



Bedouin Rights under Occupation: International Humanitarian Law and Indigenous Rights for Palestinian Bedouin in the West Bank

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Cover photo (front): A herder grazing his goats, Area C of the West Bank (John Tordai 2009). Cover photo (back): Goats and sheep, Bedouin community of Arab Rashayida (John Tordai 2009).

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Table of Contents

EXECUTIVE SUMMARY	4
1 BACKGROUND ON THE BEDOUIN	7
1.1 Overview of the Bedouin Tribes in the Middle East	7
1.2 Bedouin Tribes in Southern Israel	8
1.3 The Bedouin in the West Bank	9
1.4 The Status of the Bedouin in the West Bank	10
1.5 Palestinian Authority (PA) Assistance to the West Bank Bedouin	11
2 THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW (INTERNATIONAL HUMAN RIGHTS LAW (IHRL) TO THE BEDOUIN IN	
INTERNATIONAL HOMAN RIGHTS LAW (HIRL) TO THE DEDOCTORY	13
2.1 International Humanitarian Law (IHL)	13
2.2 International Human Rights Law (IHRL)	14
2.3 The Application of IHRL in Occupied Territory	15
2.4 Third State Responsibility	17
2.5 Key Rights and Protections relevant to the Bedouin under IHL and IHRL	17
2.5.1 Duty to Maintain Public Order and Civil Life	18
2.5.2 Maintenance of Pre-Existing Local Laws and Practices	19
2.5.3 Prohibition on Forcible Transfer	19
2.5.4 Prohibition of the Destruction and Confiscation of Private Property	20
2.5.5 Restrictions on the Provision of Humanitarian Assistance	21
2.5.6 The Right to Adequate Housing	21
2.5.7 The Right to Family Life and Privacy	23
2.5.8 Freedom of Movement and the Right to Choose Residence	23
2.5.9 Protection from Forced Eviction	24
2.5.10 The Right to Equal Treatment	24
3 THE NATURE AND CONTENT OF INDIGENOUS RIGHTS	26
3.1 Indigeneity as a Concept	26
3.1.1 The Development of the Indigenous Rights Discourse	26
3.1.2 Can the Bedouin be Described as Indigenous?	28
3.1.3 Counter Perspectives and Counter Claims	30
3.2 The Content of Indigenous Rights	32
3.2.1 Indigenous Land Rights	33
3.2.2 The Right to Culture	39
3.2.3 Right to Participate in Decision Making	43
3.2.4 The Provision of Essential Services without Discrimination	46
4 CONCLUDING REMARKS	48

EXECUTIVE SUMMARY

The following report explores the content and scope of any rights that the Bedouin¹ of the West Bank possess under International Humanitarian Law (IHL), International Human Rights Law (IHRL) and potentially as indigenous people, under the emerging body of international law in this area. As 'protected persons' under IHL, the Bedouin, in common with all Palestinians, enjoy primary protection from forced displacement. In addition, the Bedouin may enjoy supplementary rights and protections under IHRL, including indigenous rights, on account of their particular needs, history and background.

Whilst the Bedouin are an integral part of Palestinian society, they have a number of distinct features, ranging from a semi-nomadic lifestyle, certain cultural practices, history, habits and tribal relationships, as well as a particular approach to land usage based on traditional customs, often coupled with a lack of formal property ownership. Although the right to cultural life is a basic human right for all persons, the emerging body of indigenous rights focuses on protecting the traditions and cultural practices of certain groups in a way that mainstream human rights law does not fully explore.

The doctrine of indigenous rights has initially emerged in response to the degradation of the rights and lifestyles of indigenous groups in many Western settler colonial States in which members of these groups became nationals with full citizenship rights. However, there is no reason why the concept does not cover groups who can be classified as indigenous within occupied territory in which IHL is the applicable legal regime, and the Occupying Power temporarily administers the territory and is responsible for the welfare of the local population as a *de facto* government.

The introduction of new concepts, such as the indigenous rights discourse, into a highly charged political context in which IHL affords the primary and ultimate protection to people living under occupation presents a challenge. Not only that the doctrine of indigenous peoples rights is considered as non-binding soft law, it is also perceived by some as detrimental to the key objective of Palestinian self-determination by suggesting that there are different minorities, or groups deserving special protection, within the broader Palestinian polity. Opponents of the indigenous rights perspective argue that such an approach undermines the fact that Palestinians in occupied Palestine – not merely the Bedouin – are at equal risk of rights violations regardless of any particular status they enjoy. It is contended that categorizing Palestinians into different groups results in fragmented identity and diverts attention from the real struggle which is ending the occupation, fulfilling the right to self-determination and putting an end to IHL violations by Israel, the Occupying Power.

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¹ The Bedouin in Palestine (comprising the West Bank, including East Jerusalem, and the Gaza Strip) are Palestinian Arabs. The term 'Bedouin' has been used generally in public and scholarly circles without real scrutiny or analysis of the historical genealogy and formation of the term as a subject over time, or to the political and social significations attached to it. In the Israeli-Palestinian context, the use of the term is criticized as denationalizing and divisive to the Palestinian collective. Historically, the Zionist movement looked for sub-groups within the Arab community, such as Druze, Bedouin, or Maronite Arabs in an attempt to forge alliances with such minorities and thus divide the Arab collective. Similarly, the Israeli government treats the Arab minority in Israel in plurality, i.e., as separate minorities including, Muslims, Christians, Circassians, Bedouin and Druze. William Young has suggested avoiding the use of the term "Bedouin" altogether because it distorts the complex reality of interrelations between different groups, whether nomadic or sedentary, and eventually creates an 'empty signifier', lacking neutrality and replete with ideological baggage, see William Young, 'The Bedouin: Discursive Identity or Sociological Category? A Case Study from Jordan' *Journal of Mediterranean Studies* 9, no. 2, 1999, pp. 275–299. Space constraints prevent further discussion of these questions, significant as they are. In this report, the terms West Bank Bedouin/Palestinians, Bedouin-Arabs/Palestinians are used interchangeably to refer to the same group.

All Palestinians are native to historical Palestine (both in occupied Palestine and the State of Israel), and the discussion in this report does not suggest that the Bedouin are indigenous while other Palestinians are not. Further, there is no question that self-determination is the ultimate aspiration and right of all Palestinians, and that all Palestinians are at risk of violations of their rights under IHL and IHRL. Nevertheless, there is value in exploring additional avenues for the protection of groups within Palestinian society with special needs, lifestyles or cultural practices at risk of degradation. This should not detract from the broader objective of protecting the rights of all Palestinians. In fact, such an approach can be complementary by exploring a range of new and emerging areas of law, sociology, anthropology or other social sciences which can provide the necessary specialty and focus in addressing and explaining those needs. Diversity of groups, practices and lifestyles within a society should be celebrated, not homogenized.

There are a number of reasons why the legal analysis of the rights and protections of the West Bank Bedouin is complex:

Firstly, in contrast to the Bedouin in the Naqab (Negev) – in Israel proper – the Bedouin in the West Bank remain under Israeli military occupation and subject to the rules, and protections, of IHL. Whilst Israel is the sovereign in the Naqab, it has no sovereign power in the West Bank and this severely limits its authority and the decisions it can lawfully take *vis-à-vis* the local population there.² The West Bank Bedouin are entitled to full protection under IHL as protected persons and this status imposes certain obligations upon the Occupying Power, including an absolute prohibition on the forcible transfer of the protected population, the prohibition on the destruction of private property in the absence of an imperative military necessity and other rights guaranteed to protected persons. This protected persons status provides, in theory, a high level of protection to all Palestinians in the West Bank from breaches of IHL by the Occupying Power. Unfortunately, this is not borne out in practice.

Secondly, most of the Bedouin in the West Bank are refugees, having been forcibly displaced from their traditional lands in the Naqab in present day Israel, following the 1948 Israeli-Arab war. They therefore no longer occupy their traditional lands, and are entitled, under international law, to the right of return and other entitlements such as compensation for the land lost and other damage caused by displacement, including lost opportunities. Further, many of the Bedouin have been subjected to multiple and repeated displacement at the hands of Israeli authorities, ironically on account of their displaced status and consequent lack of formal land tenure. This situation further marginalizes them.

Thirdly, in common with all Palestinians in the West Bank, the Bedouin are entitled to the full package of human rights, including the rights to adequate housing, freedom of movement and the prohibition on arbitrary eviction. However, the Bedouin may be entitled to protections specifically tailored to indigenous groups, if they can be classified as such. The rights of indigenous persons are constituted by an emerging body of soft law, including the UN Declaration on the Rights of Indigenous Persons (hereinafter also "the Declaration"), as well as by domestic and international jurisprudence. Such rights include the right to recognition of land rights, including traditional ownership and usage, as well as the right to enjoy and preserve their culture, tradition and livelihood.

Fourthly, while the Israeli government contests the indigenous status of the Bedouin, UN Special Rapporteurs have described Palestinian Bedouin as indigenous and there is solid body of evidence and

² Christopher Greenwood, 'The Administration of Occupied Territory in International Law' in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories*, Oxford University Press, Oxford, 1992, p. 244; See also Théo Boutruche and Marco Sassoli, *Expert Opinion on the Displacements of Bedouin Communities from the Central West Bank under International Humanitarian Law*, 2014, p. 8.

anthropological opinion to support such a classification. Moreover, and as will be discussed below, it is important to note the context in which Palestinians (including Bedouin) within Israel and in the West Bank invoke their indigenous rights *vis-à-vis* the Israeli government and its Military Commander in the West Bank respectively. They are a marginalized group that suffered, and continue to suffer, from dispossession and discrimination. This contrasts with groups that comprise the dominant majority within a State and fully enjoy their human rights. Taking into account the rationales underlining the doctrine of indigenous peoples rights, such groups are not considered in need of protection.

This report explores the issues involved in the categorisation of the Bedouin as indigenous, concluding that they rightly meet the accepted definition as indigenous and are entitled to the full package of rights and protections owed to indigenous persons. This normative package is additional and supplementary to the rights and entitlements owed to the Bedouin as protected persons, refugees and displaced persons under international law.³ The report draws heavily on information about the Bedouin in the Naqab. Whilst West Bank and Naqab Bedouin are considered under different contexts and legal regimes, there are sufficient similarities in culture, history, tradition, community conflict resolution mechanism and challenges faced to warrant the comparison. Most West Bank Bedouin, after all, are from the Naqab, with the wish to exercise their right of return. Both groups face the challenges of cultural adaptation in a context of displacement and forced urbanization, home destruction, denial of access and usage of land and further rights violations which jeopardise the continuous existence of their traditional lifestyle and distinct culture.

The report consists of three parts:

The first part of the report opens with a brief reflection on the history of Bedouin tribes in the Middle East. It then addresses the history of the Bedouin tribes in southern historical Palestine, followed by discussion of the particular history and conditions of the Palestinian Bedouin in the West Bank.

The second part notes the applicability of International Humanitarian and Human Rights Law to the Bedouin in the West Bank focusing on those rights and protections of particular relevance to them.

The third part focuses on the indigeneity of the Bedouin Palestinians of the West Bank. It considers the characteristics of indigenous people and discusses whether the Bedouin can be classified as such. It concludes with a focus on the nature and content of the rights of indigenous persons and their particular application to the Bedouin of the West Bank.

As the interest in the doctrine of indigenous peoples rights increases, it is hoped that this report will be a first step in the wider discussion and debate about the rights and protections owed to the Bedouin in the West Bank as indigenous people at a time when their lifestyle and culture are threatened by forcible displacement, urbanization and marginalization. Further, it is hoped that the report will provide a useful resource for both legal and humanitarian practitioners, as well as other national and international stakeholders including the diplomatic community, in making arguments as to why and how the lifestyle, cultural, social and economic rights of the Bedouin should be protected. As protected persons within the West Bank, and consistent with the protection against forcible transfer enjoyed by all Palestinians, these rights must be protected in the current location of Bedouin communities.

³ Boutruche, Sassoli, supra, note 2, p. 10; NRC, The Bedouin in the West Bank as a Minority and Indigenous Group and their Protection from Forced Displacement, legal memo, 2015.

1 BACKGROUND ON THE BEDOUIN

1.1 Overview of the Bedouin Tribes in the Middle East

Arab Bedouin tribes have for centuries inhabited different parts of the Middle East and North Africa, from present-day Saudi Arabia, Iraq, Oman, Yemen, Jordan, Syria, Israel/Palestine, Egypt, Algeria and Morocco. The word 'Bedouin', derived from the Arabic terms *badawi* or *badu*, is commonly used to describe people of a nomadic or semi-nomadic pastoral lifestyle, who inhabit the desert, the *badiya*. One of the earliest scholars to have written on the Bedouin was Ibn Khaldun, the renowned fourteenth century Arab historian, sociologist, and philosopher. Perceiving them as 'savage', but 'real Arabs', who had existed prior to sedentary populations, he referred to the Bedouin by stressing the concept of '*asabiyya*' (extreme loyalty) and inter-tribal relations, describing how loyalty to the tribe, kinship, family and blood ties were important in understanding tribal order and structure.⁴

Since the late eighteenth century, there have been many accounts of Bedouin culture and history by travellers, writers, adventurers, and anthropologists, who have portrayed them as backward, living in harsh desert conditions, uneducated, and uncivilized.⁵ Some have painted a more glorious and similarly romanticized image of the Bedouin way of life, depicting them as noble and brave and equally uncivilized.

Over the years the Bedouin in the Middle East have also provoked some significant scholarly debates that have discussed Bedouin livelihood, pastoral nomadism, migration of Bedouin and their adaptation to the ecological environment of the desert, the seasonal availability of pasture and water, socio-economic and socio-political changes. More broadly, there has also been a focus on the efforts by new States to make the Bedouin settle down.⁶ Other significant debate has concentrated on Bedouin social organization and internal tribal order, and interested in Bedouin tribes, along with tribal structure, hierarchy, solidarity, honor, political organization, oral history and tribal leadership roles.⁷ An important means of unifying and organizing tribes, according to Abu Lughod,⁸ was through the concept of the group's honor (*sharaf*); this is significant in the sense of creating solidarity amongst the members of each individual tribe.⁹

Scholars have also discussed the interaction between Bedouin tribes and external authorities, a relationship that has taken different forms such as alliances with States or with other tribes to achieve a common

⁴ A. Ibn Khaldun, *The Muqaddimah: An Introduction to History*, Bollingen Series, Princeton NJ: Princeton University Press, 1969.

⁵ A. Musil, *The Manners and Customs of the Rwala Bedouins*, American Geographical Society, Vol. 6, New York, 1928; T.E. Lawrence, *Seven Pillars of Wisdom*, Wordsworth Editions Limited, Hertfordshire, 1997; J.G. Bagot, The *Story of the Arab Legion*, Da Capo Press, New York, 1976.

⁶A. Al Aref, *Tarikh' Bir al-Saba' W Qabailuha* [The History of Beersheba and its Tribes], Cairo: Maktabat Madbouli, 1999; A. Abu Rabia, *The Negev Bedouin and Livestock Rearing: Social, Economic, and Political Aspects*, Oxford: Berg Publishers, 1994; D.F. Eickelman, *The Middle East. An Anthropological Approach*, Prentice- Hall Inc, New York, 1989; D. Chatty, *From Camel to Truck: the Bedouin in the Modern World*, Vantage Press, New York, 1986.

⁷ Eickelman, supra, note 6; Chatty, supra, note 6; Al Aref, supra, note 6; E. Marx, Bedouin of the Negev, Manchester University Press, Manchester, 1967; H.V. Muhsam, Beduin of the Negev, Jerusalem Academic Press Ltd, Jerusalem, 1966; A. Shryock, Nationalism and the Genealogical Imagination: Oral History and Textual Authority in Tribal Jordan, University of California Press, Berkeley and Los Angeles, 1997; N. Shuqayr, History of Ancient and Modern Sinai and its Geography [in Arabic], Beirut: Dar Al-Geel, 1991; L. Abu Lughud, Veiled Sentiments: Honor and Poetry in a Bedouin Society, University of California Press, Berkeley, 1986.

⁸ Abu Lughud, *supra*, note 6, p. 40.

