The IHRA definition and its critics

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Bernard Harrison and Lesley Klaff

1. Introduction

ln May 2016, the International Holocaust Remembrance Alliance adopted a "non-legally binding working definition" of antisemitism. In October of that year the British House of Commons Select Committee on Home Affairs published a report entitled "Anti-Semitism in the UK." This recommended the adoption of the IHRA definition, subject to two caveats that the committee considered necessary in the interests of free speech:

> C_1: It is not anti-Semitic to criticise the government of Israel, without additional evidence to suggest anti-Semitic intent.
> C_2: It is not anti-Semitic to hold the Israeli government to the same standards as other liberal democracies, or to take a particular interest in the Israeli government' policies of actions, without additional evidence to suggest anti-Semitic intent,

In a published response, the government of the day adopted the definition, but considered the exclusion, already stated in the definition itself, of "criticism of Israel similar to that levelled against any other country" to provide a sufficient safeguard for freedom of speech. According to a statement from the Prime Minister's office at the time, the intention of adopting the definition was to "ensure that culprits will not be able to get away with being antisemitic because the term is ill-defined, or because different organisations or bodies have different interpretations of it."[1]

In 2017 and 2018, the opposition Labour Party under its new, hard-left leader Jeremy Corbyn, found itself widely accused of antisemitism, and was placed under considerable pressure to adopt the definition. This the National Executive Committee

finally did in September 2018, but only subject to a caveat to the effect that its adoption would in no way constrain criticism of Israel[2].

2017 and 2018 also saw the publication of a series of critical articles attacking the definition as obscure, unfair, and harmful in the practical effects to be feared from its wide adoption. These included two extended, carefully argued opinions sought by Palestinian-supporting non-Governmental organisations from two senior British lawyers specialising in human rights law, Hugh Tomlinson QC[3]and Geoffrey Robertson QC.[4] The conclusions of both are supported in an article by a third distinguished legal authority, Sir Stephen Sedley, a Court of Appeal Judge 1999-2011 and currently a visiting Professor at the University of Oxford[5] and, finally (for the moment) by a full-dress scholarly study by a professor of Islamic and Comparative Literature in the University of Birmingham, Rebecca Ruth Gould[6].

In general these criticisms focus on two alleged defects of the IHRA Definition: on the one hand, that it allegedly fails to provide any *legally effective* definition of antisemitism and among other things fails to show that several of the "examples" it offers are actually examples of *antisemitism*; and on the other that, in consequence of that alleged failure, any attempt to apply the Definition as a means of restraining supposedly antisemitic speech or action must pose grave dangers to freedom of speech.

The object of the present paper -- whose authors are, respectively a non-Jewish philosopher and a Jewish academic lawyer -- is to examine the validity of these two claims. Our conclusions will be as follows:

1. The first of these charges rests wholly upon the presence, in the wording of the IHRA Definition, of minor flaws of drafting easily rectified by, for instance, the addition of supplementary elucidation.

2. All of the "examples" offered by the IHRA definition correctly identify types or instances of antisemitism.

3. Provided one is careful to distinguish, as a matter both of moral common-sense and of common equity, between "criticism" and defamation, and in the latter case, between defaming Israel and, by so doing defaming Jews or the Jewish community, the IHRA definition, suitably accompanied by an explanatory note, can easily be shown to offer no obstacle whatsoever, either to the exercise of freedom of speech or to criticism of Israel.

2. The Definition.

The IHRA definition is a version of the International Working Definition, or the EUMC Definition. This was originally published in January 2005 by the Fundamental Rights Agency (FRA) of the European Union, then known as the European Union Monitoring Centre on Racism and Xenophobia (EUMC). It differed from the multitude of previous definitions, for the most part formulated by individual scholars and writers, by having emerged from lengthy discussion by teams of scholars, government officials and representative of community and civil rights organizations. No doubt because of this, the definition broke new ground in recognising for the first time that antisemitism "could also target the State of Israel, conceived as a Jewish collectivity." [7]

In 2013, the EU Fundamental Rights Agency quietly removed the Working Definition from its website during a remodelling of the site. Under pressure from Jewish organizations, the FRA's spokesperson at the time, Blanca Tapia, dodged the issue, emphasising that the Working Definition had never been sanctioned within the European Union. Her statement maintained with questionable logic, and contrary to earlier declarations by the FRA of the urgent practical need for such a definition, that

"The agency does not need to develop its own definition of anti-Semitism in order to research these issues."[8]

Despite this, the Working Definition has been enormously influential. Versions of it have been adopted by the U.S. Department of State, the U.S. Commission of Civil Rights, the Organization for Security and Co-operation in Europe, and other agencies. At its conference in Ottawa, Nov. 7-9, 2010, the Inter-parliamentary Coalition for Combating Antisemitism, an international body composed of parliamentarians of many countries, urged universities to "use the EUMC Working Definition of Antisemitism as a basis for education, training and orientation."[9] In November 2016, Senators Bob Casey and Tim Scott introduced, and the Senate passed, the Anti-Semitism Awareness Act, a bipartisan bill, aimed specifically at combating campus antisemitism, whose effective clauses are also based closely on the International Working Definition.

All versions of the International Definition share the same format. Each begins with a formula, essentially unchanged from the EUMC version, intended to establish the *nature* of antisemitism: to say *what antisemitism is*. In the IHRA version, this reads:

> **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.**

The importance attached to the above statement is often indicated by enclosing it on the page in a printed box. This is followed by a brief further elucidation of the above, and by a series of "examples," which, it is proposed, "may serve as illustrations." The further elucidation reads:

> **Manifestations might include the targeting of the state of Israel conceived as a Jewish collectivity. However, criticism of Israel similar to that levelled against any other country cannot be regarded as 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 antisemtism 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:**

The list of "contemporary examples" then follows. It includes the following [numbers added]:

> **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.**
> **2. Making mendacious, dehumanising, 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.**
> **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.**
> **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).**
> **5. Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.**
> **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.**
> **7. Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a state of Israel a racist endeavour.**
> **8. Applying double standards by requiring of it [Israel] a behavior not expected or demanded of any other democratic nation.**
> **9. Using the symbols and images associated with classical antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterise Israel or Israelis.**
> **10. Drawing comparisons of contemporary Israeli policy to that of the Nazis.**
> **11. Holding Jews collectively responsible for actions of the state of Israel.**

3. Objections to the IHRA Definition (1): The Definition as a "legal tool"

Both Hugh Tomlinson QC, in his advice to Free Speech on Israel, Independent Jewish Voices, Jews for Justice for Palestine and the Palestine Solidarity Campaign, is primarily concerned to expose the shortcomings, as he sees it, of the IHRA Definition as a "legal tool," a project in which he is joined in part by Geoffrey Robertson, AO, QC, in his advice to the Palestine Return Centre. It perhaps therefore deserves emphasis that the Definition is not a part of any law, or in any way legally binding. Nor does it even pretend to offer a rigorous definition of the terms "antisemtism" or "antisemitic." The Definition was designed merely to provide guidelines for judging whether, in a given context, an act or utterance is antisemitic; hence the title "*Working* Definition." A decision still has to be made, on any given set of facts, whether something is antisemitic or not. The Definition is intended to provide a guide to that decision, not a means of evading it.

No doubt the reply of both Tomlinson and Robertson to these objections would be that although the Definition neither constitutes in itself a legal instrument, nor is legally enforceable, nevertheless, its adoption by government agencies and others might turn out to have legal consequences in which the wording of the Definition might come to play a decisive role. It is perhaps for such reasons that both stress the obscurity and imprecision, as they see it, of the opening formula of the IHRA Definition. Tomlinson finds the language of the definition "vague and unclear" in ways that make it "very difficult to use as a [presumably legal] 'tool.' "These problems of language come to a head in the definition's fundamental characterisation of the *nature* of antisemitism, as *"a certain perception of Jews, which may be expressed as hatred towards Jews."* The word "may," he suggests, is confusing, since if understood in its usual sense of possibility it suggests that while it is *possible* that the "perception of Jews" that supposedly constitutes antisemitism may be expressed as hatred of

Jews, it is also *possible* that it may be expressed in other ways that the IHRA definition leaves entirely unspecified.

The very least that is needed to clarify matters, Tomlinson continues, is to reformulate the first sentence to read: *Antisemitism is a particular attitude towards Jews, which is expressed as hatred toward Jews*.

But even thus amended, Tomlinson argues, the definition remains obviously unsatisfactory in general terms.

> The apparent confining of antisemitism to an attitude which is "expressed" as a hatred of Jews seems too narrow and not to capture conduct which, though not *expressed* as hatred of Jews is clearly a manifestation of antisemitism. It does not, for instance, include discriminatory social and institutional practices.

