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ARE THE NEW FORMS OF ANTISEMITISM PROHIBITED IN THE EUROPEAN LEGAL SYSTEMS?

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Executive Summary

During the past several decades there has been a marked shift in the way antisemitism manifests itself. No longer aimed only at the Jew or Jewish institutions, this age-old hatred has morphed into extreme anti-Israeli expressions and actions. While it is no longer acceptable or even lawful to express classical antisemitic tropes in public, it is a different story when that hatred is properly cloaked in the language of human rights. It may well be established that it is unacceptable and unlawful to incite hatred against the Jewish person, but what is the legal status of inciting hatred against the Jewish State? And when does the latter become the former? This paper will discuss the matter of adjudicating the new antisemitism phenomenon in European countries.

Old Antisemitism in the Legal Context

To answer these questions, providing some background is necessary on how classic forms of antisemitism are treated under European legislation. Antisemitic sentiment may manifest itself in expressions and actions, and to these the following legal categories may be applied.

Discrimination

The first legal category is discrimination, which is broadly speaking, restricting a person's access to education, goods and services, housing or employment based on his or her perceived or actual belonging to a certain group based on protected characteristics.

In 2000, the European Union adopted the Race Directive and the Employment Equality Directive,¹ both imposing duties to transpose non-discrimination provisions in Member States' national laws. In most cases, anti-discrimination clauses appear in European countries' civil law and violations are subject to civil fines. In other countries, like France, discriminatory behavior is liable to criminal fines and imprisonment. Discriminating against a person based on his or her belonging to the Jewish group would fall under these laws.

Incitement to Hatred, Known as "Hate Speech"

The second relevant legal category applicable to antisemitism is the criminal prohibition of incitement to hatred, also known as "hate speech". The European Union adopted the Council Framework Decision of 2008,² which prohibits, among other things, inciting to hatred or violence. The Framework Decision of 2008 has been transposed, to varying degrees, in the Member States.³ In December 2015, the European Commission began inquiries with Member States that had not properly transposed the Framework Decision of 2008. Following such inquiries, these States may be subject to infringement proceedings. According to the Framework Decision of 2008, the protected characteristics should include: race, color, religion, descent or national or ethnic origin.

¹ EC Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, (O.J. L 303, 2 December 2000, p. 16) ("Employment Equality Directive"), and Council Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (O.J. L 180, 19 July 2000, p. 22) (the "Race Equality Directive").

² Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6.12.2008, p. 55–58) ("Framework Decision of 2008").

³ "Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law" [COM(2014) 27 final of 27.1.2014—not published in the Official Journal], eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027.

Considered specific subsets of the hate-speech category, Holocaust denial, justification and gross trivialization and disseminating Nazi symbols, glorification and propaganda are also outlawed in approximately 16 European States,⁴ and Member States who have not properly enacted Holocaust denial prohibitions as required by the Framework Decision of 2008, may be subject to infringement proceedings by the European Commission.

Hate Crimes

The third legal category relevant to antisemitism is “hate crimes”. These are any offenses carried out with a bias motivation or which target a person based on their perceived or actual belonging to a certain group. This bias motivation should be considered an “aggravating circumstance” in the penal code, or taken into account for imposing enhanced penalties. According to the Framework Decision of 2008, all offenses listed in the national penal codes (not only violent offenses), when carried out with this bias motive should be handled as “hate crimes”, including desecration of graves and memorial sites.

However, any individual case adjudicated based on the above categories, still rests upon each Member State’s law enforcement and the judiciary’s understanding and interpretation of them, and when antisemitic intent is apparent. These interpretative capabilities become ever more crucial when present-day manifestations exhibit an admixture of motivations targeting “Zionism” or Israel, as will be shown below.

New Antisemitism in the Legal Context

Despite the legislative achievements of the past decades, antisemitism has nevertheless persisted. Its manifestations have only morphed. Given the atrocities of the Second World War and the Holocaust, in the age international human rights, indeed—when it is socially unacceptable and in certain cases illegal—how can one still openly espouse antisemitic sentiment, and act upon it?

