmovement.net).

In any case, the recognition by an international human rights court is likely to empower all BDS supporters and activists in Europe. It erases potential doubts on its non-violent foundations and situates the BDS call within the large-scale civil society movement fighting global inequalities and advocating for human rights protection and the rule of law. Most importantly, the *Baldassi* decision comes at a time when the Israeli government and diplomats are leading an unprecedented effort to promote a new definition of anti-Semitism, which conflates criticism of Israel's policies with anti-Semitism (see, *inter alia*, the German Parliament motion of May 2019, available at www.dip21.bundestag.de. For further reference on the new definition of anti-Semitism, see also P. Ullrich, "On the IHRA's Working Definition of Antisemitism*"* (The Rosa Luxemburg Stiftung Report, Berlino, 2019, available at www.rosalux.de). Against this background, the judges in *Baldassi* identified the possibility of distinguishing *in concreto* between, on the one hand, discriminatory and racist discourse against the Jews and, on the other, the opinions of protest and of critique against the State of Israel's practices and policies towards the Palestinians. In this way, the ruling is set to be a powerful shield for human rights defenders within the Palestine solidarity networks in Europe as well as for scholars and practitioners against the so-called Israel's *lawfare* (N. Gordon, N. Perugini, *The Human Right to Dominate*, Oxford, 2015; Israel's efforts fall within the more general phenomenon of the so-called 'shrinking of civic spaces': see A. Buyse, "Squeezing Civic Space: Restrictions on

Civil Society Organizations and the Linkages with Human Rights", in *The International Journal of Human Rights* 8/2018*,* p. 966 ff.).

However, whereas the distinction between differential and discriminatory treatment is set to provide a boost to the BDS campaigns and to the broad Palestine solidarity movement in Europe, on the other hand the Court left opened the question of the scope of the freedom to boycott. The freedom to boycott must be upheld whereby it raises a debate on a matter of general public interest. This is what, according to the judges, ultimately justifies the differential treatment. Yet, the very broad and general nature of a matter of public interest comes with numerous doubts on the very practical issue of the scope of the freedom to boycott, *i.e.*, on the specific object of the differential treatment (see "Wielding Antidiscrimination Law to Suppress the Movement for Palestinian Rights", in *Harvard Law Review* 2020, p. 1360 ff., available at www.harvardlawreview.org). The Court avoided dealing with the controversial questions of: whether people are free to boycott all Israeli products or only those originating in the illegal settlements; whether boycotting goods from the settlements includes only Israeli economic operators or also extends to other international businesses; whether the freedom to boycott targets only the strictly economic entities or also includes cultural, art and sport initiatives. Arguably, the judges swiftly hinted at a possible solution when referring to Israel's violations of public international law and to the situation of human rights in the Occupied Territories (European Court of Human Rights, *Baldassi and Others v. France*, cit., para. 78). In other words, the link to a superior interest of the international community (*i.e.*, respect for human rights and international law) is what, in this case, renders an issue a matter of general public interest, ultimately justifying the importance to protect freedom of expression in the form of boycott. However, all the above practical questions on the scope of such a freedom are left unanswered. Arguably, developing an argument on this crucial issue would have not gone beyond the ECtHR's jurisdiction, since it inherently follows from the distinction between discriminatory and differential treatments. Also, it would have had three important merits: first, that of anchoring the practice of boycott to cases of breaches of fundamental norms of the international legal system, in line with the BDS movement's objective of targeting *complicity* with human rights violations (O. Barghouti, "Boycott, Divestment & Sanctions – Globalized Palestinian Resistance to Israel's Colonialism and Apartheid", 2020). Secondly, it would have limited its scope, yet leaving space for its potential expansion in the future, especially in light of the new increasing evidence of crimes of apartheid committed by the State of Israel (on the question of Israel's alleged crimes of apartheid, see J. Dugard, J. Reynolds, "Apartheid, International Law, and the Occupied Palestinian Territory", in *European Journal of International Law* 3/2013; see also R. Falk, V. Tilley, *Israeli Practices towards the Palestinians and the Question of Apartheid*, 2017, available at www.opensiuc.lib.siu.edu; see also the Israeli NGO's *BT'Selem* Report of 12 January 2021, "A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid", available at www.btselem.org and the more recent Human Rights Watch Report of 27 April 2021, "A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution", available at www.hrw.org). Thirdly, it would have set the scene in clearer and more objective terms for boycott practices targeting issues of general interest beyond the Israel/Palestine situation.

