

THE ZIONIST-ISRAEL JURIDICAL CLAIMS
TO CONSTITUTE "THE JEWISH PEOPLE"
NATIONALITY ENTITY AND TO CONFER
MEMBERSHIP IN IT: APPRAISAL IN
PUBLIC INTERNATIONAL LAW

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[T]he connection between the Jewish people and the State of Israel constitutes an integral part of the law of nations. . . . The Balfour Declaration and the Palestine Mandate given by the League of Nations to Great Britain constituted an international recognition of the Jewish people. . . .

—The Eichmann Trial Judgment (1961)¹

Most true is the saying, that all things are uncertain the moment men depart from law.

—Hugo Grotius
(writing in 1625)²

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The writer has served, from time to time, as consultant to the American Council for Judaism, a national organization of Americans of Jewish religious faith. The letterhead of its National Office states, in part: "The Council affirms that nationality and religion are separate and distinct; that no Jew or group of Jews can speak for all American Jews; that Israel is the 'homeland' of its own citizens only, and not of all Jews."

The analyses and conclusions in the present study are those of the writer alone.

¹ *The Attorney-General of the Government of Israel v. Adolf, the son of Karl Adolf Eichmann*, Criminal Case No. 40/61, District Court of Jerusalem, Israel, Dec. 11-12, 1961, affirmed, Criminal Appeal No. 336/61 Supreme Court of Israel, May 29, 1962.

² Grotius, *De Jure Belli ac Pacis*, 2 *Classics of International Law*, Prolegomena 17 (Scott ed., Kelsey transl. 1925).

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I. THE CLARIFICATION OF VALUES: ZIONIST NATIONALISM VERSUS INDIVIDUAL FREEDOM

A. THE FUNDAMENTAL VALUES

The subject of this study is in the domain of public international law. It emphasizes the impact of diverse juridical doctrines and principles upon values. The task of public law, whether international or municipal, is conceived as providing an institutional framework in which the individual may achieve his fundamental values. These values³ are:

(1) *Respect for the dignity of the individual*—negatively, this precludes discrimination based upon religion, race, and all other factors which are irrelevant to individual worth; positively, this includes recognition of the general merit of all people as human beings and the particular merit of each person as an individual.

(2) *Equality before the law and the sharing of governmental power*—this includes an opportunity for fair participation in the processes of government in the international, national, and local communities.

(3) *Enlightenment and information*—this includes freedom of inquiry and opinion, which are indispensable to rational decision-making.

(4) *Psychic and physical well-being*—negatively, this requires freedom from arbitrary burdens, restrictions, and punishments; positively, it includes the opportunity to develop individual abilities.

³ The eight value categories reflect the work of Professors Lasswell and McDougal of the Yale University Law School. Their classic introductory study, Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *Yale L.J.* 203 (1943), makes explicit the relevance of value clarification to juridical analysis. The eight categories appear substantially in McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 14 *Law & Contemp. Prob.* 490, 491 (1949). Studies embodying value clarification include: McDougal & Associates, *Studies in World Public Order* (1960); McDougal, *Perspectives for an International Law of Human Dignity*, 53 *Proc. Am. Soc. Int'l L.* 107 (1959) (Address as President of the American Society of International Law); Lasswell & Kaplan, *Power and Society* (Yale Law School Studies No. 2, 1950). Other significant studies which do not include explicit value analysis but are, nevertheless, directly concerned with the impact of legal doctrines upon human values include: Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law* (1962); Freund, *The Supreme Court of the United States: Its Business, Purposes, and Performance* (1961).

(5) The opportunity to participate in *congenial and constructive inter-personal relationships*.

(6) *Goods and services* necessary to adequate standards of living.

(7) *Skills and "know-how"* necessary to achieve all values in a factual sense.

(8) Freedom to develop and apply *conceptions of morality and ethics*—this includes the freedom to worship God, or the freedom not to worship, depending upon individual choice.

A democratic conception of international and municipal law,⁴ as opposed to totalitarian or authoritarian conceptions,⁵ seeks to institutionalize the shaping and sharing of such values in a rational and peaceful context. At the minimum, such a democratic juridical conception must prohibit the coercion of individuals in their shaping and sharing of values where the coercion is exercised by public entities which are foreign to the individuals coerced.⁶

B. THE CLARIFICATION OF WORD SYMBOLS

Words without specified referents are highly ambiguous and are capable of having multiple and inconsistent meanings ascribed to them by writers and readers. In order to achieve clarity, it is desirable to set forth the general terms of reference which are connected with certain key word symbols which appear throughout the study.⁷ It is recognized that these same word symbols are used by others with different terms of reference than those employed here.

Jew is used to refer to a voluntary adherent of the religion of Judaism. *Judaism* is used to refer to one of the monotheistic religions of universal moral values. The word "Jew" is used by the writer to refer to an adherent of Judaism in the same way that "Christian" refers to an adherent of Christianity.⁸

⁴Democratic conceptions of law are set forth in each of the studies cited in supra note 3 except the Lasswell and Kaplan one, which is a political science analysis.

⁵For a contemporary analysis of Soviet Russian conceptions, see Ramundo, *The Socialist Theory of International Law* (George Washington University Institute for Sino-Soviet Studies No. 1, 1964).

⁶Even in democratic municipal juridical systems, where individuals participate in governmental processes, they do not have effective means, as individuals, to protect themselves from foreign coercion. Consequently, they must seek governmental prohibition of such foreign coercion.

⁷Systematic analysis of the meaning of words appears in Ogden & Richards, *The Meaning of Meaning* (1936) and Morris, *Signs, Language and Behavior* (1946). See also Chafee, *The Disorderly Conduct of Words*, 41 *Colum. L. Rev.* 381 (1941). A useful introduction to word symbols employed in the present study appears in Sussman, "Jew," "Jewish People," and "Zionism," 20 *Etc.: A Review of General Semantics* 372 (1963).

⁸Professor Robert M. MacIver has written concerning the stated credo of the

In setting forth a religious conception of "Jew" and "Judaism" the writer is adopting a basic tenet of traditional and contemporary Judaism. In 1878 Rabbi Hermann Adler, then the Chief Rabbi in England, after stating that "Judaism has no political bearing whatever," continued:

Ever since the conquest of Palestine by the Romans we have ceased to be a body politic. We are citizens of the country in which we dwell. We are simply Englishmen or Frenchmen or Germans, as the case may be, certainly holding particular theological tenets and practising special religious ordinances; but we stand in the same relation to our countrymen as any other religious sect, having the same stake in the national welfare and the same claim on the privileges and duties of citizens.⁹

The same religious concept of Judaism has been manifested in the United States. In 1883 Rabbi Isaac M. Wise, who had emigrated from Bavaria, wrote: "We, citizens of the United States who believe in Moses and the Prophets, are an integral element of this nation . . . with no earthly interests or aspirations different from those who believe in Jesus and his Apostles."¹⁰

In 1885 a group of Reform Rabbis met in Pittsburgh to enunciate basic principles of modern Judaism. Their Pittsburgh Platform included this statement:

We consider ourselves no longer a nation but a religious community. And therefore expect neither a return to Palestine, nor a sacrificial worship under the administration of the sons of Aaron, nor the restoration of any of the laws concerning the Jewish state.¹¹

American Jewish Committee that "A Jew in America can live a full and rich Jewish life as an integrated American":

In the first place, what does it mean? Suppose we substitute another word in place of "Jewish"? We would then read, for example: "A Frenchman in America can live a full and rich French life as an integrated American." A Frenchman in America, a Pole, an Englishman, a Chinese? The statement would not be very meaningful and might easily be resented. But if we said instead: "a Roman Catholic, a Mohammedan, a Lutheran can live" and so forth, then the expression would be acceptable, since all religions have equal rights and none involves any limitations on American citizenship.

National Community Relations Advisory Council, Report on the Jewish Community Relations Agencies 39 (1951). A thoughtful appraisal appears in Lasky, *An Analysis of the MacIver Report* (American Council for Judaism, undated).

See the text accompanying note 304 *infra*.

⁹ Quoted in Stein, *The Balfour Declaration* 75 (1961).

¹⁰ Quoted in Berger, *The Jewish Dilemma* 239 (1946).

¹¹ *Id.* at 240. A contemporary conception of Judaism as a religion of universal moral values appears in American Council for Judaism, *An Approach to an American Judaism* (1953).

The sole element in the present writer's use of the word "Jew" is the religious one. Some individuals, while acknowledging the religious element, may regard Jewishness as involving another factor. The character of such an additional factor may be cultural, racial, or national depending upon the preferred values of the individual. Some individuals regard themselves, and may be regarded by others, as Jews because their parents were Jews. Jews, like Christians or Moslems, are fully entitled to regard their religious identification as derived from that of their parents. Similarly, a Jew who regards his identification as involving a common cultural heritage with other Jews should be entirely free to adopt such a view. It should not be necessary to emphasize the fact that there is no empirical basis upon which Jews can be deemed to be members of a single racial group.¹²

Zionist is employed to refer to a member or supporter of the modern political movement of Zionism, which was started as an organized political movement at the First Zionist Congress in Basle, Switzerland, in 1897.¹³ Though many Zionists profess Judaism, there is no reason to limit an accurate functional conception of "Zionist" to those who claim to be Jews.¹⁴ Prime Minister David Lloyd George¹⁵ and Foreign Secretary Arthur Balfour,¹⁶ who were members

¹² The distinction between racial conceptions in anthropology and non-scientific racist ideologies is demonstrated in Benedict, *Race: Science and Politics* (1945).

Jews are people who acknowledge the Jewish religion. They are of all races, even Negro and Mongolian. European Jews are of many different biological types; physically they resemble the populations among whom they live. The so-called "Jewish type" is a generalized type common in the Near East in countries bordering on the Mediterranean. Wherever Jews are persecuted or discriminated against, they cling to their old ways and keep apart from the rest of the population and develop so-called "Jewish" traits. But these are not racial or "Jewish"; they disappear under conditions where assimilation is easy.

Id. at 177. See also Comas, *Racial Myths* 27-32 (UNESCO 1958).

¹³ The Zionist Basle Program is examined in the text accompanying notes 59-63 *infra*.

¹⁴ The distinction between "adherents of the Jewish faith" and "Zionism" was recognized in an Address by King Hussein of Jordan, Washington, D.C., April 15, 1964. *Washington Post*, April 16, 1964, p. 1, cols. 2-3.

¹⁵ The compatibility between anti-Semitism and pro-Zionism is described by the authoritative Zionist historian of the Balfour Declaration with reference to Lloyd George. In some of his speeches there was "a streak of ordinary vulgar anti-Semitism," though he was also "sensitive to the Jewish mystique." Stein, *supra* note 8, at 143. Specific examples from his anti-Semitic speeches are provided by Stein. Id. at 143 & nn.20-21.

Stein describes the attitude of Field Marshal Smuts, another eminent political supporter of Zionism: "Smuts thought highly of Jews, but not so highly that he would not be glad to see some counterattraction provided for Jews who might otherwise be drawn to South Africa." Id. at 478.

¹⁶ Stein describes a certain ambivalence in Balfour's attitude: "If Balfour became an ardent pro-Zionist it was not simply out of a sentimental tenderness for Jews." Id. at 163-64.

Balfour's introduction to a classic Zionist history of Zionism suggested that the

of the British Government which issued the Balfour Declaration, did not claim to be Jews. Yet, in view of their political support for Zionism, they should be regarded as Zionists.

Zionist Organization is used to refer to the political entity constituted by the First Zionist Congress.¹⁷ It is an instrumentality designed to achieve the political objects of Zionism. Since the 1922 League of Nations Mandate for Palestine, the term "Zionist Organization" has been equivalent to the term "Jewish Agency."¹⁸ Article 4 of the Mandate recognized the Zionist Organization as a Jewish Agency and as a "public body."

Anti-Zionist is employed to refer to an opponent of the Zionist movement. Anti-Zionists include those who are identified as Jews, such as Edwin Montagu,¹⁹ a member of the same British Government which issued the Balfour Declaration and who insisted upon the inclusion of the safeguard clauses in it. Anti-Zionists also include democratically oriented individuals of other faiths who reject the juridical and secular separatism which Zionism attempts to impose upon Jews. From a democratic perspective, the term "anti-Zionist" is negative in form but positive in substance. In order to reject the political postulates of Zionism, an individual must have a set of political postulates and objectives inconsistent with Zionism. The most clearly inconsistent ones are those of democracy which are conceived as embracing the positive values of human dignity and individual freedom for all.²⁰ It should be recognized that some anti-

concerns of the anti-Zionists about political Zionism were baseless: "Everything which assimilates the . . . status of the Jews to that of other races ought to mitigate what remains of ancient antipathies . . ." 1 Sokolow, *History of Zionism* xxxiii (1919), cited hereafter as "Sokolow."

¹⁷ The Constitution of the World Zionist Organisation (as adopted by the Zionist General Council at its Session in Jerusalem, Israel, in December 1959-January 1960, in pursuance of the Resolution of the 24th Zionist Congress) demonstrates a high degree of centralized control over individual and group (such as the Zionist Organization of America) members. The writer, consequently, uses the term, "Zionist Organization," to refer to the World Zionist Organization, including its individual and group members, as a single public body. See the text accompanying note 246 *infra*.

¹⁸ The Palestine Mandate, which established the equivalency, is examined in the text accompanying notes 210-22 *infra*.

¹⁹ Stein, *supra* note 9, at 484, states, with reference to Montagu: "Thus, the question of a pro-Zionist declaration reached the War Cabinet at a time when the only Jew with direct access to the inner circle was an implacable anti-Zionist."

²⁰ See the studies cited in note 3 *supra* and Lasswell, *Democratic Character* (1951), in the compilation entitled *The Political Writings of Harold D. Lasswell* 463-525 (1951).

For a specific rejection of the postulates of Zionism see M. R. Cohen, *The Faith of a Liberal*, ch. 39, *Zionism: Tribalism or Liberalism* (1942); Berger, *Judaism or Jewish Nationalism: The Alternative to Zionism* (1957).

Concerning Zionist political activities in the United States, see Senate Committee on Foreign Relations, Report on Foreign Agents Registration Act, S. Rep. No. 875, 88th

Semites and other anti-democratic individuals may style themselves as anti-Zionists. The existence of such individuals, however, should not obfuscate the basic democratic character of many anti-Zionists.

Non-Zionist is a chameleon-like conception. Individuals who wish to support Zionism and the State of Israel financially, while attempting to disengage themselves from the juridical-political characteristics of Zionism and the State of Israel, may regard themselves as being "non-Zionists." Dr. Chaim Weizmann, the Zionist leader and first president of the State of Israel, has described non-Zionism in this way:

[T]hose wealthy Jews who could not wholly divorce themselves from a feeling of responsibility toward their people, but at the same time could not identify themselves with the hopes of the masses, were prepared with a sort of left-handed generosity, on condition that their right hand did not know what their left hand was doing. To them the university-to-be in Jerusalem was philanthropy, which did not compromise them; to us it was nationalist renaissance. They would give—with disclaimers; we would accept—with reservations.²¹

One of the most confusing aspects of non-Zionism is that non-Zionists, unlike Zionists and anti-Zionists, often appear to have no clarified political values of their own.²² Many anti-Zionists regard non-

Cong., 2d Sess. (Feb. 21, 1964). One of the nine cases studied by the Committee was Zionism. The cases were selected because of activities believed to be "inimical to the interests of the United States . . ." *Id.* at 5. See Stevens, *American Zionism and U. S. Foreign Policy, 1942-1947* (1962).

For uncritical approval of the postulates of Zionism, see Safran, *The United States and Israel* (1963); Halpern, *The Idea of the Jewish State* (1961).

²¹ *Trial and Error: The Autobiography of Chaim Weizmann* 75 (1949). The Weizmann autobiography is cited hereafter as "Weizmann." It not only contains material of juridical significance but provides psychological insight into Zionist mentality. See generally Lasswell, *Power and Personality* (1948); Lasswell, *Psychopathology and Politics* (1930) in the compilation entitled *The Political Writings of Harold D. Lasswell* 1-282 (1951).

²² Some regard the American Jewish Committee as a non-Zionist organization. See Appendix A for "An Exchange of Views" involving the American Jewish Committee. American Jewish Committee & Jewish Publication Society of America, *63 American Jewish Year Book* 499 (1962) describes the American Jewish Committee as follows:

Seeks to prevent infraction of the civil and religious rights of Jews in any part of the world and to secure equality of economic, social and educational opportunity through education and civic action. Seeks to broaden understanding of the basic nature of prejudice and to improve techniques for combating it. Promotes a philosophy of Jewish integration by projecting a balanced view with respect to full participation in American life and retention of Jewish identity.

The same source describes the anti-Zionist American Council for Judaism as follows:

Seeks to advance the universal principles of a Judaism free of nationalism, and

Zionists as being among the practical supporters of Zionism. If this is an accurate appraisal, it must be added, nevertheless, that non-Zionists often conceal from themselves (and perhaps from others) the extent to which their support is employed for the political purposes of Zionism.

Israel is used to refer to the present Near Eastern State of Israel.²³ It and the Zionist Organization are employed as the two principal political instruments of Zionist nationalism. It is recognized, however, that the word "Israel" has a deeply significant theological meaning to Jews. Thus, one of the traditional religious ways of referring to Jews is to employ the term, "the Children of Israel." Nevertheless, since this study is a juridical one, the term "Israel" is not used in its religious sense.

The State of Israel is sometimes termed a "Jewish" state. Such a label must be rejected if "Judaism" is to be regarded as a religion of universal moral values, rather than a religion of nationalism or tribalism, and if a "Jew" is to be regarded as a voluntary adherent of Judaism. From a functional standpoint there should be no hesitation in describing Israel as a "Zionist" state. Since 1948, when the State of Israel was established, the basic political objectives of Zionism and the State of Israel have been the same.²⁴ This identity has been enunciated explicitly in claims advanced in public international law.²⁵ Where it is not made explicit, a continuing common political program may be presumed to be the result of coordinated political planning rather than of a long continuing series of coincidences.

Zionist-Israel sovereignty is used to refer to the integral relationship between the State of Israel and the Zionist Organization. The public law character of this relationship between the State of Israel and the Zionist Organization is recognized explicitly in the Israeli Status Law of 1952 and the ensuing Covenant between the Government of

the national, civic, cultural, and social integration into American institutions of Americans of Jewish faith.

Ibid.

Some regard the American Jewish Congress as pro-Zionist. It is described in the same source as follows:

Seeks to eliminate all forms of racial and religious bigotry; to advance civil rights, protect civil liberties, and defend religious freedom and separation of church and state; to promote the creative survival of the Jewish people; to help Israel develop in peace, freedom, and security.

Ibid.

²³ For official information concerning Israel, see the annual Israel Government Year-Book.

²⁴ See sec. III B. For official justification of Zionist political objectives see Israel Office of Information (New York), *Israel's Struggle for Peace* (1960).

²⁵ *Ibid.*

Israel and the Zionist Executive of 1954.²⁶ The Status Law did not create the relationship between State and Organization, but rather recognized it.²⁷ The Covenant spells out an allocation and coordination of governmental functions as between State and Organization in furthering the Zionist political objectives of both.

The Jewish people is the most ambiguous concatenation of word symbols employed in the present study. Although the term, "the Jewish people," does not appear in Holy Writ, it was given an almost exclusively religious meaning until the founding of Zionism. Its most usual use was as a synonym for "Jews," "Israelites," "the Children of Israel," and "the people of the Book."²⁸ The Zionist movement has captured the term for its own juridical-political purposes and, consequently, the writer uses "the Jewish people" to refer to the claimed constituency of Zionist nationalism. Even though the Zionists give a specific nationalistic meaning to the words, they have not rejected whatever political advantages accrue to them from the ambiguities of the words.^{28a} Thus, they accept the support of those who have found humanitarian or religious meanings in "the Jewish people."²⁹

C. POLITICAL ZIONISM

In a fundamental sense, political Zionism is the reaction of Jews to ghetto life and the consequent denial to them of an opportunity to participate meaningfully in the secular life of the states of their regular nationalities.³⁰ The existence of ghetto life in some states reflected anti-Semitism. Zionism postulated that anti-Semitism was fundamental and ineradicable. Upon this postulate, the Zionists base their juridical objectives: that "the Jewish people" be constituted as a nationality entity and that membership in it be conferred upon Jews.³¹

In order to understand the Zionist views, it is useful to quote from

²⁶ The Status Law and Covenant are examined in the text accompanying notes 236-46 *infra*.

²⁷ See Lasky, *Between Truth and Repose* 51 (1956). The Lasky study is subtitled: *The World Zionist Organization, Its Agency for the State of Israel, The Means by Which It Raises Its Funds, and the Structure Through Which It Operates in the Diaspora: A Study in Organization*.

²⁸ Sussman, *supra* note 7, at 373. See note 304 *infra*.

^{28a} Sussman, *supra* note 7, at 374-75.

²⁹ Weizmann 75 and *passim*.

³⁰ The same conclusion is reached in Taylor, *Prelude to Israel: An Analysis of Zionist Diplomacy, 1897-1947*, v, vi (1959), cited hereafter as "Zionist Diplomacy."

³¹ The juridical objectives of Zionist nationalism stated in the text are set forth and appraised in the balance of the present study.

the words of Dr. Theodor Herzl, the founder of political Zionism, in his classic Zionist statement entitled *The Jewish State*.³²

We naturally move to those places where we are not persecuted, and there our presence produces persecution. This is the case in every country, and will remain so, even in those highly civilized—for instance, France—till the Jewish question finds a solution on a political basis. The unfortunate Jews are now carrying Anti-Semitism into England; they have already introduced it into America.³³

Herzl dealt with nationality status on the basis of Jewish identification as follows:

But the distinctive nationality of Jews neither can, will, nor must be destroyed. It cannot be destroyed, because external enemies consolidate it. . . . Whole branches of Judaism may wither and fall, but the trunk remains.³⁴

The desire for territory was summarized by Herzl as follows:

The whole plan is in its essence perfectly simple, as it must necessarily be if it is to come within the comprehension of all.

Let the sovereignty be granted us over a portion of the globe large enough to satisfy the rightful requirements of a nation; the rest we shall manage for ourselves.³⁵

Herzl anticipated the opposition which Zionism would arouse among Jews:

Perhaps we shall have to fight first of all against many an evil-disposed, narrow-hearted, short-sighted member of our own race.³⁶

The most striking feature of Herzl's views is not that he stated a proposed political solution to the problem of anti-Semitism in 1896. Its deeper significance is that the juridical-political core of Zionism has not changed from Herzl's time to the present.³⁷ Today Zionist

³² The book was published in German in 1896 as *Der Judenstaat*. The English translation from which the ensuing quotations in the text are taken is entitled *The Jewish State: An Attempt at a Modern Solution of the Jewish Question* (D'Avigdor and Israel Cohen transl. 1943).

³³ *Id.* at 19, 20.

³⁴ *Id.* at 24.

³⁵ *Id.* at 39.

³⁶ *Id.* at 108.

³⁷ Sec. III demonstrates the consistency through time of the juridical objectives of Zionism.

leaders stress the importance of saving Jews from the persecutions brought about by persistent anti-Semitism.³⁸ At the same time, they appear to be as afraid of religious freedom and secular integration as of persecution itself. Thus, Nahum Goldmann, the president of the World Zionist Organization, has stated: "The object of the Jewish State has been the preservation of the Jewish people, which was imperiled by emancipation and assimilation. . . ." ³⁹ As recently as March 16, 1964, a Zionist Executive-Israeli Government Joint Communique referred to "the dangers of assimilation affecting Jewish communities. . . ." ⁴⁰ Zionism continues to manifest defensiveness to the threat of democratic systems based upon individual rights. Recent commentary in the *Jerusalem Post* states: "Today, Zionist leaders do not speak for the majority of Jewry, though all but a tiny proportion of the nation [*i.e.*, "the Jewish people"] give their friendship and support to the State of Israel." ⁴¹

D. CULTURAL ZIONISM

In addition to political Zionism, there also has been a movement known as "cultural" or "spiritual" Zionism. Achad Ha'am was the preeminent leader of this type of Zionism.⁴² He accepted some of the aspects of political Zionism, provided that they were subordinated to the fundamental humanitarian principles of Judaism.⁴³ He participated in the negotiations leading to the issuance of the Balfour Declaration but attached an entirely different meaning to it than did

³⁸ See the Joint Israel-Zionist Communique of March 16, 1964, para. 1, in the text accompanying note 261 *supra*.

³⁹ Quoted in *Zionist Diplomacy* 2.

⁴⁰ Note 38 *supra*.

⁴¹ March 16, 1964, p. 1, col. 1. The *Jerusalem Post* is regarded as a semi-official organ of the Israeli Government.

⁴² 1 *Esco Foundation for Palestine, Palestine: A Study of Jewish, Arab, and British Policies 18-22 (1947)* contrasts the Zionism of Achad Ha'am with political Zionism. "Achad Ha'am" (also spelled Ahad Ha'am) was the pen name of Asher Ginsberg, whose work comprised a philosophy of Judaism. "Achad Ha'am" is translated as "One of the People."

