IN THE MATTER OF THE ADOPTION AND POTENTIAL APPLICATION OF THE INTERNATIONAL HOLOCAUST REMEMBRANCE ALLIANCE WORKING DEFINITION OF ANTI-SEMITISM

OPINION

INSTRUCTIONS

1. I am asked by Free Speech on Israel, Independent Jewish Voices, Jews for Justice for Palestinians and the Palestine Solidarity Campaign to provide an Opinion on the effect of the Government's decision to "adopt" the International Holocaust Remembrance Alliance ("IHRA") non-legally binding working definition of antisemitism ("the IHRA Definition"). I am also asked to consider the meaning and effect of the IHRA Definition and its compatibility with the obligations of public authorities under the Human Rights Act 1998 ("the HRA").

BACKGROUND

2. The IHRA is an intergovernmental body whose stated purpose is "to place political and social leaders' support behind the need for Holocaust education, remembrance and research both nationally and internationally". On 26 May 2016 the IHRA made a decision ("the IHRA Decision") to adopt what it described as a "non-legally binding working definition of antisemitism" in the following terms:

> "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."

This definition is then followed by "examples" which serve as illustrations. A full copy of the IHRA Decision adopting the IHRA Definition is appended to this Opinion.[1]

3. In 2016 the House of Commons Home Affairs Select Committee ("the Select Committee") conducted an investigation into "Antisemitism in the UK". In its Report, published in October 2016, it considered definitions of antisemitism and

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[1] The IHRA Definition was broadly based on the working definition of the European Monitoring Centre on Racism and Xenophobia ("EUMC"). The EUMC Definition has proved controversial, see, for example, the report of Professor David Feldman: *Sub-report for the Parliamentary Committee Against Antisemitism* (1 January 2015). http://www.antisemitism.org.uk/wp-content/themes/PCAA/images/DAVID-FELDMAN-SUBREPORT.pdf

concluded that

> "We broadly accept the IHRA definition, but propose two additional clarifications to ensure that freedom of speech is maintained in the context of discourse about Israel and Palestine, without allowing antisemitism to permeate any debate. The definition should include the following statements:
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> - It is not antisemitic to criticise the Government of Israel, without additional evidence to suggest antisemitic intent.
> - It is not antisemitic to hold the Israeli Government to the same standards as other liberal democracies, or to take a particular interest in the Israeli Government's policies or actions, without additional evidence to suggest antisemitic intent.[2]

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4. The Select Committee went on to recommend that the IHRA Definition - with its "additional caveats" - be "formally adopted by the UK Government, law enforcement agencies and all political parties, to assist them in determining whether or not an incident or discourse can be regarded as anti-Semitic".

5. The Government responded to the Select Committee Report in December 2016.[3] In relation to the recommendation concerning the IHRA Definition, the Government agreed to "adopt" this. In relation to the suggested "additional caveats" the Government said

> "We believe that references within the definition stating that "criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic" are sufficient to ensure freedom of speech."

The Government went on to note that an earlier version of the definition[4] is being used by the police and forms part of the National Police Chiefs Council Hate Crime Manual for officers and suggests that the IHRA Definition is a useful tool for criminal justice agencies and other public bodies to understand how antisemitism manifests itself in the 21st century.

THE IHRA DEFINITION

6. Three initial points can be made about the IHRA Definition. The first is that it is expressed to be a "non-legally binding working definition". In other words, it cannot be construed in the same way as a statutory definition or one produced as part of statutory guidance. The IHRA Definition does not purport to provide a

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2 Antisemitism in the UK, para 24 https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/136/13602.htm

3 Government Response to Home Affairs Committee Report, "Anti-Semitism in the UK", CM 9386

4 That is, the EUMC Definition, see note 1 above.

legal definition of antisemitism. It does not have the clarity which would be required from such a definition. It is perhaps worth pointing out that the fact that conduct is "contrary" to the IHRA Definition could not, of itself, render that conduct "illegal" in any sense.

7. Second, there is an obvious problem with the wording of the IHRA Definition. The use of language is unusual and therefore potentially confusing. The phrase "a certain perception" is vague and unclear in the context of a definition. The use of the word "may" is also confusing. If it is understood in its usual sense of "possibility" then the definition is of little value: antisemitism "may be expressed as hatred towards Jews but may also be expressed in other (unspecified) ways". This does not work as a definition. In my view, the very least that is needed to clarify the IHRA Definition is to reformulate the first sentence so that it reads as follows:

> "Antisemitism is a particular attitude towards Jews, which is expressed as hatred toward Jews".

Even in these amended terms the definition is unsatisfactory. The apparent confining of antisemitism to an attitude which is "expressed" as a hatred of Jews seems too narrow and not to capture conduct which, though not <u>expressed</u> as hatred of Jews is a clearly a manifestation of antisemitism. It does not, for example, include discriminatory social and institutional practices.