4. The ECtHR's decision in *Baldassi* comes seven months after the Court of Justice of the EU (CJEU) delivered a blow to Israel's prolonged occupation of the Palestinian Territory. In its November 2019 *Psagot* judgment (Court of Justice of the EU [GC], *Organisation*

juive européenne and Vignoble Psagot, Case C-363/18, Judgment of 12 November 2019), the CJEU held that EU law requires the specific indication of whether Israeli goods actually originate in the internationally recognized borders of Israel or, instead, in the illegal Israeli settlements in the Occupied Palestinian Territory (OPT). In other words, EU Member States have the obligation to correctly label goods originating in the OPT in order to allow consumers to take an informed decision as to what they put in their trails at supermarket, *i.e.*, as to exert their right to *not purchase* Israeli goods coming from the illegal settlements (on the *Psagot* judgment, see E. Kassoti, S. Saluzzo (eds), "Special Section – What's in a Name? The Psagot Judgment and the Questions of Labelling of Settlement Products", European Papers 3/2019; see also G. Harpaz, "Mandatory Labelling of Origin of Products from Territories Occupied by Israel and the Weight of Public International Law: Psagot", in *Common Market Law Review* 5/2020, p. 1587 ff.; see also S. Villani, "Consumer Rights and Right to Self-determination: The Judgement of the Court of Justice of the EU in the Psagot Case", in *Diritti umani e diritto internazionale* 3/2020, p. 803 ff.).

Asserting that the CJEU is inviting EU consumers to boycott Israeli goods would clearly go too far. Choosing not to purchase a specific good on the basis of ethical considerations is not necessarily equal to boycotting it. Furthermore, the *Psagot* decision applies to the field of EU consumer law and concerns the strictly private sphere of consumer's choices, while *Baldassi* relates to the collective public dimension of individuals' freedom of expression. However, there is a thin but limpid connection between the enhancement of EU consumers' rights in *Psagot* and the protection of citizens' right to boycott in *Baldassi*, that is, both are ultimately sourced in the enforcement of fundamental rights and international law. On the one hand, the ECtHR emphasized that «the respect for public international law by Israel and the human rights situation in the OPT» constitute matters of '*general interest*' which, therefore, enjoy the highest degree of protection (European Court of Human Rights, *Baldassi and Others v. France*, cit., para. 78). On the other, the CJEU asserted that « the fact that a foodstuff comes from a settlement established in breach of the rules of international humanitarian law may be the subject of ethical assessments capable of influencing consumers' purchasing decisions, particularly since some of those rules constitute fundamental rules of international law » (Court of Justice of the EU, *Organisation juive européenne and Vignoble Psagot*, cit., para. 56). The norms recalled in the two decisions are the very same peremptory norms identified by the ICJ in its Advisory Opinion, namely the right of self-determination, the prohibition of the acquisition of territory by the use of force and some of the international humanitarian law norms contained in the 1949 Geneva Conventions, including Article 49 of the Fourth Geneva Convention, which all reflect certain superior principles and values shared by the international community as a whole (D. Tladi, *First Report on Jus Cogens*, 2016, UN Doc. A/CN.4/693, available at www.digitallibrary.un.org; D. Costelloe, *Legal Consequences of Peremptory Norms in International Law*, Cambridge, 2017; E. Cannizzaro, *The Present and Future of Jus Cogens,* Roma, 2015). Thus, both rulings give a blow to Israel's continuous disregard for international law peremptory norms by upholding the primacy of the respect for fundamental principles of international law, which reflect a superior interest of the international community that also Israel is bound to respect.