This last point is echoed by Robertson, who points out that "hatred is a very strong word," that "falls short of capturing those who express only hostility or prejudice, or who practice discrimination,

> "I don't like Jews and never employ them, but I don't hate them." – this speaker is anti-Semitic, but it does not seem included in this definition. Similarly, "I am prejudiced against Jews because they are not "one of us" and their religious practices are ridiculous, but I don't hate them." Or "I think we should deport all Jews to Israel, because they would be happy there. It would be in their own interests – I certainly don't hate them, I just think they don't fit in here in England." Under the IHRA definition, these anti-Semitic comments would not be deemed "anti-Semitic." This consideration, above all others, convinces me that the definition is not fit for purpose, or any purpose that relies upon it to identify anti-Semitism accurately.[10]

According to both Tomlinson and Robertson, the obscurity of the opening clauses of the IHRA definition extends to the identification *as antisemitic* of at least some of the eleven examples offered. Not, it must be said, to all eleven. Robertson finds examples 1, 3, 4, 5, 9 and 11, "unexceptionable", or virtually so, as offering instances of antisemitism. But as far

as the remaining five examples are concerned, including all those explicitly mentioning Israel, Robertson's view is that while conduct covered by any of them "'could' amount to antisemitism, it need not necessarily do so.

Tomlinson, similarly, argues that a number of types of act widely criticised as antisemitic could not be properly described as antisemitic *by the criteria established by the International definition*. He gives it as his opinion that if a university or public authority were to ban an event on such grounds, justifying it by appeal to the IHRA Definition, but without providing such further evidence, the ban would be unlawful. The examples he suggests include:

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

The chief difficulty identified by Tomlinson as obstructing appeals to the IHRA definition to justify describing this or that kind of conduct as antisemitic, is that the initial identification of antisemitism *as a form of hatred* necessarily constrains the legal interpretation of the "examples" offered in the remainder of the definition.

> These examples must be read in the light of the definition itself, and cannot either expand or restrict its scope. All of them must be regarded as examples of activity which can properly be regarded as manifesting "hatred of Jews"

Thus an accusation of the type cited in example 6, that Jews are more loyal to Israel than to their nation of citizenship, could be classed as antisemitic, according to the terms of the definition, only if it could be shown to be motivated by hatred of Jews.

If motivated by "a reasonable belief" that the actions of a particular Jewish citizen or group had indicated such a shift of loyalties, then the accusation would not be antisemitic.

Robertson makes essentially the same point:

> It must be said that all eleven examples are of conduct that "could" amount to anti-Semitism, so long as the core definition is applied, namely that they express hatred toward Jewish people *as a race* [our italics: BH, LK] . . . If the extended definition (i.e. core definition plus examples) were ever put to law, a court would doubtless find that the core definition must control each example.[11]

Hence, he argues, it cannot be established by appeal to the IHRA definition that, in the words of Example 10, "drawing comparisons of contemporary Israeli policy to that of the Nazis" is necessarily antisemitic.

> It will usually be an exaggeration, or else inappropriate, and will inevitably give offense to many Jewish people, but that does not make it anti-Semitic unless the Nazi comparison was intended to show contempt for Jews in general. In the early years of Hitler governance, Nazi anti-Semtic policy took the form of discrimination which made it more difficult for Jews to find employment or enter the professions: it would not be anti-Semitic to liken current Israeli policy to these measures (however inappropriately) unless it displays hatred to all Jews or the intention was to manifest hostility to all Jews, and not just the present Government.[12]

A preliminary comment is appropriate here. The requirement to prove antisemitic 'intent' does little more than render the IHRA definition useless with respect to the examples identified by Tomlinson and Robertson. It renders it extremely difficult to devise effective legal restraints upon racist speech and action of any kind. It was for this reason that The MacPherson Report 1999 emphasised "outcomes" rather than "intention." We shall see in §9 that, and why, exactly the same choice is available in respect of antisemitic speech and action.

4. Objections (2): Alleged consequences for freedom of speech

Hugh Tomlinson's treatment of the IHRA definition should perhaps be seen as mainly designed to expose its shortcomings as a tool for singling out anstisemitic speech and action for legal purposes. The three remaining critics, Robertson, Sedley and Gould are also concerned to expose what they see as the dangers to free speech posed by the adoption of the definition, both by government and by such non-governmental institutions as universities, trade unions and political parties. Robertson takes it upon himself to define the present state of the law on these matters as follows:

> Anti-Semitic utterances, unless intended or likely to foment hatred against Jewish people, do not amount to an offence under English law. But this discreditable and indeed contemptible behaviour may result in disciplinary action, expulsion from organizations, and a loss of the right to practise certain employments or professions. To accuse someone wrongly of anti-Semtism is defamatory and would incur damages in a civil action.
>
> The position taken by British law differs from that in certain European countries with historic experience of Nazi repression, which have stricter laws against racism and genocide denial. Even so, all European countries are subject to the Convention, Article 10 of which lays down:
>
> > "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."
>
> This principle may only be overborne a) by a precise law, which is b) necessary in a democratic society either in the interests of national security, the prevention of disorder or the protection of the reputation and rights of others, and c) counts as a proportionate measure to achieve these legitimate aims. But the need for restrictions must be established convincingly and they must be "clear, certain and predictable" – i.e. formulated with sufficient precision to enable citizens to regulate their conduct. The European Court of Human Rights has also held that they must be a proportionate response to a pressing social need. The right may be availed of by those whose utterances "offend, shock or disturb." The scope for criticism of states and statesmen is wider than for private individuals because of the need for free and open discussion of politics.[13]

The above account is as it stands incomplete. Robertson's opening sentence presumably refers to s. 18(1) of the Public Order Act 1986 which deals with intention

to stir up racial hatred or the likelihood of stirring up racial hatred. But he has neglected to refer to s.5 Public Order Act 1986 which makes it an offence to display, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person who is likely to be caused harassment, alarm or distress by it. He also fails to mention other relevant laws: e.g., antisemitic hostile environment harassment under s.26 Equality Act 2010, which is a civil claim but renders antisemtism actionable in other respects also; and s.13 Equality Act, which allows a claim for direct or indirect discrimination, including "antisemtitic expression," on the basis of a protected characteristic (religious beliefs or ethnicity in respect to Jews). We shall return to these issues later.

Leaving these wider questions of law aside for the moment, the problem created by widespread governmental and non-governmental adoption of the IHRA definition, as Robertson sees it, is that the costs of invoking Article 10 in defence of freedom of speech may be such as to render such a defence nugatory.

> While it is true that the European Convention protects free speech that is a protection offered by the courts in what is termed “judicial review” of the actions of public authorities. Like all cases that end in court, this can be very expensive even if you win –costs only cover part of your legal expenses. For cash-strapped NGOs and student organisations, this is obviously a deterrent when faced with threats of legal action which require an expensive legal defence to protect their fundamental right to criticise Israel when it is unjustifiably limited by the application of the IHRA definition and its examples.[14]

The question naturally arises: *to what extent* the right to criticise Israel is, or might be, “unjustifiably limited” by the IHRA definition? Over the past twenty years, voices from sections of the left sympathetic to the BDS movement have consistently argued that *any and all* accusations of antisemitism on their part, even when addressed to

quite specific and limited claims concerning Israel, are to be dismissed out of hand as politically disingenuous attempts to silence *all* criticism of Israel. With the exception of Tomlinson, all of our critics appear prepared to give credence to this *non-sequitur*. Robertson notes "suggestions in the media" to the effect that

> The definition and its examples were drafted with the "hidden agenda" that they could be used to ban criticism of Israeli policy and to label the nascent BDS movement as "anti-Semitic.[15]

And while he wisely scouts the damaging suggestion that the definition was actually drafted with such ends in mind, he does observe darkly that "there have been attempts to use it in this way."[16]

Sir Stephen Sedley goes further.

> Shorn of philosophical and political refinements, anti-Semitism is hostility towards Jews as Jews. Where it manifests itself in discriminatory acts or inflammatory speech it is generally illegal, lying beyond the bound of freedom of speech and of action. By contrast, criticism (and equally defence) of Israel or of Zionism is not only generally lawful: it is affirmatively protected by law. Endeavours to conflate the two by characterising anything other than anodyne criticism of Israel as anti-Semitic are not new. What is new is the adoption by the UK government (and the Labour Party) of a definition of anti-Semitism which endorses the conflation.[17]

Rebecca Gould, for her part, goes all the way. For her the IHRA definition threatens legitimacy not just of *other than anodyne* criticism of Israel, but (her term) "Israel-critical speech" *per se*; which means, presumably, *any criticism of Israel whatsoever*.

> The very possibility of the document's legal ratification within a legal regime that would formally sanction Israel-critical speech ought to be cause for concern among scholars and activists concerned with safeguarding freedom of speech.[18]

None of these – increasingly radical -- claims concerning the supposed power of the definition to silence criticism of Israel appear to be supported by the terms of the IHRA definition itself. The range of specific criticisms of Israel identified as antisemitic by Examples 2, 6, 7, 8 and 10 appears on the face of it to be a remarkably

narrow one. They include (i) denying the right of the Jewish people to political autonomy; (ii) taking concern for the welfare of Israel on the part of non-Israeli Jews to be tantamount to a demonstration of lack of concern for the welfare of their nations of citizenship; (iii) describing Israel as an essentially racist state; (iv) describing it as a Nazi state; (v) asserting the existence of a Jewish Conspiracy; and (vi) singling out Israel alone for condemnation in respect of conduct that would be condoned on the part of any other nation.