The *Esco* work cited (comprising two volumes) is cited hereafter as "Esco, Study." The word "Esco" is an acrostic of Ethel S. Cohen, who with her husband, was a founder of the *Esco Foundation for Palestine*. The *Esco Study* is a scholarly one written by several contributing authors. Its authors include such Zionists as: Rose G. Jacobs, Avraham Schenker, and Benjamin Shwadran. It uses the word "Jewish" in the title and in the text *passim* in contexts where "Zionist" would be more accurate.

⁴³ Achad Ha'am, *Ten Essays on Zionism and Judaism passim* (Leon Simon transl. 1922). The translator's introduction states at 39:

It is not surprising that he went to the first Zionist Congress; but it is not surprising, either, that he came away disappointed. For he found that the similarity between his own ideal and that of the Zionist movement was only external.

the political Zionists.⁴⁴ He believed that "a national home" for some Jews in Palestine would be consistent with the nationalistic aspirations of the Arabs. He regarded Palestine as an opportunity for creative collaboration with the Arabs for the common benefit of all of the inhabitants of the country. He hoped that Palestine would become a center of Jewish religion and culture which would enrich Jews in other countries as well as those in Palestine.⁴⁵

Achad Ha'am's central differences with the political Zionists concerned both the justification for the movement and its character. Whereas political Zionism thought of itself as the answer to negative and destructive anti-Semitism, Achad Ha'am regarded Zionism as an expression of the humanitarianism of Judaism and the creativity of Jews.⁴⁶ He valued individual rights and human dignity for all, including Arabs.⁴⁷ He believed that "a national home in Palestine" for some Jews did not conflict with the single nationality of other Jews. Thus, the humanitarian Zionism of Achad Ha'am was completely consistent with individual freedom for all, in Palestine and in other countries as well.

E. THE CONFLICT BETWEEN ZIONIST NATIONALISM AND INDIVIDUAL FREEDOM

Professor Morris Raphael Cohen, the distinguished American scholar, has stated the basic conflict between Zionist nationalism and individual freedom:

Though most of the leaders of Zionism in America are sincerely and profoundly convinced of the compatibility of Zionism and Americanism, they are none the less profoundly mistaken. Nationalistic Zionism demands not complete individual liberty for the Jew, but group autonomy.⁴⁸

Jews, with other individuals, have the opportunity to expand and perfect existing democratic systems which include religious free-

⁴⁴ Note 157 *infra*.

⁴⁵ *Supra* note 43; Esco Study 20.

⁴⁶ Esco Study 19.

⁴⁷ Professor Hans Kohn has described the last years of Achad Ha'am's life which were spent in Palestine at the start of the British Mandate. He died with the conviction that the ideals of cultural Zionism were being betrayed by the political Zionists. Kohn quotes one of Achad Ha'am's last letters which reflected his despair: "Is *this* the dream of a return to Zion which our people have dreamt for centuries: that we now come to Zion to stain its soil with innocent blood?" Kohn, *Zion and the Jewish National Idea*, 46 *Menorah Journal* 17, 39 (1958).

⁴⁸ M. R. Cohen, *supra* note 20, at 329.

dom and secular integration for all.⁴⁹ The significant juridical features of such democratic systems are individual rights and equality.⁵⁰ By contrast, Zionist nationalism seeks to limit the individual freedom of Jews, wherever they are, by attempting to constitute "the Jewish people" nationality entity and to confer membership in it. The irreconcilable value conflict between Zionist nationalism and individual freedom has not changed from the time of Achad Ha'am to the present. Professor Cohen provides accurate summary:

The fact, however, is that the American ideal of freedom is just what the Zionists most fear. At bottom they have no confidence that with complete toleration and full freedom Judaism can hold its own in the open field.⁵¹

II. THE CENTRAL JURIDICAL ISSUES

The conflict of values considered in the previous section could be analyzed from the standpoint of any of several perspectives. For example, the religious or theological significance of the value conflict is highly important. The present study, however, is limited to public international law and excludes consideration of theological and other issues no matter how important they may be.

Two central issues are examined in the present study. The first is the juridical validity under public international law of the claim to *constitute*⁵² "the Jewish people" nationality entity. The second issue is the juridical validity under public international law of the claim to *confer membership* in the same alleged nationality entity. The two issues are closely related and may appear at times to be simply different aspects of the same basic issue. When they are considered together, they may be referred to simply as "the Jewish people" nationality claims. They are the basic juridical claims of the Zionist-Israel sovereignty. Section III of this study will examine the formulation and implementation of these nationality claims and section IV

⁴⁹ Secular integration does not impinge upon the retention of separate religious identification.

⁵⁰ Obvious illustration is provided by the United States Constitution including its Bill of Rights.

⁵¹ M. R. Cohen, *supra* note 20, at 330.

⁵² The word "constitute" is used throughout the text to refer to creation or establishment in public law. In this sense, the creation of claimed nationality entities or public bodies is the outcome of the constitutive process in public law. Where such claimed entities or bodies are not so established in law, it is because of the failure to operate the constitutive process successfully. For an analysis of the constitutive process in a different public law context, see McDougal, Lasswell & Vlasic, *Law and Public Order in Space* 94-137, 1027-1092 (1963).

will appraise them under the applicable limitations of international law. A concluding appraisal will be made in section V.

"The Jewish people" nationality claims are used by the Zionists as the foundation for a second grouping of juridical claims such as the claims to constitute and employ public bodies to act in behalf of "the Jewish people." Thus, the State of Israel is claimed to be "the sovereign State of the Jewish people" rather than only the state of its regular nationals.⁵³ In the same way the Zionist Organization public body is claimed to represent and to act for "the Jewish people" rather than only Zionists.⁵⁴ These derivative claims, and others, are not examined in detail in the present study.

III. THE FORMULATION AND IMPLEMENTATION OF THE CLAIMS TO CONSTITUTE "THE JEWISH PEOPLE" NATIONALITY ENTITY AND TO CONFER MEMBERSHIP IN IT

A. "THE JEWISH PEOPLE" NATIONALITY CLAIMS ADVANCED PRIOR TO THE ESTABLISHMENT OF THE STATE OF ISRAEL

1. *The First Zionist Congress (Basle 1897)*

Political Zionism, as opposed to the cultural concept of Zionism, has been important since the First Zionist Congress. In the period since the Balfour Declaration, however, it has become the dominant type of Zionism.⁵⁵

The First Zionist Congress was called by Dr. Theodor Herzl to provide political and juridical implementation for his basic assumption of ineradicable anti-Semitism and the consequent necessity of a "Jewish" state.⁵⁶ In the opening address Herzl stated the object of the meeting: "We are here to lay the foundation stone of the house which is to shelter the Jewish nation."⁵⁷ The Congress then proceeded to constitute the Zionist Organization,⁵⁸ and concluded with the adoption of a statement of Zionist purpose known as the Basle Program. The key provision stated: "The aim of Zionism is to

⁵³ See, e.g., the excerpts from the Eichmann Trial Judgment in the text accompanying note 256 *infra*.

⁵⁴ See, e.g., the Status Law, para. 2, reproduced in the text accompanying note 239 *infra*.

⁵⁵ Weizmann, ch. 18, *The Balfour Declaration and subsequent chs.*; *Zionist Diplomacy* *passim*, especially ch. 4, *The Growth of Political Zionism*; 2 Sokolow 83-99.

⁵⁶ *Supra* note 32; *Zionist Diplomacy* 3-6; 1 Sokolow 268-72; 1 Esco Study 40-42.

⁵⁷ 1 Esco Study 40.

⁵⁸ *Id.* at 42; *Zionist Diplomacy* 6.

create for the Jewish people a home in Palestine secured by public law."⁵⁹ Four means were formulated to obtain this objective:⁶⁰ (1) the promotion of Zionist (termed "Jewish") immigration to Palestine; (2) the "organization and binding together of the whole of Jewry" through appropriate means; (3) "strengthening and fostering of Jewish national sentiment and consciousness"; (4) taking steps toward "obtaining government consent" for the objectives of Zionism.

The means proposed were the same as those formulated in the previous year by Herzl in *The Jewish State*⁶¹ except that the word "home" was substituted for the word "state." The change in terminology was designed to appease those Jews who had a sentimental, cultural, or religious attachment to Palestine, but who objected to the concept of Jewish nationality or a Jewish state.⁶² At the same time, Herzl recognized that his political supporters would read it as meaning "Jewish State" in any event.⁶³ This calculated ambivalence concerning a central element of the Zionist political program aided Herzl in obtaining support for Zionism. Succeeding Zionist leaders have consistently used this technique of calculated ambiguity in terminology in order to enhance Zionist appeal among those opposed to Zionist nationality concepts.⁶⁴

Herzl, as the first president of the Zionist Organization, started the practical implementation of the Zionist program. In October and November 1898, he met with Kaiser Wilhelm II, who was visiting the Ottoman Empire.⁶⁵ Herzl suggested the establishment of a land development company which would be operated under German protection by Zionists in Palestine.⁶⁶ At the first meeting, the Kaiser indicated interest and even enthusiasm,⁶⁷ but he rejected Herzl's proposal at the second meeting.⁶⁸

Herzl next attempted to negotiate directly with the Sultan of Turkey. In May 1901, he proposed Zionist immigration to Palestine

⁵⁹ 1 Sokolow 268.

⁶⁰ The ensuing summary and quotations in the text are taken from 1 Sokolow 268-69 where the Basle Program is set forth.

⁶¹ Supra note 32.

⁶² Zionist Diplomacy 5.

⁶³ Id. at 6.

⁶⁴ The preeminent example remains "the Jewish people." See Weizmann passim; see Stein passim.

⁶⁵ 1 Esco Study 43; Zionist Diplomacy 6-7.

⁶⁶ 1 Esco Study 43; Zionist Diplomacy 7.

⁶⁷ See 1 Esco Study 43, which partially attributes the interest and enthusiasm to anti-Semitic motivations.

⁶⁸ Zionist Diplomacy 7. See also 1 Esco Study 43.

together with the enticing suggestion that generous financial assistance could be provided in developing the natural resources of the Ottoman Empire.⁶⁹ The Sultan rejected the idea of mass Zionist immigration to Palestine.⁷⁰

In October 1902, the Zionist Executive entered into negotiations with the British Government to obtain portions of the Sinai Peninsula for immigration and settlement.⁷¹ These negotiations broke down,⁷² but in 1903 the British Government offered the Zionist Organization the opportunity to colonize a portion of Uganda.⁷³ Herzl favored the Uganda offer. No concrete action was taken upon it, however, and it was dropped after Herzl's death in 1904.⁷⁴ In view of the subsequent Zionist emphasis upon Palestine, the Uganda proposal may appear to be surprising. It is significant as an indication of the secular and political character of the Zionist movement. The search for territory elsewhere when the Palestine objective appeared to be frustrated reveals the lack of strong cultural and religious ties to Palestine. Only at a later stage, did the emotional attachment of the Zionist movement to Palestine become so great that no other territory would be considered.⁷⁵

At the outset of the First World War, the Zionist record was one of failure and frustration in public international law. The Zionist Organization had been created, and diplomatic negotiations had been conducted with governments. Perhaps the mere conduct of such negotiations amounted to a measure of recognition for the Zionist Organization as an international public body. Nevertheless, the negotiations brought no practical political results for either the Organization or its claimed nationality entity of "the Jewish people."

2. *The Balfour Declaration (1917)*

a. *Preliminary Description of the Basic Document*

In 1904, Chaim Weizmann, a man of Russian origin, moved to England because of his conviction that the British Government was the most likely supporter of political Zionism.⁷⁶ During the decade

⁶⁹ 1 Esco Study 44; Zionist Diplomacy 7.

⁷⁰ 1 Esco Study 44 attributes humanitarian motives to the Sultan in allowing some Jewish refugees to settle while rejecting the "national aspects" of immigration.

⁷¹ Zionist Diplomacy 7.

⁷² Ibid.

⁷³ Ibid.; 1 Esco Study 48-49.

⁷⁴ Ibid.

⁷⁵ The time of this attachment was no later than the Balfour Declaration of Nov. 2, 1917.

⁷⁶ Weizmann 93.

before the First World War, Dr. Weizmann and other Zionist leaders contacted many influential persons in behalf of political Zionism.⁷⁷ Their chief purpose was to implement the Zionist Basle Program by obtaining public law assent from the British Government to the Zionist nationality claims. During the First World War, Dr. Weizmann became the principal Zionist negotiator for such a British public law declaration.⁷⁸ He habitually spoke and acted in behalf of the Zionist-claimed constituency of "the Jewish people." The British Government did not unequivocally curtail his claimed authority as spokesman for "the Jewish people" until anti-Zionist British Jews entered into the negotiations and made it clear that Dr. Weizmann lacked authority to speak for anti-Zionist Jews. The ensuing Balfour Declaration marked a "painful recession,"⁷⁹ to use Dr. Weizmann's words, from the juridical objectives which the Zionists sought during the negotiations. The Zionists, nevertheless, have consistently claimed since the issuance of the Declaration that it provides juridical authority for their "Jewish people" nationality claims.

The Balfour Declaration was transmitted to the representatives of the Zionist Organization in a letter addressed to Lord Rothschild.⁸⁰ It is reproduced in full:⁸¹

Foreign Office,
November 2nd, 1917.

Dear Lord Rothschild,

I have much pleasure in conveying to you, on behalf of His Majesty's Government, the following declaration of sympathy with Jewish Zionist aspirations which has been submitted to, and approved by, the Cabinet

⁷⁷ Id. at 93-145.

⁷⁸ Id. at 146-208; Stein, *The Balfour Declaration* passim (1961). The Stein book, written by a lawyer and Zionist, is the most complete history of the negotiations leading to the Balfour Declaration; it is cited hereafter as "Stein."

Stein, *passim*, shows that the negotiations covered three years. Stein 514 quotes Dr. Weizmann to the same effect.

⁷⁹ Weizmann 207.

⁸⁰ This was done to associate the Rothschild name with the Declaration. In addition Weizmann, though the chief Zionist negotiator, was President of the English Zionist Federation whereas Sokolow, "his senior in rank in the Zionist hierarchy," was a member of the Executive of the World Zionist Organization with headquarters in Germany. Stein 548.

The members of the Rothschild family were divided on Zionism as conceded by Dr. Weizmann. Weizmann 160-61. He refers to Lady Rothschild's "almost pathological anti-Zionism" and "her inplacable hostility to us." Id. at 161.

⁸¹ The reproduction in the text, including its punctuation, is taken from the facsimile of the Balfour Declaration which appears as the frontispiece in Stein.

'His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country'

I should be grateful if you would bring this declaration to the knowledge of the Zionist Federation.

[S] Yours
A W James Balfour

b. Preliminary Analysis of the Basic Agreement

Perhaps even more fundamental than analysis of the Balfour Declaration agreement is the issue of the juridical authority of the British Government to make a promise of political support in favor of Zionist nationalism.⁸² Such a promise might be construed as derogating the existing rights of the population of Palestine. In the same way, it might be construed as derogating the single nationality status of Jews in other countries than Palestine. Without waiving this fundamental question of the juridical authority of the British Government, the balance of the analysis is based upon the assumption that the Balfour Declaration is a valid part of public international law. It has been so regarded by the League of Nations⁸³ and the United States,⁸⁴ which have agreed to it expressly. Even assuming the juridical validity of the Declaration, difficult interpretive problems concerning its scope and meaning remain to be considered.

In a typical situation involving the interpretation of a juridical undertaking or agreement the interpreter is required to interpret a text which all parties agree includes the basic undertaking or agree-

⁸² It is clear that there was no explicit authority to do so in either the international law of peace or war. Hague Convention No. IV Respecting the Laws and Customs of War on Land, in addition to imposing explicit limitations upon belligerents, including those acting as military occupants, provides in its preamble:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, *the inhabitants* and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. . . . (Emphasis added.)

36 Stat. pt. 2, p. 2277 at 2279-80 (1910).

⁸³ League of Nations Mandate for Palestine, considered in the text at notes 210-22 *infra*.

⁸⁴ Anglo-American Convention on Palestine, considered in the text at notes 223-30 *infra*.

ment.⁸⁵ Interpretation of the Balfour Declaration is not such a typical situation. Neither the single paragraph of the Declaration quoted above nor the whole text of the Declaration includes the entire undertaking or agreement to be interpreted. The negotiating history of the Declaration demonstrates that Dr. Weizmann and the other Zionist negotiators promised to the British Government, whether expressly or impliedly, the political support of the alleged Zionist constituency of Jews in many states, in return for the political promise clause of the Declaration.⁸⁶ Since the Zionist promise was the *quid pro quo* without which the British promise would not have been made, it comprised an integral part of the Balfour Declaration

⁸⁵ Such a typical situation is envisioned in Harvard Research in International Law, Draft Convention on the Law of Treaties, 29 Am. J. Int'l L. Supp. 653, at 947 (1935), cited hereafter as "Harvard Research, Treaties."

⁸⁶ The primary authority for the textual statement is the negotiating context of conditions which is detailed in the ensuing pages.

One of the most explicit secondary authorities states:

That it [the Balfour Declaration] is in purpose a definite contract between the British Government and Jewry represented by the Zionists is beyond question. In spirit it is a pledge that in return for services to be rendered by Jewry the British Government would 'use their best endeavours' to secure the execution of a certain definite policy in Palestine.

6 Temperley (ed.), A History of the Peace Conference of Paris 173-74 (1924).

Dr. Weizmann, after denying that "the Balfour Declaration [was] a *quid pro quo*, or rather payment in advance for Jewish service to the Empire," states: "The truth is that British statesmen were by no means anxious for such a *bargain*." (Emphasis added.) Weizmann 177. Dr. Weizmann continues his narrative with a candid quotation from a letter he wrote to C. P. Scott, the pro-Zionist editor of the Manchester Guardian, that "England . . . would have in the Jews the best possible friends . . ." Weizmann 178.

Leonard Stein also manifests ambivalence concerning the Zionist promise of "Jewish" political support to the British. He states: "It is, on the face of it, nonsensical to imagine that the Declaration was handed to him [Weizmann] as a kind of good conduct prize. We shall see later how closely the case for the Declaration was considered before being finally approved by the War Cabinet as a deliberate act of policy." Stein 120. "Zionist aspirations must be shown to accord with British strategic and political interests." Id. at 126. Stein, *passim* and especially at pages 309-556, indicates the Zionist offer of "Jewish" political support in return for a public law declaration. See also Zionist Diplomacy 23-24.

Stein also states: "Neither in this nor, indeed, in any later stage was there a bargain in the sense in which that word suggests an arm's-length negotiation on a *do ut des* basis. . . . What had happened was that events were now shaping in such a way as to provide a realistic basis for a closer understanding between the British Government and the Zionists—an understanding seen to correspond to the desires and interests of both." Stein 337. See generally 1 Esco Study 75-76.

Winston Churchill stated in an Address to the House of Commons, May 23, 1939: "It was in consequence of and on the basis of this pledge [the first or political promise clause of the Declaration] that we received important help in the War . . ." Quoted in Jewish Agency for Palestine (compiled and annotated by Abraham Tulin), Book of Documents Submitted to the General Assembly of the United Nations Relating to the Establishment of the National Home for the Jewish People 3 (1947). This book, cited hereafter as "Jewish Agency Documents," contains Zionist juridical and political interpretations as well as juridical and political documents.

The Zionist promise of "Jewish" political support is clearly implied in the propaganda aspects of the Balfour Declaration considered in the text accompanying notes 194-95 *infra*.

agreement though not appearing in the text. Thus, the text of the Declaration together with the Zionist *quid pro quo* constitute the basic agreement which is to be interpreted in the present study. It is desirable for analytical purposes, however, to distinguish between this basic agreement which is being interpreted and the context of conditions (or negotiating history) which guide the interpreter in ascribing the most accurate possible meaning to the basic agreement.

Even a superficial reading of the Declaration indicates that its first clause, containing the words "best endeavours to facilitate" involves a political promise by the British Government, though one highly ambiguous in its terms.⁸⁷ The term "a national home," the "home in Palestine" of the Basle Program, was itself an ambiguous term in international law. The nominal beneficiary of the promise was the claimed Zionist constituency of "the Jewish people." The real beneficiaries of the British promise, however, were the Zionists themselves. Even though the phrase "the Jewish people" was used, it was clear that Weizmann and his fellow self-appointed representatives of "the Jewish people" had no authority to speak for members of the religious fellowship of Judaism. Weizmann admitted this fact ten years after the issuance of the Declaration:

The Balfour Declaration of 1917 was built on air, and a foundation had to be laid for it through years of exacting work; every day and every hour of these last ten years, when opening the newspapers, I thought: Whence will the next blow come? I trembled lest the British Government would call me and ask: "Tell us, what is this Zionist Organisation? Where are they, your Zionists?" For these people think in terms different from ours. The Jews, they knew, were against us; we stood alone on a little island, a tiny group of Jews with a foreign past.⁸⁸

Even if the term "the Jewish people" is given a juridical-political meaning, by its use in the Balfour Declaration, its scope was cut drastically by the second safeguard clause. Thus, the claimed constituency of "the Jewish people" was a fabrication.

The last two clauses of the Declaration are termed the safeguard clauses. The first safeguard was designed to protect the rights of the Palestinian Arabs, who then comprised the great majority of the

⁸⁷ All interpreters appear to agree that the first clause involves a political promise. There are diverse interpretations concerning its content and scope.

⁸⁸ Address by Dr. Weizmann at Czernowitz, Roumania, Dec. 12, 1917, in Goodman (ed.), Chaim Weizmann: Tribute in Honour of his Seventieth Birthday 199 (1945), cited hereafter as "Goodman (ed.), Weizmann."

Palestine population. Most of the Arabs were Moslems by religion, but a small group were Christians. The second safeguard was designed to protect the rights of Jews in any country other than Palestine from the incursions of Zionist nationalism. The common feature of these two safeguard clauses was that each was designed to protect existing rights in the event of conflict with the British Government's political promise made in the first clause. In contrast to the ambiguities of the first clause, the safeguard clauses were stated in unequivocal terms. In addition, they were given explicit priority over the first clause by the clarifying language that it was "clearly understood that nothing shall be done which may prejudice [such] rights."

c. The Zionist Interpretation

The Zionist interpretation of the Balfour Declaration is quite simple. The Declaration is regarded as providing juridical authority for "the Jewish people" nationality claims and for the Zionist national home enterprise in Palestine. The political promise clause has been extrapolated concerning the Palestine Arabs as if the first safeguard clause did not exist. In the same way, it has been extrapolated as to Jews in any other country than Palestine as if the second safeguard clause did not exist. The foregoing summary is supported by an extensive and detailed Zionist interpretation.⁸⁹

The introductory paragraph in Mr. Balfour's letter of transmittal refers to the Balfour Declaration as one "of sympathy with Jewish Zionist aspirations." The last three words just quoted were given an authoritative Zionist interpretation by the Zionist Organization/Jewish Agency in 1947:

The phrase "Jewish Zionist aspirations" in the first paragraph of the Document referred to the age-old hope of Jews the world over that Palestine shall be restored to its ancient role as the "Land of Israel". These aspirations were formulated as a concrete aim at the first World Zionist Congress at Basle, Switzerland, in 1897, under the leadership of Dr. Theodore Herzl. . . .⁹⁰

The same Zionist interpretation then quotes Dr. Herzl concerning "a publicly secured" Zionist national home.⁹¹ Thus, the Zionist interpretation of "Jewish Zionist aspirations" explicitly adopts

⁸⁹ In addition to the ensuing documentation, see Jewish Agency Documents *passim*.

⁹⁰ Jewish Agency Documents 1.

⁹¹ *Ibid.*

the political Zionism of Herzl while implicitly rejecting the cultural Zionism of Achad Ha'am.

The Zionists have been unequivocal concerning the identity of the beneficiary of the grant clause of the Declaration. The beneficiary, in their view, is neither the Zionist Organization nor the Jews of Palestine but the claimed Zionist nationality entity of all Jews.⁹² Dr. Weizmann has made this interpretation explicitly:

The Zionist Organisation has taken the political steps necessary to obtain the recognition by the other nations of the Jewish right to a home in Palestine. But we have never wanted Palestine for the Zionists; we wanted Palestine for the Jews The Balfour Declaration is addressed to all Jewry.⁹³

The words "national home for the Jewish people" have been interpreted by the Zionist Organization/Jewish Agency as authority to build "a Jewish State" in Palestine.

The phrase "the establishment in Palestine of a National Home for the Jewish people" was intended and understood by all concerned to mean at the time of the Balfour Declaration that Palestine would ultimately become a "Jewish Commonwealth" or a "Jewish State", if only Jews came and settled there in sufficient numbers.⁹⁴

This interpretation has been represented by Zionists as the intent of the Declaration. It is only the intent of the Zionists, however, because it is inconsistent with the safeguard clauses of the Declaration.

In 1948, Dr. Ernst Frankenstein, a Zionist legal writer, provided an interpretation in an article entitled "The Meaning of the Term 'National Home for the Jewish People.'" ⁹⁵ After indicating that

⁹² Id. at 2-4.