⁴ See *Legislating for Equality, A Multinational Collection of Non-Discrimination Norms, Vol. I: Europe* (Eds. Naamat, T., Osin N., Porat, D., 2013. Martinus Nijhoff Publishers, The Netherlands), and “Legislating against Antisemitism and Holocaust Denial”, kantorcenter.tau.ac.il/event/booklet-laws-prohibiting-holocaust-denial-and-antisemitism.

Redirecting the antisemitic impulse towards a different target may circumvent existing laws. Realizing that “death to the Jews” can no longer be shouted in public without risking criminal liability, nowadays one might try to get away with “death to Israel”, “death to Israelis”, or “death to Zionists”. Hate speech laws apply to protected characteristics of race, ethnicity, religion, gender, but not in all cases on nationality.⁵ In any case, these laws prohibit inciting to hatred against an *individual* or *group*, but not against a *state*. In order to apply the law, the rhetoric used, albeit against a state and not an individual person, should be shown to *affect* and incite to hatred against a person or group living in that territory.⁶

Not all criticism of Israel is antisemitic, of course. As a U.N. Member State, Israel should adhere to internationally accepted principles of human rights, and be subjected to criticism when it does not. Indeed, there is a way to differentiate between legitimate criticism and rhetoric tainted with antisemitism. When rhetoric against Israel is **demonizing** (e.g., likening IDF soldiers to Nazis), **delegitimizing** (e.g., denying Israel’s right to exist as a Jewish state), or (3) employing **double standards** (e.g., disproportionate number of resolutions at the U.N. condemning Israel), then it is not a legitimate criticism but rather antisemitic speech. This is known as Natan Sharansky’s “3Ds test”, and it is incorporated in the EUMC Working Definition of Antisemitism.⁷ The Working Definition of Antisemitism is non-legally binding and, therefore, expressions and behavior deemed antisemitic by it are not, necessarily, unlawful. That is not to say it is devoid of legal significance. It may be used as a tool for judiciary and law enforcement and a judge, once identifying the antisemitic expression or intent, may apply a hate-speech or hate-crime law upon it, provided it reaches the required threshold. The following cases may shed light on the current legal climate with respect to the new antisemitism.

⁵ The following European countries, for example, include nationality as a protected characteristic in their hate speech laws: Austria, Czech Republic, France, Estonia, Finland, Iceland, Lithuania and Slovakia.

⁶ It should be noted the differing standards for applying “hate speech” provisions: Some European countries apply a low threshold of speech “harming human dignity”, while others require a higher standard of proving the expression is likely to disrupt public order or incite to violence.

⁷ EUMC Working Definition of Antisemitism, www.antisem.eu/projects/eumc-working-definition-of-antisemitism/. The Working Definition of Antisemitism was adopted in 2016 by the International Holocaust Remembrance Alliance, the European Parliament and several other European states, including Romania, Austria, Germany, The United Kingdom, Lithuania, and Bulgaria. See, Factsheet: Working Definition of Antisemitism of the International Holocaust Remembrance Alliance, 24 October 2017, holocaustremembrance.com/sites/default/files/fcat_sheet_working_definition_of_antisemitism.pdf.

Is Firebombing a Synagogue an Antisemitic Act, if the Perpetrators Are Protesting Israel?

In July 2014, a Jewish synagogue in Wuppertal near Düsseldorf, Germany, was firebombed with Molotov cocktails. No persons were injured. Three Palestinian-born German residents were caught, confessed and stated their motivation was to protest Israeli actions in Gaza. In 2015 the first court ruled that since the perpetrators' motivation was to draw attention to the Gaza conflict with Israel, the offence was *not* antisemitic. The perpetrators were consequently found guilty of arson, but not of committing an antisemitic act. In 2017, the Düsseldorf court of appeals upheld the lower court's ruling, and stated they could not definitively prove the offense had been motivated by antisemitism, since the perpetrators' self-professed motivation was protesting against Israel.

