

## **ANTI-SEMITISM: THE IHRA DEFINITION AND ITS CONSEQUENCES FOR FREEDOM OF EXPRESSION**

1. I am asked to advise the *Palestinian Return Centre* as to the interpretation and impact on free speech, of the British Government's acceptance in 2016 of an extended definition of anti-Semitism promulgated by the International Holocaust Remembrance Alliance (IHRA).

### Freedom of Expression

2. The English writer George Orwell, in his introduction to *Animal Farm* (which his left-wing publisher turned down because it was insulting to Stalin) remarked that “if liberty means anything at all, it means the right to tell people what they do not want to hear.” That is an apt definition of free speech in the UK today, in terms of our common and statute law and the long-stop protection of speech in Article 10 of the European Convention of Human Rights. The Common Law in past centuries punished certain kinds of writing (libel) and speech (slander), namely blasphemy (now abolished) sedition (now a dead letter) and obscenity – that which “tends to deprave and corrupt” its potential audience, subject to a “public good” defence and (by judicial definition) some real prospect of harm. More recent criminal statutes have outlawed the stirring up of hatred against those identified by a personal characteristic: their race or religion or sexual orientation. But as the Crown Prosecution Service guidelines emphasize, “Hatred is a very strong emotion” and “stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence”.<sup>1</sup> Anti-Semitic utterances, unless intended or likely to foment hatred against Jewish people, do not

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<sup>1</sup> See CPS, Racist and religious crime – CPS prosecution policy, Legal Guidance, Hate crime, available at <https://bit.ly/2E6vxsk>; archived here. [http://webarchive.nationalarchives.gov.uk/20111115164417/http://www.cps.gov.uk/publications/prosecution/violent\\_extremism.html](http://webarchive.nationalarchives.gov.uk/20111115164417/http://www.cps.gov.uk/publications/prosecution/violent_extremism.html).

amount to an offence under English law. But this discreditable and indeed contemptible behaviour may result in disciplinary action, expulsion from organisations, and a loss of the right to practice certain employments or professions. To accuse someone wrongly of anti-Semitism is defamatory and would incur damages in a civil action.

3. This position taken by British law differs from that in some European countries with historic experience of Nazi repression, which have stricter laws against racism and genocide denial. Even so, all European countries are subject to the Convention, Article 10 of which lays down:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

This principle may only be overborne a) by a precise law, which is b) necessary in a democratic society either in the interests of national security, the prevention of disorder or the protection of the reputation and rights of others, and c) counts as a proportionate measure to achieve these legitimate aims. But the need for restrictions must be established convincingly and they must be “clear, certain and predictable” – i.e. formulated with sufficient precision to enable citizens to regulate their conduct. The European Court of Human Rights has also held that they must also be a proportionate response to a pressing social need. The right may be availed of by those whose utterances “offend, shock or disturb.” The scope for criticism of states and statesmen is wider than for private individuals because of the need for free and open discussion of politics.

4. These principles were most recently applied by the European Court to strike down the conviction by the Swiss Courts of a rabid Turkish nationalist for proclaiming at a small and unreported conference that “the Armenian genocide was a lie.” The Swiss genocide

denial law, the Court declared, was too broad: it should not have permitted his conviction unless there was evidence of intention to arouse, or likelihood of, violence or disorder. The ‘idea’ that there had been no Armenian genocide, although it flew in the face of the facts, was nonetheless protected unless its utterance posed some danger to the public by encouraging or justifying violence, hatred or intolerance.<sup>2</sup>

5. Another case in the European Court was brought by CICAD (Inter-community Coordination against Anti-Semitism and Defamation) which had described an academic as “anti-Semitic:” for criticising the State of Israel, calling it Judaism with “the morality of dirty hands” because of its policies of “closure of territories, destruction of civilian homes and targeted assassination of alleged terrorist leaders.”<sup>3</sup> CICAD had been convicted of defamation and fined, but the court ruled that this punishment did not infringe free speech: such criticisms of Israel did not make the academic “anti-Semitic”, and the accusation was false and libellous.
6. These cases demonstrate that Article 10 will serve to protect expression of hostile opinion about the conduct of the Government of Israel, however exaggerated or baseless, unless communicated for the purpose or with the result of stirring up disorder or hatred of Jews in general.
7. So, what is “anti-Semitism?” The Oxford English Dictionary gives as its meaning “hostility to or prejudice against Jews.” This is both simple and accurate, so long as it is understood that the hostility and prejudice must be against Jews as such, or in general, because of some sort of presumed racial characteristic – and not against an individual Jewish person or a particular organisation. Wikipedia, with reference to Encyclopaedia Britannica, Paul Johnson and Bernard Lewis, defines anti-Semitism as “hostility to,

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<sup>2</sup> Perinçek v. Switzerland, (2016) 63 ECHR 6

<sup>3</sup> CICAD v Switzerland, [2016] ECHR 495 (07 June 2016)

prejudice or discrimination against Jews.” The addition of “discrimination” is acceptable, (if unnecessary, because its motive will generally be a feeling of hostility or prejudice) but again, so long as the unfavourable treatment that constitutes discrimination is inflicted because the victims are Jewish.