⁹ Ibid.

purpose. The *Sheikh*, as the tribe's leader, played the important role of managing such interactions with States or with other tribes.¹⁰

1.2 Bedouin Tribes in Southern Israel

Bedouin tribes also populated the Galilee, as well as southern historical Palestine (present day southern Israel, namely the Naqab and Bi'r as-Saba¹¹), and a number of Bedouin communities lived in Hebron and elsewhere in the West Bank. In southern historical Palestine (the Naqab and Bi'r as-Saba), Bedouin have inhabited the area for centuries (at least since the seventh century), mainly as semi-nomadic pastoralists. Ottoman and British archival reports provide factual information about the Bedouin in southern historical Palestine, noting for example that "the Negev [Naqab], as this southern part of Palestine is called, is inhabited almost entirely by Bedouin tribes". Ottoman and British mapping of southern historical Palestine, including the region of Bi'r as-Saba' and Gaza, clearly show the distribution of Bedouin tribes across the region, and some contemporary British reports even referred to the Bedouin as the indigenous peoples of Palestine. Further detailed knowledge about the distribution of the Bedouin tribes in the region was provided by the Palestine Exploration Fund in 1881. As a result of touring Palestine, the Palestine Exploration Fund team produced 26 maps, including a number of detailed maps about the distribution of the Bedouin of southern historical Palestine, titled "Negeb or South Country". 15

According to official maps produced by British and Ottoman officials, seven Bedouin tribal confederations populated mainly the Bi'r as-Saba region (the Northern Naqab): Tiyaha, Tarabin, Azazma, Hanajreh, Jbarat, Sa'idiyeen and Aheiwat. These tribal confederations were further distributed into more than 95 tribes.¹⁶

During the last year of the Ottoman rule in 1914, Bedouin tribes in the Naqab and Bi'r as-Saba included around 55,000 people. During the British Mandate Bedouin numbers were estimated at around 65,000-100,000, divided into 95 tribes. B A British census in 1922 put the number of Bedouin at 71,115 individuals, and Muhsam reckoned that by 1946 there were between 65,000 and 90,000. In 1948 most of the Bedouin became refugees in neighboring Arab countries, with the remainder numbering approximately 11,000. The community known today as the Naqab Bedouin includes the survivors of this remaining 11,000 and

¹⁰ Eickelman, *supra*, note 6; Philip Khoury and Joseph Kostiner, *Tribes and State Formation in the Middle East*, I. B. Tauris, London, 1991.

¹¹ There are multiple contested terms used for both the Naqab and Bi'r as-Saba', and any usage carries with it ideological affiliations. The commonplace usage under different regimes was Bi'r as-Saba' to refer to the district under Ottoman rule. The term Negev is conventionally used in the Israeli era, Negeb or Beersheba district was used in the British period, and Bi'r as-Saba was used under Ottoman rule.

¹² Muktatafat mn Tarikh' Al Naqab wa Beir Al Saba, Mada al-Carmel: Arab Center for Applied Social Research, No. 1. Vol 1, pp. 1-15, 2013.

¹³ GB99, KCLMA O'Connor 3/14/53.

¹⁴ Daily Telegraph, 15 March 1940.

¹⁵ Julian Asquith (Lord Oxford) private archive, Somerset.

¹⁶ Al Aref, *supra*, note 6.

¹⁷ Muhsam, *supra*, note 7.

¹⁸ Abu Rabia, *supra*, note 6; Marx, *supra*, note 7.

¹⁹ Muhsam, *supra*, note 7, pp. 9-24.

²⁰ G. Falah, *Al-Filastinyun al-Mansyon: Arab al-Naqab* [The Forgotten Palestinians, The Nagab Arabs 1906-1987], Arab Heritage Centre, Tayiba, 1989b.

their descendants. The Bedouin outside Israel are registered as UNRWA refugees, and live primarily in Gaza, Hebron, Sinai and Jordan, ²¹ but also throughout the West Bank of occupied Palestine. ²²

1.3 The Bedouin in the West Bank

The West Bank Bedouin, including the Jahalin and the Ka'abna tribes, are a semi-nomadic people who have lived in southern historical Palestine at least since the seventh century and survived mostly by grazing their flocks.²³ The culture, traditions and historical tribal areas of the Jahalin Bedouin are discussed by Aref Al Aref who points out that the Jahalin Bedouin are one of the main tribal confederations that populated Tel Arad.²⁴ The history of the Jahalin, as a key grouping of the pre-1948 Bedouin community, is also documented by Abu Rabia who discusses various aspects of Bedouin society and life under the Ottomans and the British Mandate.²⁵

Today, the Bedouin are the group most affected by Israeli policies amongst the Palestinians within Area C. They have not only lost their original land after being displaced from Tel Arad (within present day Israel) following the 1948 Arab-Israeli war, but also most of the land they occupied more recently in light of their displacement for settlement expansion and military use.

The Bedouin of the West Bank are also marginalized in scholarship. The literature on the West Bank Bedouin is quite limited with some striking gaps. There is little available on them and it is mostly work conducted by civil society organizations and not by scholars or governments. A major study about the Bedouin in the Naqab and the West Bank was conducted by Minority Rights Group International in 2011. In this piece, based on an intensive field study, Farah Mihlar compares the Israeli policies towards the Bedouin communities in the West Bank and the Naqab, concluding that since 1948, both Bedouin communities in the West Bank and the Naqab have been subjected to a number of human rights violations, mainly illegal forced displacement and massive land expropriations. ²⁶ In Area C, which is fully controlled by Israel, the Bedouin continue to live in poor conditions, lacking basic services and under a continuous threat of home demolition.

The majority of the Bedouin in the West Bank today are classed as Palestine refugees originating from the Bi'r as-Saba's region. There are about 30,000 Bedouin populating different areas in the West Bank, including Jerusalem, Ramallah, Bethlehem, Jericho, Hebron, Khan al-Ahmar, Wadi Abu Hindi, Jordan Valley, Anata, Beir Nabala, Abu Dis, and the vicinity of Ma'ale Adumim. According to oral testimonies, the Bedouin of the West Bank belong to the Jahalin, Al Kaabneh, Al Sawahra, Al Rashayda, and Arab Al Ramadin tribes, with the Jahalin constituting the majority of the Palestinian Bedouin in the West Bank.

Historically, they maintained relations with the Bedouin of southern Israel (southern historical Palestine), including the use of similar traditional mechanisms of conflict resolution.²⁷ Further, both Bedouin

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²¹ S. Abu Sitta, 'Al-'Arab al-Mansyon, Badu Beir al-Saba' [The Forgotten Arabs: Beersheba Bedouin], *Al Hayat*, Vol. 11907, 28 September 1995.

²² În Area C, there are approximately 2000 Bedouin families in the south, i.e., Hebron/Bethlehem, 2000 families around the central West Bank and 1000 families in the north.

²³ I. Abu-Saad, 'Education as a Tool of Expulsion from the Unrecognized Villages', *Adalah Newsletter*, Vol.8, December 2004.

²⁴ Al Aref, Bedouin Love, Law and Legend: Dealing Exclusively with the Badu of Beersheba, AMS Press, New York, 1974.

²⁵ Abu Rabia Aref, A Bedouin Century: Education and Development among the Negev Tribes in the Twentieth Century, Berghahn Books, New York and Oxford, 2001.

²⁶ Mihlar Farah, Israel's Denial of the Bedouin, Minority Rights International, United Kingdom, 2011.

²⁷ Interview with Abu Ali, Beersheba, 2014.

communities in the West Bank and in the Naqab share a similar predicament despite their separation across the Green Line. Both groups faced expulsion in 1948 and thereafter and frequent displacement in years to follow, and they often live in a so-called "unrecognized villages" (informal habitation sites). They have been forced to pay the price of border changes, Israeli settlements, the construction of roads and other infrastructure projects causing their displacement from their traditional lands. In the case of the Bedouin in the Bi'r as-Saba (Beersheba) area, the Israeli government does not recognize any ownership rights to the lands that the Bedouin have occupied, sometimes for centuries. In the West Bank, and following their 1948 displacement from southern Israel, the Bedouin refugees settled on public and private lands, and typically did not possess ownership title, making them more vulnerable to the denial of land and other rights by Israeli authorities.

Whilst other semi-settled and tribal societies have faced similar difficulties in other modern nation States, in Israel the main motivation behind the government's policies appears to be Jewish settlement expansion and occupation of the West Bank for ideological and political reasons. The forced urbanization and displacement of the Bedouin is the result of this project of land takeover and control. The situation of the Bedouin in the West Bank has deteriorated due to the construction of new settlements, expanding the existing ones, building the Wall, and restricting the access to Jerusalem.²⁸

1.4 The Status of the Bedouin in the West Bank

Legally speaking, the Bedouin in the West Bank have different, and sometimes, overlapping statuses with different legal protections and implications.²⁹ The Bedouin in the Jerusalem area (for example, between Anata, Hebron and Jericho area) are Palestine refugees from 1948 (many are registered as UNRWA refugees) and are entitled to refugee assistance and protection under the UNRWA mandate. Following the 1967 War many of them were displaced again from their new post-1948 habitual site. They are also internally displaced persons (IDPs)³⁰ and are entitled to the protection owed to displaced persons under international law. These protections are developed in soft law documents such as the UN Guiding Principles on Internal Displacement.³¹ Some Bedouin live within the current municipal boundaries of Jerusalem, and are Israeli residents or entitled to such residency.³² Though the annexation of East Jerusalem is unlawful under international law, Israeli residents, such as Palestinian East Jerusalemites, are granted various rights under domestic Israeli law.

Under International Humanitarian Law (IHL), the Bedouin are 'protected persons' as this status is defined in Article 4 of the Fourth Geneva Convention. They are also protected by International Human Rights Law, which co-applies with IHL in Palestine.³³ Finally, the Bedouin may be classified as Indigenous People with the consequent protections available under international law for such categories of persons.

²⁸ Amira Hass, 'Bedouin Face Displacement in West Bank Corridor, Regardless of Israel's Constructions Plans', *Ha'aretz*, 5 December 2012.

²⁹ NRC memo, *supra*, note 3.

³⁰ UNDP, Bedouin in the Occupied Palestinian Territory, September 2013.

³¹ UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2.

³² We do not know the accurate division of the Bedouin in areas A, B, C or within the Jerusalem area, and the different documentation they hold with regard to their status (Israeli, Palestinian, or Jordanian documents).

³³ See, e.g., Orna Ben-Naftai and Yuval Shany, 'Living in Denial: the Application of Human Rights in the Occupied Territories', *Israel Law Review*, Vol. 37, Spring 2003-2004, p. 17.

Whilst these different types of legal status and mandates create, at least in theory, a wide-ranging menu of protections for the Bedouin, the objective is to apply these protections in a way that is complementary, not exclusionary, and which takes account of the full circumstances and context of the Bedouin. In the end, it is critical to hear from the Bedouin themselves as to what they wish to have and what assistance the Palestinian Authority and international community can provide them.

1.5 Palestinian Authority (PA) Assistance to the West Bank Bedouin

According to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), around 300,000 Palestinians reside in Area C, including 30,000 Bedouin and herders. The majority of the Bedouin in Area C are considered to be Palestine refugees. Most of the Bedouin in Area C have no access to services, to water and electricity, transport or roads. Access to medical and educational facilities is also limited. It is nearly impossible to obtain permits from the Israeli authorities to build schools and other facilities necessary to meet the educational needs of Bedouin communities, and most schools in Area C are under threat of demolition. Palestinian population movement in this area is subject to Israeli control. Very few services are provided to them by the PA. The majority of the Bedouin and herders. The majority of the Bedouin in Area C have no access to services, to water and electricity, transport or roads. Access to medical and educational facilities is also limited. It is nearly impossible to obtain permits from the Israeli authorities to build schools and other facilities necessary to meet the educational needs of Bedouin communities, and most schools in Area C are under threat of demolition. Palestinian population movement in this area is subject to Israeli control. Very few services are provided to them by the PA. The majority of the Bedouin and herders.

More than half of the Bedouin in Area C (55 percent) are food insecure.³⁶ Similar to other refugee populations, the Bedouin receive different forms of aid and necessary humanitarian support, provided by UNICEF, UN food agencies, the Red Cross, and UNRWA.³⁷ Other organizations, such as the Palestine Red Crescent society, distribute tents to the Bedouin communities as a temporary solution following home demolitions.³⁸ However, since the majority of the Bedouin reside in Area C, which is under full Israeli jurisdiction, it is extremely difficult for the PA to fully meet their needs.

According to the 1995 Interim Agreement on the West Bank and the Gaza Strip, the role of the PA in Area C is restricted. The PA is required to coordinate with Israel on any aspect of infrastructure development, construction or any allocation of resources for Palestinian communities in Area C. The PA does provide some assistance including cash payments for destroyed structures, animal feed, education materials, facilities and humanitarian aid, with the help of international organizations. Provision of assistance by the PA in Area C without Israeli authorization can be met with confiscation or destruction of the material provided.

UNDP have reported that given that the West Bank Bedouin are "not recognized as a minority or a displaced indigenous group by either the government of Israel or Palestinian Authority, the voice of Bedouins is not being heard by decision-makers". However, despite the lack of coherent policy by the PA concerning the Bedouin, ⁴⁰ greater awareness by the PA of the needs of the Bedouin has been recently manifested through

 $^{^{34} \} http://www.ochaopt.org/documents/ocha_opt_Area_C_Fact_Sheet_July_2011.pdf (accessed, 08\ February\ 2014); \\ http://www.ochaopt.org/documents/ocha_opt_area_c_factsheet_august_2014_english.pdf (accessed, 20\ August\ 2015).$

³⁵ Mihlar Farah, *supra*, note 26.

 $^{^{36}} http://www.undp.ps/en/newsroom/publications/pdf/other/Bedouins\%20in\%20the\%20occupied\%20Palestinian\%20territory.pdf (accessed, 13 March. 2014)$

³⁷ http://www.badil.org/en/al-majdal/item/1219-israel-continues-to-evict-jahalin-bedouin-from-west-bank-%5C

³⁸ http://www.jpost.com/Diplomacy-and-Politics/Red-Cross-stops-providing-tents-to-displaced-Palestinians-in-Jordan-Valley-340474 (accessed, 13 March 2014)

³⁹ http://www.undp.ps/en/newsroom/publications/pdf/other/Bedouins%20in%20the%20occupied%20Palestinian%20territory.pdf (accessed, 09, February 2014)

⁴⁰ http://www.pcbs.gov.ps/default.aspx. Interestingly, the Kaabneh and the Jahalin still appear at times in the statistics of the Palestinian Central Bureau of Statistics.

public statements, supportive declarations of local officials and an increasing number of visits by senior PA officials (on May 2015), including the Palestinian Prime Minister, Rami Hamdallah, to Bedouin communities for the purpose of providing political support and humanitarian assistance.

During his visit to the Al-Jahalin community (January 2013), the Palestinian Minister of Local Government, Khaled Qawasmi, stated that the demolitions of Bedouin houses constitute a war crime. He also confirmed that the Palestinian government will continue to support the affected Bedouin communities in order for them to stay on their land. ⁴¹ During a 2011 visit to some of the Bedouin communities of Al-Ka'abneh, Saeb Erekat, Chief Palestinian Negotiator, claimed that it is almost impossible for the PA to build schools for the Bedouin in Area C. In trying to renovate and expand the Al-Ka'abneh school, Erekat claimed that "I have the money and I have the donor community's support to build the school. But I have been prevented for the last nine years to build even one classroom". ⁴² Erekat's statement demonstrates the limited powers that the PA can exercise in Area C in order to assist the Bedouin.

A more significant PA/PLO statement in support of the Bedouin was issued in September 2014 in a joint press conference held by the Governor of Jericho, Minister for the Wall and Settlements Unit and UN Special Humanitarian Coordinator James Rawley, and challenging the forcible transfer of the Bedouin to Nweima, a newly planned urban site.⁴³ The PLO statement, prepared by the Negotiations Support Unit (NSU), and distributed at the press conference noted that the "Palestinian Bedouin communities are a specifically vulnerable group as an indigenous, refugee population (many are both refugees and internally displaced), without adequate housing or secure land tenure". 44 Noting also the indigenous status of the Palestinian community, the statement stressed the agricultural-nomadic lifestyle of the Bedouin and "urges all international organisations and States to recognize and pressure Israel to recognize the rights of Bedouin communities to the land they traditionally inhabit for their subsistence and traditional lifestyle".⁴⁵ This acknowledgment of the unique culture and practices of the Bedouin, together with a series of concrete recommendations to prevent their forcible transfer, marks the first clearly articulated position of the PA/PLO on the Bedouin issue, and is to be welcomed as a sign of proactive governmental action to protect their rights. In a further development, the Bedouin Protection Committee, a representative body for the Bedouin in the Jerusalem Periphery, was officially recognized by the PA in March 2015, with the Deputy Governor of Jerusalem to serve as the President of the Committee. 46

It is important to note that whilst the PA is constrained in the action it can take to directly support the Bedouin in Area C, the PA is also a duty bearer under human rights and humanitarian law in relation to matters within its control and jurisdiction. Having recently acceded to a number of human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well the Geneva Conventions, it has assumed positive obligations to respect, protect and fulfill the rights of the Bedouin to the extent it is able to do so. Further, as a member of UNESCO, and signatory to the Convention concerning the Protection of the World Cultural and Natural Heritage, it has obligations to protect Bedouin culture and traditions.⁴⁷

⁴¹ http://www.alwatanvoice.com/arabic/news/2013/01/17/351896.html (accessed, 1 November 2015).

⁴² http://www.unicef.org/infobycountry/oPt_59755.html (accessed, 10 March 2014).

⁴³ 'The Looming Threat of Forced Displacement of Palestinian Bedouin Communities by the Israeli Government', State of Palestine/PLO statement, September 2014.

⁴⁴ *Ibid*, p. 1-2.

⁴⁵ *Ibid*, p. 3.

⁴⁶ Information was provided by UNRWA.

⁴⁷ Mutaz Qafisheh, *International Educational and Cultural Obligations of Palestine*, p. 15.