⁹³ Goodman (ed.), Weizmann 203.

⁹⁴ Jewish Agency Documents 5. The Zionist interpretation quoted in the text was made in 1947. Earlier Zionist interpretations were different. Mr. Stein states that "neither on the British nor on the Zionist side was there any disposition, at the time [of the issuance of the Declaration], to probe deeply into its meaning--still less was there any agreed interpretation." Stein 552.

Writing in 1919 in the author's introduction to his authoritative Zionist history of Zionism, Sokolow stated: "It has been said, and is still being obstinately repeated by anti-Zionists again and again, that Zionism aims at the creation of an independent 'Jewish State.' But this is wholly fallacious. The 'Jewish State' was never a part of the Zionist programme." 1 Sokolow xxiv-xxv.

The Zionist interpretation quoted in the text states that it was "understood by all concerned." Such an understanding cannot be attributed accurately to either Palestinian Arabs or anti-Zionists.

⁹⁵ Feinberg & Stoyanovsky (eds.), *The Jewish Yearbook of International Law* 1948, 27 (1949), cited hereafter as "Jewish Yb.I.L." The editors' introduction states: "The need for a periodical publication which would be devoted mainly to the study

"the National Home was to be a National Home for the *Jewish People* not merely for the Jews of Palestine,"⁹⁶ Dr. Frankenstein concluded:

Thus, as we have seen, the Jewish National Home may be defined as a scheme intended to give the Jewish people the opportunity to become, through immigration and settlement, a majority of the inhabitants of Palestine, and to make Palestine a Jewish State once again.⁹⁷

Perhaps the most significant feature of the Zionist interpretation of the Declaration is the treatment accorded to the safeguard clauses. It was necessary for the Zionists to minimize these clauses, since it would be impossible to give them effect without narrowing the scope of the political promise clause. Therefore, these clauses are either ignored or considered briefly with a disclaimer of possible violation.⁹⁸

The Zionist interpretation assumes that the Declaration is clear and unambiguous.⁹⁹ Despite the substantive changes made between the first and last drafts, Dr. Weizmann has declared: "[I]n spite of the phrasing the intent was clear."¹⁰⁰ After calling the penultimate draft (prepared after Edwin Montagu's attack upon the Zionist negotiating objectives) "a painful recession from what the Government itself was prepared to offer,"¹⁰¹ Weizmann said:

The first [apparently the Zionist draft of July 18, 1917] declares that "Palestine should be reconstituted as the National Home of the Jewish people." The second [October 4 draft] speaks of "the establishment in Palestine of a National Home for the Jewish Race." The first adds only that the "Government will use its best endeavors to secure the achievement of this object and will discuss the neces-

of questions of international law affecting or of particular interest to the Jewish people has long been felt by all those who realized the *sui generis* character of those questions." Jewish Yb.I.L. v.

The present writer regards Jewish Yb.I.L. as *sui generis*. In addition to much Zionist juridical analysis and interpretation it contains a few studies of unquestioned objectivity. See, e.g., The Nationality of Denationalized Persons, Jewish Yb.I.L. 164 by the late Sir Hersch Lauterpacht who was a judge of the International Court of Justice and, earlier, Whewell Professor of International Law, Cambridge University. See also Lauterpacht, International Law and Human Rights (1950) which makes no religious discriminations among individuals.

⁹⁶ Frankenstein, Jewish Yb.I.L. 27, 39.

⁹⁷ *Id.* at 41.

⁹⁸ *Id.* at 29-30, 32-33; Akzin, The Palestine Mandate in Practice, 25 Iowa L.Rev. 32, 54-55 (1939).

⁹⁹ The intellectual inadequacies of such an assumption concerning the interpretive process are explained in Harvard Research, Treaties 937-39; 946-48.

¹⁰⁰ Weizmann 211.

¹⁰¹ *Id.* at 207.

sary methods with the Zionist Organization"; the second introduced the subject of the "civic and religious rights of the existing non-Jewish communities" in such a fashion as to impute possible oppressive intentions to the Jews, and can be interpreted to mean such limitations on our work as completely to cripple it.¹⁰²

Dr. Weizmann displayed commendable candor (writing in 1949) in recognizing the protective character of the phrasing and substance of the first safeguard clause as it appeared in the October 4 draft. In addition, he expressly recognized the compromise character of the October 4 draft: "Certain it was that Montagu's opposition . . . was responsible for the compromise formula which the War Cabinet submitted to us a few days later."¹⁰³ He also states: "[E]masculated as it was, [it] represented a tremendous event in exilic Jewish history—and that it was as bitter a pill to swallow for the Jewish assimilationists as the recession from the original, more forthright, formula was for us."¹⁰⁴ In 1949 Dr. Weizmann expressed doubt as to whether the "recession from the original, more forthright formula," should have been accepted or the Zionists should have been "intransigent."¹⁰⁵ He recognized that: "[W]e did not dare to occasion further delay by pressing for the original formula . . ."¹⁰⁶ Whatever his subsequent doubts, he did accept the Declaration with both safeguard clauses and with a substantial weakening of the political promise clause sought by the Zionists.¹⁰⁷ The Zionists did not have the political power to dictate the terms of the Declaration and had to accept the ultimate compromise document.

In spite of his contemporary concern, Dr. Weizmann subsequently developed a method of interpreting the Declaration which satisfied him: "It would mean exactly what we would make it mean—neither more nor less."¹⁰⁸

¹⁰² *Ibid.*

¹⁰³ *Id.* at 206.

¹⁰⁴ *Id.* at 207.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ Dr. Weizmann wrote:

While the cabinet was in session, approving the final text, I was waiting outside, this time within call. Sykes brought the document out to me with the exclamation: "Dr. Weizmann, it's a boy!"

Well—I did not like the boy at first. He was not the one I had expected. . . .
Id. at 208.

¹⁰⁸ *Id.* at 242. This was consistent with his general views: "Looking back, I incline to attach even less importance to written 'declarations' and 'statements' and 'instruments' than I did even in those days. Such instruments are at best frames which may or may not be filled in. They have virtually no importance unless and until they are supported by actual performance. . . ." *Id.* at 280.

d. Interpretation in Context of Negotiation: The Balfour Declaration Compromise

(1) International Law Criteria for the Interpretation of Agreements

It is obvious that an undertaking or agreement must exist before it can be interpreted. There are no particular words of art in international law which must be employed to describe an undertaking or agreement. The authoritative *Harvard Research in International Law* provides apt summary:

Some international instruments are called "treaties" *eo nomine*, but a whole repertory exists from which names for instruments may be chosen. "Convention", "protocol", "agreement", "arrangement", "declaration", "act", "covenant", "statute"—all of these terms have been employed with reference to international instruments concluded in recent times, and the choice of one rather than another is in most cases, if not in all, without any significance in international law.¹⁰⁹

In the "*Ihlen Declaration*" Case,¹¹⁰ the Permanent Court of International Justice evaluated the juridical significance of an oral statement made by the Norwegian foreign minister in the context of Danish-Norwegian negotiations concerning their respective territorial interests in Eastern Greenland and Spitzbergen. Mr. Ihlen, the Norwegian foreign minister, stated orally to the Danish minister "that the Norwegian Government would not make any difficulties"¹¹¹ concerning the Danish territorial claims in Eastern Greenland. The court held, considering the context of the negotiations between the two states, that the oral Ihlen Declaration was binding upon the Norwegian government.¹¹²

There is, a fortiori, ample authority for the juridical validity of a more formal written instrument such as the Balfour Declaration. In form the Balfour Declaration is a unilateral pronouncement by the British Government. The three years of negotiations leading to its issuance, and particularly the last several months of intensive negotiations, reveal that, in substance, it is a multilateral agreement.¹¹³

¹⁰⁹ Harvard Research, *Treaties* 667.

¹¹⁰ Legal Status of Eastern Greenland, P.C.I.J., ser. A/B, No. 53 (1933).

¹¹¹ *Id.* at 36.

¹¹² *Id.* at 73.

¹¹³ Stein *passim* demonstrates the negotiating context and the agreement character of the Declaration.

Neither the Balfour Declaration nor any other basic understanding or agreement can have any single "natural and ordinary" or "clear and unambiguous" meaning apart from its relevant context of conditions.¹¹⁴ At the minimum, this context must include the objectives of the participants and the principal purposes sought to be effectuated. Where the instrument interpreted embodies an agreement, an understanding of its negotiating history affords indispensable insight in its interpretation.¹¹⁵ A basic agreement which, like the Balfour Declaration, has been negotiated over a period of years, is the result of the negotiating process which preceded it and which gives it meaning. The unilateral negotiating proposals which were abandoned in order to achieve multilateral agreement are particularly significant portions of the negotiating history. Without such compromises or recessions, there would be no basic agreement in many instances.

Senator Elihu Root, a distinguished former Secretary of State, gave appropriate emphasis to the crucial importance of negotiations in a statement made with reference to the Hay-Pauncefote treaty:

If you would be sure of what a treaty means, if there be any doubt, if there are two interpretations suggested, learn out of what conflicting public policies the words of the treaty had their birth; what arguments were made for one side or the other, what concessions were yielded in the making of a treaty. Always, with rare exceptions, the birth and development of every important clause may be traced by the authentic records of the negotiators and of the countries which are reconciling their differences.^{115a}

A thoughtful approach to the interpretive process is summarized in the *Harvard Research*:

The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some preexisting specific intention of the parties with respect to every situation arising under a treaty. It is precisely because the words used in an instrument rarely have exact and single meanings, and because all possible situations which may arise under it cannot be, or at least are not, foreseen and expressly provided for by the parties at the time of its drafting, that the necessity for interpretation occurs. In most instances, therefore, interpretation involves *giving*

¹¹⁴ Harvard Research, Treaties 937-39; 946-48.

¹¹⁵ Id. at 937, 948-66.

^{115a} Quoted in 5 Hackworth, Digest of International Law 259 (U.S. Dep't State, 1943).

a meaning to a text—not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgment to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve.¹¹⁶

These traditional criteria will now be employed in providing juridical interpretation of the Balfour Declaration.

(2) The Negotiating History: Participants, Purposes and Proposals

It has been stated that the Balfour Declaration, though unilateral in form, is shown by its negotiating history to be a multilateral agreement in substance.¹¹⁷

The participants in the negotiations comprised four readily identifiable groups. The first group was the Zionists, represented by the principal Zionist leaders in Great Britain, including Dr. Weizmann, the president of the English Zionist Federation, and Mr. Nahum Sokolow, a member of the Executive of the World Zionist Organization. The second group was composed of the anti-Zionist Jews of England. Their leaders included Edwin Montagu, Secretary of State for India in the British Government at the time of the issuance of the Declaration, and Mr. Claude Montefiore, an eminent Englishman and Jew. The third participant comprised the Arabs of Palestine, who were either Moslems or Christians by religion. This group did not appear as an active negotiator, but its interests in the subject had to be taken into account by the other participants. The fourth participant was the British Government, which, in addition to attempting to advance its own national self-interest, served as conciliator and arbitrator among the other participants.¹¹⁸

Though the Zionists' purposes were those of political Zionism, Dr. Weizmann was well aware that Zionist political objectives had to accord with those of the British. He wrote of Palestine as "the Asiatic Belgium" and as "the barrier" protecting the Suez Canal.¹¹⁹ Leonard Stein, the authoritative historian of the Balfour Declaration and a Zionist, has described Weizmann's understanding of the situation:

¹¹⁶ Harvard Research, *Treaties* 946.

¹¹⁷ Text at note 113 *supra*.

¹¹⁸ The textual paragraph is based upon Stein *passim*.

¹¹⁹ Quoted in Stein 127.

The Declaration [sought by the Zionists] itself presupposed that the Jewish people counted for something in the world and that the ideas bound up with the connection between the Jews and Palestine had not lost their potency. But the war years were not a time for sentimental gestures. The British Government's business was to win the War and to safeguard British interests in the post-war settlement. Fully realising that these must in the end be the decisive tests, Weizmann was never under the illusion that the Zionists could rely on an appeal *ad misericordiam*. Zionist aspirations must be shown to accord with British strategic and political interests.¹²⁰

When the drafting began in the British Foreign Office, its conception was that the Government would declare itself in favor of establishing "a sanctuary for Jewish victims of persecution"¹²¹ in Palestine. This conception had little relevance to Zionist political purposes. A preliminary Zionist draft prepared by Sokolow and others stressed "the principle of recognizing Palestine as the National Home of the Jewish people."¹²² An official Zionist draft proposal transmitted by Lord Rothschild to Mr. Balfour on July 18, 1917, read as follows:

1. His Majesty's Government accepts the principle that Palestine should be reconstituted as the National Home of the Jewish people.
2. His Majesty's Government will use its best endeavours to secure the achievement of this object and will discuss the necessary methods and means with the Zionist Organisation.¹²³

This draft contained three central Zionist objectives in the wording: "that Palestine should be reconstituted as the National Home of the Jewish people." The first objective was that the Zionist national home enterprise be "reconstituted," or established as of legal right, without regard to the existing rights of the Palestinian Arabs. The second objective was that all Jews (the comprehensive claimed entity of "the Jewish people") be recognized in law as constituting a single nationality grouping. The third objective was that a juridical connection be recognized in law between "the National Home" and "the Jewish people."

Two ensuing drafts were prepared in August 1917. One of the

¹²⁰ Stein 126.

¹²¹ Id. at 468.

¹²² Ibid.

¹²³ Id. at 470. This draft, each of the three successive drafts considered in the text, and the final Declaration are reproduced by Mr. Stein in a single Appendix. Id. at 664.

August drafts followed the official Zionist draft proposal very closely and reproduced *verbatim* the wording containing the three central Zionist objectives. Stein describes this draft, termed the Balfour draft, as a "slightly amended version of the Zionist draft."¹²⁴ The other August draft, termed the Milner draft, eliminated the crucial Zionist wording and substituted much weaker wording in its place.¹²⁵ Stein refers to Milner's draft as "a considerably watered-down version of Balfour's [August] formula."¹²⁶ The Milner draft led the way to much more drastic curtailment of Zionist nationalism in the penultimate and final drafts of the Declaration. Each of the drafts considered thus far had one feature in common. They contained no safeguard clauses. Such clauses were to achieve preeminence in the penultimate and final drafts of the Declaration.

Leopold Amery, an assistant secretary of the Cabinet, stated that shortly before the War Cabinet meeting of October 4, 1917, he was asked by Lord Milner, a Cabinet member, to draft "something which would go a reasonable distance to meeting the objections both Jewish and pro-Arab, without impairing the substance of the proposed declaration."¹²⁷ The ensuing Milner-Amery draft provided not only a "pro-Arab" safeguard but an explicit pro-Jewish and anti-Zionist one as well:

His Majesty's Government views with favour the establishment in Palestine of a national home for the Jewish race and will use its best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed in any other country by such Jews who are fully contented with their existing nationality and citizenship.¹²⁸

This was the draft which Dr. Weizmann regarded as such "a painful recession."¹²⁹ Apparently the first of the "two limiting provisos"¹³⁰ was intended to satisfy Lord Curzon,¹³¹ a Cabinet member who was not a friend of the Zionists, while the second was in-

¹²⁴ Id. at 520.

¹²⁵ Id. at 521.

¹²⁶ Ibid.

¹²⁷ Quoted in Stein 520.

¹²⁸ Stein 521. The last two words "and citizenship" were added subsequently. Id. at 525 n.31.

¹²⁹ Text at note 101 *supra*.

¹³⁰ Stein 522.

¹³¹ Ibid.

serted to meet Montagu's anti-Zionist objectives.¹³² Stein acknowledges with candor "the progressive watering down"¹³³ of the official Zionist draft submitted by Rothschild in July and accepted in substance by Balfour in August. Stein recognizes that this was clearly a response, not only to the pressure of the Jewish anti-Zionists, but also to the fact that in "dealing with the Palestine question there were other claims and interests to be considered besides those of the Jews."¹³⁴

The "other claims and interests" involved were those of the Palestinian Arabs. Both the British Government and the anti-Zionists were concerned, for different reasons, with protecting the Arabs' existing rights and interests. The British Government was then engaged in military operations against Turkey¹³⁵ and hardly would be welcomed in Palestine as a liberator if Arab rights were to be violated.¹³⁶ Consistent with this, the basic humanitarianism of the anti-Zionist proposals attempted to ensure fair treatment for the Arabs. Thus only the Zionists were opposed to safeguarding the "other claims and interests."

After completion of the October 4 draft, it was sent by the Government, with an invitation for comments upon it, as a proposed declaration, "from Zionist leaders and from representative British Jews."¹³⁷ The anti-Zionist position was well summarized in the views of Claude Montefiore.¹³⁸ He objected to the phrase "a national home for the Jewish race" as implying that "Jews generally constitute a nationality."¹³⁹ In his views "such an implication is extremely prejudicial to Jewish interests."¹⁴⁰ He continued that "emancipation and liberty" are "a thousand times more important than a 'home.' . . . It is very significant that anti-Semites are always very sympathetic to Zionism."¹⁴¹

¹³² *Ibid.*; Weizmann 206.

¹³³ Stein 522.

¹³⁴ *Ibid.*

¹³⁵ See generally 1 *Esco Study* 72-73.

¹³⁶ Field Marshal Allenby's proclamation upon British entry into Jerusalem contained the promise of protection for each of the three religions practiced in the city. It is quoted in 1 *Esco Study* 73.

¹³⁷ Stein 524; Mr. Stein describes the seeking of the views of the anti-Zionist "representative British Jews" as a "concession to Montagu" which made Weizmann indignant. *Id.* at 518.

¹³⁸ Mr. Stein states of Montefiore: "By reason of his lofty character, his learning and his philanthropy, and of his high standing and reputation outside as well as inside the Jewish community, he was an important and impressive figure in Anglo-Jewish life and was recognized by the Zionists themselves as an opponent worthy of respect." Stein 175.

¹³⁹ Quoted in Stein at 525.

¹⁴⁰ *Ibid.*

¹⁴¹ *Id.* at 525-26.

Whatever may have been the subsequently expressed views of Dr. Weizmann, the Zionists accepted the Milner-Amery draft.¹⁴² In spite of their resentment over the "progressive watering down,"¹⁴³ the Zionists were sufficiently realistic to recognize that they were unlikely to obtain anything better.¹⁴⁴ In spite of Zionist opposition, the safeguard clauses had come to stay.

The text of the Milner-Amery draft was telegraphed by Mr. Balfour to Colonel House, the confidential adviser to President Wilson, on October 6, with the request that it be submitted to the President.¹⁴⁵ After prompting by Colonel House, President Wilson authorized a favorable, although a general and informal, response to the proposed draft.¹⁴⁶

On October 9, Weizmann had telegraphed the same draft to Justice Brandeis in the United States.¹⁴⁷ Brandeis and his associates found the draft unsatisfactory in two particulars. They disliked that part of the draft's second safeguard clause which read, "by such Jews who are fully contented with their existing nationality and citizenship," and wished to substitute "the rights and civil political status enjoyed by Jews in any other country."¹⁴⁸ In addition, Brandeis apparently proposed the change of "Jewish race" to "Jewish people."¹⁴⁹ In both particulars the final declaration appeared to be changed because of these views.¹⁵⁰

The proposed declaration was submitted to the British Government for approval in final form.¹⁵¹ It was so approved on October 31, 1917, and issued two days later in the letter from Balfour to Rothschild.¹⁵²

One of the most significant features of the final Declaration was the

¹⁴² Weizmann, Sokolow, and Lord Rothschild "welcomed" the draft. Stein 527.

¹⁴³ Stein 522.

¹⁴⁴ Weizmann 207-08; supra note 142.

¹⁴⁵ Stein 528.

¹⁴⁶ Id. at 529-30.

¹⁴⁷ Id. at 530.

¹⁴⁸ Id. at 531.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid. Mr. Stein is very equivocal concerning the reasons for the change in the second safeguard. Id. at 531-32. The important result is that the second safeguard was strengthened.

¹⁵¹ On two previous occasions the British Government had refused to issue earlier versions of the Declaration. Id. at 549.

¹⁵² General and informal assent to the Declaration by France and Italy was obtained after its issuance:

That neither Government had been consulted in advance is plain from Balfour's replies to question in Parliament. That both disliked the Declaration is shown by the efforts needed to induce them to endorse it. In each case it fell to the Zionists or their friends to extract the endorsement, and in each case it was communicated, not to the British Government, but to the Zionists. Id. at 587.

Zionist failure to achieve British public law assent to any of their three central juridical objectives in their official July draft.¹⁵³ In lieu of what the Zionists sought, they received a limited and equivocal political promise clause. Even more significantly, the first safeguard survived intact while the final draft of the second safeguard was strengthened by eliminating reference to Jews in countries other than Palestine who were “fully contented with their existing nationality,”^{153a} and making the second safeguard applicable, without exception, to “Jews in any other country” than Palestine.

(3) The Compromise Agreement Embodied in the Declaration

(a) The Political Promise Clause

Mr. Stein introduces his consideration of the meaning of the political promise clause with the following paragraph:

What, then, were the Zionists being promised? The language of the Declaration was studiously vague, and neither on the British nor on the Zionist side was there any disposition, at the time, to probe deeply into its meaning—still less was there any agreed interpretation.¹⁵⁴

After conceding that the Declaration failed to provide assurance that the British Government would assume direct responsibility for the establishment of the Zionist national home enterprise,¹⁵⁵ Stein’s analysis continues:

What the British Government did undertake was to use its best endeavours to ‘facilitate’ (no more) ‘the establishment in Palestine of a national home for the Jewish people’—not, as it had been put in the Zionist draft and as Balfour would, apparently, have been prepared to concede, the reconstitution of Palestine as the national home of the Jews.¹⁵⁶

The “studiously vague” character of the political promise clause, to use Stein’s description, is also revealed by the wide variety of “Zionist” support for the Declaration. Thus, Achad Ha’am, who

¹⁵³ See the text accompanying note 123 *supra*.

^{153a} See the text accompanying note 128 *supra*.

¹⁵⁴ Stein 552.

¹⁵⁵ *Ibid.* Stein adds, with ambivalence, that Weizmann and his associates “had from the start regarded as fundamental” direct British assumption of responsibility for the national home enterprise, but did not expect it to be given to them. *Ibid.*

¹⁵⁶ Stein 552-53.

had participated in the negotiations leading to the Declaration, supported the final Declaration. Similarly, Justice Brandeis supported it when issued. The support of the humanitarian Zionists just named, and others as well, was welcomed by the political Zionists during the negotiations and after the issuance of the Declaration. This humanitarian support subsequently was to prove embarrassing to the political Zionists because of the wide divergence between the humanitarian and political Zionists' interpretations of the political promise clause.¹⁵⁷

It has been explained that the political promise clause was exchanged for the Zionist promise to deliver political support of "the Jewish people" for British political objectives during and after the war.¹⁵⁸ Mention of the political support to be provided by the Zionists may possibly have been omitted from the Declaration because the negotiating history already had made it clear that it was the price to be paid by the Zionist leaders. A more pragmatic explanation may be that, if the Declaration had been explicit concerning the political bargain involved, many Jews in the states of their respective na-

¹⁵⁷ Justice Brandeis is well known as a humanitarian. He regarded the Balfour Declaration as the end of the political work of Zionism, whereas Weizmann regarded it as another beginning. Dr. Weizmann wrote:

What struck me as curious was that the American Zionists, under Justice Brandeis, though fully aware of what was going on in England and in Palestine, nonetheless shared the illusions of our Continental friends; they too assumed that all political problems had been settled once and for all, and that the only important task before Zionists was the economic upbuilding of the Jewish National Home.

Weizmann 241. See *id.* at 306.

Concerning Brandeis' disillusionment with political Zionism, see Berger, *Disenchantment of a Zionist*, 38 *Middle East Forum* No. 4, p. 21 (1962). Mr. Stein writes of the "irreconcilable differences on questions of principle" between Brandeis and Weizmann which led "to an open breach." Stein 581.

The translator's introduction to Achad Ha'am, *Ten Essays on Zionism and Judaism* (Leon Simon transl. 1922) reproduces Achad Ha'am's interpretation of the Declaration's political promise clause. Achad Ha'am pointed out that in the negotiations and the final Declaration the political Zionists failed to achieve their objectives. *Id.* at xvi-xx. He concluded that:

This position, then, makes Palestine common ground for different peoples, each of which tries to establish its national home there; and in this position it is impossible for the national home of either of them to be complete and to embrace all that is involved in the conception of a "national home." If you build your house not on untenanted ground, but in a place where there are other inhabited houses, you are sole master only as far as your front gate. Within you may arrange your effects as you please, but beyond the gate all the inhabitants are partners, and the general administration must be ordered in conformity with the good of all of them.

Id. at xviii.

The late Judah L. Magnes had a similar humanitarian value orientation. See his *Toward Peace in Palestine*, 21 *Foreign Affairs* 239 (1943). Compare Weizmann, *Palestine's Role in the Solution of the Jewish Problem*, 20 *Foreign Affairs* 324 (1942).

