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A copy of this letter was delivered to Justice Barak. The State in its subsequent filing to the Court retracted its previous assertion with no comments.

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May 3, 2005

From:
Eli E. Hertz

To:
State Attorney Office
Attorney Osnat Mandel,
Director of the BAGATZ Department,
Ministry of Justice
Salach a-Din 29
Jerusalem

Re: The State's defense regarding the validity of the Mandate for Palestine in the disengagement (*pinui/pitzui*) appeals before the High Court of Justice.

Ms. Osnat Mandel shalom,

I read with dismay Section 32 (*Haslama* 22521) on Belligerent Occupation submitted on May 2 to the Supreme Court which states:

לבסוף, העותרים טוענים כי הינם בעלי זכות להתיישב בשטחי אזור חבל עזה ובאזור יהודה והשומרון, מכוח הוראות המנדט על ארץ ישראל, שנמסר לידי בריטניה. דא עקא, ואין צורך להרחיב בעניין זה, המנדט הבריטי על כל ארץ ישראל בא לסיומו - לשמחת הישוב היהודי בארץ ישראל - בחצות הלילה שבין יום 14.5.48 ליום 15.5.48, מכאן, שלא ברורה טענת העותרים לפיה כתב המנדט על ארץ ישראל, שניתן לבריטניה על-ידי חבר הלאומים, עומד בתוקפו בכל שטחי ארץ ישראל המנדטורית, שלא הוקצו לישראל ו/או לירדן ולא נעשו מדינה עצמאית.

With all due respect, I believe the State may be unaware of the following facts and legal opinions, when the above-mentioned argument was added to the State's defense on May 2nd, and should consider revision of this position.

1. The State's defense seems to confuse the actual end of the *British* Mandate with the end of the "Mandate for Palestine" – as if both were voided on May 14th. Indeed the administrator of the "Mandate for Palestine," Great Britain, [The Mandator] turned its responsibility over to the UN as of May 14th. However, the *legal force* of the *League of*

Nation's "Mandate for Palestine" was not terminated by the British action of ending the *British Mandate* [E.H. Mandate as 'Responsibility'] in regard to the area of Palestine.

Furthermore, the wording of the State's defense which speaks in terms of "allocation of Mandatory territory in Eretz-Israel" (*shitchei Eretz Israel ha-Mandatorit she-huktzau*) demonstrates gross ignorance of history, mixing up three different documents, maps and events (the 1922s Mandate, the 1947 Partition Plan and 1949 Armistice Agreements) leading to a legally flawed conclusion: The 1922s Mandate System allocated *all* of western Palestine, from the Jordan River to the Mediterranean Sea to the Jews (not Israel) and allocated eastern Palestine, east of the Jordan River to the Arabs (what became Trans-Jordan) with nothing 'left over.'

The only other 'allocation' was the 1947 Partition Plan, 2½ decades later which *recommended* allocating most of the Galilee and parts of the Negev to Palestinian Arabs, not just the West Bank and Gaza – with nothing 'left over.' The 'left over' portion of western Palestine the State intended to speak of (the West Bank and Gaza) was the product of war, not 'allocation' – aggression against Israel in 1948 that created the 1949 Armistice Lines (the Green Line) and left the West Bank and Gaza under illegal Jordanian/Egyptian occupation, and the aggression in 1967 that broke the armistice and brought this unallocated territory under legal Israeli administration.

2. Mandates of the League of Nations have a special status in international law and are considered to be 'sacred trusts.' A trust – as in Article 80 of the UN Charter – does not end because the *trustee resigns*. [E.H. In the present case, the British Government.]

3. International law, the UN Charter, and specifically Article 80[1] of the UN Charter implicitly recognize the "Mandate for Palestine" of the League of Nations. This Mandate granted Jews the *irrevocable* right to settle in the area of Palestine, anywhere between the Jordan River and the Mediterranean Sea.

Professor Eugene V. Rostow,[2] an expert in international law explains:

> "This right is protected by Article 80 of the United Nations Charter. The Mandates of the League of Nations have a special status in international law, considered to be trusts, indeed 'sacred trusts.'
>
> "Under international law, neither Jordan nor the Palestinian Arab 'people' of the West Bank and the Gaza Strip have a substantial claim to the sovereign possession of the occupied territories."

The Mandate for Palestine, an international legal instrument that was never amended, survived the British withdrawal in 1948, and is a binding legal instrument, valid to this day.