And that's it. *Pace* Sir Stephen Sedley, the list seems, on the face of it, lean enough to leave room for a wide range of far from "anodyne" criticisms of Israel. Take for example, the accusations (vii) that the Israeli state engages in targeted assassinations of leading figures in groups such as Hamas or Hezbollah, (viii) that it committed a war crime by using white phosphorus in the first of the recent campaigns in Gaza, or (ix) that its housing policies in the West Bank proceed in defiance of international law. Such criticisms open a range of issues that could no doubt be argued back and forth by critics and defenders of Israel. What seems clear however is a) that none of them could seriously be classed as "anodyne", and b) that none of them could be silenced as "antisemitic" by appeal to anything to be found in the IHRA definition of antisemitism.

5. Conceptual shortcomings

A further question now arises. Why exactly are i-vi, as listed in the previous two paragraphs, antisemitic, while vii-ix are not? The IHRA definition appears to offer little in the way of a plausible answer. And that would seem to show it to be defective

in a way unnoticed and unexplored by our four critics: defective not merely as a source of definitions adequate to legal purposes, but on a deeper, conceptual level: defective *as a proposed characterisation of the content of a concept*: the concept in question, of course, being "antisemitism."

The International Definition conforms in its general structure to a pattern of definition not uncommon in medicine and the more descriptive parts of the natural sciences. The pattern of definition to which it belongs works by first characterising the nature of a given condition, and then offering a series of *symptoms* or *manifestations* of that condition by which its presence can be recognised. It is, essential to the intelligibility of such a definition that the *nature* of the condition should be characterised in such a way as to make it clear *why* the listed symptoms *are to be regarded as symptoms of that condition*. In the case of the medical condition known as angina, for instance, the symptoms of angina, breathlessness, nausea, weakness and chest pain, can be readily explained by reference to the nature of the condition, to *what it consists in*, namely, the narrowing and hardening of the main blood vessels going to the heart, which limits blood and therefore oxygen supply to it.

This conceptual requirement, that the singling-out of some state of affairs as a *manifestation* of condition C be explicable by appeal to the *nature* of C, is clearly not, or at least, not consistently, met by the IHRA Definition. All it offers, by way of elucidating the *nature* of antisemitism, is the statement that antisemitism is a "certain perception of Jews." The nature of that "perception" is then further elucidated as *possibly* (and therefore, presumably, not necessarily) consisting in "hatred towards Jews." While it is certainly clear that some of the appended examples (1, for instance, or 2, insofar as the "allegations" the latter invokes are "dehumanizing" or

"demonizing") intrinsically involve hatred toward Jews, it remains quite unclear why most of the others need, *in every imaginable circumstance*, involve anything of the kind. In their case, that is to say, the statement that they manifest *antisemitism* remains, as Tomlinson in effect points out, on the level of bare or *ex cathedra* assertion.

6. Two Types of Antisemitism

The opening sentence of the IHRA definition is, in fact, profoundly ambiguous, and ambiguous as between two very different ways in which antisemitism may manifest itself. It reads: "Antisemitism is a certain perception of Jews, which may be expressed as hatred of Jews." A *perception*, in ordinary, as well as philosophical English, is a *belief state*. To perceive something, X, in a certain manner, that is to say is to entertain a specific collection of beliefs concerning X. *Hatred*, on the other hand, is an *emotional disposition* towards X. Such dispositions may contain an element of belief; but equally, they may not. Thus, Peter may hate spinach because, absurdly, he believes it to lower sexual energy. Or he may just hate it, period.

In the same way, a belief state may be causally linked to an emotional disposition, but need not be. And even if it is, such linkages, as David Hume taught us, are never necessary. Peter hates spinach because of worries about his sexual powers. Paul, on the other hand, an ascetic Christian, who has read the same nonsense about spinach on the Web, eats it (though he hates the taste) precisely because he too believes in its presumed power to control his carnal appetites. James, as it happens, also believes the same rubbish about spinach, but believes it without any accompanying emotional disposition towards spinach: for him it is simply an exotic vegetable eaten in another part of the world: the markets he uses never carry it.

With these thoughts in mind, the opening move in a conceptual, as distinct from a legal critique of the IHRA definition should be: "Which is it to be then? Are you identifying antisemitism as a *belief state* (a "perception"), or as an *emotional disposition*?"

An astute defender of the definition would be well advised to reply – and now, as we shall see, we are getting somewhere – "both." For antisemitism can indeed manifest itself in either of these conceptually quite distinct forms: as an *emotional state, with Jews as its object*, or as a collection, or system, of *beliefs about Jews*.

In the first of these guises, *social antisemitism*, it is a version of what sociologists and social psychologists like to call *ethnic prejudice*. In the second, *political antisemitism,* it is a *delusive explanatory theory* concerning the supposedly central role played, not by this or that individual Jew, but by a supposedly all-powerful and malign Jewish *collectivity,* in controlling non-Jewish life and history[19].

The theory in question purports to explain why some current turn of events is – as perceived by the antisemite and his friends – going badly for non-Jews. The purported explanation is that the non-Jewish institutions that appear to be in charge of events have ceased to discharge their proper functions. They have ceased to do so because they have been hollowed out and taken over by agents of a vast Jewish conspiracy, and perverted to the service of Jewish ends. In the face of the Jewish Threat there is little that can be done by the simple and deluded non-Jew, unless and until he or she has been sufficiently roused to the urgency of that threat to take action against it; action that can only consist in expelling the Jews wholesale from their secret positions of power – at which point the world will, if the job has been done properly, inevitably

return to the state of normality from which the Jewish Conspiracy alone has perverted it.

This version of antisemitism – antisemitism as a body of doctrine, rather than a mere emotional disposition, was common enough in Europe before WWII. It is, for instance, what Sartre is talking about in the following passage from *Antisemite and Jew*.

> Anti-Semitism is thus seen to be at bottom a form of Manichaeism. It explains the course of the world by the struggle of the principle of Good with the Principle of Evil. . . . Look at Céline: his vision of the universe is catastrophic. The Jew is everywhere, the earth is lost, it is up to the Aryan not to compromise, never to make peace. . . .[20]

While the specific accusations levelled against Jews by this or that version of political antisemitism may change, the main tenets of the theory remain, in all its versions, roughly as follows:

> PA_1. The Jewish community is organised to pursue goals of its own at whatever cost to the lives and interests of non-Jewish groups. In consequence it is directly and solely responsible for human suffering on a scale far exceeding anything that can be alleged against any other human group.
>
> PA_2. The Jewish community is conspiratorially organised in the pursuit of its self-seeking and heinous goals to an extent that endows it with demonic powers not to be suspected from the weak and harmless appearance of its individual members.
>
> PA_3. Through the efficacy of its conspiratorial organization, and through its quasi-miraculous ability to acquire and manage money, the Jewish community has been able to acquire secret control over most of the main social, commercial, political and governmental institutions of non-Jewish society
>
> PA_4. Given the secret control exercised by the World Jewry over (only apparently) non-Jewish institutions, and given the obsessive concern of the Jewish community with its own interests to the exclusion of those of non-Jews, it is simply not feasible to remedy the evils occasioned by the presence of the Jews in non-Jewish society by any means short of the total elimination of the Jews.
>
> PA_5. Since the evils that the Jews do in the world owe their existence solely to Jewish wickedness, the elimination of the Jews will cause those evils to cease,

> without the need for any further action on the part of non-Jews, whose world will, in the nature of things, return forthwith to the perfect state of order natural to it, from which it would never have lapsed had it not been for the mischievous interventions of the Jews

Two leading, and connected, features of the theory are its *exceptionalism* and its *eliminationism* with respect to the Jews. On the one hand it holds, that is to say, that the Jewish community is *exceptional*, in the sense of being *radically unlike any other human group*. On the other it sees this supposed exceptionalism as posing insurmountable difficulties to assimilation. The Jewish community, in short, is so radically "other" that it cannot be lived with: it can only be got rid of: eliminated, that is to say, in one way or another.

Finally, it goes without saying that the entire theory is delusive. The problem is not just that the Jewish community is too small, too divided and too much at odds with itself to be capable of secretly taking over the world (though it manifestly is all of those things). It is, rather, that no community could possibly play the role envisaged for the Jews by the political antisemite. Political antisemitism, in short, requires no refutation: it refutes itself by its own internal absurdities.

7. Political Antisemitism and Israel

The fundamental absurdity of a pseudo-explanatory theory presents no more solid an obstacle to credulity in the case of political antisemitism than it has over the centuries in the case, say of phrenology or astrology, or for that matter in those of the innumerable conspiracy theories now flourishing on the Internet. In general, whatever

people feel a strong temptation to believe, many of them actually will believe. At the present time, there exists a strong temptation, felt by many on the left, to articulate opposition to Israel in terms of a refurbished version of political antisemitism.