8. The word seems to have been coined in German literature in the late nineteenth century, although it could be applied to the persecution of Jewish communities ever since the third century BC. It has taken various forms of negative stereotyping in ideologies and myths and of course reached its apotheosis in the Nazi genocide, although recent surveys show that it still manifests in the UK and may be increasing – often on social media or in the vandalism of Jewish tombstones and synagogues. It is a particularly vicious form of racism, criminal when it reaches the pitch of inciting hatred and unacceptable in public institutions, employment and most organisations. It is defamatory to wrongly accuse a person of being anti-Semitic. It might be thought that the word needs no further definition.
9. That is not the view of the UK Government, which in December 2016 “adopted” an extended definition which had previously featured in the “Hate Crime Manual” for police officers and had been recommended – with important changes to protect the freedom to criticise Israel – by the House of Commons Home Affairs Select Committee. It was never debated in Parliament and perhaps not even discussed in Cabinet: it was announced by the Prime Minister at a Conservative Party luncheon, and has no legal effect. It was a definition that had originated as a “working definition” in an obscure European Union agency, the European Monitoring Centre on Racism and Xenophobia, in 2005. This agency did not formally adopt it and in due course abandoned it, but it was picked up – again as a “working definition,” in 2016 by the International Holocaust Remembrance Alliance (IHRA), which as its name implies works on research into the

Holocaust. It is not part of the European Union, although it has 31 country affiliates, mainly from Europe. Its version attracted the attention of the Home Affairs Committee which recommended it but only with “caveats” i.e. necessary conditions, to protect free speech.

10. The IHRA, at its Bucharest Conference in 2016, issued this “non-legally binding working definition of anti-Semitism” which comprises what may be described as a core meaning, followed by eleven examples of how that meaning might be applied. That core meaning is:

**Anti-Semitism is a certain perception of Jews, which may be expressed as hatred towards Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.**

11. The definition is avowedly “non-legally binding”: were it to become so, or to be adopted for any disciplinary or regulatory purpose, it would be seriously deficient. The second sentence seems surplusage: of course, manifestations of anti-Semitism are directed towards such persons and institutions (and notably, the “State of Israel” is not listed as a target at this point) but they need not be directed to anyone (e.g. anti-Semitic comments and cartoons on the internet). The first sentence is question begging: what perception, and in whose eyes – those of the Jewish community, of Zionists or anti-Zionists, or is this a reference (as it should be) to the objective impression of the reasonable bystander?<sup>4</sup> The use of the conditional word “may” lends vagueness and

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<sup>4</sup> There is some confusion about the so called “MacPherson Principle” (a reference to Mr Justice MacPherson’s Report into the Stephen Lawrence murder) which is often thought to require that the victim’s perception of racism should prevail. But what Justice MacPherson was emphasising was that police should adopt the victim’s perception that he had suffered a racist attack when recording the crime, but not necessarily after further investigation.

imprecision: obviously it can be expressed as “hatred towards Jews,” but how else “may” anti-Semitism be expressed and if there “may” be other definitions, why are they not identified? As a “working definition,” it needs a lot more work before it attains the precision which Article 10 requires for a ban on speech which is “required by law.” It may be useful for purposes akin to the context in which it arose for the IHRA in Bucharest, where it was being used as a guide for the police in Romania (a country which had initially collaborated with the Nazis) to identify attitudes unacceptable to the job of law enforcement, but standing alone it lacks the precision required of a definition or rule. It is not clear whether it was adopted as a free-standing core definition by the IHRA at its Bucharest Conference, or whether the eleven “examples” were adopted at the same time. In the latter case, it would not serve as a “definition” at all, but rather as a discussion of whether certain conduct can be identified as anti-Semitic.

