Four Italian legislative proposals incorporating the IHRA definition of antisemitism into Italian positive law and their compatibility with Italy's obligations arising from the ECHR

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The authors of this legal opinion were invited by concerned human rights defenders to assess four bills, tabled in the Senate of the Italian Parliament, under the framework of the European Convention on Human Rights (ECHR) and relevant case law of the European Court of Human Rights (ECtHR).

The bills in question are:[1]

- Bill No. 1004 (Romeo et al.), introduced on 30 January 2024
- Bill No. 1575 (Scalfarotto), introduced on 8 July 2025
- Bill No. 1627 (Gasparri), introduced on 6 August 2025
- Bill No. 1722 (Delrio et al.), introduced on 20 November 2025

These legislative proposals have in common that they aim to introduce provisions into Italian positive law in various areas that would grant legal status and legal consequences to the "working definition of anti-Semitism" adopted in May 2016 by the International Holocaust Remembrance Alliance (hereafter "IHRA" and "IHRA definition").

The two sentences comprising this definition say: *"Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities*."[2]

Since its adoption by the IHRA, the definition has become highly controversial, largely due to the widespread political instrumentalization of eleven *"contemporary examples of antisemitism"* attached to it, seven of which relate to the State of Israel (cf. *infra*). In granting legal status and consequences to the IHRA definition, the four bills treat these examples as an integral part of the definition.

Before proceeding, it should be noted: there can, of course, be no question that *incitement to hatred, discrimination or violence* against Jewish people on the grounds of their origin or religion is unacceptable and that governments can and must take measures to prevent such acts and punish them if necessary.

It should also be noted, as acknowledged by the explanatory memoranda to the four bills, that Italian law already contains concrete provisions combating incitement to hatred, violence or discrimination

[1] (1004) Romeo, Pirovano, Bergesio, https://www.senato.it/show-doc?leg=19&tipodoc=DDLPRES&id=1408549&idoggetto=0&part=ddlpres_ddlpres1.
(1575) Scalfarotto, https://www.senato.it/show-doc?leg=19&tipodoc=DDLPRES&id=1467690&idoggetto=0&part=ddlpres_ddlpres1.
(1627) Gasparri, https://www.senato.it/show-doc?leg=19&tipodoc=DDLPRES&id=1473422&idoggetto=0&part=ddlpres_ddlpres1.
(1722) Delrio, Malpezzi, Alfieri, Bazoli, Casini, Rojc, Sensi, Verini, Zampa, Lambardo, Calenda, Spagnolli, https://www.senato.it/show-doc?leg=19&tipodoc=DDLPRES&id=1485177&idoggetto=0&part=ddlpres_ddlpres1.

[2] IHRA, Working definition of antisemitism, https://holocaustremembrance.com/resources/working-definition-antisemitism.

against Jewish (and other) people on the grounds of their origin or religion. In this context, reference will be made to Article 604-bis of the Italian Penal Code, which provides an adequate legal basis for combating such acts.

The central question discussed in this opinion is how the provisions in the bills effectively giving legal effect to the IHRA definition relate to Italy's obligations under the European Convention on Human Rights (ECHR), in particular with regard to the principle of legality laid down in Article 7 of the ECHR, to freedom of expression and, subsequently, to freedom of association and assembly, which are protected by Articles 10 and 11 of the ECHR.

Summary of relevant provisions of the bills

As stated above, the four bills have in common that they grant legal status and binding force to the IHRA definition in various fields of Italian law. This is in itself remarkable, in view of the declared "non-legally binding" status of the IHRA definition, as agreed and affirmed by the IHRA (see hereafter).

More specifically, Bill No. 1004 (Romeo et al.) *"adopts"* the IHRA definition as defining antisemitism for the application of the law. The bill determines that the Italian Prime Minister shall adopt by decree provisions to i.a. establish a database of antisemite incidents, to combat *"dissemination of antisemitic hate speech on the internet"*[3], develop guidelines on combating antisemitism addressed to teachers and school staff, promote training initiatives for police force personnel and promote the IHRA definition in the media.

In Article 3, the bill foresees the possibility to refuse authorization for public assembly or demonstrations *"in the case it is considered that a serious potential risk exists of the use of symbols, slogans, messages and any other antisemitic act under the working definition of antisemitism adopted by this law."*

Bill No. 1575 (Scalfarotto) contains identical proposals.

The direct restrictive impact of both bills on the right to freedom of expression and freedom of association and assembly is evident. However, there may also be an indirect impact in criminal cases, in that police personnel shall be trained to use the IHRA definition for the identification of antisemitic acts.

Bill No. 1627 (Gasparri) also *"adopts"* the IHRA definition.

Article 2 of this bill contains provisions for training programs for military personnel, police officers, magistrates and training courses for teachers and students. Remarkably, the bill equates opposition to Zionism with anti-Semitism; thereby implying that criticising a political ideology amounts to Jew hatred.

The bill states: *"The Minister of Education and Merit shall establish, in schools of all types and levels, annual training courses for students, with the aim of fostering dialogue among generations, cultures and various religions, and combating manifestations of anti-Semitism, including anti-Zionism."*

Article 3 provides for measures to report and sanction anti-Semitic incidents as defined by the IHRA definition in schools and universities.

[3] All quotes in this opinion from the four proposed laws and referenced Italian legal texts are unofficial translations.