That temptation arises in the following way. An enduring vein of opposition to Israel, one represented by Iran, Hamas and Hezbollah among others, and one with which a substantial section of the Western left sympathises, is essentially *revanchiste* in character. It wishes to see the result of the 1947-8 war reversed. It wishes to see Israel abolished as a Jewish-majority state, and replaced by a Muslim-Arab-majority state, from which Jews would either be expelled or remain as a minority. It is essential to the business of promoting this program, particularly in the West, to have some good reason for claiming that the State of Israel is "illegitimate": should never have been allowed to come into existence in the first place, and should not be allowed to continue in existence now. That is the position advanced, for instance, by the BDS movement, whose whole raison d'être is to rally a sufficiently wide and articulate body of Western opinion behind a policy of boycott, divestment and sanctions to reduce Israel to the status of a "pariah state".

The object of BDS, in short, is to spread the message that Israel is, and always was, an "illegitimate" state. It is in fact unclear as the philosopher Elhanan Yakira notes, what could even be *meant* by describing a *state* -- as such -- as "illegitimate." There is a long tradition of legal and philosophical theory (Bodin, Hobbes, Locke, Rousseau, Weber, and others) concerning the legitimacy of political authority, but what that tradition deals with is the relationship between the state and the citizen. This vast web of learned discussion, as Yakira points out[21], proposes criteria of many kinds for assessing the legitimacy of a government or a regime, but can offer no guidance on the legitimacy of a *state as such*, since it simply presumes the existence of the state

as a given. Matters are made worse by the fact that Israel remains at present the *only* state against whose *legitimacy as a state* anyone is prepared to mount a campaign.

One obvious way of cutting through these philosophical cobwebs is to claim that a state can reasonably be regarded as illegitimate, and ripe for abolition, when it embraces, as a condition of its very existence, policies so harmful to human rights that its existence can no longer be tolerated.

This is the line of argument behind which the BDS-supporting left has, broadly speaking, chosen to place itself. A state makes itself illegitimate by committing evil: by the gravity of its crimes. And if the only Jewish state in the world is also the only state in the world whose legitimacy as a state anyone is prepared to question, that is because (so goes the argument) the crimes of the Jewish state far exceed in gravity those of any other state in the world.

It is not hard to find examples of eminent public intellectuals of "anti-Zionist" tendency prepared to take up this suggestion and run with it**.** Jacqueline Rose, Professor of English at Queen Mary College, University of London, catches the general spirit of this line of anti-Zionist rhetoric:

> How did one of the most persecuted peoples of the world come to embody some of the worst cruelties of the modern nation-state?[22]

In the same vein the late Edward Said was prepared to describe Israel's occupation of the West Bank and (at that time) of Gaza, as

> . . . in severity and outright cruelty more than rivaling any other military occupation in modern history[23]

Such claims are, of course, not easy to expand and drive home in detail. Events from 1914 to the present day have set the bar of atrocity far too high for it to be easily surmounted by a nation as small and civilized as Israel. Where are the Israeli atrocities

capable of standing comparison with those committed by, to name a few, the Pol Pot regime in Cambodia, the Assad regime in Syria, Isil in Iraq and Syria, or the Nazis, first in Germany and later throughout Europe between 1933 and 1945? And to name these few, after all, is to offer a very short extract indeed from the crowded roll of potential 20th and 21st century competitors.

To create a body of opinion prepared to see Israel as a "pariah state", however, it is hardly necessary to make out a detailed case against Israel. All that is necessary is to find some means of associating Israel, in suitably receptive minds, with things *already* widely considered to represent the nadir of evil. Such things include Nazism, racism, the Apartheid regime in South Africa, colonialism and war, among others. And such associations, as Dr Goebbels taught us long ago, can be implanted in receptive minds at the cost of very little in the way of argument or appeal to verifiable fact. All that is necessary is to repeat them as frequently as possible in the context of any current news item that can be "spun" in such a way as to give them some degree of anecdotal foothold. In this way it has become, over the past twenty years, axiomatic in certain sectors of Western opinion that Israel is a "Nazi" state, that it is a "racist" or "Apartheid" state, that it is a "colonial-settler state", that it is the "main threat to peace" in the Middle East, and perhaps in the world itself, and so on.

Unfortunately these more specific claims turn out on closer examination to be no more consonant with the facts than the more general claim -- that Israel's "crimes" exceed in gravity those of all other nations -- that they pretend to explicate in detail. As far as the idea that Israel is the main threat to peace in the region, events have shown the issue of war and peace in the Middle East to turn far more upon such issues as the rise of Islamism, the Arab Spring and its consequences, and the rivalry between

Shi'a and Sunni regional powers, than on anything having to do with Israel. Nor can Israel reasonably be described as a "racist" state. Only about seventy percent of its population is, in fact, Jewish, and this includes Jews of every race, including African Jews from Ethiopia and elsewhere. The remainder of the population consists of Muslim and Christian Arabs, Druse, Circassians and various other groups. Israel is, in fact, an extraordinarily diverse multicultural society. Freedom to practice religion is guaranteed, including to minority groups such as the Baha'i subject to severe persecution elsewhere in the Middle East. In the context of the persecution suffered by Copts and other Christian denominations elsewhere in the region, it is also significant that Israel is the only country in the region in which the number of Christians is actually increasing. Nor does anything remotely resembling the Apartheid system once practiced in South Africa obtain in Israel. Every citizen of Israel, of whatever race or religion has full access to all public institutions. Girls wearing hijabs are a familiar sight in Israeli universities. There are Arab members of the Knesset, and for that matter, Arab ministers of state, and Arab judges, including a former justice of the Israel Supreme Court. Druse, Circassians, and even a few Muslim Arab Israelis serve in the IDF. Nor is it reasonable to describe Israel as a "colonial-settler" state. The impression this charge attempts to give is that the Jewish population of Israel is wholly European in origin, was implanted in the country by armed aggression with the connivance of the European powers, and confronts a subject population of equally wholly Middle Eastern descent. In fact the increase in the original Jewish element of the (very small) historical population of Palestine after 1880 remained for several decades a continuation of the long antecedent tradition of immigration into the Ottoman Empire by Jewish individuals and groups. Over half a million Jews of Arab and African descent also flooded into the country after 1948 to

escape persecution in their own countries. The foundation of the State of Israel came about, not as a result of "colonialist" aggression by the Jews, but of the fact that the forces of the *Yishuv* happened to win a war, against overwhelming odds, begun first by the (Palestinian) Arab Higher Committee, but continued by the armies of the surrounding Arab powers, with the stated objective of driving the Jews into the sea.[24]

In short, what we are dealing with in the "anti-Zionist" propaganda put about BDS and the elements of the Western left that support it, is not "criticism of Israel", but rather politically motivated defamation. Moreover, it follows a pattern made familiar by earlier versions, including the prewar Nazi version, of political antisemitism. That is to say, it offers an "explanation" of certain disturbing features of modern life -- in the present case the ever-renewed turmoil in the Near East and the Maghreb, along with the ongoing problems for European societies caused by that turmoil – in terms of the putative centrality to these disquieting events of "the Jew," as represented for present purposes by the state of Israel. The "explanation" offered is that the upheavals in the region over the past half-century, along with the – putatively -- otherwise inexplicable hostility of many in the Islamic world towards Europe, are entirely to be explained by the natural resentment felt by the indigenous inhabitants of the region for the implantation among them by the European Powers -- in (it is said) a misguided attempt to "compensate" the Jews for the Holocaust -- of a Jewish polity, Israel, whose crimes exceed those of all other nations in modern history, including those of the Third Reich. Given the extraordinary gravity of these crimes – the argument continues – the only way of addressing the situation is to work, by every means possible, towards the overthrow of Jewish political autonomy in Israel. Once that goal is achieved, the "argument" concludes -- displaying at this point a degree of blindness to the actual savagery of Middle Eastern politics that will surprise only those

unfamiliar with the intellectual left -- Palestine will become, as it should always have been, a Muslim-majority state in which Jews may continue to live perfectly happily as a minority, while the region, relieved at last of the poisonous and disruptive presence of organized Jewry, will also return to a state of peace and prosperity in which its affairs will cease to trouble the nations of Europe.

Such a view shares the exceptionalism and the eliminationism characteristic of political antisemitism in all its versions. They are, indeed, built into the fundamental claim of BDS, that the "crimes" of Israel are far in excess of those of any other nation (exceptionalism), and that the Jewish state, again unlike any other, hence lacks "legitimacy" (eliminationism).

The problem with this version of political antisemitism, as with earlier versions, is merely that its main doctrines – the extensive influence of the Jews in world affairs, the vast scope of the evils they are able to work at the expense of the non-Jewish world, the immense, quasi-demonic capacity for financial and conspiratorial organization which gives Jews the power to work these evils to the ruin of the simple and trusting goy, and (saddest of all) the belief that the world will automatically return to normality (however that elusive condition may appear to this or that generation of antisemites) once the "Jewish Threat" has been definitively dealt with – that these main claims compose a tissue of delusions so bizarre that no subordinate argument could possibly succeed in rooting them in reality. One is reminded of something the novelist Henry Fielding said long ago about a very different matter; namely, the proposition, common among the philosophers and divines of his day, that the practice of virtue is the certain road to happiness, and vice to misery, in this world: "A very wholesome and comfortable doctrine, and to which we have but one objection,

namely, that it is not true."

