



Rapport de recherche

2020

Open Access

This version of the publication is provided by the author(s) and made available in accordance with the copyright holder(s).

The IHRA working definition of antisemitism: a legal analysis. Legal opinion provided at the request of the Service for Combating Racism at the Federal Department of Home Affairs, 6 November 2020

Hertig Randall, Maya; Imbeck, Catherine

How to cite

HERTIG RANDALL, Maya, IMBECK, Catherine. The IHRA working definition of antisemitism: a legal analysis. Legal opinion provided at the request of the Service for Combating Racism at the Federal Department of Home Affairs, 6 November 2020. 2020

This publication URL: <https://archive-ouverte.unige.ch/unige:152206>

Maya Hertig Randall
Professor
Faculty of Law
University of Geneva

Catherine Imbeck
Doctoral research
fellow
Faculty of Law
University of Geneva

The IHRA working definition of antisemitism: a legal analysis

6 November 2020

Legal opinion

provided at the request
of the Service for Combating Racism
at the Federal Department of Home Affairs

This legal analysis expresses the personal opinions of the authors and does not reflect the position of
any other person or organisation.

Mandate and context	2
I. Executive summary	3
II. Analysis of the working definition	6
A. Introductory remarks.....	6
B. Structure of the broad definition.....	7
C Core definition	8
D. Examples	15
1. <i>Scope of examples.....</i>	<i>15</i>
2. <i>Examples that do not predominantly relate to Israel</i>	<i>17</i>
3. <i>Examples that predominantly relate to Israel.....</i>	<i>20</i>
E. Assessment of the definition in the light of international standards	28
F. Conclusion	30
Appendix 1: Working Definition of Anti-Semitism (EUMC).....	32
Appendix 2: Working Definition of Antisemitism (IHRA).....	33
Abbreviation list.....	34

Mandate and context

- 1 On 26 May 2016, the Plenary of the International Holocaust Remembrance Alliance (IHRA) adopted a working definition of antisemitism which has received a great deal of attention ever since. Several institutions and organisations, including, for instance, the European Forum on Antisemitism and the European Parliament, invited states to adopt the working definition at the domestic level and to apply it as a tool to identify, prevent and combat antisemitism. As in other member states of the IHRA, the question of adoption has made it onto the political agenda in Switzerland. In 2019, the Swiss Federal Council (the federal government) approved a postulate submitted by a member of the Council of States (one of the two chambers of the Swiss Federal Parliament),¹ asking the government to present a report on options for using the working definition in several areas of domestic policy and in foreign relations.

This legal opinion was commissioned by the Service for Combating Racism (SCRA) of the Federal Department of Home Affairs. The authors' mandate was to carry out an in-depth analysis of the working definition and its possible legal and other implications, in line with the intention expressed by the government to provide a factual basis for the complex political debate on what constitutes antisemitism.²

Based on the instructions of the SCRA, the original version of the legal opinion (drafted in French) comprised the following five sections:

1. An overview of the context in which the definition was developed, relevant political debates, and the use of the definition in other countries.
 2. A textual analysis of the components of the definition, including an assessment in the light of Switzerland's international obligations, for example under the International Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination (CERD).
 3. A discussion of the examples serving to illustrate the definition.
 4. An exploration of the potential use of the definition in different areas of law.
 5. A description of the various options available for the endorsement of the definition and their legal implications.
- 2 The following text is structured in two parts. Part I provides an Executive Summary of the entire legal opinion. Part II is a slightly shortened version of the analysis of points 2 and 3 mentioned above. It provides an in-depth textual analysis of the various components of the working definition, the explanatory notes and the examples of contemporary forms of antisemitism. The analysis has been mainly undertaken from a legal perspective. It takes into account Switzerland's international obligations under human rights treaties to effectively combat and prevent manifestations of antisemitism, while respecting other fundamental rights, in particular freedom of expression. The 'General conclusion' section summarises the main findings of this study.

¹ Paul Rechsteiner postulate 'International Holocaust Remembrance Alliance definition of antisemitism' (19.3942), submitted on 21 June 2019, [...] <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20193942>] (15.04.2020). For the parliamentary debate, see transcript of the Council of States debate on the Paul Rechsteiner postulate in Official Bulletin of the Federal Assembly dated 12 September 2019 (online). Paul Rechsteiner postulate (19.3942) [<https://www.parlament.ch/fr/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=47030>] (15.04.2020), procedural request submitted by Council of States member Paul Rechsteiner.

² Ibid. procedural request submitted by Federal Councillor Alain Berset.

I. Executive summary

The IHRA working definition (see Appendix 2) is based on the EUMC definition (see Appendix 1), which was intended to facilitate the collection of data on antisemitic crimes in Europe. In 2016 the IHRA member states, including Switzerland, adopted the working definition by consensus at the plenary assembly meeting in Bucharest ('IHRA Plenary'), although it was agreed that it would be non-legally binding.

Due to a lack of consensus regarding 'new antisemitism', the IHRA separated the first part of the working definition, i.e. the core definition, which does not refer to the State of Israel, from the other parts. As a result, the working definition as a whole ('working definition in the broader sense') has a complex structure comprising a core definition,³ explanatory notes and a list of examples. There is some disagreement as to whether the IHRA has adopted the entire definition, or just the core definition.

Following the conference, some organisations and institutions called on IHRA member states to endorse the definition at the domestic level in order to enhance its status and make it more widely known. In September 2020, 27 states had acted on this request. While some states just adopted the core definition, or a slightly refined or extended version, others adopted the definition in the broader sense, including the explanatory notes and examples. However, the distinction between the core definition and the examples went largely unnoticed during political or public debate. Even in countries that solely adopted the core definition, discussions were largely focused on the parts of the definition and examples relating to Israel, which are also the parts that have attracted the most criticism.

The compromise reached by the IHRA Plenary in Bucharest, which was to separate the core definition from the other parts, is problematic on various levels. It is far from clear whether the core definition works on its own. Because it is couched in highly abstract terms, it does not describe the specific features of antisemitism as compared to other forms of racism. Moreover, the core definition excludes certain elements that are crucial to combating antisemitism. For example, it makes no reference to structural discrimination, or discrimination generally. Because the definition is so open-textured, it is to a large extent possible to fill in the gaps by way of interpretation, although this requires relatively extensive prior knowledge.

The vagueness of the core definition makes potential addressees focus on the contemporary examples of antisemitism that follow and include references to Israel. The drafters aimed to arrive at a definition and/or provide a list of antisemitic actions and language which takes into account the contemporary context and avoidance strategies that resort to subtle or coded language. Such an approach is commendable for the purpose of fighting antisemitism.

However, the safeguard according to which "criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic" lacks precision and predictability and therefore does little to reduce or eliminate real or perceived risks to freedom of expression. The statement that "manifestations might include the targeting of the State of Israel, conceived as a Jewish collectivity" is also an

³ The core definition consists of the following two sentences: "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."

insufficient safeguard for freedom of expression because it lends itself to different interpretations. Applying the examples, mainly in relation to Israel, while upholding freedom of speech, is therefore a challenging endeavour which requires a contextual analysis. It is important to note that the list of examples is not intended as a checklist to be applied mechanically. The introductory sentence clearly states that contemporary examples of antisemitism *could*, taking into account the overall context, include, but are not limited to, the following acts.

- 7 In terms of freedom of expression, it is important to bear in mind that vaguely worded caveats may have a chilling effect, as they make it difficult to determine when certain statements cross the line of what would be considered acceptable criticism. From this perspective, example 8 (applying double standards to the State of Israel) and example 7 (denying the Jewish people their right to self-determination) may raise questions.
- 8 To reduce the risk of the examples being misused, it seems important to provide training to people who may be required to apply the definition. When used by individuals who have participated in training and awareness sessions, the definition can provide a basis for interesting discussions on what constitutes antisemitism in a contemporary context. The controversy generated by US universities using the definition within the context of campus hate speech codes demonstrates, however, that resorting to the definition to determine freedom of expression issues can be problematic.
- 9 As a non-legally binding international instrument adopted by an intergovernmental body, the working definition can already have some impact. Swiss courts can use the definition to clarify and interpret concepts under Swiss law, just as they do with other non-legally binding instruments adopted by international organisations of which Switzerland is a member.
- 10 There is no legally binding definition of antisemitism in Swiss law. The legal system addresses the issue indirectly, mainly through provisions prohibiting discrimination, hate crimes and hate speech, which are set out in different pieces of legislation. The thresholds and criteria for dealing with forms of antisemitism may vary depending on the area of law, field of activity and legislative aims. It is therefore to be expected that the definition will have a different impact in different areas of law, as illustrated by the three examples explored in this legal opinion.
- 11 The 'anti-racism provision', as it is known, i.e. Article 261^{bis} of the Swiss Criminal Code, sets a high threshold for identifying punishable manifestations of racism and antisemitism, which means that only the most egregious forms of antisemitism will fall within its scope. The definition of racial discrimination under the Swiss Criminal Code therefore differs significantly from the IHRA antisemitism definition. In our view, the working definition is therefore unlikely to have an impact on the application of this provision in practice. However, where the working definition is used for training purposes, it could help to raise awareness among public prosecutors and criminal judges of avoidance strategies, ensuring that individuals making statements that potentially constitute an offence under Article 261bis SCC are brought to justice. Raising awareness of the different forms of antisemitism could also make the courts more inclined to take antisemitic motives into account when sentencing offenders.

Adopting the working definition of antisemitism could have a greater impact on the protection of personality rights, a specific area of civil law, than in relation to offences under criminal law. It could encourage courts to refer more frequently to the working definition in order to determine whether criticism levelled against a specific individual for making antisemitic statements lacks a sufficient factual basis and thus constitutes an injury to personality rights.⁴ The Federal Supreme Court's case law tends to limit the scope of permissible criticism to situations where labelling a person's statements as racist falls within the scope of Article 261bis of the Swiss Criminal Code, an approach that was rejected by the European Court of Human Rights ('ECtHR') in *GRA v. Switzerland*⁵. Given that the working definition of antisemitism is broader than the definition used in criminal law, more extensive use of the working definition could have the advantage of widening the scope of permissible criticism, thus opening up the debate on what constitutes and what does not constitute antisemitism. Any potential effect of the working definition would, however, be limited by the contextual approach adopted in the case law when balancing freedom of speech against the right to reputation.

Adopting the working definition is unlikely to have a significant impact on one particular area of administrative law: using state property to exercise freedom of expression. When determining appeals against the refusal to grant an authorisation to use the public domain or administrative assets for communication purposes, the Federal Supreme Court has held that applications for an authorisation must be assessed objectively, i.e. without regard to the substance of the ideas and messages to be communicated. The authority concerned is solely permitted to undertake a cursory examination. The court stated that given the importance of freedom of expression in relation to political issues, and the serious implications of any forms of prior restraint of freedom of expression, withholding an authorisation on the grounds of content was only justified in exceptional circumstances, mainly in situations where there is a real and specific risk of a breach of the provisions of the Swiss Criminal Code (Art. 261bis SCC).⁶ This leaves little scope for a broader conception of antisemitism than that set out in the Swiss Criminal Code.

Given that courts can already refer to the working definition, adopting the definition would not necessarily bring about a fundamental change. However, it is likely that the definition would be invoked more frequently if it were officially endorsed, particularly in relation to the protection of personality rights. Conversely, any refusal to adopt the definition could lead courts to discard the definition.

Although adopting the working definition, a soft law instrument, would be an unusual approach for Switzerland, it would have the advantage of giving the authorities a degree of control over potential legal and psychological effects the definition may deploy, and allow them to minimise chilling effects. For the purposes of freedom of expression, it would, for example, be desirable for the instrument

⁴ In *CICAD v. Switzerland*, the Federal Supreme Court and the ECtHR had to engage with the working definition, which was relied upon by the anti-racism organisation Coordination Intercommunautaire Contre l'Antisémitisme et la Diffamation (CICAD). Cf. FSC, decision 5A_75/2008 dated 28 July 2008 and ECtHR, *CICAD v. Switzerland* dated 7 June 2016, case no. 17676/09.

