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## The Transfer of Jews Under Prime Minister Sharon's Unilateral Disengagement Plan

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The forcible expulsion and transfer of about 8,000 Jews from 21 settlements in Gaza and four in Northern Samaria under Prime Minister Ariel Sharon's Unilateral Disengagement Plan, though not "a crime against humanity" in the narrow sense of the term, is nevertheless illegal under international law insofar as it infringes upon or extinguishes the national and political rights of Jews to all of the Land of Israel. It is also illegal under Israeli constitutional law and Jewish religious law. Moreover, the Plan may also be classified as a crime of treason under the relevant provisions of Israel's Penal Code. Therefore, continuous and widespread efforts must be made in every available forum – public, political and legal – to halt the implementation of the Plan before it becomes an accomplished fact and causes immense damage to the Rule of Law, to Zionism and to the future of the State of Israel and Land of Israel.

The Disengagement Plan under which Israeli citizens are to be uprooted from their government-authorized settlements and transferred to other areas inside the state's present borders is a deliberate misnomer and deception fostered by the Prime Minister and his chief advisers. The Israelis who are living in the Gush Katif settlements and those in northern Gaza and northern Samaria are already separated or disconnected from the Arab population. There is no interaction or dealings between the two sectors of population in the areas where the

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settlements are located. The Israelis reside in self-contained and self-supporting units that are protected by the IDF in the same way as are all other settlements in Yesha (Hebrew acronym for Judea, Samaria and Gaza). Thus there is no actual requirement for “disengagement”. It is a fiction to assert otherwise. What the so-called Disengagement Plan represents is really the illegal territorial withdrawal from the Land of Israel that is part of the Jewish National Home under international law, an uprooting and abandonment of flourishing Jewish settlements and, last but not least, a forcible transfer of Jews from Jewish land. All this is to be done unilaterally to separate most Israelis from Arabs in the Holy Land under the false belief that this will ensure greater security for Israel and ultimately bring peace, according to the architects of the Plan. In this regard, the building of the security fence is part of the overall strategy of disengagement from the Arab side.

It should, however, be noted that the kibbutzim that lie not too far from Gaza, such as Nahal Oz, Kissufim, Nir Oz and others, would under the same logic employed by the proponents of the Disengagement Plan have to be uprooted and abandoned because they, too, are very close to Gaza and require constant IDF protection for their survival. This logic also applies to Israeli towns and cities, such as Ashkelon and Sderot that are now or may one day be within firing range of Arab-launched missiles from Gaza. Indeed, no place in Israel is completely safe from Arab attack – including Tel-Aviv, Jerusalem and Haifa and the whole of Galilee which has a large Arab population. There is no need, therefore to single out for evacuation the Gaza and Samaria settlements because of the defense burden their very existence entails.

This is not the first time that the Government of Israel has resorted to trickery or euphemisms to hide what it was really doing. That already happened under the Israel-PLO agreements when the act of surrendering territory in Judea, Samaria and Gaza to an unrepentant terrorist and criminal organization was referred to as the “redeployment” of the IDF in Yesha. This apparently innocuous designation covered up the real purpose of what the Government had decided to do: the giving up of parts of the Land of Israel to an Arab entity, the so-called “Palestinian Authority”, contrary to Israeli law, in the hope that this would bring “peace” and solve the Arab-Israeli dispute over the Land of Israel. Instead, the dispute grew a thousand times worse, judging by the number of Israelis murdered and wounded by the “Redeployment Plan” of Yitzhak Rabin, Shimon Peres, Yossi Beilin and the two academics who helped to devise this policy that became an unmitigated disaster for Israel.

The Disengagement Plan will fare no better. It will make Gaza into a safe haven for Arab terrorism and not stop the rockets hurtling into Israel. The solution is not to withdraw from the Land of Israel and uproot Israelis from their homes and settlements, but to expel the Palestinian Authority and all other Arabs who support terrorism or work for the destruction of the Jewish state, including the hundreds of thousands who have arrived in the land since the so-called Oslo Peace Process began.

