

The European Commission “Handbook” promoting the controversial IHRA Working Definition of Antisemitism: A Legal Analysis

Introduction

On 7 January 2021, the European Commission (“EC”) published a “Handbook for the practical use of the IHRA Working Definition of Antisemitism” (hereafter: Handbook), notwithstanding the widespread criticism and concerns surrounding the International Holocaust Alliance’s Working Definition of Antisemitism (hereafter: IHRA-WDA) in the last years.¹ As also reflected in its title, the Handbook aims to promote Good Practices in the application of the IHRA-WDA. It contains sections on the IHRA-WDA, presents the 11 Contemporary Examples of Antisemitism attached to it (hereafter: Examples) and lists (alleged) antisemitic incidents. It also offers Good Practices on the use of the IHRA-WDA in various policy areas, including law enforcement, the judiciary and education; and contains a Good Practices checklist.

The ELSC welcomes the critical and comprehensive analysis of the Handbook published by the Belgian NGO coalition 11.11.11 in its briefing paper titled “European Commission ‘Handbook’ entrenches controversial IHRA definition of antisemitism” (hereafter: 11.11.11 Briefing Paper).² The ELSC’s legal brief presented here builds on and complements this 11.11.11 briefing paper by adding relevant legal analysis to the debate about the Handbook.

Section I of this legal brief provides an overview of the main facts that render the Handbook problematic, namely: **a)** the use of the controversial IHRA-WDA Examples to delegitimise criticism of Israeli Government policies; **b)** the false equation of anti-Zionism and antisemitism; **c)** the designation of boycotts and the BDS movement as inherently antisemitic; **d)** the promotion of an agenda of defunding organisations and activities perceived as supporting anti-Zionism and/or the BDS movement; and **e)** the use unreliable, biased and unverifiable sources to report alleged antisemitic incidents. **Section II** will analyse these problematic facts in the light of the relevant legal framework and demonstrate that **a)** the content of the Handbook amounts to misinformation, according to the definition adopted by the EC itself, as it provides inaccurate and misleading information. Consequently, **b)** the authors of the Handbook violated the European Code of Conduct of Research Integrity and the EC failed to properly review the author’s work and prevent these violations; and **c)** as the publisher and owner of the Handbook, the EC bears the duty and the ability to correct the erroneous and imprecise content.

¹ See for further details: Friedman L., Database *Challenging the IHRA Definition of Antisemitism — Expert Views & Resources*, Foundation for Middle East Peace, updated periodically, available at: <https://fmep.org/resource/challenging-the-ihra-definition-of-antisemitism-expert-views-resources/>

² 11.11.11, European Commission ‘Handbook’ entrenches controversial IHRA definition of antisemitism, 2 March 2021, available at: https://11.be/sites/default/files/2021-03/11briefingpaper_EC_IHRA_handbook.pdf.

Section I: Facts that render the Handbook problematic

- a) **Promoting the controversial IHRA-WDA Examples as means to delegitimise criticism of Israeli Government policies**
1. Although published by the EC, the Handbook has been authored by other external actors, *i.e.* the Berlin-based Federal Association of Departments for Research and Information on Antisemitism (“RIAS”), as the primary author, and several other contributors (hereafter: Contributors).³ It is noteworthy that the **Contributors of the Handbook** are primarily the **same individuals and organisations that, since the early 2000s, have played a leading role in the drafting and promotion of a “Working Definition of Antisemitism”** that frames certain criticisms of Israel as antisemitic – known since its adoption by the IHRA in May 2016 as the **IHRA-WDA**.⁴
 2. Already at the beginning of the millennium, two contributors, Rabbi Andrew Baker from the [American Jewish Committee](#) (AJC) and Michael Whine (then with the British-Jewish Community Security Trust) worked with the RIAS, seeking to deflect increasing European criticism of the Israeli Government for its anti-Palestinian policies by re-defining such criticism as antisemitic.⁵ Both played a key role in the preparation and release of the so-called EUMC Working Definition of Antisemitism by the European Monitoring Centre on Racism and Xenophobia (EUMC), the predecessor of the EU’s Fundamental Rights Agency (FRA). When, in 2013, it became clear that the EUMC definition was not considered an official EU document, they approached the IHRA to give it official status.⁶ Another contributor to the Handbook, Mark Weitzman, Director for Government Affairs at the [Simon Wiesenthal Center](#) (SWC) and then chair of the IHRA Committee on Antisemitism and Holocaust Denial, has claimed an important role in the formal adoption by IHRA in 2016 of the Working Definition of Antisemitism previously considered by the EUMC.⁷
 3. In May 2016, **only the two-sentence short and vague definition of antisemitism** (the so-called text in the box) was **adopted by consensus** by the IHRA Plenary of Member States in Bucharest.⁸ The Examples were and still are deemed as particularly controversial, because they blur the line between legitimate opinions on the State of Israel and statements about Jews as such, also labelling the former as antisemitic *per se*.⁹ In fact, the Examples, presented as illustration to guide IHRA’s works, were **not considered as an integral part**

³ European Commission and Bundesverband RIAS, Handbook for the practical use of the IHRA Working Definition of Antisemitism, November 2020, available at: <https://op.europa.eu/en/publication-detail/-/publication/d3006107-519b-11eb-b59f-01aa75ed71a1>, p. 4.

⁴ Baruch, I. Why is the EU helping to label Israel criticism as antisemitism?, 19 April 2021, available at: <https://www.972mag.com/ihra-ngo-monitor-ilf-european-union/>.

⁵ Whine, M. (2004). International Organizations: Combating Anti-Semitism in Europe. Jewish Political Studies Review 16(3/4), available at: <https://www.jcpa.org/phas/phas-whine-f04.htm>.