8. These problems with the wording of the IHRA Definition mean that it is very difficult to use as "tool". It is obviously most unsatisfactory for the Government to "adopt" a definition which lacks clarity and comprehensiveness in this way. It means that there is likely to be lack of consistency in its application and a potential chilling effect on public bodies which, in the absence of definitional clarity, may seek to sanction or prohibit any conduct which has been labelled by third parties as antisemitic without applying any clear criterion of assessment.

9. Third, it is important to note the structure of the IHRA Decision. The IHRA Definition is contained in the two sentences set out at paragraph 2 above. The remainder of the decision consists, as the IHRA Decision says, of "examples by way of illustration". These examples must be read in the light of the definition itself and cannot either expand or restrict its scope. All of them must be regarded as examples of activity which can properly be regarded as manifesting "hatred towards Jews".

10. In many of the examples which are given the "hatred towards Jews" is obvious and uncontroversial. For example, "charging Jews with conspiring to harm humanity", or "justifying the killing or harming of Jews in the name of ideology or religion" obviously involve "hatred towards Jews". However, in some cases, the examples do not explicitly refer to the "hatred" requirement and therefore need further elaboration.[5] I will consider two of the examples given although the point is a general one:

- *"Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations"*. This must be read in the light of the definition. Such an accusation would only be antisemitic if motivated by hatred of Jews. If, for example, the accusation was motivated by a reasonable belief that a particular Jewish citizen or a group of citizens had by their words or actions showed that their loyalty to Israel was greater than their loyalty to their own nation, the accusation could not be properly regarded as antisemitic.
- "*Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor".* This must, again, be read in the light of the definition. A denial of a Jewish right to self-determination could be the result of a particular analysis of the nature of the Jewish people (motivated, for example, by religious considerations) which had nothing to do with the "hatred of Jews". Furthermore, unless such a claim was informed by hatred to Jews, it would not be antisemitic to assert that as Israel defines itself as a Jewish state and thereby by race, and that because non-Jewish Israelis and non-Jews under its jurisdiction are discriminated against, the State of Israel is currently a racist endeavour.

EFFECT OF THE GOVERNMENT'S "DECISION TO ADOPT"

11. The Government has decided to "adopt" the IHRA Definition. This is not a decision made in accordance with any statutory power but is a freestanding statement of policy. It cannot, and does not purport to, have any binding effect on any public body and no public body is under a resulting obligation to adopt or use this definition. It is simply a "suggestion" by the Government as to a "definition of antisemitism" which public bodies might wish to use. No public body could properly be criticized for refusing to adopt the IHRA Definition. On the

[5] This requirement of evidence of subjective intent is appears to be the Select Committee was seeking to achieve through the additional caveats.

contrary, in view of the unsatisfactory nature of the IHRA Definition, it is my view that a public body should give very careful consideration to its suitability for use as a guide to decision making and should, if it is adopted, give careful guidance as to its application.

12. The Government has declined to adopt the "caveats" suggested by the Select Committee which it said were designed to "ensure that freedom of speech is maintained in the context of discourse about Israel and Palestine". It has done so on what is, strictly speaking, a mistaken basis. It is said that

> "references within the definition stating that "criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic are sufficient to ensure freedom of speech" (emphasis added).

In fact, the IHRA Definition does not contain this statement. It appears within the "illustrations" designed to guide the IHRA in its work. Nevertheless, the intention is clear: the Government takes the view that the Select Committee's caveats are unnecessary because it is already clear from the IHRA Definition and the illustrations that it is not antisemitic to criticise the Government of Israel, or to hold that Government to the same standards as other democracies "without additional evidence to suggest antisemitic intent". This view is reflected in the letter sent by the Minister of State for Universities, Science, Research and Innovation, Jo Johnson MP, to Universities UK on 13 February 2017 ("the Minister's Letter") in which, after referring to the IHRA Definition he points out that it "gives examples of the kind of behaviours, which depending on the circumstances, could constitute anti-Semitism" (my emphasis). In other words, the Minister accepts that the "examples" given may not, of themselves, be of antisemitic behaviour but that "antisemitic intent" also has to be demonstrated.

13. In short, the Government's decision to "adopt" the IHRA Definition does not, of itself, have any immediate or direct legal consequences. It will only have such consequences if, following the Government, public bodies also decide to "adopt" the definition and then seek to apply it in practice. I will now turn to the question as to how the definition should be applied by public bodies.