In examining the planned transfer of Jews from Gaza and northern Samaria, the term itself should be defined. Under international law, transfer does not mean voluntary transfer, which can be assimilated to emigration and, in Zionist parlance, to *aliyah*, ever since Theodor Herzl urged the mass evacuation of Jews from Europe to the Holy Land to establish the Jewish state he visualized. Transfer as a legal term only exists if there is coercion or intolerable conditions which cause a movement of people from one place to another. It is equivalent to compulsory displacement, expulsion, deportation or relocation. Under the Rome Statute of the International Criminal Court, “transfer” means the “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”. This definition would apply to any area of dispute in the world, whether it concerns “occupied territory” or not.

Though the Rome Statute is not part of Israeli law, the definition of “transfer” it contains is useful in judging whether the contemplated evacuation of Israeli settlers in Gaza and Northern Samaria under the Unilateral Disengagement Plan fits this definition and would thus be considered “a crime against humanity” under this Statute. These settlers are lawfully present in areas that international law has designated as part of the Jewish National Home. Jews are not an alien element of the population in Gaza or Samaria, but live there as of right. This right was explicitly recognized under the Mandate for Palestine and the Churchill White paper of June 3, 1922. They are also lawfully present in these areas by virtue of the decision of the Government of Israel. Inasmuch as the great majority of the settlers are peaceful, law-abiding and loyal citizens of the State of Israel, there are no valid grounds permitted under international law for their evacuation and transfer. Hence if and when the Government of Israel carries out its Disengagement Plan, the forced displacement of the settlers would constitute an illegal transfer of population that is forbidden under international law. It would not, however, constitute “a crime against humanity” as defined in the Rome Statute, since the transfer is to be carried out by the decision of the home government of the settlers and does not involve an attack from another state or an attack on a civilian minority comprising a separate ethnic or religious population. On the other hand, those who vociferously advocate the transfer of Jews from Gaza and Northern Samaria, particularly members of Israel's Labour, Yahad and Arab political parties, would likely deem it “a crime against humanity” if the persons to be transferred were Arabs rather than Jews.

Historically, the transfer of Jews either from their homeland or from various lands in the Diaspora has occurred several times in both ancient and modern days. We need only recall the large-scale deportation of Jews from the Kingdom of Israel by the Assyrians, those later exiled from the Kingdom of Judah to Babylonia, or banished from Judea to Rome after the subjugation of the land by brutal foreign conquerors. In the medieval period, Jews were also expelled from England by Edward I (1290) and from Spain (1492) by Ferdinand and Isabella, among some notorious examples. During the twentieth century, the most notable example of the forcible transfer of Jews occurred when Adolph Hitler assumed power in Germany and deported not only German Jews to concentration camps but also the Jewish populations in all the neighbouring European countries conquered and occupied by Germany during World War II. The Jews were removed from their homes and sent on trains to concentration camps for the purpose of providing Germany with slave labour and for extermination. The deportation of Jews carried out by Hitler's Germany violated every norm of law in civilized countries and was subsequently prohibited by Article 49 of the Fourth Geneva Convention. This kind of transfer was not only a crime against humanity, but also a war crime, a crime against the Jewish People and constituted the crime of genocide.

In the period after Israel's War of Independence (1948-1949) and subsequent wars, approximately 800,000 Jews were forced to leave Arab lands, particularly Iraq, Yemen, Egypt and Morocco, of which approximately 600,000 made their way to Israel in various operations. The number of Jews who were forced to leave all the Arab countries actually exceeded the number of Arab refugees who left the Land of Israel in the wake of the first Arab-Israeli war, which – according to the initial figure compiled by UNRWA – was put at 590,000. The forcible transfer of Jews from Arab countries was illegal because the Jews were peaceful and law-abiding citizens who were not disloyal, but merely caught up in the vortex of the struggle between Arabs and Jews over Palestine. They were forced to leave Arab League states, where in some cases they had resided a thousand years before the advent of Islam and Arab rule, merely because as Jews they were suspected of identifying with the Jewish state of Israel. In contrast to the exemplary behaviour of Jews living in Arab lands, most of the Arabs who have left the Land of Israel since 1948 either engaged in or supported a war to drive the Jews out of