Article 4 provides for the incorporation of (elements of) the IHRA definition into Article 604-bis of the Italian Penal Code.

Bill No. 1722 (Delrio et al.) *"applies"* the IHRA definition *"for the purpose of this law"* (Article 1).

On this ground:

Article 2 delegates the Italian government *"regarding the strengthening of measures relating to anti-Semitic content disseminated on online digital service platforms."* In this context, the bill compels the government to provide for online platforms and the Italian Communications Regulatory Authority (AGCOM) to apply the IHRA definition.

Article 3 reaffirms the freedom of research and teaching in universities.

Article 4 provides for the nomination of a person within each university who is responsible for verifying and monitoring actions to combat anti-Semitism.

Article 5 institutes an obligation for educational institutions to report annually to the Ministry of Education on actions taken to combat antisemitism.

The bills' definition includes IHRA examples of antisemitism

Adopting the IHRA definition, including the examples of antisemitism attached to it, as a legal basis for wide-ranging government interventions (criminal prosecution of racism, prohibition of public gatherings, regulation of social media and even removal of content, monitoring of racism in schools and universities), can have a profound impact on the enforcement of criminal law, freedom of expression and assembly or association.

This observation is of direct relevance when assessing the bills in terms of their "quality of the law", with a view to the principle of legality and to "the necessity in a democratic society", which is a necessary condition and threshold for imposing restrictions on freedom of expression and association or assembly in the framework of the ECHR.

As mentioned above, the four bills treat the *"contemporary examples of antisemitism"* attached to the IHRA definition as an integral part of the definition. Accordingly, the bills incorporate not only the two sentences core definition into positive law, but also the examples, seven of which relate to Israel. This follows from the below provisions.

Bills No. 1004 (Romeo et al.) and No.1575 (Scalfarotto) state in their identical Article 1.2 that the law *"adopts the working definition of antisemitism formulated by the International Holocaust Remembrance Alliance (IHRA) on 26 May 2016, including the related indicators."*[4] "*Indicators*" refers to the examples.

Bill No.1627 (Gasparri) states in Article 1:*"The Italian Republic (…) adopts in full the working definition of antisemitism approved at the Plenary Assembly of the International Holocaust Remembrance Alliance (IHRA)."* This is confirmed by the explanatory memorandum which describes the aim of the bill as to provide *"legislative adoption of the IHRA's working definition of antisemitism, and, following the examples provided by the same organization, to articulate a set of manifestations of antisemitism that constitute criminal offences punishable under existing legislation."*

[4] In this and subsequent paragraphs, emphasis has been added by the authors.

Bill No. 1722 (Delrio et al.) states in Article 1 that the working definition of antisemitism as adopted by the International Holocaust Remembrance Alliance (IHRA) *"applies"*. In this regard, the explanatory memorandum clarifies: *"In particular, for the purposes of applying this bill, reference should be made to the full operational definition, as antisemitism constitutes 'a polymorphous threat, as can be clearly seen from the so-called 'eleven examples' given in the IHRA operational document, which explain the different forms that the antisemitic threat can take.'"*

It should be recalled that when the IHRA adopted the working definition in May 2016, there was little or no discussion about the core definition. It was the explanatory part with the examples, which triggered heavy debate and controversy, precisely because of its potential to sow confusion between criticism of Israel or Zionism on the one hand and anti-Semitism on the other.

Testifying to such confusion, the explanatory memorandum of Bill No. 1004 (Romeo et al.) states that after 7 October 2023, *"the outbreaks of antisemitism already present throughout Europe ... have expanded and spread under the guise of anti-Zionism, of hate toward the Jewish State and toward its right to exist and defend itself."*

The explanatory memorandum of Bill No.1575 (Scalfarotto) states that after 7 October 2023, *"the episodes of antisemitism and intolerance against the Jewish community in our country have multiplied, creating an unacceptable climate of hostility and intolerance towards Israeli people."*

As in Bill No. 1004 (Romeo et al.), the explanatory memorandum of Bill No. 1627 (Gasparri) states that after 7 October 2023, *"the outbreaks of antisemitism already present throughout Europe ... have expanded and spread under the guise of anti-Zionism, of hate toward the Jewish State and toward its right to exist and defend itself"*. It adds: *"The multiplication of antisemitic episodes is based in part – similarly to what unfortunately still happens regarding the Holocaust – on the denial of violence, especially against women and child, committed on 7 October and on a radical denial of Israel, which projects onto the state dimension antisemitic prejudices that remain all too widespread."* Moreover, it says: *"Even Italian institutions firmly reacted against antisemitism masked as anti-Zionism (...)."*

In Article 2, this bill foresees training courses, i.a. for magistrates and law enforcement officials that *"shall focus specifically on the study of Jewish and Israeli culture, the analysis of cases of antisemitism, and, with specific reference to police forces training on the drafting of reports concerning antisemitic acts."*

Compatibility with the European Convention on Human Rights

Article 7 of the ECHR: the principle of legality

The first question to be asked is whether the legislative proposals are compatible with the principle of legality laid down in Article 7 of the ECHR. The relevant part of Article 7 reads:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."[5]

It should be noted that Article 15 of the ECHR prohibits any derogation from this provision.

[5] European Convention on Human Rights (ECHR), Article 7, No punishment without law, https://www.echr.coe.int/documents/d/echr/convention_ENG.