Hence, even though it is undeniable that the ECtHR's decision protects a specific modality of freedom of expression while the CJEU addressed a matter of private choice, the *Baldassi* ruling cannot be isolated from *Psagot* and even contributes to amplify the latter's impact. By identifying an EU law obligation for the Member State to correctly label Israeli products, the CJEU ultimately upheld the citizens' right (and own responsibility)

to choose whether to purchase them or not. After less than a year, the ECtHR is now completing the work already started by its Luxembourg counterpart by adding a further layer: European consumers not only can make such an individual private choice; they can even actively incite others to do so, as long as their conduct does not exceed the limit of incitement to discrimination. In this way, the boundary between private consumers' ethically driven choices and public interest boycotts gets eroded and civil society actors discover the function of the latter as an informal bottom-up remedy for the protection of human rights. From the State's perspective, this dynamic assumes an even broader significance: not only are EU Member States bound to properly indicate the geographical provenience of Israeli goods in order to allow citizens to make an informed choice; when the individual informed choice turns into a global call for boycott as a remedy for human rights and international law violations, they are also under an obligation to protect such a choice and abstain from any interference with it.

The *Baldassi* decision is therefore not simply yet another case on freedom of expression delivered by the ECtHR, but constitutes an incredibly remarkable precedent in Europe on three accounts: first, it may in the long-term contribute to put an end to Israel's disregard for fundamental rights; second, it is the first ruling of an international human rights court that recognizes boycott as a tool in the hands of individuals and civil society actors to express dissent and drive State's policy changes; third, and consequently, in light of the breach of *erga omnes* obligations such as those at stake in the present case, the decision may eventually spark further reflection on the question of non-state actors' *status* as subjects of international law, especially in regard to the protection of the superior interest for the international community highlighted above (in relation to the non-state actors in international law, see A. Peters, *Beyond Human Rights – The Legal Status of the Individual in International Law*, Cambridge, 2014; on non-state actors' *erga omnes* obligations, see A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, 2006). The Court demonstrates to be perfectly aware of the worrisome trend of shrinking spaces for civil society human rights advocacy currently undermining the European core values of democracy and rule of law (on the shrinking spaces phenomenon, see the Council of Europe Commissioner for Human Rights, *The Shrinking Space for Human Rights Organizations*, 4 April 2017, available at www.coe.int; see also Amnesty International, *Human Rights Defenders Under Threat – A Shrinking Space for Civil Society*, 2017, available at www.amnesty.org). Non-state actors may fill the gap left by States in ensuring the respect for the rule of law, human rights and fundamental freedoms (OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Guidelines on the protection of Human Rights Defenders*, Warsaw, 2014). Accordingly, where States fail to comply with their international human rights obligations, individuals and civil society organizations can contribute to protect human rights by resorting to bottom-up strategies and remedies, including the call for boycott.

5. The broader political context surrounding the *Baldassi* decision and the recent legal developments at the European level confirm the ECtHR's progressive stand and even judicial activism in relation to human rights protection in Europe. In line with this trend, the Court upheld the demonstrators' freedom of expression and formally took the distance from its 2009's *Willem* decision on the basis of the different private vs public *status* of the applicants. Also, the judges' view of boycott as a tool in the hands of civil society is in stark contrast with their finding in *Willem*, where boycott was considered merely from a purely international law perspective as a rather exceptional State remedy against serious breaches of international law (European Court of Human Rights, *Willem v. France*, cit.,