2 THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW (IHL) AND INTERNATIONAL HUMAN RIGHTS LAW (IHRL) TO THE BEDOUIN IN THE WEST BANK 48

The following section will refer to the applicability of IHL and IHRL in the West Bank, as well as responsibilities owed by Third States to uphold IHL. While these legal regimes apply to all Palestinians in the West Bank, the focus in this section is on those rights and protections of particular relevance to the Bedouin. This will demonstrate the disproportional impact of certain IHL and IHRL violations on the Bedouin, and conversely, their increased need for protection under those legal frameworks. These violations endanger not only their individual rights where the damage is similar to the damage caused to non-Bedouin Palestinians, but also their collective right to preserve their culture, traditional lifestyle and customs.

2.1 International Humanitarian Law (IHL)

International humanitarian law, which governs the conduct of armed conflict including belligerent occupation, consists of several legal instruments, the most important are the Hague Regulations of 1907,⁴⁹ the Geneva Conventions of 1949⁵⁰ and their Additional Protocols of 1977,⁵¹ as well as relevant customary IHL norms. The applicable laws on occupation are most comprehensively defined in Section III of the Hague Regulations, Section III of the Fourth Geneva Convention, as well as in some provisions of the First Additional Protocol to the Geneva Conventions and customary IHL rules.⁵² Notably, Israel, Jordan, and Egypt were parties to the Fourth Geneva Convention at the time armed conflict broke out in 1967.⁵³

The Israeli government has continually rejected the *de jure* applicability of the Fourth Geneva Convention to occupied Palestine⁵⁴ on the basis that the Occupied Palestinian Territories never belonged to a Party to the Convention, in other words, because Jordan's sovereignty over the West Bank was not internationally recognized at the time Israel gained control of the area. However, the consensus of international opinion affirms the applicability of the Fourth Geneva Convention to occupied Palestine. The ICJ, the UN Security Council, its General Assembly, the International Committee of the Red Cross (ICRC) and international law experts accept the *de jure* application of the Convention, relying on arguments that appeal to the object and purpose of the Geneva Conventions and to other methods of treaty interpretation sanctioned by the Vienna Convention on the Law of Treaties.⁵⁵

⁴⁸ Part of the arguments in this section (pp.14-24 *infra*) was published in an edited report by Ahmad Amara, titled *The Eastern Ring Road: The Legality and Impact from an International Humanitarian and Human Rights Law Perspective*, 2009, available at, http://www.legalclinic.alquds.edu/images/pdf/publications/Ring%20Road%20Report%20English%2028.4.2010%20.pdf.

⁴⁹ Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (hereinafter Hague Regulations).

⁵⁰ The most relevant is the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (hereinafter Fourth Geneva Convention).

⁵¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3 (hereinafter Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 609 (hereinafter Protocol II).

⁵²See also, The International Committee of the Red Cross (ICRC), at http://www.icrc.org/web/eng/siteeng0.nsf/html/634KFC (last visited May 20, 2009). The Fourth Geneva Convention details the protections granted to civilians during times of war and occupation.

⁵³ Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, 2004, p. 109.

⁵⁴ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, paras. 90-91. See also Harvard Program on Humanitarian Policy and Conflict Research, Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory, Policy Brief 9, July 2004 ('HPCR Review'), p. 2.

⁵⁵ See HCPR Review, *supra*, note 54, p. 6; see also Boutruche, Sassoli, *supra*, note 2, p. 8.

Despite Israel's formal objections, Israeli authorities have stated that Israel would observe the "humanitarian provisions" of the Fourth Geneva Convention.⁵⁶ While it remains unclear precisely which provisions fall under the classification of "humanitarian," the Israeli Supreme Court has largely affirmed this policy and reviewed actions of the Military Administration in occupied Palestine through the lens of the Fourth Geneva Convention.⁵⁷ The Supreme Court has also declared the Israeli government to be bound by customary international humanitarian law when acting in Palestine.⁵⁸ The Supreme Court has recognized that the Hague Regulations of 1907, along with certain provisions of the Fourth Geneva Convention, constitute customary international law binding on Israel.⁵⁹ Moreover, the Supreme Court has held that the customary provisions of the 1977 Additional Protocol I to the Geneva Conventions are also applicable in Palestine.⁶⁰

The signature of the 1995 Israeli-Palestinian Interim Agreement did not affect the applicability of IHL in occupied Palestine, nor the status of Israel as Occupying Power.⁶¹ Certainly in the context of Area C, which is the subject of the present report, Israel retains full jurisdiction and effective control.⁶²

As protected persons in occupied territory, the Bedouin in the West Bank enjoy, first and foremost, the full protection of IHL which includes the prohibition on forcible transfer and against the destruction of private property.

2.2 International Human Rights Law (IHRL)

Both Israel and Palestine have ratified a number of international conventions that contain provisions relevant to the Bedouin claims. The relevant human rights conventions by which Israel is bound include the International Covenant on Civil and Political Rights (ICCPR),⁶³ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶⁴ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁶⁵ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁶⁶ and the Convention on the Rights of the Child (CRC).⁶⁷ The State of

⁵⁶ See Benvenisti, *supra*, note 53.

⁵⁷ Ibid, p. 4 (citing High Court of Justice (HCJ) 7015/02 Ajuri v. IDF Commander in West Bank, 3 September 2002).

⁵⁸ Ibid, p. 5 (citing HCJ 593/82 Leah Tsemel Attorney, et al. vs. the Minister of Defense and others, July 13, 1983; HCJ 69/81 Bassil Abu Aita v. The Regional Commander of Judea and Samaria, 4 April 1983).

⁵⁹ See Elin Hilwig, *The Barrier in the Occupied Palestinian Territory: Protection of Private Property under International Humanitarian and Human Rights Law*, p. 18, Wolf Legal Publishers, 2005; see also HCPR Review, *supra*, note 54, p. 5.

⁶⁰ See HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel, 11 December 2005, para. 20.

⁶¹ Wall Advisory Opinion, supra, note 54, paras. 77-78.

⁶² See Boutruche, Sassoli, *supra*, note 2, p. 8; also E. Benvenisti, 'The Status of the Palestinian Authority' in E. Cotran and C. Mallat (eds.), *The Arab-Israeli Accords: Legal Perspectives*, 1996, pp. 58–60.

⁶³ G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (Ratified by Israel on Jan. 3, 1992) (hereinafter ICCPR).

⁶⁴ G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (Ratified by Israel on Jan. 3, 1992) (hereinafter ICESCR).

⁶⁵ G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Ratified by Israel on Nov. 2, 1991) (hereinafter CEDAW).

⁶⁶ G.A. Res. 2106 (XX) Annex, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1966) (Ratified by Israel on Feb. 2, 1979) (hereinafter CERD).

⁶⁷ G.A. Res. 44/25 Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (Ratified by Israel on Nov. 2, 1991) (hereinafter CRC).

Palestine joined these treaties in April 2014, and also acceded to the Rome Statute of the International Criminal Court in January 2015.⁶⁸

Relating more specifically to the protection of indigenous groups, in September 2007 the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples (hereinafter also: the Declaration), with only four negative votes and 11 abstentions. While this document is a declaration, and therefore formally non-binding, it pronounces basic principles which all States are urged to consider when addressing the unique situations of indigenous populations. The only binding convention addressed exclusively to indigenous groups, the International Labour Organization's Indigenous and Tribal Peoples Convention (more commonly known as "ILO 169") has not been ratified by Israel, nor by Palestine. However, many of the elements considered essential in ILO 169 have been restated both in the Declaration and, in more general terms, in many of the human rights conventions by which Israel and Palestine are bound.

2.3 The Application of IHRL in Occupied Territory

It is widely accepted nowadays that both IHL and IHRL apply during armed conflict and occupation, although scholars have posited different models of the interface between the two bodies of law and how they ought to apply concurrently.⁶⁹ Both regimes seek the protection of civilians, among other things. The overlapping nature of IHL and IHRL has been determined by the ICJ and affirmed by other UN human rights treaty bodies, which have emphasised States' responsibility to adhere to their IHRL obligations also during times of conflict.⁷⁰

In relation to Palestine, the Committee on Economic, Social and Cultural Rights, for example, has repeatedly stated that Israel's obligations under the ICESCR apply to all territories and populations under its effective control, even during times of armed conflict. The ICJ affirmed that Israel is bound by the ICESCR when exercising its authority as Occupying Power over the Palestinian population in Palestine which becomes within Israel's jurisdiction. The ICJ further held that Israel cannot "raise any obstacle to the exercise of such rights" - guaranteed in the ICESCR - where governing competence has been transferred to Palestinian Authorities.

Still, the Israeli government has repeatedly refused to recognize the application of these treaties, contending that only humanitarian law grants protection in conflict situations, whereas human rights conventions are intended only to protect citizens from their own governments in times of peace.⁷⁴ Thus, Israel continues to contend that the ICESCR does not apply to areas that are not its sovereign territory, nor to populations other

⁶⁸ See, United Nations Treaty Series Online Collection, https://treaties.un.org.

⁶⁹ On the co-application of IHL and IHRL and the arising challenges as a result, see, *Israel Law Review*, Vol. 40, No. 2, 2007, Special Issue on Parallel Applicability of IHRL and IHL.

⁷⁰ See generally ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996; Wall Advisory Opinion, supra, note 54; Case Concerning Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda, 2005; Human Rights Committee, General Comment 29: States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, 2001; Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations, CERD/C/ISR/CO/13, 14 June 2007.

⁷¹ Harvard Program on Humanitarian Policy and Conflict Research, *From Legal Theory to Policy Tools: International Humanitarian Law and International Human Rights Law in the Occupied Palestinian Territory*, Policy Brief, May 2007 ('HPCR, *From Legal Theory*), pp. 3-4.

⁷² See *Wall* Advisory Opinion, *supra*, note 54, para. 112.

⁷³ Ibid

⁷⁴ Ben-Naftali and Shany, *supra*, note 33; see also *Wall* Advisory Opinion, *supra*, note 54, para. 102.

than the Israeli citizens in the OPT.⁷⁵ Israel has consistently denied the application of the CERD to the OPT on similar grounds.⁷⁶ The Committee on the Elimination of All Forms of Racial Discrimination has denounced this position, holding it contrary to the "letter and spirit of the Convention."⁷⁷

In additional to formal treaties, States may adopt some non-binding documents in order to highlight certain aspects of human rights, set guidelines and develop standards and best practices. In this context, the Declaration on Indigenous Peoples' Rights and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities are highly relevant. While these instruments are classified as soft law which is not binding, they can inform the interpretation of human rights obligations and their implementation by States. Indeed, commentators including Boutruche and Sassoli argue that factors such as the protection of the Bedouin "ancestral way of life needs to be taken into account when applying IHL and IHRL norms." These instruments may also be legally binding to the extent they reflect, in whole or in part, norms that are already embodied in human rights conventions, such as the ICCPR or the ICESCR, or in customary international law. Israel, however, may raise its general objection regarding the applicability of human rights law to its actions in occupied Palestine.

Interestingly, while the Israeli government objects to the application of IHRL to occupied Palestine, the Supreme Court of Israel has, at times, applied international human rights law to cases arising in Palestine, ⁷⁹ including claims involving freedom of movement, freedom of religion, and the liberty and security of the person. ⁸⁰ The Supreme Court acknowledged the concurrent application of both IHL and IHRL regimes in its 2006 decision in *Public Committee against Torture in Israel* v. *Government of Israel*, stating that "[h]uman rights are protected by the law of armed conflict, but not to their full scope." However, as noted by Aeyal Gross, the Israeli Supreme Court's application of human rights law in Palestine tends, in some cases, to strip Palestinians of their rights to property and freedom of movement rather than uphold them, because the Court limits and balances such rights against those of Jewish settlers in the West Bank. ⁸²

It is worth noting that in addition to international law, the Israeli Supreme Court has also applied Israeli

⁷⁵ Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations, E/C.12/1/Add.90, para. 11, 26 June 2003.

⁷⁶ See, e.g., Committee on the Elimination of Racial Discrimination, *supra*, note 70.

⁷⁷ *Ibid*.

⁷⁸ Boutruche, Sassoli, *supra*, note 2, p. 28.

⁷⁹ The Israeli Supreme Court strongly defers to the discretion of military authorities, particularly whenever Israel raises security concerns as a justification. The Court has held in only very few cases that security concerns were not the true or illegitimate motives behind administrative acts. See Benvenisti, supra, note 53, p. 120 (citing HCJ 390/79 Seventeen Residents of the Village of Rujerib v. Gov't of Israel et al., (The Alon Moreh Case) and HCJ 351/80 Jerusalem District Electric Company v. The Minister of Energy and Infrastructure (Electricity Company of East Jerusalem Case (no. 2)). Under this pattern of reasoning, the Israeli Supreme Court has allowed numerous changes to be implemented within the oPt, ranging from road projects and the Wall, to tax initiatives and arbitration proceedings in labour disputes, see Harvard Program on Humanitarian Policy and Conflict Research (HCPR), Israel's Obligations Under IHL in the Occupied Palestinian Territory, Policy Brief, January 2004) (citing HCJ 337/71 Al-Maqasda v. Minister of Defense; HCJ 69/81 Abu-Aita v. IDF Commander in Judea and Samaria). Scholar David Kretzmer has observed that the Israeli Supreme Court, despite the prestige it enjoys internationally as an impartial body, has very rarely interfered with the decisions of the Israeli military. Kretzmer further argues that the Court works to legitimize government activities in the oPt by giving military actions the "cloak of legality", David Kretzmer, The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories, 2002, p. 2.

⁸⁰ HPCR, From Legal Theory, supra, note 71 (citing Bethlehem Municipality & 21 Others v. The State of Israel—Ministry of Defense; Hamoked Center for the Defense of the Individual founded by Dr. Lota Salzberger et al. v. Commander of the IDF Forces in the West Bank; Marah v. IDF Commander in the West Bank).

⁸¹ HCJ 769/02 Public Committee against Torture in Israel et al. v. Government of Israel et al., 14 December 2006, para. 22.

⁸² Aeyal Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?', *Eur. J. of Int'l L.* 18(1), 2007, pp.1-35.

administrative law, including the principles of proportionality and reasonableness to Israeli actions and policies in Palestine, 83 holding that "every Israeli soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law." 84

2.4 Third State Responsibility

Notably, the responsibility for respecting international law in Palestine may not fall on Israel alone. Article 41 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts calls on States to refuse to recognize as lawful a situation created through the violation of a peremptory norm. In its *Wall* Advisory Opinion, the ICJ found that Israel violated certain obligations of a peremptory status, including the obligation to respect the right of the Palestinian people to self-determination and other obligations under international humanitarian law. The Court further emphasised that all States party to the Fourth Geneva Convention have undertaken to "respect" and "ensure respect" for that Convention "in all circumstances." Thus, the Court was of the view that not only must all States not recognize the illegal situation resulting from the construction of Wall in violation of IHL and IHRL, but they also must not provide any assistance to Israel in maintaining that situation in Palestine. Additionally, the Court imposed an affirmative obligation on all States to ensure, while respecting the UN Charter and international law, that existing impediments to self-determination by the Palestinian people are eliminated. Accordingly, third States are under the obligation to ensure respect for the Geneva Conventions and of peremptory norms of international law, including the right to self-determination.

2.5 Key Rights and Protections relevant to the Bedouin under IHL and IHRL

The following section will cover the main rights and legal protections applicable to the Bedouin as protected persons under IHL and under IHRL. In many cases the protections offered by IHL and IHRL are complementary and mutually reinforcing. For example, IHL prohibits forcible transfer of the protected population, with the exception of a temporary measure in case imperative military reasons so demand (in the context of active hostilities). IHRL obliges the Occupying Power to ensure an adequate standard of living. Taken together, this requires Israel to provide the Bedouin (and all Palestinian within its effective control) with an adequate standard of living *in their present location*.

In other cases there may be some inconsistency. For example, under IHRL forced evictions and relocation are permitted provided that such actions are not arbitrary, are undertaken for a public purpose, that adequate

⁸³ See, HCJ 393/82 Jam'iyat Ascan el-Mua'limun el-Mahdudat el-Masauliyah v. Commander of Israeli Forces in the Judea and Samaria Area ('Jam'iyat Ascan'), para. 10.

⁸⁴ Ibid, para. 33. See also, HCJ 7015/02 Ajuri et. al. v. IDF Commander in the West Bank et. al. 3 September 2002, para. 13.

⁸⁵ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 41. Article 41(2) states: "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

⁸⁶ Wall Advisory Opinion, supra, note 54, para. 155-57. See also U.N. Charter, Article 2(4).

⁸⁷ Wall Advisory Opinion, supra, note 54, para. 158. See also the Geneva Conventions, Article 1:

⁸⁸ Wall Advisory Opinion, *supra*, note 54, para. 159. The obligation of States not to recognize or encourage other States in an illegal occupation has also been noted by the U.N. General Assembly in a 1972 Resolution, and a later 1987 Declaration on the illegal threat or use of force, see G.A. Resolution 2949 (XXVII), The Situation in the Middle East, 8 December 1972, para. 8; A/RES/42/22, 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, 18 November 1987.

⁸⁹ Wall Advisory Opinion, supra, note 54, para. 159.

compensation is provided, and that due process and consultation with the affected community have taken place. However, pursuant to IHL, forcible transfer is not permitted, unless temporary evacuation during hostilities is justified by the safety of the population or imperative military reasons. In this case, the IHL prohibition on forcible transfer trumps the ability under IHRL to relocate a community for a public purpose.