⁵ ECtHR, *GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland* dated 9 January 2018, case no. 18597/13, overturning Federal Supreme Court decision 138 III 641.

⁶ For cases relating to antisemitism and criticism of the State of Israel, see FSC decision 1C_312/2010 dated 8 December 2010, which involved the letting of a communal theatre to a comedian known to use antisemitic language, and Federal Supreme Court decision 138 I 274 concerning a poster criticising Israeli policy towards Palestinians.

adopting the working definition to state the specific purposes and areas to which it should apply and address the uncertainties surrounding its interpretation.

II. Analysis of the working definition

A. Introductory remarks

- 13 Firstly, it is important to note that Swiss law does not, to our knowledge, provide legally binding definitions of antisemitism. Neither does it define racism.⁷ The legal system addresses the issue indirectly, mainly through provisions prohibiting discrimination, hate crimes and hate speech, which are set out in different pieces of legislation.⁸ The thresholds for dealing with forms of antisemitism vary depending on the branch of law, field of activity and objectives pursued. An in-depth reflection and discussions on Article 20 paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR) illustrate this point. This provision requires states to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Four expert workshops on Article 20 of the ICCPR, which were held by the Office of the United Nations High Commissioner for Human Rights (OHCHR), resulted in the adoption of the Rabat Plan of Action in Rabat on 5 October 2012. It states the following:

"In terms of general principles, a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable, but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others."⁹

- 14 The same language may therefore be deemed to be antisemitic under civil or administrative law, but not under criminal law, or be deemed to constitute wrongdoing, without meeting a threshold of seriousness that would warrant the application of civil, administrative or criminal sanctions. However, language expressing intolerance and prejudice still requires action by the state, for example in the form of training or awareness-raising measures. These types of measure can also be used to fight structural antisemitism under the non-discrimination provisions of the Federal Constitution and in international law, which are broader in scope than the prohibition against racial discrimination set out in the Swiss Criminal Code.¹⁰

⁷ See Tarek Naguib, "*Wenn der Antirassismus staatlich sanktioniert wird: Urteil GRA gegen Kaspar (5A_82/2012): Rassismus benennen als Persönlichkeitsverletzung*", *Recht*, vol. 31, no. 1, 2013, pp. 13-27, 22; Naguib (2014), footnote 6, pp. 16 ff.

⁸ See in particular Article 8 paragraph 2 Cst. (non-discrimination), the provisions of the CERD and criminal law provisions, in particular Article 261bis SCC.

⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR), Rabat Plan of Action, 2012, [<https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>], para. 20; see also Committee on the Elimination of Racial Discrimination, General recommendation No. 35: Combating racist hate speech (2013), 26 September 2013, CERD/C/GC/35, para. 12: "The Committee recommends that the criminalisation of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity."

¹⁰ See Tarek Naguib (2013), p. 22, footnote 167.

The working definition will therefore be interpreted differently, depending on stated or implied expectations about which areas, and for which purpose, it is supposed to be applied – especially if we look beyond the legal definition of racism. Expectations may differ, for example, depending on whether a definition is meant to serve an academic purpose (and vary in this context depending on the academic discipline) or is intended for practical use. 15

The working definition does not pursue an academic purpose, but was mainly intended to aid in the collection of data on antisemitic incidents. 16

This section analyses the wording of the definition, taking into account the main purposes for which it was drafted, whilst also keeping in mind other potential uses, which will lead us to put forward other possible interpretations, and highlight certain risks. We will also consider the wording of the definition in the light of general definitional requirements. A good definition is expected to meet the requirements of consistency, clarity and precision, capturing the essential properties of the phenomenon described and placing it in its broader context.¹¹ 17

B. Structure of the broad definition

For the analysis of the meaning and scope of the IHRA definition, the core working definition of antisemitism needs to be read against its broader context. As noted above, the core definition is followed by explanatory notes, which appear beneath the definition and introduce a list of examples. The explanatory notes specify certain constitutive elements of the definition, providing details on the various manifestations of antisemitism and its modus operandi (antisemitism "employs sinister stereotypes and negative character traits"). They also indicate the extent to which criticism of the State of Israel may be considered as a manifestation of antisemitism. They moreover mention an important form of antisemitism – conspiracy theories (antisemitism "charges Jews with conspiring to harm humanity, and it is often used to blame Jews for 'why things go wrong'") – and therefore already include a specific example. This is followed by eleven contemporary examples of antisemitism. The list is not intended to be exhaustive. Underneath the list of examples, there are descriptions of three types of acts that include the term 'antisemitic': (i) antisemitic acts that are criminal, (ii) criminal acts that are antisemitic, and (iii) antisemitic discrimination. The acts described illustrate how antisemitism may fall within the purview of the law. 18

The complexity of the text, which comprises a core definition, explanations and examples, raises the question of how the various elements relate to each other. Based on the interpretive approach adopted in this legal opinion, the various parts of the text should be read as being interrelated. The explanatory notes following the definition may be used to fill in gaps in the core definition and explain its meaning and scope. However, it is important to note that the passages were originally intended to have a limited scope in that they were meant to guide the IHRA in its work.¹² Equally, the examples should not be studied in isolation but read in the light of the core definition, which provides the framework which the examples are not meant to exceed. 19

¹¹ For a detailed discussion, see Ullrich (2019), p. 10, footnote 7.

¹² See the first sentence following the core definition: "*To guide IHRA in its work, the following examples may serve as illustrations*" (emphasis added).

C Core definition

- 20 The core definition consists of two sentences. The first sentence states that "antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews". The second sentence refers to the different manifestations and targets of antisemitism.

First sentence: "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews."

- 21 The first part of the working definition describes antisemitism as a 'perception' and specifies the object of that perception, i.e. the 'Jews'. The nature of this perception is not specified and is qualified by a single term 'certain'. At first glance, the phrase 'a certain perception' seems rather imprecise.¹³ We need to look at the other elements of the definition to help us understand its meaning.
- 22 To begin with, it is necessary to explain the term '**perception**', given that its use in defining antisemitism has been criticised. Peter Ullrich points out that the term 'perception' refers primarily to sensory processes, such as seeing, hearing, touching, smelling and tasting, so that its meaning extends into the empirical-sensory domain. Read like this, "antisemitism can be understood as a more or less passive process of a sensory experience of Jews".¹⁴ Ullrich argues that far from being a passive process of sensory experience, antisemitism produces, namely through projections, a deformed image of Jews.¹⁵ The image of the 'collective Jew' is a social construct, fuelled by prejudice and stereotypes. These prejudices and stereotypes are so ingrained that antisemitism exists independently of its object,¹⁶ and is therefore not based on any 'sensory perceptions' of the behaviour or attitudes of Jews. Interpreting 'perception' as a 'sensory perception' could have the counterproductive effect of legitimising antisemitism.
- 23 Interpreting 'perception' as 'sensory perception' essentially accords with the primary meaning of the term in English, German and French.¹⁷ However, there are other meanings of 'perception' that are better suited to determining antisemitism. The French dictionary *Larousse* defines 'perception' as an "idée, compréhension plus ou moins nette de quelque chose: avoir une perception, confuse de la situation". The

¹³ Tomlinson (2017), footnote 54, para. 7 ; Ullrich (2019), p. 11, footnote 7; Armin Pfahl-Traughber, *Die EUMC-Arbeitsdefinition Antisemitismus in der Kritik*, 16 July 2017, [<https://www.hagalil.com/2017/07/eumc-arbeitsdefinition-antisemitismus/>] (20.07.2020).

¹⁴ Ullrich (2019), p. 11, footnote 7.

¹⁵ Ibid. ; see also Klug (2013), p. 472 f., footnote 44: "antisemitism is a form of hostility to Jews as Jews, where Jews are perceived as something other than what they are. Or more succinctly: hostility to Jews as *not* Jews. (...) For, even if some real Jews happen to fit the stereotype some of the time, the 'Jew' towards whom the antisemite feels hostile is not a real Jew at all."

¹⁶ See Barbara Tuchmann, *They Poisoned the Wells* in Newsweek, 3 February 1975, quoted in Harvey Fields, *A Torah Commentary for Our Times: Exodus and Leviticus*, New York (Union for Reform Judaism), 1990, p. 5.

¹⁷ The primary *Larousse* definitions of 'perception' are as follows: "*action de percevoir par les organes des sens: la perception des couleurs*" and "*événement cognitif dans lequel un stimulus ou un objet, présent dans l'environnement immédiat d'un individu, lui est représenté dans son activité psychologique interne, en principe de façon consciente ; fonction psychologique qui assure ces perceptions.*" [<https://www.larousse.fr/dictionnaires/francais/perception/59399?q=perception#59036>] (07-07-2020). The *Oxford English Dictionary* defines 'perception' in similar terms: "the process of becoming aware of physical objects, phenomena, etc. through the senses; an instance of this," while the German dictionary *Duden* primarily defines the verb '*wahrnehmen*' (perceive) as "*(als Sinneseindruck) aufnehmen; bemerken, gewahren*". [<https://www.duden.de/rechtschreibung/wahrnehmen#Bedeutung-1>] (07.07.2020).

Oxford English Dictionary defines 'perception' as follows: "as a count noun: a direct recognition of something; an intuitive insight; an understanding. Also: an interpretation or impression based upon such an understanding; an opinion or belief."

To make it clear that antisemitism is not the result of sensory processes, but a social construct generated from stereotypes and prejudices, 'perception' should be understood as an 'understanding, ideas, interpretation or impression', or as a 'conception'.¹⁸ The explanatory notes following the definition lend support to this interpretation, stating that antisemitism "employs sinister stereotypes and negative character traits".¹⁹ It is unfortunate that the core definition makes no mention of stereotypes, given that they are crucial to understanding antisemitism.

It is also worth pointing out that 'Jews', rather than the State of Israel, are the object of the 'perception' referred to in the core definition. As with other racist ideologies or attitudes, antisemitism is problematic because its manifestations harm individuals, rather than states, because of their real or imagined affiliation to a socially constructed group.

In the first sentence of the core definition the adjective 'certain' qualifies the term 'perception'. In selecting 'certain' instead of a more precise qualifier, the IHRA working definition departs from other definitions, including dictionary definitions, and those which are used by Swiss civil society stakeholders and public authorities, such as the Federal Commission against Racism (FCR) and SCRA, or have been put forward by researchers.²⁰ For example, the SCRA uses 'hatred of Jews' as a synonym for antisemitism and defines this as follows: "hatred of Jews, describes a negative outlook or attitude towards people who identify themselves as Jewish or are perceived as such."²¹ The FCR website defines antisemitism along similar lines as 'hatred of Jews'.²² The definition of antisemitism on the website of the Coordination Intercommunautaire contre l'Antisémitisme et la Diffamation (Inter-Community Coordination against Anti-Semitism and Defamation, or CICAD) states that there are several definitions of antisemitism, but that the most commonly accepted meaning is: "*une attitude d'hostilité à l'égard des minorités juives, quel que soit, d'ailleurs, le motif de cette hostilité*" (a hostile attitude towards Jewish minorities regardless of the reason for this hostility).²³ All of these definitions describe the perception of Jews typical of antisemitism as *negative*, characterised by *rejection* and *hostility*.

The explanatory notes following the core definition contain similar wording, referring to '*sinister* stereotypes' and '*negative* character traits'. In determining whether a character trait is negative,

¹⁸ Term suggested by Klug (2013), p. 474, footnote 44.

¹⁹ Emphasis added by the authors.

²⁰ See for example Helen Fein's definition: "A persisting latent structure of hostile beliefs towards Jews as a collectivity manifested in individuals as attitudes, and in culture as myth, ideology, folklore and imagery, and in actions – social or legal discrimination, political mobilisation against the Jews, and collective or state violence – which results in and/or is designed to distance, displace, or destroy Jews as Jews." (quoted in: EUMC, Manifestations of Antisemitism in the EU 2002–2003, 2004 [<https://fra.europa.eu/en/publication/2010/manifestations-antisemitism-eu-2002-2003>]), p. 186.