⁶ See Stern-Weiner, J. (2021). IHRA: The Politics of a Definition. Free Speech on Israel, available at <https://freespeechonisrael.org.uk/wp-content/uploads/2021/04/The-Politics-of-a-Definition.pdf>, pp. 20-21.

⁷ For further details, see: 11.11.11 Briefing Paper, concerns n. 1-2, p. 1-2. It is also worth mentioning that the SWC publishes an annual list of the “Top 10 Worst Anti-Semitic Events” which in 2015 included the European Union for its decision to label Israeli settlement products. See also Baruch (n 4).

⁸ International Holocaust Alliance Remembrance Romanian Chairmanship Press Release, 26 May 2016, available at: https://www.holocaustremembrance.com/sites/default/files/press_release_document_antisemitism.pdf.

⁹ The reference is to Examples 7-11 as seen as the most problematic. For further details see: Hoban, W. The EU Handbook for Fighting Antisemitism, 20 January 2021, available at: <https://www.thebattleground.eu/articles/2021/01/20/the-eu-handbook-for-fighting-antisemitism/>.

of the WDA in 2016 as revealed by Jamie Stern-Weiner, PhD candidate at Wolfson College University of Oxford.¹⁰

4. Nonetheless, individuals and organisations seeking recognition of the Examples of “Israel-related antisemitism” pushed for a definitive shift in the IHRA position.¹¹ In May 2018, this shift took place: Mark Weitzman misleadingly proclaimed on behalf of the IHRA Committee on Antisemitism and Holocaust Denial that, in 2016, the IHRA had adopted the Examples as part of the WDA, and that the subject was not open for further discussion.¹² In the summer of 2018, the IHRA revised its website to support the false claim that the IHRA Plenary adopted the IHRA-WDA included the Examples.¹³ As a result of this misrepresentation, in 2020 the IHRA Permanent Office in Berlin declared that it would have been incorrect to distinguish between the WDA and the Examples, because both were adopted as one text in 2016.¹⁴
5. By failing to clarify the *status* of the Examples and by treating them as an integral part of the IHRA-WDA, the **Handbook promotes and legitimises the mentioned falsification of the historical record.**
6. The above demonstrates that the contributors of the Handbook **are biased since their agenda is not only guided by the fight against antisemitism** in Europe, but also by ambitions to **blur the line between antisemitic statements and legitimate criticisms** of the Israeli Government’s endemic violations of international law.

b) Falsely equating anti-Zionism and antisemitism

7. **The Handbook**, while not explicitly discussing the concepts of Zionism or anti-Zionism, implicitly **promotes the position that anti-Zionism is a form of antisemitism.** It does so primarily by endorsing and supporting the IHRA-WDA Examples of antisemitism that refer to acts or practices that fall within the meaning of Zionism and/or anti-Zionism, and by citing sources that invoke the equation of anti-Zionism and antisemitism. Significant examples in the Handbook are, *inter alia*:
 - a. The “Good Practice examples” of: the UK Police Education and Hate Crime Operational Manual,¹⁵ which defines anti-Zionism as a “*form of hostility [that] often blames Jews and/or Israelis for all of the tension in the region*”;¹⁶ the amendment of the German criminal code to include antisemitism as a motivation that allows for an increased penalty for crimes and, according to the Ministry of Justice, antisemitism should be understood as defined by the IHRA-WDA and its controversial Israel-related Examples.¹⁷
 - b. Presenting the appearance of an advertisement at a London bus stop saying “*Israel is a racist endeavour*” as an antisemitic incident related to the IHRA-WDA’s Guiding Example 7: “*Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavour*”;¹⁸

¹⁰ Stern-Weiner (n 6) p. 26-30-31.

¹¹ *Ibid.*, p. 32.

¹² *Ibid.*

¹³ *Ibid.*, p. 40.

¹⁴ *Ibid.*, p. 44; 11.11.11 Briefing Paper (n 2) p. 2.

¹⁵ The Handbook (n 3) p. 21.

¹⁶ College of Policing, Hate Crime Operational Manual, 2014, available at: <https://www.scribd.com/document/381304809/hate-crime-operational-guidance-pdf>, p. 36

¹⁷ The Handbook (n 3) p. 26.

¹⁸ *Ibid.*, p. 14.

- c. Describing as an antisemitic incident the boycott campaign against the performance of an American Jewish singer (*i.e.* Matisyahu) at the Spanish Rototom Reggae music festival because of his support for the Israeli policies towards the Palestinian people (hereafter: the Rototom case). This claim is based on the IHRA-WDA's Guiding Example 8: "*Applying double standards by requiring of Israel a behaviour not expected or demanded of any other democratic nation*".¹⁹
8. However, it is important to stress that criticism of Zionism and the state of Israel cannot, in itself, be deemed antisemitic. Jewishness and Judaism are not synonymous with Zionism or support for Israel. **Zionism** is originated in the 19th century in Europe and is a political ideology and movement that has first promoted the establishment and later the existence and development of Israel as a Jewish State in Palestine. Defining itself as Jewish State,²⁰ Israeli law conveys the full rights of nationals only to one group, namely Jewish persons, and discriminates against the indigenous Palestinian population.²¹ The **discriminatory practices and policies** implemented by the Israeli Government are widely documented and condemned by the United Nations ("UN") and human rights organisations²² and categorised by both UN Economic and Social Commission for Western Asia (ESCWA)²³ and renowned human rights scholars as a form of **Apartheid**.²⁴ Since Zionism, characterised by scholars as a settler colonial movement and a form of ethnic nationalism practiced by the State of Israel,²⁵ is controversial, everyone has the right to express an opinion on the matter, whether such opinion is supportive or critical.
9. Therefore, **anti-Zionist positions are not antisemitic per se** but must be considered and evaluated in light of their context, motives and content. The fact that some anti-Zionist

¹⁹ The Handbook (n 3) p. 15.