12. There is one aspect which I find remarkable, but which does not seem to have engaged the attention of critics or proponents. Despite its imprecision, it does pivot upon manifestations of “hatred towards Jews.” As I point out in paragraph 2 above, “hatred” is a very strong word. It is the emotion that can be deduced in those who daub abhorrent slogans on tombstones and Synagogues, but it falls short of capturing those who express only hostility or prejudice, or who practice discrimination. “I don’t like Jews and never employ them, but I don’t hate them” – this speaker is anti-Semitic, but it does not seem included in this definition. Similarly, “I am prejudiced against Jews because they are not “one of us” and their religious practices are ridiculous, but I don’t hate them.” Or “I think we should deport all Jews to Israel, because they would be happy there. It would be in their own interests – I certainly don’t hate them, I just think they don’t fit in here in England.” Under the IHRA definition, these anti-Semitic comments would not be deemed “anti-Semitic.” This consideration, above all others, convinces me that the

definition is not fit for purpose, or any purpose that relies upon it to identify anti-Semitism accurately. By pivoting upon racial hatred (a crime to stir up in this country) it fails to catch those who exhibit hostility and prejudice – or apply discrimination – against Jewish people for no reason other than that they are Jewish. It fails Jewish people, most of all, by its inability to detect many who harbour hostility towards them – for example, those who insinuate racial prejudice politely (remember Enoch Powell's “rivers of blood” speech, with its classical allusions).

13. There have been suggestions in the media that the definition and its examples were drafted with the “hidden agenda” that they could be used to chill or ban criticism of Israeli policy and to label the nascent BDS movement as “anti-Semitic”.<sup>5</sup> While there have been attempts to use it in this way, this was not the original intention according to its lead draftsman, a US attorney named Kenneth Stern from the American Jewish Committee against Anti-Semitism, who worked with the European Monitoring Centre on Racism and Xenophobia to study an upsurge in race hate crimes in Northern Europe. It was discovered, in the course of collecting data from various countries that they had different definitions of anti-Semitism, or none at all. So, as Stern testified to the US Congress in 2017:

“The definition was drafted to make it easier for data collectors to know what to put in their reports and what to reject... because the definition was drafted with data collectors utmost in mind, it also gave examples of information to include regarding Israel... The definition was not drafted, and was never intended, as a tool to target or chill speech.”

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<sup>5</sup> E.g. “BDS: How a Controversial Non-Violent Movement has Transformed the Israeli-Palestinian Debate,” ‘The Guardian’ 16 August 2018.

14. Mr Stern's evidence to this effect is credible, especially as he has spoken out strongly against the misuse of "his" definition at British universities to ban an "Israel Apartheid Week" and in ways he describes as "McCarthy-like."<sup>6</sup> The definition was never formally adopted by the EU Committee: it was placed on its website in 2005, from which it was later removed and was adopted (for want, it may be, of any alternative) by other bodies, and was taken down in 2013.<sup>7</sup> However, in 2016 the core definition was picked up and promulgated in a press release by the IHRA after it was endorsed by representatives of 31 state members at its Bucharest Conference. It is not clear whether they endorsed the eleven examples as well as the core definition, although these examples have always been treated as an extension of that core definition. It is by reference to several of them that some Jewish activists have asserted that BDS activities are anti-Semitic, as well as the EU exercise of labelling Israeli products from the disputed West Bank and occupied Golan. This is not only wrong, as I shall explain, but a perversion of the original intention of the extended definition. Although one of the American drafting team had Israeli Government affiliations and this was at the time when Natan Sharansky identified "the new anti-Semitism" as "aimed at the Jewish State" through "double standards, demonization and delegitimation", I have found no real evidence that the definition was produced in 2005 with the secret intention of being used as a weapon against Israel's critics. That it has been, is a measure of the ineptitude of its drafting (or of the fact that it was drafted for the innocuous purpose of data collection) rather than as part of some alleged Zionist conspiracy. Although it may be odd that an EU instrumentality should ask Americans to write its definitions, Mr Stern

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<sup>6</sup> Written Testimony to US House of Representative Committee on Judiciary, 7 November 2017, p5-7, 14.

<sup>7</sup> By this time, the EU Group was called The Fundamental Rights Agency.



(a self-declared Zionist) has made continual and credible criticisms of the subsequent misuse of his words.

## The Examples

15. Having stated at the outset in bold type that the definition itself is a “**non-legally binding working definition**” the examples are prefaced by an assertion that they are “to guide IHRA in its work” – and its work of Holocaust research and commemoration does not include proposing laws or rules. It goes on “the following examples may serve as illustrations: ...anti-Semitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for “why things go wrong.” It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.” This is true and unexceptional. However, it adds (in the place denoted by the ellipsis above):

“Manifestations might include targeting the State of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that levelled against any other country cannot be regarded as anti-Semitic.”

The importance of this passage is that the British Government identified it as sufficient to ensure that the definition it adopted would not infringe free speech, after the House of Commons Committee had warned that the definition should only be adopted with additions (“caveats”) “to ensure that freedom of speech is maintained in the context of discourse about Israel and Palestine.”