²¹ SCRA, Terms used in connection with racism and racial discrimination [<https://www.edi.admin.ch/edi/en/home/fachstellen/frb/FAQ/wie-definiert-die-fachstelle-fuer-rassismusbekaempfung-rassismus.html>] (07.07.2020).

²² FCR, Antisemitism (fr, de), updated 2 January 2019, [<https://www.ekr.admin.ch/themes/fl125.html>] (07.07.2020).

²³ CICAD, Definition of antisemitism (fr only)[<https://cicad.ch/fr/antisemitisme/definitions/definition-de-1%E2%80%99antisemitisme>] (07.07.2020)

the particular features of antisemitism must be taken into account. Antisemitism is often driven by the idea of the supposed superior abilities and powers of Jews which enable them to dominate the world.²⁴ A character trait that is in itself positive (e.g. superior intelligence, strong financial acumen) can induce fear, hatred and hostile attitudes when attributed to Jews.

- 28 The core definition also signals that the original drafters intended 'perception' to be construed negatively, as the first sentence states that the perception "may be expressed as hatred toward Jews". However, the use of the word 'may' here poses another set of interpretive challenges.
- 29 The use of the modal verb 'may' (antisemitism "may be expressed as hatred") suggests that a perception of Jews, expressed as hatred, does not encompass all types of antisemitism. Hate is only one of the ways in which antisemitism can be expressed. In other words, there are other manifestations of antisemitism, which raises the question of what these are. This interpretation produces an open-ended definition, which makes it less useful to refer to the second half of the sentence to clarify the term 'certain'. It was apparently the drafters' aim to keep the manifestations of antisemitism intentionally indeterminate in the definition. According to one of the lead drafters, Kenneth Stern, the working definition was written to facilitate data collection about antisemitism. It was intended to focus the attention of data collectors away from the question of whether the actor hated Jews, and focus them on whether the actor selected Jews to be victims, regardless of the reason.²⁵
- 30 The open-ended nature of the definition also comes in for criticism. Some have argued that the vague wording does not satisfy the requirements of a good definition, which should be as clear as possible.²⁶ In the absence of any examples other than antisemitism expressed as hatred, readers of the definition will tend to focus on the one term that is explicitly mentioned. This is likely to lead to a narrower understanding of antisemitism than that resulting from the other commonly used definitions referred to above.
- 31 Firstly, the term 'hatred' potentially raises the definitional threshold of antisemitism above the more commonly used term 'hostility', as hatred is clearly a stronger negative emotion. *Larousse* defines hatred as "*un [s]entiment qui porte une personne à souhaiter ou à faire du mal à une autre, ou à se réjouir de tout ce qui lui arrive de fâcheux; une [a]version profonde, répulsion éprouvée par quelqu'un à l'égard de quelque chose*" (a feeling that causes a person to wish harm or to harm another person, or to revel in their misfortune; a deep aversion, someone's dislike of something) and hostility as "*[s]entiment d'inimitié à l'égard de quelqu'un ; attitude d'opposition à l'égard de quelque chose*" (a feeling of enmity towards someone; an attitude of antagonism). However, the two terms are sometimes used interchangeably, depending on the context. The German terms '*Judenfeindlichkeit*' (hostility towards Jews) and '*Judenhass*' (hatred of Jews), for example, are frequently used as synonyms for antisemitism.²⁷

²⁴ Ibid.

²⁵ See the testimony of Kenneth S. Stern and Rabbi Andrew Baker in the hearing before the United States House of Representatives Committee on the Judiciary, in: United States House of Representatives, Committee on the Judiciary, Examining Anti-Semitism on College Campuses. Written Testimony of Kenneth S. Stern, 7 November 2017 [<https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=1930>] (27.02.2020), pp. 5-6.

²⁶ Tomlinson, (2017), footnote 54, para. 7; Ullrich (2019), p. 10, footnote 7 (criteria of a good definition) and p. 11 (criticism of the vagueness of the working definition).

²⁷ For works using the term 'hatred of jews' (*Judenhass*) to refer to antisemitism, see e.g. Trond Berg Eriksen, *Judenhass: die Geschichte des Antisemitismus von der Antike bis zur Gegenwart*, Göttingen (Vandenhoeck & Ruprecht) 2019; Birgit Erdle,

Article 20 paragraph 2 of the ICCPR does not clearly distinguish between the two terms. Similarly, the Camden Principles²⁸ call on states to make it clear that "the terms 'hatred' and 'hostility' refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group".²⁹ However, this definition sets a high threshold, as it relates to a provision that requires states to adopt legislation prohibiting certain types of hate speech and thus to take measures that restrict freedom of speech.

Secondly, the definition focuses on one manifestation of antisemitism, i.e. 'hatred', which potentially supports an interpretation that excludes incitement to discrimination or discriminatory behaviour towards Jews. This was clearly not intended by the original drafters, given that the final paragraph of the explanatory notes below the core definition refers to antisemitic discrimination ("antisemitic discrimination is the denial to Jews of opportunities or services available to others and is illegal in many countries").

The risk of such an interpretation is, however, limited by the fact that hate and discrimination are intertwined and cannot neatly be separated. Discrimination (taking for instance the form of service denial) is often the 'logical' consequence of hatred towards Jews.

Conversely, acts of violence, or incitement to violence against Jews, are arguably also a form of discrimination, as they are directed against individuals because of their real or imagined membership of a Jewish group, and are therefore based on drawing distinctions between Jews and non-Jews.

ECtHR case law, for example, defines hate crimes as a type of discrimination. Crimes with a racist motive do not just violate the right to life or to physical or mental integrity, which are protected under Articles 2, 3 and 8 ECHR, but are also contrary to the prohibition of discrimination (Article 14 ECHR).³⁰ The ECtHR has adopted the same stance with respect to another form of violence based on another criterion protected by provisions on discrimination – gender.³¹ This is also in line with the CEDAW Committee's interpretation of discrimination.³²

Article 20 of the ICCPR expressly refers to discrimination, requiring states to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or

Werner Konitzer and Irene Aue-Ben-David, *Theorien über Judenhass - eine Denkgeschichte. Kommentierte Quellenedition (1781–1931)*, Frankfurt/New York (Campus Verlag) 2015; Peter Schäfer, *Judenhass und Judenfurcht. Judeophobia. Die Entstehung des Antisemitismus in der Antike*, Berlin (Verlag der Weltreligionen) 2010; Wolfgang Gerlach, Ludger Heid, Christina von Braun (eds.), *Der ewige Judenhass: christlicher Antijudaismus, deutschnationale Judenfeindlichkeit, rassistischer Antisemitismus*, Berlin (philo) 2000.

²⁸ ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality*, April 2009 <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (07.07.2020). The Camden Principles, prepared by ARTICLE 19, have been used, for example, in the work of the OSCE <https://www.osce.org/fom/68769?download=true> (04.10.2020) and in the 2012 OHCHR Rabat Plan [\[https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx\]](https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx).

²⁹ Idem, Principle 12.

³⁰ See ECtHR (GC), *Natchova and Others v. Bulgaria* of 6 July 2005, case no. 43577/98; ECtHR, *Burlyka and Others v. Ukraine* of 6 November 2018, case no. 3289/10.

³¹ See ECtHR, *Opuz v. Turkey* of 9 June 2009, case no. 33401/02; ECtHR, *Volodina v. Russia* of 9 July 2019, case no. 41261/17.

³² Committee on the Elimination of Discrimination against Women (CEDAW), *General recommendation no. 19 on violence against women*, 1992; CEDAW Committee, *General recommendation no. 35 on gender-based violence against women*, updating *General recommendation no. 19*, 26 July 2017, CEDAW/C/GC/35.

violence". This provision also construes the term 'hatred' broadly, as including incitement to discrimination and hostility. However, Manfred Nowak's commentary on the ICCPR criticises the explicit reference to 'discrimination', arguing that the addition of this term is 'inexplicable'³³ on the grounds that hate speech and discrimination are closely related, as noted above: "it is most difficult to conceive of an advocacy of national, racial or religious hatred that does not simultaneously incite to discrimination".³⁴ The broad definition of 'hatred' in Article 20 paragraph 2 ICCPR and Nowak's criticism argue in favour of a wide-ranging interpretation of the term 'hatred' in the working definition.

- 36 For the sake of clarity and for training purposes, the working definition should arguably have included hostility and discrimination as manifestations of antisemitism³⁵ along the lines of Article 20 ICCPR. Adding these terms would also have been expedient, as they would have highlighted that antisemitism can be expressed under the guise of rational or pseudo-scientific statements³⁶ that do not appeal to strong emotions.
- 37 Finally, the use of 'may' in the second half of the first sentence of the working definition ("may be expressed") can, in our view, also be interpreted as meaning that antisemitism may be expressed as hatred, or may not be expressed, or at least not in an easily detectable manner. In other words, the manifestation of a negative perception of Jews is not a constitutive element of antisemitism. This interpretation has the advantage of highlighting that antisemitism, like racism and other ideologies or mindsets, can be confined to a person's inner, mental space without necessarily being expressed in concrete words or deeds that can clearly be attributed to a specific individual. Interpreted in this way, antisemitism also encompasses latent, and often unconscious, attitudes in society, which may evolve into structural discrimination³⁷ and stir up antisemitism, which in certain circumstances could erupt into unexpected outbreaks of violence. Based on this interpretation, the first half of the first sentence of the definition thus includes a key component of antisemitism: a 'certain perception of Jews'. The second part of the sentence makes it clear that antisemitism may, but does not necessarily have to be, expressed in some form.
- 38 In order to achieve a full understanding of antisemitism in line with commonly used definitions, the first sentence of the working definition should be interpreted as follows: antisemitism is a perception, i.e. an attitude, idea, or conception that is hostile to Jews. The hostile perception may, for example, take the form of an unconscious bias confined to a person's inner, mental space, but it may also be manifested as structural discrimination, or more openly, as hatred, hostility, or discrimination against Jews. These different manifestations of antisemitism are either based on an understanding of hatred as just one of the ways in which antisemitism may be expressed, or on a broad interpretation of the term 'hatred'.

³³ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2005, Art. 20 ICCPR, note 14.

³⁴ Ibid.

³⁵ Other expressions can of course be taken into account, including fear, as the frequent term 'Judeophobia' shows.

³⁶ Ullrich (2019), p. 12, footnote 7.

³⁷ Structural discrimination is linked to structural racism, which consists in exclusionary rules, structural practices and organisational cultures that favour particular members of a group over the targets of racism (cf. Naguib, 2014, pp. 14 ff, footnote 37).

Second sentence: "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."

The second sentence of the definition builds on the first. It addresses and clarifies the various ways in which antisemitism may be expressed, referring to 'rhetorical and physical manifestations', and specifies the targets of these manifestations, i.e. "Jewish or non-Jewish individuals and/or their property" and "Jewish community institutions and religious facilities".

The second sentence does not explain whether the two types of manifestation, i.e. 'rhetorical' and 'physical', should be read as exhaustive or indicative only. Referring to two types of manifestation is in line with the drafters' objective of aiding the collection of data on antisemitic incidents. Referring to other possible manifestations of antisemitism, which are more diffuse and more difficult to identify (structural antisemitism), appears to be secondary to this objective. Reading the reference to 'rhetorical and physical manifestations' as indicative and non-exhaustive has the advantage of making the definition more inclusive, lending weight to the argument that the second part of the first sentence ("may be expressed as hatred toward Jews") should be interpreted broadly.

The meanings of the 'rhetorical' and 'physical' manifestations explicitly referred to also require further investigation.