8 The coherence of the IHRA definition

Depressing as these reflections are, they at least offer us an answer to a question we raised earlier: why the examples of antisemitism offered by the IHRA definition stigmatise certain types of observation concerning Israel as antisemitic, while excluding, or at least failing to mention in that capacity, others (including those mentioned earlier at the end of §4) that might be considered equally, or for that matter more, politically damaging.

The list of observations there stigmatised as antisemitic comprises, we noted: denying the right of the Jewish people to exercise political autonomy; describing Israel as an essentially racist or Nazi state; asserting the existence of a Jewish Conspiracy in relation to Israel; asserting concern for the welfare of Israel among non-Israeli Jews to argue lack of concern for the welfare of their nations of citizenship; and singling out Israel for condemnation in respect of conduct passed over or condoned in other nations.

The answer suggested by the above reflections is that the examples chosen involve not *criticism* of Israel, but *defamation* of Israel. More specifically, the examples single out types of defamatory falsehood characteristic of political antisemitism. It is, after all, only intelligible to deny the right of the Jewish people, alone among the nations of the world, to exercise political autonomy, as we noted above, if there is some good reason why they should be denied it, That reason can only rest in the alleged commitment of the Jews to harming, on an altogether overwhelming scale, the interests of others, that forms the central plank of antisemitism considered as a delusive explanatory theory. Other claims stigmatised as antisemititic by the

examples, specifically the claim that Israel is a "Nazi" or "racist" state, form part of current efforts to persuade people of the possibility of embedding in reality the central claim of political antisemitism with respect to Israel: that Israel is the epitome of evil.

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As we have already argued, none of these claims can be defended by the sober recitation of facts. Hence the goal of "delegitimating" Israel| can only be pursued by means of the remaining two elements in Natan Sharansky's famous "3 D's" test for distinguishing legitimate criticism of Israel from antisemitic defamation: of antisemitism with regard to Israel. Delegitimation, that is to say, can be achieved *only* by way of demonization and double standards. Similarly, belief in the existence of a Jewish Conspiracy, rehashed of late years as the claim that the activities of the Israel Lobby in the United States are a) conspiratorial and b) opposed to the national interest of the United States, is a familiar element in any version of political antisemitism, as is the closely related belief that Jews *by their nature* operate, in effect, as agents of a foreign power.

To make clear, in this way, the legitimacy, *as examples of antisemitism*, of examples 2, 6, 7, 8 and 10, certainly requires us to distinguish between antisemitism as an emotional state (essentially, hatred *of* Jews *as* Jews) and antisemitism as a body of delusive beliefs *about* Jews. And certainly the IHRA definition is unclear on this issue as it stands. That may, of course, be because the distinction between antisemitism as an emotional disposition, and antisemitism as a delusive, pseudo-explanatory theory, was felt by the authors of the distinction to be too obvious to need belabouring. Be that as it may, the wording of its opening definition not only allows but invites clarification in this direction, possibly by the circulation of some further explanatory guide to its intended meaning.

9. **Free speech vs. defamation**

Does the wide adoption of the IHRA definition pose, as our four critics contend, a serious threat, actual or potential, to freedom of speech? The argument to that effect pursued by both Tomlinson and Robertson rests fundamentally on the idea that, as Sir Stephen Sedley puts it, "anti-Semitism is hostility to Jews as Jews."[25] He, like Tomlinson and Robertson, interpret the opening sentence of the IHRA definition as strengthening this interpretation of the meaning of the term to require not merely hostility but "hatred" as the criterion. This both Tomlinson and Robertson see as yielding two successive conclusions. The first is that an act or utterance can be considered antisemitic only if it can be shown to express or to manifest hatred towards Jews *as Jews.* The second is that, since no current expression of political hostility towards Israel or "Zionism," including those stigmatised as antisemitic in the "examples" section of the IHRA definition, can be shown to meet this criterion, and since, therefore, the IHRA definition offers no plausible ground for distinguishing between "legitimate" and antisemitic criticism of Israel, we have no option but to class all criticism of Israel as legitimate political discourse, in which case it stands protected by law, in particular, as Robertson reminds us, by the European Convention on Human Rights, Article 10 of which lays down:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers"[26]

This argument displays two points of weakness:

(1) It shows only that the IHRA definition *as presently formulated* offers no basis for a distinction between antisemitic and non-antisemitic criticism of Israel. It in no way excludes the possibility that a revised version of the definition might not, after all, succeed in adequately grounding that distinction.

(2) It assumes the factual adequacy of a certain account of the *nature* of antisemitism – of *what sort of phenomenon antisemitism is*. The favoured account says, in effect, that antisemitism is a species of *emotional disposition*: namely, a disposition to hate Jews *qua* Jews.

No serious supplementary argument for (2) is offered by either Robertson or Tomlinson, or for that matter Sir Stephen Sedley; worse still, such arguments as are offered are seriously unimpressive. Robertson cites in support the OED and "Wikipedia, with reference to Encyclopaedia Britannica, Paul Johnson and Bernard Lewis;" but reference to such authorities, while useful enough for the limited purposes served by dictionaries and encyclopaedias, can hardly be regarded as sufficient to close a question of this degree of complexity, and one, moreover, central to the argument. Sir Stephen Sedley, for his part, simply assumes, *ex cathedra* as it were, that antisemitism *just is* "hostility towards Jews as Jews," and that there, in effect, as Dr Johnson put it in another context, "is an end on't."

None of this will quite do. Even if we consider the nature of antisemitic activity only over the past century or two, it seems evident that it has not consisted solely in rancorous or frothing railing against any Jew whatsoever *qua* Jew. It has consisted also, and much more dangerously in a sustained attempt to propagate and popularise a range of extraordinary beliefs, concerning, not Jews taken one by one ("distributively," as the logicians say), but rather the Jewish *community*, conceived as a conspiratorially organised entity, secretly dominating a range of institutions central to the welfare of non-Jewish societies, and hence posing a permanent and terrible threat to the stability and welfare of the non-Jewish world. Nazi antisemitism – the kind of antisemitism sedulously disseminated, for instance, by the Nazi weekly

tabloid newspaper *Der Stürmer* – was of exactly this type. And it is because it was of this type that the Nazis were foolish enough, as well as wicked enough, to divert to the imaginary "War against the Jews" German manpower, trains, and other *materiel*, that they might have been wiser, in the event, to devote to the real war against the Allied Powers. One does not seriously impede the war effort in this way merely to get rid of people whom one happens to dislike and despise. One does so only because one imagines the people in question to present a serious threat to the welfare of the nation. It is no doubt for this reason that the Nazis relied heavily on the blood libel to convince their enemies to be receptive to antisemitism. They successfully spread the belief in the reality of Jewish ritual murder as "proof" of a more general Jewish murder plot against non-Jewish humanity.

In the light of these evident facts, it seems reasonable to conclude, as we have done here, that antisemitism manifests itself not in one, but in two fundamental forms. It manifests, indeed, as an emotional disposition. But it also manifests as a body of doctrine; specifically, as a delusive explanatory theory concerning the supposed centrality to world events of a Jewish Conspiracy.

We have argued, as have many others, that a version of that body of doctrine has in recent years attached itself to the state of Israel. Its central thesis is that the "crimes" of Israel outweigh those of any other nation and that for that reason Israel should be regarded as an "illegitimate" state, one that should never have been allowed to come into existence in the first place. In defence of that thesis, its proponents advance a range of subordinate supporting claims, all of them hyperbolic in the highest degree, and all at the same time manifestly false; for example that Israel is a Nazi state, an Apartheid state, a racist state, and so on. The hyperbole and falsehood of these claims,

along with their evident roots in the long tradition of antisemitism as a body of essentially delusive doctrine, is sufficient, we suggest, to allow a clear distinction to be drawn between plainly antisemitic claims such as these and a vast range of perfectly legitimate criticisms of Israel, in no sense hyperbolic or indefensible by appeal to the facts, that are, for those reasons, also in no significant sense antisemitic.

It is also material to the legal arguments before us, we suggest, that it is by no means necessary, in order to convict of antisemitic intent, say, the material propagated each week by *Der Stürmer*, to show that its authors were animated by "hatred of Jews qua Jews," or as Robertson occasionally puts it, "hatred of Jews as a race." They may have been, and given the atmosphere of Nazi politics it is very likely that they were. But it is at least logically possible to imagine that one or more of them might not have been. It is possible, that it, to imagine someone entirely persuaded by Nazi propaganda concerning the overwhelming threat to the nation posed by the Jewish Conspiracy, but who nevertheless does not believe that individual Jews of his acquaintance are personally connected with that conspiracy. Such a person believes, one might say, a great deal of antisemitic rubbish, but is not himself an *antisemite*, at least in the specific sense of someone who entertains hatred towards Jews *qua* Jews. And in the same way, of course, someone who nowadays both entertains *and sedulously propagates* a great deal of antisemitic rubbish concerning Israel, may nevertheless be able to claim with reason that he or she is not an *antisemite, if we mean by that a hater of Jews qua Jews*. But equally, of course, the fact that he is not an antisemite *in that sense* in no way implies or entails that he is not an antisemite in the sense of *one who habitually propagates and disseminates antisemitic material.* The requirement to demonstrate "intent," in line, as we noted earlier, with the findings

of the MacPherson report, is in other words, and pace both Tomlinson and Robertson, irrelevant to most cases where antisemitism is at issue.