¹⁵⁸ See the text and authorities cited at note 86 *supra*.

tionalties would have repudiated expressly the Zionist leaders' claim to act for them and to deliver their loyalties. In any event, as actually drafted, the Declaration could more easily be represented as an unsolicited humanitarian act of the British Government in behalf of oppressed Jews. In addition, the political promise clause, in its drastically changed wording, could be interpreted accurately as a humanitarian act which should be supported by all men of good will. This interpretation of the political promise clause is even more compelling when it is read in the context of the safeguards. Thus, the British Government and the political Zionists were in the happy position of having humanitarian motives attributed to them and humanitarian interpretations applied to the Declaration because of the narrowed political promise and the inclusion of the safeguard clauses.¹⁵⁹

Probably the clearest feature of the political promise clause of the Declaration, viewing "with favour the establishment in Palestine of a national home for the Jewish people," is its limited substance in comparison to the wording of the official Zionist draft of July 1917. Standing alone, the political promise is certainly as vague as Stein claims it to be. In comparison with the Zionist negotiating objectives, it must be construed as having a very restricted political meaning and perhaps even a humanitarian one. More precise interpretation of the political promise will be made after consideration of the meaning of the safeguard clauses.

(b) The Safeguard Clauses

In contrast to the relative uncertainties of the political promise clause, the safeguard clauses have a high degree of clarity. In lieu of generalizations such as "view with favour" and "best endeavours to facilitate," the safeguards are introduced by unequivocal language. It would be difficult indeed to draft clearer language than the words "it being clearly understood that nothing shall be done which may prejudice"¹⁶⁰ the safeguarded rights. Rather than merely stating that nothing shall be done which may injure or damage the safeguarded rights, the wording went further and prohibited "prejudice" to those rights. The words, "it being clearly understood," prove that, whatever the vagueness or ambiguity of the political promise clause,

¹⁵⁹ The humanitarian views of Justice Brandeis and Achad Ha'am are referred to supra note 157.

¹⁶⁰ The Balfour Declaration is reproduced in the text accompanying note 81 supra.

it must be interpreted as subordinate to and conditioned upon the implementation of the safeguarded rights. Both safeguard clauses were placed in the Declaration contrary to the explicit negotiating objectives of the Zionist leaders.¹⁶¹

The first safeguard clause reassured the "non-Jewish communities in Palestine" against prejudice which might result from the political bargain made between the British Government and political Zionism. The first clause refers to "the civil and religious rights" of the non-Jewish communities in Palestine. A Zionist interpretation has urged that such rights do not include either "political status" or "rights" without qualification or limitation.¹⁶² A more likely explanation is that the specific wording referred to the rights actually enjoyed by the Arabs under Ottoman rule, which were deemed to include, among others, such basic ones as freedom of religion and the right to own land.¹⁶³ The first safeguard has been distorted by interpreting protection accorded to "the civil and religious rights" of Palestinian

¹⁶¹ Their inconsistency with the official Zionist draft proposal of July 18, 1917, and the three central political objectives embodied in it is obvious. See the text accompanying note 123 supra.

¹⁶² Frankenstein, *The Meaning of the Term "National Home for the Jewish People,"* Jewish Yb.I.L. 27, 29-30. More typical Zionist "interpretation" is to ignore the safeguard clauses.

¹⁶³ Hadawi, *The Loss of a Heritage* (1963) reveals violation of the first safeguard clause even if it is narrowly construed. Perez, *Israel and the Palestine Arabs* (1958) passim, shows systematic violation.

A sympathetic observer of Israel has written:

She [Israel] should abolish the military government and rely on her excellent secret service to apprehend spies and saboteurs. Having at last opened the *Histadrut* to Arab membership, she should now treat the problem of Arab unemployment with exactly the same urgency as the finding of jobs for new immigrants. She should give back to its Israeli-Arab owners as much expropriated land as possible, mindful that every *dunam* of it now yields more in disaffection in Israeli-Arab hearts than in crops.

Schwarz, *The Arabs in Israel* 167 (1959).

American Jewish Committee & Jewish Publication Society of America, 63 *American Jewish Yearbook* 499 (1962) describes the Anti-Defamation League of B'nai B'rith as follows: "Seeks to eliminate defamation of Jews, counteract un-American and anti-democratic propaganda, and promote better group relations." Forster & Epstein, *The Trouble-Makers: An Anti-Defamation League Report* (1952) makes a valuable contribution in exposing anti-Semitism, even though it accepts uncritically some Zionist-Israeli postulates. In attacking Arabs, at 169-96, the authors display intellectual confusion concerning the distinction between Zionists and Jews. The same authors then "indict" Arabs for religious prejudice:

[W]e do indict those Arabs who use religious hatred and prejudice to achieve their ends. We do indict those Arab delegates, diplomats, and others, who peddle suspicion and distrust of Jews to the four corners of the world, and would disenfranchise them wherever they live in order to accomplish their objectives in the Middle East. We do criticize, and strongly, that Arab activity which victimizes the Jew and creates dissension in our country.

Id. at 195.

Arabs as implying juridical authority for a "Jewish" state in which the Arabs of Palestine would become a protected minority.¹⁶⁴

In view of the fundamental protective purpose of the safeguard clauses, a narrow and destructive interpretation of the first safeguard clause should be rejected. It must be given a broad scope because it was inserted in opposition to the comprehensive claims of political Zionism concerning Palestine. In addition, if Palestine were to be brought under British military rule, and perhaps subsequently under an internationally supervised regime such as the League of Nations Mandate system,¹⁶⁵ it was essential to have the good will and cooperation of the Palestine population. The first indispensable step in obtaining such cooperation was assurance that their "civil and religious rights" would not be prejudiced.

Political Zionism also threatened the single nationality status of Jews in other countries. Anti-Zionist Jews insisted upon inclusion of the second safeguard to protect themselves from Zionist nationalism.^{165a} Especially dangerous was prejudice, not to mention injury, caused by involuntary inclusion in the claimed nationality of "the Jewish people." The comprehensive terms of the clause effectuate the protection, since it includes both "rights" and "political status" of Jews in any other country than Palestine.

(c) The Consistency of the Clauses in the Compromise

An interpretation which recognizes that each of the three clauses of the Declaration is an integral part of the negotiated compromise provides clarification of the meaning of the political promise clause.¹⁶⁶ Since the safeguard clauses protected existing rights, they would have to be interpreted, even if there were no clarifying wording in the Declaration, as having at least equal juridical significance with the political promise clause. On the basis of such an assumption, the safeguards still would be interpreted as limiting the political promise clause. The text of the Declaration, however, by providing that "it being clearly understood that nothing shall be done which may prejudice" the safeguarded rights, accords the latter an express pre-eminent position in the Declaration.

¹⁶⁴ *Supra* note 162.

¹⁶⁵ The Palestine Mandate is examined in the text accompanying notes 210-22 *infra*.

^{165a} See the text accompanying note 132 *supra*.

¹⁶⁶ It is elementary learning that all provisions of an agreement must be interpreted. Harvard Research, *Treaties* 947.

Further clarification is provided by the generalizations in the political promise and the specifics in each of the safeguard clauses. The political promise clause's generality, as well as the unequivocal negotiating history, prevents it from being construed as a limitation upon the safeguards. The express purpose of the specific safeguards, however, is to limit the political promise. Because each of the three clauses is an integral element in a compromise agreement, they must be construed as consistent with one another.¹⁶⁷ An interpretation of the political promise clause which accords with the safeguards is one which limits the political promise to the requirements of humanitarianism. In this interpretation, the political promise extends only to "a national home" for some Jews who desire it. Such a political promise is consistent with both the rights and nationalistic aspirations of the Palestinian Arabs and the single nationality status of Jews in any other country. The political promise, so interpreted, meets the objectives of the humanitarians including Achad Ha'am and Brandeis. It does not meet the objectives of the political Zionists which were specifically rejected by the British Government. In summary, one juridical interpretation of the political promise clause is that it provides sanctuary for Jews without impinging upon the rights of Palestinian Arabs or the rights of Jews in any other country.¹⁶⁸

(4) Zionist Distortion of the Second Safeguard Clause

The preeminent character of the safeguard clauses has presented a problem to Zionist interpreters of the Declaration. Typically, the Zionists have ignored the safeguards. An article by Professor Feinberg of the Hebrew University entitled "The Recognition of the Jewish People in International Law"¹⁶⁹ is important because it gives

¹⁶⁷ An objective interpreter cannot lightly assume that a text which has been agreed upon following negotiations conducted over a period of years contains inconsistent provisions. By "objective interpreter" the writer does not refer to one who lacks moral values and corresponding juridical objectives.

¹⁶⁸ Another juridical interpretation of the political promise clause is provided in the text accompanying notes 198, 199 *infra*.

Mr. Stein, as lawyer, approaches the humanitarian juridical interpretation. See the text accompanying notes 154, 155, and 156 *supra*. Mr. Stein, as Zionist, then retreats from it. After having compiled the negotiating history demonstrating Zionist failure, which facilitates juridical analysis, and providing a measure of close juridical analysis, he makes this statement: "The Declaration was a political and not a legal document, and the *crucial* words did not lend themselves to close analysis." (Emphasis added.) Stein 553. Mr. Stein, in typical Zionist fashion, does not interpret the safeguards (although he spells out their crucial importance in the negotiations). If Stein did interpret the safeguards, as a lawyer, he would be compelled to interpret the political promise clause even more narrowly than he does.

¹⁶⁹ Jewish Yb.I.L. 1.

direct attention to the second safeguard clause. The article begins with a survey of the historic humanitarian interventions in behalf of persecuted Jews. Professor Feinberg examines the juridical grounds for the interventions under a heading entitled, significantly, "Rights of Jews, not of the Jewish People."¹⁷⁰ He states that the "chief characteristic" of the humanitarian interventions before the First World War was that "the Jewish question was not dealt with in its entirety, as a question concerning a nation or a people and requiring a political solution."¹⁷¹ He then contrasts individual rights with collective rights:

These interventions had in common the further characteristic that they aimed at protecting only individual and not collective rights. The struggle for rights which the Jews pursued in their respective countries was carried on under the banner of the emancipation of the individual Jew, and aimed only at obtaining religious freedom and civil and political rights.¹⁷²

From the Zionist perspective, the humanitarian protection of Jews *as individuals* was an undesirable situation. In Professor Feinberg's view the possession of "only" individual rights by Jews is changed by the Balfour Declaration.¹⁷³ In Feinberg's words, "[T]he Jewish question was raised to the level of a question involving a nation as a whole, i.e., an entity entitled to separate national existence and to the organization of its life within the framework of the State."¹⁷⁴

After emphasizing the "binding effect"¹⁷⁵ of the Declaration, Professor Feinberg spells out his interpretation of the political promise clause:

The right to the National Home is granted to the Jewish people as a whole, and not to any part of it; it is granted not to Zionists or to Jews who have settled in Palestine or who will settle there, but to all Jews wherever they may be.¹⁷⁶

The most startling feature of the foregoing interpretation is that it is a violation of the second safeguard clause. In elementary juridical

¹⁷⁰ Id. at 5.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Id. passim.

¹⁷⁴ Id. at 7.

¹⁷⁵ Id. at 9.

¹⁷⁶ Id. at 17.

conception, a right necessarily involves a correlative duty.¹⁷⁷ In Feinberg's view the "right to the national home" is granted to "all Jews wherever they may be." This national right is difficult to separate, either in theory or in practice, from the correlative duty of national allegiance. The additional national allegiance which appears to be involved in the national right is inconsistent with the existing single nationality status and allegiance of Jews in the states of their respective nationalities. The protection of this single nationality status of Jews was the principal purpose of the second safeguard.

Feinberg continues with a detailed examination of the second safeguard clause:

It was also on the basis of the above view that, as early as 1917, when the Balfour Declaration was drafted, it was thought necessary to remove any doubt as to the status of those Jews who would not settle in Palestine. To this end the second part of the Declaration provided that "nothing should be done which might prejudice . . . the rights and political status enjoyed by Jews in any other country."¹⁷⁸

The foregoing analysis would not be subject to criticism if "the status of those Jews who would not settle in Palestine" were interpreted consistently with the negotiating history of the Balfour Declaration agreement.

Professor Feinberg, however, then states:

Neither the Czechoslovaks nor the Poles required any such provision, as no international rights were granted to members of those peoples who lived outside the limits of the future States of Czechoslovakia and Poland The Building up of the National Home could not have been effected without the collaboration and assistance of Jews throughout the world; and it was for the purpose of representing them in all that concerned the establishment of the National Home that the Jewish Agency was created. Under these circumstances it was seen fit to secure that the grant of the National Home, and the ensuing right of all Jews to take part in the upbuilding of that home, did not in any way affect their status and allegiance as citizens of the countries to which they belonged.¹⁷⁹

The second safeguard clause is thus construed by Feinberg as providing international legal protection for Zionists (termed "Jews" by

¹⁷⁷ See generally Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L. J.* 16, 30-32 (1913).

¹⁷⁸ Feinberg, *Jewish Yb.L.L.* 1, 17.

¹⁷⁹ *Id.* at 17, 18.

him) exercising the system of national "rights" and correlative obligations necessary for the building of the "National Home." The legal protection of such Zionists is apparently regarded as protection from the states of their regular nationalities, since their participation in Zionist political activities is interpreted as not affecting "their status and allegiance as citizens of the countries to which they belonged."¹⁸⁰ Thus, the additional Zionist nationality status attributed to "the Jewish people" is interpreted as consistent with the recognized nationality "status and allegiance" of Jews in their respective states in spite of the second safeguard clause. These astonishing conclusions are reached by mere statement of the Zionist juridical objective of protecting Zionists outside Palestine by giving them international legal authority to participate in the activities of Zionist nationalism without regard for the municipal laws of the respective states of their recognized nationalities. Professor Feinberg's methodology is simply to assume the answer to the question in issue, that is, whether or not such international rights were granted to Zionists. The alleged Zionist rights are explained by stating that no other "peoples" (Czechoslovaks and Poles) required such a provision "as no international rights were granted" to them.¹⁸¹ Then the postulate of Zionist nationalism is restated, with appropriate changes in terminology, as the conclusion of the analysis. In Feinberg's words, "the ensuing right of all Jews"¹⁸² (*i.e.*, Zionists) is provided in the second safeguard clause of the Declaration. If the human values at stake were less important, the quaint old game of legal ring-around-the-rosy might be amusing. By the same "logic," if it is postulated that the moon is made of green cheese, then it becomes obligatory to conclude, *inter alia*, that green cheese is that of which the moon is made.¹⁸³ The human values are so crucial, however, that the Feinberg fallacy must be exposed.

The Feinberg interpretation is so inconsistent with the negotiating history and the ultimate compromise embodied in the Declaration that it does not deserve consideration on its merits. His interpretation is, nevertheless, a highly ingenious and original one. He attributes to the French international law authority, Paul Fauchille, the con-

¹⁸⁰ *Ibid.*

¹⁸¹ *Id.* at 18.

¹⁸² *Ibid.*

¹⁸³ Systematic exposure of the fallacies of such legal "logic" or "reasoning" is provided by Francis, *Three Cases on Possession—Some Further Observations*, 14 *St. Louis L. Rev.* 11 (1928), reprinted in Fryer (ed.) *Readings on Personal Property* 85 (1938).

clusion that the Balfour Declaration and informal assent to it¹⁸⁴ "undoubtedly constituted the recognition of the Jewish people as a nation."¹⁸⁵ M. Fauchille writes of the Balfour Declaration, as embodied in the Treaty of Peace with Turkey signed at Sevres in 1920:

But Article 95 takes care still to add that "nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country." In the clearest way, this was to recognize both the existence of a Jewish nation and the rights of Israelites to international protection in all states in which they reside or whose nationals they have become.¹⁸⁶

The last sentence in the Fauchille quotation introduced by the words, "In the clearest way," leaps to the conclusion of juridical recognition of "the existence of a Jewish nation." Such a conclusion is inconsistent with the compromise agreement embodied in the Declaration and, in particular, the second safeguard. The second portion of Fauchille's last sentence referring to the "rights of Israelites to international protection in all states in which they reside or whose nationals they have become" might possibly be regarded as sufficiently ambiguous so that it could be construed as consistent either with Professor Feinberg's interpretation of the second safeguard clause or the interpretations based upon the negotiating history and the ultimate compromise agreement. If Fauchille's word, "Israelites," is employed to refer to "Zionists," then the Feinberg interpretation¹⁸⁷ appears to be partially supported. If "Israelites" is accorded its more accepted meaning of "Jews," then the Fauchille interpretation gives considerably less support to Feinberg. The principal ambiguity in the

¹⁸⁴ See supra note 152.

¹⁸⁵ Feinberg, *Jewish Yb.I.L.* 1, 15.

¹⁸⁶ 1 Fauchille, *Traité de Droit International Public* 316 (1923). (Translation by Mrs. Vera Taborsky and the writer.)

¹⁸⁷ Professor Feinberg's article ends with the following paragraph:

There is an old dictum which may be regarded as a canon of interpretation in Jewish matters, even though it is not to be found in treatises on international law. The dictum is etched in the long and turbulent history of the Jews, and its severity has even been enhanced in our own days: *Judaeorum causae non es aequitate sed rigore juris decidendae sunt.*

Jewish Yb.I.L. 1, 26. The last sentence quoted is translated by Professor John F. Latimer of The George Washington University as follows: "Jewish juridical causes must be decided not on the basis of justice or equity but according to the strictness of the law."

In the view of the present writer, the juridical causes of individual Jews, as of all adherents of religions of universal moral values, and even as of those individuals who do not profess a religion, must be decided according to law including the pre-eminent objectives of justice and equity which the law is intended to effectuate.

Fauchille statement, however, concerns the character of the "international protection" accorded to Israelites. The negotiating history, previously examined, demonstrates that it was protection from Zionist nationalism.

(5) The Limited "Jewish People" of the Balfour Declaration:
The Zionists Only

It has already been stated that Dr. Weizmann's claimed constituency of "the Jewish people" in the negotiations leading to the Balfour Declaration was a fabrication subsequently conceded by him.¹⁸⁸ What then was the actual constituency intended to be included within the phrase "the Jewish people"?

During the negotiations, Dr. Weizmann and the other Zionist negotiators attempted to negotiate in behalf of "the Jewish people."¹⁸⁹ In their conception "the Jewish people" consisted of: (1) the Zionist negotiators along with other Zionist leaders and the avowed members of the Zionist movement; (2) Jews in any country other than Palestine.¹⁹⁰ There was no doubt that the Zionist leaders had the right to speak for the Zionists. The central controversy in the negotiations, however, concerned the right of the Zionists to speak for Jews in any country other than Palestine. Montagu and the other anti-Zionist leaders directed their principal effort to limiting the Zionists to their real constituency and denying them the right to act for Jews who were not Zionists.¹⁹¹ The anti-Zionist purpose of maintaining the single nationality status of Jews in any other country than Palestine was maintained implacably throughout the negotiations.¹⁹² The full measure of the anti-Zionist success is set forth unequivocally in the second safeguard clause. The complete failure of the Zionist leaders' claim of authority to act for Jews in any coun-

¹⁸⁸ See the text accompanying note 88 *supra*.

¹⁸⁹ It is clear that the meaning of "the Jewish people" was drastically limited from October 4, 1917, when the anti-Zionists succeeded in having the second safeguard clause placed in the Milner-Amery draft. See the text accompanying notes 127-132 *supra*.

¹⁹⁰ The textual statement is based upon the Zionist negotiating objectives. See Weizmann 176-94, 200-08, and *passim*; Stein 502-32, 543-56, and *passim*.

¹⁹¹ Mr. Stein admits this, by implication only. Stein *passim*. "[N]or could anything be better calculated to prejudice his [Montagu's] work in India, than a British declaration which, as he saw it, would imply that he belonged, as a Jew, to a people apart, with its home—the real focus of its loyalties—in Palestine." *Id.* at 498-99.

¹⁹² Primary authority for the textual statement is found in the negotiating history and particularly in the Milner-Amery draft (reproduced in the text accompanying note 128 *supra*) where the second safeguard first appeared.

try other than Palestine is demonstrated by the strengthening of the second safeguard as it appeared in the final Declaration.¹⁹³

What, then, did "the Jewish people" of the political promise clause include, in the light of the exclusion of Jews in any other country than Palestine from the Zionist constituency? It is a drastically restricted "Jewish people" limited to contemporary Zionists or those who would become Zionists in the future.

The question is raised: If "the Jewish people" excludes the "Jews in any other country" and thus limits Zionist nationalism to its genuine constituency of Zionists, why was not the term "Zionists" substituted for "the Jewish people" in the political promise clause? A realistic answer must recognize that, in spite of the crucial juridical significance of the Declaration, it had other purposes as well. The Zionist negotiators had offered, as *quid pro quo*, the support of their claimed international constituency of Jews to the British Government for British political objectives. Even though the second safeguard fully protected Jews "in any other country" than Palestine, the British Government welcomed political support from all sources. The phraseology of the Declaration was designed, *inter alia*, to make it appear as a humanitarian act by the British Government. There is no doubt that the Declaration had substantial propaganda value to Great Britain and the Allies.¹⁹⁴ A classic study of propaganda during the First World War states: "General Ludendorff regarded the Balfour Declaration as the cleverest thing done by the Allies in the nature of war propaganda, and lamented the fact that Germany had not thought of it first."¹⁹⁵

None of the additional purposes of the Declaration could have been achieved if "the Jewish people" had been candidly described as "Zionists" or "Zionist nationalists" in the political promise clause. Humanitarian concern with the plight of oppressed Jews would not have been aroused by a political promise in behalf of "a national home for the Zionists." Similarly, such a clause would have eliminated the appearance of humanitarian intent on the part of the British

¹⁹³ Text accompanying note 153 *supra*.

¹⁹⁴ Balfour recognized the propaganda value of the Declaration. Stein 544. So did Lloyd George. *Id.* at 546-47. Propaganda reasons are referred to in 1 *Esco Study* 115. "The essential reason, accounts agree, was strategic and had to do with the need of strengthening Great Britain's lifeline to the East." *Id.* at 117. "Through the Balfour Declaration Great Britain ultimately strengthened and extended her position in the whole Near East." *Id.* at 118.

¹⁹⁵ Lasswell, *Propaganda Technique in the World War* 176 (1927). See Stein 533-42 concerning Zionist contacts with the German Government. A cautious German Government statement concerning Zionists and Palestine, issued on Jan. 8, 1918, is quoted in Stein at 602-03.

Government.¹⁹⁶ For British political objectives, consequently, it was indispensable to use "the Jewish people" intact in wording but limited in meaning by the second safeguard clause.

The Zionists were opposed to any limitation of the content of their "Jewish people" concept but failed to achieve this negotiating objective. The Zionists as political realists, however, were aware of the benefits which might accrue to them from even the carefully limited word symbols. Non-Zionists and other potential supporters of Zionism might be led to believe that something akin to "the Jewish people" of Zionist nationalism had been recognized in public law. In addition, the Zionists *qua* "Zionists" could not succeed in the Zionist "national home" enterprise without support from outside Palestine. Only by making the "national home" appear to be a haven for oppressed Jews were the Zionists able to recruit more Zionists while simultaneously obtaining humanitarian support for British and Zionist political objectives. Of all the possible selections of word symbols, "the Jewish people"¹⁹⁷ was the most likely to assist in promoting Zionist political objectives consistent with the stringent juridical limitation of the second safeguard clause. The anti-Zionists were secure in the knowledge that Jews (as opposed to Zionists) had their existing "rights and political status" fully protected by the ultimate compromise Declaration.¹⁹⁸

In summary, the second safeguard clause of the Declaration limited Dr. Weizmann by law to his genuine constituency of the Zionists by subtracting his false constituency of "Jews in any other country" than Palestine. The ensuing juridical result is that though the word symbols "the Jewish people" were used in the political promise clause, they referred to a restricted "Jewish people" which was limited to the Zionists alone. This juridical interpretation recognizes that "the Jewish people" of the political promise clause is employed as a palatable euphemism for "Zionists" or "Zionist nationalists." Whatever doubt may have existed concerning the character of Dr. Weizmann's constituency during the negotiations, it was removed by the clear cut anti-Zionist victory spelled out in the second safeguard of the compromise Declaration.

¹⁹⁶ The humanitarian appearance was needed to enhance the juridical, propaganda, strategic, and other objectives.

¹⁹⁷ As to the ambiguity of the term, see the text accompanying note 28 *supra*.

¹⁹⁸ In addition, domestic constitutional law provides similar protection. For example, the United States Government is prohibited by the First Amendment to the Constitution from discriminating among its citizens on a religious basis. See text accompanying notes 320-24 *infra*. It should be noted that the Jews of Palestine were not protected by the terms of either safeguard clause.