²⁰ See Basic Law: Israel - The Nation State of the Jewish People (Hattis Rolef S., Trans.), 2018, available at: <http://knesset.gov.il/laws/special/eng/basiclawnationstate.pdf>, para. 1.

²¹ According to the NGO Adalah, a matrix of over sixty-five laws systematically discriminates against Palestinian citizens of Israel. See Adalah - The Legal Center for Arab Minority Rights in Israel, The Discriminatory Laws Database, 2017, available at: <https://www.adalah.org/en/content/view/7771>.

²² In January 2018, the UN Office of the High Commissioner for Human Rights (OHCHR) affirmed that "**The violations of human rights associated with the settlements are pervasive and devastating [...] Palestinians suffer from restrictions on freedom of religion, movement and education; their rights to land and water; access to livelihoods and their right to an adequate standard of living; their rights to family life; and many other fundamental human rights**", see: Report of the OHCHR (A/HRC/37/39), p.9. See also UN Security Council resolutions condemning Israel's violations of international law: UNSC 252 (21 May 1968), UNSC 267 (3 July 1969), 298 (25 September 1971), 476 (20 August 1980), UNSC 1397 (12 March 2002), SC Resolution 2334 (23 December 2016).

²³ Falk R. and Tilley V. Q. (2017). Israeli Practices towards the Palestinian People and the Question of Apartheid. Palestine and the Israeli Occupation No. 1, available at: https://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1013&context=ps_pubs.

²⁴ See Dugard J. and Reynolds J. (2013). Apartheid, International Law, and the Occupied Palestinian Territory. European Journal of International Law 24(3), available at: <http://www.ejil.org/article.php?article=2421&issue=117>; Joint Submission on Israeli Apartheid to the UN Committee on the Elimination of Racial Discrimination (CERD) by Palestinian, regional and international human rights organisations, November 2019, available at: <https://www.alhaq.org/advocacy/16183.html>; Human Rights Watch, A Threshold Crossed Israeli Authorities and the Crimes of Apartheid, April 2021, available at: <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>; B'Tselem, A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid, January 2021, available at: https://www.btselem.org/publications/fulltext/202101_this_is_apartheid.

²⁵ Pappé, I. (2008). Zionism as Colonialism: A Comparative View of Diluted Colonialism in Asia and Africa. South Atlantic Quarterly 107(4); Pappé, I. (2006). A History of Modern Palestine: One Land, Two Peoples. Cambridge University Press, pp. 142-169; Dana, T. and Jarbawi, A. (2017). A Century of Settler Colonialism in Palestine: Zionism's Entangled Project, Brown Journal of World Affairs, 24(1); Khalidi, R. (2019). The Hundred Years' War on Palestine: The History of Settler Colonial Context and Resistance, MacMillan; Pappé, I. (2006). The Ethnic Cleansing of Palestine. One World Oxford; Lentini, R. (2016). Palestine/Israel and State Criminality: Exception, Settler Colonialism and Racialization. State Crime Journal, 5(1); Erakat, N. (2019). Justice for Some: Law and the Question of Palestine. Stanford University Press.

manifestations do also engage in antisemitic content, effect or purpose, does not entail anti-Zionism is intrinsically antisemitic; correlation does not imply and should not be mistaken for causation. Based on a review of expert opinions, in 2004, the EUMC concluded that criticism or hostility toward Israel or Zionism must not be classified as antisemitism if it expresses criticism or grievances about concrete policies of the State of Israel and not a prejudice against Jews.²⁶

c) Designating boycotts and the BDS movement as inherently antisemitic

10. The Handbook does not discuss the BDS movement nor explicitly defines it. Nevertheless, it **insinuates unambiguously** that boycotts and BDS movement are inherently antisemitic and should be treated as such, by:
 - a. Presenting as Good Practices, public policy motions and decisions that are aimed at blaming the BDS movement as antisemitic, such as the parliamentary motions adopted in national and local level by public institutions (hereafter: **anti-BDS motions**) in Germany²⁷ and the Austrian Parliament in December 2019 that designate the BDS as a form of antisemitism and invite all municipal institutions not to support the movement or its affiliated groups;²⁸ the resolution of the Balearic Islands (Spain) of June 2020 that referred to BDS as an antisemitic movement;²⁹
 - b. Referring to boycott actions as inherently discriminatory behaviour;³⁰
 - c. Omitting all mention of the milestone judgement *Baldassi and others v. France*, when addressing the case-law of the European Court of Human Rights (ECtHR).³¹
11. The Boycott, Divestment and Sanctions movement (BDS) is a Palestinian civil society-led, global **human rights movement** seeking to pressure Israel, as well as other States, institutions and business enterprises, to respect and comply with international law and Palestinian human rights, through non-violent public campaigns.³² The **legitimacy of BDS** is widely recognised at the international level: *inter alia*, in 2010, the UN Special Rapporteur on Human Rights in the Occupied Palestinian Territory (OPT) acknowledged the importance and results of the BDS movement in his periodic report to the Human Rights Council,³³ also, more than 350 European civil society organisations (CSOs) have

²⁶ European Monitoring Centre on Racism and Xenophobia, Manifestations of Antisemitism in the EU 2002 – 2003, 2004, available at: https://fra.europa.eu/sites/default/files/fra_uploads/184-AS-Main-report.pdf, pp. 13-14; p. 227; pp. 242-243.

