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**What Antisemitism Means Today:
Invoking the Jewish State to Justify Jew-Hate**

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Subcommittee on Global Health, Global Human Rights, and International Organizations

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Authority, and NGO Community*

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Chairman Smith, Ranking Member Wild, and honorable members of the Committee, I am honored to be invited here to discuss modern antisemitism. Opposing antisemitism is easy because everyone is on your side. Even Henry Ford's *Dearborn Independent*, in its notorious series *The International Jew*, complained that the term is "used indiscriminately and vituperatively" against those who merely want to "discuss... Jewish world-power," which would be an important topic if it were real.¹ One cannot address antisemitism unless one can define it.

Much of the testimony at today's hearing focuses on the delegitimization of Israel by international organizations and NGOs. There is a broad consensus that casting Israel as a uniquely problematic entity, or applying double standards to it, is a major form of contemporary antisemitism.² Today, the general anathema on antisemitism in polite society makes "Anti-Zionism" a convenient and common substitute. Yet recent actions by the Biden Administration show that the issue of antisemitism manifesting as "anti-Zionism" (distinguished from ordinary disputes about the policies of a foreign country) requires further clarification.

When Anti-Israel Sentiment Becomes Antisemitism: the IHRA Working Definition

The only widely accepted definition of antisemitism today is the working definition of the International Holocaust Memorial Alliance (IHRA), an intergovernmental organization of over thirty member countries. After several years of consultations with academic experts from around the world, including debate about the role of "anti-Zionism," IHRA unanimously adopted its definition in 2016.³ It crucially states that "anti-Zionist" or "anti-Israel" sentiments *can be* "manifestations" of antisemitism. IHRA's definition provides several illustrations: claiming Israel's existence is illegitimate; the widespread practice of "applying double standards" to the Jewish State; or "requiring of it a behavior not expected or demanded of any other democratic nation."⁴

To be clear, IHRA does not equate criticism of Israel with antisemitism. It explicitly states that criticism of Israeli government policies is legitimate, as with any country. However, condemning Israel based on standards or supposed norms that are in fact applied only to the Jewish State may cross over

¹ See Henry Ford, *The International Jew: The World's Foremost Problem*, DEARBORN INDEP., Nov. 1920 (v. 1-4), at 56.

² See U.S. State Dept., *Contemporary Global Anti-Semitism: A Report Provided to the United States Congress*, at 4 (2008).

³ See Andrew Baker, et. al, *The Origins of the Working Definition*, in Alan Johnson, ed., IN DEFENSE OF THE IHRA WORKING DEFINITION OF ANTISEMITISM (2021), <https://fathomjournal.org/wp-content/uploads/2021/02/Fathom-eBook-In-Defence-of-the-IHRA-Working-Definition-of-Antisemitism.pdf>.

⁴ See IHRA, *About the IHRA non-legally binding working definition of antisemitism*, <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism>.

into antisemitism. Even for such double-standards, IHRA only creates a presumption that must be corroborated by other contextual factors.

Opponents of IHRA claim it is designed to silence ordinary criticisms of Israel.⁵ (If so, it is singularly ineffective – as a growing number of jurisdictions adopt the IHRA definition, there seems to be no abatement in hostility to the Jewish State.) Yet IHRA stresses that its working definition is non-legally binding. The definition’s only role is to help create a consensus on what *is* antisemitism, not how to regulate it. Under the First Amendment, the government must not, under almost all circumstances, restrict antisemitic speech (or other forms of hate speech), and can only deal with actual discriminatory conduct, such as boycotts.⁶ Similarly, principles of representative democracy demand that members of this House should be permitted to say whatever they want about Israel, whether it involves classic or contemporary forms of antisemitism, or both.⁷