The term 'rhetoric', which is generally defined as an "[e]nsemble de procédés constituant l'art du bien-dire, de l'éloquence" (set of procedures constituting the art of effective speaking, of eloquence),³⁸ needs to be interpreted synonymously with 'verbal'. 'Verbal' should also be interpreted broadly, i.e. without reference to the form, medium or channel in which antisemitism is expressed. Antisemitism can therefore be expressed orally or in writing and take the form of images, gestures (e.g. the Hitler salute) or symbols (e.g. wearing a swastika pin).³⁹ To qualify as forms of communication, non-verbal signals must be intended to convey a message (in this case hostility towards Jews) which can be understood as such by the receiver(s).⁴⁰

The plain meaning of 'physical' is relating to the body as opposed to the mind, as in 'physical health' or 'physical exertion'⁴¹. A physical manifestation of antisemitism therefore evokes associations with human behaviour involving body movement, and a physical effort, such as acts of violence ('hate crimes'). Such an interpretation would be too narrow, as it excludes other important manifestations of antisemitism, including legal acts, discriminatory behaviour or practices. To take due account of these types of actions, two complementary approaches are available. Firstly, the rhetorical and physical manifestations of

³⁸ [<https://www.larousse.fr/dictionnaires/francais/rhétorique/69242?q=rhétorique#68497>] (07.07.2020).

³⁹ See Committee on the Elimination of Racial Discrimination General recommendation no. 35 on combating hate speech, 26 September 2013, CERD/C/GC/35, paragraph 7; by way of comparison, see also the broad interpretation of forms of freedom of expression, e.g. Human Rights Committee, General Comment no. 34: Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, paragraph 12 : "Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression".

⁴⁰ Maya Hertig Randall, Article 16 Cst. in: Bernhard Waldmann, Eva Maria Belser, Astrid Epiney (eds.), *Basler Kommentar. Bundesverfassung*, Basel (Helbing & Lichtenhahn) 2015, note 12.

⁴¹ See the definition in the Larousse on [<https://www.larousse.fr/dictionnaires/francais/physique/60630>] (07.07.2020).

antisemitism can be read as being indicative, rather than exhaustive, which does not exclude other types of manifestation. Secondly, we can seek a broader interpretation of the term 'physical'. Such an interpretation would suggest that 'physical' is used in contraposition to the term 'rhetorical' to reflect the common, although somewhat tenuous, distinction between 'speech' and 'conduct' in the literature on freedom of expression.⁴² According to such an interpretation, the term 'physical manifestations' would include all deeds (including legal acts, such as discriminatory contract provisions) and hostile behaviour (such as assaults, attacks on physical integrity, interference with freedoms, intimidation, harassment, denial of service, destruction or devaluation of property, or desecration of places of worship).

Verbal or physical manifestations of hostility may be directed at "Jewish or non-Jewish individuals" and "their property", including "Jewish community institutions and religious facilities".

- 44 The reference to Jewish or *non-Jewish* individuals requires some elaboration. The inclusion of 'non-Jewish individuals' may be perplexing for readers who are not very familiar with racism, antisemitism and discrimination. Hostile attitudes or behaviour are not problematic because they are directed at Jewish individuals, but because victims are targeted *for being Jewish*, a nuance that is absent from the definition.⁴³ A person's Jewishness may be real or imagined, which means that a non-Jewish individual, who is wrongly deemed to be a Jew, can also be a victim of antisemitism. Antisemitism may also be directed at non-Jewish individuals or property that have links, whether real or imagined, with Jewish individuals or institutions (discrimination by association).⁴⁴ For example, assaulting the partner of a Jew to punish him or her for having a relationship with the Jewish person would constitute an antisemitic offence.⁴⁵
- 45 "Jewish community institutions and religious facilities" refer to property that is frequently the target of antisemitic acts, including, for example, synagogues, cemeteries and the premises of cultural associations or organisations working to end antisemitism. It should be noted that the State of Israel is not specifically mentioned as a possible target. This omission appears to be deliberate, given that the negotiated compromise solution was to exclude any reference to the State of Israel from the core definition.

⁴² See e.g. Frederick Schauer, *On the Distinction Between Speech and Action*, Emory Law Journal (online), vol. 65, 2015, pp. 427-453 ; Aviva Wertheimer, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, Fordham Law Review, vol. 63, no. 3, 1994, pp. 793-851.

⁴³ Ullrich (2019), p. 11, footnote 7.

⁴⁴ See for example CJEU, *Coleman v. Attridge Law and Steve Law* of 17 July 2008, case no. C-303/06, ECLI:EU:C:2008:415.

⁴⁵ See ECtHR *Škorjanec v. Croatia* of 28 March 2017, case no. 25536/14, paras. 56-66. "Likewise, it should be reiterated that under the Convention the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence exists not only with regard to acts of violence based on the victim's actual or perceived personal status or characteristics but also with regard to acts of violence based on the victim's actual or perceived association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic. Indeed, some hate-crime victims are chosen not because they possess a particular characteristic but because of their association with another person who actually or presumably possesses the relevant characteristic. This connection may take the form of the victim's membership of or association with a particular group, or the victim's actual or perceived affiliation with a member of a particular group through, for instance, a personal relationship, friendship or marriage."

D. Examples

In this section, we explore the eleven examples in the working definition in greater depth, differentiating between those that are essentially unrelated to the State of Israel (section 2) and the more contemporary, controversial examples that refer specifically to Israel (section 3). In paragraph 1 we consider the scope of the examples and how they relate to the working definition.

1. Scope of examples

The following sentence precedes the list of examples: "*Contemporary* examples of antisemitism 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*".⁴⁶ The sentence contains a number of important qualifications:

Firstly, the list is intended to be indicative and not exhaustive. Antisemitism may therefore also include acts that are not given as examples, but meet the criteria of the core definition.

Secondly, the reference to 'contemporary' examples of antisemitism also makes it clear that the list is not intended to be exhaustive, and moreover acknowledges that antisemitism evolves and changes over time. It is therefore essential that the contemporary examples provided in the definition do not exclude potential future manifestations of antisemitism.

Finally, 'could' suggests that the examples may, but need not necessarily, be deemed to be antisemitism. Whether a specific type of behaviour matches one of the examples depends on the overall context – another key term in the sentence. The term 'overall' points to the fact that the context is to be understood in a broad sense. It requires taking into account, in particular, the historical (which is already implied by the term 'contemporary'), social, political, legal or geographical context, i.e. the totality of the circumstances.

The use of the term 'could' and the reference to 'overall context' show that the examples are not intended to be used as a checklist of acts and speech which are antisemitic per se. Using the examples mechanically as a checklist, as certain critics fear,⁴⁷ would be to misuse the definition and ignore the qualifying terms and phrases built into the wording. To reduce the risk of the definition being misused in this way, especially as a 'box ticking' approach is attractive due to its simplicity, compared to the more demanding contextual approach, it seems important to provide training to people expected to apply the definition.

The ECtHR's case law, in particular, recognises the need to consider the overall context in determining whether or not specific acts or speech are antisemitic or, more generally, racist. When asked to rule on cases involving hate speech or genocide denial, the ECtHR has held that "the Court's approach to that type of case can thus be described as highly context-specific."⁴⁸ This approach involves assessing "the interplay between the various factors rather than any one of them taken in isolation", which determines

⁴⁶ Italics added by the authors.

⁴⁷ See Ullrich (2019) p. 13, 16 ; Tomlinson (2018) para. 22.

⁴⁸ ECtHR (GC), *Perinçek v. Switzerland* of 15 October 2015, case no. 27510/08, para. 208.

the outcome of the case.⁴⁹ These factors include the content of the statements, with the Court being "particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups";⁵⁰ the "manner in which the statements were made, and their capacity – direct or indirect – to lead to harmful consequences".⁵¹ This last factor depends on a whole series of elements; for example the same statements may have a different impact depending on whether they are made against a tense political or social background or not;⁵² the chosen method of dissemination, depending on which it is possible to reach a different audience, more or less receptive or critical, and a greater or lesser number of people; the particular context in which the statements were made (including whether they were made spontaneously, for example in a deliberately pluralistic televised debate, where they may be relativised by other participants in the discussion, or in the context of political campaigning).⁵³ It should be pointed out that the last criterion may weigh in the balance for or against freedom of expression. On the one hand, political discussion lies at the core of freedom of speech (margin note 70 ff below), which argues for a high standard of protection. On the other hand, statements by a prominent politician, which reach a wide audience, can have a much more damaging impact than those of lesser known individuals. Another factor that must be taken into account is therefore the identity of the person making the statements.⁵⁴ Statements can also have different meanings and repercussions depending on whether they are used in an academic, artistic or humorous context, for example during carnival season.⁵⁵ There is a wider margin of tolerance for exaggeration and provocation in humorous or artistic contexts than in other situations, although this does not give artists or comedians carte blanche to make racist or antisemitic remarks.⁵⁶ Finally, historical and geographical contexts are also relevant.⁵⁷

- 53 A contextual approach is also recommended by the Committee on the Elimination of Racial Discrimination⁵⁸ and in work carried out under the auspices of the UN. The Rabat Plan of Action stresses the importance of context in the following terms:

⁴⁹ Ibid.

⁵⁰ Idem, para. 206.

⁵¹ Idem, para. 207.

⁵² Idem, para. 205.

⁵³ The ECtHR (GC) refers to the various factors in *Perinçek v. Switzerland* of 15 October 2015, case no. 27510/08, para. 206 f.

⁵⁴ See for example the ECtHR decisions, *Willem v. France* of 16 July 2009, case no. 10883/05 and *Baldassi and others v. France* of 11 June 2020, case no. 15271/16 concerning calls to boycott Israeli products. The Court found that there had been a violation of the freedom of expression in the second case but not in the first. In drawing a distinction between the two cases, it gave considerable weight to the fact that the appeals had been made by appellants who did not have the same status, capacity or function, given that Mr Willem had acted in his capacity as mayor, while the appellants in *Baldassi* were activists. As mayor, Mr Willem was in a better position to wield influence and, given that he was accountable to all his constituents, he was required to maintain a certain level of neutrality (*Baldassi v. France*, para. 48).

⁵⁵ See *mutatis mutandis* the different determinations regarding attacks on honour, based on whether they were published in a newspaper (ECtHR (dec.), *Costa Moreira v. Portugal* of 22 September 2009, case no. 20156/08) or constituted an expression of satire in a carnival procession (ECtHR, *Alves Da Silva v. Portugal* of 20 October 2009, case no. 41665/07).

⁵⁶ ECtHR (dec.), *M'Bala M'Bala v. France* of 20 October 2015, case no. 25239/13, para. 40, where the Court emphasised that a "blatant display of a hateful and antisemitic position disguised as an artistic production is as dangerous as a fully-fledged and sharp attack".

⁵⁷ ECtHR (GC), *Perinçek v. Switzerland* of 15 October 2015, case no. 27510/08, paras. 208, 207 and 242 ff.

⁵⁸ Committee on the Elimination of Racial Discrimination, General recommendation No. 35: Combating racist hate speech, 26 September 2013, CERD/C/GC/35, para. 14 ff.

"Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated."⁵⁹

In conclusion, in determining whether certain statements constitute hate speech it is crucial to take the context into account. This fact must be borne in mind when assessing the various examples which accompany the definition. The importance of the context will depend on the example assessed. Some of the acts referred to in the examples will be deemed to constitute antisemitism in the vast majority of cases, which means an in-depth contextual analysis will hardly ever be required. But for other examples, such as those addressing 'new antisemitism', it will be essential to consider the context.

For the purpose of assessing the examples in depth, we have divided them into two groups based on whether or not they predominantly relate to the State of Israel. The 'predominant connection' criterion provides a solution to the difficulty of classifying certain examples, in placing them depending on the importance given to the State of Israel (see example 5). Another advantage of this approach is that it results in a classification which largely correlates with the distinction between traditional and 'new' forms of antisemitism. It also corresponds to the categorisation of the examples in the EUMC working definition (Appendix 1), which was redrafted in the course of the IHRA negotiations.