16. The Government refused to “adopt” the suggested additional conditions, on the ground that the introductory passing comment – that “criticism of Israel similar to that levelled against any other country cannot be regarded as anti-Semitic” was “sufficient to ensure freedom of speech.” This is wrong, or at least naïve. The comment makes no reference

to freedom of speech, for a start, and Israel is unlike any other country. It was established by resolution of the Security Council in 1947, to compensate for the Holocaust, granting over half of Palestine – a country which at the time contained 1.3 million Arabs and a small minority of Jewish settlers. It won independence from British rule partly as a result of a terrorist campaign; it turned hundreds of thousands of Palestinians into refugees; it acquired territory (the Gaza strip and the West Bank) through war and refused Security Council demands to withdraw its armed forces; it has persistently been criticised by Britain and by the Red Cross and respected Human Rights NGOs like Amnesty International and Human Rights Watch for policies which have had a “catastrophic” effect on the Palestinian economy and on the health, wealth and wellbeing of its people, for its Parliament (the Knesset) passing various laws that discriminate against Arab Israelis (20% of the population, i.e. 9 million people) and for military occupation which stifles political development and has involved frequent lethal attacks with disproportionate civilian casualties, and for encouraging “Settlements” on Palestinian land. As recently as last month, it’s “One Nation” Basic Law was widely condemned as consigning Palestinians to second-class citizenship, and many commentators described it as “a form of apartheid.” It points out, differentiating itself from other countries, that it has been at various times subject to terrorist atrocities – suicide bombing campaigns, routine rocket attacks and armed confrontations with a political organisation – HAMAS – which refuses to recognise its right to exist.

17. All member-states of the UN are bound to comply with international human rights law (notably the International Covenant on Civil and Political Rights) and criticism of Israel on that score could not be regarded as anti-Semitic. Unlike most countries, it is engaged in military operations in occupied territory, and so is subject to International Humanitarian Law (the laws of war ) and may be open to legitimate criticism for

breaches. It has what fits the definition of a displaced indigenous minority (the Palestinians) and is under an obligation, which it may legitimately be criticised for disregarding, to protect them from discrimination and to respect their dignity. Therefore, criticism of Israel and its government of the kind mentioned in para 13 above is likely to be dissimilar to criticism levelled against other countries, but is not for that reason anti-Semitic.

18. To suggest that the IHRA definition is internally protective of free speech is mistaken: criticisms may be made of Israel that are not made of other countries, but this of itself does not constitute anti-Semitism. Moreover, the test (if it is used as a test) is confusing. For example, Dr Manfred Gerstenfeld, an anti-Semitism scholar, writes in Arutz Sheva of the “huge importance” of the IHRA definition: “Using the IHRA definition it becomes clear that BDS activities are anti-Semitic as they are only applied against Israel.”<sup>8</sup> This is plainly wrong, not only because sanctions are applied to other countries (Russia, Iran, North Korea, and formerly apartheid-era South Africa) but because the impression from the IHRA wording has led this commentator to think that criticism of Israel can be defined as anti-Semitic simply because it targets Israel and does not include other countries. This is just one example of how the loose words in the definition have been misunderstood and misapplied, in a way which could be used to besmirch legitimate political action as “anti-Semitic.”

19. The eleven examples are prefaced by the statement:

*“Contemporary examples of anti-Semitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:”*

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<sup>8</sup> See Arutz Sheva, “The Huge Importance of the Recent IHRA Definition of Anti-Semitism” 7<sup>th</sup> June 2016.

This is an ambiguous way to introduce what are meant to be concrete examples: they “could” (but they presumably could not). This is discussion, not definition. What is not clear, (although it should have been made clear) is whether the core definition requirement of a perception of “hatred towards Jews” is a prerequisite before any example is deemed anti-Semitic. This is an important, but unaddressed, question.

#### Example 1

*“Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.”*

20. This is motivated by hatred and obviously anti-Semitic (and, as incitement to violence, is also a hate crime punishable under British law).

#### Example 2

*“Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective — such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, Government or other societal institutions.”*

21. Here, the need to find hatred, or at least hostility, towards Jews becomes important. “The power of Jews as a collective” – for example, the power of the American-Jewish Public Affairs Committee (AIPAC) – is often referred to in political discourse as “the Jewish lobby,” so described in books and newspapers by reporters and commentators who are not in any sense anti-Semitic. Similar descriptions could be used of the combined efforts of rabbis, Jewish newspapers and organisations who condemned the conduct of the Labour Party executive in altering some of the examples when Labour adopted most of the IHRA definition. There should be no constraint on describing some

Jewish organisations or organisers as working towards a shared aim, unless of course it is done with hostility towards Jews in general. If “the Jewish lobby” is used in promoting the longstanding conspiracy theory (promoted by many anti-Semites) that Jews control the government or media or economy, and the comment displays hatred or hostility to Jews generally, then in that context it would be anti-Semitic.