the country. The Arabs who now live in the areas under the control of the “Palestinian Authority” created in 1993 under the first Israel-PLO Agreement (the Declaration of Principles) continue to act in the most violent and lawless manner, committing acts of terrorism, murder and sabotage that no other country in the world would tolerate. Their forcible transfer to nearby Arab countries would not be considered illegal under international law, for the same reason that 12 million Germans were expelled after the end of the Second World War from Poland, Czechoslovakia (now the Czech Republic) and other European countries. In each instance there was active complicity in the wrongful and terrible acts that were being perpetrated against the host countries they lived in, which made their continued presence in those countries an abomination or simply intolerable. Transfer in these circumstances is permitted under international law, provided it is carried out in an orderly and humane manner, as decided in the Potsdam Agreement of August 2, 1945 between the USSR, the USA and the U.K., and subsequently approved by China and France.

In regard to the forcible transfer of Jews from settlements set up with the approval of the Government of Israel, a harmful precedent was set in April 1982 when about 4,500 Israeli civilians living in nearly a dozen settlements in the Rafa Salient (Pit’hat Rafiah), including the town of Yamit, located on the northern edge of the Sinai Peninsula, bordering on the Gaza Strip, as well as several other settlements along the coast of the Gulf of Eilat and the Red Sea including the town of Ophira (Sharm e-Sheikh), were transferred and the settlements dismantled, pursuant to the Camp David Accords and the Egyptian-Israeli Peace Treaty.

Prime Minister Menahem Begin justified the demolition of these Jewish communities and the transfer of their residents on the ground that this step was necessary to secure a permanent peace with the largest Arab country in the region, which would at the same time enhance Israel’s security and achieve good neighborly relations, as spelled out in the Framework Agreement for Peace in the Middle East. In any case, Begin did not consider Sinai to be part of the Land of Israel, so he had no apparent misgivings about giving all of it up to Egypt in return for peace. Begin’s view about Sinai not being part of the Land of Israel differed sharply with the one held by Israel’s first and greatest Prime Minister, David Ben-Gurion, who in a victory speech at the conclusion of the Sinai War on November 7, 1956, told the Knesset that the IDF did not enter or violate the territory of Egypt when it conquered Sinai. He believed that the whole of Sinai, including the Red Sea islands of Tiran and Sinafer (Sennaper), were part of the historical Land of Israel. He recalled that the island of Tiran was the place where an independent Jewish state once stood in ancient times, known as Yotva, until it was destroyed by the Byzantine Emperor Justinian in the year 535, according to Procopius, a 6<sup>th</sup> century Greek historian born in Caesarea in Palestine.

In truth, at least half of Sinai was an historical and geographical part of the Land of Israel ever since the days of King Solomon. If the Brook of Egypt or River of Egypt was congruent with the Nile River, then all of Sinai would be within the borders of the Promised Land, a point that is still hotly debated today among Biblical scholars.

Under Ottoman Turkish rule, the Sanjak of Jerusalem covered a major part of Sinai until 1906, when Britain forced the Ottoman Sultan to adopt a new administrative border running from Rafiah to Eilat to protect its imperial interests in the Suez Canal from military attack by creating an extended buffer zone away from the Canal. This line differed from the previous one, from El-Arish to Suez. However, neither of these boundary lines constituted an international border between the Ottoman Empire and Egypt. It was only by virtue of the Egyptian-Israeli Peace Treaty signed in Washington, D.C. on March 26, 1979 by Menahem Begin and Anwar Sadat that the formal international boundary was delineated, thus making Sinai a part of Egypt. Begin’s decision to destroy all the Jewish communities of Sinai in April

1982 was illegal, because it contradicted the Law of Return and other Israeli laws pertaining to the Land of Israel, based on the assumption that these communities were located in the area of Sinai that was undoubtedly a historical and geographical part of the Land of Israel and still is.