2. Examples that do not predominantly relate to Israel

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

This is a very clear example of antisemitic behaviour outlined in the definition, i.e. hateful speech and actions directed at Jews because of their real or imagined membership of the group of Jews. It refers to the most blatant manifestations of antisemitism: participating in violent acts that violate the fundamental legal right to life and physical integrity and inciting others to engage in such acts. The reference indicating that these acts have a racist, extremist or religious basis underscores their hate-driven nature. Aside from the fact that the example clearly falls within the core definition, it refers to acts that states are required to prohibit by law and prosecute effectively, whether under general provisions safeguarding the right to life and physical integrity or general anti-discrimination provisions,⁶⁰ or under specific provisions or treaties, including Article 20 paragraph 2 of the ICCPR and the CERD. Indeed, the types of situation described in the example clearly amount to advocacy of national, racial or religious hatred that constitutes incitement to violence under Article 20 paragraph 2 ICCPR and matches the definition of racial discrimination in Article 1 CERD, i.e. an extreme form of racially motivated exclusion which has the purpose or effect of impairing the enjoyment and exercise of fundamental rights by Jews.

The example also refers to 'justifying' hate crimes, which can be considered as a form of indirect incitement to hatred towards Jews. Article 4 CERD therefore requires states parties to condemn all propaganda attempting to justify or promote racial hatred and discrimination in any form.

⁵⁹ OHCHR, Rabat Action Plan, 2012, [<https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>], para. 29(a). Other factors that should be taken into account are set out in para. 29(b) ff.

⁶⁰ See decisions referred to in footnote 191.

Example 2: Making mendacious, dehumanising, demonising, 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

58 The second example, like the first, is also uncontentious. It places the emphasis on prejudice and stereotypes as the building blocks of antisemitism and highlights a few common stereotypes, which are absent from the core definition, such as the supposed superior abilities and powers of Jews (Jewish conspiracy, the idea of Jews as an oppressive and threatening group that exerts control and wields power).

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

59 The third example builds on the second, referring to the stereotypical view of Jews as a group that poses a danger to society, who are accused of being responsible for real or imagined wrongdoing, i.e. of causing harm.

60 The ECtHR case *Pavel Ivanov v. Russia*⁶¹ provides a pertinent example of this type of antisemitism and its unacceptable nature. In this case, the applicant sought to overturn his criminal conviction for public incitement to ethnic, racial and religious hatred on the basis that he had a right to freedom of expression. The Court noted that the applicant authored and published a series of articles "portraying the Jews as the source of evil in Russia" and that he had "accused an entire ethnic group of plotting a conspiracy against the Russian people and ascribed Fascist ideology to the Jewish leadership." It had no doubt "as to the markedly antisemitic tenor of the applicant's views" and that he sought through his publications to incite hatred towards the Jewish people, pointing out that "such a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination." The Court held that invoking freedom of expression was an abuse of rights (Article 17 ECHR) and accordingly that the statements in question were not protected by freedom of expression.⁶²

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)

Example 5: Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust

61 Examples 4 and 5 will be assessed together, as they concern both 'simple' and 'qualified' Holocaust denial. Simple Holocaust denial (example 4) argues that the Holocaust simply did not occur or plays down the facts (and may also include justifying genocide, which is not mentioned in the example). Or it denies the gravity of the crime by claiming that there was no intention to exterminate the Jews and that the Holocaust does not therefore satisfy the core definition of genocide.⁶³ Qualified Holocaust denial (example 5) does not merely deny, trivialise or justify genocide, but also blames Jews for inventing or

⁶¹ ECtHR (dec.), *Pavel Ivanov v. Russia* of 20 February 2007, case no. 35222/04.

⁶² *Idem*, para. 1.

⁶³ See Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, which defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (...)".

exaggerating the Holocaust "for political or financial gain as if [it] was the result of a conspiracy plotted by the Jews",⁶⁴ as stated in the IHRA working definition of Holocaust denial.

The same accusations are often implicit in simple Holocaust denial. This strategy, fed by anti-Jewish stereotypes, is used to legitimise Nazi ideology and argues for its rehabilitation. The ECtHR has consistently used this approach in interpreting Holocaust denial,⁶⁵ although it has taken a more stringent stance towards other forms of genocide denial.⁶⁶ In *Garaudy v. France*, for example, concerning the publication of a work denying the Holocaust, the Court noted that

"The applicant denies the reality, scope and gravity of these historical facts, which are not the subject of debate among historians but have, on the contrary, been clearly established. It appears (...) that far from confining himself to political or ideological criticism of Zionism and the actions of the State of Israel, or even giving an objective account of revisionist arguments (...) and merely calling, as he claims, for 'a public and academic debate' on the historical event of the gas chambers, the applicant has subscribed to those theories and engaged in a virulent and systematic denial of the existence of the crimes against humanity committed by the Nazis against the Jewish community. There can be no doubt that denying the reality of clearly established historical events, such as the Holocaust, (...) does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, *the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and incitement to hatred of them.* The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and antisemitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention."⁶⁷

A consideration of the overall context leaves the door open to exceptions, such as the hypothetical scenario where revisionist statements are made through ignorance rather than because of any racist motive.

A distinctive feature of example 5 is that it refers to Israel as a state in addition to the Jews as a people inventing or exaggerating the Holocaust. In the context of Holocaust denial, the term 'Israel as a state', rather than Jews as a people, can presumably be understood as a synonym for Jews collectively, and does not fundamentally change the antisemitic message of the statements made.

⁶⁴ IHRA working definition of Holocaust denial and distortion [<https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-holocaust-denial-and-distortion>] (07.07.2020).

⁶⁵ See paragraphs 209–212 of ECtHR (GC), *Perinçek v. Switzerland* of 15 October 2015, case no. 27510/08, which provide an overview and various references to decisions of the ECtHR and European Commission of Human Rights ('the Commission'). The Commission has taken a slightly stricter line than the ECtHR by placing greater emphasis on context in order to determine whether revisionist comments amount to antisemitism and racism. See European Commission of Human Rights, *Faurisson v. France* of 2 January 1993, case no. 550/1993, paragraph 9.6.

⁶⁶ See the Court's approach in ECtHR (GC), *Perinçek v. Switzerland* of 15 October 2015, case no. 27510/08.

⁶⁷ ECtHR (dec.), *Garaudy v. France* of 24 June 2003, case no. 65831/01, emphasis added by the authors. See also the more recent cases ECtHR, *Pastörs v. Germany* of 3 October 2019, case no. 55225/14 and ECtHR (dec.), *Williamson v. Germany* of 8 January 2019 case no. 64496/17.

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

- 65 This example also addresses a traditional stereotype that feeds antisemitism: the disloyalty of the Jews (as a 'wandering' people) to their own country, which makes them 'malicious', posing a threat to the nation.⁶⁸ The phrase 'alleged priorities of Jews worldwide' conjures up the conspiracy theory of a Jewish plot to control the world, which is a key component of antisemitism. In our opinion, the use of the plural ('Jewish citizens') shows that the example targets generalised accusations implying that all Jews are disloyal (reducing Jews to a 'Jewish lobby') and does not extend to criticism of a specific action or policy of a Jewish individual or an organisation defending the interests of the State of Israel, for example.⁶⁹ The context is crucial in differentiating between legitimate criticism and antisemitic speech.

3. Examples that predominantly relate to Israel

- 66 Criticisms levelled at the working definition and the debates on adopting the definition in various countries are commonly centred on the controversial examples which refer to the 'new' type of antisemitism and criticism of the State of Israel. The controversy surrounding these examples resulted in the compromise adopted by the IHRA Plenary in Bucharest. There is no reference to criticism of Israel in the core definition, but the explanatory notes preceding the list of examples specify that "manifestations might include the targeting of the State of Israel, conceived as a Jewish collectivity", adding that "criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic."
- 67 Despite the compromise adopted, the working definition still attracts criticism from the vantage point of freedom of expression, i.e. that it could be used to stifle criticism of Israeli policy. The tension between freedom of expression and the need to combat racism and antisemitism deserves further investigation.
- 68 In order to fight racism and antisemitism, a definition and/or a list of racist actions and speech is needed that take account of the current context and the strategies used by racists or antisemites to adapt their speech or vocabulary, in an attempt to avoid penalties or simply the stigma of being labelled 'racist' or 'antisemitic'. Linguistic analyses have shown, for example, that contemporary antisemitic speech replaces references to Jews with terms such as 'Rothschild' or 'international finance' that still convey age-old anti-Jewish stereotypes.⁷⁰ Similarly, the term 'State of Israel' can be used to denote a 'Jewish

⁶⁸ Report of UN Special Rapporteur Ahmed Shaheed on freedom of religion or belief dated 20 September 2019, A/74/358, [<https://undocs.org/en/A/74/358>], paragraph 15.

⁶⁹ But see Ullrich (2019), p. 14, footnote 7, who finds the wording of the example ambiguous.

⁷⁰ Monika Schwarz-Friesel, *Aktueller Antisemitismus. Konzeptuelle und verbale Charakteristika*, 7 September 2015 [<https://www.bpb.de/politik/extremismus/antisemitismus/211516/aktueller-antisemitismus>] (20.07.2020); Pierre Birnbaum, *Tous les fantasmes sur l'antisémitisme peuvent naître*, 19 February 2019, [http://www.lavie.fr/actualite/societe/pierre-birnbaum-tous-les-fantasmes-sur-l-antisemitisme-peuvent-renaitre-19-02-2019-96476_7.php] (20.07.2020); Marie Poinot, 'Un nouveau moment antisémite?', *Homme et migrations* [online] 2017, vols. 1317–1318, pp. 172–179, [<https://journals.openedition.org/hommesmigrations/3920>] (20.07.2020).

collectivity', perpetuating the same stereotypes.⁷¹ In situations such as these, it would appear justified to characterise such utterances as antisemitic.

The ability to discuss political issues freely and to keep state power in check are key concerns pertaining to freedoms of expression. In line with these fundamental concerns, freedom of expression is deemed to be an indispensable condition for a free and democratic society.⁷² As the ECtHR famously remarked, "it 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'".⁷³ The fact that opinions may be biased or excessive, as is often the case in political debate, does not justify restricting them.

Given the democratic function played by freedoms of expression, case law affords a very high level of protection to political speech in the broadest sense, including debate on subjects of public interest.⁷⁴ Restrictions must meet a pressing social need and be strictly proportionate,⁷⁵ having regard to the role of the press as a 'public watchdog' and civil society actors (NGOs) as a 'social watchdog' in a democratic society.⁷⁶ In the same vein, the limits of permissible criticism are wider with regard to the government⁷⁷ and political figures,⁷⁸ who must tolerate a good deal of exaggeration and hyperbole. These principles also apply to representatives of foreign states. Criminal provisions granting special protection to foreign heads of state against offensive or disparaging remarks are incompatible with the idea of freedom of expression.⁷⁹

⁷¹ Cf. Ullrich (2019) (footnote 7), p. 13: "antisemitism can use Israel as camouflage or be directed against the state of Israel as the 'collective Jew'".

⁷² Human Rights Committee, General Comment 34: Article 19: Freedoms of opinion and expression dated 12 September 2011, CCPR/C/GC/34, paragraph 2; see also paragraph 13 which states that a free press or other media "constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its functions. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint. The public also has a corresponding right to receive media output." See also paragraph 20: "the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential."

For the ECHR, see ECtHR (Plenary), *Handyside v. United Kingdom* of 7 December 1976, case no. 5493/72, paragraph 49.

In terms of Federal Supreme Court case law, see Federal Supreme Court decision 96 I 586, finding 6, describing freedom of expression as the "*fondement de tout Etat démocratique*" (the foundation of every democratic state) which deserves "*une place à part dans le catalogue des droits individuels garantis par la constitution et un traitement privilégié de la part des autorités*" (a special place in the catalogue of individual rights guaranteed by the Constitution and privileged treatment by the authorities).

⁷³ See ECtHR (Plenary), *Handyside v. United Kingdom* of 7 December 1976, case no. 5493/72, para. 49.