It has been demonstrated previously that one juridically sound interpretation of the political promise clause is that it provides humanitarian sanctuary for Jews.¹⁹⁹ Its alternative juridically sound interpretation is that it is limited to present and potential Zionists only. The common element in these alternative interpretations is that each is consistent with the compromise Declaration including the safeguards.²⁰⁰ In contrast, the central feature of Zionist interpretation of the political promise clause is its violation of the safeguards.²⁰¹

(6) The Continuing Validity of the Balfour Declaration

From its issuance on November 2, 1917, until the present, the Balfour Declaration has been relied upon by the Zionist Organization,²⁰² and since 1948, by the State of Israel²⁰³ also, as authority for Zionist juridical claims. In particular, it has been viewed by the Zionist-Israel sovereignty as granting international juridical authority for "the Jewish people" nationality claims.²⁰⁴

The Balfour Declaration came into existence as an explicit international agreement binding, *inter alia*, the British Government, as such, and as the Mandatory Government in Palestine.²⁰⁵ It might be argued that Israel is bound by the Declaration, including both safeguards, as the successor government to the Palestine Mandatory Government.²⁰⁶ It could also be argued that the United Nations General Assembly Resolution of November 29, 1947,²⁰⁷ which recommended partition of Palestine, obligated Israel to the Balfour Declaration. As to both the recommended Arab and "Jewish" states, the

¹⁹⁹ Text accompanying notes 167, 168 *supra*.

²⁰⁰ Any *juridical* interpretation of the political promise must be consistent with the safeguards.

²⁰¹ See, e.g., Weizmann 211 and *passim*; Feinberg, *Jewish Yb.I.L.* 1 *passim*; Frankenstein, *Jewish Yb.I.L.* 27 *passim*.

²⁰² In addition to the specifics considered in this study see, generally, *Jewish Agency Documents passim*.

²⁰³ In addition to the specifics considered in this study see, generally, *Israel Office of Information (New York), Israel's Struggle for Peace (1960)*.

²⁰⁴ The "Jewish people" concept was used by the Zionist negotiators as one of the devices employed to obtain the Balfour Declaration political promise and now that very restricted promise is used to advance the nationality claims based upon the "Jewish people" concept.

²⁰⁵ The Declaration was incorporated into the League of Nations Mandate for Palestine which is examined in the text accompanying notes 210-22 *supra*.

²⁰⁶ See C. H. Alexander, *Israel in Fieri*, 4 *Int'l L.Q.* 423 (1951) which states: "[A]t the time of withdrawal of the Mandatory Power the new Sovereign was already at hand. Continuity of rights and duties is provided by general principles of International Law, the breach of which would make the State of Israel a tortfeasor." The same writer makes rigid distinctions between different types of international duties. *Id.* at 427. He is aware that Israel denies that it is a successor to the Mandatory Government. *Ibid.*

²⁰⁷ U.N. Gen. Ass. Off. Rec. 2d Sess. 131-50 (A/519) (1947).

resolution provided: "The State shall be bound by all the international agreements and conventions, both general and special, to which Palestine has become a party."²⁰⁸

It is even more convincing to contend that the Balfour Declaration is now a part of customary international law. Even though the Balfour Declaration was originally an explicit international agreement, it has now become established as customary international law through the implicit agreement, by toleration and acquiescence, of states other than Israel in the context of the repeated Zionist-Israel claims advancing it.²⁰⁹ Since the Zionists have so continued the validity of the Declaration as international law, they are confronted with the extremely difficult situation brought about by their violation of both safeguard clauses. It would not be an adequate defense to the charge of violation of customary international law at this late date for the Zionists to claim that there was no intention to incorporate the safeguard clauses of the Declaration into customary law. If such a defense were attempted, it would have to be rejected as being too late and because of the preeminent character of the safeguards.

3. *The League of Nations Mandate for Palestine (1922)*

The basic elements of the Mandate system were enunciated in the League of Nations Covenant. The applicable article provides:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.²¹⁰

By the terms of the Covenant the "sacred trust of civilisation" was to be exercised for the benefit of the people inhabiting the respective territories. This applied, *prima facie*, to the existing inhabitants of Palestine, whatever the religious identification of individual Palestinians.²¹¹ This provision of the Covenant, protecting territories

²⁰⁸ *Id.* at 138.

²⁰⁹ The implicit agreement-making processes of customary law are considered systematically in the text accompanying notes 306-17a *infra*.

²¹⁰ League of Nations Covenant art. 22(1).

²¹¹ Palestine was not a member of the League and, consequently, Palestinians were not directly represented in it.

There was no Arab resentment or hostility to Jewish immigration, as such, in

"inhabited by peoples," is clearly inconsistent with "the Jewish people" nationality claims based upon the religious identification of individuals who are the inhabitants of many territories. Dr. J. Stoyanovsky, a Zionist legal writer, has nevertheless labored to make these nationality claims, which in his view are recognized in the Palestine Mandate, appear to be consistent with the Covenant.²¹²

The Council of the League of Nations designated Great Britain as the Mandatory Power for Palestine, and the Palestine Mandate went into force on September 29, 1922.²¹³ The second paragraph of its preamble incorporated the Balfour Declaration. It shortened the political promise clause but set forth both safeguard clauses with only one word changed: "which might prejudice" was substituted for "which may prejudice."²¹⁴ The third paragraph of the preamble provided:

Whereas recognition has thereby [through the Balfour Declaration] been given to the historical connection of the Jewish people and to the grounds for reconstituting their national home in that country.²¹⁵

contrast to the Arab attitude concerning Zionist immigration. The Zionists referred to Zionist immigration as "Jewish." See 2 Esco Study passim and index heading "Immigration, Jewish" at 1320. "Immigration, Zionist" does not appear in the index. Compare the candid reference to "Zionist Immigration into Palestine" in Hourani, *Near Eastern Nationalism Yesterday and Today*, 42 *Foreign Affairs* 123, 130 (1963). As late as 1918, and entirely consistent with the juridical interpretations of the Balfour Declaration, "The Sherif [of Mecca], in turn, welcomed the Jews to the Arab lands on the understanding that a Jewish state in Palestine would not be in the offing." *Zionist Diplomacy* 32.

²¹² Stoyanovsky, *The Mandate for Palestine: A Contribution to the Theory and Practice of International Mandates* 42-47 (1928), cited hereafter as "Stoyanovsky." Dr. Stoyanovsky appears to perceive some inconsistency between the Zionist nationality claims and the League Covenant: "The peculiarity of the national home policy seems to be the extension of this principle [protecting existing inhabitants] so as to include the Jewish people in the category of the above peoples." *Id.* at 43.

²¹³ Stoyanovsky 33.

²¹⁴ Citations to the League Palestine Mandate are taken from the Convention between the U.S. and Great Britain concerning Palestine of Dec. 3, 1924 (proclaimed by the President on Dec. 5, 1925) by which the U.S. agreed, *inter alia*, to the Palestine Mandate and the Balfour Declaration as described in the text: 44 *Stat. pt. 3*, p. 2184. The word changed in the text of the safeguards certainly did not weaken them. The omission of "and will use their best endeavours to facilitate the achievement of this object" may be construed to weaken the British political promise clause to which the United States agreed. It is not necessary, of course, to rely on such an interpretation because of the juridical interpretations of the political promise. See text accompanying notes 167-68, 198-200 *supra*.

²¹⁵ 44 *Stat. pt. 3*, p. 2184. The Zionists could argue plausibly that the Mandate wording, recognizing "the historical connection," is highly significant, except for the fact that it resulted from the rejection of their recommended wording. "Zionists wanted to have it read: 'Recognizing the historic rights of the Jews to Palestine.'" Weizmann 280. Curzon, then the British Foreign Secretary, rejected the Zionist claim of "rights" unequivocally. *Ibid.* It is clear that he was obligated to reject the Zionist claim by both safeguard clauses as well as by the "rights and political status" enjoyed by British Jews under municipal law.

The Zionists interpreted the Mandate in the same way that they had interpreted the Declaration. Dr. Weizmann, in a contemporary Zionist interpretation, advanced “the Jewish people” nationality claims:

[T]he value of the Mandate, apart from being a great success of Zionism, consists in the recognition of the Jewish people. This is of immense value, which will bear fruit and will open up new perspectives as yet hidden from our weak eyes, while we are engaged in our daily task.²¹⁶

Dr. Stoyanovsky advanced the same claims in the guise of a careful juridical interpretation:

There can hardly be any question now whether Jews constitute a distinct national entity in the eyes of international law. This seems to have been laid down, on the one hand, by the various treaties containing what is known as minority clauses, and on the other, by the mandate for Palestine providing for the establishment in that country of a *national* home for the Jewish people. If, therefore, the question of the national character of the latter may remain open—as in fact it does—for purposes of ethnographical or sociological research, it seems to have been definitely settled from the point of view of international law. The status of Jews no longer constitutes a mere political issue within certain States, or a diplomatic issue between States, on the ground of humanitarian protection afforded to them by such Powers as Great Britain, France and the United States; Jews as such have now become subjects of rights and duties provided for by international law.²¹⁷

The Weizmann and Stoyanovsky interpretations, of course, reflect the meaning which the Zionists sought to impose upon the Mandate and not the meaning of the Mandate. They are fallacious for the same reasons that the Zionist interpretations of the Declaration are fallacious.²¹⁸ The Weizmann interpretation impliedly violates the second safeguard clause. The Stoyanovsky interpretation, on the other hand, expressly violates it. His interpretation imposes “the national character” of “the Jewish people” upon Jews in any country other than Palestine without regard to the second safeguard clause. In his interpretation, “Jews as such” have become members of a

²¹⁶ Address, Carlsbad, Germany, Aug. 25, 1922. Goodman (ed.), Weizmann 175, 179.

²¹⁷ Stoyanovsky 55.

²¹⁸ Text accompanying notes 89-108 *supra*.

"distinct national entity" recognized by international law without regard to their individual preferences.

A comprehensive analysis of the provisions of the Palestine Mandate dealing with Zionism and its "national home" enterprise is beyond the scope of the present study.²¹⁹ It may be appropriately mentioned, however, that article two of the Mandate made the Mandatory responsible for placing Palestine "under such political, administrative and economic conditions as will secure the establishment of the Jewish national home."²²⁰ The Zionist "national home" enterprise referred to in the Mandate preamble was specifically limited by the inclusion of both safeguards. Consequently, it is inaccurate and misleading to attribute a broader meaning to the Zionist "national home" and the related claimed nationality of "the Jewish people" in the Mandate than that in the Balfour Declaration upon which the Mandate is based. Even though article two of the Mandate refers to "*the* Jewish national home,"²²¹ it has to be interpreted as consistent with the phrase "a national home" set forth in the preamble. Whether the phrase is "the" or "a" national home, it must be interpreted as being limited by the preeminent safeguard clauses in the preamble to the Mandate.

The League of Nations Mandate for Palestine is significant because it involved explicit agreement by the League of Nations to the provisions of the Balfour Declaration. It should be recognized that this amounts to multilateral approval of the Declaration compromise agreement. It does not change the interpretation of the Declaration including the two alternative juridical interpretations of the political promise clause which have been explained.²²²

²¹⁹ General description is provided in U.S. Dep't State, Mandate for Palestine (Near Eastern Series No. 1, Pub. No. 153, 1931).

Zionist interpretation is provided in Feinberg, *Some Problems of the Palestine Mandate* (1936) and Stoyanovsky, *Law and Policy under the Palestine Mandate*, *Jewish Yb.I.L.* 42.

An analysis of the Zionist pressure politics utilized to implement Zionist nationalism (where juridical attempts had failed) is beyond the scope of this study. See *Zionist Diplomacy* 32-33, 39-87; *Jewish Agency Documents* passim and 226-27 concerning the "Declaration Adopted by the Extraordinary Zionist Conference, Biltmore Hotel, New York City, May 11, 1942."

²²⁰ 44 Stat. pt. 3, p. 2184 at 2185.

²²¹ *Ibid.* (Emphasis added.)

²²² See text accompanying notes 167-68, 198-200 *supra*.

The interpretation of the Palestine Mandate in the text postulates that the incorporation of the Declaration in the Mandate incorporates the Declaration's negotiating history which gives it meaning. If it should be postulated, unrealistically, that the Declaration was incorporated without its negotiating history, then the interpretation of the Mandate in the text is supported by the clear and preeminent character of the safeguards and the ambiguities in the political promise clause.

4. *The Anglo-American Convention on Palestine (1924)*

The nominal subject of the Anglo-American Convention was the rights of the United States Government and its nationals concerning Palestine. For present purposes the significance of the Convention is that it made the United States a party to the Balfour Declaration agreement. The entire League of Nations Mandate, including the substance of the Balfour Declaration, was set forth in the preamble to the Convention.

Article two of the Convention provided:

The United States and its nationals shall have and enjoy all the rights and benefits secured under the terms of the mandate to members of the League of Nations and their nationals, notwithstanding the fact that the United States is not a member of the League of Nations.²²³

Of "all the rights and benefits," probably the most obvious was the protection accorded by the second safeguard clause to American Jews.

Article seven provided:

Nothing contained in the present convention shall be affected by any modification which may be made in the terms of the mandate, as recited above, unless such modification shall have been assented to by the United States.²²⁴

This article empowered the United States to object to any changes in the Mandate which affected American citizens.²²⁵ A change in the second safeguard clause would affect American citizens. Thus, the United States Government obtained an additional means of preventing any infringement of the nationality status of its citizens based upon their religious identification.

American Jews are entitled to rely upon United States adherence to the entire Balfour Declaration, including the safeguards, as embodied in the Anglo-American Convention.²²⁶ Such reliance is il-

²²³ *Supra* note 220, at 2191.

²²⁴ *Id.* at 2192.

²²⁵ For Zionist criticism of the United States' interpretation of the Convention as limiting its power to prevent modifications to those situations in which Americans were affected, see Feinberg, *The Interpretation of the Anglo-American Convention on Palestine 1924*, 3 *Int'l L.Q.* 475 (1950).

²²⁶ They are still entitled so to rely because of the present status of the Balfour Declaration as customary law. See the text accompanying notes 202-09 *supra*. The Anglo-American Convention, as such, is no longer in force. See U.S. Dep't State, *Treaties in Force 99-100, 192-204* (1964).

American Jews are entitled, fundamentally, to rely upon the First Amendment

illustrated by the actions of Louis Marshall, a distinguished lawyer. In 1929, Marshall wrote to a German Jew who, like himself, rejected Zionist nationalism but deemed it desirable to obtain from the League of Nations an interpretation of the phrase "national home for the Jewish people."²²⁷ At the outset, Marshall stated, "I am not a nationalist, and . . . I take pride in my American citizenship and in my loyalty to Judaism."²²⁸ After stating that there was "no occasion whatsoever for requesting"²²⁹ such an interpretation, Marshall declared:

There can be no clearer reservation than that contained in concise terms in the Balfour Declaration and adopted by the other documents to which I have referred [the League of Nations Mandate for Palestine and the British White Papers of June 3, 1922, and October 4, 1922]:

"It being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country."

The American non-Zionists have found it unnecessary to make any reservation on this subject, and I am sure that they would be unwilling to unite in any application to the League of Nations looking for a definition.²³⁰

to the Constitution prohibiting religious discrimination. See the text accompanying notes 318-24 *infra*. Subordinate municipal law authority for adherence to the Balfour Declaration may be found in the Joint Resolution Favoring the establishment in Palestine of a national home for the Jewish people. 42 Stat. pt. 1, p. 1012 (Approved, Sept. 21, 1922). The Joint Resolution included the first safeguard clause of the Balfour Declaration with variations in the wording. It omitted the second safeguard but this is not significant juridically since its provisions must have been regarded as obviously applicable to Americans. In any event, it is clear that a joint resolution cannot diminish the constitutional prohibition against religious discrimination.

²²⁷ 2 Reznikoff (ed.), Louis Marshall, *Champion of Liberty: Selected Papers and Addresses* 775 (1957).

²²⁸ *Ibid.*

²²⁹ *Id.* at 777.

²³⁰ *Ibid.* Marshall, as an American lawyer, quoted the safeguards, including the word "might," as they appeared in 44 Stat. pt. 3, p. 2184.

Marshall referred to "American non-Zionists." In 1929, this term included anti-Zionists also, as clarified in the text accompanying note 19 *supra*.

The Anglo-American Convention is no longer in effect, as such, though the Balfour Declaration included in it is valid as customary law. See the text accompanying notes 202-09 *supra*. The Treaty of Friendship, Commerce and Navigation Between the U.S. and Israel, Aug. 23, 1951, [1954] 1 U.S.T. & O.I.A. 552, 5 T.I.A.S. No. 2948 (Effective April 13, 1954), contains two specific denials of the right to engage in political activities, although one such denial is considered sufficient in many similar treaties. The last sentence of art. 8, sec. 3 states: "Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities." Art. 13, sec. 4 states: "The present Treaty does not accord any rights to engage in political activities." Systematic Zionist-Israel violation of these provisions in the United States is revealed in Senate Committee on Foreign Relations, *Hearing on Activities of Nondiplomatic Representatives of Foreign Principals in the United States*, 88th Cong., 1st Sess., pt. 9 (May 23, 1963); pt. 12 (Aug. 1, 1963). "The hearings of the

B. "THE JEWISH PEOPLE" NATIONALITY CLAIMS ADVANCED SINCE THE ESTABLISHMENT OF THE STATE OF ISRAEL

1. *The Declaration of the Establishment of the State of Israel (1948)*

An analysis of the constitutive process which created the State of Israel, including the claimed juridical authority for its creation, is beyond the scope of the present study.²³¹ The Declaration of the Establishment of the State of Israel, however, is significant in the present analysis because it contains "the Jewish people" nationality claims. The following excerpts from the Declaration manifest the continuing Zionist objective of advancing "the Jewish people" nationality claims in the context of public law:

- (1) ERETZ-ISRAEL was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. . . .
- (2) In the year 5657 (1897), at the summons of the spiritual father of the Jewish State, Theodore Herzl, the First Zionist Congress convened and proclaimed the right of the Jewish people to national rebirth in its own country.
- (3) This right was recognised in the Balfour Declaration of the 2nd November, 1917, and reaffirmed in the Mandate of the League of Nations which, in particular, gave international sanction to the

committee have offered some guidance, but the nine chosen cases were selected not because they were typical but rather because they illustrated a range of activities which the committee believed were *inimical* to the interests of the United States and should be dealt with in new legislation." (Emphasis added.) Senate Committee on Foreign Relations, Report on Foreign Agents Registration Act Amendments, S. Rep. No. 875, 88th Cong., 2d Sess. p. 5 (Feb. 21, 1964).

²³¹Zionist views are suggested in the ensuing text in the quotations in which the Zionist nationality claims are advanced.

For critical appraisal of a portion of the Israeli constitutive process see Roosevelt, *The Partition of Palestine: A Lesson in Pressure Politics*, 2 *Middle East J.* 1 (1948).

United States Foreign Policy: Compilation of Studies (Prepared under the direction of the Senate Committee on Foreign Relations, 86th Cong., 2d Sess., 2 vols., 1960) provides a systematic and thoughtful appraisal of U.S. foreign policy. Study No. 13 concerning U.S. Foreign Policy in the Middle East was prepared by the Staff of the Senate Committee on Foreign Relations; it appears in vol. 2 at pp. 1269-1387. "The Palestine Problem" is examined, *id.* at 1303-16. The views of retired Foreign Service Officers concerning Israel and the Middle East are printed, *id.* at 1459-62. The staff of the Senate Committee on Foreign Relations summarized their views as follows: "It was unanimously agreed that the manner in which Israel was created had an unfortunate effect on our relationship with the Arab nations." *Id.* at 1459. See also [1943] 4 *Foreign Rel. U.S.* 747-829 (1964) indicating United States official concern with Zionist political activities.

In 1954, Mr. Henry A. Byroade, then Assistant Secretary of State, stated:

To the Israelis I say that you should come to truly look upon yourselves as a Middle Eastern State and see your own future in that context rather than as a headquarters, or nucleus so to speak, of worldwide groupings of peoples of a particular religious faith who must have special rights within and obligations to the Israeli state.

The Middle East in New Perspective, 30 *Dep't State Bull.* 628, 632 (1954). See also Byroade, *Facing Realities in the Arab-Israeli Dispute*, 30 *Dep't State Bull.* 708 (1954).

historic connection between the Jewish people and Eretz-Israel and to the right of the Jewish people to rebuild its National Home.

(4) The catastrophe which recently befell the Jewish people—the massacre of millions of Jews in Europe—was another clear demonstration of the urgency of solving the problem of its homelessness by re-establishing in Eretz-Israel the Jewish State, which would open the gates of the homeland wide to every Jew and confer upon the Jewish people the status of a fully-privileged member of the comity of nations. . . .

(5) THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles;

(6) WE APPEAL to the United Nations to assist the Jewish people in the building-up of its State and to receive the State of Israel into the comity of nations. . . .

(7) WE EXTEND our hand to all neighbouring states and their peoples in an offer of peace and good neighbourliness, and appeal to them to establish bonds of cooperation and mutual help with the sovereign Jewish people settled in its own land. . . .

(8) WE APPEAL to the Jewish people throughout the Diaspora to rally round the Jews of Eretz-Israel in the tasks of immigration and upbuilding and to stand by them in the great struggle for the realization of the age-old dream—the redemption of Israel. . . .²³²

Excerpt (1) refers to, *inter alia*, the "political identity" of "the Jewish people." Excerpt (2) illustrates the consistent character of the claimed nationality entity of "the Jewish people" from 1897 to 1948. Excerpt (3) sets forth the familiar Zionist nationalist claims based upon Zionist interpretation of the Balfour Declaration and the League of Nations Mandate.²³³

Excerpt (4) affords a clear illustration of the Zionist political solution to anti-Semitism and Nazi criminality. This political solution had not changed from the time of Theodor Herzl. The excerpt claims that the Zionist State of Israel is "the Jewish state" and claims to confer "the status of a fully-privileged member of the comity of nations" upon "the Jewish people." The word "homeland" in the excerpt is not used to refer to the State of Israel as the home of its regular nationals without regard to their religious identification. "[T]he homeland" is deemed to be the homeland of "every Jew." Excerpt (5) emphasizes the last point by showing that Jews living

²³² The excerpts from the Declaration in the text are numbered by the present writer for convenience in the ensuing analysis. 1 Laws of the State of Israel (authorized translation from the Hebrew) 3-5 (May 14, 1948), cited hereafter as "Israel Laws." The Declaration is also in Badi (ed.), *Fundamental Laws of the State of Israel* 8-11 (1961), cited hereafter as "Fundamental Laws."

²³³ See note 215 *supra*.

outside of the State of Israel are treated in Zionist public law as living in exile. Excerpt (6) further emphasizes the Zionist public law claim that the State of Israel is the state of "the Jewish people" and not of its regular nationals alone.

Excerpt (7) is ambiguous. It refers to the "sovereign Jewish people" as "settled in its own land." This could be interpreted as referring only to the "sovereign" character of that part of "the Jewish people" living in the State of Israel. Even if it is interpreted in such limited fashion, the word "sovereign," as it appears in the context of the excerpt, tends to identify Jews in states other than Israel with the State of Israel in public international law without regard to their individual preferences and regular nationality status.

Excerpt (8) provides an alternative in the form of an emotional "appeal" to the juridical claims already considered. Individual Jews who reject the Zionist claim of juridical connection between them and the State of Israel may be induced to give practical assistance to the State of Israel if the objectives of Zionist nationalism are reformulated as an "appeal."

In summary, the Declaration of the Establishment of the State of Israel reveals no change or diminution in the character of the Zionist-Israel juridical claims to constitute "the Jewish people" nationality entity and confer membership in it. This Declaration provides a highly effective platform from which to advance the nationality claims in public law. In the same way that Brandeis and the other humanitarians regarded the Balfour Declaration as an end to the political work of Zionism,²³⁴ some today may regard the establishment of the State of Israel as the culmination of Zionist nationalism. The excerpts from the Declaration of the Establishment of the State advancing "the Jewish people" nationality claims in international law indicate a very different situation. The Zionists conceive of the State of Israel as an additional public body, to be associated with the existing Zionist Organization in achieving Zionist political objectives.²³⁵ The establishment of "the Jewish people" nationality claims

²³⁴ See note 157 *supra*.

²³⁵ See *Zionist Diplomacy* at 106 entitled, Epilogue: The Remaining Task for Political Zionism.

A director-general of the Israeli Foreign Ministry has written:

It is a commonplace of our Foreign Service that every Envoy Extraordinary and Minister Plenipotentiary of Israel has a dual function. He is Minister Plenipotentiary to the country to which he is accredited—and Envoy Extraordinary to its Jews. This has come to be accepted generally—by other

in law is the central juridical task of each of these two Zionist public bodies.

2. *The World Zionist Organization-Jewish Agency Status Law (1952)*

Prior to the establishment of the State of Israel, the Zionist Organization achieved status as a public body through the Balfour Declaration,²³⁶ the League of Nations Mandate for Palestine,²³⁷ and the

governments in the "free" world, . . . by the Jews of the diaspora, and by every one in Israel.

Eytan, *The First Ten Years: A Diplomatic History of Israel 192-93* (1958).