The same argument that was raised in regard to Sinai – that it is not part of the Land of Israel and can therefore be given up because it does not belong to the Jewish People – is heard again in regard to Gaza as a result of the Disengagement Plan. At a meeting of the Knesset Constitution, Law and Justice Committee on November 14, 2004 to discuss the draft law for the implementation of the Disengagement Plan, Ruth Lapidot, Professor of International Law at the Hebrew University, is reported to have said<sup>1</sup>: “Gaza is not part of the Land of Israel; it is occupied territory”. This statement by a person known as an expert in international law is ludicrous nonsense. Gaza was an integral part of Mandated Palestine otherwise known as the Land of Israel. Gaza never belonged to any Arab state and therefore cannot be classified as “occupied territory”, as defined in Article 42 of the Hague Regulations. It is one of the several territorial divisions of the Jewish National Home belonging to the Jewish people.

None other than Menachem Begin, who willingly gave up the Sinai to Egypt, vociferously opposed Israel's withdrawal from Gaza after the Sinai War of 1956 on the ground that being part of the Land of Israel, it should not be given up. However, Israel was compelled by joint Russian and American pressure a mere 24 hours after Ben-Gurion's victory speech to the Knesset on November 7, 1956 to agree to withdraw not only from Sinai but also from Gaza. The USSR had threatened a nuclear strike if Israel did not accept its demand, while the USA threatened a cut-off of all financial aid as well as other sanctions. Ben-Gurion acted under duress or *force majeure* when he decided to withdraw from what was part of the Land of Israel, and therefore cannot be legally blamed for what he did. Furthermore, no Jewish settlements then existed in either Sinai or Gaza and no Jews were being transferred. That situation is vastly different from what Israel intends to do under the Disengagement Plan, which is to voluntarily abandon parts of the Land of Israel to non-Jews, uproot a score of settlements and forcibly transfer Jews, when there is no pressing need to do so.

Gaza was not always considered a liability. In August 1946, the Jewish Agency put forward a Partition Plan in which Gaza was included within the borders of a Jewish state. In the Alon Plan devised by Yigal Alon in 1970 to determine which of the territories Israel conquered in the Six-Day War should be retained for itself in any future peace agreement to be made with its Arab neighbours, he advocated that the part of Gaza that did not contain a dense Arab population ought to be left in Israel's possession. This part was, in fact, the southern half of Gaza, which is exactly where Gush Katif stands today, that Sharon is so anxious to abandon.

Insofar as Northern Samaria is concerned, no one can deny its status as an integral part of the Land of Israel ever since the days of Joshua, despite the recent Supreme Court judgment handed down by Aharon Barak, the President of the Court, who ruled it to be held by Israel under “belligerent occupation”, which translates into “occupied territory”.<sup>2</sup> That the most senior judicial figure in the country can so misjudge the legal status of Samaria is a shameful mark of abysmal ignorance about Israel's legal rights to the Land of Israel under international law and Israeli constitutional law. That same abysmal ignorance also underlies Sharon's Disengagement Plan.

In determining the legality of Sharon's Plan to transfer Jews from Gaza and Northern Samaria, attention must first be paid to Article 6 of the Mandate for Palestine, which represents the legal recognition of the Jewish right of return to all of Palestine and the Land of Israel, under international law. The Jewish right of return embraces the twin right of

immigration and the right of settlement in all parts of the Land of Israel, including Gaza and Samaria. That is why the British Government, during the time it governed Palestine and the Land of Israel under the Mandate, never dared to uproot any Jewish settlement established by Palestinian Jews even without its consent. The Mandatory Government realized it would have been illegal for them to do so in light of the specific text of Article 6 of the Mandate requiring the Government to facilitate Jewish immigration and encourage close settlement by Jews on the land. The Government was further required by Article 11 of the Mandate “to introduce a land system appropriate to the needs of the country, having regard, among other things, to the desirability of promoting the close settlement and intensive cultivation of the land”. This article was a further elaboration of Article 6 insofar as it related to close Jewish settlement on the land. The uprooting of settlements and transfer of Jews by Britain from any part of the Land of Israel would have defeated the purposes of Articles 6 and 11 of the Mandate and rendered these provisions without legal effect.