⁷⁴ See e.g. ECtHR, *VgT Verein g. Tierfabriken v. Switzerland* (no. 1) of 28 June 2001, case no. 24699/94, paragraph 70 f.

⁷⁵ Ibid, paragraph 67 ff.

⁷⁶ Cf. Franz Zeller/ Regina Kiener, Art. 17 Cst. in: Bernhard Waldmann, Eva Maria Belser, Astrid Epiney (eds.), *Basler Kommentar. Bundesverfassung*, Basel (Helbing & Lichtenhan) 2015, note 8; Maya Hertig Randall, Art. 16 Cst. in: Bernhard Waldmann, Eva Maria Belser, Astrid Epiney (eds.), *Basler Kommentar. Bundesverfassung*, Basel (Helbing & Lichtenhahn) 2015, note 45.

⁷⁷ See e.g. ECtHR, *Castells v. Spain* of 23 April 1992, case no. 11798/85, paragraph 46.

⁷⁸ See e.g. ECtHR, *Lingens v. Austria* (no. 1) of 8 July 1986, case no. 9815/82, paragraph 42 ; Federal Supreme Court decision 128 IV 53, finding 1(a).

⁷⁹ ECtHR, *Colombani v. France* of 25 June 2002, case no. 51279/99, paragraph 59 ff.

- 71 Case law shows that courts are aware of the risks of self-censorship, given that freedom of expression does not just serve the personal interests of the senders or recipients of ideas or information, but also the public interest in maintaining the indispensable conditions of an open and democratic society.⁸⁰ The risk of self-censorship can be attributed to several factors:⁸¹ firstly, legal restrictions on freedoms of expression that are too vaguely worded make it difficult to predict whether speech may be punishable and can have a chilling effect on the free expression of legitimate criticism and ideas. Secondly, a chilling effect will also depend on the nature of the penalty imposed, or on the risk that the party making the statements could be penalised. Criminal penalties, in particular, have the potential for exerting a significant chilling effect. Case law has also recognised that the threat of prosecution or of a sanction,⁸² such as the threat of dismissal if the person makes or repeats certain comments, can have a chilling effect.
- 72 In applying these general considerations to the working definition, it is possible to draw two conclusions: firstly, there must be freedom to express even biased and exaggerated criticism of Israeli politicians or policies, especially when made in the context of the extremely sensitive Israeli-Palestinian conflict. This view is also reflected in the ECtHR's case law, which draws a line between "political or ideological criticism of Zionism and the actions of the State of Israel", which is protected by freedom of expression, and 'racial defamation' or 'inciting hatred' (in the case of Holocaust denial), which is not.⁸³
- 73 On the other hand, the vague wording of the definition may have a chilling effect, depending on the way it is used. A phrase such as "criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic" lacks precision and predictability and therefore does little to reduce or eliminate real or perceived risks to freedom of speech. The statement that "manifestations might include the targeting of the State of Israel, *conceived as a Jewish collectivity*"⁸⁴ is also insufficient to ensure free expression because it lends itself to different interpretations. The term 'Jewish collectivity' could be interpreted as an attempt to prevent indirect forms of antisemitism from being shielded from criticism. But given that the State of Israel is conceived as a 'Jewish and democratic state', criticism of the Jewish nature of the State of Israel,⁸⁵ which has intensified following the adoption of the controversial Jewish nation state law (margin note 80 below), could also be deemed to be directed at Israel conceived as a

⁸⁰ See e.g. Maya Hertig Randall, Article 16 Cst. in: Bernhard Waldmann, Eva Maria Belser, Astrid Epiney (eds.), *Basler Kommentar. Bundesverfassung*, Basel (Helbing & Lichtenhahn) 2015, note 40.

⁸¹ See *ibid.* for an overview.

⁸² ECtHR, *Wille v. Liechtenstein* of 28 October 1999, case no. 28396/95, paragraph 50.

⁸³ See the passage quoted in note 128, from ECtHR (dec.), *Garaudy v. France* of 24 June 2003, case no. 65831/01; see also ECtHR, *Baldassi v. France* of 11 June 2020, case no. 15271/16 concerning calls by activists to boycott Israeli products. The Court noted that the case concerned a situation in which Article 10 of the Convention required a high level of protection of the right to freedom of expression. The Court found that on the one hand the actions and remarks imputed to the applicants had concerned a subject of public interest, i.e. compliance with public international law by the State of Israel and the human rights situation in the occupied Palestinian territory, and had been part of a contemporary debate in France and also throughout the international community. On the other hand, the actions and words had fallen within the ambit of political or militant expression. The Court has emphasised on many occasions that there is little scope under Article 10 paragraph 2 for restrictions on freedom of expression in the sphere of political speech or matters of public interest. Calls for boycotts that turn into calls for violence, hatred or intolerance, however, cross the line of what would be considered acceptable statements (*Baldassi v. France*, paragraph 78 f.).

⁸⁴ Emphasis added by the authors.

⁸⁵ For an overview of the debates and different viewpoints, see e.g. Benyamin Neuberger/Sarah Strélski, '*Etat juif et démocratique. Essai de définitions*', *Les Temps Modernes*, nos. 652–653, 2009, pp. 19–45.

Jewish collectivity.⁸⁶ Only the first interpretation could lead to applications of the definition that respect freedom of expression.

The fact that the definition is not legally binding does not stop it from having a chilling effect on freedom of expression. The level of self-censorship risk depends on the way in which the definition will be used,⁸⁷ but also the fundamental uncertainty surrounding its future use and interpretation. For the purposes of freedom of expression, it would, for example, be advisable to clarify the specific purposes and areas for which the working definition should be used and provide guidance on interpretation.

Combating antisemitism effectively and respecting freedom of expression are both important concerns⁸⁸ that need to be taken into account in assessing the examples predominantly relating to the State of Israel.

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

This example takes up the idea of delegitimation, which is one of the constituent elements of the 3D test for antisemitism (demonisation, double standards and delegitimation).⁸⁹ The 3D test was developed to help us distinguish between permissible criticism of Israel and antisemitism and recognises anti-Zionism (the self-determination of the Jewish people being a key component of Zionism) as a new form of antisemitism. Example 7 needs to be handled carefully, having due regard to the all-important context. Denying the Jewish people their right to self-determination may be built into a strategy to incite hatred or violence against Jews. For example, in *Pavel Ivanov v. Russia* (margin no. 61 above), the applicant argued at his trial that the 'Zion-Fascist leadership of the Jewry' was the source of all evils in Russia⁹⁰ and sought clarification of various questions, including whether Jews were a nation or a 'Judaic diaspora' and whether the adjective 'national' or the term 'national dignity' could be used in respect of a member of the 'Judaic diaspora'.⁹¹ On appeal, he again denied that a 'Jewish nation' existed. Analysed in their context, the applicant's submissions, which challenged the idea that the Jews formed a nation or had a right to dignity and, by extension, their right to self-determination, were clearly antisemitic and potentially constituted incitement to violence.

The decision in *Garaudy v. France*, referred to above, is also interesting in this respect. The book that gave rise to the applicant's criminal conviction, *Founding Myths of Israeli Politics*, combined criticism of the State of Israel, implicitly questioning the Jewish people's right to self-determination, with revisionist statements. In particular, the author made accusations of deliberate distortions of history

⁸⁶ See Ullrich (2019), p. 13, footnote 7.

⁸⁷ On the importance of the intended purpose, see Report of UN Special Rapporteur Ahmed Shaheed on freedom of religion or belief dated 20 September 2019, A/74/358 [<https://undocs.org/en/A/74/358>], paragraph 54.

⁸⁸ Cf. Report of UN Special Rapporteur Ahmed Shaheed on freedom of religion or belief dated 20 September 2019, A/74/358, [<https://undocs.org/en/A/74/358>], paragraph 54: "nevertheless, the potential chilling effects of the use of those examples by public bodies on speech that is critical of policies and practices of the government of Israel must be taken seriously, as should the concern that criticism of Israel sometimes has been used to incite hatred towards Jews in general, including through expression that feeds on traditional antisemitic stereotypes of Jews."

⁸⁹ Natan Sharansky, 3D Test of Antisemitism: Demonization, Double Standards, Delegitimization, 23 December 2010, [<https://antisemitism.org.il/en/17763/>] (07.04.2020).

⁹⁰ ECtHR (dec.), *Pavel Ivanov v. Russia* of 20 February 2007, case no. 35222/04 (relevant section).

⁹¹ Ibid. As a further example, see also the following comment posted on Facebook: "[...] Leider hat unser lieber Hitler viel zu wenig von euch erwünscht! Ich sage noch einmal – vernichtet Israel und es herrscht Weltfrieden" (Unfortunately, our dear Hitler caught far too few of you – destroy Israel and we will have peace on earth again) (FCR case 2017-003N).

("myth of the six million") or mystifications for political ends (...) by the Zionists ("the Israeli-Zionist lobbies in France and the United States"), who were the 'major beneficiaries', in order to legalise all their external and internal acts of violence by placing themselves above the law and endangering world unity and peace.⁹² Read in context, these comments deny the legitimacy of the State of Israel, which is presented as having emerged from illegal actions based on lies. In addition to providing a concrete example of denying the Jewish people their right to self-determination, the ECtHR's decision shows how important it is to consider the context in distinguishing between criticism of the State of Israel, which is protected by freedom of speech, and racist utterances that would warrant a criminal conviction. The ECtHR upheld the decision of the French lower courts, arguing that "the indiscriminate use of the terms 'Zionist', 'Jewish vote', 'Jewish lobby', 'Israeli' or 'State of Israel' in the applicant's book, and in particular in the passages complained of, served to confuse the reader." It added that while criticism of the policy of the State of Israel, or of any other state, fell within the scope of freedom of expression, "the applicant did not limit himself to such criticism" and, "in view of the generally revisionist tenor of the book", he was "pursuing a proven racist aim."⁹³

- 78 However, it is not hard either to think of examples where commenting on the Jewish people's right to self-determination would unjustifiably be categorised as antisemitic, as they amount to statements about a matter of general interest which are afforded a high level of protection by freedom of expression. Situations of this kind are all the more likely to arise as the right to self-determination raises complex issues from a legal and political standpoint, leading to controversies on both the substance and the holder of the right.⁹⁴ In addition, the historical facts surrounding the creation of any nation, including the State of Israel, may be open to all sorts of interpretations.⁹⁵ Finally, the complexity of the Israeli-Palestinian conflict makes it difficult to categorise criticism of the Jewish people's right to self-determination as antisemitic per se.⁹⁶
- 79 Fears that example 7 could be misused to stifle political or academic speech are therefore not unfounded.⁹⁷ For the purpose of freedom of expression, assessing the context is essential to prevent the example from being used to stigmatise criticism of certain Israeli policies linked to the issue of self-determination. For example, people ought to be allowed to discuss the controversial Israeli nation state

⁹² ECtHR (dec.), *Garaudy v. France* of 24 June 2003, case no. 65831/01 (relevant section).

⁹³ *Idem*, para. 1.

⁹⁴ On the self-determination of peoples, see e.g. Antonio Cassese, *A Legal Reappraisal*, Cambridge (Cambridge University Press) 1995; Nowak (2005) (footnote 194), Art. 1 ICCPR, pp. 5-26

⁹⁵ Regarding debates on historical events, the ECtHR has noted that "it is an integral part of freedom of expression to seek historical truth" and that "it is not its role to arbitrate the underlying historical issues" (see ECtHR, *Giniewski v. France* of 31 January 2006, no. 64016/00, para. 51).

⁹⁶ Klug (2013) (footnote 44), pp. 470, 477 (referring to anti-colonialism as a lens through which the conflict may be viewed) and p. 480.