[T]he Foreign Ministry of Israel probably brings more money into the public chest than any other ministry, except the tax-collecting Ministry of Finance. No computation has ever been made of the value, in terms of money, of Israel's representatives abroad. They are constantly engaged in the campaigns for voluntary funds contributed by Jews all over the world, in popularizing Israel bond issues, in securing official loans (as from the American Export-Import Bank) and grants-in-aid, in negotiating commercial agreements and stimulating trade in general, and in a variety of other revenue-producing activities. If it were not for them, there would be a heavy slump in Israel's income.

Id. at 225.

A pro-Zionist writer has stated:

[T]he level of aid given to her [Israel] has been quite exceptional. During the first fourteen years of Israel's existence, the United States government has in fact awarded her close to \$850,000,000 of aid in various forms, mostly outright grants of one kind or another. On a per capita basis of the recipient country, this is probably the highest rate of American aid given to any country. Moreover, the American government never seriously attempted to question the classification of the billion dollars of donations made by American Jews as tax-exempt "charity," though this money went, in effect, into the general development budget of Israel.

Safran, *The United States and Israel* 278 (1963).

²³⁶ It received some status before the Declaration by the conduct of negotiations with various governments. See the text accompanying notes 65-74 *supra*.

²³⁷ Art. 4 of the Mandate provided:

An appropriate Jewish agency shall be recognized as a public body. . . . The Zionist organization, so long as its organization and constitution are in the opinion of the Mandatory appropriate, shall be recognized as such agency

44 Stat. pt. 3, p. 2184 at 2185.

The Permanent Court of International Justice has interpreted the foregoing provisions:

This clause shows that the Jewish agency is in reality a public body, closely connected with the Palestine Administration and that its task is to co-operate, with that Administration and under its control, in the development of the country.

The Mavrommatis Palestine Concessions, P.C.I.J., ser. A., No. 2, p. 21 (1924).

In 1946 an impartial and respected fact-finding committee concluded:

There thus exists [through the Jewish Agency] a virtual Jewish nonterritorial State with its own executive and legislative organs, parallel in many respects to the Mandatory Administration, and serving as the concrete symbol of the Jewish National Home. This Jewish shadow Government has ceased to cooperate with the Administration in the maintenance of law and order, and in the suppression of terrorism.

Anglo-American Committee of Inquiry, Report to the United States Government and His Majesty's Government in the United Kingdom, April 20, 1946, p. 39 (U.S. Dep't State Pub. 2536, 1946).

Anglo-American Convention on Palestine.²³⁸ Since its establishment in 1948, the State of Israel has sought to maintain the public body status of the Zionist Organization as a means of advancing Zionist nationalism. The purpose of the 1952 Status Law is to implement this goal.

The following excerpts from the Status Law reveal the integral juridical relationship between the Zionist Organization and the State of Israel:

1. The State of Israel regards itself as the creation of the entire Jewish people, and its gates are open, in accordance with its laws, to every Jew wishing to immigrate to it.
2. The World Zionist Organisation, from its foundation five decades ago, headed the movement and efforts of the Jewish people to realise the age-old vision of the return to its homeland and, with the assistance of other Jewish circles and bodies, carried the main responsibility for establishing the State of Israel.
3. The World Zionist Organisation, which is also the Jewish Agency, takes care as before of immigration and directs absorption and settlement projects in the State.
4. The State of Israel recognises the World Zionist Organisation as the authorised agency which will continue to operate in the State of Israel for the development and settlement of the country, the absorption of immigrants from the Diaspora and the coordination of the activities in Israel of Jewish institutions and organisations active in those fields.
5. The mission of gathering in the exiles, which is the central task of the State of Israel and the Zionist Movement in our days, requires constant efforts by the Jewish people in the Diaspora; the State of Israel, therefore, expects the cooperation of all Jews, as individuals and groups, in building up the State and assisting the immigration to it of the masses of the people, and regards the unity of all sections of Jewry as necessary for this purpose.
6. The State of Israel expects efforts on the part of the World Zionist Organisation for achieving this unity
7. Details of the status of the World Zionist Organisation—whose representation is the Zionist Executive, also known as the Executive of the Jewish Agency—and the form of its cooperation with the Government shall be determined by a Covenant to be made in Israel between the Government and the Zionist Executive. . . .²³⁹

The first section of the Status Law enunciates a fundamental precept of Zionist nationalism: The State of Israel is not created for its

²³⁸ In this Convention, the United States agreed to the entire Palestine Mandate including art. 4 quoted *supra* note 237. See the text accompanying notes 222-23 *supra*.

²³⁹ 7 Israel Laws 3 (1952); Fundamental Laws 285.

own regular nationals alone but, rather, for "the entire Jewish people." This may be appraised as a Zionist claim to identify further "the entire Jewish people" (not only that part possessing Israeli nationality) with the State of Israel in law.

The second section recognizes with candor that the Zionist Organization was the principal creator of the State of Israel. In other words, "the Jewish people" was not sufficiently organized to create the State of Israel. Consequently, the Zionist Organization, as the self-appointed agent for its alleged constituency of "the Jewish people," created the State. The reference to "other Jewish circles and bodies" acknowledges non-Zionist support for political Zionism.

The third section indicates that the Zionist Organization (under that name or under the name "Jewish Agency") continues to perform the same functions after the enactment of the Status Law as it did before. The fourth section refers particularly to the long continuing governmental functions of the Zionist Organization within Palestine and the State of Israel. The sections of the Status Law do not create public body status for the Zionist Organization. They recognize its pre-existing and continuing public body or governmental status.²⁴⁰

The fifth section is applicable to the individual members of the alleged "Jewish people" entity living in other states than Israel. In traditional Zionist public law conception, they are regarded as "exiles" whose "gathering in" is "the central task" of both the State of Israel and the Zionist Organization.²⁴¹ In addition, the State "expects the cooperation of all Jews, as individuals and groups," in implementing Zionist political objectives. "The unity" (meaning,

²⁴⁰ The same conclusion is reached in Lasky, *Between Truth and Repose* 51 (1956).

²⁴¹ Israeli nationality law, as opposed to "the Jewish people" nationality claims, is beyond the scope of the present study. It is important to note, however, that Israeli nationality law is designed to facilitate the acquisition of Israeli nationality by that part of "the Jewish people" living outside Israel. See the Law of Return (1950), 4 Israel Laws 48, as amended 8 Israel Laws 144; Fundamental Laws 156, as amended 8 Israel Laws 332. Sec. 1 of the Law of Return provides: "Every Jew has the right to come to this country as an *oleh* (Jew immigrating to Israel)."

See also the Nationality Law of 1952, 6 Israel Laws 50, as amended 12 Israel Laws 99; Fundamental Laws 254, as amended Fundamental Laws 410.

See *Ravenna v. Ministero Interno* (Italy Tribunal of Rome, February 25, 1958), 26 Int'l L. Rep. 376 (1958-II) holding that the acquisition of Israeli nationality by an Italian Jew was not "spontaneous" within the meaning of Italian law. The result was that the Italian Jew did not lose her Italian nationality. The court indicated that it would have been "very difficult for the applicant to make an express declaration that she *did not desire*" to acquire Israeli nationality as required by Israeli law of Jews. *Id.* at 379. See the severe Zionist criticism of the case in Bar-Yaacov, *Dual Nationality* 245-47 (1961).

of course, political unity rather than religious unity) "of all sections of Jewry" is regarded as necessary for Zionist purposes. The excerpt from the sixth section refers to the public or governmental function of the Zionist Organization in achieving the Zionist political unity of Jews in states other than Israel.

The seventh section refers to an agreement between Zionist State and Zionist Organization. The ensuing "Covenant"²⁴² between the Israeli Government and the Zionist Executive allocates specified governmental functions to the Zionist Executive. These include the "organizing of immigration abroad and the transfer of immigrants and their property to Israel"²⁴³ and Zionist participation in economic development activities in Israel. It provides that the Zionist Executive is to coordinate activities in Israel within the scope of its functions "by means of public funds."²⁴⁴ The Covenant also establishes a "Coordination Board" for "the purpose of coordinating activities between the Government and the Executive in all spheres to which this Covenant applies. . . ."²⁴⁵

In summary, the Status Law and Covenant embody the central provisions of the integral public law relationship between the State of Israel and the Zionist Organization. The Law and Covenant provide for an allocation and coordination of governmental functions to further the common Zionist objectives of State and Organization.²⁴⁶

²⁴² The Covenant is reproduced in Lasky, *supra* note 240, at 63-65.

²⁴³ Covenant sec. 1.

²⁴⁴ *Ibid.*

²⁴⁵ Covenant sec. 8.

²⁴⁶ The conclusion as to the public or governmental character of the Zionist Organization—Jewish Agency is supported by the authorities in *supra* note 237. Contrast with this conclusion the statements of Mr. Gottlieb Hammer, Executive Vice-Chairman of the Jewish Agency for Israel, Inc. (identified by Mr. Hammer as an organization under American control), in his testimony under oath. He stated that he would refer to the Jewish Agency for Israel, Jerusalem, as the "Jerusalem Agency." Senate Committee on Foreign Relations, Hearing on Activities of Non-diplomatic Representatives of Foreign Principals in the United States, 88th Cong., 1st Sess., pt. 9 at 1216 (May 23, 1963). He then continued:

Since 1948, when the State of Israel was established, the Jerusalem Agency has performed no political functions.

The Jerusalem Agency is a unique organization. It is a nongovernmental body

Ibid.

In response to a question by Senator Fulbright concerning the relationship of the Jewish Agency for Israel, Jerusalem, to the State of Israel, Mr. Hammer replied in part:

I think I should make it clear they are not part of the Government, they are not a governmental agency, nor are they an agency of the Government.

Id. at 1227.

The Jewish Agency for Israel, Jerusalem, is the same Jewish Agency referred to in the Israeli Status Law. See the text accompanying notes 236-46 *supra*. Sec. 3 of the Status Law shows clearly that the Jewish Agency and the World Zionist Organization are the same entity.

Because of this juridical structure, the State of Israel and the Zionist Organization taken together may be realistically described as a single Zionist-Israel sovereignty.

In addition, the Status Law spells out a clear governmental interference by a foreign sovereign in the lives of "Jews in any other country" than Israel. The juridical consequence is a violation of the "rights and political status" specifically protected by the second safeguard clause in the Balfour Declaration. This also involves a violation of the equal domestic rights of American Jews protected by the First Amendment to the Constitution. The practical consequence is injury to individual American Jews which goes beyond mere "prejudice" to their "equal rights and political status."

3. *The Eichmann Trial Judgment (1961)*

The Nazi murder of millions of innocent men, women, and children is probably the most tragic event of the present century. All moral individuals of whatever national or religious identification share revulsion at those who perpetrated these crimes. The largest group of victims was designated by the Nazis as "Jews." Other designated groups included, *inter alia*, "Poles," "Gypsies," "Slavs," and "Ukrainians." Many other civilians throughout Europe were murdered by the Nazis even though they could not be included properly in even the most extended definitions of the specified victim groups. These crimes have been established by overwhelming evidence, including documents prepared by the Nazis themselves, in the forty-two volumes of *The Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg*,²⁴⁷ as well as in other post-war trials.

The jurisdictional authority, insofar as crimes against civilians were concerned, involved in the principal *Nuremberg Trial*²⁴⁸ and the subsequent proceedings²⁴⁹ was derived from the concept of crimes against the common humanity of all. The juridical concept of crimes against humanity (as opposed to a concept of crimes against the victims and their co-religionists alone) was firmly established in international law by the principal *Nuremberg Trial* and other post-World War II trials.²⁵⁰ The jurisdictional authority derived from

²⁴⁷ Official Text in the English Language (1947), cited hereafter as "I.M.T." See the Judgment of the Tribunal, 1 I.M.T. 171.

²⁴⁸ 1 I.M.T. 226-28, 232-38.

²⁴⁹ See, e.g., *United States v. Ohlendorf (The Einsatzgruppen Case)*, 4 *Trials of War Criminals Before the Nuernberg Military Tribunals* 1, 496-500 (1948).

²⁵⁰ *Supra* notes 248-49.

crimes against humanity is a very extensive one which is usually termed universality of jurisdiction. "Universality," in this jurisdictional sense, authorizes any state having custody of the accused to try him without regard to the geographic location and time elements of the acts alleged to constitute the crime against humanity. In addition, the national state trying the accused may not discriminate upon the basis of the national identity of the accused or that of the alleged victim.²⁵¹

The evidence produced before the Israeli trial court in the case against Adolph Eichmann appears to be ample to establish his guilt for crimes against humanity. If the principal charges against Eichmann had been crimes against humanity,²⁵² there is no doubt that Israel would have been entitled to invoke universality of jurisdiction. It would, of course, have been required, in order to meet the juridical criteria, to apply universality of jurisdiction without regard to the national identity of the accused or of the victims.

It is particularly significant that the Israeli court in the *Eichmann Trial Judgment* paid only lip service to the concept of crimes against humanity.²⁵³ Principal emphasis was placed upon the Zionist concept of "crimes against the Jewish people."²⁵⁴ This involved the

²⁵¹ The requirements of universality of jurisdiction stated in the text are based upon the decisions of the post-World War II trials conducted by the United States and its allies. A similar formulation appears in McDougal & Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* 717-18 (1961). See also 1 Oppenheim-Lauterpacht, *International Law* 753 (8th ed. 1955).

²⁵² Eichmann was also charged with crimes against humanity, but the principal charges were "crimes against the Jewish people." See the Israeli Nazis and Nazi Collaborators (Punishment) Law (1950), 4 Israel Laws 154, Fundamental Laws 162, defining "crime against the Jewish people." This Israeli statute was applied in *The Attorney-General of the Government of Israel v. Adolf, the son of Karl Adolf Eichmann*, Criminal Case No. 40/61, District Court of Jerusalem, Israel, Dec. 11-12, 1961, affirmed Criminal Appeal No. 336/61 Supreme Court of Israel, May 29, 1962, cited hereafter as "*Eichmann Trial Judgment*."

²⁵³ The Israeli trial court did not appear to understand the distinction between defining the crime in terms of the victims' identification and defining it in terms of the common humanity of all. It stated:

It is hardly necessary to add that the "crime against the Jewish people", which constitutes the crime of "genocide" is nothing but the gravest type of "crime against humanity"

Eichmann Trial Judgment p. 22, heading #26. In a conception of law based upon respect for the individual, "crimes against humanity" are of equal gravity without regard to the religious identification of the victim. Definition of crime by the victim's religion involves the immoral implication that crimes against Jews are not crimes against common humanity.

²⁵⁴ *Eichmann Trial Judgment* passim. In Criminal Appeal No. 336/61, the Supreme Court of Israel in affirming the *Eichmann Trial Judgment*, in reference to the alleged "connecting link between the State of Israel and the Jewish people," stated: "It should be clear that we fully agree with every word said by the Court on this subject in Paragraphs 31-38 of its judgment." *Id.* at p. I 24, heading #12, last para.

claim of the alleged "Jewish people" nationality status of Eichmann's victims. Similarly, the Israeli court preferred to base its jurisdictional claim to try Eichmann principally upon the alleged legal link between the State of Israel and "the Jewish people" rather than upon the recognized authority of universality of jurisdiction.²⁵⁵

A sense of reality concerning the *Eichmann Trial Judgment* can be achieved by examination of the following excerpts from it:

If there is an effective link (and not necessarily an identity) between the State of Israel and the Jewish people, then a crime intended to exterminate the Jewish people has a very striking connection with the State of Israel.

The connection between the State of Israel and the Jewish people needs no explanation. The State of Israel was established and recognised as the State of the Jews. . . . It would appear that there is hardly need for any further proof of the very obvious connection between the Jewish people and the State of Israel: this is the sovereign State of the Jewish people.

* * *

In the light of the recognition by the United Nations of the right of the Jewish people to establish their State, and in the light of the recognition of the established Jewish State by the family of nations, the connection between the Jewish people and the State of Israel constitutes an integral part of the law of nations.

* * *

The Balfour Declaration and the Palestine Mandate given by the League of Nations to Great Britain constituted an international recognition of the Jewish people, (see *N. Feinberg*, "The Recognition of the Jewish People in International Law" *Jewish Yearbook of International Law* 1948, p. 15, and authorities there cited), the historical link of the Jewish people with Eretz Israel and their right to reestablish their National Home in that country.²⁵⁶

It is significant that the claim of juridical connection between "the Jewish people" and the State of Israel is set forth, not as a claim, but as though it were already established as "an integral part of the law of nations." The *Eichmann Trial Judgment*, with its wide humanitarian appeal, was thus exploited by Zionism as an instrument for advancing "the Jewish people" nationality claims in international law.²⁵⁷ The price paid for this approach was the sacrificing of

²⁵⁵ *Ibid.*

²⁵⁶ *Eichmann Trial Judgment*, cited *supra* note 252, at p. 32, headings #33-34, pp. 34-35, heading #38.

²⁵⁷ Penetrating criticism of the Eichmann trial is provided in T. Taylor, *Large*

reliance upon the established concept of crimes against humanity and ensuing universality of jurisdiction. The almost certain result was lack of jurisdictional authority. Such a result was acceptable to Zionists because of the great opportunity presented to advance "the Jewish people" claims in a supposedly judicial context. The Zionist objection to *basing* the claim to jurisdictional authority upon the established concepts of crimes against humanity and ensuing universality of jurisdiction, as opposed to merely giving lip service to them, is that the established concepts recognize the membership of Jews in the common humanity of all. Such recognition is inconsistent with the purpose of "the Jewish people" nationality claims to separate Jews from other individuals in public law.

Thus, in the Zionist public law conception of the *Eichmann Trial Judgment*, the regular nationality status of Jewish victims of the Nazis was ignored or minimized in favor of their alleged nationality status as members of "the Jewish people." The Zionist objective was to show that only the Zionist State of Israel seeks to protect the Jewish victims of the Nazis.²⁵⁸ The principal *Nuremberg Trial* and the subsequent proceedings demonstrate unequivocally that the United States and other states employed the concept of crimes against humanity and ensuing universality of jurisdiction without discrimination based upon the religious or national identity of the victims or the accused.²⁵⁹

4. *The Joint Israel-Zionist Communique of March 16, 1964*

A joint meeting of the Israeli Cabinet and the Zionist Executive was held on March 15, 1964.²⁶⁰ The Joint Communique issued on the following day illustrates further the integral relationship and

Questions in the Eichmann Case, N.Y. Times Magazine 11 (Jan. 22, 1961). Lasok, *The Eichmann Trial*, 11 Int'l & Comp. L.Q. 355, 372-74 (1962) provides some criticism. See also Silving, *In Re Eichmann: A Dilemma of Law and Morality*, 55 Am. J. Int'l L. 307 (1961).

²⁵⁸ The same conclusion is reached in Rogat, *The Eichmann Trial and the Rule of Law* 15-17 and *passim* (1961).

²⁵⁹ In addition, no discrimination was permitted where victim or accused lacked either religious or national identity or both. See, e.g., *United States v. Ohlendorf*, *supra* note 249, at 499 involving crimes against humanity where the victims were identified, factually but without juridical discrimination, as German Jews. Many Jews in Germany were deprived of their German nationality by municipal law.

²⁶⁰ Reported in the semi-official *Jerusalem Post*, March 16, 1964, p. 1, col. 1; p. 8, cols. 3, 4.

Arts. 40-45 of the Constitution of the World Zionist Organization concern the Executive of the World Zionist Organization. These articles are reproduced in Senate Committee on Foreign Relations, *Hearing on Activities of Nondiplomatic Representatives of Foreign Principals in the United States*, 88th Cong., 1st Sess., pt. 9 at 1412 (May 23, 1963); part 12 at 1768 (Aug. 1, 1963).

cooperation between the Zionist State and the Zionist Organization. On its face, the Communique is designed to interfere in the lives of nationals of states other than Israel. It is reproduced in full:

A joint meeting of the Government of Israel and the Executive of the World Zionist Organization, which took place yesterday in Jerusalem, was devoted to the examination of the problems facing the Jewish people in the Diaspora, in view, on the one hand, of the denial to Jews in certain countries of religious and cultural liberties and, on the other hand, of the dangers of assimilation affecting Jewish communities elsewhere.

The members of the Executive expressed the determination of the Zionist movement, whilst continuing to discharge its functions in the spheres of immigration, absorption and settlement on the land, as provided for in the Covenant, to concentrate and invigorate its efforts in the Diaspora in the fields of the education of children and the youth, as well as by active participation in the activities of Jewish communities and Jewish international organizations.

It was explained that the purpose of these endeavours will be to strengthen the attachment of Jewish communities in the Dispersion to the State of Israel as a centre of their spiritual life; to enlist their effective sharing in the responsibility for the further development of the State and the safeguarding of its future; to intensify among them the consciousness of the unity of the Jewish people, the solidarity of its various parts and its vigil for self-preservation through an organized effort; to assist in the extension and development of Jewish education with a view to imparting to the young generation the values of Judaism and its spiritual heritage, to spread the knowledge of the Hebrew language and Israel's renascent Hebrew culture, and to awaken and cultivate the mental readiness and active desire to settle in Israel.

On behalf of the Government of Israel, the Prime Minister expressed his agreement with this analysis of the situation and the programme of action entailed thereby, of which the primary aim is the preservation of the identity and unity of Jewish people in all the lands of the Dispersion and the strengthening of its emotional and material ties with the State of Israel.

It was agreed that the effort aiming at the enhancement of the Zionist spirit in Jewish life is a matter of joint concern for the State of Israel and the World Zionist Organization. Consequently, the Government gave expression to its vital interest in the Zionist Executive's plan of action in the Diaspora and its readiness to lend full assistance to its realization.²⁶¹

The first paragraph acknowledges explicitly that the joint meeting concerned the affairs of Jews in states other than Israel. It also sets

²⁶¹ Text of Joint Communique in *Jerusalem Post*, March 16, 1964, p. 8, col. 4.

forth a traditional Zionist concept by expressing concern about "the dangers of assimilation affecting Jewish communities elsewhere." The phrase, "the dangers of assimilation," may be interpreted, in the light of Zionist objectives, as referring to integration into the secular aspects of life in the state of a Jew's regular nationality. Thus, secular integration and accompanying individual equality of rights for Jews and their fellow nationals who are not Jews is regarded as dangerous to Zionist nationalism.

The second paragraph emphasizes the continuing practical implementation of the governmental functions allocated to the Zionist Executive by the Covenant. The reference to "the education of children" may appear to be a non-political matter if read out of context. In relation to the objectives of political Zionism, it must be interpreted as education for Zionist nationalism. "Jewish communities," in Zionist conception, refers to a grouping of Jews for secular purposes and not to a voluntary religious fellowship.

The third paragraph states the purpose of strengthening "the attachment" of secular "Jewish" communities to the State of Israel in a "spiritual" manner. This appears to be Zionist exploitation of religious values for political purposes. It also refers to the "Dispersion" of Jews. Zionist nationalism is to be implemented by awakening and intensifying among such dispersed Jews "the consciousness of the [political] unity of the Jewish people" and "the mental readiness and active desire to settle in Israel." The phrase "self-preservation" must be taken as meaning the self-preservation of "the Jewish people" rather than the self-preservation of individual Jews and their religion of Judaism. "The Jewish people" is viewed as comprised of various parts which must maintain political "solidarity" by "an organized effort." Obviously, the "organized effort" is a politically organized one.

The penultimate paragraph in the Communique states that "the primary aim" of the Zionist-Israel sovereignty "is the preservation of the identity and unity of Jewish people" in "all the lands of the Dispersion." In addition, the importance of strengthening the "emotional and material" ties of such Jews with Israel is stressed. "Emotional" is interpreted, in the light of Zionist objectives, as exploitation of humanitarian and philanthropic motives for political purposes. The final paragraph states the Israeli Government's interest in, and full support of, Zionist political interference with Jews in any other

country than Israel.²⁶² In summary, the Joint Communique illustrates continuing Zionist-Israel efforts in public law to implement Zionist nationalism wherever Jews live.²⁶³

In an address of March 23, 1964, concerning the same subjects dealt with in the Joint Communique, Israeli Prime Minister Levi Eshkol stated:

To us falls the responsibility of securing the future of the Jewish people. Zionists must not draw a distinction between the two complementary sections: the State and the people.²⁶⁴

The foregoing dichotomy indicates the "two complementary sections" of "the Jewish people" nationality without equivocation. In Zionist conception "the Jewish people" nationality comprises: (1) the State of Israel (or at least its "Jewish" nationals together with the apparatus of the Zionist State); and (2) all Jews in states other than Israel without regard to their individual preferences and juridically recognized nationality status. In the official view of the Israeli Prime Minister, an artificial distinction must not be drawn between "the two complementary sections." If the distinction were stressed unduly, it would, in Zionist conception, minimize the common "Jewish people" nationality of both sections.

The *Israel Digest* attributed another significant point to the Israeli Prime Minister in the same address:

[E]ver since the emergence of the State, the Zionist Movement had been re-examining itself, not because there had been any change in its mission, but because it must establish goals and objectives in accordance with the present-day circumstances in the life of the State of Israel and the Jewish people.²⁶⁵

There is ample evidence of the consistent character of the Zionist political "mission" from the First Zionist Congress to the present. One of the principal conclusions of the present study is that the character of "the Jewish people" claimed nationality has been maintained consistently since the First Zionist Congress.