The rights of Jews enshrined in Articles 6 and 11 did not lapse under international law with the extinction of the Mandate on May 14-15, 1948. Neither did the prohibition lapse on transferring Jews from the land on which the settlements had been established. *Under the principle of acquired legal rights, though the international instrument upon which those rights were founded did indeed expire, the rights themselves conferred on the Jewish People remained in force.* This principle of international law is now codified in Article 70(1)(b) of the Vienna Convention on the Law of Treaties which states that “unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention... does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”. Applying this provision of international law to the Mandate for Palestine, the conclusion must be that when international law recognized the Jewish right of immigration and right of settlement in the Land of Israel, it also at the same time prohibited the transfer of Jews from the land on which all settlements were established. This prohibition represents the converse or flip side of the aforementioned rights.

This conclusion is reinforced by the Rome Statute of the International Criminal Court, which prohibits the transfer of persons from where they are lawfully present, unless other grounds exist under international law for their expulsion. No such grounds can exist for the expulsion of Jewish settlers living in Jewish settlements in the Land of Israel.

It is also to be noted that the rights of Jews to settle the Land of Israel under Articles 6 and 11 of the Mandate, the converse of which – as noted above – prohibits their displacement, entered the legal system of Israel, at the conclusion of the Mandate, by virtue of Article 11 of the Law and Administration Ordinance. Articles 6 and 11 were modified only to the extent that account now had to be taken of the changes brought about by the establishment of the State of Israel. Thus it was now incumbent upon the Government of Israel – instead of the Mandatory Government – to facilitate Jewish immigration and encourage close Jewish settlement on the land and, conversely, not to uproot settlements or transfer Jews from them.

The Supreme Court of Israel, in several judgments handed down in the first years of Jewish independence, overturned the previous interpretation of the British courts during the Mandate period that the provisions of the Mandate for Palestine did not form part of the domestic law unless specifically incorporated by a separate law to that effect. However, it was decided in effect by the Supreme Court that the provisions of the Mandate were indeed part of the constitutional infrastructure of Israel unless otherwise changed by the legislature of the Jewish state.

The Jewish right of settlement in the Land of Israel could not be exercised in the regions of Judea and Samaria during the 19 year period that Jordan illegally occupied and annexed them. The same was true of Gaza during the period of Egypt's occupation of that region. Each Arab country was in a state of war with Israel and barred entry of Jews to the areas of the Land of Israel under its control. All that was completely changed by the Six Day War in June 1967, when effective control over Judea, Samaria and Gaza passed into the hands of Israel. The right of settlement in those regions of the Land of Israel, which had been temporarily suspended or dormant, was now revived to its full extent. The Government of Israel did not hesitate to establish new Jewish settlements in the liberated Jewish lands that had never legally belonged to either Jordan or Egypt as recognized sovereigns under international law. The Government was now placed, as already noted above, in the same position as the British Mandatory Government. It could only encourage Jewish settlements; it could neither disband them nor transfer Jews from where they had a perfect right to live.

In addition to the recognition of Jewish immigration and settlement rights derived from the Mandate, with the implicit ban it imposed on uprooting settlements and transferring Jews from the land on which the settlements were built, the Knesset passed the Law of Return on July 5, 1950, which reinforced those same rights and further embedded them into the constitutional law of Israel. The Law of Return is applicable not merely to the State of Israel but to all of the Land of Israel, as is evidenced by the use of the Hebrew word *eretz* (in the form *artza*, meaning "to the land") rather than *medina* ("state"), to describe the destination of the Jewish immigrant and Jewish settler in the land. The distinction between *eretz* and *medina*, which indicates the territorial scope of application of the Law of Return, was made in the Law itself, as well as in the Explanatory Note when the bill was first tabled in the Knesset on June 27, 1950. If the Law of Return had been limited to the State alone, the Law when enacted would have used the term *medina* instead of *eretz*. The Government of Israel cannot therefore deprive Jews of their right to live in Gaza or Samaria, both of which, without doubt, constitute integral parts of *Eretz Israel*. Any steps taken to evict Jews from their homes and settlements in these two regions would be unconstitutional, even if a special law that is now being prepared by the Sharon Government is passed by the Knesset authorizing their displacement, since that law would completely contradict the most fundamental law of the State, namely, the Law of Return which enshrines the right of Jewish settlement in *Eretz Israel*. This right indeed represents the essence of Zionism and built the State of Israel. If settlements are uprooted and Jews are forced to evacuate them, this would be a repudiation of Zionism and a staggering blow to the highest value of the Jewish state.