Comparing this ruling with the broad consensus, almost all monitoring agencies' reports from 2014 cited this as an antisemitic act of violence.⁸ Representatives of the EU and the US State Department objected to this ruling. Holly Huffnagle, from the US State Department Office of Religion and Global Affairs, stated plainly:

We believe that when a Jewish house of worship is firebombed in response of Israeli policy, it is anti-Semitism.⁹

This case illustrates a gap in understanding the connection between actions protesting Israel and inciting hatred against Jewish people in Europe. In their protest against Israel, the perpetrators did not choose to attack an Israeli building, like an embassy or consulate. They chose to attack a Jewish institution. According to the Working Definition of Antisemitism, holding Jews collectively responsible for Israeli policies is an example of antisemitism.¹⁰ Attacking an institution used by Jewish people in

⁸ "German court rules that firebombing a synagogue is not anti-Semitic", Sarah Wildman, 13 January 2017, *Vox*, www.vox.com/world/2017/1/13/14268994/synagogue-wuppertal-anti-semitism-anti-zionism-anti-israel.

⁹ As cited in "EU, US officials slam German ruling that synagogue arson not anti-Semitic", Raoul Wootliff, 23 January 2017, *The Times of Israel*, www.timesofisrael.com/eu-us-officials-slam-german-ruling-synagogue-arson-not-anti-semitic/.

¹⁰ EUMC Working Definition of Antisemitism, www.antisem.eu/projects/eumc-working-definition-of-antisemitism/.

Germany, associated with Jewish people living in Germany, should be deemed as a direct attack of intimidation upon them; particularly so when it punishes Jewish persons living in Germany for Israeli government policies.

Is Chanting “Death and Hate to Zionists” an Expression of Antisemitism?

In July 2014, during an anti-Israeli demonstration in Essen, Germany, a person led the crowd to chant “death and hate to the Zionists”. In court the perpetrator insisted he had “*nothing against the Jews, just against Zionists*”. In the first-instance ruling, the judge declared that calling “death and hatred to Zionists” does amount to antisemitism, and that the word “Zionist” was used as a code for “Jew”. The perpetrator was convicted to a three-month probation and a fine of 200 Euros. The judgment was upheld in 2015 by an appeals court, which also increased the probation sentence to 10 months.¹¹

This was a landmark ruling in which a judge had finally made the connection between antisemitic hate speech and speech supposedly only criticizing Israel. To be sure, calls for the “death of Zionists” or Israelis are not a legitimate criticism of Israel, but rather, as the court interpreted it, an incitement to hatred prohibited by German law.

In a similar vein, a German court of appeals recently ruled that labeling an anti-Zionist activist as an antisemite was permitted.¹² The case involved statements made by Abraham Melzer, a leading BDS activist, during a “Palestinians in Europe” conference in 2015. While Melzer wished to categorize his speech as merely anti-Israeli, the court stated that Melzer’s behavior was unquestionably antisemitic, in that he had justified the call to kill Jews and had “expressed an extreme hostile conviction toward Jews and the Jewish people.”

¹¹ Appeals court ruling of 22 May 2015. See, “Report: German Court Rejects Appeal of Man Who Shouted ‘Death to Zionists’ at Protest”, 26 May 2015, *The Algemeiner*, www.algemeiner.com/2015/05/26/report-german-court-rejects-appeal-of-man-who-shouted-death-to-zionists-at-protest/#.

¹² “German court allows labeling Jewish anti-Zionist activist as antisemite”, Benjamin Weinthal, 19 January 2018, *Jerusalem Post*, www.jpost.com/Diaspora/Antisemitism/German-court-OKs-labeling-anti-Zionist-activist-as-antisemite-538241. This court of appeals ruling had overturned a lower court’s former ruling in favor of Melzer.

These court rulings can be seen as a trend in the German judiciary, towards realizing that in certain cases, the word “Zionist” and “Israel” are used as code words for Jew and that expressions should be judged on their substance, and whether they, in fact, affect and incite against Jewish people.¹³

Are Calls to Boycott Israel and Boycotting Activities Permitted?

The BDS (Boycott, Divestments and Sanctions) campaign, its rhetoric and activities against Israel, may in many cases be considered another new manifestation of antisemitism. The objective of the BDS movement is *not* to convince Israel to change its policies on the Israeli-Palestinian conflict. Rather, it sets out to convince all other nations that Israel should be ostracized, denying its very right to exist. The BDS charter calls for a right of return for all Palestinian refugees, in effect calling for the annihilation of Israel as the Jewish State.