para. 22). Numerous commentators and human rights advocates have praised such a 'distinguo' for the Court ultimately protected the citizens' right to boycott (A. De Leo, "Baldassi and Others v. France: Criminal Convictions of BDS Activists Violate Freedom of Expression under the European Convention on Human Rights", in *Opinio Juris Blog*, 2020, available at www.opiniojuris.org; see also K. Ambos, "Freedom of Expression and Political Controversy: The ECtHR's BDS Judgment", in *Just Security Blog*, 2020, available at www.justsecurity.org). However, a thorough analysis of the *Baldassi* decision reveals that, in fact, the judges applied the same legal reasoning as they did in *Willem*, simply reaching an opposite outcome in light of the different factual circumstances of the two cases, *i.e.*, the public *vs*. private nature of the applicants.

Mr Willem was the mayor of the French town of Seclin. Acting in his quality as mayor, he had incited the catering services of the town of Seclin to not purchase Israeli products, thus failing to comply with the duty of neutrality and of restraint over those acts engaging the community he represented (European Court of Human Rights, *Willem v. France,* cit., para. 37). Surely, a public officer is bound to behave with diligence, loyalty and impartiality while carrying out his functions. This is a fundamental principle enrooted in the legal constitutional traditions of European States, including France. Yet, Mr Willem conflated his individual choice with the global call for human rights protection, blurring the distinction between the private and public dimensions of individual freedoms. On this account, his failure to publicly debate the call for a boycott within the municipal council and to have the latter vote on it was considered «un acte positif de discrimination» (*Ibid.*, para. 38) and constituted an evidence of the mayor's non-compliant conduct, by itself sufficient to engage his responsibility. By contrast, the demonstrators in *Baldassi* were ordinary citizens and certainly not subject to the same duty of neutrality and restraint as Mr Willem: contrarily to the mayor's action, theirs was precisely meant to trigger public debate among the supermarket costumers on a matter of general public interest. In light of this, it was deemed to fall under the protection of freedom of expression. The opposed outcomes of the two decisions are therefore simply a matter of different factual circumstance (*i.e.*, the public/private quality of the applicant), but the rationale behind them is the same, namely the utmost necessity to preserve the pluralist character of the democratic society through freedom of expression. This approach upholds the ECtHR's case law on boycott and reverberates throughout the whole *Baldassi* decision, thus situating it within the Court's adjudicatory powers as circumscribed by the European Convention on Human Rights.

However, also a different outcome for the *Willem* case would have been possible. Arguably, the appreciation of a public officer's duties cannot be limited to the latter's impartiality and neutrality obligations. Likewise, affirming that a local governor should refrain from actively implementing his political views over the community of his citizens seems rather odd (R. Wintemute, "Baldassi & Others v. France: Article 10 protects the right to call for a boycott of goods from Israel", in *Strasbourg Observers*, 2020, available at www.strasbourgobservers.com; see also A. Quéré, "L'arrêt Baldassi de la CEDH: L'interdiction Française D'Appeler au Boycott des Produits Israéliens Viole la Liberté D'Expression", in *Revues des Droits et Libertés Fondamentaux* 2020, available at www.revuedlf.com). First, a mayor is not only a citizen whose freedom of expression should be protected, but he is also an elected political representative. He holds political responsibility *vis-à-vis* his constituency, *i.e.*, the very same citizens who voted for him on the basis of certain common political and ideological views. Second, Willem's call for a boycott was clearly «a reaction against the policies of massacre and killings» systematical-