The Jewish right of return and of settlement in the Land of Israel is not only embodied in the Law of Return and in Article 6 of the Mandate, it is also expressly referred to in the Proclamation of Independence of the State of Israel, which declares in its opening paragraphs that "*Eretz Israel* was the birthplace of the Jewish People... [who] never ceased to pray and hope for their return to it and for the restoration in it of their political freedom". In light of the foregoing constitutional instruments, any action taken by the Government of Israel to oust Jews from any region of the Land would not only violate these instruments of Israeli law, but such action can be justly construed as impairing the sovereignty of the State over all areas of the Jewish National Home under the rule of the State, whether included in it formally or not. Such an action would constitute the crime of treason under Section 97(a) of the Penal Code.<sup>3</sup> In fact, the mere intention to withdraw from any area under the sovereignty of the State of Israel is enough to constitute the crime of treason under sections 97(b)<sup>4</sup> and 100<sup>5</sup> of the Penal Code.

It is the author's original thesis<sup>6</sup> that sovereignty over all of the Land of Israel or Palestine was vested in the Jewish People as a direct result of the adoption of the San Remo Resolution by Britain, France, Italy and Japan on April 24-25, 1920. This resolution, which combined the Balfour Declaration with the Smuts Resolution, the precursor of Article 22 of the Covenant of the League of Nations, was actually an international agreement between these four powers that was inserted into the three opening paragraphs of the Preamble of the Mandate for Palestine and later confirmed by a total of 52 member-nations of the League of Nations, as well as separately by the United States in a 1924 treaty with the United Kingdom.<sup>7</sup>

Inasmuch as the State of Israel is the Sovereign Power over Gaza and Samaria, inheriting that status from the Jewish People when the Jewish state was proclaimed in May 1948, any withdrawal from these areas which would automatically result in the loss of Israel's *de facto* sovereignty over them is an act tantamount to the crime of treason under section 97(b). If the Unilateral Disengagement Plan is implemented, all the members of the Government of Israel, including Prime Minister Sharon, could be charged with this crime. Such a charge would actually be officially made if Israel had an Attorney-General who truly applied the provisions on treason found in the Penal Code and warned the members of the Government in advance of what they were about to do. A warning of this kind would undoubtedly put an end to the Disengagement Plan. The law on treason would also be strengthened enormously if the Supreme Court of Israel contributed its part to the enforcing of the provisions of this law, as it failed to do in regard to the Israel-PLO Agreements.

Territorial withdrawal from any area of the State of Israel has now been made legally possible by a new law enacted on January 26, 1999, known as the "Administration and Law Arrangements Law". The purpose of this law was to make it more difficult for the Government to withdraw from the Golan Heights, but the law applies theoretically to any other area within the State of Israel as well. Prior to the enactment of this law, there was no constitutional procedure to affect any territorial withdrawal from the State of Israel. Under the terms of this law, a government decision rescinding the application of the law, jurisdiction and administration of the State of Israel to a particular area of the State, such as the Golan Heights, must receive the approval of at least 61 members of the Knesset, i.e., an absolute majority, and also be approved in a referendum before there can be any territorial withdrawal. The new law, however, does not apply to areas of the Land of Israel outside the formal borders of the State of Israel; hence, it does not apply to Judea, Samaria and Gaza. What that means is that even if 61 or more Knesset members approve a government decision to withdraw from Gaza and Northern Samaria under the Disengagement Plan, Knesset approval still would not suffice to prevent the application of the penal provisions of treason to those directly responsible for any territorial withdrawal from these two areas of the Land of Israel that lie outside the borders of the State, but which are under the sovereignty of the State. As a result, a charge of treason could still be brought against Prime Minister Sharon for any withdrawal under the Disengagement Plan, despite the existence of the new law.