The IHRA definition struck a chord. It has been formally adopted by at least thirty-nine countries, including the U.S., and endorsed by the European Union and Commission, the Organization for Security and Cooperation in Europe, most U.S. states, and a vast number of ideologically diverse jurisdictions, universities, and political entities around the world.⁸ For example, Ahmed Shaheed, the U.N. Special Rapporteur for freedom of religious belief, called on all states to adopt the IHRA definition. The U.N.’s “action plan” for combatting antisemitism does not even mention any definition other than IHRA’s.⁹

Criticism of the IHRA: the Nexus Definition

Not surprisingly, the IHRA definition is opposed by those who wish to engage in precisely the kind of anti-Israel double standards that it warns of. In an effort to confound or counteract the legitimacy and clarity of the IHRA working definition, a few other groups have offered definitions of antisemitism that greatly minimize the role of Israel-focused antisemitism. One such effort is the Nexus Document, a project hosted by Bard University. The Nexus definition differs from IHRA

⁵ See Chris McNeal, *UN urged to reject antisemitism definition over ‘misuse’ to shield Israel*, GUARDIAN, Apr. 24, 2023 (describing letter signed by Amnesty International, Human Rights Watch and other groups saying IHRA definition will “suppress or chill” criticism of Israel).

⁶ See, e.g. Eugene Kontorovich, *The Anti-Semitic Nature of Boycotts Singling Out Israel*, testimony before H. Homeland Security Comm., Subcomm. on Intelligence and Terrorism (Jan. 15, 2020); Eugene Kontorovich, *Boycotting Israel Isn’t Free Speech*, WALL ST. J., July 6, 2022, at A15.

⁷ This of course does not mean that such views are not relevant to committee assignments. See H. RES. 76, 118th Cong., *Removing a certain Member from a certain standing committee of the House*, Feb. 2, 2023.

⁸ Zvika Klein, *More than 1,000 global entities adopted IHRA definition of antisemitism*, JERUSALEM POST, Jan. 17, 2023.

⁹ Special Rapporteur on freedom of religion or belief, *Rep. on combating antisemitism to eliminate discrimination and intolerance based on religion or belief*, U.N. Doc. A/74/358 (Sep. 20, 2019).

primarily in its treatment of Israel-focused conduct. Nexus does not regard as presumptively antisemitic either the questioning the basic legitimacy of Israel's existence or the application of double standards to Israel.¹⁰ According to Nexus, such views may have legitimate grounds.

Unlike IHRA's adoption by a wide range of countries (including many states that are often sharply critical of Israel), not one single country has adopted the Nexus Declaration. The IHRA definition was developed by an international group of scholars not known for their views on Israel or their politics one way or another. The Nexus Advisory Board, by contrast, is overwhelmingly left-wing and includes people, like the head of J-Street,¹¹ who can only be described as professionals in the field of Israel bashing. Members of Nexus's advisory board have described Israel as "fascist," denounced it as an "apartheid state," and justified those who say it should have never existed.¹²

While IHRA has become the global benchmark, the narrow Nexus definition has languished in total obscurity—that is, until the White House suddenly announced its "welcome and appreciation" of the Nexus Document last month, while still "embracing" IHRA.¹³ Nexus leaped from the discussions of like-minded academics straight into a White House policy document. While the IHRA definition remains the only one officially used by the government,¹⁴ the White House's *National Strategy* harms efforts to respond to antisemitism by referring to two different, and fundamentally contradictory, definitions. The remainder of this testimony explains why IHRA is correct in identifying Israel as a major focus of antisemitism and addresses the claims made by Nexus.

Israel as a Proxy for Antisemitism

The notion underpinning IHRA's focus on "double standards"—that treating one national group radically differently from another can create a rebuttable presumption of discrimination—is commonplace in anti-discrimination law. It is also uncontroversial that discrimination need not be 100% congruent with the targeted class.¹⁵ Proxies for race, sexual orientation, and so forth can be

¹⁰ The Nexus Task Force, *The Nexus Document* (2021), <https://israelantisemitism.com/the-nexus-document>.

¹¹ THE NEXUS TASK FORCE, <https://israelantisemitism.com/nexus-task-force>.

