

Statement of Kenneth S. Stern¹
ABA International Law Section Council
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Good morning. Thank you for inviting me. I am sorry I can't appear in person.

Given the importance of confronting antisemitism, let me suggest that the value of your statement will be significantly diminished if you let it be subsumed in the heated debate over two issues: 1) the text and uses and abuses of the IHRA definition regarding Israel and 2) an internal communal contest over Jewish identity.

I'm sure you'll hear that IHRA is needed to be able to identify antisemitism. That's hyperbole and frankly nonsense. The historical examples in the Report didn't need the definition. I didn't need it to help people understand antisemitism during my quarter century at the American Jewish Committee.

The House and Senate Resolutions you cited didn't need it – in fact didn't mention it. And in the last weeks, I don't recall anyone saying you needed to run Kanye's statements through IHRA to understand it was antisemitic.

The text which became IHRA was drafted primarily with data collectors in mind. Bean counters in different European countries preparing reports on antisemitism didn't have a common idea of what to count. The goal was to give them concrete examples of what to include or exclude, so levels of antisemitism could be compared across time and borders. There were examples about Israel because there was a correlation, as opposed to causation, about certain types of speech about Israel and attacks on Jews. The purpose was to take a temperature, not to create a blunt instrument to label anyone an antisemite.

Sadly, the definition hasn't been used in the ways intended. Around 2010 groups on the pro-Israel right started marrying Title VI of the Civil Rights Act of 1964 with the definition, bringing cases alleging a civil rights violation predicated, in part, on things like what Israel-related texts a professor assigned, what speakers were coming to campus, what films were shown.

The major use of the definition has been to go after pro-Palestinian speech. As a Zionist I don't agree with some of the speech complained about, but it is political speech, and should be answered, not suppressed or chilled by law. The chilling effect worries me more than the actual cases – administrators and faculty rightly worry about outside groups hunting for what they perceive as IHRA violations to threaten, or bring, legal action.

I can give you many examples of the danger and abuse, but one from the UK is instructive. The UK adopted the definition, and an "Israel Apartheid Week" event on campus was cancelled. The US-based Simon Wiesenthal Center praised the ban, and encouraged other universities everywhere to do the same.

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And you'll recall that Secretary of State Pompeo floated the idea to label Amnesty International and Human Rights Watch antisemitic, thus threatening their funding.

Does the ABA have a definition of racism? If it did, would it include political examples, as IHRA does? To take the temperature of racism over time, one might ask data collectors to include these examples: opposition to affirmative action, opposition to Black Lives Matters, opposition to the removal of Confederate Statues. You see the problem. But that's only part of it.

It's true that most Jews have their identity linked in a significant way with Israel and consider themselves Zionists. I count myself among them. But for many Jews, Zionism, and what it means for Palestinians, is irreconcilable with what Judaism says about treating the stranger or repairing the world.

There is a deep internal Jewish conflict about whether a particular attitude toward Israel is required, one with church/state implications when law takes one side or the other. The ABA shouldn't be endorsing the political position articulated by Jared Kushner about the Executive Order – that the policy of the government is that anti-Zionism is antisemitism, per se.

When people's identity is tethered to an issue of social justice or injustice, when they see an internal or external threat, hate studies shows they crave certainty, seek out binary good/bad, black and white thinking, symbols, and simple solutions to complicated problems. The debate around IHRA has devolved into this dangerously false question: "are you tolerant of antisemitism or against it?" When we lawyers treat words as symbols like flags to wave, that's a problem.

We also miss so much when we think antisemitism only involves what people say about Jews.

When leaders vilify anyone among us as an "other," and explain how it's noble to demonize or dehumanize them, antisemitism will grow in that us-them culture. It explains to people how they might be losing to these "others." No definition of antisemitism capture anti-immigrant, anti-Asian, anti-Muslim, anti-LGBTQ, or anti-Black animus. But the level of each of these, especially when promoted by leaders, is one of the main reasons why antisemitism will grow. Another is when our democratic norms are under attack. One of those norms is protection for free speech, including speech we might disagree with. We should push back, expose, deplore, such speech, but not encourage the use of law to chill or suppress it.

So the question I ask you is which is more important – to build consensus about the need to address antisemitism with a statement that people can support regardless of their views on the Israel/Palestine conflict or the complicated matter of where Israel fits in Jewish identity, or a statement that endorses IHRA, thus picking a side in a contentious political battle, and inevitably undercutting what you are trying to achieve?