²⁷ Good practice example: Federal Ministry of the Interior, Building and Community, Germany (p. 21) according to which “*The BKM and the Jewish Museum Berlin categorically reject support for the BDS movement*”, at p. 10 of the concerned source; Good practice example: German Rectors’ Conference, Germany (p. 28), citing the latter as stating “*There is no place for anti-Semitism at German universities. The General Assembly of the HRK supports the resolution “Against BDS and every anti-Semitism”*”; Good practice example: Berlin State Concept for the further development of antisemitism prevention, Germany (p. 31), a document that mentions, among others, that “*The state-owned Musicboard Berlin GmbH as organiser - with the express support of the Senate - has unequivocally rejected the repeated anti-Semitic calls for a boycott of the PopKultur Festival by the BDS campaign*”.

²⁸ See the Handbook (n 3) p. 32.

²⁹ *Ibid.*

³⁰ *Ibid.*, p. 18, referring to “[...] various forms of threats and discriminatory behaviour such as calls for boycotts based on ethnic, religious, and/or national background.”; and (ii) Good practice example (France, p. 32), according to which “*The PM also said that the President of the Republic “will continue to clearly reject, in accordance with the law, discriminatory “boycott” actions*”.

³¹ *Ibid.*, p. 10.

³² <https://bdsmovement.net/what-is-bds>

³³ Richard Falk, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, A/HRC/13/53, UN Human Rights Council, 2010, available at:

expressly called for respect for the BDS movement,³⁴ while in 2016 the EC confirmed that “[t]he EU stands firm in protecting freedom of expression and freedom of association in line with the Charter of Fundamental Rights of the European Union, [...] including with regard to BDS actions carried out on this territory. Freedom of expression, as underlined by the case-law of the European Court of Human Rights, is also applicable to information or ideas ‘that offend, shock or disturb the State or any sector of the population’”.³⁵

12. In June 2020, the ECtHR, in its landmark judgement *Baldassi and others v. France*, acknowledged that a boycott campaign is “first and foremost a form of expressing opinions of protest. The call for a boycott, which aims to communicate these views while calling for specific actions related to them, is therefore in principle protected by Article 10 of the Convention.”³⁶ The Court also clarified that “[t]he call for a boycott is [...] a special modality of exercising freedom of expression in that it combines the expression of a protesting opinion and encouragement for differential treatment so that, depending on its circumstances, it may constitute a call for discrimination of others. [...] However, incitement to differential treatment does not necessarily amount to incitement to discriminate” (§64). In sum, the Court held that the BDS actions **i)** are protected by freedom of expression under the Convention, **ii)** concern subjects of public interest, which enjoy the highest level of protection under the Convention, as they relate to matters of internal law and **iii)** cannot be restricted even by law, as such restrictions would not be necessary in a democratic society.³⁷
13. Therefore, public authorities and private actors can legitimately restrict violence, hatred or intolerance, but not BDS itself, which is not intrinsically violent, racist or intolerant. Manifestations of BDS are allowed to take place as long as they do not turn into calls for violence, hatred or intolerance.
14. Thus, the Handbook’s representation of BDS as an inherently antisemitic movement is inaccurate and disregards the responsibility of public authorities to protect the expression of legitimate opinions as emphasized by the ECtHR.

d) Promoting the defunding of organisations and activities perceived as anti-Zionist or support BDS

15. As pointed out by the 11.11.11 Briefing Paper, the Handbook promotes an **unacceptable funding conditionality**. Particularly, the Handbook refers to examples related to the Good Practice of “preventing funding of antisemitic groups” presenting that
 - a. the Parliament of the Balearic Islands (Spain)³⁸ adopted a resolution through which “urged the government not to [...] grant subsidies to institutions or organisations that express themselves in antisemitic terms”, while considering the BDS movement as a form of antisemitism; and

<https://unispal.un.org/DPA/DPR/unispal.nsf/2ee9468747556b2d85256cf60060d2a6/33f2a0a73ab185db8525773e00525d05?OpenDocument>, paras. 38-39.

³⁴ European Coordination of Committees and Associations for Palestine, Enough with the criminalisation of the BDS movement for justice in Palestine! Let’s support right to boycott!, 18 May 2016, available at: <https://www.eccpalestine.org/enough-with-the-criminalisation-of-the-bds-movement-for-justice-in-palestine-lets-support-right2bds/>.

³⁵ Parliamentary Question, Answer given by (then) Vice-President Mogherini on behalf of the EC, 15 September 2016, E-005122/2016, available at: https://www.europarl.europa.eu/doceo/document/E-8-2016-005122-ASW_EN.html?redirect.

³⁶ *Baldassi and others v. France*, no. 15271/16, 11 June 2020.

³⁷ For more info on this judgement see: <https://elsc.support/cases/baldassi-vs-france-2020>.

³⁸ The Handbook (n 3) p. 32.