### Example 3

*“Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.”*

22. This is unexceptional.

### Example 4

*“Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).”*

23. Anti-Semitism is frequently manifested by Holocaust denial, which is not a crime in the UK but is outlawed in some European countries. Given the undeniable proof of the Holocaust, denials are usually intended to offend and denigrate the Jewish people, although it is possible that a few may be the product of stupidity rather than malice.

### Example 5

*“Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.”*

24. This is similar to Example 4, although it slips in, as an illustration, the example of criticism of the State of Israel, whether or not it is a manifestation of hostility to Jews

generally. There are many grounds on which Israel is criticised – exaggerating the Holocaust (which is difficult to exaggerate, given proof that it took 6 million lives) is not one that is much heard.

#### Example 6

*“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.”*

25. Israel, as in recent legislation, claims to be the true homeland of Jewish people wherever they are born, and grants citizenship to all members of its diaspora whether they want it or not. This does not make it acceptable to treat Jewish people as synonymous with Israel or assume all Jewish people are loyal to and have an affinity with Israel. Accusing Jewish people of being loyal to the priorities of Jews worldwide is likely to promote the anti-Semitic conspiracy theory described in para 21 above. Other countries (Australia, for example) treat dual citizenship as a disqualification for standing for Parliament, presumably for fear of divided loyalties. There may be rare individual cases where a Jewish citizen is in a situation of conflict of interest where their State of birth or nationality is at diplomatic odds with Israel (for example, where a Jewish citizen of Britain returns to Israel for military service and participates in military action in support of the occupation of Palestinian territory). Jewish MP’s who oppose their party’s or their governments policy on Israel may be made the subject of criticism on this score, which would be anti-Semitic if it expresses a hatred or insinuates suspicion of all Jews, or e.g. that they are “political traitors” because they are Jews. Anti-Semitic abuse of these MPs is notable for viciousness, an indication of hatred.

### Example 7

*“Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavour.”*

26. This example plainly trespasses on political speech, or at least brands as anti-Semitic what may be statements, supportive of the Palestinian people’s right of self-determination, or a reasonably held view about the history of the Balfour declaration, which in 1917 offered to establish a “national home” (not a “nation state”) for Jewish people in a land of 400,000 Arabs and 30,000 Jewish settlers. “Nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine” the declaration added, but in 1947 those rights were certainly prejudiced by partitioning the country and giving more than half of it to Jewish settlers and immigrants and forcing hundreds of thousands of Arabs into exile. Whether the State of Israel is a “racist endeavour” is open to question given its racially discriminatory laws and its new nation state Basic Law which is frequently said to make Palestinians second class citizens and likened by some reputable commentators to a form of apartheid. The claim that Israel has no right to exist is often made by anti-Semites but can be argued dispassionately by historians and others who say that a portion of Germany should have been set aside for a Jewish homeland to compensate for the Holocaust.
27. For the record, the position in international law was pithily summarised by the British judge, Dame Rosalyn Higgins, in the International Court of Justice case about the Wall:
- “Israel is entitled to exist, to be recognised and to security, and the Palestinian people are entitled to their territory, to exercise self-determination and to their own State.”

Unless made with the intention of arousing hostility against Jews in general, attacks on Israel for “racist endeavours” by denying Palestinians their territory and their right to self-determination cannot be assumed to be anti-Semitic. The example is in any event liable to confuse. The “right of self-determination” is a complex question of international law, which is (in Article 1 of the Covenant on Civil and Political Rights) declared to be the right of “peoples” – the majority of whom were, at Israel’s inception, Palestinians. That was not a problem for advocates of Theodore Hetzel’s political ideology of creating a Jewish state in Palestine for Jews from anywhere in the world. However, it is not anti-Semitic to be critical of the ideology of Zionism unless this is part of a hate campaign or unless this criticism is expressed in a way that displays prejudice or hostility towards Jewish people generally. Nor is it anti-Semitic to identify some Jewish people who espouse this ideology as Zionists: the Home Affairs Committee notes that 57% of Jewish people in the UK support Zionism (the founding philosophy of the State of Israel) but many do not, here and in Israel itself. But it also noted that “Zionist” and the colloquial “Zio” are frequently used in anti-Semitic discourse as terms of abuse, so the word must be used accurately and in an appropriate context.