4. To understand the fundamental nature of the "Mandate for Palestine" one should comprehend how "international guarantee[s]" for the existence of a Jewish National Home in Palestine were achieved:

> "The Declaration was endorsed at the time by several of the Allied Governments; it was reaffirmed by the Conference of the Principal Allied Powers at San Remo in 1920; it was subsequently endorsed by unanimous resolutions of both Houses of the Congress of the United States; it was embodied in the Mandate for Palestine approved by the League of Nations in 1922; it was declared, in a formal statement of policy issued by the Colonial Secretary in the same year, 'not to be susceptible of change;' and it has been the guiding principle in their direction of the affairs of Palestine of four successive British Governments. The policy was fixed and internationally guaranteed."[3]

5. In an April 1990 Eugene Rostow, former Dean of Yale Law School and U.S. Undersecretary of State for Political Affairs under President Lyndon B. Johnson (1966-69) and a key draftee of Resolution 242 – the foundation for a peace settlement – was formulated, concurs:

> "The Mandate does not permit even a temporary suspension of the Jewish right of settlement in the parts of the Mandate west of the Jordan River. … Many believe that the Palestine Mandate was somehow terminated in 1947, when the British government resigned as the mandatory power. This is incorrect. A trust never terminates when a trustee dies, resigns, embezzles the trust property, or is dismissed. The authority responsible for the trust appoints a new trustee or otherwise arranges for the fulfillment of its purposes. … The terms of the Mandate ceased to be operative when Israel and Jordan were created and recognized by the international community … but its rules apply still to the West Bank and the Gaza Strip, which have not yet been allocated either to Israel or to Jordan or become an independent state." [4]

A year later Rostow further clarified that the Jewish right of settlement in Palestine west of the Jordan River (Israel, the West Bank, Jerusalem, and the Gaza Strip) was "unassailable," stressing:

> "That right has never been terminated and cannot be terminated except by a recognized peace between Israel and its neighbors."[5]

Douglas Feith, until recently U.S. Undersecretary of Defense for Policy, wrote in the fall of 1993 in *The National Interest* that:

> "[Although] the Mandate distinguished between Eastern and Western Palestine … it did not distinguish between the region of Judea and Samaria and the rest of Western Palestine. No event and no armistice or other international agreement has terminated the Mandate-recognized rights of the Jewish people, including settlement rights in those portions of the Mandate territory that have yet come under the sovereignty of any state. Those rights did not expire upon the demise of the League of Nations, the creation of the United Nations, or the UN General Assembly's adoption of the 1947 UN Special Committee on Palestine plan for Western Palestine [E.H. The 'partition plan']."[6]

6. To understand the enduring nature of the Mandate for Palestine, one should examine the permanent spirit of the goals set forth by the League of Nations in this legally binding international instrument:[7]

> "Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, [E.H. The Balfour Declaration] and adopted by the said Powers, in favor of the establishment in Palestine of a national home for the Jewish people. … Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country …
>
> "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble …
>
> "The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and shall encourage, in co-operation with the Jewish agency referred to in Article 4, close settlement by Jews on the land, including State lands and waste lands not required for public purposes."

7. While 1922-3 vintage documents may seem 'dated,' one should keep in mind that arbitration of the border dispute between Israel and Egypt over title to the Taba area was decided in favor of Egypt based on a 1906 British map.

8. **In conclusion:** The "Mandate for Palestine" that was conferred on April 24 1920 at the San Remo Conference, its provisions outlined in the Treaty of Sevres on August 10 1920, and its terms finalized on July 24 1922, laid down the Jewish right to settle anywhere in western Palestine, the area between the Jordan River and the Mediterranean Sea, an entitlement unaltered in international law and valid to this day.

In light of the above, I respectfully suggest that the State consider revising its defense as stated on page 13, paragraph 32. There is nothing in recognition of the right of Jews to settle anywhere in Judea Samaria, and Gaza that prevents the Government of Israel carrying its sovereign duties, including 'disengagement.' Whether one believes that this 'disengagement' is wise or not, is immaterial to the rights set in the "Mandate for Palestine." However, the State of Israel claiming that the Mandate is void is both *erroneous*, and has far-reaching ramifications in the international arena and International Law – and in essence, undermines Israel's right to have any say in determining the fate of the Territories.

Sincerely,

Eli E. Hertz
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(See notes on page 5)

1 UN Charter, Article 80: "…nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties."

2 Eugene V. Rostow, "The Future of Palestine," Institute for National Strategic Studies, November 1993. Professor Rostow was Sterling Professor of Law and Public Affairs Emeritus at Yale University and served as the Dean of Yale Law School (1955-66); Distinguished Research Professor of Law and Diplomacy, National Defense University; Adjunct Fellow, American Enterprise Institute. In 1967 as U.S. Under-Secretary of State for Political Affairs he become a key draftee of the UN Resolution 242.

3 The first Report of The High Commissioner on the Administration of Palestine 1920-1925 to the Secretary of State for the Colonies, published in April 1925, the most senior official of the Mandate for Palestine, the High Commissioner for Palestine.

4 Eugene Rostow, "Historical approach to the issue of legality of Jewish settlement activity," New Republic, October 21, 1991, at http://middleeastfacts.org/content/book/Rostow-Are-the-settlement-legal.htm. (10510)

5 Ibid.

6 Quoted in "Israeli Settlements: Legitimate, Democratically mandated, vital to Israel's security and, Therefore in US Interest," Center for Security Policy, December 17, 1996, at http://www.centerforsecuritypolicy.org/index.jsp?section=papers&code=96-D_130. (10517)

7 "Mandate for Palestine" document; Preamble, and Articles 2 and 6.