- b. the French National Agency for Territorial Cohesion,³⁹ in revising its funding policy for organisations, affirmed to “*align its actions with the guidelines defined by the President of the Republic concerning antisemitism*” accordance with the IHRA-WDA.
16. Furthermore, in the Good Practice Checklist, the Handbook recommends the EU and the Member States to use a funding control mechanism as a tool “*to avoid funding for antisemitic groups and projects*”,⁴⁰ in the understanding of the IHRA-WDA, including those groups or individuals that express legitimate anti-Zionist positions or that explicitly support the BDS movement, enjoying their rights to freedom of expression and assembly; and prioritising instead “*State funding for civil society programmes against antisemitism based on and disseminating the IHRA Working Definition of Antisemitism*”.⁴¹
17. It is worth recalling that the safeguards for the rights to freedom of expression and assembly provided by Articles 10 and 11 ECHR have been widely interpreted by the ECtHR throughout time. Particularly, the protection granted to the right to freedom of expression, recently recognised to the BDS actions and campaigns through the *Baldassi and Others v. France* judgement, extends not only where a law establishes civil or criminal limits on freedom of expression, but also, among others, in the denial of public awards or funding.⁴² Therefore, by advising that Member States and EU funding for civil society should be conditioned upon conformity with the IHRA-WDA, **the Handbook promotes an arbitrary and unjustified limitation** of the rights to freedom of expression and assembly **for CSOs that seek access to public funds**.
18. Also, the Handbook’s recommendation results in indirectly **upholding the policy of defunding** CSOs and groups that advocate for Palestinian rights, including supporters of the BDS movement, based on false accusations of antisemitism and/or associations with proscribed organisations. Employed by politically motivated actors in Israel to delegitimise and silence advocacy for Palestinian rights,⁴³ the tactic of defunding contributes to the **phenomenon of shrinking space for civil society** – an issue of concern considered by UN human rights experts⁴⁴ and several EU Member States.⁴⁵
19. Therefore, the Handbook, **by recommending** such problematic **conditionality** that does not take into consideration the legitimate anti-Zionist positions, support for the BDS movement and the criticisms of the IHRA-WDA as stands today, suggests **the**

³⁹ The Handbook (n 3) p. 32.

⁴⁰ *Ibid.*, p. 38

⁴¹ *Ibid.*

⁴² Mendel, T. (2010). Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights, available at: <https://rm.coe.int/16806f5bb3>.

⁴³ In this regards, the reference is to organisations as NGO Monitor and Shurat Hadin (the Israeli Law Center). Such actors demonstrate political motivations through their selective focus on Israeli and Palestinian individuals, groups and CSOs who oppose to the Israeli state policies in the occupied Palestinian territory (oPt). For further details, see International Federation for Human Rights, Target Locked: The Unrelenting Israeli Smear Campaigns to Discredit Human Rights Groups in Israel, Palestine, and the Syrian Golan, April 2021, available at: https://target-locked-obs-defenders.org/IMG/pdf/obs_palestine2021lang-1.pdf; Policy Working Group, SHRINKING SPACE - NGO Monitor: Defaming human rights organisations that criticize the Israeli occupation, 2018, available at: http://policyworkinggroup.org.il/report_en.pdf, p. 6.

⁴⁴ UN OCHA oPt, Humanitarian operations undermined by delegitimization, access restrictions, and administrative constraints, 2019, available at: <https://www.ochaopt.org/content/humanitarian-operations-undermined-delegitimization-access-restrictions-and-administrative>.

⁴⁵ Among others, the Netherlands acknowledged that this phenomenon has “*contributed to a climate in which human rights organisations have come under increasing pressure*”, available at: <https://www.tweedekamer.nl/kamerstukken/kamervragen/detail?id=2019Z26067&did=2019D53565>. See also: Policy Working Group (n 43) pp. 32 – 35; Staes, W. and Janne, N. Occupation and Shrinking Space, January 2020, available at: <https://www.cncd.be/IMG/pdf/2020-occupation-shrinking-space-israel-palestine-report.pdf>.

implementation of the policy of defunding, which unlawfully limits the rights to freedom of expression and assembly.

e) Using unreliable and biased sources

20. The Handbook uses, among others, the newspaper The Algemeiner as a source to report an alleged antisemitic incident.⁴⁶ This newspaper is aligned with the positions of Israel's right-wing governments and **was questioned for publishing unverified, biased and, thus, unreliable information.**
21. For instance, in April 2020, the online edition of The Algemeiner published a defamatory article entitled "Why Do European NGOs Support Palestinian Terrorism", written by Oliver Taylor, accusing Dr. Mazen Masri (Senior Lecturer in Law at the University of London) and Dr. Ryvka Barnard (Head of Civic Space at War on Want) to be "*terrorist sympathisers*". These allegations were mainly based on a NGO Monitor report, an Israeli organisation that has been frequently been criticised for reporting factually incorrect and baseless claims.⁴⁷ Later on, the news agency Reuters exposed the author, Oliver Taylor, to be a non-existent deep-fake, writing on antisemitism and Jewish affairs, with half a dozen opinion pieces and blog posts also in the Jerusalem Post.⁴⁸ Therefore, this **source cannot be fully relied upon** when considering alleged antisemitic episodes.
22. Finally, in three places, the Handbook also **lists sources that are not verifiable**, because they refer to general web pages or no longer available.⁴⁹

⁴⁶ The Handbook (n 3) p. 16.

⁴⁷ Policy Working Group (n 43) p. 15, pp. 23-25, p. 33.

⁴⁸ Satter, R., Deepfake used to attack activist couple shows new disinformation frontier, 15 July 2020, available at: <https://www.reuters.com/article/us-cyber-deepfake-activist-idINKCN24G15E>.

⁴⁹ Footnotes nn. 27 and 28 respectively related to The Estonian Academy of Security Sciences (available at: https://www.sisekaitse.ee/en/estonian-academy-security-sciences?language_content_entity=en) and Federación Comunidades Judía España, Spain, 30.10.2020, (available at: <https://www.fcje.org/>) provides the links to the general websites and not to the mentioned activities. The document cited in footnote 43 concerning the Code of Conduct of Antisemitism, 2019, (<https://www.luminpdf.com/viewer/5de6389c8df9f90012a96fa8>) is no longer available.