One Israeli law often cited to claim that Sharon's Disengagement Plan is illegal is the Basic Law: Human Dignity and Liberty, which affirms that the right of a person to his property is a fundamental human right recognized by the State of Israel as a Jewish and democratic state, for which there shall be no violation (section 3 of the Law). While there is no doubt that if the Disengagement Plan is implemented, there will naturally be a violation of the fundamental human rights of all the people who own property in Gaza and Northern Samaria – rights to real estate, for instance, will expire on the day people are evacuated from their homes, and any movable property left behind will be considered ownerless – the Basic Law: Human Dignity and Liberty cannot be invoked to block the Plan in court because this law applies only

to areas within the borders of the State. Any appeal to the Supreme Court based upon this law will be rejected because the Government will claim that persons who live in so-called "occupied territory" have no permanent rights in the immovable property located outside the borders of the State. The Government of Israel was legally obliged – under a law called the Area of Jurisdiction and Powers Ordinance – to apply the laws of the State to all areas of the Land of Israel repossessed by the IDF in the Six Day War of June 1967. However, the Eshkol Government evaded its legal responsibility at the time and, instead of doing what it was supposed to do, brought in new legislation to give it the option to decide which areas of the Land of Israel would be annexed and which would not be. This new legislation was Section 11B of the Law and Administration Ordinance.<sup>8</sup> Since Gaza and Northern Samaria were never formally incorporated into the State, the Basic Law: Human Dignity and Liberty does not apply to the property rights of the residents of Yesha who will be evicted and transferred under the Disengagement Plan. They will have to rely primarily on the Law of Return which does apply to Judea, Samaria and Gaza and also on the right of settlement which extends to the whole of the Land of Israel, including areas not included in the State.

Another point of contention that has arisen in the debate on the Sharon Disengagement Plan is the legality of any military order given to Jewish soldiers of the IDF (or to Jewish policemen of the Israel Police) to evacuate Jews from their homes in the Land of Israel. In the opinion of the author, such an order will be patently illegal in that it will violate the right of every Jew under the Law of Return to live peacefully on the soil of the homeland. It will be an order that runs counter to the highest values of the Jewish state, to settle and build up the Land of Israel. This value is implanted not only in Israeli constitutional law, but also in Jewish religious law. In the Book of Numbers, the fourth book of the Torah (chapter 33, verse 53), God instructs Moses to tell the Israelites as they are about to enter the Land of Canaan from the plains of Moab, by the Jordan, opposite Jericho, "to drive out the inhabitants of the land and dwell therein; for unto you have I given the land to possess it". This was a clear divine commandment to settle the Land of Israel in addition to driving out the Canaanites, a commandment that was carried out in the main. This commandment to settle the whole of the Land of Israel, and not leave it in the hands of other nations, was adduced by the great 13<sup>th</sup> century halakhic scholar, Nahmanides (Rabbi Moses Ben Nahman or RaMBaM) in the work he compiled with the charming title "Positive Commandments which the RaMBaM [Maimonides] Overlooked". RaMBaM, the most outstanding halakhic authority in the medieval period, had omitted this commandment in his own work, *Sefer Ha-Mitzvot*, but he did include a commandment on war, known in Hebrew as *milhemet mitzva*, which imposed a duty on the Jewish People to go to war rather than let an enemy take over any part of the Land of Israel. This evidently means that Jews are forbidden under any circumstances to voluntarily surrender the land to non-Jews. Sharon's Disengagement Plan is therefore in clear conflict with what *halakha* rules must be done to prevent the Land of Israel from being ruled by non-Jews, as interpreted by two of the greatest rabbinical authorities on the subject.<sup>9</sup> From the standpoint of *halakha*, therefore, it is forbidden to uproot Jewish settlements in the Land of Israel and concomitantly, to transfer Jews from the land. Former Chief Rabbis Avraham Shapira and Mordechai Eliyahu did not misinterpret *halakha* when they, together with other prominent rabbis, called upon soldiers and policemen to refuse an order to dismantle Jewish settlements in Gaza and Northern Samaria.