⁹⁷ See also Ullrich (2019), p. 13 f., footnote 7; Tomlinson (2017) para. 10, footnote 54; Robertson (2018) para. 26 ff, footnote 54; see also Stern (2017), p. 9, footnote 6: "Imagine a definition designed for Palestinians. If 'denying the Jewish people their right to self-determination, and denying Israel the right to exist' is antisemitism, then shouldn't 'denying the Palestinian people their right to self-determination, and denying Palestine the right to exist' be anti-Palestinianism? Would they then ask administrators to police and possibly punish campus events by pro-Israel groups who oppose the two state solution, or claim the Palestinian people are a myth?"

law freely. This basic law⁹⁸, which was enacted in 2018, solely recognises the Jewish people's right to self-determination, stipulating that "the State of Israel is the nation state of the Jewish People, in which it realises its natural, cultural, religious and historical right to self-determination,"⁹⁹ and that "the exercise of the right to national self-determination in the State of Israel is unique to the Jewish People."¹⁰⁰ Criticism that these provisions fail to protect minorities is a legitimate use of freedom of expression.¹⁰¹ The same applies to criticism of the notion of a 'Jewish state', support for alternative views (Israeli state, two state solution), or criticism of certain Israeli policies from the vantage point of racial discrimination. Due consideration should also be given to the fact that virulent speech and exaggeration, especially in political contexts, are also protected under freedom of expression. Even very strong statements claiming that the state of Israel is a 'racist endeavour',¹⁰² as in the example, are not in themselves antisemitic taken out of context.

Example 8: Applying double standards by requiring of it a behaviour not expected or demanded of any other democratic nation

This example refers back to the caveat preceding the list of examples, also mentioned above, that "criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic." Like example 7, example 8 addresses one of the constitutive elements of the 3D test (double standards) and attempts to differentiate between antisemitic speech and permissible criticism of the State of Israel. Double standards are often imputed to critics of Israeli policies who explicitly set higher standards for the policies of the State of Israel than for other nations, for example by claiming that Jews should have learned from past experiences of persecution and extermination and should therefore pay particular regard to human rights and minorities.

Such statements are certainly inappropriate and particularly offensive to Jewish people. Nevertheless, they cannot be qualified as antisemitic per se without reference to the context and any stereotypes present. David Feldman suggests that it is the presence of an underlying antisemitic stereotype or discriminatory practice, rather than double standards as such, which would confirm suspicions of antisemitism in any given instance:

"We should conclude that the application of double standards does not in itself constitute antisemitism. We may suspect that the application of double standards is in some cases underpinned by antisemitism in the form of a malign stereotype of Jews applied to the State of Israel. For this charge to be effective it is the presence of the stereotype not the application of double standards which will be crucial. In other cases the application of double standards could lead to antisemitism

⁹⁸ A French translation and analysis of the law is available at *Tribune Juive, La Loi Israël Etat-Nation du peuple juif, traduction et analyse*, 20 July 2018, [<https://www.tribunejuive.info/2018/07/20/la-loi-israel-etat-nation-du-peuple-juif-traduction-et-analyse/>] (08.07.2020).

⁹⁹ Art. 1 let. b.

¹⁰⁰ Art. 1 let. c.

¹⁰¹ For a critical analysis see e.g. Tamar Hostovsky Brandes, "Basic Law: Israel as the Nation State of the Jewish People: Implications for Equality, Self-Determination, and Social Solidarity", *Minnesota Journal of International Law*, vol. 29, no. 1, spring 2020, pp. 65-108.

¹⁰² NB: the French wording differs slightly from the English. The French version reads as follows: "l'existence de l'État d'Israël est le fruit d'une entreprise raciste" (emphasis added by the authors), while the English version reads "the existence of a State of Israel is a racist endeavour." This English version focuses more on the present than the French version and could therefore imply contemporary policies.

in the form of discriminatory practices. However, in these cases it is the fact of discrimination which will be crucial, not the double standard."¹⁰³

- 82 In addition, the wording of example 8 provides little in the way of clarity and therefore limited predictability, which means that it is problematic when applied to freedom of expression. There is no homogeneous category of 'democratic nations' that can be used to determine whether higher standards have been applied to the State of Israel. Neither is there any one-size-fits-all notion of the behaviour expected or demanded of a democratic nation. In addition, freedom of expression and, in particular, press freedom, include the ability to choose topics for discussion. Certain nations and politicians generate more interest than others for a variety of reasons unconnected to racism.¹⁰⁴
- 83 It would be impossible to require fair and equal coverage of all questionable policies of nations considered to be 'democratic' (a term that is open to debate in itself, as noted above), just as it would be impractical to require an environmental organisation to criticise all companies that pollute the environment. Freedom of expression therefore commonly involves selecting and simplifying material and using selective examples in journalism to illustrate a point. Applying example 8 in practice, however, presents huge challenges and is highly controversial, as evidenced by the criticism levelled at the Human Rights Council for employing double standards in its approach to the State of Israel.¹⁰⁵
- 84 More fundamentally, the 'double standards' theory is particularly problematic in the context of the Israeli-Palestinian conflict and is itself likely to give rise to double standards. As Klug notes:

"The Israeli-Palestinian conflict is a complex, bitter and tragic struggle. Both sides have their ardent supporters. On both sides, people are partisan; and partisanship can lead to crossing the red line. When 'friends of Israel' cross that line, this does not make them anti-Arab racists. By the same token, when 'friends of Palestine' cross the same line, this does not make them antisemites. It cuts both ways."¹⁰⁶

Example 9: Using the symbols and images associated with classic antisemitism (e.g. claims of Jews killing Jesus or blood libel) to characterise Israel or Israelis

- 85 Example 9 provides some specific examples of typical stereotypes and prejudices conveyed by traditional antisemitism, used specifically to characterise Israel or Israelis.
- 86 Situations where mendacious, dehumanising, demonising, or stereotypical allegations are made about Jews are covered by example 2.
- 87 But example 9 differs from example 2 in that it solely refers to symbols and images associated with 'classic' antisemitism, i.e. symbols and images that have a long history and are easily ascribed to antisemitism, such as claims of Jews killing Jesus or blood libel. Indeed, the specific nature of these

¹⁰³ Feldman (2015), p. 4, footnote 8.

¹⁰⁴ See Feldman (2015), p. 4, footnote 8: "There are many reasons why Israel is singled out in political debate. For example, in some cases this is due to the geopolitical and religious significance of the land. Equally significant in attracting attention has been Israel's claim to be a liberal and democratic state. This means it is held to standards which are different from those applied to its neighbours, for example. Whether these are good reasons or bad for singling out Israel for criticism they are not antisemitic."

¹⁰⁵ Robertson (2018), para. 28, footnote 54.

¹⁰⁶ Klug (2013), p. 479, footnote 44. Stern, quoted in footnote 262, argues along similar lines.

images and the fact that they are inextricably and unambiguously linked to antisemitism would normally enable this type of speech to be categorised as antisemitic, even if it is directed against Israel or the Israelis, used as bywords here for 'Jewish collectivity'.¹⁰⁷

Example 9 also sheds further light on the phrase 'rhetorical manifestations' of antisemitism used in the core definition, by clarifying that these include symbolism and imagery, i.e. non-verbal forms of communication.

Example 10: Drawing comparisons of contemporary Israeli policy to that of the Nazis

In connection with this example it should be noted that it is difficult to determine in the abstract whether comparing contemporary Israeli policy with Nazi policy should be categorised as antisemitic. Once again, context will be the major determinant of antisemitism. On the one hand, the reversal of the roles of perpetrators and victims is part of the standard repertoire of racists and/or antisemites,¹⁰⁸ which may, for example, feature in speech denying or talking down the Holocaust, or speech demonising Jews,¹⁰⁹ fomenting hatred towards them.

On the other hand, both non-Jewish and Jewish opponents of certain Israeli policies compare those policies to Nazi policy in order to discredit them and the politicians who make them.¹¹⁰ Animal rights activists, for example, have drawn such comparisons to condemn intensive animal farming.¹¹¹ Others have criticised populist, nationalist and right-wing politicians by calling them 'Nazis'.¹¹² Comparisons involving individuals may in certain circumstances be defamatory.¹¹³ Clearly, comparisons of this kind are particularly inappropriate and offensive when used in relation to Israeli actors and politicians,¹¹⁴ but out of context they cannot automatically be deemed to be antisemitic.¹¹⁵

Example 11: Holding Jews collectively responsible for actions of the State of Israel

It is also essential to take account of the context for the purposes of example 11. Reducing Jews to an undifferentiated collectivity and attributing objectionable behaviour or characteristics to them (in this

¹⁰⁷ In our view, the example refers to 'Israelis' and 'Israel' because both terms are commonly used to mean the Jewish people. The intention is not to settle debates about the Jewish character of the State of Israel or the Israeli people.

¹⁰⁸ Ullrich (2019), p. 14, footnote 7.

¹⁰⁹ It should be noted that demonisation is one of the elements of the 3D test.

¹¹⁰ For examples, see François Dubuisson, *The definition of antisemitism by the European Monitoring Centre on Racism and Xenophobia (EUMC): Towards a criminalisation of criticism of Israeli policy?*, July 2005, [http://www.eccpalestine.org/wp-content/uploads/2018/01/Francois-Dubuisson_opinion.pdf], p. 10.

¹¹¹ See arguments put forward by David Hesse, *Das Schlachthaus als Konzentrationslager. Lässt sich menschliches Leid mit dem von Nutztieren vergleichen? Tierschützer finden: unbedingt*, in: *Tagesanzeiger* [online], 30 September 2017, [<https://www.tagesanzeiger.ch/zeitungen/das-schlachthaus-als-konzentrationslager/story/29137702>] (08.07.2020). In one case the ECtHR held that banning a poster campaign against battery animal farming under the head 'The Holocaust on your plate', was a proportionate means to protect the personality rights of persons of Jewish origin and that the ban was reconcilable with freedom of expression. In reaching its conclusion, the Court took into account the specific context of Germany's past (ECtHR, *Peta Deutschland v. Germany* of 8 November 2012, case no. 43481/09).

¹¹² See e.g. ECtHR, *Scharsach and News Verlagsgesellschaft mbH v. Austria* of 13 November 2003, case no. 39394/98 (where a politician was called an 'old closet Nazi' (*Kellernazi*)); ECtHR, *Karman v. Russia* of 14 December 2006, case no. 29372/02 (where a politician was described as a 'local neofascist'). In both cases, the Court found in favour of freedom of expression.

¹¹³ Federal Supreme Court decision 137 IV 313 (photomontage and article comparing a politician to Hitler).

¹¹⁴ Feldman (2015), p. 7, footnote 8.

¹¹⁵ Ibid.; Ullrich (2019) p. 14 f, footnote 7, Robertson (2018), para. 30, footnote 54.

case, support for harmful policies of the State of Israel¹¹⁶) is a modus operandi of antisemites and likely to foment hatred of Jews. In certain contexts, however, statements holding Jews responsible for the policies of the State of Israel cannot be categorised as antisemitic. Robertson provides the example of a law or policy that leads to human rights violations but to which a blind eye is turned by government agencies and civil society in Israel.¹¹⁷ The claim made in this context that the Jews (here used as shorthand for the vast majority of Israeli citizens belonging to the Jewish community) are turning a blind eye to injustice, is a sweeping generalisation, which deserves criticism in itself, but would unjustifiably be categorised as antisemitic. Stereotypes associated with classic antisemitism and the overall context can provide pointers to help distinguish antisemitic speech from shortcuts and lazy generalisations, which may, in themselves, be open to criticism.