All four of our legal critics of the IHRA definition display a strong commitment -- most radical in the case of Dr Gould, who appears to imply, or suggest, quite mistakenly in law, that the right to free speech is an absolute, rather than a qualified right -- to the principle of freedom of speech, and more specifically to that principle as embodied in Article 10 of the European Convention of Human Rights. It seems unclear, given the strength of their expressed commitments in this respect, whether any of them would even support the suppression of *Der Stürmer*, were that weekly still in existence today.

Might this not, though, be a nettle that should be grasped? It is surely reasonable, at least in principle, to hold that the conduct of politics in a democratic state requires the fullest possible freedom of all parties to the debate to express their opinions freely, without fear of legal restraint. So it is, but it is also reasonable to retort that no guarantee of rights in a democratic state can altogether dispense with marginal restrictions designed to meet competing demands. The right of free expression under Article 10 of the European Convention, for that matter, as Sir Stephen Sedley puts it,

> is not absolute or unqualified: it can be abrogated or restricted where to do so is lawful, proportionate and necessary for (among other things) public safety, the prevention of disorder or the protection of the rights of others. [Though] These qualifications do not include a right not to be offended.[27]

Do such reasons obtain in the case of the (as we have seen, rather short and limited) list of specific lines of attack on Israel qualified as antisemitic by the IHRA definition? They do, we suggest; and they are of two types. The first are straightforwardly legal in character, and have to do with the protection of the rights of others as prescribed by law. The second concern relates to issues of public safety,

including the need to restrain the power of radical politics to threaten the coherence of society.

The legal grounds first. While there is no specific law prohibiting antisemitism, antisemitic activity might be covered by legislation on hate crime; online abuse; and equalities. There are three different ways that legislation deals with hate crime motivated on the grounds of race or religion. These are: offences of stirring up hatred; aggravated forms of certain “basic” criminal offences; and enhanced sentencing for offences motivated by hate. The Crown Prosecution Service (CPS) guidance suggests that antisemitic hate crime is capable of being dealt with either as racist or religious hate crime.

Part III of the Public Order Act 1986 criminalizes certain acts that are intended to stir up racial hatred, defined as "hatred against a group of persons defined by reference to colour, race, nationality (including citizenship), or ethnic or national origin". A Part III offence can also be committed where it is *likely*, having regard to all the circumstances, that racial hatred will be stirred up. To constitute the crime, the acts, which include "words," "behavior", or "material", must be "threatening, abusive or insulting." *There is no freedom of expression defense to racial hatred*.

How does this section impact the IHRA's examples of antisemitism that have been rejected by our three critics? Well, let's take the 'Nazification of Israel', which has been described as the principal signifier or reference point of contemporary anti-Zionist discourse.[28] The 2009 Report of the European Institute for the Study of Contemporary Antisemitism (EISCA), *Understanding the Nazi Card: Intervening against Antisemitic Discourse*[29] stated that the 'Nazification of Israel' has the potential to incite violence against British Jews as it is the biggest component of racial hatred

against them. Indeed, the late distinguished historian, Professor Robert Wistrich referred to the Israel/Nazi trope as "in practice….the most potent form of contemporary antisemitism," because those who engage in it "exploit the reality that Nazism in the post-war world has become the defining metaphor of absolute evil."[30] It's also interesting to note that the Israel/Nazi trope is not far removed from Holocaust denial, which Robertson does accept as antisemitic. Acclaimed historian Deborah Lipstadt, author of the 1993 book *Denying the Holocaust: The Growing Assault on Truth and Memory,* and the 2019 book, *Antisemitism: Here and Now,* coined the neologism "soft-core denial" to explain the Nazi/Israel equivalence. This is because the false comparison between Israel and the Nazis "….lessens by a factor of a zillion what the Germans did," thus whitewashing the crimes of the Nazis and trivilialising the Holocaust.[31] It's reasonable to assume that if Robertson accepts that Holocaust denial is antisemitic, then he should accept that Holocaust equivalence is also antisemitic. In fact, Lipstadt says that its deployment is "a very convenient way of engaging in antisemitism," because it involves "accusing Jews of atrocities."[32]

Judging by the annual and bi-annual antisemitic incidents reports produced by the Community Security Trust, it appears that all the examples that Roberston and Tomlinson reject as antisemitic without specific proof of intent incite attacks on Jews, whether these be verbal, physical, or property damage. Further, spikes in antisemitic attacks have been shown to occur during clashes between Israel and Hamas[33] This is presumably because of the increase in media attention given to Israel and the attendant awakening among Israel's detractors of the examples given in 2, 6, 7, 8, and 10 of the IHRA Definition. This is why the police force's *Hate Crime Operational Guidance* has incorporated the IHRA Definition with all eleven examples.

Note that Part IIIA of the Public Order Act 1986 makes similar provision for acts intended to stir up religious hatred, defined as "hatred of a group of persons defined by reference to religious belief or lack of religious belief." It only criminalises acts *intended* to stir up religious hatred and there is a freedom of expression defense to allow for "discussion, criticism, or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practicing their religion or belief system."[34] Part III A was specifically enacted in 2007 to protect Muslims who, unlike Jews and Sikhs, are not classed as a 'racial group' on the grounds that they cannot be "defined by reference to their ethnic origins."

Under the Crime and Disorder Act 1998, perpetrators of specified “basic” criminal offences can be charged with an aggravated form of the offence (carrying a longer maximum sentence) if they demonstrated or were motivated by hostility on the basis of race or religion. The specified offences covered by the 1998 Act include assault, criminal damage, public order offences, harassment and stalking. The Crown Prosecution Service says that “monitoring had indicated that these were the most common types of crime experienced by the victims of racially and religiously aggravated violence or harassment”[35].

Section 145 of the Criminal Justice Act 2003 applies when the court is sentencing an offender for an offence other than one of the aggravated offences under the 1998 Act. The section requires the court to consider whether the offence was racially or religiously aggravated. If so, the court must treat that as an aggravating factor for sentencing purposes and must state in open court that the offence was so aggravated.

There are several general criminal offences that can be used to prosecute online antisemitism, the most relevant of which are as follows:

Section 1 of the Malicious Communications Act 1988, which makes it an offence to send indecent, grossly offensive, threatening or false electronic communications if the purpose (or one of the purposes) of the sender is to cause the recipient distress or anxiety.

Section 127 of the Communications Act 2003 makes it an offence to use a public electronic communications network to send a message (or other matter) that is grossly offensive or of an indecent, obscene or menacing character; or to send a false message "for the purpose of causing annoyance, inconvenience or needless anxiety to another".

Harassment or stalking offences under sections 2, 2A, 4 or 4A of the Protection from Harassment Act 1997, which deals with behavior that alarms or distresses the victim, and may include racial and religious harassment.

In May 2018, section 127 Communications Act 2003 was used to convict a Holocaust revisionist of Holocaust denial online. Alison Chabloz was convicted of two counts of causing obscene material to be sent and one of sending obscene material. She performed two songs, titled *Nemo's Antisemitic Universe* and *I Like It How It Is,* at the right-wing London Forum in 2016, and she uploaded a third onto YouTube titled *(((survivors)))*. In the latter, Chabloz mocked Jewish figures, including Elie Weisel and Anne and Otto Frank to the tune of *Hava Nagila.* The judge said that he was "entirely satisfied" that the material was "grossly offensive" and that it was "intended to insult Jewish people."[36] Chabloz lost her appeal against the conviction in February 2019.[37]

While the Chabloz case does not relate directly to Israel, it does illustrate that freedom of speech may be severely curtailed by the law, and that Holocaust trivialization, which is essentially what the Israel/Nazi equivalence is, may be held to be against the law even in the absence of specific laws criminalizing Holocaust denial.

The Equality Act 2010 prohibits discrimination in relation to "protected characteristics" which include both race and religion. Antisemitism is likely to be prohibited on both grounds. As Employment Judge Snelson observed in *Fraser v University and College Union* (2013) "Jewishness is a characteristic which attracts protection under the race and religion or belief provisions of the 2010 Act."[38]

In R (E) v Governing Body of JFS [2009] UKSC 15, Lord Phillips explained how Jews possess both characteristics:

> One of the difficulties in this case lies in distinguishing between religious and ethnic status. One of the criteria of ethnicity … is a shared religion. In the case of Jews, this is the dominant criterion. In their case it is almost impossible to distinguish between ethnic status and religious status. The two are virtually co-extensive. A woman who converts to Judaism thereby acquires both Jewish religious status and Jewish ethnic status.[39]

The effect of this is that antisemitism is likely to constitute both race and religious discrimination. Consequently, the Equality Act 2010 would protect Jews from discrimination, harassment (including hostile environment harassment) and victimisation in the fields to which the Act applies, such as employment, services, education and housing.