#### Example 8

*“Applying double standards by requiring of it a behaviour not expected or demanded of any other democratic nation.”*

28. This begs the question of what behaviour is being objected to, and why. It focuses on political and diplomatic argument, which often shows double standards (Soviet and US accusations against each other during the Cold War, for example) but it cannot logically be concluded, as this example does, that double standards in criticising Israel denote



anti-Semitism. The example could be used against the UN Human Rights Council, which notoriously makes more criticisms of Israel than of other nations where behaviour may be as bad, in moral or legal terms, but is nonetheless different. It would be wrong to accuse the Council members of anti-Semitism, unless their votes are dictated by hatred of Jews generally rather than distaste for the human rights violations allegedly perpetrated by Israel. There is, in any event, a UN country-specific mandate on Palestine, partly because of the history of human rights abuse by Israel – another fact that makes its position different to that of other democratic countries and therefore open to particular scrutiny. Israel, unlike most democratic nations, has not ratified the Treaty for the International Criminal Court and does not accept the jurisdiction of the Human Rights Commission: this also sets it apart and makes criticism of its policies, unless attended by incitement to hatred, unexceptional.

#### Example 9

*“Using the symbols and images associated with classic anti-Semitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.”*

29. This is unobjectionable, although these hateful symbols manifest anti-Semitism irrespective of whether they are applied to Israel or Israelis.

#### Example 10

*“Drawing comparisons of contemporary Israeli policy to that of the Nazis.”*

30. This is more complicated. The writer or speaker may have no hostility towards Jews in general but may intend merely to draw a dramatic comparison. It will usually be an exaggeration, or else inappropriate, and will invariably give offence to many Jewish

people, but that does not necessarily make it anti-Semitic unless the Nazi comparison was intended to show contempt for Jews in general. In the early years of Hitler governance, Nazi anti-Semitic policy took the form of discrimination which made it more difficult for Jews to find employment or enter the professions: it would not be anti-Semitic to liken current Israeli policy to these measures (however inappropriately) unless it displays hatred to all Jews or the intention was to manifest hostility to all Jews, and not just the present Government.

#### Example 11

*“Holding Jews collectively responsible for actions of the state of Israel.”*

31. Israel is a democracy and its government is by definition endorsed by a majority of voters. But it would be absurd to hold all Jews responsible for its policies and its military actions: they are contested by an opposition in Israel and by many in the diaspora. So the example will usually be evidence of anti-Semitism. However, where such policies have led to human rights violations to which a blind eye is turned by its courts and law enforcement in Israel and to which little opposition is offered by the opposition in the Knesset (other than by its Palestinian representatives) then it may not be anti-Semitic to criticise “Israelis” for turning a blind eye – unless, of course, the criticism is intended to arouse racial hatred.

#### General Observations

32. It must be said that all eleven examples are of conduct that “could” amount to anti-Semitism, so long as the core definition is applied, namely that they express hatred towards Jewish people as a race. One problem is that this is not made clear. If the extended definition (i.e. core definition plus examples) were ever put into a law, a court

would doubtless find that the core definition must control each example. It would also emphasise the introductory paragraph which makes the examples contingent – they “could” be examples of anti-Semitism, but “could not” if they did not express hatred of Jews as a race. The trouble is that this is not clear, and many commentators, both those concerned to emphasise its danger to free speech and those concerned to use it to endanger free speech, have interpreted the examples as if they were intended to protect the state of Israel from criticism. This is the problem with loose drafting, and it is a problem in the UK because the government promulgated the definition without adding the caveat:

**“It is not anti-Semitic to criticise the Government of Israel, without evidence to suggest anti-Semitic intent.”**

33. It must be remembered that the definition was drafted in 2005 for an EU exercise in data collection about anti-Semitism incidents, and was dropped by that organisation, then called the Fundamental Rights Agency, and removed from its website in 2013 because of its inutility. It was resurrected by the IHRA at its Conference in 2016, held in conjunction with the highly respected *Elie Wiesel National Institute for the Study of the Holocaust in Romania*, which was involved in teaching police officers about anti-Semitism and Holocaust denial. It cannot be doubted that the extended definition would be useful for such an exercise, and there could be no objection to its use for similar purposes by police forces in the UK (so long as it is made clear that anti-Semitism is not a criminal offence unless it stirs up racial hatred).
34. In relation to the examples which refer to Israel, special caution is required. According to the Home Affairs Committee, most anti-Semitic utterances come from right-wingers and UKIP is the political party which is most infested. That said, there is no doubt that dyed-in-the-wool anti-Semites may exploit human rights concerns over Israeli policy

to whip up anger against Jews generally. There is evidence however, that some politically involved people (in the Labour and Liberal Democrat parties in particular) have allowed their anger at human rights violations by Israel to boil over into utterances and posts that reveal or can reasonably be interpreted as meaning a hatred towards Jews. There can be no objection to political parties, or other membership-based organisations, expelling or disciplining such persons by reference to the IHRA definition, so long as the offending statement does express hatred of Jewish people generally. As pointed out above, I consider this is too limited a definition: such organisations should consider adopting broader definitions that allow them to discipline members who express hostility or prejudice towards Jews in general.