Article 7 only applies in matters of enforcement of criminal law. Bill No. 1627 (Gasparri) expressly amends Article 604-bis of the Italian Penal Code. There can therefore be no question as to whether the principle of legality applies to it. However, the three other bills also contain provisions that may influence the interpretation of criminal law.

Bills No. 1004 (Romeo et al.) and No.1575 (Scalfarotto) provide in identical terms for *"specific training initiatives for police forces regarding knowledge of the phenomenon of antisemitism, in order to correctly determine the antisemitic nature of an offence (...) according to the working definition of antisemitism."*

In assessing the compatibility of a criminal conviction with the principle of legality, the European Court of Human Rights (ECtHR) considers domestic law "as a whole" and the way it was applied at the material time.[6]

The ECtHR accepts that, however clearly drafted a legal provision may be, in any system of law, there is an inevitable element of judicial interpretation. It considers that the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the States Parties to the ECHR.

Article 7 of the ECHR cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

For these reasons, it makes sense to include rules or guidelines (binding or otherwise) relating to the interpretation of the definition and constituent elements of an offence when assessing whether the requirement of "foreseeability" of the law has been met. This is one of the qualitative requirements imposed by the ECtHR on the law when reviewing the principle of legality (cf. *infra*). It is therefore necessary to consider Bills No. 1004 (Romeo et al.) and No. 1575 (Scalfarotto) when assessing the Italian legislative proposals in the light of Article 7 of the ECHR, since they contain provisions on training police forces to detect anti-Semitism on the basis of the criteria set out in the examples attached to the IHRA definition. Article 2.1 of Bill No. 1627 (Gasparri) also provides for the drafting of "*guidelines*": *"To this end, the Minister of the Interior, in agreement with the Minister of Justice, shall adopt, within one year from the date of entry into force of this law, a 'Practical Guide to Combating Antisemitism', containing information on current legislation, operational guidelines, templates for reports, and criteria for defining the constituent elements of offences and aggravating circumstances connected with antisemitic motives."*

The principle of legality requires the offences and corresponding penalties to be clearly defined by law. The concept of "law" within the meaning of Article 7, as in other ECHR Articles (for instance Articles 8 to 11), comprises qualitative requirements, in particular those of accessibility and foreseeability.[7] These qualitative requirements must be satisfied as regards both the definition of an offence[8] and the penalty the offence in question carries or its scope.[9] Insufficient "quality of law"

[6] ECHR, Grand Chamber, *Kafkaris v. Cyprus*, judgment of 12 February 2008, § 145; ECHR, Grand Chamber, *Del Río Prada v. Spain*, judgement of 21 October 2013, § 90.
[7] ECHR, Grand Chamber, *Kafkaris v. Cyprus*, judgment of 12 February 2008, § 140; ECHR, Grand Chamber, *Del Río Prada v. Spain*, judgement of 21 October 2013, § 91; ECHR, Grand Chamber, *G.I.E.M. S.R.L. and Others v. Italy,* judgement on the merits of 28 June 2018, §§ 242; ECHR, *Cantoni v. France*, judgment of 15 November 1996, § 29; ECHR, Grand Chamber, *Perinçek v. Switzerland* , Judgement of 15 October 2015, § 134.
[8] ECHR, *Jorgic v. Germany*, judgment of 12 July 2007, §§ 103-114.
[9] ECHR, Grand Chamber, *Kafkaris v. Cyprus*, judgment of 12 February 2008, § 150; ECHR, *Camilleri v. Malta*, judgement of 22 January 2013, §§ 39-45.

concerning the definition of the offence and the applicable penalty constitutes a breach of Article 7 of the ECHR.[10]

In this case, accessibility is not an issue. The law, in particular Article 604-bis of the Penal Code, has been published and so will the law(s) that will result from the four discussed proposals (if adopted). The IHRA definition, which is put forward as the interpretative standard for Article 604-bis, is also easily accessible.

A different question, however, is whether the foreseeability requirement has been met. An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act and/or omission committed.[11]

The question at stake is how the incorporation of the IHRA definition into criminal law as an instrument for interpreting the law contributes to or contradicts and contravenes this foreseeability requirement.

At the outset, it should be recalled that the IHRA definition has always been presented and treated as being "non-legally binding", including by the IHRA. As UK barrister Hugh Tomlison QC (Maxtrix Chambers) has noted in an earlier legal opinion: "The IHRA definition does not purport to provide a legal definition of antisemitism. It does not have the clarity which would be required from such a definition."[12] In another legal opinion, UK barrister Geoffrey Robertson AO QC (Doughty Street Chambers) has argued: "The definition is avowedly 'non-legally binding': were it to become so, or to be adopted for any disciplinary or regulatory purpose, it would be seriously deficient. [...] As a 'working definition,' it needs a lot more work before it attains the precision which Article 10 ECHR requires for a ban on speech which is 'required by law.'"[13] It should be noted that the level of precision required by Article 7 of the ECHR is particularly high.

As already said, the four bills treat the examples attached to the IHRA definition as an integral part of the definition. The core definition as adopted by the IHRA has already been quoted above – it says:

"Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."

To assess the implications of these texts (and their interpretation) for the foreseeability requirement, it should be borne in mind that the four bills aim to modify or interpret with regard to one specific form of racism, namely anti-Semitism, i.a. a criminal law provision prohibiting the dissemination of racist ideas or incitement to racist acts, regardless of the target group against which those ideas and acts are directed.