To illustrate how criticism of Israel as identified in two of the examples rejected by Robertson could be actionable under the Equality Act 2010, let us consider the following scenario. Section 26 of the Act, which recognises that “Jewish” is a

"protected characteristic" as it refers to “a ‘race’, a ‘religion’ or ‘a belief’ provides that “ a person A harasses another B if a) he engages in unwanted conduct related to a *relevant* protected characteristic, and b) the conduct has the purpose or effect of (i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B". A hostile environment for a Jewish student or lecturer could conceivably be created in the university setting by the display of a poster showing a swastika, an equal sign, and the Star of David; a poster showing Netanyahu morphing into a jackbooted storm-trooper; and a poster stating that "Israel is a racist endeavour." Such posters are commonly seen on some British campuses during Israeli Apartheid Week. Note that section 26 does not require antisemitic 'intent'.

The display of these posters could be grounds for a Jewish individual to claim hostile environment harassment because successive reports of the Institute for Jewish Policy Research have indicated that a majority of Jews in Britain support Israel and self-identify as Zionists.[40] That fact alone is enough to make Israel an essential aspect of contemporary Jewish identity, *as that is perceived not only by many Jews but by many of their non-Jewish neighbours,* and hence enough to make Israel relevant to the “protected characteristic” of being Jewish in the terms of Section 26. Although the Employment Tribunal in *Fraser v The University and College Union* (2013) unanimously held to the contrary, stating that Israel is not an aspect of Jewish identity[41] because not all Jews are Zionists and not all Zionists are Jews, it must be noted that the decision was one of first instance only and therefore did not set a precedent, and *pace* Employment Judge Snelson and the two lay decision-makers, the decision and reasoning on that point is open to serious criticism.

It must be, and plainly is, entirely possible to advance factually well-grounded criticisms of the policies of the government of Israel in a manner that avoids abusing or wrongfully defaming Israel and, by association, the majority of British Jews. But reasoned and factually well-grounded criticism of Israel is in **no way threatened by the IHRA definition. What the IHRA definition singles out as antisemitic** is, rather, the violent and belligerent repetition of a small range of entirely factually ungrounded but profoundly defamatory slogans, to the effect that Israel is a “racist”, “Apartheid” or “Nazi” state, whose “crimes” outweigh those of any other modern political entity. [42] As a result, Jews are harassed and ostracised with accusations of "Zio-Nazi," "Nazi," "apologist for Apartheid," and so on. This is as a result of the Jewish self-identification with Israel, and the connection non-Jews make between Jews and Israel. It is also because of the fact that the majority of Jews support Israel, although not necessarily the policies of the government of Israel. Rather, they support Israel in the sense of wanting it to exist as a Jewish state because it was their ancestral homeland, and in acknowledging its role as a psychological and physical refuge from antisemitism.

Nor can the resulting harassment be regarded as an unfortunate side-effect of the overriding need to protect free political speech. While, as Robertson points out in his opinion, political speech is given a particularly strong degree of legal protection "because of the need for free and open discussion in politics,"[43] it has been defined by the European Court of Human Rights as "speech on matters of general public concern."[44] Moreover, the justification for according political speech privileged status - and this also has explicit recognition within UK domestic law - is that it allows citizens to participate fully in a democracy and to make informed decisions about

who to vote for. It also ensures that citizens are provided with enough information to hold the government to account. When one considers its legal definition, and the reasons for its high degree of legal protection, it is clear that 'political speech' so understood can hardly include the expressions of hostility to Israel identified as antisemitic by the IHRA Definition.

What is morally and legally wrong with the type of sloganizing identified as antisemtic by the IHRA Definiton may be, but need not, moreover, *only* be that it "expresses hatred towards Jews as a race" or stirs up hatred towards Jews as a race, whether intentionally or not. It may not do so, and in any case it is always possible to whitewash the sloganizing by means of *caveats* (e.g. that it is not antisemitic but merely "anti-Zionist", e.g.). But so what? What is morally and legally wrong with the mindless defamation that such sloganizing articulates is simply that it is *defamatory*: that it is *libel and slander*. Whether it defames *all* Jews or merely those – in the majority – who happen to support Israel, is entirely irrelevant to the fundamental character of such discourse as politically motivated collective defamation.

Geoffrey Robertson QC correctly notes, in the published opinion we have been discussing, that "it is defamatory to wrongly accuse a person of being antisemitic." So it is; but in that case why is it not also defamatory to wrongly accuse a Jewish supporter of Israel of being, *solely by virtue of that support*, a racist, a friend of Apartheid, and a Nazi? And if such accusations are made on a daily basis in certain workplaces, frequently ones connected in some way with universities where the pro-BDS narrative is prevalent, as one element in an effectively inescapable atmosphere of heated political rhetoric, why would this not constitute conduct that in effect, if not in intent, creates a hostile, degrading, humiliating or offensive environment for Jews?

In the university setting, anti-harassment codes which effectively operate as "hate speech codes" expressly prohibit expression that degrades, humiliates, threatens, or offends minority students. This is to protect the students' right to equal educational opportunity which can be jeopardised because of the documented harms of hate speech. These consist of a range of psychological and physiological harms which can result in missed lectures, lower grades, poorer job prospects, and consequent economic losses.[45]

If the legality of allowing the dissemination of material concerning Israel of the kinds stipulated as antisemitic by the IHRA examples is dubious, the wisdom of allowing it to claim the protection of Article 10 is even more so. “Public safety” justifications for restricting the application of Article 10 have so far generally concerned the politics of the far-Right. In Europe these include the criminalising of Holocaust denial in certain countries, and in Britain the recent unprecedented banning of the neo-Nazi group National Action. Talk of Israel as a “criminal,” “Nazi,” “Apartheid,” “racist” state, the carrying of banners showing the swastika and the Star of David connected by an equals sign, and so on, is currently overwhelmingly associated with the extreme or “hard” left. But organisations of the extreme Right, on social media and in other ways, constantly take the opportunity to express their support of left-wing organizations that, in their terms, have finally won through to the insight that all the evils besetting the world are Jewish in origin. Thus, former BNP leader, Nick Griffin supported Jeremy Corbyn's claim in August 2018 that British Zionists do not understand English irony.[46]

To such unwanted expressions of support, the left, naturally enough, tend to reply that their quarrel in not with Jews but with Israel. But if that were really the case, then

surely the very large numbers of non-Jews who publicly support Israel, including the non-Jewish co-author of this paper, could expect to find themselves vociferously attacked and pilloried by the left. But that is not what happens. In fact, the only supporters of Israel who find themselves vociferously attacked and pilloried by the various organisations providing active support for BDS are *Jewish* supporters of Israel, or supporters of Israel who they *think* are Jewish. In America these are chiefly Jewish university students, but in Britain they include Jewish university faculty, Jewish members of Parliament and other politically salient members of the Jewish community. Moreover these attacks are often violent to a degree that in Britain has, on a number of occasions been fully reported by the press, required police protection for the Jewish students, MPs or others involved. For instance, Jewish MP, Luciana Berger, served as a Labour MP for Liverpool, Wavertree from 2010 until February 2019, when she left the Party to form The Independent Group with seven other MPs. She claimed that she was driven out of the Party by antisemitic bullying. While this took the form mostly of verbal abuse, such were the threats against her that in September 2018, she had to have a police escort to the Labour Party Annual Conference.[47]

Public safety concerns have not always involved the politics of the far-right or the hard-left. The concern to prevent incitement to racial and religious hatred, for example, is also underpinned by the perceived need to prevent public disorder, hence the name given to the relevant legislation - The Public Order Act. In 2016 the High Court upheld an appeal against a decision by the University of Southampton to cancel a conference organised by two of its professors. The conference, entitled, "Public Law and the State of Israel: Legitimacy, Responsibility and Exceptionalism" was to be held on the University's premises in April 2015. The conference was cancelled

amid concerns that the safety of staff, students and visitors could not be guaranteed. The judge observed that "the Defendant (University of Southampton) made what appears on the face of it to be a perfectly rational and lawful decision on appeal against its refusal of permission for a conference to be held on its premises on 17 - 19 April 2015 because of concerns about security." This was because some of the planned conference speakers were controversial, the conference would promote only one point of view, and there was a high risk of large demonstrations. The judge added that the decision had been taken by the university in good faith with conscientious application of the duty to protect free speech. There were no arguable grounds to challenge it.[48]

As we pointed out earlier, the more extreme and factually unfounded lines of current defamation of the Jewish state -- as “criminal” to a supposedly altogether operatic degree; as supported by conspiratorially organised Jewish groups supposedly able effortlessly to control such organisations as the US State Department and Presidency; as “Nazi”, “racist”, and so on -- display strong structural similarities to the traditional and recurrent lines of defamation of Jews in general that go to make up the content of what we have here and elsewhere called *political antisemitism*: antisemitism as a delusive, pseudo-explanatory political theory. The connection may be obscure to eminent human rights lawyers, but it is as evident to a great many Jews as it is to both the authors of this paper. Moreover the specific slurs against Israel and the Jews characterised as antisemitic by the IHRA definition are also, as we have seen, easy enough to link back to the traditional vocabulary of political antisemitism, including its (genuinely) Nazi version. It is for that reason deeply disquieting to British Jews that the British Labour Party, which since the accession of Jeremy Corbyn to its leadership has become deeply embroiled in repeated controversies over its alleged

antisemitism, though it has been reported in the press as having accepted the IHRA definition, has accepted it only subject to caveats. As David Conway describes this situation,