35. UK Courts have not had occasion to consider the IHRA definition, although one very recent decision of the Court of Appeal (August 2018) in *Jewish Human Rights Watch Limited v Leicester City Council* does indicate the likely approach. The Council had passed a motion “to boycott any produce originating from illegal Israeli settlements in the West Bank until such time as it complies with International Law and withdraws from Palestinian occupied territories.” Jewish Human Rights Watch, an organisation formed to challenge anti-Semitism, claimed that condemnation of Israel was being used as a means to attack British Jews and that the BDS movement, which it claimed had the long-term aim of destroying Israel, only increased the level of hatred experienced by Jewish people in the UK. Reflecting Example 8 above, it was argued that by passing the resolution, the Council “singled out Israel for different treatment than that adopted in respect of other countries.” The Court rejected these arguments:

“The condemnation was in line with a respectable body of opinion, including the UK Government, the European Union and the International Court of Justice... there is a legitimate scope for criticism of Israel without that implying anti-Semitic attitudes.

There was nothing in the context to suggest the resolution was in fact being proposed as a cover for incitement or anti-Semitism. Calling for boycotts of goods is a well-known gesture of political solidarity with oppressed groups overseas...”

36. This is how I would expect UK Courts to approach the IHRA definition were it deployed by a University, say, or local council to ban protest meetings or to discipline students for criticising Israel. There would have to be evidence that the offending speech or action was a pretext or cover for inciting hatred of Jews generally before the core definition could be applied. Much of the concern about its “chilling” consequences seems misplaced, until it is realised that the very vagueness of the extended definition with its examples of anti-Israel conduct which “could” metamorphose into anti-Semitism, is likely to confuse decision-makers and encourage complaints that are intended to chill legitimate speech. There are already examples of Universities banning meetings because they associate discriminatory Israeli policies with apartheid. These decisions would be likely to be reversed if taken to court.
37. Where the definition most acutely threatens freedom of speech is that by Palestinians resident in or visiting the UK and supporters who may show their opposition and anger at the establishment of Israel against the wishes of its indigenous majority of Palestinians, or the expulsion of 750,000 of them in 1948 (albeit after an unsuccessful attack by Arab States). Such people are entitled, under international human rights law, to set out their case against the State that they perceive as their oppressor, so long as their expression does not conduce to actual violence against its Jewish citizens, or against Jewish people anywhere – in which case their speech would be contrary to UK law against stirring up racial hatred. If their speech did not go so far, it might nonetheless be characterised (although not under the IHRA core definition) as anti-Semitic, if for example it aroused hostility to Jewish people by praising Palestinian

armed action against Israel. The Institute of Race Relations has argued that minority communities “have a right to be heard, to make... information public, while others have the right to hear them, and the arguments based on these facts.” That right should be enjoyed by speakers who criticise Israel for being a racist endeavour, unless they step over the red line and encourage attacks on Jewish people by military action or terrorism. I should add that it is not anti-Semitic to criticise the Israeli security service for assassinating terrorist suspects without trial – this has incurred criticism from Human Rights bodies and from countries whose passports have been forged to assist the movements of assassins.

38. I have, necessarily in this opinion, concentrated on the definition of anti-Semitism in respect to critics of Israeli policy. I should add that by far the most common expression of it is in tweets, demonising Jewish MPs and public figures. To judge from those discussed in the Home Affairs Committee report and in newspapers, these are malevolent and vicious outbursts (in no more than 280 characters) evincing hatred or contempt for pro-Israeli commentators or (in particular) for critics of Jeremy Corbyn’s alleged pro-Palestinian sentiments. They do not warrant detailed analysis: any identifiable sender of such messages could justifiably be expelled (e.g. if a member of the Labour Party) under any definition of anti-Semitism it chose to adopt. If that part does revert to the full IHRA definition, it should also adopt the Home Affairs Committee recommendation of inserting a provision to protect freedom of speech.

#### Application of the IHRA Definition

39. As I have made clear, this extended definition might be useful for purposes of discussion but should not be adopted as a rule or standard to be applied in any

qualitative or quasi-judicial decision-making by any public authority. Nonetheless, it has been adopted by some universities and local councils and applied or threatened as a ban on public meetings – e.g. “Israeli apartheid week” at various universities, and a proposal to refuse the BDS a meeting place by Barnet Council Hall. Public bodies in the UK are all subject to the Human Rights Act, with its Article 10 freedom of expression protection, (as explained above), so I do not think that such unlawful actions would survive court challenge. They are not even anti-Semitic under the IHRA definition as properly interpreted. So is the adoption of this definition likely to chill free speech? The answer is “yes,” but in two non-legal senses. Firstly, the definition, by so often referring to certain criticisms of Israel, is likely to encourage pro-Israeli organisations to urge that they be applied to ban criticisms of Israel. And correspondingly likely to discourage human rights groups and others from organising such protests.