²⁶² An editorial comment stated: "In re-affirming the State's link with Zionism, the Government is seeking to strengthen the link of the State and People of Israel with the Jewish people." *Jerusalem Post*, March 16, 1964, p. 1, col. 1.

²⁶³ Some individuals, and perhaps organizations as well, have accepted assurances from Israeli officials which are quite inconsistent with the conclusions of the present study. Among the examples, see the one provided in Appendix A.

²⁶⁴ *7 Israel Digest* (American Edition published by Jewish Agency-American Section, Inc., New York) No. 8, p. 2 (April 10, 1964).

²⁶⁵ *Ibid.*

IV. INTERNATIONAL LAW LIMITATIONS UPON THE
 COMPETENCE TO CONSTITUTE A NATIONALITY
 ENTITY AND TO CONFER MEMBERSHIP IN IT:
 APPLICATION TO "THE JEWISH PEOPLE"
 NATIONALITY CLAIMS

The competence to constitute a nationality entity and confer membership in it is limited by law. The juridical limitations are as applicable to "the Jewish people" nationality claims as to any others.

A. THE FUNCTIONAL SIGNIFICANCE OF NATIONALITY LAW

Professor Silving has aptly summarized the practical political importance of nationality law as follows:

Nationality Law is closely connected with the political structure of a country, more so than most branches of law. It determines who shall be a "citizen," and thus what shall be the composition of the "nation." The concept of "nationality" prevailing in a country importantly reflects its political philosophy, which is also expressed in a country's attitude towards "foreign nationality."²⁶⁶

Nationality membership is "the principal link" between individuals and the protection afforded to them by international law.²⁶⁷ Thus, individuals abroad are accorded the standard of treatment prescribed for aliens under international law by virtue of their nationality membership in a particular state.²⁶⁸ The state whose national is abroad may intervene diplomatically to protect him according to the principles of international law.²⁶⁹

Nationality, or citizenship, membership is traditionally regarded as imposing reciprocal obligations between a state and its individual nationals. In a typical formulation of this basic concept, the United States Supreme Court has stated:

Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other.²⁷⁰

²⁶⁶ Silving, *Nationality in Comparative Law*, 5 *Am. J. Comp. L.* 410 (1956).

²⁶⁷ 1 *Oppenheim-Lauterpacht, International Law* 645 (8th ed. 1955), cited hereafter as "*Oppenheim-Lauterpacht*."

²⁶⁸ Borchard, *The Diplomatic Protection of Citizens Abroad* (1915).

²⁶⁹ *Ibid.*

²⁷⁰ *Luria v. U.S.*, 231 U.S. 9, 22 (1913).

An elementary "duty of protection" on the part of a political society or state is the protection of its national's or citizen's status against foreign attack. In the contemporary world of conflicting nationality claims, democratic states cannot afford complacency. If a democratic state did not protect the status of its nationals, the consequence would be a subversion, in the functional sense of the term, of the individual's democratic value orientation including his "duty of allegiance." The central point has been enunciated by Professors McDougal and Leighton:

It should need no emphasis that one condition of the survival of a free society is a vision, fortified with reasonable hopes of fulfillment, by the peoples of the world of what a free society can offer. Loyalties that are not indissolubly tied to democracy can be captured²⁷¹

Application to "the Jewish People" Nationality Claims

"The Jewish people" nationality claims have a central role in advancing Zionist nationalism in many public law contexts considered in the present study. These claims are used to change the juridical status of Jews in states other than Israel. In states like the United States of America, where each individual possesses equal nationality status, the objective is to add to the existing nationality status of Jews a further membership in "the Jewish people" nationality entity.

Any such additional nationality status, based upon the religious identification of individuals, is functionally subversive of their equal nationality status. Whether it is regarded as adding to or subtracting from their equal status, it changes such equality to inequality. In Zionist conception, the additional "Jewish people" nationality may be deemed necessary to compensate for the postulated inadequacy of a Jew's regular nationality status. In Orwellian conception, such an additional nationality could be deemed to result in a status of "equal but . . . more equal."²⁷² In democratic conception, such an additional nationality status must be recognized as subversive of the equal nationality status of each citizen.

²⁷¹ McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 14 *Law & Contemp. Probs.* 490, 530 (1949).

²⁷² Orwell, *Animal Farm* 148 (1946).

B. LIMITATIONS UPON THE COMPETENCE TO CONSTITUTE NATIONALITY

1. *The Constituting Entity Must Be a National State*

The universally recognized nationality entity in the contemporary world community is the national state. In the typical nationality situation, an individual has the single nationality status of a particular state. It is widely agreed that a state must have at least three juridical qualifications:²⁷³

First, there must be a permanent population. A population, in this sense, may be regarded as a group of individuals who live together in a common political community. All of the individuals comprising this population must share a common national identification. In religious belief, racial identification, national origin, and other similar matters they may be quite different from one another.

Second, there must be a fixed geographical territory or country which the population inhabits. A nomadic tribe or group does not comprise a state.

Third, there must be an organized government exercising control over the population within the fixed territory. A community of anarchists, even though inhabiting a fixed territory, does not comprise a state. A government is necessary for the maintenance of both a municipal public order system and an international one.

2. *The Constituted Entity Must Be the Nationality of a State*

In addition to national states there are other significant group participants in the contemporary world community, including international public organizations or bodies,²⁷⁴ political parties, pressure groups, and private associations.²⁷⁵ Without minimizing the importance of such international groups, none of them has the unique juridical competence of the national state to constitute its nationality entity. Even where a particular international organization or public body is controlled by the same political elite which controls a state,

²⁷³ The ensuing textual statements are based upon 1 Oppenheim-Lauterpacht 118-19 and 1 Hyde, *International Law: Chiefly as Interpreted and Applied by the United States* 22, 23 (2d rev. ed. 1945), cited hereafter as "Hyde."

²⁷⁴ This category includes the Zionist Organization. See the text accompanying notes 236-46 and note 17 *supra*.

²⁷⁵ McDougal, *International Law, Power and Policy: A Contemporary Conception* (1953), 82 *Hague Academy Recueil Des Cours* 137, 227 (Ch. 4 entitled *Participants in the World Power Process Other than Nation-States*) (1954). See also Schwarzenberger, *Power Politics*, ch. 8 (1951).

it is only the latter which constitutes a nationality entity. As Lord Acton has stated:

The nationality formed by the State, then, is the only one to which we owe political duties, and it is, therefore, the only one which has political rights. The Swiss are ethnologically either French, Italian, or German; but no nationality has the slightest claim upon them, except the purely political nationality of Switzerland.²⁷⁶

Application to "the Jewish People" Entity Claim

One of the features of "the Jewish people" nationality entity claim which requires its rejection in international law is that it does not comprise the nationality of a national state. Even though "the Jewish people" is claimed to have a juridical relationship to the State of Israel,²⁷⁷ it is obvious that the nationality of "the Jewish people" is not the same as the nationality of the State of Israel.²⁷⁸ It is an additional "nationality" entity in the sense that it is composed of individuals identified by religion who are the nationals of the states of their respective nationalities. It is designed to remain such an additional nationality until the time when all the "exiles" are "ingathered" to the Zionist State of Israel.²⁷⁹ It may be assumed that the State of Israel is a state in the sense of having population, territory, and government. This would have some relevance to an examination of Israeli nationality law.²⁸⁰ It has little or no relevance to evaluation of an alleged additional "nationality" entity which is claimed to have existed for half a century before the establishment of the State of Israel.²⁸¹ During that time "the Jewish people" was claimed to comprise an additional "nationality" entity by the Zionist Organization public body in many juridical contexts.²⁸² Since 1948 "the Jewish people" has been claimed, in the same way, as such a "nationality"

²⁷⁶ Acton, *Essays on Freedom and Power* 190 (1949). See 2 Hyde, *supra* note 273, at 1064-66.

²⁷⁷ See the Eichmann Trial Judgment, in the text accompanying note 256 *supra*.

²⁷⁸ *Supra* note 241.

²⁷⁹ Since I called, at the beginning of my remarks, for absolute allegiance to the Jewish revolution, I shall now make a few concluding remarks about the goal, of our revolution: *It is the complete ingathering of the exiles into a socialist Jewish state.*

Ben Gurion, *The Imperatives of the Jewish Revolution* (1944) in Hertzberg (ed.), *The Zionist Idea: A Historical Analysis and Reader* at 606-19 (1959).

²⁸⁰ *Supra* note 241.

²⁸¹ Herzl, *The Jewish State: An attempt at a Modern Solution of the Jewish Question* (original pub. 1896; D'Avigdor & Israel Cohen transl. 1943), and text at *supra* notes 32-36; *The Zionist Basle Program* examined in text accompanying notes 59-60 *supra*; *Zionist Diplomacy* *passim*.

²⁸² Sec. III A *supra*.

entity by both the Zionist Organization and the Zionist State of Israel.²⁸³

Another feature of the claimed "Jewish people" additional "nationality" entity is that it is divided into two parts in Zionist conception as enunciated by Prime Minister Eshkol.²⁸⁴ The two parts are: (1) the State of Israel (or at least the "Jewish" nationals of that State) together with its Zionist governmental apparatus; and (2) all Jews in states other than Israel. It is apparent that each of the parts of "the Jewish people" has a different normal and juridically recognized nationality status. The part in Israel has Israeli nationality. Individual Jews "in any other country" than Israel have the nationality status of their respective countries. For these further reasons, neither the State of Israel nor the Zionist Organization has the juridical competence to constitute "the Jewish people" additional "nationality" entity.

C. LIMITATIONS UPON THE COMPETENCE TO CONFER MEMBERSHIP: THE RECOGNIZED PROCEDURES FOR CONFERRING NATIONALITY

Given the existence of a state nationality entity, the problem remains as to which individuals may have its nationality membership conferred upon them. Though a state has wide discretion in conferring its nationality status, there are certain international law limitations upon the recognized procedures employed to confer nationality membership.

1. *Membership by Birth or Naturalization*

The first sentence of the Fourteenth Amendment of the United States Constitution summarizes the two principal methods of conferring nationality membership:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Nationality at birth may be acquired either through the territorial principle of *jus soli*,²⁸⁵ prescribed in the Fourteenth Amendment,

²⁸³ Sec. III B supra.

²⁸⁴ See text accompanying note 264 supra.

²⁸⁵ 2 Hyde 1068-73; 1 Oppenheim-Lauterpacht 651-52.

or by the principle known as *jus sanguinis*,²⁸⁶ where the child at birth acquires the nationality of one or both of his parents.

The second method of acquiring nationality membership is through naturalization.²⁸⁷ The provisions of the municipal nationality law must not conflict with the applicable limitations of international law.²⁸⁸ Through its naturalization procedure, an individual who is an alien by birth may acquire nationality membership in a state through his *voluntary* choice.²⁸⁹

2. *Membership in More Than One Nationality Entity: Dual Nationality*

Illustration of dual nationality is provided from Hackworth, *Digest of International Law*:

The classic example of dual nationality is that of a person born in one country of nationals of another country, who acquires the nationality of the former by reason of the place of birth, *jure soli*, and that of the latter by virtue of the nationality of the parents, *jure sanguinis*.²⁹⁰

The United States recognizes ordinary dual nationality and the juridical limitations upon it.²⁹¹ One such limitation is that one state may not intervene effectively in behalf of its national who has voluntarily identified himself with his other national state, as by establishing his residence there.²⁹²

The common feature of these recognized procedures is fairness or reasonableness in conferring nationality membership upon individuals. The reasonableness of conferring nationality membership based upon birth within the national territory is obvious. The child's acquisition of his parent's nationality at birth also contains an element of reasonableness. The acquisition of nationality membership through naturalization based upon consent rather than coercion is eminently reasonable. Consensual naturalization promotes the democratic objec-

²⁸⁶ 2 Hyde 1073-78; 1 Oppenheim-Lauterpacht 651-52.

²⁸⁷ 2 Hyde 1087-93; 1 Oppenheim-Lauterpacht 654-56.

²⁸⁸ The Nottebohm Case in the text accompanying notes 297-301 *infra*; 2 Hyde 1066; Briggs, *The Law of Nations: Cases, Documents, & Notes* 460 (2d ed. 1952), cited hereafter as "Briggs."

²⁸⁹ See the official view of the United States emphasizing voluntariness in the text accompanying note 302 *infra*. See also 2 Hyde 1088-90.

²⁹⁰ 3 Hackworth, *Digest of International Law* (U.S. Dep't State) 352 (1942), cited hereafter as "Hackworth."

²⁹¹ 3 Hackworth 353.

²⁹² Cases and other authorities are collected in *id.* at 353-62.

tive of permitting maximum individual voluntariness in political membership and participation.²⁹³

Application to "the Jewish People" Membership Claim

Is the procedure employed in conferring "the Jewish people" nationality upon individuals deemed to be through membership at birth? If the answer is affirmative, then such a conferring of nationality status at birth by religious identification is not consistent with the principle of *jus soli*, the principle of *jus sanguinis*, or any other principle recognized in public international law.

Is the membership in "the Jewish people" nationality entity conferred upon individuals by naturalization? If the answer is affirmative, it does not conform to the recognized procedures for naturalization. Its attempted conferment is involuntary in two respects. It has no regard for the consent of the individual concerned or the consent of his national state. More specifically, it includes all Jews simply because they are Jews and without regard to the individual consent of any member of the supposed nationality entity. "The Jewish people" membership claim makes no exception for United States citizens who are Jews, even though many such United States citizens are pro-democratic and consequently anti-Zionist. In addition, attempted conferring of membership in "the Jewish people" is without the consent of states other than the State of Israel. One of the principal purposes of the reiterated Zionist "Jewish people" membership claim in international law contexts examined in section III of this study is to obtain the assent of governments other than the Government of Israel through the processes of implied agreement in customary international law.²⁹⁴ The United States Government is, of course, constitutionally prohibited by the First Amendment from assenting to "the Jewish people" membership claim (and entity claim, as well) either expressly or by implication.

Is "the Jewish people" additional "nationality" entity a type of dual-nationality? In Zionist conception, the alleged membership of Jews in "the Jewish people" is not deemed to be a substitute for their juridically recognized nationality status.²⁹⁵ Such nationality status

²⁹³ Compare the Zionist conception of "membership and identity" quoted in the text accompanying note 327 *infra*.

²⁹⁴ Customary law making is examined in the text accompanying notes 306-17a *infra*.

²⁹⁵ The textual statement is implicit in the attempts to implement "the Jewish people" membership claim. It is made explicit in the lives of Zionist leaders such as Dr. Weizmann, who was a naturalized British subject while claiming to be also

of Jews "in any other country" than Israel is deemed to be actually or potentially inadequate.²⁹⁶ Consequently, "the Jewish people" nationality is intended to provide additional nationality membership to supplement or correct the alleged inadequacy of such Jews' recognized nationality status. Even though "the Jewish people" is an additional "nationality," it does not meet the juridical criteria for dual or multiple nationality in international law. Such criteria require that membership in each of the two or more nationalities be conferred by recognized procedures. None of the recognized procedures permits conferment of nationality membership according to the religious identification of individuals.

D. LIMITATIONS UPON THE COMPETENCE TO CONFER MEMBERSHIP: THE "GENUINE LINK" REQUIREMENT FOR CONFERRING NATIONALITY

The significant test of the scope of discretion accorded to a state in conferring its nationality membership is the extent to which other states are bound to honor such nationality membership. The International Court of Justice has considered this issue in the *Nottebohm Case* (Liechtenstein v. Guatemala).²⁹⁷

Mr. Nottebohm was a German national who resided and conducted his business affairs in Guatemala from 1905 until 1943, when he was removed from the country as an enemy alien. On October 9, 1939, a little more than a month after the beginning of the Second World War, Nottebohm applied for naturalization in Liechtenstein. After having apparently complied with all the requirements of Liechtenstein municipal law, he was naturalized effective October 13, 1939. In early 1940, he obtained a Liechtenstein passport and returned to Guatemala and the conduct of his business activities until 1943. Liechtenstein, relying on the nationality membership thus conferred by it, subsequently intervened diplomatically with Guatemala. It claimed that Guatemala had violated international law in its treatment of Nottebohm as a German and thus an enemy alien. The counsel for Liechtenstein formulated the issue before the Court as follows: "[T]he essential question is whether Mr. Nottebohm, having acquired the

a member of "the Jewish people." Stein 117. For explicit statement of conflict between Zionist nationality obligations and juridically recognized nationality obligations, see the last quotation from former Israeli Prime Minister Ben Gurion in Appendix A.

²⁹⁶ Such actual or potential inadequacy, in Zionist conception, follows from the basic Zionist postulate of ineradicable anti-Semitism. See, e.g., Herzl, *supra* note 281.

²⁹⁷ [1955] I.C.J. Rep. 1.

nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States.”²⁹⁸ After conceding that each state is permitted a measure of discretion to confer its own nationality membership, the Court stated:

[A] State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's *genuine connection* with the State which assumes the defence of its citizens by means of protection as against other States.²⁹⁹

The Court determined that there was no genuine connection between Mr. Nottebohm and Liechtenstein.³⁰⁰ Consequently, it refused to give effect to the acts of Liechtenstein purporting to confer its nationality upon Nottebohm. The Court's reasoning emphasized the relationship between fact and law in conferring nationality membership:

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.³⁰¹

The last sentence from the opinion just quoted is particularly important. Absent the necessary factual connection or “genuine link” between the individual and the state which has attempted to confer nationality membership upon him, other states are not juridically required to honor the purported nationality membership.

The decision and reasoning of the International Court of Justice in the *Nottebohm Case* are highly persuasive. It is important, never-

²⁹⁸ Id. at 17.

²⁹⁹ Id. at 23. (Emphasis added.)

³⁰⁰ Id. at 26 and passim.

³⁰¹ Id. at 23.

theless, to recognize that the *Nottebohm Case* merely added a judicial determination to what had long been understood to be the applicable customary law. The same principles had been recognized by the United States in 1929. In its letter of March 16, 1929, replying to questions submitted to governments by the preparatory committee of the Hague Conference for the Codification of International Law, the United States stated its official position:

While, as indicated, the Government of the United States has always recognised the fact that the acquisition or loss of the nationality of a particular State are matters which pertain primarily to domestic policy and are therefore to be determined by the domestic law of that State, it does not admit that a State is subject to no limitations in conferring its nationality on individuals. It has proceeded upon the theory, which is believed to be sound, that there are certain grounds generally recognised by civilised States upon which a State may properly clothe individuals with its nationality at or after birth, but that no State is free to extend the application of its laws of nationality in such a way as to reach out and claim the allegiance of whomsoever it pleases. The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States. The reason for this is that true nationality involves a reciprocal relationship. It not only confers upon the individual certain rights and privileges with regard to the State of which he is a national, but gives to the State the right to claim the allegiance and obedience of the individual and to give him diplomatic protection when he is in a foreign State.³⁰²

Application to "the Jewish People" Membership Claim

The existing limitations of public international law have been developed to protect the primary human values which are involved in nationality law. The requirement that the constituted nationality entity must be that of a state with a genuine nationality link protects individuals from a multiplicity of nationality claims based upon religion or other factors which are juridically irrelevant to the individual's nationality status. The "genuine link" requirement limits the conferment of nationality status to those situations in which the individual has "a genuine connection of existence, interest and sentiments" with the state conferring its nationality and "is in fact more

³⁰² League of Nations, Conference for the Codification of Int'l Law, Bases of Discussion: 1 Nationality 118, 145-46 (1929). Many other states indicated similar views. *Id. passim*. See Briggs 460-62, concerning the United States' official position against "forced naturalization."

closely connected with the population” of such state than with that of any other. The “interest and sentiments” must be secular rather than religious ones. Thus the *Nottebohm Case*, in considering various nationality links and alleged links, did not even mention Nottebohm’s religious identification, if any. Mr. Nottebohm’s continuing political, business, and social connections with Nazi Germany, however, were contrasted with his lack of such genuine connections with Liechtenstein.³⁰³ It is clear that in “the Jewish people” membership claim there is no semblance of the required “genuine link” between the identification of an individual as a Jew and *any* juridically recognized nationality.

“The Jewish people” membership claim is based upon the religious identification of individuals.³⁰⁴ Nothing in either the *Nottebohm Case* or in the customary law formulations of the same basic juridical principles suggests that the “genuine link” requirement may be met by conferring nationality membership according to the religious identification of individuals. “The Jewish people” membership claim is invalid, consequently, under the existing criteria of public international law. In the same way, supposed nationality concepts such as “the Christian people” would be equally invalid. It requires but little imagination to envision the legalistic chaos and ensuing human despair which would result from juridical acceptance of nationality membership based upon the religious identifications of individuals.

V. APPRAISAL OF “THE JEWISH PEOPLE” NATIONALITY CLAIMS: INVALID UNDER PUBLIC INTERNATIONAL LAW

The central conclusion of section III of this study is that the Balfour Declaration agreement and the later international agreements concerning the same subject denied the Zionists juridical authority for

³⁰³ [1955] I.C.J. Rep. at 25-26.

³⁰⁴ The textual statement refers to the fact that Jews are claimed as members of “the Jewish people” entity. It is recognized that Zionists are claimed as members of the same entity. Zionists are placed in the alleged entity accurately because individual Zionists claim additional membership in “the Jewish people” whatever their juridically recognized nationality membership. As to individual Jews, they are claimed as members of “the Jewish people” by the Zionists. Jews are a highly diverse group as to many factors, including nationality, language, political opinions concerning Zionism and other subjects, and race. See *supra* note 12. The only identification they share is adherence to Judaism. Zionist nationalism, in spite of its preeminent political character, has had to rely upon the religious identification of individual Jews to bring them within “the Jewish people” membership claim because there is no other criterion shared by Jews. See the text accompanying notes 7-12 *supra*. Cf. Feinberg, *The Recognition of the Jewish People in International Law*, *Jewish Yb.I.L.* 1, 18 and n. 34.

"the Jewish people" nationality claims. The safeguard clauses of these agreements are so unequivocal that they must be construed as prohibiting the claims. The central conclusion of section IV is that the claims to constitute "the Jewish people" nationality entity and to confer membership in it fail because they are inconsistent with the applicable basic principles of public international law.

In spite of the present invalidity of "the Jewish people" nationality claims, the State of Israel and the Zionist Organization continue to advance them in the context of customary international lawmaking processes.³⁰⁵ It is because the Zionists lost the negotiations analyzed in section III and because the Zionist nationality claims are now legally invalid as demonstrated in section IV that the Zionist public bodies attempt to validate them through customary law. These nationality claims are indispensable to Zionist nationalism and, if the Zionists fail to establish them in public law, Zionist nationalism will also fail. May these nationality claims be validated juridically through customary lawmaking or prescribing processes?³⁰⁶

A. THE ATTEMPT TO ESTABLISH "THE JEWISH PEOPLE" NATIONALITY CLAIMS THROUGH CUSTOMARY INTERNATIONAL LAW

Customary international law is regarded traditionally as having two constituent elements.³⁰⁷ First is the existence of a particular, uniform pattern of conduct in the past. Without more, this conduct may be dismissed as mere "usage" which does not attain the status of "custom." The second element required for customary international lawmaking is an *opinio juris* or element of moral "oughtness" ascribed to the past uniformities in conduct.

In order to prescribe international law by custom it is not necessary for the past uniformities in conduct to have existed for a long period of time.³⁰⁸ The time element is significant as evidence, which may be provided in other ways, of contemporary expectations of decision-

³⁰⁵ Examples are set forth in the text of sec. III B supra.

³⁰⁶ The contemporary importance of prescribing international law by custom was stated in Committee VI (Legal) of the U.N. General Assembly by Senator Albert Gore, representative from the United States, Nov. 21, 1962: 47 Dept. State Bull. 972 (1962).

³⁰⁷ The textual statements are based upon the analysis of customary law in McDougal, Lasswell & Vlasic, *Law and Public Order in Space* 115-19 (1963).

³⁰⁸ In *The Scoria*, 81 U.S. (14 Wall.) 170 (1871), the international maritime practice which the U.S. Supreme Court applied as customary law had existed only for eight years. The decision reflected the common interest in safe navigation. Individual rights were not adversely affected.

makers as to the existence of customary international law. Professor Lauterpacht states:

As usages have a tendency to become custom, the question presents itself: at what stage does a usage turn into a custom? This question is one of fact, not of theory. All that theory can say is this: Wherever and as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary International Law.³⁰⁹

To prescribe international law by custom, it is not necessary that the consent of all national states be obtained: The assent of states may be manifested expressly or impliedly. Consent by implication includes silence and acquiescence when juridical claims are advanced by others. Such acquiescence has been accurately described by Professor Hyde:

The requisite acquiescence on the part of individual States has not been reflected in formal or specific approval of every restriction which the acknowledged requirements of international justice have appeared, under the circumstances of the particular case, to dictate or imply. It has been rather a yielding to principle, and by implication, to logical applications thereof which have begotten deep-rooted and approved practices. Moreover, such a yielding seems to be inferred from the absence of objections to recurrent acts assertive of freedom to commit particular forms of conduct, or to apply principles in a particular fashion.³¹⁰

Emphasizing the juridical significance of the failure "to make appropriate objection," Professor Hyde has written:

It should be observed, however, that acquiescence in a proposal may be inferred from the failure of interested States to make appropriate objection to practical applications of it. Thus it is that changes in the law may be wrought gradually and imperceptibly, like those which by process of accretion alter the course of a river and change an old boundary.³¹¹

The American Law Institute's *The Foreign Relations Law of the United States* considers the highly relevant situation of a past

³⁰⁹ I Oppenheim-Lauterpacht 27.