ly carried out by the Sharon-led Israeli government in 2002 (European Court of Human Rights, *Willem v. France,* cit., para. 8), thus stemming from his concerns for the respect of the superior interest highlighted above. It was a means of «protesting against an antidemocratic policy» (*Ibid.*, para. 7), enrooted in the democratic values at the heart of Europe and of the European Convention on Human Rights. Consequently, the ECtHR arguably missed the opportunity to thoroughly examine the mayor's obligations *vis-à-vis* human rights and international legality. Whereas the implementation of human rights obligations clearly falls under the State's competence, the principle of subsidiarity entails that within their jurisdiction local authorities also play a key role in the respect and promotion of fundamental values and in the enforcement of human rights standards, this being «a responsibility shared by all the different tiers of authority» within the State (Council of Europe, Resolution 296 of 17 March 2010, paras. 2-3, available at www/rm.coe.int). If the State upper tiers of executive and legislative powers fail to fulfil their human rights obligations, then one should expect local authorities to fill the gap and actively contribute to mitigate the State's omission. In other words, precisely *because of* their public *status* and functions and by virtue of the subsidiarity principle, mayors have a legal and moral duty to adopt all necessary measures to ensure that at least those public services and activities under their jurisdiction and control meet the State's human rights obligations (Y. Blank, "Localism in the New Global Legal Order", in *Harvard International Law Journal* 2006, p. 263 ff.; J.E. Nijman, "Renaissance of the City as Global Actor: The Role of Foreign Policy and International Law Practices in the Construction of Cities as Global Actors", in *The Transformation of Foreign Policy: Drawing and Managing Boundaries from Antiquity to the Present*, G. Hellmann, A. Fahrmeir, M. Vec (eds), Oxford, 2016).

In light of the above, Mr Willem's action could have been interpreted as the latter's attempt to meet his human rights duties in the town of Seclin, thus being fully legitimate and even legally owed. For instance, as outlined by the International Law Commission (ILC) and upheld by the ICJ precisely in relation to Israel's prolonged occupation of the Palestinian Territory, third states have the obligation not to recognize as lawful a situation created by the serious breach of a *jus cogens* norm nor to assist the maintenance of such a situation (See Article 41(2) of the ILC's Draft Articles on State Responsibility; see also the ICJ's 2004 Wall Opinion, paras. 159-160). Whether this would have been sufficient for the Court to find a violation of his freedom of expression and avoid him the criminal conviction goes beyond the scope of this commentary. Going back to the *Baldassi* decision, by espousing the rationale in *Willem*, the judges arguably missed the opportunity to develop an innovative case law on the duties of regional and local authorities in relation to States' failure to meet their human rights obligations and in light of the subsidiary principle, thus failing to echo the developments occurring at the political and international level (Council of Europe, Resolution 296 of 17 March 2010, cit.; see also *Role of Local Governments in the Promotion and Protection of Human Rights – Final Report of the Human Rights Council Advisory Committee*, 7 August 2015, UN Doc. A/HRC/30/49). Whereas the ECtHR interpreted its role of human rights adjudicator as strictly defined through the boundaries of the ECHR, in this case a more proactive appreciation of its role as guardian of the international legal system would have been much appreciated.

6. The *Baldassi* decision of the European Court of Human Rights is a powerful tool for human rights advocacy in favour of justice in Israel/Palestine and beyond. The ECtHR qualified the boycott as a modality to express protesting opinions and recognized the *de facto* lawfulness of the BDS movement, as long as its practices do not exceed the boundary

of incitement to discrimination. The Court identified a case-to-case approach that ultimately reduces the scope of France's generalized criminalization of the call for boycott of the Israeli products. On these grounds, France's interference in the demonstrators' freedom of expression was found to be in breach of the standards set out in Article 10 ECHR.

The Court grounded its decision on the objective public interest nature of the issues at stake, namely Israel's full disregard of certain fundamental norms of international law and the protection of human rights. By doing so, it consciously left aside the very sensitive and general questions of the legality and scope of boycott in international law, thus leaving the doors open to future controversies. However, this choice has the merits of empowering individuals and civil society actors, for it does not rule out recourse to boycott for countering serious disregard of rules of international law. Ultimately, the Court recognized the twofold function of boycott as a legitimate informal tool in the hands of civil society actors to express protesting opinions and to promote human rights and justice. In this way, the *Baldassi* decision constitutes an important precedent in Europe for the general use of boycott as a form of freedom of expression, far beyond the Palestine/Israel situation.