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[10] ECHR, Grand Chamber, *Kafkaris v. Cyprus*, judgment of 12 February 2008, § 150-152.
[11] ECHR, *Cantoni v. France*, judgment of 15 November 1996, § 29; ECHR, Grand Chamber, *Kafkaris v. Cyprus*, judgment of 12 February 2008, § 140; ECHR, Grand Chamber, *Del Río Prada v. Spain*, judgement of 21 October 2013, § 79.
[12] Hugh Tomlinson QC, Counsel's opinion on the IHRA definition in the matter of the adoption and potential application of the International Holocaust Remembrance Alliance working definition of anti-semitism, 8 March 2017, https://freespeechonisrael.org.uk/wp-content/uploads/2017/03/TomlinsonGuidanceIHRA.pdf (we underline).
[13] Geoffrey Robertson AO QC, Anti-Semitism: The IHRA definition and its consequences for freedom of expression, https://prc.org.uk/upload/library/files/Anti-Semitism_Opinion_03.09.18eds.pdf (we underline).

Indeed, it must be noted that Italian criminal law already contains extensive provisions regarding the punishment of racism and incitement to racial hatred. In this regard, Article 604-bis of the Penal Code states:[14]

"Article 604-bis [Propaganda and incitement to commit crime for discrimination on racial, ethnic and religious grounds]

Unless the fact constitutes a more serious offence:

a) whoever disseminates ideas based on racial superiority or racial/ethnic hatred, or incites to commit/commits discrimination acts on racial, ethnic, national or religious grounds shall be punished with imprisonment up to one year and six months or with a fine up to 6,000 euro;

b) whoever, in any way, incites to commit/commits violence or acts of provocation of violence on racial, ethnic, national or religious grounds shall be punished with imprisonment from six months to four years;

Any organization, association, movement or group whose aims include incitement to discrimination or violence on racial, ethnic, national or religious grounds is prohibited. Whoever participates in said organizations, associations, movements or groups or supports their activities shall, by the mere fact of participating or supporting, be punished with imprisonment from six months to four years. Whoever promotes or directs said organizations, associations, movements or groups shall, for that reason alone, be punished with imprisonment from one to six years.

The punishment shall be from two to six years' imprisonment if the propaganda or the instigation and incitement - committed in such a way that a real danger of dissemination arises - are fully or partially based on the denial, gross minimisation or apology of the Shoah, or the crimes of genocide, crimes against humanity and war crimes set out in Articles 6, 7 and 8 of the Statute of the International Criminal Court."

Bill No. 1627 (Gasparri) proposes to add the following wording to Article 604-bis of the Penal Code:

"The same penalty shall apply when the propaganda, instigation or incitement is based, in whole or in part, on hostility, aversion, denigration, discrimination, struggle, or violence against Jews, their property and appurtenances, including those of a religious or cultural nature, as well as on the denial of the Shoah, the right of the State of Israel to exist, or on [calls for] its destruction.

For offences committed under the fourth paragraph, if the offence is committed through the use, in any form, of signs, symbols, objects, images, or reproductions that express, directly or indirectly, prejudice, hatred, aversion, hostility, struggle, discrimination, or violence against Jews, the denial of the Shoah, or the right of the State of Israel to exist, the penalty shall be increased by up to one half."

To begin with, the text proposed by Bill No. 1627 (Gasparri) is redundant with regard to the existing text of Article 604-bis. The amendment refers to behaviors such as *"discrimination (...) or violence against Jews, their property and appurtenances"* that already fall within the scope of the law and are defined therein in general terms: disseminating ideas based on racial superiority or racial/ethnic hatred, incitement to commit/committing discrimination acts on racial, ethnic, national or religious grounds, incitement to commit/committing violence or acts of provocation of violence on racial, ethnic, national or religious grounds. In that sense, the proposal does not add anything substantial to the law.

[14] Article 604-bis, Italian Penal Code, https://www.brocardi.it/codice-penale/libro-secondo/titolo-xii/capo-iii/sezione-i-bis/art604bis.html.

The same applies to Holocaust denial, which already falls within the scope of the law. The existing text in Article 604-bis is even stricter in this regard, as it also provides for the criminalisation of gross minimisation or apology of the Shoah, while the new proposal only targets "*denial*".

The text offers only one substantial addition, with far-reaching implications (cf. *infra*): the *"denial of the right of the State of Israel to exist."*

However, the proposed text reformulates those offences in relation to the Jewish community and Jewish people in particular, adding some wording that blurs the lines set by Article 604-bis in its current form.

The first paragraph of Gasparri's proposal – "*when the propaganda, incitement, or instigation is based, in whole or in part, on hostility, aversion, denigration, discrimination, struggle, or violence"* – multiplies the terms and mixes objective and psychological elements of the offence, undermining the clarity of the provision. Legal certainty is also undermined by the second paragraph, as it is difficult to understand, for example, how a sign, symbol or object that indirectly expresses prejudice or discrimination towards Jews or *"the right of the State of Israel to exist"* could be defined.