While all Palestinians suffer rights violations across the West Bank, certain communities, areas and groups may face a differential impact of these violations. The following analysis highlights those provisions of IHL and IHRL that are of particular relevance to the Bedouin in the West Bank. In addition to the protections of IHL and IHRL, which apply to all protected persons in occupied Palestine, there may be additional obligations on the Occupying Power to protect the rights of the Bedouin as indigenous people. These issues are covered in the third part of this report.

2.5.1 Duty to Maintain Public Order and Civil Life

Israel generally does not invoke security reasons for the demolitions and evictions but rather maintains that the Bedouin build without a permit and/or reside in areas that are not zoned for Bedouin habitation. Israel typically justifies the demolition of Bedouin homes (and the homes of other Palestinian communities) in Area C under the prerogative of maintaining law and order and preventing construction without an Israeli issued building permit.

Pursuant to Article 43 of the Hague Regulations, the Occupying Power "shall take all the measures in his power to restore and ensure, as far as possible, public order and civil life, whilst respecting, unless absolutely prevented, the laws in force in the country". However, the public order and civil life prerogative must be exercised according to the legitimate and genuine security needs of the occupying forces, as well as in the interests of the protected population. The interests of the Occupying Power's own population that is transferred into the occupied territory, such as Israeli settlers, in violation of the Fourth Geneva Convention and other relevant international law, are not legitimate factors to consider when exercising the public order prerogative. Ocmmentators have further noted that the Israeli planning and building regulations are themselves discriminatory, disproportionately applied and in violation of international law. As noted by Bothe, "the enforcement of a law which violates international law cannot be lawful".

Commentators also stress the need to take account of the factual situation of occupation, such as prolonged occupation when analyzing the duties and obligations of the Occupying Power, including the obligation to restore and ensure public order and civil life. Such obligations must be exercised in accordance with the needs of the protected population, and in light of human rights norms, as well as the social and cultural identity, customs and traditions of indigenous and tribal people.

In a context of long-term and multiple displacement, where the Bedouin in Area C are unable to avail themselves of their right of return to the Naqab, have no ownership rights, no security of tenure and are statistically extremely unlikely to receive a building permit for structures designed to meet their basic needs

⁹⁰ Article 49 of Fourth Geneva Convention prohibits transfer of part of the Occupying Power's population into the occupied territory.

⁹¹ M. Bothe, *The Legal Principles Governing the Provision of Assistance by Humanitarian Agencies in the Occupied Palestinian Territory, in Particular in Area C of the West Bank*, Expert opinion, p. 5-6; see also Boutruche, Sassoli, *supra*, note 2.

⁹² Boutruche, Sassoli, *supra*, note 2, p. 9.

⁹³ *Ibid*, p. 27.

⁹⁴ *Ibid*, p. 31.

for housing, 95 the Occupying Power is obliged to use its public order powers to protect and promote – not hinder – the welfare of the Bedouin. Such an approach would be in keeping with the obligation to act as a *de facto* government in the interest of the protected population. This would require the facilitation of building permits for Bedouin communities on State land, 96 in their existing locations, as well as securing access to services such as water, electricity, health care and education, in order to meet their basic needs. The denial of all building permit applications to Bedouin despite their protected persons status, at the same time as facilitating unlawful settlement construction in the West Bank, is arguably the key violation of the obligation to ensure public order and civil life given the discriminatory and detrimental effect of this policy on the welfare of the Bedouin.

2.5.2 Maintenance of Pre-Existing Local Laws and Practices

Having stepped into the role of temporary administrator, the Occupying Power is obliged to continue to apply the existing domestic law in place prior to the occupation of the territory, provided such laws are not inconsistent with international law, and Israel's international obligations. It is not contested that the relevant applicable laws in this case were Ottoman, British Mandatory and Jordanian land laws. Of relevance to the present context is the fact that during their occupation of the West Bank, the Jordanian authorities allowed the Bedouin to graze and use State land and practice their traditional lifestyle within minimal disruption. Arguably, and in keeping with the obligation to act in the interests of protected persons, promote human rights and protect traditional cultures and practices, Israeli authorities should maintain a similar approach. In other words:

If the previous sovereign respected certain traditional rights of the Bedouin, the occupying power must respect them too, as the legislation it has to respect is not only written legislation. ⁹⁸

2.5.3 Prohibition on Forcible Transfer

The IHL protection of greatest relevance to the Bedouin is the prohibition of individual or mass forcible transfers of protected persons pursuant to Article 49 of the Fourth Geneva Convention. This prohibition has attained the status of customary international law.⁹⁹ Article 49 states, relevantly, that:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population, or imperative military reasons, so demand... Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

⁹⁵ See for example, Human Rights Watch, Separate and Unequal, 2010, p. 11.

⁹⁶ 'State land' in this report refers to public land over which there is no claim of private ownership, whether recognized by Israel or not. As part of a restrictive process of recognition of Palestinian private ownership rights, Israel froze land registration procedures in the West Bank at the time of occupation in 1967. For further details, see NRC, A Guide to Housing, Land and Property Law in Area C of the West Bank, February 2012.

⁹⁷ Boutruche, Sassoli, *supra*, note 2, p. 11.

⁹⁸ *Ibid*, p. 31. This quote refers to previous *de facto* sovereign, namely the Ottoman, Mandatory and Jordanian rule.

⁹⁹ *Ibid*, p. 10.

With reference to the transfer of Bedouin communities to the Al Jabal area outside of Jerusalem in the 1990s and the proposed transfer of other Bedouin communities to sites, including Nweima outside Jericho, Boutruche and Sassoli contend that such acts meet the elements of forcible transfer and thus constitute a grave breach of the Fourth Geneva Convention. Force may include not only physical force but the "threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment". 101

The impact of such transfers on the affected communities are powerfully presented in the UNRWA report on the Al Jabal in which they noted:

The forced environment of Al Jabal, which is likened by residents to the refugee camps established by UNRWA for other Palestinian refugee in the 1950s is a spatial concept which was rejected outright by the Bedouin prior to its implementation. Today, neither social or economic integration is currently evident in Al Jabal on a sustainable level. While transfer to a planned environment potentially provides improved living standards, safety from demolition, proximity to services and increased economic opportunity for residents, damage sustained to the very core of the Bedouin's social fabric as a result of transfer to Al Jabal has not been considered in drawing up the criteria for measuring success. ¹⁰²

There seems to be no suggestion from Israeli authorities that the forcible transfer of the Bedouin is based on imperative security reasons, and in any event the transfer to the Al-Jabal area was not carried out as a temporary measure of evacuation in the context of active hostilities nearby. Self-evidently it was planned for the purpose of the settlement expansion of Ma'ale Adumim and Kedar into the sensitive E1 area outside of Jerusalem, which is a long-term Israeli policy goal. ¹⁰³

2.5.4 Prohibition of the Destruction and Confiscation of Private Property

Article 17 of the Universal Declaration of Human Rights provides that everyone has the right to own property alone as well as in association with others, and prohibits the arbitrary deprivation of property.

Article 53 of the Fourth Geneva Convention states that:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.¹⁰⁴

According to the ICRC, the military necessity reservation is subject to the Occupying Power's judgment as to the importance of such military requirements. However, the Occupying Power must "try to interpret the clause in a reasonable manner: whenever it is felt essential to resort to destruction, the occupying authorities

¹⁰⁰ *Ibid*, pp. 22-23, 43.

¹⁰¹ Prosecutor v. Krnojelac, ICTY, Trial Chamber, IT-97-25-T, 2002, para. 475, quoting the Krstic judgement.

¹⁰² UNRWA and Bimkom, Al Jabal: a Study on the Transfer of Bedouin Palestine Refugees, 2013, p. 39.

¹⁰³ Amira Hass, *supra*, note 28.

¹⁰⁴ Fourth Geneva Convention, art 53.

must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done." ¹⁰⁵ States are thus obliged to follow the principle of proportionality, which protects against bad faith circumvention of the protection of private property.

As already noted, the motive for the previous transfer of the Bedouin to Al Jabal was not military but rather for the purposes of the expansion of Ma'ale Adumim settlement. Similar considerations appear to be the motive for the proposed Bedouin transfer to Nweima site. As such, and given that it is not absolutely necessary by military operations, the destruction of Bedouin homes or property, even if built without a permit (which is nearly impossible to obtain), constitutes a violation of Article 53 of the Fourth Geneva Convention, especially in cases in which the Occupying Power makes no provision for the regularization of the status of the Bedouin in their present location.

2.5.5 Restrictions on the Provision of Humanitarian Assistance

As a particularly vulnerable community at regular and repeated risk of displacement within Area C, the Bedouin are recipients of various forms of humanitarian assistance from the humanitarian community. Article 59 of the Fourth Geneva Convention obliges the Occupying Power to agree to relief, or humanitarian schemes, on behalf of the protected population if the population is otherwise inadequately supplied. Much of the humanitarian assistance provided to the Bedouin in Area C is for the purpose of basic shelter, access to water and other essential living and livelihood needs. Experts, including Boutruche and Sassoli, consider that the destruction of such humanitarian facilities (including shelter, water cisterns and so forth) may constitute a breach of the Fourth Geneva Convention.¹⁰⁷

2.5.6 The Right to Adequate Housing

Several international conventions ratified by Israel offer specific provisions that relate directly to the right to adequate housing. For example, Article 11(1) of the ICESCR requires States Parties to the Covenant to: 1) "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate . . . housing, and to the continuous improvement of living conditions" and; 2) to "take appropriate steps to ensure the realization of this right." Article 17 of the ICCPR prohibits States from "arbitrary or unlawful interference with [the] privacy, family, [and] home" of individuals. The right to adequate housing is also recognized in the CERD, CEDAW, and the CRC.

According to General Comments 4, 7, and 16 of the Committee on Economic, Social, and Cultural Rights (Committee on ESCR), when implementing the Covenant, States have an obligation to recognize, respect, protect and fulfill the right to adequate housing, without discrimination.¹¹¹ A State must first recognize that the right to adequate housing is a human right and "ensure that no measures of any kind are taken with the

¹⁰⁵ ICRC, Commentary on Fourth Geneva Convention, Geneva, 1958, art 53.

¹⁰⁶ 'UNRWA Calls for Bedouin Relocation Plan to be Scrapped', *Ha'aretz*, 21 September 2014.

¹⁰⁷ Boutroche, Sassoli, *supra*, note 2, p. 36.

¹⁰⁸ ICESCR, art 11(1).

¹⁰⁹ ICCPR, arts 17, 26.

¹¹⁰ CERD, art 5; CEDAW, arts 2(f), 5, 13, 14(2) and 15; CRC, art 27(3).

¹¹¹ See, e.g., CESCR, General Comment 16, Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, paras. 16-21 and 28, U.N. Doc. E/C.12/2005/3, 2005.

intention of eroding [its] legal status". The obligation to respect requires "the abstention by the Government from certain practices and a commitment to facilitating self-help by affected groups. In other words, States must "cease any practices which could or do result in the infringements of the human right to adequate housing, in particular... forced, mass evictions and any form of racial or other discrimination in the housing sphere. States must "respect people's rights to build their own dwellings and order their environments in a manner which most effectively suits their culture, skills, needs and wishes. Specifically related to the granting of security of tenure, the Committee on ESCR has stated:

Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States Parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups. 116

The prohibition of forcible transfer under IHL, coupled with the IHRL-based positive obligation to ensure legal security of tenure for those persons and groups currently lacking such protection, makes it incumbent upon Israel, as the relevant duty bearer, to provide the Bedouin with legal security of tenure in their present location. This is on account of Israel's status as Occupying Power and by virtue of the fact that Bedouin communities in Area C are subject to its effective control, thus Israel has human rights obligations towards them. Such tenure need not necessarily be through the granting of ownership rights over the land occupied by the Bedouin. Apart from ownership, Israel is able to confer legal protection to the continuous usage and occupation of the land, with adequate guarantees for continued residence. By doing so, Israel would meet its international law obligations.

The *protection* element requires States to protect all rights-holders from violations by third parties, such as landlords or property developers, and to provide access to legal redress if violations occur.¹¹⁷ Some acts, such as forced evictions by third parties, may directly violate the right to housing; others, such as "discrimination, harassment, withdrawal of services", more indirectly violate the right.¹¹⁸ This obligation requires Israel to protect the Bedouin from instances of settler violence directed against them and their property.

With regard to the *adequacy* component of the right, the Committee on ESCR and the Special Rapporteur on the Right to Adequate Housing have defined "adequate housing" as consisting of sixteen factors, including legal security of tenure; availability of services, materials, facilities and infrastructure; cultural

¹¹² *Ibid*.

¹¹³ *Ibid*, para. 10.

¹¹⁴ Commission on Human Settlements, Resolution 14/6 on The Human Right to Adequate Housing, 5 May 1993.

¹¹⁵ Vienna Declaration, World Conference on Human Rights, Vienna, 14 - 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I), p. 20, para. 31, 1993.

¹¹⁶ CESCR, General Comment 4, para. 8(a).

¹¹⁷ See, e.g., UNHCHR, *The Human Right to Adequate Housing*, U.N. Fact Sheet No. 21, available at http://www.unhchr.ch/housing/fs21.htm#obligations [hereinafter Fact Sheet 21].

¹¹⁸ *Ibid.*

adequacy; access to land, water and other natural resources; freedom from dispossession, damage and destruction; access to information and participation.¹¹⁹

2.5.7 The Right to Family Life and Privacy

Both IHL and IHRL protect the right to family life and the home. Article 46 of the 1907 Hague Regulations requires respect for family honour and rights, the lives of persons and private property, whilst Article 27 of the Fourth Geneva Convention sets out the general obligations towards protected persons who "are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices and their manners and customs". Both these provisions are complemented by Article 17 of the ICCPR which provides that "no-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

Repeated home demolitions, creation of a coercive environment, lack of access to basic services, and restrictions on the usage of land are inconsistent with the obligation to respect family and home life. Further, "merging separate kinship groups into one space against their will instantly dissolves a [Bedouin] community's sense of spatial security; movement corridors carved out by decades of social laws and traditional economic movement in one's own rural kinship group suddenly no longer exist" with a further "restriction on the free movement of women should men of a different group be present". ¹²⁰ Israeli practices and policies of home demolition and forcible transfer have a devastating impact on Bedouin communal, family and private life, especially for women.

2.5.8 Freedom of Movement and the Right to Choose Residence

The right to movement is protected under Article 12 of the ICCPR. It is a fundamental right enabling the realization of other rights, such as a choice of residence, the practice of family and daily life, and access to health and educational institutions. The Human Rights Committee, in its General Comment on the implementation of Article 12, emphasises that "[I]iberty of movement is an indispensable condition for the free development of a person." The right to free movement applies to "the whole territory of the State". Specifically, "persons are entitled to move from one place to another and to establish themselves in a place of their choice." The semi-nomadic lifestyle of the Bedouin makes it particularly important for them to be able to realize this right as a component of their identity and culture.

The lack of formal ownership of the land in their present locations is frequently used as justification by Israeli authorities for the transfer of Bedouin to areas in which they will be granted the right to reside by Israeli authorities. There are three responses to such claims. Firstly, the Bedouin in the West Bank have

¹¹⁹ The 16 factors are: (1) legal security of tenure; (2) availability of services, materials, facilities and infrastructure; (3) affordability; (4) habitability; (5) accessibility; (6) location; (7) cultural adequacy; (8) access to land, water and other natural resources; (9) freedom from dispossession, damage and destruction; (10) access to information; (11) participation; (12) resettlement, restitution, compensation, non-refoulement and return; (13) privacy and security; (14) access to remedies; (15) education and empowerment and (16) freedom from violence against women. For the 16 factors and elaborations thereon, See CESCR, General Comment 4, para. 8 (citing factors (1) through (7)); Special Rapporteur on the Right to Housing, Women and Adequate Housing, para. 11, E/CN.4/2006/118, 27 February 2006 (adding factors (8) through (16)).

¹²⁰ UNRWA and Bimkom, *supra*, note 102, p. 39.

¹²¹ ICCPR, General Comment 27, para. 1.

 $^{^{122}}$ *Ibid*, para. 5.

¹²³ *Ibid*.

been essentially displaced to their present locations following the 1948 conflict without being granted their international law right of return. Secondly, having settled in their present location, and absent any legitimate military necessity, the Occupying Power is prohibited from forcibly transferring the Bedouin or demolishing their homes. Thirdly, some commentators note that in determining whether the Bedouin had a right under applicable local law to settle in their present location, 'an Occupying Power must take into account the specificities of Bedouin communities and of their relationship with the land on which they settle or which they use'. 124

2.5.9 Protection from Forced Eviction

Additionally, in its General Comment 7, the Committee on ESCR interpreted Article 11(1) of the ICESCR to prohibit the practice of arbitrary forced evictions and to create a positive obligation upon States to protect against such evictions. ¹²⁵ The Commission on Human Rights has noted the tremendous consequences that forced relocation causes for those displaced. According to the Commission, forced evictions are "a gross violation of human rights," ¹²⁶ that can only be "carried out under exceptional circumstances," ¹²⁷ regardless of whether those being displaced hold a formal legal title to the land under national law. ¹²⁸ Further, Principle 9 of the Guiding Principles on Internal Displacement notes that "States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands." ¹²⁹ Such protections are particularly relevant to the Bedouin who are currently facing demolitions on a large scale by the Israeli authorities. ¹³⁰

2.5.10 The Right to Equal Treatment

Both Israel and the PA are obliged to act under the principle of equal treatment of all persons and groups within their jurisdiction. The right to equality and non-discrimination requires States to apply all human rights in an equal manner and without discrimination.