E. Assessment of the definition in the light of international standards

- 92 Following the analysis of the working definition, this section will examine whether the definition covers the scope of the current policies against racism and antisemitism and whether it is necessary to broaden its reach in line with Switzerland's international obligations and, in particular, its obligations under the CERD.
- 93 The working definition and the CERD do not lend themselves to comparison, given that the working definition has an aim and legal status different from the CERD and other international instruments. The purpose of the definition is to establish clarity on what antisemitism is with the overriding objective of allowing better categorisation of antisemitic speech and acts. By contrast, the overall aim of the CERD is to prohibit and eliminate all forms of racial discrimination¹¹⁸ and racial prejudice with a view to enabling everyone, without distinction as to race, colour, or national or ethnic origin, to fully exercise their fundamental rights and enjoy equality before the law,¹¹⁹ without interference from public or private actors. It therefore indirectly extends to acts by individuals, requiring states to take effective measures against discriminatory practices by private actors, such as service denial, refusing to provide medical care, employ or agree to let property to individuals on the grounds of race, colour or ethnic origin.¹²⁰
- 94 In order to achieve its overall objective, the CERD defines racial discrimination broadly, focusing on the impact of discrimination¹²¹ without distinguishing between intentional and unintentional acts. The CERD focuses on discriminatory impact¹²² rather than discriminatory intent. Its potential reach therefore

¹¹⁶ Although the example does not explicitly refer to 'harmful' policies, this is implicit in the context.

¹¹⁷ Robertson (2018), para. 31, footnote 54.

¹¹⁸ See Art. 5 CERD.

¹¹⁹ Ibid.

¹²⁰ Art. 2(b) and (d) and the list set out in Art. 5(d) of the CERD.

¹²¹ See Art. 1 CERD.

¹²² See Art. 1 CERD.

extends to systemic or structural discrimination¹²³ caused by unconscious biases which are so deeply ingrained in practices and institutions that they are often difficult to detect.¹²⁴

Giving due consideration to the importance of bias and prejudice in causing racial discrimination, the CERD requires states "to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination ..."¹²⁵ It should be noted that the requirement to adopt educational and awareness-raising measures with a view to ending discrimination is also based on anti-discrimination provisions set out in the general human rights treaties.¹²⁶ As is the case with other human rights, the prohibition of discrimination imposes different levels of obligation on states, i.e. the obligation to respect, to protect, and to fulfil the rights in question.¹²⁷ The obligation to fulfil includes taking all necessary measures to promote human rights, for example by raising awareness, providing training and disseminating information.

In order to match the scope of the CERD, the working definition must first and foremost extend to discrimination. As noted above, the working definition does not include the term 'discrimination', although this omission can be rectified through interpretation (margin note 34 ff above).

Moreover, it is also essential that the definition captures systemic forms of discrimination that are largely attributable to unconscious prejudices and biases. By virtue of its wording (antisemitism 'expressed as hatred' and 'rhetorical and physical manifestations of antisemitism') the definition focuses on deliberate actions by individuals and does not explicitly refer to discrimination caused by unconscious practices and biases. As argued above, however, the wording of the definition leaves room to take these factors into account by way of interpretation, e.g. 'physical acts' may be construed broadly, or it can be argued that the definition only provides examples of antisemitism, without pretending to be exhaustive.

Finally, in requiring states to adopt educational and awareness-raising measures, the CERD is not merely concerned with *discriminatory practices*, but also with conscious or unconscious racist attitudes and prejudices. In order to match the scope of the CERD, it is therefore essential that the working definition of antisemitism extends to antisemitic attitudes and biases. Such an interpretation implies that the expression of antisemitism (as hatred or otherwise) need not be viewed as constitutive of all forms of antisemitism.

¹²³ See e.g. Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence*, DePaul Journal for Social Justice [online], vol. 4, 2011, pp. 263–312, [<https://via.library.depaul.edu/jsj/vol4/iss2/3>], p. 263; Patrick Thornberry, *Einführung und aktuelle Bezüge*, in Europe, in Doris Angst/ Emma Lantschner (eds.), *ICERD. Internationales Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung*, Baden-Baden/Vienna/Zurich/St. Gallen (Dike) 2020, pp. 36–52, note 7 ; Paul Gragl, Art. 1 no 19, in Doris Angst/ Emma Lantschner (eds.), *ICERD. Internationales Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung*, Baden-Baden/Vienna/Zurich/St. Gallen (Dike) 2020, pp. 198–224, note 19.

¹²⁴ Cf. *supra*, note 100.

¹²⁵ See Art. 7 CERD.

¹²⁶ Cf. Walter Kälin/Jörg Künzli, *Universeller Menschenrechtsschutz. Der Schutz des Individuums auf globaler und regionaler Ebene* (4 eds.), Basel (Helbing Lichtenhahn) 2019, note 11.85.

¹²⁷ *Ibid.* This tripartite classification of state obligations was developed by Henry Shue, *Basic Rights – Subsistence, Affluence, and U.S. Foreign Policy*, Princeton, NJ (Princeton University Press) 1980.

F. Conclusion

- 99 What conclusions may be drawn from our analysis of the core working definition and the list of examples?
- 100 Firstly, the core working definition is couched in highly abstract terms. Vague wording, such as 'certain perception' and the use of the modal verb 'may', as in 'may be expressed', results in a definition that is very broad in scope. Viewed in isolation, the definition does not explain the specific features of antisemitism as distinct from other forms of racism. It becomes clear just how vague and unspecific the definition is if we substitute equivalent terms referring to Muslims, who also suffer discrimination, for 'antisemitism' and 'Jewish', in an attempt to define Islamophobia (racism against Muslims): "Islamophobia is a certain perception of Muslims, which may be expressed as hatred toward Muslims. Rhetorical and physical manifestations of Islamophobia directed toward Muslim or non-Muslim individuals and/or their property, toward Muslim community institutions and religious facilities."
- 101 Given the high level of abstraction, it is far from obvious that the core definition should be used on its own for specific purposes, for example to raise awareness of antisemitism or provide relevant training. As Peter Ullrich points out, relatively extensive prior knowledge is required to gain a proper understanding of antisemitism based on the working definition. Prior knowledge is needed in order to fill in gaps and understand the vague formulations such as manifestations of antisemitism directed toward 'Jewish or non-Jewish individuals' instead of 'individuals because of their real or imagined Jewish status or because of their association with such persons'. The explanatory notes and examples fill in some of the gaps by highlighting the importance of negative stereotypes and conspiracy theories and providing examples of common prejudices.
- 102 The core definition, however, focuses on antisemitic acts, i.e. hate speech and hate crimes, and does not deal with the construction of the image of the Jew that is at the root of antisemitic imagination.¹²⁸ Moreover, the core definition does not explicitly refer to other elements that are crucial to combating antisemitism. For example, it makes no reference to structural discrimination, or discrimination generally. Because the definition is so broad, it is to a large extent possible to fill in the gaps through interpretation. But for the definition to be truly workable, it would be helpful if interpretative guidance were provided to those expected to apply it in practice.
- 103 The open-endedness and vagueness of the core working definition makes potential readers focus on the examples. The lack of consensus regarding 'new antisemitism', which resulted in references to the State of Israel being excluded from the core definition, is also evident in the disputed eleven examples, five of which address 'new antisemitism'. Combining traditional forms of antisemitism, for which there is a fairly broad consensus, with forms of antisemitism that are still being debated, reduces the educational impact of the list of examples and potentially causes confusion. It is therefore important that anyone using the definition for training and awareness-raising purposes is well prepared. When used by properly

¹²⁸ Porat (2015), p. 98, see footnote 24 above: "Because it is short and is presented as a practical tool, not merely a theoretical one, this document really does constitute a working definition; it does not deal with the image of the Jew, but rather with antisemitic activities."

trained individuals, the definition can provide a basis for interesting discussions on what constitutes antisemitism in a contemporary context.

In order to address concerns relating to freedom of expression, it is essential to note that the list of examples is not intended as a checklist to be applied mechanically. The introductory sentence clearly states that contemporary examples of antisemitism *could*, taking into account the *overall context*, include, but are not limited to, the following acts. The importance of context should be clearly communicated to reduce the risk of the examples being misused.

For the sake of freedom of expression, it is important to bear in mind that vaguely worded caveats may have a chilling effect, as they make it difficult to determine when certain statements cross the line of what would be considered acceptable criticism. From this perspective, example 8 (applying double standards to the state of Israel) and example 7 (denying the Jewish people their right to self-determination) may raise questions. The risks involved will depend on the way in which the broader working definition is used.¹²⁹ It is of little significance whether the definition is used, for example, as a teaching aid or to raise awareness or collect data, which is the main purpose for which it is used in other states. Conversely, the more the use of the definition negatively impacts on freedom of expression, the greater the risks involved, as demonstrated by the controversy generated by US universities using the definition as part of campus hate speech codes.

¹²⁹ Cf. Report of UN Special Rapporteur Ahmed Shaheed on freedom of religion or belief dated 20 September 2019, A/74/358, [<https://undocs.org/en/A/74/358>], para. 54. "The use of the definition, as a non-legal educational tool, could minimise such chilling effects," (i.e. the risk of a chilling effect on speech that is critical of policies and practices of the government of Israel). "When public bodies use the definition in any regulatory context, due diligence must be exercised to ensure that freedom of expression within the law is protected for all."

Appendix 1: Working Definition of Anti-Semitism (EUMC)

"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 towards Jewish or non-Jewish individuals and/or their property, towards Jewish community institutions and religious facilities.

In addition, such manifestations could also target the State of Israel, conceived as a Jewish collectivity.

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.

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:

- Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion;
- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as a 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;
- 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;
- 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);
- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust;
- 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.

Examples of the ways in which anti-Semitism manifests itself with regard to the State of Israel, taking into account the overall context, could include:

- 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;
- Applying double standards by requiring of it behaviour not expected or demanded of any other democratic nation;
- 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;
- Drawing comparisons of contemporary Israeli policy to that of the Nazis;
- Holding Jews collectively responsible for actions of the State of Israel.

However, criticism of Israel similar to that levelled against any other country cannot be regarded as anti-Semitic.

Anti-Semitic acts are criminal when they are so defined by law (e.g., denial of the Holocaust or distribution of anti-Semitic materials in some countries). Criminal acts are anti-Semitic when the target of an attack, whether people or property – such as buildings, schools, places of worship, and cemeteries – is selected because it is, or is perceived to be, Jewish or linked to Jews. Anti-Semitic discrimination is the denial to Jews of opportunities or services available to others and is illegal in many countries."¹³⁰

¹³⁰ ODIHR; Yad Vashem, *Addressing Anti-Semitism: Why and How? A Guide for Educators*, December 2007, [<https://www.osce.org/odihr/29890>] (11.04.2020), Annex 1.

Appendix 2: Working Definition of Antisemitism (IHRA)

"On 26 May 2016, the Plenary in Bucharest decided to:

Adopt the following non-legally binding working definition of antisemitism:

"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."

To guide IHRA in its work, the following examples may serve as illustrations:

Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic. Antisemitism 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.

Contemporary examples of antisemitism 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:

- Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.
- 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.
- 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.
- 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).
- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- 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.
- 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.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
- Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Holding Jews collectively responsible for actions of the state of Israel.

Antisemitic acts are criminal when they are so defined by law (for example, denial of the Holocaust or distribution of antisemitic materials in some countries).

Criminal acts are antisemitic when the targets of attacks, whether they are people or property — such as buildings, schools, places of worship and cemeteries — are selected because they are, or are perceived to be, Jewish or linked to Jews.

Antisemitic discrimination is the denial to Jews of opportunities or services available to others and is illegal in many countries."¹³¹

¹³¹ IHRA, Working Definition of Antisemitism, [<https://www.holocaustremembrance.com/working-definition-antisemitism>] (05.07.2020).

Abbreviation list

AJC	American Jewish Committee
BDS	Boycott, Divestment and Sanctions
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979
CEDH	Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention on Human Rights)
CERD	Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965
CICAD	Coordination Intercommunautaire contre l'Antisémitisme et la Diffamation (Inter-Community Coordination against Anti-Semitism and Defamation)
CRIF	Conseil représentatif des institutions juives de France (Representative Council of Jewish Institutions in France)
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EUMC	European Monitoring Centre on Racism and Xenophobia
FCR	Federal Commission against Racism
FDHA	Federal Department of Home Affairs
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
IHRA	International Holocaust Remembrance Alliance
ITF	Task Force for International Cooperation on Holocaust Education, Remembrance and Research
n.	margin note
no	number
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
SCRA	(Federal) Service for Combating Racism