APPLICATION OF THE IHRA DEFINITION

14. A public authority such as, for example, a university or a local authority is free to decide whether or not to adopt the IHRA Definition as part of its own anti-racism policies. It is noteworthy that, in the Minister's Letter, it is not suggested that Universities are under any obligation to "adopt" the IHRA Definition. It is simply

suggested that the definition is “disseminated”. If a public authority does decide to “adopt” the definition then it must interpret it in a way which is consistent with its statutory obligations. I would draw attention to two such obligations, one general and one specific to “universities, polytechnics and colleges”.

15. First, there is the general obligation. Public authorities cannot lawfully act in a manner which is inconsistent with rights under the European Convention on Human Rights (“the Convention”).[6] This means that, for example, a public authority cannot interfere with freedom of expression unless this is justified under Article 10(2) of the Convention or with freedom of assembly unless this is justified under Article 11(2). Such justifications must be “convincingly established”. It is, of course, fundamental that freedom of expression “is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that “offend, shock or disturb the State or any sector of the population.”[7] However public authorities are likely to be justified in restricting or prohibiting statements or demonstrations which meet the strict test of being “a direct or indirect call for violence or as a justification of violence, hatred or intolerance”.[8] Speech which is incompatible with Convention values, such as Holocaust denial or justification of pro-Nazi policies is outside the protection of Article 10.[9]

16. In addition to the “negative obligation” on public authorities not to interfere with freedom of expression unless such interference is justified under Article 10(2) of the Convention, they are also under a “positive obligation”

> “to create a favourable environment for participation in public debates for all concerned, allowing them to express their opinions and ideas without fear, even if these opinions and ideas are contrary to those defended by the official authorities or by a large part of public opinion, or even if those opinions and ideas are irritating or offensive to the public”[10] .

17. The Court of Human Rights has not sought to provide a general definition of

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6 See, HRA section 6(1).

7 This formulation first appears in *Handyside v United Kingdom* (1976) 1 EHRR 737 [49] and has been repeated in numerous subsequent judgments.

8 See, *Perinçek v Switzerland* (2016) 63 EHRR 6 [206] and the cases cited there.

9 As a result of Article 17 of the Convention, see *Ivanov v Russia*, Decision of 20 February 2007

10 *Dink v Turkey* Judgment of 14 September 2010 (in French only) [137]

antisemitism. However, the recent case of *CICAD v Switzerland*[11] provides an useful indication of its likely approach to the IHRA Definition. The applicant in that case, CICAD, was an NGO which campaigned against antisemitism. An article in its newsletter had condemned an academic for using antisemitic language. He had edited a book entitled *Israel et l'autre* and had written a Preface which contained the following passages:

> "By becoming very consciously the Jewish state, Israel brings together on its shoulders the weight of all these questions which explicate the basic Jewish question. (...) The identification of Israel with Judaism means that all political, diplomatic, military activity is considered as an examination of Judaism: let us see how (...). Under these conditions, it is perfectly futile to consider that Israel is a State like any other: its hands are bound by the definition it has set itself. When Israel is exposed on the international scene, it is Judaism that is exposed at the same time.
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> "In the field of politics too, there are few such impressive examples of the active presence, at all levels, of a strong and interventionist state like the State of Israel, A state which assumes so completely the morality of "dirty hands" (in particular the policy of closure of territories, destruction of civilians' houses, targeted assassinations of alleged terrorist leaders) in the interests of the security of its citizens."

CICAD's newsletter condemned these arguments as antisemitic. The academic brought a successful civil action in the Swiss Courts. CICAD was ordered to remove the article, publish the court's judgment and pay costs. Its complaint that this ruling was a breach of its Article 10 rights was dismissed by the Court of Human Rights. The domestic court had rejected the argument of CICAD that the academic's comments were within the EUMC Working Definition of Antisemitism. The Court of Human Rights found no basis for disturbing that conclusion. Although it did not directly engage with the merits of the EUMC Working Definition it is plain from the Court's reasoning that it did not accept that comments of the type made by the academic could properly be characterized as antisemitic.

18. Secondly, in the case of universities, polytechnics and colleges there is a specific statutory "duty to ensure freedom of speech"[12] expressed in the widest terms. Such institutions are under a duty to

> "take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members,

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11 Judgment of 6 June 2016 (in French only).

12 See Education Act 1986, section 43

students and employees… and visiting speakers".[13]

They must ensure, insofar as is reasonably practicable, that no individual is denied use of their premises on any ground connected with "the beliefs or views of that individual". The only basis on which the duty to ensure freedom of expression can be overridden is if what a visiting speaker is likely to say is not "within the law" or it is not "reasonably practicable" to allow use of university premises.

19. The effect of the general obligation on a public authority to act compatibly with the Convention is that, if it adopts the IHRA Definition, it would have to take active steps to ensure that it was applied in a way which was consistent with Article 10. It would, for example, be lawfully entitled to prohibit conduct which incited hatred or intolerance against Jews. It would not be lawfully entitled to prohibit conduct on the sole basis that supporters of the State of Israel found it upsetting or offensive.