The BDS campaign exhibits all of the Working Definition of Antisemitism’s “three Ds” discussed above: demonizing Israel as a criminal, racist, apartheid regime, IDF soldiers are Nazis; delegitimizing its very right to exist and, obviously, applying double standards: although touted as a rights-based organization, it is solely interested in Israel’s human rights record, to the exclusion of all other states—even when other states or authorities’ deplorable human rights record affects Palestinians’ own welfare. Thus, the organization doesn’t primarily work to promote Palestinian rights or welfare, but rather uses that discourse to attack Israel.

Given BDS’s prevalence during the past decade or so, some national states have had to decide on the legal status of calls to boycott Israel within their territory. Some

¹³ Other countries outside of Europe are also reaching the conclusion that anti-Israeli hate speech can be considered antisemitic. For example, the South African Equality Court ruling from 2017 provides an important comparative-law perspective. The case involves Bongani Masuku, a trade union leader associated with the Congress of South African Trade Unions. Mr. Masuku has given many speeches across South African university campuses. In 2009, Masuku spoke at Wits University, and spoke against Zionism and Israel. He threatened to make Zionists’ lives “a living hell”, and said they should leave South Africa. He also cautioned South African families who sent their children to the IDF to not be surprised “when something happens to them with immediate effect.” (“A powerful judgment in the battle for truth about anti-Semitism”, 4 July 2017, South African Human Rights Commission, www.sahrc.org.za/index.php/sahrc-media/news/item/714-a-powerful-judgment-in-the-battle-for-truth-about-anti-semitism. The judge declared that Masuku’s statements had amounted to incitement to hatred.(South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another (EQ01/2012) [2017] ZAEQC 1; [2017] 3 All SA 1029 (EqC, J) (29 June 2017), Website of the Southern African Legal Information Institute, www.saflii.org/za/cases/ZAEQC/2017/1.html. Masuku is expected to file an appeal of this ruling.

countries have unequivocally declared that boycotting Israeli products is against the law (France, Spain, the UK), while others like the Netherlands and Sweden have declared that the boycotting activities are constitutionally protected under the right to freedom of expression. The following is a summary of some legal arguments raised and successfully used against the BDS movement.

France is considered at the forefront of the legal combat against BDS.¹⁴ It prohibits both calls to boycott Israel and the boycotting activities themselves under existing laws. French legislation is perfectly tailored for the task: its “incitement to discrimination” penal code article includes a list of protected characteristics, among them the basis of nationality.¹⁵ Based on this law, boycotting activities targeting Israeli products have been deemed a criminal incitement to discrimination against Israelis. Moreover, calls to boycott Israel have been successfully convicted under the Freedom of the Press Law which prohibits expressions of discrimination. At least ten court cases have been tried successfully in French courts against anti-Israel boycotters.¹⁶

The **United Kingdom** has gone a different route, giving another basis for the illegality of the boycott. Its argument is based on international trade law, and that the singling out of Israel and imposing of economic sanctions, violates the non-discrimination clause of World Trade Organization agreements.¹⁷ In a Policy Note published in 2016, the government stated that as the EU and Israel both signed the World Trade Organization’s Government Procurement Agreement, and since the agreement requires all signatories to “treat suppliers equally”, boycotting Israeli suppliers would be considered a breach of the Agreement.¹⁸ It remains unclear if this

¹⁴ France has been against economic boycotts long before the current anti-Israel boycott movement, and the same laws employed to counter boycotts against Israel are also used against boycotts of Iran.

¹⁵ According to Article 225(2), these offenses are punishable with imprisonment of up to three years and/or €75,000 when consisting of refusing service or access, committed in a public space.

¹⁶ “BDS a Hate Crime? In France, Legal Vigilance Punishes anti-Israel Activists”, 15 February 2015, *JTA*, www.haaretz.com/jewish/1.574361. In 2016, the French Cassation Court upheld two court cases convicting the perpetrators of inciting to discrimination.