It should also be noted that the first paragraph undermines either the principle of legality with regard to punishment (the proposed text is to be inserted at the end of Article 604-bis of the Criminal Code and refers to the *"same penalty"*, without it being possible to determine which one), or to the principle of equality and non-discrimination (Article 14 of the ECHR) if the *"same penalty"* is that provided for in the last paragraph of the current Article 604-bis, because of the much higher penalty it would apply to similar behaviour when it targets Jews or the State of Israel. The same applies to the second paragraph of the Gasparri proposal, which introduces an aggravating circumstance based on the nature of the target(s) (Jews, the State of Israel, the Holocaust), whereas these constitute only part of those referred to in the last paragraph of the provision currently in force.

The IHRA definition does not seem more suitable for clarifying the text of the existing criminal law provision. The expressions *"a certain perception of Jews"* and *"may be expressed as hatred towards Jews"* offer no additional or better guidance compared to the wording of the existing law, which refers to "*ideas based on racial superiority or racial/ethnic hatred"*, *"discrimination acts on racial, ethnic, national or religious grounds"* and "*violence or acts of provocation of violence on racial, ethnic, national or religious grounds."* In fact, due to their vagueness, the referenced wording in the IHRA definition sows confusion and adds unclarity. Obviously, this does not promote respect for the principle of legality.

Let us note that none of the explanatory memoranda accompanying the four bills indicates why Article 604-bis would not offer sufficient legal clarity and means to prosecute and punish anti-Semitic acts and ideas. Also, no examples are given of anti-Semitic acts that may go unpunished due to any current loopholes in the law, grey areas or difficulties of interpretation.

The explanatory part featuring the examples attached to the IHRA definition poses a problem of a different nature. This text, which includes the eleven *"contemporary examples of antisemitism"*, says:

"Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for "'why things go wrong." It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.

Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:

• Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.

• Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective – such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.

• Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.

• Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).

• Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.

• Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.

• Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.

• Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.

• Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.

• Drawing comparisons of contemporary Israeli policy to that of the Nazis.

• Holding Jews collectively responsible for actions of the state of Israel.

Antisemitic acts are criminal when they are so defined by law (for example, denial of the Holocaust or distribution of antisemitic materials in some countries). Criminal acts are antisemitic when the targets of attacks, whether they are people or property – such as buildings, schools, places of worship and cemeteries – are selected because they are, or are perceived to be, Jewish or linked to Jews. Antisemitic discrimination is the denial to Jews of opportunities or services available to others and is illegal in many countries."

Some of the above examples are straightforward and clearly match the three types of conduct characterized in Article 604-bis. This applies, among other things, to the following examples: *"Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion"*, *"Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective"* and "*Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust)."*

With regard to Holocaust denial, the existing criminalization in the Italian Penal Code is even wider and clearer than the related IHRA example, considering it explicitly bans in addition to denial *"gross minimisation or apology of the Shoah."*

By contrast, other examples attached to the IHRA definition are highly problematic and controversial, as they blur the line between anti-Semitism on the one hand, and legitimate criticism of the State of Israel and anti-Zionism on the other.

The example *"Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor"* illustrates this concern. Under international law, the right to self-determination is a complicated matter, but it certainly does not imply the right to establish a state to the detriment of members of other ethnic or religious communities living in the same territory, and to deny to the latter the right of self-determination. The exercise of the right to self-determination can take various forms, depending on the concrete conditions.

The referenced example equates the exercise of the Jewish people's right to self-determination with the State of Israel. This equation is a controversial and contested notion. Granting legal effect to this example injects this historical and political controversy into the sphere of criminal law. This could only result in the blurring of the existing distinction and demarcation in Article 604-bis between lawful and unlawful acts.

By creating the impression that even positions debated in a legal scientific context might be punishable under criminal law, the incorporation of this example as an instrument of interpretation undeniably undermines the principle of legality.

The second part of this particular example is even more confused. It establishes an odd link between criticizing structural racism as an essential characteristic of the State of Israel and the denial of the right to self-determination. However, the exercise of the right to self-determination can, of course, never be a pretext or a justification for a state practicing systematic discrimination, while being shielded from international criticism.

When interpreting Article 604-bis in the light of this example of the IHRA definition, the implications could stretch as far as applying to mere repetitions of the finding of the International Court of Justice (ICJ) in its Advisory Opinion of 19 July 2024 on the legal consequences arising from the policies and practices of Israel in the Occupied Palestinian territory including East Jerusalem, according to which *"Israel's legislation and measures constitute a breach of Article 3 of CERD."* The CERD (Convention on the Elimination of All Forms of Racial Discrimination) says: *"States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction."*[15]

This brief assessment shows the examples attached to the IHRA definition are highly inadequate as a legal basis and instrument for interpreting Article 604-bis of the Penal Code. The direct or indirect incorporation of the explanatory part and examples of the IHRA definition into the Penal Code would cause great uncertainty as to whether – and to what extent – criticism of Israel's violations of Article 3 of the CERD are punishable offences under Italian law.

Similar reservations can be made with regard to another IHRA example that identifies as anti-Semitism the following conduct: "*Applying double standards by requiring of it [Israel] a behaviour not expected or demanded of any other democratic nation."*

It is completely unclear to what statements and behaviours this example applies and to which it doesn't. For example, the aforementioned ICJ Advisory Opinion establishes that the State of Israel violates international law in multiple areas. It follows that it may indeed be demanded, as UN General

[15] International Court of Justice (ICJ), Advisory Opinion on the Legal Consequences arising from the policies and practices of Israel in the Occupied Palestinian territory including East Jerusalem, 19 July 2024, p. 229, https://www.icj-cij.org/case/186.