¹² Rabbi Jill Jacobs (@rabbijilljacobs), TWITTER (Mar. 1, 2023, 4:07 PM), <https://twitter.com/rabbijilljacobs/status/1631038430875377666?s=20>; Rabbi Jill Jacobs (@rabbijilljacobs), TWITTER (Jun. 2021, 10:37 AM), <https://twitter.com/rabbijilljacobs/status/1407347027487383554?s=20>; Raja Khouri (@khour2000), TWITTER (May 17, 2021, 5:36 PM), <https://twitter.com/khour2000/status/1394406572642738179?s=20>.

¹³ See U.S. *National Strategy to Combat Anti-Semitism*, at 12 (May 2023).

¹⁴ See Exec. Order No. 13899, 84 Fed. Reg. 68779 (Dec. 11, 2019); U.S. DEP. OF STATE, DEFINING ANTISEMITISM (2016), <https://www.state.gov/defining-antisemitism>. c

¹⁵ See e.g., *Pacific Shores Properties v. City of Newport Beach*, 730 F.3d 1142, 1160, n.23 (9th Cir. 2013) ("Proxy discrimination is a form of facial discrimination."); *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (gray hair as proxy for age). Proxy discrimination occurs when a policy "treats individuals differently on the basis of seemingly neutral criteria that

discriminatory. Moreover, no one disputes that the political treatment of a country *could potentially* be a proxy for bigotry against a people or faith. For example, when the prior administration adopted immigration restrictions on five Muslim-majority countries, many members of this House denounced it as a “Muslim ban.” Whether that was true is a question that depends on context, as with Israel-focused antisemitism, as IHRA stresses.¹⁶ Israel is by far the largest Jewish community in the world and home to the plurality—and soon the majority—of the world’s Jews. Because the vast majority of American Jews identify closely with Israel,¹⁷ “Zionism” is a convenient though imperfect proxy for Jewishness in general.¹⁸ Yet some, including members of this House,¹⁹ who vigorously denounced President Trump’s immigration policy as a “Muslim ban” now argue that singling out Israel for harsh treatment should not be considered antisemitic. This is a double standard within a double standard.

“Anti-Zionism” from a Historical Perspective

The central claim of Nexus and other IHRA critics is that even vicious attacks on Israel should not be considered antisemitic because they are not about Jews per se, but about the Jewish State’s *government policies*. It would be lazy to dismiss this possibility out of hand. Let us examine it first in the perspective of history and then in light of some of the “reasons” suggested by Nexus.

The obsessive focus on the supposed wrongs of this one tiny group has resurfaced across an amazing array of cultures and epochs. From the Romans to the Crusades. From the Reformation to the Inquisition. From National to International Socialism. The justifications change, the target remains same. Then after two thousand years, the Jewish people reconstituted their nation—and immediately found it the subject of unparalleled international defamation and libel—accompanied by ongoing efforts at physical elimination. Jews have been hated sometimes as adherents of a faith, sometimes as

are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group.” *Id.*

¹⁶ A narrowly divided Supreme Court held that because the restriction applied to only “8% of the world’s Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks,” it was not a discriminatory Muslim ban. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018).

¹⁷ Jeremy Sharon, *80% of US Jews say they are pro-Israel, study finds*, JERUSALEM POST (Feb. 4, 2020).

¹⁸ Labelling Zionism as inherently racist, as Nexus permits, allows de facto exclusion of American Jews from public life, a phenomenon that has started to emerge on campuses. For example, a Jewish student government leader at the University of Southern California was accused of being unsuitable because of her “Zionism.” She was targeted by an aggressive social media campaign to “impeach her Zionist ass.” See Bari Weiss, *Stop Being Shocked*, TABLET (Oct. 15, 2020). One of the Nexus Task Force members insisted that the epithet was not antisemitic. *See* Jonathan Jacob & Diane H. Winston, *About double standards, antisemitism, and Israel*, THE FORWARD (Oct. 24, 2020).