Section II: Legal Analysis

23. In this Section, building on the analysis of factual inaccuracies and misrepresentations in the Handbook, we will demonstrate that **a) the content of the Handbook amounts to misinformation**, according to the definition adopted by the EC itself, as it provides inaccurate and misleading information. Consequently, **b) the Contributors violated the principles laid down in the Code of Conduct for Research Integrity and the EC failed to properly review their work.** **c) The EC has the duty to correct the erroneous and imprecise content based on its responsibility under the principles of good administration and its duty to publish complete and accurate information as a publisher.** As the owner of the publication, the EC is entitled to make modifications to the content of the Handbook.

a) The content of Handbook that amounts to misinformation

24. The term misinformation concerns **false or misleading messages** spread under the guise of informative content.⁵⁰ An expert report prepared for the EC defines **misinformation** as “***misleading or inaccurate information shared by people who do not recognize it as such.***”⁵¹ Because of the shortcomings described in the previous section, **the Handbook amounts to misinformation, presenting both inaccurate and misleading information.**
25. **Firstly**, the Handbook promotes the widely contested IHRA-WDA Examples of “Israel-related antisemitism”, implying that anti-Zionist positions and the BDS movement are inherently antisemitic and thus suggesting the mentioned policy of defunding. This claim is **inaccurate and misleading**, because criticism of a State that is engaged in gross human rights violations, such as Israel (see paragraphs 8 and 9), is categorically distinct from an act of racism, bigotry or racial discrimination against a particular population.
26. **Secondly**, the Handbook supports such misleading content also by **presenting partial information**, omitting important facts, and thus **misrepresenting actions** that would fall within the scope of the rights to freedom of expression and assembly as antisemitic *per se*. As already stressed, in addressing the relevant jurisprudence of the ECtHR, the Handbook omits all mention of the milestone judgement in the case *Baldassi and other v. France* (see paragraph 12). This omission is particularly misleading, because – in this way – the Handbook **does not provide for a comprehensive overview and an objective analysis** of relevant situations in the European context falling within the scope of the right to freedom of expression and, therefore, protected by Article 10 ECHR, including the right to advocate for BDS.
27. Also, the Handbook avoids taking into consideration judicial evolutions of alleged antisemitic incidents. When referring to the anti-BDS motions adopted in Germany and Austria as Good Practices, it omits to mention that between 2019 and 2020, eight German courts declared these incompatible with the constitutional rights to freedom of expression,

⁵⁰ Guess, AM. and Lyons, BA. Misinformation, Disinformation, and Online Propaganda, in Persily, N. and Tucker, JA. (2020) Social Media and Democracy: The State of the Field, Prospects for Reform. Cambridge University Press, p. 10.

⁵¹ European Commission, A multi-dimensional approach to disinformation, Final report of the High Level Expert Group on Fake News and Online Disinformation, 12 March 2018, available at <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>, at p. 10.

assembly and association,⁵² and that five UN Special Rapporteurs have questioned the German government about the “*worrying trend of unduly limiting*” these fundamental rights.⁵³ Instead, as pointed out in paragraph 10, the Handbook promotes restrictive measures based on these anti-BDS motions in its Good Practice examples on “*education about antisemitism*” and on “*preventing funding of antisemitic groups*”.

28. Finally, while assuming that the Rototom case was an antisemitic episode *per se* (see paragraph 7), the Handbook fails to inform that the judicial proceeding was still pending at the time of the publication. In this context, it is important to add that, on 11 January 2021, the Provincial Court of Valencia (Spain) dismissed the case, acknowledging that objecting to a singer’s participation in a festival that is committed to the respect of human rights, based on his personal support for the practices of the State of Israel, is not criminal, but reflective of a legitimate form of activism in support for Palestinian rights.⁵⁴
29. From this analysis emerges that the content of the Handbook **amounts to misinformation**, as it contains **inaccurate and misleading information by spreading the erroneous premise/representation of anti-Zionism and boycott of Israel as inherently antisemitic**.

b) Violations of the European Code of Conduct for Research Integrity

30. The 2017 European Code of Conduct for Research Integrity (hereafter: Code of Conduct) was developed by the All European Academies (ALLEA) Federation, in close cooperation with the EC,⁵⁵ which recognised it as **the reference document for research integrity for all EU-funded research projects**.⁵⁶ The Code of Conduct aims to formulate the principles of research, to define the criteria for proper research behaviour and to ensure quality research. Accordingly, good research practices must respect the **principle of honesty**. This principle involves, *inter alia*, “*honesty in developing, undertaking, reviewing, reporting and communicating research in a transparent, fair, full and unbiased way*”.⁵⁷ Concerning research misconduct and other unacceptable practices, the Code of Conduct refers to the **practice of falsification**, which is defined as “*manipulating research materials, equipment or processes or changing, omitting or suppressing data or results without justification*.”⁵⁸
31. The Code of Conduct is a framework for self-regulation and thus “[r]esearchers, academies, learned societies, funding agencies, public and private research performing organisations, publishers

⁵² See (in chronological order) [Administrative Court of Oldenburg](#), No. 3 A 3012/16; [Higher Administrative Court of Lower Saxony in Lüneburg](#), No. 10 ME 48/19; [German-Palestinian Women’s Association v. Bonn](#), No. 14 L 1766/19, 13 September 2019; [Administrative Court of Cologne](#), No. 14 L 1747/19, 18 September 2019; [District Court of Munich](#), No. 12 O 13183/19, 23 September 2019; [Constitutional Court of the State of North-Rhine Westphalia](#), VerfGH 49/19.VB-2, 22 September 2020; [Highest Administrative Court in Bavaria](#), 23 November 2020; [Administrative Court of Hesse](#) on a Frankfurt case, 4 December 2020.

⁵³ Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967; and the Special Rapporteur on freedom of religion or belief, AL DEU 3/2019, 18 October 2019, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24834>.