Assembly resolution A/RES/ES-10/24 of 18 September 2024 does, that Israel must immediately and unconditionally cease all violations of international law as listed in the Advisory Opinion and said UNGA resolution. By definition, such cessation cannot be demanded or expected of "any other democratic nation", because no other country in the world is the subject of an Advisory Opinion that establishes the same complex of violations. Does this render such demands, including in UNGA resolutions, antisemitic?

The lack of clarity about which acts fall within the scope of this example adds to the unsuitability of the IHRA definition for the purpose of incorporation into a criminal law text or as an instrument for interpreting criminal law. If used for this purpose, it is likely to lead to the criminalisation of a wide range of legitimate social, political and scientific discussions and positions.

In sum, it can be concluded that the incorporation of the IHRA definition into the Italian Penal Code is legally superfluous and detrimental to the existing sharp demarcation in Article 604-bis, through the definition of its constituent elements: *"disseminating ideas based on racial superiority or racial/ethnic hatred"*, *"discrimination acts on racial, ethnic, national or religious grounds"* and *"violence or acts of provocation of violence on racial, ethnic, national or religious grounds."*

The examples attached to the IHRA definition are especially unsuitable as a criminal law instrument, due to their textual vagueness, conceptual flaws and likely extension to legitimate expressions and debates, including about Israel's obligations and their violations under international law.

This is incompatible with the principle of legality laid down in Article 7 of the ECHR, which requires clear provisions in order to ensure foreseeability so that everyone can know which behaviours are punishable.

Article 10 of the ECHR: the right to freedom of expression

It is undeniable that the four bills, each in its own way, provide for state interference in the exercise of the right to freedom of expression.

Bills No. 1004 (Romeo et al.), No. 1575 (Scalfarotto) and No. 1722 (Delrio et al.) provide for measures aimed at curbing anti-Semitic content on online platforms. They also provide for measures to combat alleged anti-Semitic ideas in education. Bill No. 1627 (Gasparri), in addition to the amendments to Article 604-bis of the Criminal Code (Article 4), provides for the reporting of anti-Semitic incidents in schools and universities and for the sanctioning of staff, teachers and researchers who fail to fulfil their duties to prevent and report racist or anti-Semitic acts (Article 3).

The most direct interference with the right to freedom of expression naturally stems from Bill No. 1627 (Gasparri). This proposal will therefore be discussed hereafter in more detail.

Article10 of the ECHR reads:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or orals, for the protection of the reputation

or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[16]

The ECtHR has repeatedly said that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every human being. Subject to paragraph 2 of Article 10, it is applicable not only to *"information"* or *"ideas"* that are favorably received or regarded as inoffensive or as a matter of indifference, but "*also to those that offend, shock or disturb the State or any sector of the population*." Such are the demands of pluralism, tolerance and broadmindedness, without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.[17]

States can interfere with the freedom of expression and impose limitations. However, such interference is subjected to conditions. First, it must be based on a law. As discussed in Article 7 above, this can mean a law in the broad sense of a regulatory text. On the other hand, the law must meet the conditions of accessibility and foreseeability. In this regard, for the reasons exposed above, the requirement of foreseeability is clearly not met when a law is based on – or "adopts" – a text as vague and ambiguous as the IHRA definition.

Also, the interference must pursue one of the legitimate aims set out in Article 10 § 2 (public order, rights and reputation of others etc.). Furthermore, it must be strictly *"necessary in a democratic society."* That implies that both the requirements of proportionality and subsidiarity should be met.

In particular this last condition raises fundamental concerns in relation to the four bills. Firstly, it is striking that none of the bills refers to the requirements of respect for freedom of expression and/or assesses the proposed provisions in light of their compatibility with freedom of expression as defined by Article 10 of the ECHR and the abundant case law of the ECtHR on this subject.

This is even more striking after the ECtHR has emphasised the importance of freedom of expression in relation to the situation in the Middle East in two key judgments, CICAD v. Switzerland and Baldassi and others v. France.[18] In these judgments, the Court described the discussion on "*the particularly complicated political situation in the Middle East"* as "*a matter of general interest*."[19] Consequently, the Court specified that, according to its established case law, "*discourse on matters of public interest cannot be restricted without compelling reasons*."[20]

In Baldassi and others v. France, the ECtHR clarified and explained this principle as follows:

"The need for detailed reasoning was, however, all the more essential in the present case because it involved a situation in which Article 10 of the Convention required a high level of protection of the right to freedom of expression. On the one hand, the actions and remarks complained of concerned a subject of general interest, namely the State of Israel's compliance with public international law and the human rights situation in the occupied Palestinian territories, and were part of a contemporary debate which was ongoing in France and throughout the international community. On the other hand, these actions and statements were a form of political and "militant" expression (see, for example, Mamère v. France, no. 12697/03, § 20, ECHR 2006-XIII). The Court has repeatedly emphasised that there is little scope under Article 10 § 2 of the Convention for restrictions on political expression or on

[16] European Convention on Human Rights (ECHR), Article 10, Freedom of expression, https://www.echr.coe.int/documents/d/echr/convention_ENG.
[17] ECHR, *Handyside v. the United Kingdom*, judgment of 7 December 1976, § 49.
[18] ECHR, *CICAD v. Switzerland*, 7 June 2016 and Baldassi and others v. France, 11 June 2020.
[19] ECHR, *CICAD v. Switzerland*, 7 June 2016, § 55.
[20] ECHR, *CICAD v. Switzerland*, 7 June 2016, § 55.