³¹⁰ 1 Hyde 5.

³¹¹ *Id.* at 9.

uniformity in conduct or practice "for which there is no precedent in international law":

Objection to practice as a means of preventing its acceptance as a rule of law. The growth of a practice into a rule of international law depends on the degree of its acceptance by the international community. If a state initiates a practice for which there is no precedent in international law, the fact that other states do not object to it is significant evidence that they do not regard it as illegal. If this practice becomes more general without objections from other states, the practice may give rise to a rule of international law.

Because the failure to object to a practice may amount to recognition of it, the objection by a state to the practice of another is an important means of preventing or controlling in some degree the development of rules of international law.³¹²

In what type of situation should a state object to a practice "as a means of preventing its acceptance as a rule of law"? The same publication of the American Law Institute states:

A state subjects a person to its laws when it provides, by statute or otherwise, that its law is applicable to him as well as when it actually applies its law to him through its courts or other law enforcement agencies.³¹³

Section III B of this study provided examples, "by statute or otherwise," of "the Jewish people" nationality claims made expressly applicable to Jews in states other than Israel. The national states of such Jews should reject "the Jewish people" nationality claims to prevent their being prescribed as customary international law.

It is not necessary that a state's nationals be adversely affected before it objects to the prescription of customary law. Indeed, a state should object before this happens. This point is amplified in *The Foreign Relations Law of the United States*:

Objection by a state prior to being adversely affected. In many cases, a state is not adversely affected until the rule prescribed is actually enforced. In such cases, nevertheless, registering opposition to the prescription of the rule through appropriate means such as diplomatic correspondence may serve a significant purpose. . . .

³¹² Restatement: The Foreign Relations Law of the United States § 1, comment (d) (Proposed Official Draft, 1962), hereafter cited as "Restatement."

³¹³ Restatement, Introductory Note to part 1 (Jurisdiction), at 23.

[T]he growth of a practice into a rule of international law depends on the degree of its acceptance by the international community. In putting on record the view that the state prescribing the rule lacks jurisdiction to prescribe it, another state not only precludes the suggestion that it recognizes the prescribing of the rule as legal but may contribute as well to the prevention of the development of a rule of international law sanctioning the legality of the action.³¹⁴

The quoted analysis refers to the informal processes of claim, counter-claim, and decision between foreign ministries and state departments which involve prescribing and applying customary law. The juridical status of unilateral claims, including "the Jewish people" nationality claims, is appraised and decided by national officials, excluding those of the claimant state. Toleration and acquiescence by these officials, in customary law context, may result in favorable decision.

National and international judicial tribunals also prescribe and apply customary international law. Classic formulation was provided by Justice Gray, writing for the United States Supreme Court, in the case of *The Paquete Habana*:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . .^{314a}

In the famous *Lotus Case*,³¹⁵ decided by the Permanent Court of International Justice, the French Government failed to object to Turkish legislation prior to its application to a French national in a Turkish court. The French Government claimed unsuccessfully that the application of the Turkish criminal legislation to the French national was invalid under international law. One of the bases for the decision was that:

[T]he Court does not know of any cases in which governments have protested against the fact that the criminal law of some coun-

³¹⁴ Restatement § 8, comment (c).

^{314a} 175 U.S. 677, 700 (1900).

³¹⁵ Case of the S.S. "Lotus," P.C.I.J., ser. A, No. 10 (1927).

try contained a rule to this effect or that the courts of a country construed their criminal law in this sense.³¹⁶

The significance of the *Lotus Case* is that the decision against the French government was based partly upon its failure to object to a provision of Turkish law before an actual case or controversy had arisen. The Turkish legislation, however, was in existence prior to the high seas collision between the French and Turkish merchant ships which led to the litigation. Apparently, the French Government assumed that no practical problems existed for France and its nationals and, consequently, timely protest was not made.

In summary, "the Jewish people" nationality claims are not advanced only upon the basis of Zionist interpretation of the Balfour Declaration and ensuing international agreements. The Zionist-Israel sovereignty also continues to attempt to prescribe these claims through customary international law. One of the most dramatic contemporary attempts is embodied in the *Eichmann Trial Judgment*.³¹⁷ Unless national states make appropriate objection to these nationality claims, they might become prescribed as customary law. It should be recognized that it requires more to prescribe as customary law claims which derogate from the rights of individuals than claims which do not.^{317a}

B. JURIDICAL REJECTION OF "THE JEWISH PEOPLE" NATIONALITY CLAIMS

Even if the Balfour Declaration did not exist, the United States Government would be required by its Constitution, which prohibits religious discrimination among its citizens,³¹⁸ to reject the Zionist-Israel "Jewish people" concept and the juridical claims based upon it. Quite recently, in fact, the United States Government did reject the central concept of "the Jewish people" nationality claims. The rejection contains nothing new in United States constitutional law principles, but it is highly significant in terms of its specific applica-

³¹⁶ *Id.* at 23.

³¹⁷ See the text accompanying note 256 *supra*.

^{317a} *Supra* note 308.

³¹⁸ The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Fourteenth Amendment (applicable to the states) contains "due process of law" and "equal protection of the laws" clauses. The Fifth Amendment (applicable to the Federal Government) contains a "due process of law" clause but not an express equal protection clause. The Supreme Court has, however, unequivocally held the Federal Government to at least the same standard of equal protection which is applicable to the states. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

tion to the "Jewish people" concept. The rejection is enunciated in the letter of April 20, 1964, from the Department of State to the American Council for Judaism.³¹⁹ The second paragraph of this letter reads:

The Department of State recognizes the State of Israel as a sovereign State and citizenship of the State of Israel. It recognizes no other sovereignty or citizenship in connection therewith. It does not recognize a legal-political relationship based upon the religious identification of American citizens. It does not in any way discriminate among American citizens upon the basis of their religion.

The first sentence quoted reflects recognition of the State of Israel and *its* nationality membership. The second sentence rejects any "other sovereignty or citizenship" in connection with the State of Israel. The Zionist Organization public body may be regarded as another "sovereignty" connected with the State of Israel. The other citizenship (or nationality) connected with the State of Israel is that of the claimed "Jewish people" nationality.

The third sentence in the quoted paragraph is a rejection of the "legal-political relationship based upon the religious identification of American citizens" involved in "the Jewish people" nationality claims. The last two quoted sentences reflect juridical obligations of the United States Government which are binding upon it in United States constitutional law as well as in public international law.³²⁰

The penultimate paragraph of the Department's letter states:

Accordingly, it should be clear that the Department of State does not regard the "Jewish people" concept as a concept of international law.

"Accordingly" is the key introductory word. Since it follows the statements of basic United States constitutional obligation, it must be interpreted as governmental rejection of the "Jewish people" concept according to its constitutional obligation to do so.³²¹ There is

³¹⁹ Appendix B.

³²⁰ See *supra* note 318. In addition to the public international law obligations examined in the present study, the United States, along with other members of the United Nations including the State of Israel, has agreed to promote human rights in the world community without "distinction" as to "religion." Article 55 (c) of the United Nations Charter provides that "the United Nations shall promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

³²¹ The press reporting of the governmental rejection included, *inter alia*: N.Y. Herald Tribune, May 8, 1964, p. 3, cols. 1-2; N.Y. Times, May 8, 1964, p. 9, col.

no constitutional alternative to official rejection of this juridical concept, since it is fundamentally inconsistent with the constitutional prohibition against discrimination upon religious grounds.

Among the earlier precedents is one applied by the Department of State in response to religious discrimination against some Americans by Tsarist Russian officials. It was the Tsarist practice to refuse to visé United States passports of American Jews (but not of other

1; Washington Post, May 9, 1964, p. A4, col. 5; Christian Science Monitor, May 19, 1964, p. 3, cols. 1-3.

The Zionist reaction pointed up the significance of the rejection of the "Jewish people" concept. Max Nussbaum, president of the Zionist Organization of America, was quoted as stating:

The oneness of the Jewish people is not legal or political but emotional and spiritual and cultural. . . . That is our position and that has always been our position. It is also the position of the Israeli Government.

N.Y. Times, May 8, 1964, p. 9, col. 1.

The semi-official Jerusalem Post in editorial comment conceded that:

The State Department itself has elaborated the statement as deriving from the principle that there must be no differentiation between American citizens on account of religion or race, which is a perfectly proper view from the U. S. standpoint.

Jerusalem Post, May 10, 1964, p. 1, col. 1. But the balance of the comment was devoted to establishing "the Jewish people" as recognized in law:

It does not diminish the fact that the U.S. recognized the existence of the Jewish people at the time when the League of Nations Mandate for the creation of the Jewish National Home in this country was given to Britain, and that its present recognition of Israel as a sovereign state, and of Israel citizenship, which derives its legal basis in part from the Balfour Declaration, is ultimately also based on the recognition of the existence of the Jewish people as a national unit. . . . There is today a Jewish people exposed to a variety of economic and social disabilities in many countries—not excluding even the United States itself.

Ibid.

I. L. Kenen wrote under the heading, "Misuse of A Letter," that the letter of April 20, 1964, had been misinterpreted to mean "that the Zionists believe that Jews have a political connection with Israel. (*They don't.*)" 8 Near East Report No. 11, p. 42, col. 3 (May 19, 1964).

Dr. S. Margoshes, one of the principal Zionist ideological protagonists in the United States, wrote:

The concept of a Jewish people and of Jewish peoplehood may be new, of [sic] even obnoxious, to Mr. Talbot, as it is obviously obnoxious to Mr. Coleman [president of The American Council for Judaism]; that does not alter the fact that the concept is recognized by international law.

The Day-Jewish Journal, May 12, 1964, p. 1, col. 1.

An editorial in a periodical with the masthead statement, "Dedicated to the advancement of Judaism as a religious civilization, to the upbuilding of Eretz Yisrael as the spiritual center of the Jewish People, and to the furtherance of universal freedom, justice and peace," stated:

Naturally, having set up a straw man, it is easy to knock it down; and this is precisely what the Talbot letter has done. . . . But Mr. Talbot goes further. He collaborates with the ACJ [American Council for Judaism] in attempting to destroy the entire concept of the Jewish people. Thus he adds, in his letter: "Accordingly, it should be clear that the Department of State does not regard the 'Jewish people' concept as a concept of international law." But this is clearly contrary to the facts. As early as 1917, the Balfour Declaration referred to the "establishment in Palestine of a national *home for the Jewish people . . .*"

30 Reconstructionist No. 8, pp. 3-5 at 3, 4 (May 29, 1964).

Americans) for travel to Russia. Although less comprehensive than the Zionist-Israel discriminations, these Tsarist Russian discriminations also had a domestic impact within the United States.³²² The juridical position of the United States was set forth unequivocally in a communication of June 25, 1895, to the Tsarist Government. After quoting the First Amendment provisions concerning religion, it continued:

Thus, you see, my Government is prohibited in the most positive manner possible by the very law of its existence from even attempting to put any form of limitation upon any of its citizens by reason of his religious belief. How, then, can we permit this to be done by others? To say that they can thereby be discriminated against by foreign Governments, and are only safeguarded against their own, would be a remarkable position for us to occupy.³²³

Another diplomatic communication to the Tsarist Government on July 8, 1895, concerning the same subject, stated the United States Government's position emphatically:

Our Constitution does not say that Congress shall not make a law simply "prohibiting" or "authorizing" a religious exercise or belief, as your excellency seems to understand.

It says that "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof." Certainly if a law deprives any people or person of a certain faith, because of that faith, of all or of any part of the rights, privileges, and immunities enjoyed by any other citizen, or class of citizens, it is made "respecting" that religion, and it militates against "the free exercise thereof" as much so as if the sect had been mentioned in the title of the act and the consequences had been named as pains and penalties for the conscientious belief and observances entertained and practiced.³²⁴

In summary, the United States executive branch was required by the Constitution to reject Tsarist religious discriminations applied to Americans in 1895. The Constitution places the same obligation upon all branches of the Government to reject any discriminations based upon religion which are applied to Americans today. This is recognized in the letter of April 20, 1964, rejecting the central "Jewish people" concept in its application to American nationals. Unless there

³²² [1895] Foreign Rel. U.S. 1056-74 (1896).

³²³ *Id.* at 1064.

³²⁴ *Id.* at 1067.

should be drastic change in the political character of Zionist nationalism and its "Jewish people" concept persistently advanced in public law contexts, the United States Government will have the opportunity to reject it in numerous specific situations in the future. In doing so, the United States Government will be faithful to the Constitution and to long established executive branch precedents in applying it.

The *Harvard Research in International Law* provides authority for the concluding juridical rejection of "the Jewish people" nationality claims:

It may be difficult to precise [*sic*] the limitations which exist in international law upon the power of a state to confer its nationality. Yet it is obvious that some limitations do exist. . . . Thus, if State A should attempt to naturalize all persons living outside its territory but within 500 miles of its frontier, it would clearly have passed those limits; or similarly if State A should attempt to naturalize all persons in the world holding a particular political or *religious* faith or belonging to a particular race.³²⁵

The quoted text does not consider a situation as extreme as that involved in "the Jewish people" nationality claims. It assumes the existence of a valid state nationality entity and considers the juridical validity of imposition of *its* nationality membership upon individuals holding a particular "religious faith." This situation is stated to be one which has "clearly" exceeded the permissible "limits" of public international law. The even more aberrational factual and juridical elements in "the Jewish people" nationality claims must, a fortiori, make them invalid under international law.

C. MORAL REJECTION OF "THE JEWISH PEOPLE" NATIONALITY CLAIMS

In fulfilling its constitutional and international juridical obligations by rejecting the discriminatory "Jewish people" concept, the United States is also justified by the most fundamental considerations of morality. Not the least of these fundamentals is separation of religious and political values sufficient to permit the exercise and development of religions of universal moral values free from political

³²⁵ Harvard Research, Draft Convention on Nationality, 23 Am. J. Int'l L. Supp. 1, 26 (1929). (Emphasis added.)

interference and coercion.³²⁶ The practical implementation of such value separation requires the separation of corresponding religious and political organizational structures. Similarly, this requires that clear differentiation be made between identity of and membership in religious organizations, on the one hand, and political organizations, on the other.

A significant insight into the Zionist conception of "membership and identity" is provided by a contemporary writer:

It is perhaps the greatest irony of the [*Eichmann*] trial that its two antagonistic forces—Israel and the Nazis—have both asserted the older view of membership and identity. In saying this, it is necessary to be very careful because of the emotional consequences of any comparison of any kind with the Nazis. I am not saying Israel is like the Nazis. Referring back ultimately to an intensely humane Old Testament and Talmudic tradition differs completely from following a brutal and uniquely destructive charismatic leader. Nevertheless, they are at one in their opposition to the rootless, cosmopolitan, and atomized individual; and in each case this opposition is so intense that it may permit no accommodation with the liberal spirit.³²⁷

The quotation appropriately emphasizes the involuntary and coercive aspects of the "membership and identity" conception of Zionist nationalism. Such a conception is inconsistent with democracy and individual equality including religious freedom and secular integration.

As long ago as 1896, Theodor Herzl reacted to the fundamental problems posed for Zionist nationalism by democracy and individual equality:

³²⁶ See Editorial: The Church-State Legacy of John F. Kennedy, 6 *Journal of Church and State* 5, 9-10 (1964):

Confronted with challenges and complexities unknown to [his] . . . early predecessors, Kennedy nonetheless expressed in clear and unmistakable terms a strong commitment to the separation of church and state In church-state relations, Kennedy was no neutralist. . . . He expressed strong opposition to clericalism of any kind and that type of bloc voting which determines the support of a political candidate on the basis of religion. . . .

Contrast the mixture of religious and secular matters in Silberg, *Law and Morals in Jewish Jurisprudence*, 75 *Harv. L. Rev.* 306 (1961) which is a translation of a lecture delivered by an Israeli Supreme Court justice ten years earlier.

³²⁷ Rogat, *The Eichmann Trial and the Rule of Law* 21-22 (1961). Rogat attributes the Zionist conception to "Israel."

Concerning the Nazi conception of "membership and identity" see the statutes and other documents collected in *The German Reich and Americans of German Origin* (sponsored by a group of fourteen individuals, 1938). Among the lawyers in the sponsoring group were Felix Frankfurter, George Wharton Pepper, and Henry L. Stimson. *Id.* at vii.

It might further be said that we ought not to create new distinctions between people; we ought not to raise fresh barriers, we should rather make the old disappear. But men who think in this way are amiable visionaries Universal brotherhood is not even a beautiful dream. Antagonism is essential to man's greatest efforts.³²⁸

There is no reason to believe that Zionist nationalism will succeed in imposing its conception of "membership and identity" where similar ones of the past have failed.³²⁹ Democratically oriented individuals, while sympathizing with those who appear to desire an intellectual or physical ghetto,³³⁰ will not surrender their individual freedom and equality under law for any mess of pottage.³³¹ Professor Hans Kohn has enunciated the democratic promise of creative freedom for all men:

Modern Jewish life with its great promise of creativeness in freedom is based on Enlightenment and Emancipation everywhere. Enlightenment and Emancipation are nowhere secure against the resurgence of atavistic forces. Enlightenment and Emancipation have to be defended and revitalized everywhere and at all times. This is the difficult task of modern life of which the Jews form part. . . .³³²

³²⁸ Herzl, *The Jewish State: An Attempt at a Modern Solution of the Jewish Question* 107-08 (D'Avigdor & Israel Cohen transl. 1943). Zionist contempt for "brotherhood" or humanitarianism is not merely theoretical. Morris L. Ernst has described Zionist attacks upon himself because he undertook to assist President Franklin D. Roosevelt in providing humanitarian asylum for refugee Jews in places other than Palestine. Ernst, *So Far So Good* 176-77 (1948). See *Zionist Diplomacy* 92-94 concerning Zionist subordination of humanitarian values to political objectives.

³²⁹ Many ancient ways of life have been shattered by the new forces of democracy and science, challenging as they do the evils of past and present at many points. The dignity of man and the consent of the governed hold no terrors for the scientific study of government, with its indifference to privilege, its trend away from the thralldom of force, fear, and want. The finest reasoning and the most decisive experiments point in the direction of the goals which humanity hopes to attain.

Merriam, *Systematic Politics* ix, x (1945).

³³⁰ See *Israel versus the Jews*, *The Economist* (London), 399, 400, col. 2 (Feb. 1, 1964):

[W]hat the rabbis [in the State of Israel], who for the first time in history possess state coercive powers, fail to see is that in the contemporary world a religious people can coexist with a secular state. Indeed, modern man requires this freedom if he is to be religious. He will not be forced to observe, much less to believe.

³³¹ It was a great day for the human race—the new day of Creation—when the idea dawned that every man is a human being, an end in himself, with a claim for the development of his own personality, and that human beings had a dignity and a worth, respect for which is the firm basis of human association.

Merriam, *supra* note 329, at 59.

³³² Kohn, *Zion and the Jewish National Idea*, 46 *Menorah Journal* 17, 46 (1958). The same value orientation appears in Berger, *A Partisan History of Judaism* (1951).

Jews, with the adherents of other religions of universal moral values, as well as those who adhere to such moral values for other reasons, must continue to expand and perfect the existing heritage of enlightenment and emancipation for the individual. This high task requires the expansion and perfection of juridical systems based upon democracy, individual equality, and religious freedom in both the international and national communities.

APPENDIX A

“AN EXCHANGE OF VIEWS: AMERICAN JEWS
AND THE STATE OF ISRAEL”

(See note 263 of the present study.)

[American Jewish Committee & Jewish Publication Society of America, 53 American Jewish Yearbook 564-568 (1952).]

On August 23, 1950, Mr. David Ben Gurion, then Israeli Prime Minister, stated in an address at an official luncheon tendered by him in honor of Mr. Jacob Blaustein, then President of the American Jewish Committee:

It is most unfortunate that since our State came into being some confusion and misunderstanding should have arisen as regards the relationship between Israel and the Jewish communities abroad, in particular that of the United States. These misunderstandings are likely to alienate sympathies and create disharmony where friendship and close understanding are of vital necessity. To my mind, the position is perfectly clear. The Jews of the United States, as a community and as individuals, have only one political attachment and that is to the United States of America. They owe no political allegiance to Israel. . . . We, the people of Israel, have no desire and no intention to interfere in any way with the internal affairs of Jewish communities abroad. The Government and the people of Israel fully respect the right and integrity of the Jewish communities in other countries to develop their own mode of life and their indigenous social, economic and cultural institutions in accordance with their own needs and aspirations. Any weakening of American Jewry, any disruption of its communal life, any lowering of its sense of security, any diminution of its status, is a definite loss to Jews everywhere and to Israel in particular.

53 American Jewish Yearbook at 564.

In reply to the address, which included the foregoing, Mr. Blaustein stated, *inter alia*:

Your statement today, Mr. Prime Minister, will, I trust, be followed by unmistakable evidence that the responsible leaders of Israel, and the organizations connected with it, fully understand that future relations between the American Jewish community and the State of Israel must be based on mutual respect for one another's feelings and needs, and on the preservation of the integrity of the two communities and their institutions.

I believe that in your statement today, you have taken a fundamental and historic position which will redound to the best interest not only of Israel, but of the Jews of America and of the world. I am confident that this statement and the spirit in which it has been made, by eliminating the misunderstandings and futile discussions between our two communities will strengthen them both and will lay the foundation for even closer cooperation.

Id. at 568.

Compare the official views of Prime Minister Ben Gurion, expressed to a different audience, about a year later:

First of all there is the collective duty of the Zionist Organization and of the Zionist Movement to assist the State of Israel in all conditions and under any circumstances towards accomplishment of 4 central matters—the Ingathering of the Exiles, the building up of the country, security and the absorption and fusion of the Dispersions within the State.

This signifies assisting the State whether the government to which the Jews in question owe allegiance desire [*sic*] it or not We are speaking about countries in which the citizen is free to go against his government's will, as the Jews of England did in the days of the White Paper. They have given an example of civic courage. When the official policy of their government was anti-Zionist, they persevered in their Zionist rebellion and were not afraid of being spoken about as disloyal to their country; these were English citizens and not citizens of Israel, and they had duties as well as rights in England, and nevertheless they showed no fear. They live in a country where a citizen may oppose the policy of his government. . . .

When we say "one Jewish nation" we must ignore the fact favourable or unfavourable as the case may be, that this Jewish nation is scattered over all the countries of the world and that Jews living abroad are citizens of the states in which they live—desirable or undesirable, no matter which—and that they possess rights or demand rights or we demand rights for them. They also have duties. And we, for whom this duplicity has ended and who are residents of the State of Israel living here and talking its language and fighting for the State of Israel, must not disregard the situation of those Jews who are not among us. . . .

Article entitled, Tasks and Character of a Modern Zionist, based on a speech by Prime Minister Ben Gurion delivered at the World Conference of Haichud Haolami on Aug. 8, 1951, Jerusalem Post, Aug. 17, 1951, p. 5, cols. 3-8 at cols. 4-6.

APPENDIX B



DEPARTMENT OF STATE
WASHINGTON

April 20, 1964

Dear Mr. Berger:

We have carefully studied your letter of March 14, 1964, drawing the Department of State's attention to the "sui generis character of 'the Jewish people' concept," and urging clarification of the Department's views with respect to the "'Jewish people' claim." You state: "The central point is that the Zionist-Israel sovereignty uses 'the Jewish people' concept as the basic juridical claim directed against the Jews in states other than Israel who insist upon maintaining their single nationality status." "Its principal function," you state, "is to change the legal status of Jews from that of individual nationals of Jewish religious faith to members of a juridically recognized transnational nationality group with additional 'rights' and obligations to the Zionist-Israel sovereignty. The core of 'the Jewish people' concept is its nationality characteristics..."

The Department of State recognizes the State of Israel as a sovereign State and citizenship of the State of Israel. It recognizes no other sovereignty or citizenship in connection therewith. It does not recognize a legal-political relationship based upon the religious identification of American citizens. It does not in any way discriminate among American citizens upon the basis of their religion.

Accordingly, it should be clear that the Department of State does not regard the "Jewish people" concept as a concept of international law.

I remain doubtful that a formal meeting of the type you describe would lead to useful results. As in the past, however, appropriate officers of the Department will be willing to discuss any problem that may arise and the Department will always be happy to continue the dialogue whenever occasion warrants.

Sincerely yours,

Phillips Talbot
Assistant Secretary

Mr. Elmer Berger,
Executive Vice President,
American Council for Judaism,
201 East 57th Street,
New York, New York.

[1075]