⁵⁴ For further details, see <https://elsc.support/cases/rototom-valencia/>

⁵⁵ See <https://ec.europa.eu/programmes/horizon2020/en/print/2787>

⁵⁶ All European Academies, European Code of Conduct for Research Integrity, 2017, available at: <https://www.allea.org/wp-content/uploads/2017/05/ALLEA-European-Code-of-Conduct-for-Research-Integrity-2017.pdf>

⁵⁷ *Ibid.*, p. 4.

⁵⁸ *Ibid.*, p. 8.

*and other relevant bodies each have specific responsibilities to observe and promote these practices and the principles that underpin them.”*⁵⁹ Furthermore, “*all partners in research collaborations take responsibility for the integrity of the research.*”⁶⁰ As such, the Code of Conduct is relevant for both the Contributors, as a private research organisation and individual researchers, and the EC, as the publisher.

32. The Handbook, whose content, as previously demonstrated, amounts to misinformation, does not communicate research about antisemitism and the practical use of the IHRA-WDA in an accurate and unbiased way. Therefore, **the Contributors have not respected the principle of honesty**. Furthermore, **the Contributors are responsible for the misconduct of falsification**, primarily through omitting and suppressing facts that contradict the Handbook’s false and misleading premise that anti-Zionism, BDS and most criticisms of Israel are to be seen as inherently antisemitic and should therefore be countered. It is important to highlight that such omissions involve – among others – **the significant judicial decisions** mentioned in paragraph 27, but also the international debate and **the strong and sustained critique and concerns about the IHRA-WDA** by renowned scholars of antisemitism studies and related fields, as well as Palestinians and advocates for Palestinian rights, including Jewish organizations from around the world.⁶¹
33. In conclusion, **the Handbook**, with these unjustified omissions, **manipulates and misrepresents information** and characterises even legitimate manifestations of the rights to freedom of expression and assembly as antisemitic. Thereby, it emerges that the **Contributors have violated their obligations** stemming from the **European Code of Conduct for Research Integrity**.
34. Accordingly, the EC, as the publisher who has a duty to identify and prevent the publication of works where research misconduct has occurred, failed to properly review the Contributors’ activity and omitted to ensure that they comply with the Code of Conduct.

c) Responsibility of the EC to correct inaccurate content

35. Firstly, the EC has a clear duty to correct mistakes under the **EU Good Administration Principles**. Article 41 of the EU Charter of Fundamental Rights protects the right of every EU citizen to good administration. In addition, the EU adopted **the European Code of Good Administrative Behaviour** (hereafter: the Code),⁶² to share best practices, provide practical guidance on transparency and accountability for EU institutions and promote a harmonised European administrative culture. As explained by the EU Ombudsman, EU institutions, including the EC, must comply, among others, with the Code’s Public Service Principle on **objectivity**, according to which “[*civil servants [...] should be ready to*

⁵⁹ European Code of Conduct for Research Integrity (n 56) p. 3.

⁶⁰ *Ibid.*, p. 6.

⁶¹ Balsam, C., Who’s against adopting the IHRA antisemitism, 9 December 2020, available at: <https://blogs.timesofisrael.com/whos-against-adopting-the-ihra-antisemitism-definition/>; For more sources of critique of the IHRA-WDA see: the database of the Foundation for Middle East Peace: <https://fmep.org/resource/challenging-the-ihra-definition-of-antisemitism-expert-views-resources/>; also: Staes, W. and Janne, N. (n 44). In March 2021, this critique culminated in the release of the Jerusalem Declaration on Antisemitism (JDA) as an alternative to the IHRA-WDA by more than 200 scholars of Holocaust history, Jewish studies and Middle East studies: <https://jerusalemdeclaration.org/>

⁶² The Code, firstly adopted in 2001, has been re-published in 2015 through an update version. Available at: <https://op.europa.eu/en/publication-detail/-/publication/6f34b389-82be-11e5-b8b7-01aa75ed71a1>

acknowledge and correct mistakes.”⁶³ Moreover, the Code’s Article 12 on courtesy provides that “[i]f an error occurs which negatively affects the rights or interests of a member of the public, the official shall apologise for it and endeavour to correct the negative effects resulting from his or her error in the most expedient way”.⁶⁴

36. By publishing the Handbook that misrepresents anti-Zionist expressions and BDS, the EC provided a platform for the amplification of **generalized stigmatisation of advocates of Palestinian rights** as antisemitic.⁶⁵ This stigmatisation particularly grows the fear of publicly expressing critical views on Israeli policy in the OPT and announcing support for the BDS campaign.
37. The risk of being stigmatised as ‘antisemitic’ combined with the increased threat of exclusion from public facilities and funding projects **creates a chilling effect** on individuals and CSOs advocating for Palestinian rights.⁶⁶
38. The **fear of being subject to accusations** of antisemitism creates a **climate of intimidation and self-censorship** and **reduces willingness to exercise criticism** on policies of the Israeli Government. This also deters others from joining in activities of BDS movement and show support, as they might also encounter social exclusion.
39. The chilling effect that the accusation of antisemitism creates for advocates of Palestinian rights **prevents them from fully exercising their right to freedom of expression**. By omitting to prevent the spread of stigmatisation of Palestinian rights advocacy, **the EC contributed to this chilling effect, which causally affected the exercise of the right to freedom of expression negatively**. Therefore, according to the principle of objectivity and courtesy, the EC has the responsibility to acknowledge its omission and **correct the negative effects** resulting from it.
40. **Secondly, the EC, as the publisher, bears the duty to modify the inaccurate information**. As explained in paragraph 31, the Code of Conduct requires the EC, as the publisher, to take responsibility for the integrity of the research. The Handbook indeed contains the disclaimer stating “[t]he information and views set out herein are those of the author(s) and do not necessarily reflect the official opinion of the Commission. The Commission does not guarantee the accuracy of the data included in this document. Neither the Commission nor any person acting on the Commission’s behalf may be held responsible for any use of the information provided here.”
41. However, this **disclaimer does not release the EC from its duty** as the publisher to **ensure the accuracy and objectivity** of the research it publishes. As demonstrated in paragraph 32, the research communicated by the Contributors is incomplete and biased. As the publisher who is guided by the principle of honesty, the EC has the **duty to review the Contributors’ work** and if it does not meet the criteria of research integrity, it must **instruct the Contributors to correct the mistakes**.