¹⁹ Rep. Ilhan Omar (@Ilhan), TWITTER (Jul. 22, 2020, 10:07 AM), <https://twitter.com/Ilhan/status/1285939451622031362?s=20>; Rashida Tlaib (@RepRashida), TWITTER (Jan. 26, 2023, 2:08 PM), <https://twitter.com/RepRashida/status/1618687449177395201?s=20>.

members of a people. Now the extraordinary enmity is aimed at their State. The coin lands on the same side on every toss. The segue from earlier modes of antisemitism to “anti-Zionism” is a remarkable coincidence.

It is an illusion that antisemitism amounts to such only when it presents as pure unreasoned Jew-hatred or as stereotypes and “tropes.” Antisemitism has never been merely a hate-filled *emotional state*, it has always been a “*pseudo-explanatory political theory*.”²⁰ The most effective antisemites have always sought to justify their bigotry by claiming they simply object to the bad things Jews do to the world. The Jews were hated for producing Jesus and for not accepting him. They were hated as representatives of global capitalism and of international communism. Even Hitler cited policy reasons for his opposition to Jewry: they have “the two million dead of the [First] World War on their conscience,” and “they undermine the economies of countries leading to poverty.”²¹

The accusations leveled against Israel often resemble those made by antisemites throughout history. Instead of the Jews being accused of killing Gentile children,²² Israel is accused of deliberately killing Palestinian children;²³ instead of Jews being accused of causing plague among Gentiles, Israel is accused of causing disease among Palestinians.²⁴ And the accusation of “apartheid” is a modern blood libel—an absurd “Big Lie,” but inciteful in ways that cannot be rectified by mere refutation. Just as the classic blood libel resonated with the theological preoccupations of earlier ages, today’s claims resonate with the ethnic justice concerns of our times.²⁵ That in our times several members of

²⁰ See Bernard Harrison & Lesley Claff, in IN DEFENCE OF IHRA, supra note 3, at 28-29.

²¹ ADOLF HITLER, MEIN KAMPF 326(trans. Ralph Manheim), First Mariners Book edition (1999).

²² See MAGDA TETER, BLOOD LIBEL: ON THE TRAIL OF AN ANTISEMITIC MYTH (2020).

²³ See, e.g., Mona El-Naggar et al., *They Were Only Children*, N.Y TIMES, May 26, 2021, at A1; see also, Robert Satloff, *What’s Wrong with the NY Times’ Report on Children’s Deaths? So Much*, TIMES OF ISRAEL, May 31, 2021.

²⁴ See Ron Kampeas, *Some Democratic lawmakers, including Joaquin Castro and Rashida Tlaib, criticize Israel on vaccines for Palestinians*, JEWISH TELEGRAPH AGENCY, Jan. 26, 2021. See generally Eugene Kontorovich, *Fake International Law is the Newest Anti-Israeli Libel*, NEWSWEEK, Mar. 24, 2021.

²⁵ See Eugene Kontorovich, *The Apartheid Accusation Against Israel is Baseless – and Agenda-Driven*, EJIL: TALK! (July 8, 2021). The Apartheid accusation dates back at least to Soviet-backed United Nations’ “Zionism = Racism” resolution of 1975. See U.N.G.A. Res. 3379 (1975). The U.N.’s singling out Jewish nationhood for such stigma has since widely been understood as a dishonorable moment for the world body and the resolution has been renounced by the U.N. itself. See G.A. Res. 46/86 (1991). Yet the same discredited claims have resurfaced, now rebranded as “Apartheid.” See Eugene Kontorovich, *The Apartheid Slander Against Israel*, B’NAI B’RITH INTL., at 7. (2022), <https://www.bnairbith.org/report-apartheid-slander-against-israel>.