More specifically in the context of the right to adequate housing, States must ensure equal "legal security of tenure, protection from discrimination and equal access to affordable, adequate housing for all persons and their families." In addition, States must "counter social exclusions and marginalization of people and communities" by enforcing laws designed to combat discrimination, and they should ensure that "where evictions do occur... no forms of discrimination are involved." Indeed, given that States have an obligation to ensure that remedies and venues for redress for discrimination are available in practice to all, they should adopt "temporary special measures" to accelerate the equal enjoyment of the right to adequate

¹²⁴ Boutroche and Sassoli, *supra*, note 2, p. 30.

¹²⁵ Committee on Economic, Social and Cultural Rights (16th Sess. 1997), *General Comment 7: The Right to Adequate Housing (Art. 11.1): Forced Evictions*, para. 9, U.N. Doc. E/1998/22, annex IV, 1997.

Commission on Human Rights, Resolution 1993/77, December 1993, U.N. doc: E/CN.4/1994/20, available at http://www.cohre.org/store/attachments/COHRE%20Sources%203.pdf.

¹²⁷ *Ibid*, p. 6.

¹²⁸ *Ibid*, p. 21.

¹²⁹ Guiding Principles on Internal Displacement, extract from E/CN.4/1998/53/Add.2, 11 February 1998, available at http://www.unhchr.ch/html/menu2/7/b/principles.htm (hereinafter Guiding Principles).

¹³⁰OCHA, Under Threat: Demolition Orders in Area C of the West Bank, September 2015.

¹³¹ United Nations Conference on Human Settlements (Habitat II), U.N. GAOR, U.N.Doc A/Conf.165/14, para. 8, 1996 (emphasis added) (hereinafter Istanbul Declaration).

¹³² CESCR, General Comment 7, supra, note 125, para. 11; see also, e.g., General Comment 16, supra, note 111, para. 20.

housing, including conducting "gender audits, and gender-specific allocation of resources." This provision creates a positive obligation on Israel to take special measures to ensure that the Bedouin receive adequate housing in their present location, and equal access to services and resources at the same level enjoyed by other persons subject to its jurisdiction or within its effective control.

In summary, there are a range of rights and protections that can, and must be, invoked to protect Bedouin communities under the complementary legal frameworks of IHL and IHRL. Whilst the protections are accorded to all Palestinians in the West Bank as 'protected persons', the disproportional impact of violations of these rights on Bedouin communities is clearly demonstrated on account of their particular vulnerability. In practice, care must be taken to ensure that due process and other protections under IHRL, such a consultations with the affected community on alternative locations for relocation, adequate and reasonable notice for planned evictions and the existence of legal remedies such as payment of adequate compensation, do not displace explicit prohibitions under IHL, in particular the prohibition on forcible transfer.

The next part of this report will consider the nature and scope of any additional rights and protections that may be accorded to the Bedouin under an indigenous peoples' rights framework.

¹³³ Special Rapporteur, *supra*, note 119, para. 21.

3 THE NATURE AND CONTENT OF INDIGENOUS RIGHTS

3.1 Indigeneity as a Concept

3.1.1 The Development of the Indigenous Rights Discourse

The debate about the existence and possible scope of the rights of 'indigenous people' has evolved rapidly over past decades, leading to the landmark adoption of the Declaration of the Rights of Indigenous People in 2007. This document has played a pivotal role in concretising the discussion into a series of rights and guiding principles that can be used by stakeholders in the course of promoting the realization of those rights in practice.

The concept of indigenous peoples first came into scholarly use during the 1970s. ¹³⁴ However, even this term has been identified as "problematic" and unclear as there are many other terms that have a similar and overlapping meaning: e.g., 'First peoples', 'First Nations', 'People of the land', 'Aboriginals', and 'Fourth World Peoples'. ¹³⁵ Such terms are used in reference to indigenous communities in New Zealand, Australia, Mexico, Canada and Brazil. According to scholars of international law the concept of "indigenous-native" is a new concept, emerging in international law over the last 30 years or so as a means of classifying a wide range of indigenous communities. ¹³⁶

Whilst a considerable amount of work has been devoted to the concept of indigenous rights, including by international organisations such as the United Nations, the International Labour Organization (ILO) and the World Bank, even with passage of the Declaration by the UN General Assembly, the international community has been unable to agree upon a single definition of the term 'indigenous'. While this may seem problematic, the prevailing view among States and legal experts is that even in the absence of consensus on a single official definition, it is still necessary to ensure that the rights of indigenous groups are respected and protected. That said, the following factors are widely accepted as the defining characteristics of 'indigenous people' and most relevant to understanding the concept of indigeneity, as set out by the UN Working Group on Indigenous Populations:

- Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity;
- Priority in time to the dominant society, with respect to the occupation and use of a specific territory;
- The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; and
- An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.

¹³⁴ B. Kingsbury, 'Indigenous People in International Law: A Constructivist Approach to the Asian Controversy', *American Journal of International Law*, Vol. 92, no. 3, 1998, p. 414; L. Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, Zed Books Ltd, London & New York, 1999, p.7.

¹³⁵ Smith, *supra*, note 134, p. 6.

¹³⁶ I. Brownlie, 'The Rights of People in Modern International Law' in J. Crawford (ed.), *The Rights of Peoples*, Clarendon Press, Oxford, 1988, pp. 55-57; J. Tully, 'The Struggle of Indigenous Peoples for and of Freedom' in D. Ivison, P. Patton and W. Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press, Cambridge, 2000, p.37.

¹³⁷ See R. Stavenhagen and A. Amara, 'International Law of Indigenous Peoples and the Naqab Bedouin Arabs' in A. Amara, I. Abu-Saad and O. Yiftachel (eds.), *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev*, Harvard Law School, Cambridge, 2012, p. 181.

UN Special Rapporteur Jose Martinez Cobo¹³⁸ has provided the following guidance on the issue:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹³⁹

According to Cobo's definition, indigenous people constitute a nation that has lived for generations in a territory which was invaded and controlled by a settler society. Indigenous people have in common some important aspects, such as their own distinct language, culture, land, identity, and historical continuity, and play a marginal role in the current society.

The indigenous rights discourse has been wide-ranging, covering issues from the inter-relationship between indigenous and minority rights,¹⁴⁰ the right to indigenous self-determination, the collective nature of indigenous rights as opposed to more individualist human rights and the challenge posed by the indigenous rights framework to the territorial integrity of the national State. Ian Brownlie in his work on the rights of peoples in modern international law prefers to use the twin precepts of "indigenous claims" and minority rights when considering indigenous rights. ¹⁴¹ Noting the sensitivity to such claims, he developed three characteristics of "indigenous peoples' claims": (1) the claim for positive action to maintain cultural and linguistic identity of communities; (2) the claim to have adequate protection of land rights in traditional territories; and (3) the claim of the political and legal principle of self-determination. ¹⁴²

Richard Falk similarly recognized the "indigenous" claim in his work on the rights of people (particularly indigenous peoples), noting that such claims represent a significant challenge to state authority. In his view, international law should recognize and take seriously indigenous people's claims for self-determination, including the possibility of exercising their identity and even some form of self-governance in their territory. Falk notes that the recognition of indigenous people within an existing State challenges the concept of sovereignty and unified nationality within that State. New States in particular see indigenous rights and claims as unacceptable.¹⁴³

Benedict Kingsbury suggests that the fundamental claims raised by indigenous people include five particular categories: human rights and non-discrimination, minorities protection, self-determination claims, historic sovereignty, and claims to be recognized as indigenous peoples. He Focusing on the transformative potential of the concept of indigenous rights, Kingsbury concludes that "... indigenous people as a global concept is unworkable and dangerously incoherent, but has some adherents. But it is a

¹³⁸ Former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

¹³⁹ J.M. Cobo, Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, 1988, pp. 378-380.

¹⁴⁰ Stavenhagen and Amara, *supra*, note 137, p. 171.

¹⁴¹ Brownlie, *supra*, note 136, p.16.

¹⁴² *Ibid*, pp.3-4.

¹⁴³ R. Falk, 'The Rights of People (in Particular Indigenous Peoples)' in Crawford, *supra*, note 136, p.18.

¹⁴⁴ B. Kingsbury, 'Indigenous People in International Law: a Constructivist Approach to the Asian Controversy', 92(3) *American Journal of International Law*, 1998, pp. 69, 106.

concept of great normative power for many relatively powerless groups that have suffered grievous abuses". 145

Despite some definitional and conceptual ambiguity, sufficient guidance has emerged on some of the key characteristics shared by indigenous people as a group requiring particular protection under human rights norms. This is best expressed in the Declaration adopted by the UN General Assembly.

Before considering the content of any indigenous rights, it is necessary to consider whether the Bedouin can accurately be classified as an indigenous group in accordance with the criteria set out above.

3.1.2 Can the Bedouin be Described as Indigenous?

The indigenous status of the Bedouin enjoys a near consensus, and is significantly supported by the views of international experts, most notably two recent Special Rapporteurs on Indigenous People. Whilst much of the material which is referred to below focuses on the indigenous status of the Bedouin in the Naqab (in Israel proper), it is contended that the cultural and anthropological information is equally applicable to the Bedouin in the West Bank who stem from the Naqab and still share many, if not most, of the same cultural traits and practices as their brethren in the Naqab.

A former UN Special Rapporteur on the Rights of Indigenous Peoples Rodolfo Stavenhagen submitted a statement to the Israeli District Court (Beersheva) in the *Al-Uqbi* case confirming the indigenous status of the Bedouin community in the Naqab. ¹⁴⁶ In a recent exchange between the previous UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, and the Israeli government, Anaya confirms the indigenous status of the Bedouin in the Naqab, at least until he is allowed to conduct a country visit to better determine his position. ¹⁴⁷ Whilst Israel refutes this indigenous status, in support of his the contention that the Bedouin can be defined as indigenous people, and thus within his mandate, Anaya notes:

...the longstanding presence of Bedouin people throughout a geographic region that includes Israel, and observes that in many respects, the Bedouin people share in the characteristics of indigenous peoples worldwide, including a connection to lands and the maintenance of cultural traditions that are distinct from those of majority populations. Further, the grievances of the Bedouin, stemming from their distinct cultural identities and their connection to their traditional lands, can be identified as representing the types of problems to which the international human rights regime related to indigenous peoples has been designed to respond. Thus, the Special Rapporteur considers that the concerns expressed by members of the Bedouin people are of relevance to his mandate and fall within the ambit of concern of the principles contained in international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples. 148

¹⁴⁵ Kingsbury, *supra*, note 134, p. 415.

¹⁴⁶ Copy of Stavenhagen's submission with the author.

¹⁴⁷ Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, August, 2011, pp. 24-31. UNGA Doc. A/HRC/18/35/Add.1

¹⁴⁸ *Ibid*.

UNRWA describe the Bedouin as a mobile pastoralist community.¹⁴⁹ In their report on the transfer of some West Bank Bedouin to Al Jabal, outside of Jerusalem, UNRWA highlight aspects of the traditional life of the Bedouin:

With strict honour codes informing a traditional justice system, maintaining small social groups based mainly – though not exclusively – on kinship ties, originally served the Bedouin to protect both the environment and family assets, including honour. Whilst much of the Bedouin population is today experiencing transition from a traditional pastoralist economy towards wage-labour commercialism, traditional social structure is still largely observed amongst the rural Bedouin Palestine refugee communities in the West Bank. While their mobility has been vastly restricted and most now operate a dual economy (combining livestock management with wage labour in urban centres), rural Bedouin communities in the West Bank remain small and mainly kinship based. Their use of space within the community continues to reflect the protective element of their society, promoting privacy for women and preserving family honour. 150

Other observations made by human rights bodies also support the indigenous status of the Bedouin. Following the expansion of the Kedar and Ma'ale Adumim settlements in the mid-1990s and the displacement and relocation of the Jahalin community, the situation of the Jahalin community drew international attention. The Committee on Economic, Social and Cultural Rights noted in 1998:

...with deep concern the situation of the Jahalin Bedouin families who were forcibly evicted from their ancestral lands to make way for the expansion of the Ma'aleh Adumim and Kedar settlements. The Committee deplores the manner in which the Government of Israel has housed these families - in steel container vans in a garbage dump in Abu Dis in subhuman living conditions. The Committee regrets that instead of providing assurances that this matter will be resolved, the State Party has insisted that it can only be solved through litigation. ¹⁵¹

Interestingly, the Committee referred to the lands occupied by the Jahalin as their "ancestral lands", thus implying an indigenous status. It is unclear whether the term was used intentionally, and whether the fact that the Bedouin have occupied such lands in historical Palestine for decades, after being displaced from their original lands in Tel-Arad, was relevant to the designation of these lands as ancestral.

According to Minority Rights Group International:

Arab Bedouin have a historical and traditional link to their land. As in many indigenous communities, this connection is deep, almost spiritual. Their culture, traditions and way of life revolve around land. Some Bedouin families have legal documents proving that they own their land, but the Israeli government broadly refuses to recognize these documents. Bedouin have their own traditional administrative and governance systems, and their own codes of conduct. Under Bedouin systems, specific criteria for recognition of land rights include historical access to the land for animal grazing and where their ancestors are buried. Within the community these laws are well understood and respected. Tribal ownership of land is respected by families even if the original owner has been displaced by the government and no longer lives there. This system was recognized, before the formation of the State of Israel, by the Ottoman and British authorities. 152

¹⁴⁹ UNRWA and Bimkom, *supra*, note 102, p. 4.

¹⁵⁰ Ibid.

¹⁵¹ CESCR, Conclusions and Recommendations: Israel, U.N. Doc. E/C.12/1/Add.27, 1998, para. 12.

¹⁵² Mihlar Farah, *supra*, note 26.

The Indigenous World of the International Work Group on Indigenous Affairs (IWGIA) is a yearbook that "updates the state of affairs of indigenous peoples around the world and gives an overview of developments in international policies and processes that impact on indigenous peoples." In its recent yearbooks (2012-2015), both the Bedouin of Israel and of the West Bank were listed, and their conditions addressed. This acknowledgment provides further validation of the claims of the Bedouin to indigenous status.

Finally, in their September 2014 statement on the threat of forced displacement of the West Bank Bedouin, the PLO/PA note many of the characteristics that qualify the Bedouin as indigenous, including their traditional nomadic way of life and "agricultural and livestock raising dependent lifestyle" sustained over many centuries.¹⁵⁴

There is a sufficient factual and legal basis - with reference to the anthropological and cultural material available, the criteria set out in the Declaration and the writings of experts such as the Special Rapporteurs on Indigenous Rights - to draw a conclusion that the Bedouin can be considered an indigenous people.

While it is submitted that all Palestinians (not only the Bedouin) belong to the indigenous population in historical Palestine, the indigenous categorization does not mean that all indigenous people are homogeneous; rather there are sub-groups with different needs and backgrounds. The Palestinian Bedouin refugees within the West Bank face different needs and have a different unique lifestyle due to the political and historical circumstances conditioning their life. ¹⁵⁵ For them, land, for farming and as grazing areas continue to play a vital role in their life, even after their displacement in 1948 and thereafter. The particular situation of this group requires further attention with regards to land rights, especially in light of the lack of formal ownership to the land. Still, they have strong legal claims to adequate housing and protection from displacement and eviction, under both IHL and IHRL.

3.1.3 Counter Perspectives and Counter Claims

Any discussion of indigeneity in the Palestinian context would be incomplete without some reference to counter-perspectives and claims. In keeping with the highly politicized nature of political discussions in Israel/Palestine, these come from different perspectives.

The first narrative, based mainly on writings of Jewish commentators, contends that the categorization of the Bedouin as indigenous is a political construct, is factually inaccurate and that the Jewish people have, if anything, a greater right to be considered indigenous than the Bedouin. This analysis is based in part on the 'time-priority' argument and holds that the majority of the Bedouin arrived in the Naqab in the eighteenth and nineteenth centuries, and thus after Ottoman rule was already established in the region. ¹⁵⁶ This claim appears to misunderstand the time-priority argument, which relates to the fact that Bedouin presence predates the existence of the State of Israel, as well as the beginning of the Israeli occupation of the West Bank. Research also shows that Bedouin have lived in the Naqab at least as back as the seventh

¹⁵³ http://www.iwgia.org/publications/series/yearbook-the-indigenous-world.

¹⁵⁴ PLO/PA statement, *supra*, note 43, p. 2-3.

¹⁵⁵ See, for example, Mihlar Farah, *supra*, note 26, pp. 8-9, 16.