> While Corbyn has vociferously denied charges that he is an anti-Semite, he was eventually led to acknowledge the presence of anti-Semitism in certain pockets of his party and vow to do something about it. This he notionally did by appointing a special commission to look into the problem under his Shadow Attorney General Shami Chakrabati. Her report was published in June 2016. Besides that report, which on the whole exonerated the party, little action appeared to address the problem, much to the mounting consternation of many of party members and the general public, especially Jews.
>
> Their mounting frustration erupted at the end of March this year into a hastily convened demonstration on the steps of Parliament. Under the banner "Enough is Enough," protestors voiced frustration after reading press reports that five years earlier Jeremy Corbyn had lent his support on Facebook to an artists' display in London's East End of a large street mural depicting several distinctly Jewish-looking financiers playing Monopoly on the backs of several crouching naked people.
>
> Matters came to a head in July, after Labour's governing National Executive Committee endorsed a definition of anti-Semitism drawn up in 2016 by the International Holocaust Remembrance Alliance (IHRA), which has since become widely adopted elsewhere in Britain and other liberal democracies. The rub was that Labour accepted the IHRA definition but declined to embrace several illustrative examples the IHRA had given as part of the definition. Most notable among the illustrative examples of anti-Semitism that Labour's NEC declined to accept were the following: accusing Jewish people of being more loyal to Israel than their home country; claiming that Israel's existence as a state is a racist endeavour; and likening contemporary Israeli polices to those of the Nazis.[49]

In effect, the National Executive Committee of the British Labour Party has reserved the right to accuse Jews, *simply in virtue of supporting Israel*, of caring nothing for the welfare of any race other than their own, of being potential traitors to their nations of citizenship, and of being fellow-travellers of Nazism. Both the first two are standard components of previous versions of political antisemitism, including the Nazi version; the third offers an interesting new twist on the old delusions. In a political climate in which things like this can happen, is it at all surprising as Conway notes, that "Reportedly, as many as 40 percent of Britain's 300,000 Jewish population

have intimated that they would seriously consider moving to Israel if Jeremy Corbyn becomes PM."

9. Conclusion

We conclude that, *pace* our four critics, there is not, in the end, a great deal wrong with the IHRA definition as a guide to current antisemitism. If it has a defect, it is merely that ambiguity of its opening general characterisation of the nature of antisemitism needlessly allows critics to read it as stressing the identity of antisemtism as a form of emotional disposition, while ignoring its other identity as a form of pseudo-explanatory delusion. But that, as we have seen, is a defect very easily remedied.

NOTES

[1] Peter Walker, "UK adopts antisemitism definition to combat hate crime against Jews", *The Guardian*, Monday 12 December, 2016.
[2] "This does not in any way undermine the freedom of expression on Israel and the Palestinians," see, "Labour adopts antisemitism definition, but guarantees free speech on Israel," *BICOM* 5 September 2018, http://www.bicom.org.uk/news/labour-adopts-antisemitism-definition-but-guarantees-free-speech-on-israel
[3] "In the Matter of the Adoption and Potential Application of the International Holocaust Remembrance Alliance Working Definition of Anti-Semitism": Opinion by Hugh Tomlinson QC. Available in full at feeespeechonisrael.org/ihra-opinion.
[4] Geoffrey Robertson QC, "Anti-Semtism: The IHRA Definition and Its Consequences for Freedom of Expression." Full text available at doughtystreet.co.uk.
[5] Sir Stephen Sedley, "Defining Anti-Semitism," *London Review of Book*s, v.39, No.9, 4 May 2017
[6] Rebecca Ruth Gould, "Legal Form and Legal legitimacy: the IHRA Definition of Antisemitism as a Case Study in Censored Speech", *Law, Culture and the Humanities*, v. 14, August 2018, 1-34
[7] Kenneth L. Marcus, *The Definition of Anti-Semitism*, Oxford: Oxford University Press (2015), p.18
[8] Marcus, pp.22-23.
[9] Marcus, 20.

[10] Robertson, p.7
[11] Robertson, p.18
[12] Robertson, pp.17-18
[13] Robertson, pp. 1-2
[14] Robertson, p.23
[15] Robertson, p.7
[16] Robertson, p.7
[17] Sedley, p.8
[18] Gould, p.9
[19] For the origins of this distinction and the associated terminology, see Bernard Harrison, *The Resurgence of Anti-Semitism: Jews, Israel and Liberal Opinion*, NY: Rowman and Littlefield (2006), p. 12f; and for a more developed account, Bernard Harrison, *Blaming the Jews: The Persistence of a Delusion*, Bloomington and Indianapolis: Indiana University Press, forthcoming 2019.
[20] Sartre, Jean-Paul, *Antisemite and Jew*, NY: Grove Press (1962), p.41
[21] Elhanan Yakira, "Antisemitism and Anti-Zionism as a Moral Question", in Rosenfeld 2013, 56
[22] Rose 2005, 115-16
[23] "An Exchange on Edward Said and Difference", *Critical Inquiry*, 15 (Spring 1989), 641
[24] This account of the origins of Israel is in no way controversial, but follows the account given by Benny Morris in *1948: The First Arab-Israeli War* (Yale University Press, 2008) and many other historians.
[25] Sedley, p.8
[26] Robertson, p.2
[27] Sedley. p.9
[28] Alan Johnson, "Antisemitism in the guise of anti-Nazism: Holocaust Inversion in the UK during Operation Protective Edge." Paper delivered at the Anti-Zionism, Antisemitism and the Dynamics of Delegitimization Conference, April 2 - 6, 2016, Institute for the Study of Contemporary Antisemitism, Indiana University, Bloomington.
[29] Paul Iganski and Abe Sweiry, *Understanding the "Nazi Card": Intervening against Antisemitic Discourse,* Report of the European Institute for the Study of Contemporary Antisemitism, July 2009, http://www.eisca.eu/wp-content/uploads/2009/07/nazicard.pdf (accessed 15 Mar. 2019).
[30] Robert S. Wistrich, "Anti-Zionism and Antisemitism," *The Jewish Political Studies Review* 16 (3-4) (Fall 2004): 29
[31] Amy Klein, "Denying the Deniers: Q & A with Deborah Lipstadt," *JTA* News 19 April, 2009.
[32] Ibid.
[33] The Community Security Trust's Antisemitic Incident Report 2018 suggested that the highest monthly total of antisemitic incidents (182) in May was likely to be caused in part by reactions to the surge in violence on the border between Israel and Gaza during that month, *CST Antisemitic Incidents Report 2018,* https://cst.org.uk./news/blog/2019/02/07/antisemitic-incidents-report-2018 (accessed 15 Mar. 2019).

[34] Part 3A Public Order Act 1986, inserted (1.10. 2007) by Racial and Religious Hatred Act 2006 (c. 1), ss. 1, 3(2), Sch.; S. I. 2007/2490 {art. 2}
[35] "HATE CRIME: What it is and how to support victims and witnesses", The Crown Prosecution Service, October 2016, https://www.cps.gov.uk/sites/default/files/documents/publications/Hate-Crime-what-it-isand-how-to-support-victims-and-witnesses.pdf (accessed 15 Mar. 2019).
[36] Ben Welch, "Alison Chabloz convicted over antisemitic songs in landmark case," *The Jewish Chronicle,* 25 May, 2018, https://www.thejc.com/news/uk-news/alison-chabloz-antisemitic-songs-blogger-1.464612 (accessed 15 Mar. 2019).
[37] Alison Chabloz v R (2019), https://antisemitism.uk/wp-content/uploads/2019/02/R-v-Chabloz-Judgment-Southwark-Crown-Court.pdf (accessed 15 Mar. 2019).
[38] *Mr R. Fraser v University & College Union*, 25 March 2013, https://www.judiciary.uk/judgments/fraser-uni-college-union/ (accessed 15 Mar. 2019).
[39] *R (E) v Governing Body of JFS* [2009] UKSC 15, para. 39.
[40] David Graham and Jonathan Boyd, "Committed, Concerned and Conciliatory: The Attitudes of Jews in Britain towards Israel," JPR/Institute for Jewish Policy Research, 15 July 2010, https://archive.jpr.org.uk/download?id=1509 (accessed 15 March 2019).
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[42] Citation needed from Bernard
[43] Robertson, pp. 1-2
[44] *Lingens v Austria* (1986) 8 E.H.R.R. 407 ECtHR at [42].
[45] Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 Michigan Law Review 2320 (1987); Richard Delgado and Jean Stefancic, *Understanding Words that Wound* (Boulder, CO: Westview, 2004).
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[47] Oliver Milne, "Jewish MP Luciana Berger flanked by police protection at Labour conference after months of antisemitic threats," *Mirror Online*, 24 September 2018, https://www.google.co.uk/amp/s/www.mirror.co.uk/news/politics/jewish-mp-luciana-berger-flanked-13298354.amp (accessed 15 Mar. 2019).
[48] *Ben-Dor & Ors, R (on the application of) v University of Southampton* [2016] EWHC 953.
[49] David Conway, "Is Jeremy Corbyn's Labour Party a Home for Anti-Semitism", Law/Liberty.org, September 10, 2018