For more, see: “Countering BDS through Legal Measures”, Talia Naamat, *Justice Magazine*, Winter 2017, intjewishlawyers.org/justice/no58/#24.

¹⁷ The World Trade Organization Government Procurement Agreement, signed by the UK and Israel, requires all its signatories to “treat suppliers equally.”

¹⁸ United Kingdom “Procurement Policy Note: Ensuring compliance with wider international obligations when letting public contracts”, Information Note 01/16, 17 February 2016,

position will change after UK's departure from the EU. At any rate, this argument could be easily applied to all EU Member States signatories of the same agreements, with "non-discrimination" clauses. For a comparative perspective, the **United States**, at the federal level, also employs the trade-based argument, and in 2015 passed a law declaring that:

[T]he boycott, divestment, and sanctioning of Israel by governments, governmental bodies, quasi-governmental bodies, international organizations, and other such entities is contrary to the General Agreement on Tariffs and Trade (GATT) principle of non-discrimination.¹⁹

The *Ultra Vires* Argument²⁰

Who, exactly, is entitled to call for a boycott of another state? A broader legal argument made against the BDS campaign is that boycotting measures are taken by entities that are operating beyond the powers vested in them. An individual person, acting for himself, may decide to buy or refrain from buying a certain product. A sovereign state also may decide to cease from economic relations with another state under certain conditions. However, town councils, municipalities, and representatives of state universities, must first examine under the relevant national laws, as well as their own by-laws, whether they have a right to call for a boycott of a foreign state. In the European Court of Human Rights case of *Willem v. France*²¹, in calling to boycott Israel within his municipality, the former mayor of Seclin was deemed to have acted beyond the scope of powers vested in him as a mayor. Similarly, the UK's Policy Note²² reminds town councils, public bodies and local authorities that only the

www.gov.uk/government/publications/procurement-policy-note-0116-complying-with-international-obligations. www.gov.uk/government/news/putting-a-stop-to-public-procurement-boycotts.

¹⁹ The United States-Israel Trade and Commercial Enhancement Act of 2015. At the state-level, laws have employed the "boycotting the boycotters" approach. Twenty-five states have enacted anti-BDS laws. In essence, these laws require state pension funds to divest from investing in companies that boycott Israeli businesses that have connections with Israeli settlements. Moreover, according to some state laws, like South Carolina's, eligibility for receiving state contracting is conditioned upon the company not boycotting Israel.

²⁰ *Ultra vires*—acting beyond one's vested powers or authority.

²¹ *Willem v. France*, Application No. 10883/05, ECtHR judgment of 10 December 2009.

²² "Procurement Policy Note: Ensuring compliance with wider international obligations when letting public contracts", Information Note 01/16, 17 February 2016, www.gov.uk/government/publications/procurement-policy-note-0116-complying-with-international-obligations.

government is authorized to call for sanctions of another country. Another notable example is the recent court case in **Spain**, which declared that a boycott against Israel declared by a city council was overruled, deemed it discriminatory since it was not in accordance with the principle of neutrality and objectivity, and since the city council was not authorized to adopt such a resolution which could affect Spain's foreign policy.²³

To conclude, the most central question pertaining to antisemitism asked in the legal arena today is when speech ostensibly targeting the State of Israel may actually be considered unlawful "hate speech"; and, similarly, when actions against Israel violate the principle of non-discrimination. As shown above, the approaches and legal arguments employed vary from country to country. But a trend does emerge: there is a new willingness by judges to unmask code words (e.g. Israeli or Zionist) used to circumvent existing laws; and, an application of non-discrimination principles on calls to boycott Israel. This may lead to a more nuanced approach to applying non-discrimination and hate speech laws, where one may no longer safely hide behind political sounding speech if it is tainted with antisemitism, or when, in point of fact, it affects the security of Jewish people, or incites to hatred against them.

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²³ "Spanish court rules city council's BDS agreement illegal.", 21 December, 2017, *Jerusalem Post*, [antisemitism.org.il/article/119784/spanish-court-rules-city-council%E2%80%99s-bds-agreement-illegal](https://www.antisemitism.org.il/article/119784/spanish-court-rules-city-council%E2%80%99s-bds-agreement-illegal).