¹⁵⁶ Kark's expert opinion, 31 January 2010, p. 3; see also S. Frantzman, H. Yahel and R. Kark, 'Contested Indigeneity: The Development of an Indigenous Discourse on the Bedouin of the Negev', *Israel Studies*, vol 17(1), 2012, pp. 78-104; H. Yahel, R. Kark and S. Frantzman, 'Fabricating Palestinian History: Are the Negev Bedouin an Indigenous People?', *Middle East Quarterly*, Summer 2012, pp. 3-14.

century. 157 Further, the dialogue around indigenous people has focused on those groups who still adhere to their unique lifestyle, often tied to land as livelihood, and whose culture, rights and traditions are marginalized within the existing dominant society. This gives rise to the claim for protection of such rights that are not fully respected when it comes to marginalized groups, as opposed to a dominant majority which is not in need of this kind of protection.

In spite of these views, and whilst the official position of the Israeli government is of non-recognition of indigeneity within the Israeli legal system, the Israeli government does appear to treat the Bedouin differently than the rest Palestinian society, and to acknowledge the Naqab Bedouin as an ancient minority with a strong tradition and culture. In an affidavit submitted to the Supreme Court in the matter of Avitan v. Israel Land Authority, the government accepted that:

> The Bedouin in Israel constitute an ethnic minority with a distinct character. They originate from nomadic tribes whose economy was based on pasturing camels, sheep and goats. The Bedouins possess an ancient culture and heritage that originate from the Arab tribes of the pre-Islam period. From that time and until the middle of the 20th century, only few changes took places in their customs and lifestyle. 158

It should be noted that Israel had undertaken a different approach towards the Bedouin than the rest of other Palestinian groups. 159 Whilst its position represents a somewhat orientalist and historically inaccurate approach, it does, acknowledge the distinct character and ancient culture of the Bedouin. As a matter of fact, the Bedouin community was dynamic and in transformation at least since the 19th Century, in opposition to the discourse of Bedouin nomadism, living outside the State, in a fossilized culture.

The second narrative, based on the perspectives of different Palestinian writers and academics, contends that describing the Bedouin, but not the rest of the Palestinian population, as indigenous, reinforces the fragmentation of the Palestinian society as religious and cultural minorities (Muslim, Christian, Bedouin, Druz, Circassians), a claim which is often used by the Israeli authorities to further divide Palestinian society. 160 It is argued that this, in a sense, denationalizes the Bedouin as Palestinians, or de-indigenizes the rest of the Palestinians. 161 Abu Sitta views the Bedouin Arabs as part of the transnational Arab majority in the Middle East, rather than indigenous minority in Israel. 162 Some Bedouin leaders in the Naqab also voice reservations about their categorization as indigenous, associating such identification with vulnerability and a primitive nature with which they refuse to be identified.

The utilization of the concept of indigenous status in the West Bank is also viewed as being incompatible with, or undermining, the goal of national Palestinian self-determination. This perspective holds that the Palestinians (not only the Bedouin) belong to the indigenous population of historical Palestine, and they have the right to self-determination in historical Palestine which is being impeded by the colonial power, namely Israel as occupier. The Palestinians, as a collective, must first achieve self-determination from colonial occupation before issues of minority and/or indigenous rights for separate groups within

¹⁵⁷ Stavenhagen and Amara, *supra*, note 137.

¹⁵⁸ HCJ 528/88 Avitan v. Israel Land Authority, 1989, para. 5.

¹⁵⁹ M. Nasasra, 'The Ongoing Judaisation of the Naqab and the Struggle for Recognising the Indigenous Rights of the Arab Bedouin people', *Settler Colonial Studies*, Vol. 2(1), 2012, pp. 81-107.

160 L. Jakubowska, 'Resisting Ethnicity: The Israeli State and Bedouin Identity' in C. Nordstrom and J. Martin (eds.), *The Path to*

Domination, Resistance and Terror, University of California Press, Berkeley, 1992.

¹⁶¹ For a different view, see Nasasra, supra, note 159, p. 88; M. Nasasra et al, The Naqab Bedouin and Colonialism: New Perspectives, Routledge, 2014.

¹⁶² Exchange with Ahmad Amara.

Palestinian society should be considered. Such commentators argue that recognition of the indigenous status of the Bedouin may be seen as a challenge to Palestinian unity and play into the hands of those who seek to fragment such unity. In fact, the international law of indigenous people takes the State as a given legal and political framework and states explicitly that indigenous rights are not intended to challenge territorial integrity and sovereignty. However, Palestinians in the West Bank are yet to achieve political self-determination in the form of a State and see themselves as being in the midst of a conflict with an undetermined outcome.

Much of the evolving practice and jurisprudence on the issue of indigenous rights stems from Western settler colonial societies and their efforts to develop policies which will protect indigenous groups within the confines of State sovereignty. For Palestinians, the struggle for self-determination and sovereignty continues. In this context, some would argue that it is premature to focus on indigenous rights of certain groups when the wider polity has not yet attained its fundamental right to self-determination. It is, however, contended that there is space for the indigenous rights perspective, without in any way undermining the right of broader Palestinian self-determination. Measures to protect culture and tradition are equally applicable in occupied and non-occupied contexts.

Without undermining the indigenous status of those who lived in historical Palestine for generations, and especially prior to the establishment of the State of Israel, having established the claims for the West Bank Bedouin to be recognized as indigenous as a culturally specific group, marginalized under a foreign rule that they had preceded, it is necessary to consider the rights and protections owed under international law to indigenous people.

3.2 The Content of Indigenous Rights

Due to the particular needs and historical circumstances of indigenous groups, the emerging international law on indigenous people has focused on protecting the cultural identity of indigenous peoples, and sought to redress the historical and current violations of their rights. This included the protection of their cultural institutions, ancestral lands, natural resources and traditional knowledge. ¹⁶³ The Declaration on the Rights of Indigenous Peoples was the product of decades of activism, negotiation, debate and demands for the protection of indigenous people's rights. The adoption of the Declaration is a significant milestone in the legal development, internationally, of indigenous rights. Inevitably, the Declaration reflected, as most international legal documents do, a compromise over different groups of interests (including State interests). Thus, whilst the Declaration marked an important step forward in the protection of a wide range of indigenous rights, it fell short in some aspects of the aspirations of indigenous people.

At the heart of the Declaration is the need to protect the indigenous population as a distinct group-people-nation-culture. The Declaration provides that "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture" and protects the right of indigenous people "to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies" and to "maintain, protect and have access in privacy to their religious and cultural sites." ¹⁶⁴ As for material resources, the Declaration also asserts the rights of the indigenous peoples to their lands and resources.

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¹⁶³ United Nations Declaration on the Rights of Indigenous Peoples (hereinafter also: 'the Declaration'), in particular arts. 5, 8, and 10–13 ff. See also ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, in particular arts. 2, 5, 7, 8, and 13–15 ff.

¹⁶⁴ Declaration, art. 12.

The following section will highlight three key rights under the Declaration, namely the right to traditional land ownership or usage, the right to culture and the right to participate in the decision making process regarding matters that affect them.

3.2.1 Indigenous Land Rights

3.2.1.1 General

Land rights are often identified as one of the most important types of indigenous rights, consistent with the strong attachment that many, if not all, indigenous people have to their traditional or ancestral land, or to usage of land in a traditional way. One of the reasons for this is the nature of land as a source of food and livelihood for indigenous people. Discussing the right to an adequate standard of living, including adequate food and housing (Article 11 of the ICESCR), the Committee on Economic, Social and Cultural Rights has noted that "[a] particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened."¹⁶⁵

Article 26 of the Declaration provides wide protections for the land and resources rights of indigenous peoples:

- (1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
- (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.¹⁶⁶

Very often 'legal' rights of ownership are denied to indigenous population over their traditional lands, since indigenous communities have usually maintained oral and customary ownership systems which lack official paper registration and individual titles to the land, contrary to modern notions and legal systems of property rights. States typically maintain formalized land registration systems and legislative frameworks, and courts are typically obliged to follow and interpret these applicable land and property laws. ¹⁶⁷

The recognition of the right to land which indigenous people "have traditionally owned, occupied or otherwise used or acquired" aims to challenge and overcome the overly rigid insistence on formal titles by modern States which fails to acknowledge long-standing informal land rights and arrangements, and effectively disenfranchises indigenous people from their land. This formulation in the Declaration acknowledges land rights not only in land, territories and resources which are "owned" but also in land that was occupied and otherwise used (such as through cultivation, grazing, hunting, or worship). This is

¹⁶⁵ CESCR, General Comment No. 12, The Right to Food, E/C.12/1999/5, 1999.

¹⁶⁶ Declaration, art. 26.

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¹⁶⁷ Although, as will be discussed below, in some countries courts have been creative in developing concepts of traditional ownership or native title, such as in Canada, Australia and the Inter-American Court of Human Rights.

fundamental to the case of the Bedouin of the West Bank, as it demonstrates that indigenous land rights can exist for land usage, not only land ownership.

Additional particular protections to land rights are enshrined in the Declaration with regards to environmental considerations. Article 29 states that:

- 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
- 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
- 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30(1) of the Declaration, which in occupied territory must be read together with IHL provisions, prohibits "[m]ilitary activities . . . in the lands or territories of indigenous peoples, unless justified by a significant threat to relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned." This issue must be related to the concepts of military necessity and proportionality covered earlier in the report under IHL.

There is an emerging but significant body of domestic and international jurisprudence on the scope of indigenous land rights. Within the Nicaraguan context, the case of *Mayagna Community of Awas Tingni v. Nicaragua*¹⁶⁸ affirmed that the human right to property (especially as reiterated in the American Convention on Human Rights) includes the right of all indigenous peoples to the protection of their customary land and resource tenure. Most significantly, the Inter-American Court of Human Rights afforded this recognition to *collective* land rights, despite the lack of collective ownership rights in Nicaraguan property law. In addition to its substantial impact on the Nicaraguan legal system, this was the first legally binding decision by any international tribunal to uphold collective land rights despite State policy to the contrary.¹⁶⁹

In 1997, the Canadian Supreme Court issued its most significant decision on the issue of indigenous land titles in *Delgamuukw v. British Columbia*.¹⁷⁰ While the Supreme Court decision did not determine the ownership of the claimed land, it outlined the scope of Aboriginal title, a unique form of ownership under Canadian law. Previous to *Delgamuukw*, the exact scope of the legal interest in the land held by Canada's indigenous groups was not defined. However, Canada had acknowledged that indigenous title was a legal right, rooted in the historic "occupation, possession and use" of traditional territories, ¹⁷¹ and existent whether or not it was recognized by colonizing Europeans.

¹⁶⁸ Decision delivered on August 31, 2001. Available at http://www.worldlii.org//cgi-bin/disp.pl/int/cases/IACHR/2001/9.html?query=mayagna (last accessed, April 14, 2008).

¹⁶⁹ J. Anaya and C. Grossman, 'The Case of *Awas Tingni* v. *Nicaragua*: A New Step in the International Law of Indigenous Peoples', 19 *Ariz. Journal of Int'l and Comp. Law* 1, 2002.

¹⁷⁰ Delgamuukw v. British Columbia, Supreme Court of Canada, [1997] 3 S.C.R. 1010, available at http://scc.lexum.umontreal.ca/en/1997/1997rcs3-1010/1997rcs3-1010.html, (last accessed, April 14, 2008).

¹⁷¹ Calder v. The Attorney General of British Columbia, Supreme Court of Canada, [1973] S.C.R. 313.

Similar recognition and elaboration on the aboriginal land title took place also in Australia, after two centuries of British colonization, with the High Court's decision in *Mabo & Ors v. The State of Queensland*.¹⁷² The decision found that there is a concept of Aboriginal native title in Australian common law, that the source of this title is the continuous and uninterrupted usage of the land and traditional connection and occupation of the land by the indigenous inhabitants, and that the nature and content of native title is determined by the character of the connection or occupation under traditional laws or customs. The *Wik* case in Australia considered indigenous usage rights (such as for hunting or gathering) over land which was the subject of a pastoral lease, concluding that such leases did not necessarily extinguish the indigenous native title. Both usages could co-exist, unless there was a clear inconsistency in which case the formal pastoral lease would prevail over the indigenous usage right.¹⁷³

Acknowledging the political obstacles to the absolute return of indigenous lands, and the impracticality of doing so in some cases, the Declaration addresses the issue of compensation, when return is impossible. Article 28(1) of the Declaration states that "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent." In paragraph 2, the article stresses the form and conditions of such redress. Land, of equal size and quality, should be the default restitution position, unless agreed differently: "Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

3.2.1.2 Recent Israeli Jurisprudence on Bedouin Land Claims in the Naqab

Whilst jurisprudence from many other Western legal systems is moving towards greater recognition of indigenous rights, including traditional ownership and usage rights over land, Israeli jurisprudence appears to be moving in the opposite direction.

In the *Al-Uqbi* case, concerning the legality of a 1954 requisition of land in the unrecognized Bedouin village of Al-Araqib under Israel's Land Acquisition (Validation of Acts and Compensation) Law 1953, the Supreme Court concluded that the Al-Uqbi tribe did not have any rights in the requisitioned land, and therefore were are not entitled to a remedy.¹⁷⁴ The Court rejected the tribe's ownership claim based on Bedouin traditional law. Referring to the applicable Ottoman and British Mandate land laws, it opined that the land in question is *Mawat* land which at the time of the requisition belonged to the State, and was not privately owned. The Court further noted that none of the following legal norms – the doctrine of equity, Israel's Basic Law: Human Dignity and Liberty, nor the doctrine of indigenous peoples rights in international law – has granted land rights to the Al-Uqbi tribe.¹⁷⁵

Specifically, the Al-Uqbi tribe asked the Court to recognise their land rights based on the UN Declaration on the Rights of Indigenous Peoples, or to interpret the applicable local land laws in light of the

¹⁷² Mabo & Ors v. The State of Queensland (No. 2) (Mabo) (1992) 66 ALJR 408.

¹⁷³ Wik Peoples v. Queensland HCA 40; (1996) 187 CLR 1; (1996) 141 ALR 129; (1996) 71 ALJR 173 (23 December 1996), available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1996/40.html?query=Wik (last accessed, 1 November 2015).

¹⁷⁴ CA 4220/12 Al-Ogabi v. State of Israel, 14 May 2015.

¹⁷⁵ See, Al-Oqabi (Al-Araqib) and Al-Kiya'an (Um Al-Hiran) Cases: Analysis of the Supreme Court Decisions and Their Implications, NRC legal memo, June 2015, p. 1.

Declaration's principles. The Court, however, rejected this line of argument, noting that Israel did not vote in favour of the Declaration, and did not incorporate it into its legal system. The Court further emphasised that the Declaration is non-binding and does not form customary international law. Given the Court's conclusion that the Declaration does not confer land rights, it did not address the question whether the Bedouin are indigenous people.¹⁷⁶

A second judgment deals with the forced eviction of members of the Al-Kiya'an Bedouin tribe from the unrecognized village of Um Al-Hiran in the Naqab in which the Israeli government plans to build a new Jewish town. Despite the fact that in 1956 the Al-Kiya'an tribe was moved by Israeli authorities from their previous location to Um Al-Hiran and lived in this area for six decades, the authorities refused to recognise their right to stay in the land and to include their homes (most were built without a formal construction permit) in the planned new town. The Court concluded that the tribe did not acquire property rights in the land through their protracted presence and building in the area.

In both judgments the Court did not accept the argument that occupying and cultivating the land, for decades in the case of *Al-Kiya'an*, and for generations in the case of *Al-Uqbi*, is sufficient in order to acquire ownership, to stay on the land or to overcome the adverse claim by the government. In *Al-Uqbi* the Court insisted, in line with its previous case law, on a documented ownership registered in an official land registry, which most of the Bedouin do not have, thus denying them the protection of their rights and interests in their ancestral land or in lands that they were displaced to decades earlier. Both judgments focus on the strict classification of property rights and on the formal ways to obtain them, without paying due regard to the unique lifestyle of the Bedouin and to their customs and traditional arrangements that have regulated their land rights and interests. It is noteworthy, however, that under Ottoman law, which was incorporated into British Mandatory law and Israeli law, it was possible to acquire land rights based on long-term possession and cultivation, which the Bedouin had historically practiced over at least 2.5 million dunams in historical Palestine. 179

Interestingly, in the *Al-Uqbi* case, the Court noted, in *dicta*, that from the evidence presented in the course of litigation, it is possible that certain parts of the Naqab land are in fact *Matruka* land, land that was designated by the Ottoman and Mandatory authorities for the Bedouin collective use – for the purpose of parking, grazing and seasonal agriculture, and it is possible that also the plots in question were *Matruka* land granted to the Al-Uqbi tribe as a collective (rather than privately owned). The Court did not make a conclusive findings on the issue, as the factual situation was not sufficiently clear (given that the Court required evidence from more than 150 years ago, placing a heavy burden of proof on the Bedouin), and the Al-Uqbi tribe did not argue in this matter but focused on formal ownership rights. Nevertheless, any future finding on this issue may provide some recognition of the collective usage rights of the Bedouin.

In light of the Al-Uqbi and Al-Kiya'an judgments, it is noteworthy that the Bedouin in Area C of the West Bank face similar challenges to the Bedouin in the Naqab in terms of displacement, non-recognition of their rights in their ancestral land or in lands that they were displaced to decades earlier, and difficulties in proving their rights due to strict requirements of documentation and registration. This is coupled with the

¹⁷⁶ *Ibid*, p. 3.