⁶³ *Ibid.*, Principle 3, p. 9.

⁶⁴ *Ibid.*, Article 12, paragraph 3, p. 16

⁶⁵ Notably, it is undisputed that Israel and the affiliated NGOs carry out delegitimisation efforts to stigmatize advocates of Palestinian rights and supporters of BDS. See Jamal, A. (2018). The Rise of “Bad Civil Society” in Israel, available at: https://www.swp.berlin.org/fileadmin/contents/products/comments/2018C02_jamal.pdf, p. 1; Staes, W. and Janne, N. (n 45) p. 10. See also the media reports: Beaumont, P., Israel brands Palestinian-led boycott movement a 'strategic threat', 3 June 2015, available at: <https://www.theguardian.com/world/2015/jun/03/israel-brands-palestinian-boycott-strategic-threat-netanyahu>; Alsaafin, L., From spying to lobbying, Israel’s fight against BDS intensifies, 20 June 2019, available at: <https://www.aljazeera.com/news/2019/06/spying-lobbying-israel-fight-bds-intensifies-190620170711122.html>.

⁶⁶ The chilling effect is a concept defined as “*the negative effect any state action has on natural and/or legal persons, and which results in pre-emptively dissuading them from exercising their rights*”. See Pech, L. (2021). The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, the Rule of Law, and Fundamental Rights in the EU. Available at: <https://www.opensocietyfoundations.org/publications/the-concept-of-chilling-effect>, p. 4.

42. In addition, following Freedom of Information (FoI) requests, we examined the **call for tenders** launched in April 2020 by the EC to develop the “practical guide” for the application of the IHRA-WDA,⁶⁷ and the **contract** signed in June 2020 between the EC and the successful tenderer RIAS,⁶⁸ (hereafter: the Parties).
43. From the analysis of these documents, it emerges that:
- 1) The EC **itself was responsible for developing the structure and general content** of the Handbook, as published. In this regard, the EC’s call for tenders clearly stated that the practical guide had to include, *inter alia*, a description of “*the different contemporary forms of antisemitism explained in the [IHRA] definition with examples by referencing concrete instruments, best practices or incidents from member states, respecting the geographical diversity of the Union*”, while “[t]aking into account its legally non-binding nature, put forward suggestions for using the IHRA definition as a support for the work of different target groups among public authorities (law enforcement, teacher, judiciary, state administration institutions, journalists)”.⁶⁹
 - 2) The EC has the **exclusive right to modify the content of the Handbook**. Indeed, the contract signed between the Parties provides that “[t]he **Union acquires irrevocably worldwide ownership of the results and of all intellectual property rights on the newly created materials produced specifically for the Union under the contract and incorporated in the results**”, as well as “*the exclusive right to **authorise or prohibit any modification of the results***”.⁷⁰
44. In light of the above, the EC is fully entitled to monitor the activities undertaken by the contributors, review the documents received, and make suggestions or even modify the content of the Handbook because the EC **has a significant influence on the content** and also the **ownership rights that entitle it to make modifications**.

⁶⁷ European Commission, Invitation to Submit a Tender Negotiated Procedure for Low Value Contracts with Minimum One Candidate, and Tender Specifications Attached to the Invitation to Tender, No. JUST/2020/RRAC/PR/RIGH/0063, April 2020

⁶⁸ Service Contract, No. JUST/2020/RRAC/PR/RIGH/0063 between the EC and RIAS, June 2020

⁶⁹ EC Invitation to Submit a Tender (n 66) p. 4.

⁷⁰ Service Contract (n 67) Article II.13.1 and Article II.13.3.

Conclusion

In Section I, we showed that the Handbook

- a) Promotes the controversial IHRA-WDA Examples as means to delegitimise criticism of Israeli Government policies;
- b) Falsely equates anti-Zionism with antisemitism;
- c) Designates boycotts and the BDS movement as inherently antisemitic;
- d) Promotes a defunding policy against those organisations and activities that do not comply with the IHRA-WDA and Examples;
- e) Uses a source whose reliability and objectivity is in question, as well as unverifiable sources.

In Section II, we analysed the content of the Handbook in light of the relevant legal framework and demonstrated that

- a) The content of the Handbook, by providing misleading and erroneous information, amounts to misinformation;
- b) The Contributors violated the principles of research integrity and the prohibition of the misconduct of falsification contained in the Code of Conduct and the EC failed to fulfil its duty to oversee their work and prevent these violations;
- c) The EC had (and has) the duty to correct the misinformation in the Handbook which derives from its obligation to correct its mistakes based on the principle of objectivity and its duty and the ability to modify inaccurate and misleading information as the publisher and owner.

Recommendations

We urge the European Commission to:

- a) Halt all circulation and promotion of the Handbook and ensure its removal from all official EU websites until all inaccurate and/or misleading content has been revised;
- b) Instruct the Contributors to revise the Handbook by correcting all false and misleading content and by communicating all EU research and policies on antisemitism and the IHRA-WDA in a transparent, fair and unbiased manner.