



# Responsible Land Governance: Towards an Evidence Based Approach

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY  
WASHINGTON DC, MARCH 20-24, 2017



## **STRENGTHENING TENURE SECURITY OF THE WEST BANK BEDOUIN**

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**Paper prepared for presentation at the  
“2017 WORLD BANK CONFERENCE ON LAND AND POVERTY”  
The World Bank - Washington DC, March 20-24, 2017**

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# Responsible Land Governance: Towards an Evidence Based Approach

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## **Abstract**

The Bedouin in the West Bank – a Palestinian territory occupied by Israel – 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. They originate from the Negev/Naqab desert, from which they were compelled to flee during and following the 1948 Arab-Israeli war. Following the 1967 war and the occupation of the West Bank by Israel, the Bedouin residing in the area are under the effective control of Israel as the occupying power. The Bedouin communities in the area have undergone several displacement waves and are constantly struggling to prevent further displacement brought about by numerous factors, including: border changes; the establishment of Israeli settlements; the construction of roads and infrastructure around the settlements; the construction of the separation wall; closure of areas for military training purposes; lack of formal land title; and lack of adequate planning schemes which make any and every building illegal under the existing planning laws and therefore in threat of demolition. Combined, these have produced a reality of tenure insecurity for the Bedouin communities of the West Bank, with devastating humanitarian implications that warrant timely and effective response by the international community.

**Key Words:** Bedouin, IHL, occupation, West Bank, tenure-security.

## **INTRODUCTION**

### **THE NAQAB BEDOUIN DURING THE OTTOMAN AND BRITISH MANDATE PERIODS**

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, Lebanon, Israel, Egypt, Algeria and Morocco. The West Bank Bedouin 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. 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. 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 (Al Aref, 1999).

In 1914, nearing the end of the Ottoman rule in Palestine, Bedouin tribes in the Negev/Naqab<sup>1</sup> and Bi'r as-Saba amounted to around 55,000 people (Muhsam, 1966). During the British Mandate, Bedouin numbers were estimated at around 65,000-100,000 (Abu Rabia, 1994). 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 (Muhsam, 1996, p. 9-24). In 1948 most of the Bedouin became refugees in neighboring Arab countries, with the remainder numbering approximately 12,000 (Goldberg Commission Report, 2011). Most of the Bedouin outside Israel are registered as refugees under the UN Relief and Work Agency for Palestine Refugees in the Near East (UNRWA), and live primarily in Gaza, Hebron, Sinai and Jordan, but also throughout the West Bank.

### **THE BEDOUIN IN AREA C OF THE WEST BANK**

The majority of the West Bank Bedouin reside today in 'Area C'.<sup>2</sup> According to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), an estimated 297,900 Palestinians live in 532

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<sup>1</sup> Negev/Naqab are used interchangeably throughout the paper. 'Negev' and 'Naqab' refer to the same territorial unit, located today in southern Israel. Negev is the Hebrew name which has its etymological roots in the Bible. In Arabic, the Negev is known as al-Naqab or an-Naqb ("the [mountain] pass").

<sup>2</sup> Oslo accord II, also known as the 'interim agreement', concluded in September 1995, divided West Bank territory into three categories. Area A which includes the Palestinian cities (constituting some 18% of the West Bank) was assigned to full civil and security Palestinian Authority (PA) control. Area B, which included most of the built-up areas of the Palestinian villages, (22%) was placed under full Palestinian civil authority, yet remained under Israeli security control. Area C which included the settlements, the main roads, and extensive rural areas (60%), remained under Israeli civil and security authority. Certain civilian powers in Area C were transferred to the Palestinian Authority, yet security and land-related issues (such as planning and building, nature reserves, etc.) remained under full Israeli control. Initially, the division into Areas A, B and C was not intended to last more than five years. In the period 1995-2000, the divisions changed multiple times following the phased re-deployments of the Israeli military from

residential areas in Area C (OCHA, 2014), out of which around 30,000 Bedouin and herders, divided into approximately 2000 Bedouin families in the south (Hebron/Bethlehem); 2000 families around the central West Bank; and 1000 families in the north. The majority of the Bedouin in the West Bank today are classified as Palestine refugees originating from the Bi'r as-Saba's region. 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. 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.