¹⁷⁷ CA 3094/11 Al-Kiya'an v. State of Israel, 5 May 2015.

¹⁷⁸ See also CA 218/74 Hawashle v. State of Israel, 1984; Report of the Goldberg Commission, 2011, paras. 38-45.

¹⁷⁹ O. Yiftachel, S. Kedar and A. Amara, 'Challenging a Legal Doctrine: Rethinking the Dead Negev Ruling', 20(1) *Law and Government* (Mishpat U-Mimshal), 2012, p. 4 (in Hebrew); See also Mansour Nasanra, 'Ruling the Desert: Ottoman and British Policies towards the Bedouin of the Naqab and Transjordan Region, 1900–1948', 42(3) *British Journal of Middle Eastern Studies*, 2015, p. 261.

narrow approach taken by the Israeli authorities which does not formally recognise a collective or individual right to hold, stay, access or use the land in the absence of ownership or formal permission from the government, and thus does not provide the Bedouin security of tenure. These judgments have possible implications for the Bedouin in Area C as the Ottoman and Mandatory land laws, as well as human rights law, are also applicable in Area C. In the event petitions concerning land issues in Area C will come before the Israeli Supreme Court, the Court is likely to interpret these laws in a similar manner.

It is important, however, to remember that the Bedouin in Area C are also protected by IHL which does not apply in the Naqab. This legal regime prohibits the Occupying Power, namely Israel, from forcibly transferring them to another location within or outside the occupied territory, regardless of the motive.

3.2.1.3 Land Rights for the Bedouin

As relates to the Bedouin, "Land has always been the most important resource." More generally, eminent legal scholars agree that "unless indigenous peoples can reassert their right to control their own development and future and win back sufficient lands and resources, there can be no real progress in their standards of living." Thus, the land is essential as a source for living and as central and essential to Bedouin cultural identity. Denial of land and/or housing tenure and displacement continue to infringe upon Bedouins' cultural rights.

The land rights contexts for Bedouin in the Naqab and the West Bank are different, partly because the Bedouin in the West Bank have been displaced from their traditional lands in the Naqab, and partly because of the question whether Israel, as the Occupying Power in the West Bank, is authorized to confer any formal land ownership rights to the West Bank Bedouin. As 'temporary' administrator of the land, Israel must act in the interests of the protected population, subject to legitimate issues of military necessity, and respect IHL, including the prohibition on forcible transfer and on the destruction of private property. Whilst Israel can confer or otherwise recognize the informal ownership rights of the Bedouin in the Naqab, its legal powers under the law of occupation are more limited in the West Bank. In any case, public land in the West Bank clearly should be used for the benefit of the public who are legitimately resident, including the Bedouin, in the occupied territory. Israel should respect and protect the human rights of the Bedouin, including by respecting their informal land usage, lease and possession agreements, and respecting their right to housing and their desire to preserve their cultural identity and traditional lifestyle.

In comments equally pertinent to the West Bank Bedouin, the UN human rights and treaty monitoring bodies have stressed the need for land tenure and the right to access to land to support the traditional agriculture lifestyle of the Bedouin. Observations made by experts on indigenous rights, such as Special Rapporteurs on the Rights of Indigenous People, in relation to the situation of the Naqab Bedouin are also highly relevant to the West Bank context. In regards to the Naqab Bedouin, Special Rapporteur Anaya, noted the following:

¹⁸⁰ T. Abu-Ras, 'Land Disputes in Israel: The Case of the Bedouin of the Naqab', *Adalah's Newsletter*, Volume 24, April 2006, p. 2

 ¹⁸¹ J. Burger, 'The Economic Rights of Indigenous Peoples' in L. Van Der Vlist (ed.), *Voices of the Earth, Indigenous Peoples, New Partners and the Right to Self-Determination in Practice*, Netherlands Centre for Indigenous Peoples, Utrecht, 1994, p. 195.
 ¹⁸² Israeli settlements in the West Bank are in violation of international law. In addition, settlers – Israeli citizens – cannot qualify as protected persons in the territory occupied by Israel, see Fourth Geneva Convention, arts. 4, 49.

6. The land tenure situation of the Bedouin in the Negev has been identified as a matter of concern by both the Human Rights Committee, in its review of Israel's compliance with the International Covenant on Civil and Political Rights, and by the Committee on the Elimination of All Forms of Racial Discrimination (CERD), in its review of Israel's compliance with the Convention on the Elimination of All Forms of Racial Discrimination. In particular, the Human Rights Committee has stated that Israel "should respect the Bedouin population's right to their ancestral land and their traditional livelihood based on agriculture" (CCPR/C/ISR/CO/3, para. 24) and similarly, CERD has recommended that Israel give "recognition of the rights of the Bedouins to own, develop, control and use their communal lands, territories and resources traditionally owned or otherwise inhabited or used by them" (CERD/C/ISR/CO/13, para. 25). 183

12. [w]hile in general, removals of people from their traditional lands have serious implications for a wide range of human rights, these implications are greater for groups like the Bedouin, who hold bonds of deep historical and cultural significance to the lands in which they live. In this context, consent is a precondition for any forced removal according to article 10 of the United Nations Declaration, which states that "[i]ndigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return"...

14. In any case, even if, after careful analysis bearing in mind the above standards, restriction of the rights to land and resources of Bedouin is considered an option, these restrictions should only take place with adequate mitigation measures and, in the case of any removals, with the agreement of the affected Bedouin within a participatory, consensus-building process, and the opportunity to return to their traditional lands. 184

In 2010 the Human Rights Committee made the following concluding observations to the Israeli government in relation to the traditional lands and livelihood of the Bedouin community in the Naqab and the need to accommodate such needs in any future planning:

24. ...the Committee is concerned at allegations of forced evictions of the Bedouin population based on the Public Land Law (Expulsion of Invaders) of 1981 as amended in 2005, and of inadequate consideration of traditional needs of the population in the State Party's planning efforts for the development of the Negev, in particular the fact that agriculture is part of the livelihood and tradition of the Bedouin population. The Committee is further concerned at difficulties of access to health structures, education, water and electricity for the Bedouin population living in towns, which the State Party has not recognized (arts. 26 and 27). In its planning efforts in the Negev area, the State Party should respect the Bedouin population's right to their ancestral land and their traditional livelihood based on agriculture. The State Party should further guarantee the Bedouin population's access to health structures, education, water and electricity, irrespective of their whereabouts on the territory of the State Party. 185

The Bedouin in the Naqab face the partial destruction of their own space, through the denial of legal status to their habitats, house demolitions, land dispossession, expansion of Jewish communities into Bedouin land, and attempts for forced urbanization and concentration. The limited space has impacted the ability of

¹⁸³ Report of the Special Rapporteur, supra, n 146.

¹⁸⁵ Human Rights Committee, Concluding Observations: Israel, U.N. Doc. CCPR/C/ISR/CO/3, 2010.

the Bedouin to graze and farm lands, and these policies denied them their housing tenure. Similar problems are faced by the Bedouin in the West Bank.

3.2.1.4 Land Rights for the West Bank Bedouin

The key land right for the West Bank Bedouin is the right of return to their ancestral lands in the Naqab. Until and unless that right is realized, the Bedouin must be given security of tenure and recognition of their indigenous land usage rights in their present locations in the West Bank.

The Bedouin in the West Bank have preserved their traditional values and affinity to their land in the face of enormous pressure; they have followed pastoralism as one way of life; used wells as a source of water; and maintained traditional agriculture. They use their own laws, customs and beliefs. They largely identify themselves according to both tribal/communal and national lines: a strong sense of oral history, kinship, inter-marriage relations, special attachment to historical territory, weddings norms, hospitality aspects, and a Bedouin dialect that is still preserved.

Despite their lack of land ownership rights, the Bedouin in the West Bank have maintained adaptive and mutually advantageous relations with Palestinian private owners whose land they occupy. As noted by UNRWA, "[s]uch arrangements ranged from simply securing the blessing of a land owner to reside on the land, to the payment of monthly rent or the sharing of any agricultural profits resulting from land use on a seasonal basis". ¹⁸⁶ Prior to the Israeli occupation, Bedouin also grazed and used public land with the tacit acceptance of the Jordanian authorities, and without any claims of land ownership over such land. ¹⁸⁷

Academics such as Boutruche and Sassoli note the artificiality of insisting on formalized legal land ownership rights as a prerequisite to the right of residence for a nomadic people living a traditional life, such as the West Bank Bedouin. ¹⁸⁸ They argue that a broader understanding of land rights, beyond the mere question of ownership, is necessary and should consider land usage as well. ¹⁸⁹

3.2.2 The Right to Culture

3.2.2.1 General

The right of persons to enjoy and preserve their own culture is particularly critical to the survival of many indigenous cultures in the face of a rapidly urbanizing, globalizing world in which traditional culture is subsumed by the weight of national and global media and culture. The protection of individuals' and communities' cultural rights stems from three overlapping international bodies of law: 1) general human rights law, 2) minority protections, and 3) soft law relating directly to indigenous populations.

Article 27 of the ICCPR is the most important provision in the context of protecting members of minority groups and their right to culture. To this extent, members of Bedouin communities may rely on Article 27

¹⁸⁶ UNRWA and Bimkom, *supra*, note 102, p. 10.

¹⁸⁷ This was confirmed by oral testimonies of Bedouin representatives.

¹⁸⁸ Boutroche, Sassoli, *supra*, note 2, p. 28.

¹⁸⁹ *Ibid*, p. 31.

in order to protect their traditional way of life, including their traditional ownership or use of land. The Article reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 15(1) of the ICESCR acknowledges the general right to freely participate in the cultural life of the community. ¹⁹⁰ The right is also interdependent with other rights enshrined in the ICESCR, including the right of all peoples to self-determination (Article 1) and the right to an adequate standard of living (Article 11).

Similar language is also enshrined in article 27(1) of the UDHR which states that "everyone has the right freely to participate in the cultural life of the community". Other international instruments protect the right to cultural life or particular aspects or forms of it.¹⁹¹

According to the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, a State may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding, and accordingly take all appropriate measures to protect and preserve cultural expressions. 192

By way of analogy to the situation of the Bedouin, it is interesting to mention the Council of Europe's Framework Convention for the Protection of National Minorities, while not applying in the Israel/Palestine context, reiterates these principles. It also stipulates that States shall refrain from policies or practices aimed at the assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation. ¹⁹³ The State Parties to the Framework Convention shall further refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and that are aimed at restricting their rights. ¹⁹⁴ Various measures taken in order to integrate the minority in the general-dominant society may be inconsistent with the protection of the cultural identity of certain groups and with the desire to promote and maintain cultural diversity. ¹⁹⁵

The Human Rights Committee, which monitors the implementation of the ICCPR, points out that the right to enjoy a particular culture may include a way of life which is closely associated with territory and use of its resources, and it further notes that this may particularly be true of members of indigenous communities constituting a minority.¹⁹⁶

In addition, the Human Rights Committee considered cases in which a State Party (Canada) failed to enable members of a minority group to live in their native land – where they can access their native culture and preserve their identity, or to which they have a strong claim – either by expropriating land or prohibiting

¹⁹⁰ ICESCR, art. 15(1).

¹⁹¹ ICERD, art. 5(e)(vi); CEDAW, art. 13(c); CRC, art. 31(2); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43(1); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2(1), 2(2). See also Framework Convention for the Protection of National Minorities (Council of Europe, ETS No. 157), art. 15.

¹⁹² Article 8. Israel is not a party to the Convention. Palestine joined in December 2011.

¹⁹³ Framework Convention, art. 5.

¹⁹⁴ *Ibid*, art. 16.

¹⁹⁵ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), art. 2(6).

¹⁹⁶ *Ibid*, paras. 3.2, 7.

residence in that land. The Committee concluded that this governmental policy threated the traditional way of life of persons belonging to this minority group, and constituted a violation of their right "to enjoy their own culture" in accordance with Article 27 of the ICCPR. 197

The Committee on Economic Social and Cultural Rights (CESCR) has provided in its General Comment No. 21 a thorough interpretation of the scope of the right of everyone to take part in cultural life, and regarding the aspects and groups to be protected, and the obligations imposed on all States to give effect to this right. In addition, the Committee on the Elimination of Racial Discrimination has also called for the respect of distinct indigenous cultures, histories, languages and ways of life. 198

The UN Declaration on the Rights of Indigenous Peoples enshrines the right to culture in Article 31 as follows:

- 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
- 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

3.2.2.2 Scope of the Right to Cultural Life

The CESCR has provided a broad definition of the term 'culture', noting that "culture,... encompasses, inter alia, ways of life, language,... methods of production or technology, natural and man-made environments,... customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives." The Committee viewed the right to be particularly relevant to indigenous people, and it considered their relationship with their ancestral land to be part of their cultural identity:

States Parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples.²⁰⁰ The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which

¹⁹⁷ Ominayak and the Lubicon Lake Band v. Canada (Communication No. 167/1984, 10 May 1990), Lovelace v. Canada (Communication No. R. 6/24, 30 July 1981).

¹⁹⁸ OHCHR, General Recommendation No. 23: Indigenous Peoples, 18 August 1997, available at http://www.unhchr.ch/tbs/ doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c? Opendocument.

¹⁹⁹ CESCR, General Comment No. 21, para. 13.

²⁰⁰ See Declaration on the Rights of Indigenous Peoples, art. 1. See also ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), art. 1, para. 2.

they have traditionally owned, occupied or otherwise used or acquired.²⁰¹ Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.²⁰² States Parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.²⁰³

The scope of the right to culture is broad enough to encompass the protection against removal from traditional lands. ²⁰⁴ Culture, being integral to the way people live, also requires protection of particular living and housing arrangements in indigenous communities. With regard to the inter-relationship between the right to culture and to adequate housing, the Committee stressed, "the need to take into account, as far as possible, cultural values attached to, *inter alia*,… the way housing is designed and constructed." ²⁰⁵

Thus, human rights protections involve clear obligations on duty bearers not only to ensure the right to adequate housing and security of tenure, but also to ensure that the realisation of human rights (housing, education, and others) occurs in a way that takes account of the relevant cultural context, including the cultural characteristics of a specific indigenous group.

These rights are not only the obligation of Israel, as the Occupying Power in the West Bank, but also of the PA as a human rights duty bearer. In April 2014 Palestine acceded to the ICCPR and the ICESCR. In December 2011 Palestine ratified the Convention concerning the Protection of the World Cultural and Natural Heritage. It also became a party to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the Convention for the Safeguarding of the Intangible Cultural Heritage. ²⁰⁶ It is therefore incumbent upon the PA to develop and implement positive and practical measures, within the limits of its control and powers taking into account the obstacles placed by the occupation, to give effect to these cultural rights of those who are within its territory or subject to its jurisdiction.

3.2.2.3 Bedouin West Bank Culture

Bedouin culture is not static, or immutable, but evolves and changes with the culture and context around it, as do all cultures. Commentators note the drastic change in lifestyle of the Naqab Bedouin from one of nomadic, or semi-nomadic, herding to a lifestyle featuring increased agricultural production and urban employment.²⁰⁷ Similarly, the forced transfer of the West Bank Bedouin has the potential to result in a devastating impact on Bedouin cultural life, whereby concentration of groups into a single location would destroy their traditional livelihoods and the small fabric of their kinship groups.²⁰⁸

²⁰¹ Declaration, art. 26 (a).

²⁰² Convention No. 169, arts. 13–16. See also the Declaration, arts. 20, 33.

²⁰³ CESCR, *supra*, note 199, para. 36 (emphasis added).

²⁰⁴ Alexandra Xanthaki, *Indigenous Rights and United Nations Standards*, Cambridge University Press, 2007, p. 196 ("Patterns of cultural violence include the seizure of traditional lands, the expropriation and the commercial use of indigenous cultural objects without permission from indigenous communities; the misinterpretation of indigenous histories, mythologies and cultures[.]").

²⁰⁵ CESCR, *supra*, note 199, para. 16(e).

²⁰⁶ Qafisheh, *supra*, note 47.

²⁰⁷ Stavenhagen and Amara, *supra*, note 137, p. 165.

²⁰⁸ UNRWA and Bimkom, *supra*, note 102, p. 14.