debate on questions of public interest (see Perinçek, cited above, § 197, and the references therein).”[21]

In this specific case, the ECtHR found that “*the domestic court did not establish that, in the circumstances of the case, the applicants’ conviction on account of their call for a boycott of products from Israel was necessary, in a democratic society, to achieve the legitimate aim pursued, namely the protection of the rights of others, within the meaning of the second paragraph of Article 10.”*[22]

On the other hand, the ECtHR has also clearly stated that so-called hate speech or incitement to violence or discrimination does not enjoy the protection of freedom of expression, stating:

“Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (...), provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued.” [23]

Evidently, the ECtHR has ruled on numerous occasions that denying the genocide of Jews during the Second World War cannot benefit from the protection of Article 10. The decision in the case of Garaudy v. France[24] shows that this is also the case when such denial is made under the pretext of criticising Israel. In a book entitled *“The Founding Myths of Israeli Politics”*, Roger Garaudy described the Holocaust and the facts established by the Nuremberg Tribunal as such *“founding myths”*. The ECtHR drew the line between legitimate criticism of Israel and anti-Semitism, ruling that Holocaust denial is incompatible with legitimate political or ideological criticism of Zionism and the actions of the State of Israel, and determining such denial constituted an *“acute”* form of *“racial defamation”* and *“incitement to hatred”* against the Jewish community.

In this way, the Court drew a clear distinction between *“political or ideological criticism of Zionism and the actions of the State of Israel”*, which is perfectly permissible, and *“racial defamation”* or *“incitement to hatred”*, which are clearly reprehensible and do not fall within the scope of freedom of expression.

The essence of these decisions can be summarized as follows: Article 10 provides considerable and even enhanced protection of the freedom of expression with regard to the Israeli-Palestinian conflict and its potential resolution, as long as the positions taken do not descend into Holocaust denial or incitement to murder or violence under the pretext of criticising Israel or Zionism.

The text proposed by Bill No. 1627 (Gasparri) triggers several questions.

First of all, whether *“denying the right to exist of the State of Israel”* does indeed fall under the definition of hate speech, as interpreted by the ECtHR, and whether banning such denial is *“necessary in a democratic society.”*

Reflecting on a proposed French law criminalising ‘the denial’ of the state of Israel, Professor of international law François Dubuisson has noted: “*There is no obligation under international law to recognise a state. This margin of discretion is reflected in the non-recognition of the State of Israel by a number of States, particularly Arab States, but also in the non-recognition of the State of Palestine*

[21] ECHR, *Baldassi and others v. France*, 11 June 2020, § 78.
[22] ECHR, *Baldassi and others v. France*, 11 June 2020, § 77.
[23] ECHR, *Erbakan v. Turkey*, judgment of 6 July 2006, § 56.
[24] ECHR, *Garaudy v. France*, decision of 24 June 2003.

by Israel (the reverse not being true) and a number of other mainly Western States, despite the admission of the State of Palestine to the United Nations as a 'non-member observer State'."[25]

The historical causes of and possible solutions to the conflict in the Middle East are the subject of intense public and political debate, in which opinions often diverge and clash. Some representatives of the State of Israel advocate a Jewish state "from the river to the sea". Some pro-Palestinian actors advocate the existence of a Palestinian state "from the river to the sea". Opinions vary greatly on what a Palestinian state should look like. Some observers are convinced that peace can only be just and sustainable if all Israelis and Palestinians live together in a single democratic secular state, with equal rights for all, regardless of one's origin and religion. Other observers favour a theocratic state based on Judaism or Islam. Some believe that two states should coexist, while others favor a single federal state with constituent states.

It is completely unclear which of these divergent views would be tolerated under Bill No. 1627 (Gasparri) if adopted; and which would be considered "criminal" or subject to disciplinary action. Would the use of the slogan "From the River to the Sea" be tolerated if it referred to Greater Israel, while being punishable if it referred to a Palestinian state?

In the case of Hizb ut-Tahrir and others v. Germany[26], the ECtHR ruled that a call for the destruction of the State of Israel accompanied by a call to kill Israeli citizens could not enjoy the protection of the rights guaranteed by the ECHR (and therefore by Article 10).

This clear ruling is in line with the case-law of the ECtHR on hate speech and incitement to violence. However, it does not imply that arguments that the State of Israel in its current form should disappear fall by definition into the same category of hate speech.

Meanwhile, Bill No. 1627 doesn't explain and justify at all why, in a democratic society, it serves a pressing social need to limit the debate on these issues to two options: Greater Israel and the so-called 'two-state solution'. The bill's bias is indeed striking: criminalizing the denial of Israel's right to exist, but not the denial of Palestine's right to exist.

The proposed addition of Bill No. 1627 to Article 604-bis of the "denial of the right of the State of Israel to exist", as well as the numerous examples that seek to equate anti-Zionism with anti-Semitism, is therefore not in conformity with Article 10 of the ECHR, because it limits unduly a legitimate debate on a complicated and contested matter.