Within area C of the West Bank, the Bedouin are arguably the group most affected by Israeli policies amongst the Palestinians. This far-from-coveted title was also recently confirmed by the UN Secretary General, which called attention in his report on Israeli settlements in the Occupied Palestinian Territory (2016) to the fact that the "Bedouins living in Area C are the most affected by demolitions and at risk of forcible transfer." The assessment of their vulnerability conducted by UN Development Programme (UNDP) also factors in that most of the Bedouin in Area C have no access to municipal services, water, electricity, public transportation and 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. Lastly, more than half of the Bedouin in Area C (around 55 percent) are food insecure (UNDP, 2013).

## **THE LEGAL STATUS OF THE WEST BANK BEDOUIN**

The Bedouin in the West Bank have different, and sometimes, overlapping statuses with different legal protections and implications. 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.<sup>3</sup> Following the 1967 War many of them were displaced once again from their new post-1948 habitual site, making them also internally displaced persons (IDPs) and entitled to the protection owed to displaced persons under international law. These

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some areas and the gradual transfer of authority to the newly-created Palestinian Authority. Since 2000, no official changes to these areas has been made (OCHA 2014).

<sup>3</sup> According to UNRWA's eligibility rules, the operational definition of a Palestine refugee is any person whose "normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict." Palestine refugees are persons who fulfil the above definition and descendants of fathers fulfilling the definition. The UNRWA Agency also provides services to refugees and people displaced by the Arab-Israeli conflict of 1967 and subsequent hostilities. Its fields of operation are: Jordan, Lebanon, the Syrian Arab Republic, West Bank and the Gaza Strip. See: <https://www.unrwa.org/>

protections are developed in soft law documents such as the UNHCR Guiding Principles on Internal Displacement (2004). Some Bedouin live within the current municipal boundaries of Jerusalem, and are Israeli residents or entitled to such residency.<sup>4</sup> 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 (NRC, 2015, p.11).

Under International Humanitarian Law (IHL), the Bedouin are ‘protected persons’ as this status is defined in Article 4 of the Fourth Geneva Convention.<sup>5</sup> They are also protected by International Human Rights Law (IHRL), which co-applies with IHL in occupied territory (ICJ, 2004, para.106). Finally, the Bedouin may be classified as Indigenous People with the consequent protections available under international law for such categories of persons. 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. As will be shown, the difficulties related to tenure security facing the West Bank Bedouin stem not from the abundance of international legal norms, but rather from the lack of respect and implementation of the obligations spelled out in these norms.

The first section of the paper opens with a discussion of the characteristic most identified with the Bedouin, namely, their semi-nomadic migration pattern. Among the several characteristics of which Bedouin identity is constructed, understanding the migration pattern of the Bedouin in the West Bank has particular relevance to the issue of tenure security. The first section also includes a discussion of the Bedouin in respect to the international law on indigenous persons. The second section provides an overview of the laws applicable to the West Bank relating to Housing, Land and Property rights (HLP), spanning from the Ottoman period to the present. To date, the Ottoman land law is the applicable law in the West Bank. However, its interpretation and implementation have undergone significant changes to the detriment of the Palestinian and Bedouin population residing in the area. Specific focus is given to the change in the Bedouins’ legal status as a consequence of the transition from Jordanian to Israeli occupation— a transition which resulted in a significant weakening of their tenure security. This is followed by a presentation in the third section of the contemporary practices and policies implemented in the West Bank by the occupying power, Israel, which undermine the Bedouins’ right to tenure security. The fourth and last section concludes with

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<sup>4</sup> 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).

<sup>5</sup> “Persons protected by the Convention are those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of persons a Party to the conflict or Occupying Power of which they are not nationals...”

recommendations and steps that the international community is encouraged to adopt to strengthen tenure security of the West Bank Bedouin.

### **I.i. THE BEDOUIN: SEMI-NOMADIC / NOMADIC PASTORALISM**

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*. ‘Semi-nomadic’, or ‘nomadic pastoralism’, is a two-fold concept which seems to be *the* definitive characteristic of Bedouin identity, or way of life.