Previous instances of forcible transfer have also impacted the ability of Bedouin women to move freely within their community. Women in Bedouin society play a key role in managing the household and livestock, but their ability to fulfill these duties depends on appropriate space around the house and limits on contact with males from other groups. Forcing the Bedouin into small landholdings in close connections with males from other groups creates a difficulty for women and to their status in the family and community. The result is that a greater number of Bedouin women are now home-bound and face restricted mobility on account of the forced urbanization.²⁰⁹ Indeed, the lack of space, for a semi-nomadic pastoral people, will not only restrict female mobility, but exacerbate tensions between groups or clans who have generally enjoyed spatial autonomy and are now forced together into cramped conditions whilst trying to maintain a lifestyle which requires space for livestock and living.²¹⁰ As noted by UNRWA:

Merging separate kinship groups into one space against their will instantly dissolves a community's sense of spatial security; movement corridors carved out by decades of social laws and traditional economic movement in one's own rural kinship group suddenly no longer exist.²¹¹

Practices such as displacement of Bedouin from grazing land, forced urbanization, limitations on communal space and restriction on access to the land used for livelihood, demonstrate no respect for Bedouin culture. Alternatively, there are a range of ways in which the right to culture can be realized for the Bedouin, such as through planning for Bedouin communities in their current locations with local service centres to provide access to basic health, water, education and other services, as is being proposed by NGOs such as Bimkom.²¹² Other possibilities concern rural development approaches which would allow the Bedouin to "govern the pace and direction of their own social, economic and cultural development from within", as proposed by UNRWA, or initiatives that could be taken by the PA (within the limits of its control and powers), including support for Bedouin representative associations, mainstreaming Bedouin issues throughout PA decision making, emphasising the cultural value of Bedouin traditions within Palestinian society, or establishing a Bedouin interests section with a PA ministry.

3.2.3 Right to Participate in Decision Making

3.2.3.1 General

The right to participation in decisions impacting upon a community is a key concern for indigenous groups who have often been excluded from decision making in areas of direct relevance to them.²¹³ The right is realized in different ways, such as through democratic elections, representative bodies, community consultations, and more frequently now, through social media forums.

Article 25 of the ICCPR protects the right of individuals "to take part in the conduct of public affairs." With respect to land and development, the Human Rights Council has called upon States to "promote participation in decision making processes and inclusion of relevant stakeholders in the planning stage of urban or rural development, in particular at the local level." ²¹⁵

²⁰⁹ *Ibid*, pp. 30, 33, 39

²¹⁰ *Ibid*, p. 34.

²¹¹ *Ibid*, p. 39.

²¹² E.g., Bimkom, *Planning Guidelines for the Village of Al-Aragib*, March 2011 (in Hebrew).

²¹³ Stavenhagen and Amara, *supra*, note 137, p. 169.

²¹⁴ ICCPR, art. 25.

²¹⁵ Human Rights Council Resolution 6/27, Adequate Housing as a Component of the right to an Adequate Standard of Living, para. 4(e), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_27.pdf.

In addition, in order to minimize displacement, ²¹⁶ governments are required to conduct "comprehensive and holistic impact assessments... prior to the initiation of any project that *could* result in development-based eviction and displacement, including the "exploration of alternatives and strategies for minimizing harm." The Special Rapporteur's Guidelines regarding evictions and displacement specify that "States should explore fully all possible alternatives to evictions. All potentially affected groups and persons, including women, indigenous peoples . . . have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider." ²¹⁸

More specifically with regard to instances of policies or decisions that could lead to eviction or displacement of indigenous people, the Declaration on the Rights of Indigenous Peoples affirms that "[I]ndigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."²¹⁹

The right to participation in decisions, such as decisions to relocate a community, presupposes that the underlying decision itself is lawful. The case is, however, different for the West Bank Bedouin. A decision to forcibly transfer a population in breach of IHL is not a lawful decision. An Occupying Power is prevented from making decisions which are in breach of its IHL obligations or which exceed its authority. It should not be trying to engage communities in consultations on decisions which are manifestly unlawful or when the consultation process is carried out in circumstances of a coercive environment in which the protected persons have no real choice of remaining in their present locations. The level of engagement or consultation with the community is, in a sense, peripheral to the wider issue of the legality of the decision itself. This is a key difference between the treatment of the Bedouin in the Naqab, who are subject to Israeli domestic law and IHRL, and the treatment of the Bedouin in the West Bank who receive the additional protection of IHL to maintain the status quo, pending the end of the occupation. A further consideration is the inherently coercive nature of the environment in the West Bank, characterized by the constant threat of demolitions, seizure of materials, restrictions on water, movement and grazing. Such an environment vitiates any 'informed consent'.

3.2.3.2 Bedouin Participation in Decision Making

Bearing this in mind, Bedouin aspirations to retain control over their resources and to maintain their cultural identity, language and religion, will be only realized when they take effective part in decision making. However, the marginalized situation of the Bedouin community makes their representation almost absent at Palestinian local and regional levels.

Whilst consultation with the Bedouin at the local level remains problematic and largely absent, it is noted that the establishment of the Bedouin Protection Committee in the West Bank in 2011, supported by UNRWA, was the first Bedouin representative body of its kind, serving as a negotiating party with the

²¹⁶ Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, A/HRC/4/18, p. 32. ²¹⁷ Ibid.

²¹⁸ *Ibid*, p. 38.

²¹⁹ Declaration, art. 10.

²²⁰ Sassoli, Boutrouche, *supra*, note 2, p. 23.

authorities and the focal voice of the community at international forums.²²¹ The Committee was formally recognized by the PA in March 2015 as a representative forum for the Bedouin.²²²

The benefits of representation were demonstrated by Bedouin participation in the Permanent Forum for Indigenous Issues in New York. In 2011, Mohammed Al-Kurshan, the representative of the West Bank Bedouin, delivered a speech at the 10th session of the UN Forum for Indigenous Issues in New York entitled 'Bringing the Bedouin Voice to the International Community'. In his speech Al-Kurshan asked for protection and recognition of his community as an indigenous group living as refugees and under Israeli occupation. As for the right of participation, Al-Kurshan demanded "that Bedouin be consulted and permitted to participate in policymaking that directly affect the exercise of their indigenous rights - including relocation and resettlement - and that measures be taken to secure their access to basic services and natural resources (especially water) in order to continue living while maintaining their culture and their traditional tribal lifestyle/livelihood". Participation in such forums is important from the perspective of self-perception and empowerment of the community, as well as the trans-national advocacy utilized by the community leaders in bringing their issues to the attention of the world.

Whilst meaningful and consensual participation by Bedouin in decision making affecting them is lacking, Israeli authorities regularly stress, in various court petitions, the efforts they have made to consult with Bedouin communities that they intend to relocate. As noted, the difficulty is that the decision to forcibly transfer the Bedouin, in violation of principles of IHL, is not a decision the Israeli authorities can lawfully make. Rather, Israeli engagement with the Bedouin communities should focus on the most culturally appropriate and sustainable living arrangements it can provide the Bedouin *in their present location*.

In cases in which the Israeli Civil Administration (ICA) do consult with the community on living arrangements in their present location, the process typically takes place in a coercive and one-sided manner in which the Bedouin are presented with a limited number of options that are often inconsistent with basic principles of IHL. Such dialogue is not common, but may include, for instance, tolerating Bedouin presence in a certain area with an undertaking not to demolish homes, provided there is no further construction or development beyond a certain line. Impermissible factors taken into account by Israeli authorities in consultations include the proximity of Israeli settlements, which are illegal in international law, closed military zones and other settler infrastructure. UNRWA notes that:

Unspecified compensation and transfer into a concentrated environment not conducive to the promotion of the pastoral economy or safeguarding of centuries-old customs remains today the only option being proposed by the ICA for the "modernization" of the Bedouin in the Ma'ale Adummim bubble and other parts of Area C.

In other cases, such as the transfer of a number of Bedouin communities to the Al Jabal, 'consultation' with communities has been non-consensual, limited and displayed very little interest in taking into account cultural considerations. In the course of this transfer, UNRWA notes that "the relatively simple steps towards safeguarding their traditional livelihood by ensuring access to natural resources and approving basic infrastructure in their existing rural locations were never offered to the Bedouin by the ICA". On a

²²¹ Mihlar Farah, *supra*, note 26, p. 10.

²²² Information was provided by UNRWA.

²²³ 'West Bank Bedouin Refugee Appeals for Recognition and Protection,' 26 May 2011, available at, http://www.unrwa.org/newsroom/press-releases/west-bank-bedouin-refugee-appeals-recognition-and-protection (accessed, 12 March 2014).

²²⁵ UNRWA and Bimkom, supra, note 102, p. 11.

variety of socio-economic levels, the Israeli process of re-settling the Bedouin to Al Jabal has been viewed as disenfranchising, destructive of culture and tradition and as creating an urbanized ghettoized Bedouin population that is dysfunctional.²²⁶

3.2.4 The Provision of Essential Services without Discrimination

While a primary focus of this report has been on the land tenure of the Bedouin in the West Bank, it is important to note that ongoing Israeli policies against the Bedouin have caused disadvantageous socioeconomic conditions. The Declaration provides that: "[i]ndigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions" and instructs States to "take effective measures...to ensure continuing improvement of their economic and social conditions". "Particular attention" must be "paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities". 227

A host of other major international human rights law treaties also protect the social and economic status of indigenous groups including the CERD (prohibiting discrimination on the basis of race) and the ICESCR (requiring efforts to progressively achieve the right to, *inter alia*, education²²⁸, health²²⁹ and work²³⁰). In its concluding observations on Israel in 1998, the Committee on Economic, Social and Cultural Rights specifically addressed the problems faced by the Palestinian Bedouin citizens of Israel (in the Naqab). It noted "with deep concern that a significant proportion of Palestinian Arab citizens of Israel continue to live in unrecognized villages without access to water, electricity, sanitation and roads."

The Bedouin of the West Bank also face a number of specific economic and social problems; although conditions differ depending upon their area of residence and the geographical sensitivity of their location. The socio-economic situation of the Bedouin often contrasts starkly with nearby Jewish settlers, and even with other Palestinian groups.

Socio-economic rights are interconnected with the right to adequate standard of living, including housing, food, health, employment and education. Israeli authorities, in the Israeli Naqab case, claim that the dispersion of the Bedouin community in large areas and in small numbers makes the provision of services impossible.²³¹ Similar arguments might be raised in the context of the West Bank. However, in both Israel and the West Bank, smaller Jewish communities, at times adjacent to Bedouin villages, are provided with all necessary services. As noted by the Human Rights Committee in its concluding observations on Israel in 1998, with regards to the Negev Bedouin:

14. The Committee is also concerned at the discrimination faced by Bedouins, many of whom have expressed a desire to continue to live in settlements in the Negev which are not recognized by the Israeli Government and which are not provided with basic infrastructure and essential services. The Committee recommends that members of Bedouin communities should be given equality of

²²⁶ UNRWA and Bimkom, *supra*, note 102, p. 26.

²²⁷ Article 21

²²⁸ Article 12.

²²⁹ Article 13.

²³⁰ Article 6.

²³¹ See, Israel Land Administration, *Bedouins in the Negev*, available at http://www.mmi.gov.il/static/HanhalaPirsumim/Beduin_information.pdf ("These services can only be provided to those living in permanent housing, and the fact that the Bedouin are dispersed over an extensive area prevents the state from offering these public services").

treatment with Jewish settlements in the same region, many of which are also dispersed and populated by small numbers of people.²³²

Claims by Israeli authorities of the need to relocate Bedouin communities to cramped urban areas in order to realize their socio-economic rights ring hollow when such services can, and should, be provided in their current locations in the West Bank consistently with principles of international law. There are many options for doing so. A similar position was taken, for the example, by the Committee on the Elimination of All Forms of Discrimination (CERD) in relation to the Nagab Bedouin:

...expresse[d] concern about the relocation of inhabitants of unrecognized Bedouin villages in the Negev/Naqab to planned towns. While taking note of the State Party's assurances that such planning has been undertaken in consultation with Bedouin representatives, the Committee notes with concern that the State Party does not seem to have enquired into possible alternatives to such relocation, and that the lack of basic services provided to the Bedouins may in practice force them to relocate to the planned towns. (Articles 2 and 5 (d) and (e) of the Convention)

The Committee recommends that the State Party enquire into possible alternatives to the relocation of inhabitants of unrecognized Bedouin villages in the Negev/Naqab to planned towns, in particular through the recognition of these villages and the recognition of the rights of the Bedouins to own, develop, control and use their communal lands, territories and resources traditionally owned or otherwise inhabited or used by them. It recommends that the State Party enhance its efforts to consult with the inhabitants of the villages and notes that it should in any case obtain the free and informed consent of affected communities prior to such relocation. ²³³

²³² Human Rights Committee, *Concluding Observations: Israel*, U.N. Doc. CCPR/C/79/Add.93, 1998, available at, http://www1.umn.edu/humanrts/hrcommittee/israel1998.html.

²³³ Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel*, CERD/C/ISR/CO/13, 2007. As noted in relation to the West Bank Bedouin, there is no merit to the consultation process when the proposed 'relocation' is in violation of IHL.

4 CONCLUDING REMARKS

This report has tried to spell out the rights and protections owing to the West Bank Bedouin under international law, including under IHL, IHRL and the emerging body of indigenous rights. This was also done by referring to the status, challenges and experience of the Naqab Bedouin living in Israel's sovereign territory. Along the way the report has considered the concept of indigenous people's rights and the evidence and available information to support a claim of the Bedouin to the status of indigenous people in historical Palestine.

While the Declaration on Indigenous Peoples Rights constitutes non-binding soft law, there is a growing consensus on the need for States, including States exercising extra-territorial jurisdiction as Occupying Powers, to take pro-active measures to give effect to this emerging body of rights and protections, essentially based on IHRL, and correspond with the needs and vulnerability of indigenous groups.²³⁴ Although both IHL and IHRL offer strong protections for the Bedouin in the West Bank, such as the prohibition on forcible transfer and the right to adequate standard of living, there is value in exploring the additional protections that indigenous rights doctrine may offer in light of the emphasis on circumstances that are not well explored under IHL or IHRL. For example, the UN Declaration takes into account the culture, tradition and historical land of particular groups, and the indigenous rights discourse further places special emphasis on the collective nature of rights with regard to land rights and usage in historical perspective, thus historical restorative justice in a sense. Such rights are particularly pertinent to the Bedouin of the West Bank in the context of their tribal and semi-nomadic way of life. Whilst there is some overlap between different rights, the package of protections should be implemented in a complementary way, starting with the status of the Bedouin as protected persons under IHL.

This report should be considered as part of the growing conversation on indigenous peoples rights in historical Palestine. The legal debate and advocacy on Palestinian indigeneity deserves further research, especially in relation to the West Bank Bedouin who are significantly underrepresented in anthropological surveys and scholarly debates. As demonstrated in the report, Palestinian Bedouin, both in the Nagab and West Bank, do satisfy the definition of an indigenous group and should be accorded the requisite respect and protection commensurate with such status.

Protection of these rights should start with a cessation of the demolition of Bedouin homes and livelihood structures, coupled with initiatives to regularize the residential and housing status of the Bedouin in their present locations. The Bedouin need to enjoy security of tenure and residence. This is not limited to the granting of ownership rights, but can take place through confirmation of rights of residence, access, control and land use in the form of leases or other arrangements with land owners, and in order to secure the economic viability of the community. Under IHL, the forcible transfer of the Bedouin is prohibited and considered a grave breach of the Fourth Geneva Convention. Arguments as to why the Bedouin should be transferred should be strongly rebutted using all available forums. The primary duty bearer is Israel, as Occupying Power in the West Bank, but the PA and the international community also have responsibilities to ensure the protection of Bedouin rights. In practice, their ability to act may be hampered by the Israeli control and limitations imposed by the occupation.

In parallel with efforts to safeguard the land tenure of the Bedouin, the Occupying Power must give effect to the human rights of the Bedouin, including the right to adequate housing, and access to services, including

²³⁴ For the State's extra-territorial human rights obligations in relation to persons who find themselves within its power or effective control, see Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 2004, para. 10.

water, electricity, education and humanitarian assistance. Israel should plan for Bedouin communities in their current locations in a manner consistent with their traditional lifestyle. The Bedouin communities should be consulted and given the opportunity to participate in decision making that would impact them, particularly concerning model communal and living arrangements that would respect Bedouin values, concepts of shared space and privacy. Sufficient land should be made available for Bedouin communities in order for them to continue their pastoralist-agriculturist, semi-settled lifestyle in the West Bank. Realistic options to accommodate these needs have been proposed, firstly and foremost by Bedouin communities themselves, but also by UNRWA and NGOs specialising in planning such as Bimkom.

The multiple and ongoing displacement suffered by the Bedouin, their continuing attachment to the land for culture and livelihood, and the risk of destruction of that lifestyle through displacement and urbanisation, makes it particularly critical for Israeli authorities to recognize the land *usage* rights over public land and private Palestinian land (with the consent of the land owners). This could be easily realized, without prejudice to the position of Israel, the PA, and other private Palestinian owners of the land, by granting the Bedouin long term leases or usage rights over the land, coupled with the right to build temporary structures and communities. Such a situation would not prejudice any final status talks between Palestinian and Israeli authorities, nor affect the current status of the land as occupied territory under the temporary control of Israel, pending transfer of the land to a future Palestinian State as part of a two State solution. Additionally, such an arrangement would give substance to the content of indigenous land rights and provide security of tenure for the Bedouin.

It is hoped that this report will serve as a resource for Bedouin communities, legal practitioners, humanitarian workers, NGOs, international organisations including UN agencies, the diplomatic community and others working to uphold Bedouin rights by providing a range of information, including anthropological evidence, legal opinion and analysis and expert commentary on Bedouin and indigenous rights issues. This information can be used as part of a wider legal and advocacy campaign to raise awareness of the need to protect Bedouin unique culture, prevent displacement and encourage duty bearers to take pro-active steps to implement the rights owed to the Bedouin as protected persons and indigenous people under international law.