Similarly, criminalising *"the targeting of the state of Israel, conceived as a Jewish collectivity"*, when it is Israel that has proclaimed itself the 'nation-state of the Jewish people' through a law passed by the Knesset on 19 July 2018, would amount to preventing any criticism of the State of Israel. The nuance added to the IHRA definition, stating that *"criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic"*, appears inadequate to effectively protect the right to freedom of expression in light of the concurrence of violations of international law mentioned in the finding of the International Court of Justice (ICJ) in its Advisory Opinion of 19 July 2024 on the legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, as well as the finding in the ICJ Order of 26 January 2024 that the risk of genocide the Palestinians in Gaza faced was *"plausible"*.[27]

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[25] François Dubuisson, *Guerre à Gaza et respect de la liberté d'expression : le cas de l'apologie du terrorisme,* Revue belge de droit international, 2024,1 / 2, p. 657.
[26] ECHR, *Hizb ut-Tahrir and others v. Germany*, decision of 12 June 2012.
[27] International Court of Justice (ICJ), Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), 26 January 2024, https://www.icj-cij.org/node/203447.

The combined violations deemed established or *"plausible"* by the ICJ point to a situation that is unique in the world. Any attempt to 'weigh' criticism of this situation by the yardstick of criticism of violations occurring elsewhere in the world, is therefore futile.

Furthermore, considering that *"drawing comparisons between contemporary Israeli policy and that of the Nazis"* constitutes punishable anti-Semitism, would lead to restrictions not only on freedom of expression, but also on academic freedom, given that comparative analysis, which involves identifying similarities and differences, is a legitimate scientific approach commonly used in the social sciences. Researchers whose scientific work focuses, for example, on the ideological foundations of Zionism and/or the colonial policy of the State of Israel could see their research hindered, prohibited or even prosecuted.

More broadly, its effects on general culture can only be harmful: the ideological framework it would impose as law – Article 2, paragraph 2, of the Gasparri decree aims to establish, at all levels of education, training courses aimed at *"countering manifestations of anti-Semitism, including anti-Zionism"* – would contribute to hindering the development of critical thinking based on controversy, the foundation of any democracy.

The above analysis points to multiple violations of Article 10 of the ECHR: the proposed provisions and definitions unjustifiably restrict the freedom of expression of academics, journalists, political staff and citizens who wish to express their opinion, which, far from being *"necessary in a democratic society"*, puts the exercise of fundamental democratic rights at risk.

Article 11 of the ECHR: freedom of assembly and association

Article 11 of the ECHR reads:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."[28]

The framework of Article 11 is consistent with that of Article 10. Accordingly, for the same reasons as those raised above in relation to Article 10 and freedom of expression, the IHRA definition is unsuitable for justifying restrictions on the right to assembly and association.

This applies to Bills No. 1004 (Romeo et al.) and No. 1575 (Scalfarotto), which contain in Article 3 identical provisions that restrict freedom of assembly and association:

"The refusal to authorize a public meeting or demonstration on grounds of morality, pursuant to Article 18 of the Coordinated Text of Public Security Laws, as set out in Royal Decree No. 773 of 18 June 1931, may also be justified in the case it is considered that a serious potential risk exists of the use of symbols, slogans, messages, or any other antisemitic act as defined by the working definition of antisemitism adopted under this law."

[28] European Convention on Human Rights (ECHR), Article 11, Freedom of assembly and association, https://www.echr.coe.int/documents/d/echr/convention_ENG.

Concluding remarks

The above clearly shows that the incorporation of the IHRA definition – directly or indirectly – into Italian legislation criminalising hate crimes is not compatible with the principle of legality laid down in Article 7 of the ECHR. By blurring the boundaries of the acts criminalised by Article 604-bis of the Italian Criminal Code, introducing into criminal law all kinds of undefined concepts such as *"hostility"*, *"aversion"*, *"denigration"* and *"struggle"*, all within the framework of a reference to the IHRA definition, which in turn also uses very vague concepts in its core definition and puts forward highly debatable *"examples of antisemitism"* that, according to the legislative proposals, would become part of Italian law, the quality requirements for legislation in accordance with the case law of the ECHR on the principle of legality are clearly not met.

In addition, the four legislative proposals restrict freedom of expression, assembly and association. Pursuant to Articles 10 and 11 of the ECHR, such restrictions are only possible by means of a law that meet the same quality requirements as those set out in Article 7 of the ECHR. Here too, it must be established that the legislative proposals – insofar as they are adopted – do not meet this requirement.

Furthermore, restrictions on freedom of expression, association and assembly must be *"necessary in a democratic society"*. This second fundamental requirement is also not met in this case. The IHRA definition (including the examples attached to it) covers a number of issues on which legitimate public debate is not only permissible in a democratic society, but in fact essential for finding a just and sustainable solution to the conflict in the Middle East.

While the most obvious violation of fundamental human rights principles stems from the proposed Gasparri bill containing an amendment of Italy's Penal Code, the surveillance and disciplinary measures advocated by all draft legislation under consideration, especially due to the fact that they are based on and give legal effect to the IHRA definition, seriously jeopardise freedom of expression, academic freedom and freedom of assembly and association.

Against this background, the incorporation of the IHRA definition into Italian positive law through the proposed bills (if adopted) risks setting a dangerous precedent, as it opens the door to future and further restrictions, or even repression, of legitimate criticisms of political actors and actions, which are expressed individually or collectively. With regard to the subject matter discussed in this opinion, this can only be prevented if the essential fight against anti-Semitism draws its strength and legitimacy from consistent respect for and compliance with fundamental rights and freedoms.

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