In her seminal book *From Camel to truck: the Bedouin in the modern world*, Dawn Chatty (2013) provides a brief, yet comprehensive, explanation of the Bedouin migration pattern throughout the north and center of the Arabian Plateau (which correlates roughly to the middle east region)—a pattern that reflects not only the need to migrate, but at the same time, the need for some form of stability or certainty within migration, which ultimately led to the division of lands between tribes. Migration “at its core”, Chatty explains, “was, and still is, determined by a combination of seasonal and areal variability in the location of pasture and water. Because water and grass could be in short supply in a particular area at the same time that it was abundant elsewhere, survival of both herd and herders made movement from deficit to surplus areas both logical and necessary. Thus each group sought to control a territory that contained sufficient resources to sustain communal life. The relatively stable dominance, over a period of time, of such territory by a group of genealogically related agnatic segments identified a pastoral nomadic tribe.”(Id, p. 29-30)

Although obvious at second thought, at first glimpse it is easy to forget that Bedouin nomadism is not without confines. The constant demand for grazing lands, water, and a living environment that is compatible with the varying seasonal desert conditions still dictates the migration of many Bedouin tribes. Even within extremely limited areas, such as those in which the West Bank Bedouin communities roam, slight movements in anticipation or in response to changing weather conditions mean a lot. Moving from east to the west, there is a marked transition from a Mediterranean climate which enables regular cultivation, to a desert climate suitable only for grazing. Due to the hilly terrain of the West Bank, a modest change of location that is only a few kilometers beeline can have significant implications in terms of wind, temperature, rainfall, exposure to direct sunlight — all of which are crucial factors for living and for sustaining livestock in desert conditions.

The physical space in which the Bedouin communities can maintain their migration pattern is constantly being carved away, a process which effects the communities’ ability to preserve their economic, social, and

cultural lifestyle. The Bedouin localities residing in the periphery of East Jerusalem are a case in point. As detailed by the NGO 'Bimkom- Planners for Planning Rights', the Bedouin communities located east of Jerusalem are organized in residential clusters arranged mainly according to extended family, or in clusters of a number of tightly knit families. The clusters encompass temporary structures that are usually constructed of light building materials, such as iron, wood and tin. These structures are covered with makeshift cloth and plastic roofs. The Bedouin communities are sparsely distributed. Historically, this is attributed to the concern for personal privacy, and the need for spatial segregation that arises from it, in addition to the requirement for relatively expansive and open spaces for the purposes of raising flocks. However, the inclination to scatter over an expanse has over the years been reduced as a result of elaborate development and construction of infrastructure for Israeli settlements and military use (Bimkom, The Bedouin Communities East of Jerusalem – A Planning Survey). A detailed account of this process is discussed in section III.

## **I.ii. THE BEDOUIN AS INDIGENOUS PEOPLE**

### **BACKGROUND**

Whilst the Bedouin can be seen as 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.

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 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 (NRC, 2015, p.4).

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 is the doctrine of indigenous peoples rights considered 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. 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.

### **CLASSIFICATION OF BEDOUIN AS INDIGENOUS PEOPLE**

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 (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 (NRC, 2015, p.5). 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.

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 not adopted a definition of indigenous peoples. Yet, the prevailing view today is that no formal universal definition is necessary for the recognition and protection of their rights. (UNDG Guidelines on Indigenous Peoples' Issues, 2008).

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 (1996):

- 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.

The indigenous status of the Bedouin enjoys a near consensus within international forums, and is supported by the views of international experts, most notably two recent Special Rapporteurs on Indigenous People (Report of the Special Rapporteur on the Rights of Indigenous Peoples, 2011, pp. 24-31). Whilst much of the material in this respect 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 neighboring tribes in the Naqab.

Notwithstanding, the classification of the Naqab and West Bank Bedouin as entitled to the protection afforded to indigenous peoples is not without contention. The objections are of legal as well of political nature. The following are some of the main objections and countering arguments.

Based in part on the ‘time-priority’ argument, some commentators holds that the majority of the Bedouin arrived in the Naqab in the eighteenth and nineteenth centuries, after Ottoman rule was already established in the region, and that the Jewish people have, if anything, a greater right to be considered indigenous than the Bedouin (Yahel, Kark, Frantzman, 2012) . In response, it is argued, first on factual grounds, that research shows that Bedouin have lived in the Naqab at least as back as the seventh century. On a more principled level, the argument is that this claim appears to misunderstand the time-priority requirement, 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. The emphasis of most researchers of indigeneity is on previously autonomous cultural groups, strongly connected to their lands, which was subjugated to a modern state. If the ‘time-priority’ requirement meant that indigenous peoples must be present in their territory ‘‘since time immemorial’’, several groups that are today considered indigenous would lose their status (e.g. the Sami people in Scandinavia which arrived very shortly before their occupiers, the Mauri people who immigrated to New Zealand some 600 years ago and occupied it from its Polynesian inhabitants) (Yiftachel, Roded, Kedar, 2016). 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 (Id).