Congress can level such libels against the Jewish State²⁶ without facing sanctions from their party demonstrates how dangerous “polite” antisemitism is.²⁷

Double Standards and International Law

Much of my academic research documents the use of double standards against Israel in international law.²⁸ *Sui generis* rules or applications of rules are so common in the case of Israel that they amount to a special set of norms for the Jewish State. A definition of antisemitism is inadequate if it cannot capture a phenomenon of such breadth, persistence, and significance in the treatment of Jews. Under international law, a country’s borders are those of the prior administrative unit in the territory. That rule is applied around the world and the Middle East—except to Israel.²⁹ Under international law, “occupation ceases when the occupying forces are driven out of or evacuate the territory”³⁰—except when Israel is involved.³¹ Countries can choose their own capitals—except Israel. Despite an abundance of relevant situations, no country has ever been accused by the U.N. or major NGOs of violating the Geneva Conventions for allowing its citizens to migrate into territory it controls.³² That being said, it is completely legitimate to protest what one sees as occupation. But when one supports a boycott of Israel while at the same time promoting ties with other territories regarded as occupations, one may infer *international law* is not what is driving these choices.³³

²⁶ See Victor Nava & Josh Christenson, *Rashida Tlaib hosts anti-Israel event at the Capitol despite Kevin McCarthy’s move to block it*, N.Y. POST (May 10, 2023); Alexandria Ocasio-Cortez (@AOC), TWITTER (May 15, 2021, 5:04 PM), https://twitter.com/AOC/status/1393673695433043976?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwrm%5E1393673695433043976%7Ctwgr%5Edcbdf634cfe49c831a7df24d0494906218942%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.aljazeera.com%2Fnews%2F2021%2F5%2F16%2Fin-tweet-us-legislator-aoc-calls-israel-apartheid-state.

²⁷ Rep. McCollum’s apartheid accusations highlight the central role of double standards against Israel. She justified her claim by referring to Israel’s Nation State Law, a largely symbolic national identity provision similar to those found in the constitutions of many Western democracies. See Jackson Richman, *Minnesota congresswoman receives verbal backlash for accusing Israel of ‘apartheid’*, JNS (Oct. 22, 2018); See generally, Eugene Kontorovich, *A Comparative Constitutional Perspective On Israel’s Nation-State Law*, 25 *Israel Studies* 137-52 (2020).

²⁸ See Eugene Kontorovich & Penny Grunseid, *At the U.N., Only Israel Is an ‘Occupying Power’*, WALL ST. J. A15 (with (Sept. 14, 2016).

²⁹ See Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris and the Borders of Israel*, 58 *ARIZ. L. REV.* 633-92 (2016).

³⁰ See International Committee of the Red Cross, *The Law of Armed Conflict: A Teaching File Lesson 9* (2002), <https://www.icrc.org/en/doc/resources/documents/misc/5p8ex4.htm>.

³¹ See Eugene Kontorovich, *Why Gaza Is not Remotely Occupied (I)*, WASH. POST: VOLOKH CONSPIRACY (Nov. 13, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/13/why-gaza-is-not-remotely-occupied-i/>.

³² See Eugene Kontorovich, *Unsettled: A Global Study of Settlements in Occupied Territory*, 9 *J. LEGAL ANALYSIS* 285 (2017).

³³ See Eugene Kontorovich, *A Selective Opponent of ‘Settlers’*, WALL ST. J. A17 (Jan. 15, 2020).

Nexus Document’s Justifications of Anti-Israel Double Standards

Now Nexus argues that discriminating against Israel should not be seen as presumptively bad because there exist good “reasons... for treating Israel differently.” Nexus cites two—that people “care” more about Israel, and U.S. military aid. “Caring” of course is not a reason but a feeling, making this explanation circular. It is undeniable that much of the world “cares” a great deal about Israel, but such hostile caring is itself the phenomenon that requires explanation. Nexus suggests that perhaps someone’s “personal or national experience may have been adversely affected by the creation of the State of Israel.” This is a woefully inadequate account. If contemporary anti-Israel sentiment were limited to, say, Palestinians, we would not be having this hearing. This cannot explain the “caring” of large, impersonal institutions like the United Nations, and supposedly neutral groups like Amnesty International or Human Rights Watch, which lack “personal or national experiences.” Nor cannot it explain the lack of systematic, global delegitimization against other nations with whom many people have had “negative experiences.” Surely Nexus authors would not suggest it is proper to denounce Muslims because of negative “personal experiences” with Islam.