40. Secondly, while it is true that the European Convention protects free speech, that is a protection offered by the courts in what is termed “judicial review” of the actions of public authorities. Like all cases that end up in court, this can be very expensive even if you win – costs only cover part of your legal expenses. For cash-strapped NGOs and student organisations, this is obviously a deterrent when faced with threats of legal action which require an expensive legal defence to protect their fundamental right to criticise Israel when it is unjustifiably limited by the application of the IHRA definition and its examples. Universities and Councils which desire to avoid the costs of a legal quagmire would be well advised not to adopt this confusing and litigation-prone definition, and – if they need one – to use the Oxford Dictionary and add in all cases a provision protecting free speech of the kind recommended by the Home Affairs Committee.

41. In the case of Universities and polytechnics there is a special statutory duty in the Education Act “to ensure freedom of speech,” i.e.

“to take such steps as is reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees... and visiting speakers.”<sup>9</sup>

This duty is compulsory and binding and can be enforced by judicial review. There are also duties under “Prevent” legislation to avoid incitements to terrorism (which are not in any event “within the law”) so they would only be entitled to ban speakers or events likely to advocate violence against Jewish people, in Israel or outwith. Intelligent discussion of whether discrimination against Palestinians by the Israeli Government amounts to apartheid, or whether the settler movement is colonialist, or meetings which call for Universities and Councils to adopt BDS policies, cannot be considered anti-Semitic under the IHRA definition or any other, in the absence of evidence that the event is being organised for the purpose of inciting hostility to all Jews. It must be emphasised – as the Court of Appeal in *Jewish Human Rights Watch Limited v Leicester City Council* emphasised – that there must be evidence of anti-Semitic purpose. Despite Natan Sharansky’s fears that the hidden agenda of BDS is to cause anxiety in the Jewish community, evidence that goes no further than this will not be sufficient to show even a *prima facie* case.

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<sup>9</sup> See Education Act 1986, Section 43.



## Conclusion

42. It is my opinion, for the reasons set out above, that:

1. The IHRA definition of anti-Semitism is not fit for any purpose that seeks to use it as an adjudicative standard. It is imprecise, confusing and open to misinterpretation and even manipulation. It does not cover some insidious forms of anti-Semitism.
2. It was originally drafted, in the absence of any other definition, as a tool for collecting data and is useful for purposes of discussion, but should not be used (or be used with great caution) as a measure for discipline or in ways which have consequences for political speech.
3. The UK Government was wrong to adopt it without the “caveat” recommended with reason by the Home Affairs Committee, namely:

**“It is not anti-Semitic to criticise the Government of Israel, without additional evidence to suggest anti-Semitic intent.”**

Any public body or other organisation (including the Labour Party) that is contemplating adoption of the IHRA definition in full should add this provision to it.

4. As a matter of internal construction, the examples appended to the IHRA core definition should be read as incorporating a) the fact that they “could not” amount to anti-Semitism and b) in particular, unless they exhibited to reasonable people a hatred of Jewish people.
5. The Governments “adoption” of the definition has no legal effect and does not oblige public bodies to take notice of it.
6. The definition should not be adopted, and certainly should not be applied, by public bodies unless they are clear about Article 10 of the EHCR which is binding upon

them, namely that they cannot ban speech or writing about Israel unless there is a real likelihood it will lead to violence or disorder or race hatred.

7. Universities and Colleges should be particularly careful about adopting or using the definition, as they have a statutory duty to protect freedom of expression.
8. A particular problem with the IHRA definition is that it is likely in practice to chill free speech, by raising expectations of pro-Israeli groups that they can successfully object to legitimate criticism of their country and correspondingly arouse fears in NGOs and student bodies that they will have events banned or else have to incur considerable expense to protect themselves by legal action. Either way, they may not organise such events.
9. Whether under human rights law or the IHRA definition, political action against Israel is not properly characterised as anti-Semitic unless the action is intended to promote hatred or hostility against Jews in general.

Geoffrey Robertson AO QC

A handwritten signature in black ink, appearing to read 'G. Robertson', written in a cursive style.

Doughty Street Chambers, 27<sup>th</sup> August 2018.

*About the Author:* Geoffrey Robertson AO QC is founder and head of Doughty Street Chambers. He has appeared in many ground-breaking cases in criminal, constitutional and international law, and served as First President of the UN War Crimes Court in Sierra Leone and as a “distinguished jurist member” of the UN’s Justice Council. His books include a text on Media Law, “Crimes Against Humanity – the Struggle for Global Justice” and an “Inconvenient Genocide – Who now Remembers the Armenians.” In December 2016 he lectured at the Hebrew University in Jerusalem on the connection between the Armenian Genocide and the Holocaust.