In reaction to the call of the rabbis, it was preposterous for Professor Mordechai Kremnitzer, a criminal law expert, known as a great exponent of freedom of expression and human rights, to say that Rabbi Shapira had committed a crime (supposedly that of sedition),<sup>10</sup> when in fact it is Sharon and the members of his Government who will be committing a greater crime if and when they drive out Jews from their homes. If Kremnitzer's advice had been followed in

ancient times, some of the prophets of ancient Israel (such as Nathan, Elijah and Jeremiah *inter alia*) would have been prosecuted for the very same crime.

The plan to transfer Jews from legally established settlements in the Land of Israel is not merely a “painful concession”, as the Prime Minister has put it. It is a clear violation of law, both secular and religious, and a severe blow to the true ideals of Zionism. Those who are responsible for this illegal plan must one day be held accountable, not only in the public and political arenas, but also in a court of law when a true Zionist Government comes to power and initiates prosecution.

## Endnotes

- <sup>1</sup> **Ha`aretz**, November 15, 2004.
- <sup>2</sup> See the case of Beit Sourik Village Council vs. The Government of Israel [HCJ 2056/04].
- <sup>3</sup> The text of section 97(a) of the Penal Code reads as follows: “A person who, with intent to impair the sovereignty of the State, commits an act calculated to impair such sovereignty, is liable to the death penalty or to imprisonment for life.”
- <sup>4</sup> Section 97(b) states: “A person who, with intent that any area be withdrawn from the sovereignty of the State or placed under the sovereignty of a foreign state, commits an act calculated to bring this about, is liable to the death penalty or to imprisonment for life.”
- <sup>5</sup> Section 100 provides: “A person who does any act evincing one of the intentions referred to in sections 97, 98 and 99 is liable to imprisonment for ten years.”
- <sup>6</sup> In a speech in the US (February 1991), later reprinted as an article, Prof. Yuval Ne`eman, basing himself on a paper written for him by the author, who then served as his adviser in matters of international law affecting *Eretz Israel*, stated in regard to Israel’s legal foundation: “[At a conference held in] San Remo (April 1920) [attended by] the Principal Allied Powers...the decision [was taken to] establish a separate territory of Palestine...it is from this moment at San Remo that the State of Israel draws its legal existence. Sovereignty over the area of Palestine was thereby bestowed on the Jewish people.” See the article by Prof. Ne`eman, “How to Save ‘the Peace Process’”, **Global Affairs, The American Journal of Geopolitics**, Washington, DC, Fall 1992, p. 85. The author of the present article developed his thesis on sovereignty a few years earlier.
- <sup>7</sup> See the author’s forthcoming book on the Legal Foundation and Borders of Israel under International Law, which discusses in detail the question of sovereignty over Palestine and the Land of Israel. See the Introduction of this book, “Legal Rights and Title of Sovereignty of the Jewish People to the Land of Israel and Palestine Under International Law”, published separately as Policy Paper No. 147, Ariel Center for Policy Research, April 2003. See also an earlier article in *Nativ*, Nov. 2001, Issue 6, pp. 18-19, “Jewish Legal Rights and Title to the Land of Israel and Palestine” (Heb.), and its English synopsis.
- <sup>8</sup> The text of section 11B provides: “The law, jurisdiction and administration of the State shall extend to any area of *Eretz-Israel* designated by the Government by order.”
- <sup>9</sup> In regard to what *halakha* says about the Land of Israel, see the author’s, “A Petition to Annul the Interim Agreement”, Policy Paper no. 77, Ariel Center for Policy Research, January 1999, pp. 86-92.
- <sup>10</sup> **Jerusalem Post**, October 22, 2004.