The second justification Nexus cites is that Israel receives a significant amount of “American aid.”³⁴ To be sure, criticizing U.S. aid to Israel is itself legitimate³⁵—but it hardly accounts for the double standards against Israel. For one, heightened hostility to Israel’s existence is not solely or even primarily an American phenomenon. IHRA grew out of European anti-racism monitoring efforts. European countries do not provide significant foreign aid to Israel, but the same kind of double standards are present there (See Table 1.) Nexus wants us to believe that those Americans who oppose Israel, just as their European counterparts do, happen to do so for a distinctive American reason—another amazing coincidence.

Table 1

<u>Countries</u>	<u>Total UK Foreign Aid</u> ³⁶	<u>Condemnatory UNGA Votes since 2015</u>
Afghanistan	£187m	1
Nigeria	£140 m	0
Pakistan	£128 m	0
Ethiopia	£120 m	0
Israel	0	98 anti-Israel votes

³⁴ Unlike most other foreign aid programs, the aid to Israel is overwhelmingly military assistance that can only be used to purchase U.S. defense technology. See Congressional Research Service, *U.S. Foreign Aid to Israel*, at 5-7 (March 1, 2023).

³⁵ See, e.g., Eugene Kontorovich, *Israel Needs to Kick the Subsidy Habit*, WALL ST. J. A22 (July 17, 1997).

³⁶ Russell Taylor, *UK aid spending: Statistics and recent developments*, HOUSE OF LORDS LIBRARY (Dec. 8, 2022), <https://lordslibrary.parliament.uk/uk-aid-spending-statistics-and-recent-developments>.

Table 2 compares leading recipients of U.S. with various indications of domestic and international special “care.” Foreign aid cannot explain heightened hostility to Israel. It must be some other factor.

I thank the Committee for its time and attention.

Table 2

<u>Countries</u>	<u>Total Aid in USD in 2020</u> ³⁷	<u>Military Aid in 2020</u> ³⁸	<u>UNHRC Resolutions since 2010</u>	<u>UN General Assembly resolutions in 2022</u> ³⁹	<u>NYT Board Editorials since 2010</u>	<u>US Student Government Boycott Resolutions (2015-Present)</u> ⁴⁰
Afghanistan	3.97 B	3.3 B	1	1	50	0
Israel	3.31 B	2.761 B	78	15	90	117
Jordan	2.6 B	503.973 M	0	0	3	0
Egypt	1.47 B	1.302 B	0	0	7	0
Ethiopia	1.21 B	3.771 M	1	0	1	0
Iraq	1.18 B	548 M	1	0	60	0
Nigeria	1.1 B	9.906 M	1	0	3	0
South Africa	1.1 B	.203 M	0	0	0	0
Congo	965.4 M	5.072 M	5	0	1	0

³⁷ Julia Haines, *Countries That Receive the Most Foreign Aid From the U.S.*, U.S. NEWS & WORLD REP. (Feb. 28, 2023).

³⁸ Sources: <https://web.archive.org/web/20211217004605/>; <https://foreignassistance.gov/>.

³⁹ 2022 UNGA RESOLUTIONS ON ISRAEL VS. REST OF THE WORLD (Nov. 14, 2022) <https://unwatch.org/2022-2023-unga-resolutions-on-israel-vs-rest-of-the-world/>.

⁴⁰ See Amcha Initiative, *Student Government BDS Resolutions and Statements*, https://amchainitiative.org/israel-divestment-vote-scorecard/#divestment-resolutions/search-by-date/?view_272_page=1