In addition to the above, the ECtHR's findings cannot be isolated from other legal and political developments occurring at the international and European level. On the one hand, *Baldassi* gave a boost to the November 2019's *Psagot* decision of the Court of Justice of the EU. It stated that when consumers' individual choices stem from ethical and humanity considerations (*e.g.*, the enforcement of international law and human rights) and pursue non-violent democratic objectives in a way as to not exceed the limit of the incitement to discrimination, then not only should States allow and encourage such choices, but they should even abstain from any interference with individuals' freedom of expression. On the other hand, the judges in *Baldassi* reached an opposite outcome compared to the 2009 *Willem* decision as to the protection of the applicants' freedom of expression, in light of the different public/private quality of the applicants. However, by recalling and espousing the *Willem* rationale, they showed reluctance to fully divert from the latter's narrow understanding of mayors' rights and obligations and arguably missed the opportunity to develop a thorough analysis on regional and local authorities' human rights obligations, in line with current political and academic debates.

Whereas France has been at the forefront in prosecuting activists calling for the boycott of Israeli products, the *Baldassi* ruling is likely to give a significant boost to the BDS movement's international recognition and to provide a solid shield for future BDS actions and campaigns in Europe. For instance, the criminal court of Lyon recently acquitted the journalist Olivia Zemor from the charges of defamation and of incitement to economic discrimination against the Israeli corporation Teva Pharmaceuticals. Likewise, the Cadiz Regional Court of Appeal dismissed a criminal complaint for hate crime and arbitrary exercise of power against officials from the City Council for the issuance of a statement against Israel's disregard of human rights norms (for further information, see the work by the European Legal Support Center, available at www.elsc.support). In this regard, the ECtHR showed to be fully aware of the worrisome trends of curtailment of individual political rights and freedoms currently faced by human rights advocates within the Palestine solidarity networks. Notwithstanding the strong position reflected in *Baldassi*, on 20 October 2020 France's Ministry of Justice issued a new Circular that left no doubts as to its stance *vis-à-vis* the ruling. It reaffirmed the content of its February 2010 Circular and emphasized that the ECtHR did not rule out the possibility for States to prosecute boycott actions, ultimately leaving on Public Prosecutors the burden to assess *in concreto* whether the BDS actions under investigation exceed the boundaries of incitement to dis-

crimination (Le garde de sceaux, Ministre de la Justice, *Dépêche relative à la répression des appels discriminatoires au boycott des produits israéliens*, 20 October 2020). Whereas the Ministry's move further fuels the ambiguity over the difference between the call to boycott and the incitement to anti-Semitism, it is clearly a hostile reaction to the *Baldassi* decision (N. Boeglin, G. Poissonier, "Appel au boycott des produits israéliens: quand la France fait la sourde oreille", in *Le Monde du Droit*, 1 December 2020, available at www.lemondedudroit.fr), likely to give rise to future actions on freedom of expression and boycott at the European Court of Human Rights.

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ABSTRACT. The Use of Boycott as a Tool to Protect Fundamental Norms of International Law: the *Baldassi* Decision

On June 11, 2020, the European Court of Human Rights issued its groundbreaking *Baldassi and Others v. France* decision, protecting the freedom of expression of eleven political activists who called for the boycott of Israel. The ECtHR upheld its case-law on Article 10 ECHR and qualified the boycott as a means to express protesting opinions which deserves protection as long as its practices do not exceed the boundary of incitement to discrimination. The ruling is the very first by an international human rights court on the boycott movement and is set to deliver a blow to Israel's disregard of international law and human rights. One year after *Baldassi*, this article offers some reflections on the ruling legacy both with regard to the Palestine/Israel context and beyond that.

Keywords: boycott; Israel; human rights; article 10; freedom of expression; Palestine.

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