A different counter perspective 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 claims that denationalizes the Bedouin as Palestinians, or de-indigenizes the rest of the Palestinians.

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 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. Countering this, is the ‘relational-political’ approach to indigeneity, according to which indigeneity is (also) a strategic tool for resisting persisting marginalization and dispossession (Id), and therefore, should be utilized whenever possible to raise awareness and gain support for the Bedouin cause.

### **INDIGENOUS LAND RIGHTS IN THE CONTEXT OF BELLIGERENT OCCUPATION**

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.

The recognition of the right to land which indigenous people “have traditionally owned, *occupied or otherwise used or acquired*” (Article 26 of the Declaration) 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 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.

In the context of belligerent occupation, a fundamental question arises: whether Israel, as the occupying power, is even 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 Negev, for example, since the area is within its sovereign territory, its legal powers under the law of occupation are more limited. Yet, 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. In this respect, Israel should respect and protect the Bedouins’ informal land usage, lease and possession agreements, their right to housing and their desire to preserve their cultural identity and traditional lifestyle (NRC, 2015, p.38).

## **II.i. THE LAND REGIME IN THE WEST BANK**

This section provides an overview of the land regime in the West Bank throughout two time periods: 1948-1967 and 1967-present. In the period 1948-1967, the West Bank was under the administration of Jordan, which gained control over it during the 1948 war, and later unilaterally annexed it and extended its laws to the area. Jordan's annexation was widely regarded as illegal and void by the Arab League and by the international community, with the exception of Britain, Iraq and Pakistan (Benvenisti, 2004). Nonetheless, up until the eve of its occupation by Israel, the Jordanian laws were the laws applicable to the West Bank.

Why should the domestic laws applicable to the West Bank prior to the present occupation be of relevance to the understanding of the current HLP rights of the Bedouin residing in the area? Under IHL, the occupying power is under an obligation to keep intact the domestic laws applicable in the territory before it came under its occupation, as long as they were not abrogated before the occupation started and are not contrary to international law (Bouttruche and Sassòli, 2014). Thus, the occupying power may exercise only limited legislative powers and may enact or abolish laws only under certain conditions set out by the international law of belligerent occupation. In conformity with its legal obligations as an occupying power,

shortly after occupying the West Bank in 1967, the Israeli military forces commander issued proclamations stating that the prevailing law would remain in force, subject to changes made by military orders and proclamations. Some of the changes, which include annulments of prior domestic planning laws to the detriment of the protected persons residing in the West Bank, are discussed below.

The domestic law in force in the West Bank is a complex amalgam of Ottoman codes, British Mandate amendments thereto and regulations adopted before 1947, and Jordanian law. Since Ottoman and British mandate laws and regulations on land ownership apply to date to the West Bank, let us briefly dwell on the policies of the Ottoman and British mandate administrations' with respect to Bedouin land issues before considering more recent issues.

## **II.ii. THE OTTOMAN AND THE BRITISH MANDATE PERIODS**

The Arab tribes spread throughout the Middle East during the early Muslim expansion in the seventh century (632–732). These tribes had diverse traditions concerning land rights. Nonetheless, roughly speaking, they all recognized a tribal 'dira', that is a communally held territory that included seasonal grazing areas, rather than individual ownership (Kark & Frantzman, 2012, p.488). Tribal territories often overlapped and were contested, yet it is reported that the tribes themselves had a keen understanding of the boundaries, which were usually defined by natural and man-made landmarks, such as wells. Although cultivation and graze were generally unrestricted, there was strict ownership of wells. The Bedouins' main completion over land and resources were the city dwellers (Biladi'in) and the peasants (Fellaheen) (Ibid).