20. A number of the "contemporary examples" of antisemitism in public life included in the IHRA Decision might, if read literally, appear to condemn as antisemitic conduct which does not constitute or manifest hatred or intolerance against Jews. As I have already discussed, those examples must be read in the light of the definition itself and can only properly be regarded as antisemitic if they "manifest a hatred against Jews". This was recognized by the Select Committee when it suggested that criticism of the Government of Israel, is not antisemitic "without additional evidence to suggest antisemitic intent". The Government expressed the view that this qualification was already present in the IHRA Definition so that no express caveat was needed. The position is, however, unclear and public authorities should take steps to ensure that freedom of expression and assembly are properly protected by ensuring that unpopular but lawful views can be put forward at meetings or demonstrations.

21. In my view any public authority which sought to apply the IHRA Definition to decisions concerning the prohibition or sanctioning of activity which was critical of the State or Government of Israel would be acting unlawfully if it did not require such activity also to manifest or incite hatred or intolerance towards Jews. If an authority applied the IHRA Definition without such a requirement it would be in breach of Article 10 of the Convention and would, therefore, be

[13] Ibid, section 43(1).

acting unlawfully under domestic law in the United Kingdom.

22. A number of examples of conduct which have been criticised as antisemitic have been suggested in various publications. These include:

- Describing Israel as a state enacting policies of apartheid.
- Describing Israel as a state practising settler colonialism.
- Describing the establishment of the State of Israel and the actions associated with its establishment, as illegal or illegitimate.
- Campaigning for policies of boycott divestment or sanctions against Israel, Israeli companies or international companies complicit in violation of Palestinians human rights (unless the campaigner was also calling for similar actions against other states).
- Stating that the State of Israel and its defenders "use" the Holocaust to chill debate on Israel's own behaviour towards Palestinians.

In my view, none of these statements or activities could, of themselves, be properly described as antisemitic. I do not think that any of them, without more (that is, without evidence of "hatred towards Jews"), fall within the terms of the IHRA Definition. If an event were to be banned by a university or other public authority on the grounds that such views were being expressed by the organisers or by speakers on a panel then, without more, such a ban would in my view be unlawful.

23. The position would, of course, be very different if the organisers or speakers at an event where such views were expressed were also inciting hatred or intolerance towards Jews by, for example, seeking to justify the killing of Jews in the name of radical Islam or claiming that the Holocaust had been invented or exaggerated by the State of Israel. Such statements would be the "additional evidence" referred to in the Select Committee's suggested "caveats" and would then be likely to justify prohibition or sanction.

24. The starting point should be that events which seek to protest against the actions of the State of Israel or the treatment of Palestinians are lawful expressions of political opinion. There is no justification in law for treating such events any differently from any other political protests. Any policy which a public authority adopts for the regulation of political meetings or protests should be applied consistently to all events and protests. In particular, the organisers of events of the kind mentioned should not be required to justify them or prove that they are not motivated by antisemitism and should not be subject to special

restrictions or conditions. In the absence of positive evidence of antisemitism such restrictions or conditions would be unlawful.

CONCLUSION

25. In summary, therefore, it is my view that:

(1) The IHRA "non-legally binding working definition" of antisemitism is unclear and confusing and should be used with caution.

(2) The "examples" accompanying the IHRA Definition should be understood in the light of the definition and it should be understood that the conduct listed is only antisemitic if it manifests hatred towards Jews.

(3) The Government's "adoption" of the IHRA Definition has no legal status or effect and, in particular, does not require public authorities to adopt this definition as part of their anti-racism policies.

(4) Any public authority which does adopt the IHRA Definition must interpret it in a way which is consistent with its own statutory obligations, particularly its obligation not to act in a matter inconsistent with the Article 10 right to freedom of expression. Article 10 does not permit the prohibition or sanctioning of speech unless it can be seen as a direct or indirect call for or justification of violence, hatred or intolerance. The fact that speech is offensive to particular group is not, of itself, a proper ground for prohibition or sanction. The IHRA Definition should not be adopted without careful additional guidance on these issues.

(5) Public authorities are under a positive obligation to protect freedom of speech. In the case of universities and colleges this is an express statutory obligation but Article 10 requires other public authorities to take steps to ensure that everyone is permitted to participate in public debates, even if their opinions and ideas are offensive or irritating to the public or a section of it.

(6) Properly understood in its own terms the IHRA Definition does not mean that activities such as describing Israel as a state enacting policies of apartheid, as practicing settler colonialism or calling for policies of boycott divestment or sanctions against Israel can properly be characterized as antisemitic. A public authority which sought to apply the IHRA Definition to prohibit or sanction such activities would be acting unlawfully.

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8 March 2017