The introduction of the Ottoman Land Code of 1858 to the Arab provinces of the Ottoman Empire (except for Egypt and much of what became Saudi Arabia) changed this state of affairs. The code was drafted with the intent of codifying the various traditional land divisions used throughout the empire in order to improve tax collection and promote cultivation of non-profitable lands. The introduction of the code resulted in changes to ownership rights of village lands, especially in sparsely inhabited regions. This significantly impacted Bedouin controlled land, large parts of which were made available for sale (Id, p.489).

The code classified lands into five categories, out of which the two most relevant for the present discussion are 'Mawat' and Miri':<sup>6</sup>

'Mawat' are uninhabited and uncultivated land located beyond the ring surrounding the village. Mawat land is defined as either a place so far from the village that even the furthest living villager cannot hear the call

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<sup>6</sup> The remaining three are: **Mulk** (privately owned land); **Matruka** (communal land); and **Waqf** (land assured to pious foundations or revenue from land assured to pious foundations).

of someone who is in the said land, or as land located 2.5 kms from the outermost village houses that existed at the time.

‘Miri’ which is designated for agricultural use, extends between Mawat land and the outermost houses of the village. Miri land forms a kind of ring enclosing the old core of the village with a radius of 2.5 kms on all sides. Uncultivated land within this circle also constitutes Miri, rather than Mawat, land.

Up until the closing decade of the 19<sup>th</sup> century, the Naqab Bedouin lived in relative freedom since the Ottoman government refrained from intervening in the area. This changed in 1896 (due, among others, to ongoing territorial disputes between the tribes in the Naqab) when the government demarcated intra-tribal territorial boundaries and confined each tribe to an allocated area. This was achieved through agreements with the tribes’ leaders, yet has also been described by Kark and Frantzman (2012, p.490) as an attempt “to forcefully pacify the Negev Bedouin’, by their sedentarization. It is disputed whether this process, by which the Naqab lands were divided between the Bedouin tribes, granted the Bedouin formal ownership over the lands or not and whether it implied that the Ottoman government acknowledged the traditional ownership patterns of the Bedouin. The Negev Bedouin, on their part, generally avoided the possibility of registering their tribal diras for reasons that have to do with taxation and conscription. Ultimately, the tribal division into defined territories and the establishment of Be’er Sheva in the beginning of the 20th century contributed to the transition of the Bedouin from nomadism to semi-nomadism.

During the British Mandate of Palestine (1917–48), the British adopted the Ottoman land laws and enacted a series of laws and regulations which considerably affected the Bedouin (Id, p.494). The Mawat Ordinance of 1921 sought to bring an end to unauthorized incursions into and takeover of lands by prohibiting the revival of Mawat lands without the authorities’ authorization.<sup>7</sup> The ordinance stated that any person who revived Mawat lands in the past must notify the authorities within two month and request a deed. Most of the Bedouin, however, refrained from officially registering their land claims due to several reasons, the main one being that they did not consider such lands Mawat (because they were not uninhabited), and therefore did not require registration. Additional reasons included unawareness of the ordinance and again reasons that have to do with taxation and conscription. It is also claimed that the British carried out registration processes mainly in parts of Palestine with higher population densities such as the Galilee. However, in less densely populated areas like the Naqab, where most of the Bedouin resided, the British

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<sup>7</sup> Another example is the Bedouin Control Ordinance of 1942 which was used to compel tribes to stay within certain areas. It sought to provide the administration with special powers of control of nomadic or semi-nomadic tribes with the object of persuading them towards a more settled way of life.

administration did not resolve issues of land tenure (Id, pp. 491-494). This has been interpreted as implying that the British, like the Ottomans, respected the tribal agreements in the Naqab and therefore let them be.

During the mandate period, there was a significant difference between the two systems of law applicable in Palestine and in Transjordan (subsequently Jordan) (Mogannam, 1952, p.195). While in Palestine old Ottoman laws were gradually repealed and replaced by modern legislation based for the most part on the Common Law of England and British statutes and rules, in Transjordan English Common Law was not applicable. The Ottoman Commercial and Criminal Codes (the Mejjelle) remained in force. When Jordanian forces occupied the West Bank in May 1948, the military governor at the time, Ibrahim Pasha Hashim, issued a proclamation to the effect that all laws and regulations in force in Palestine up to the termination of the Mandate remain in force, provided that they were not in contradiction to the Transjordan Defence Regulations (Id, p.195-196).

#### **1948-1967**

Jordan granted citizenship to the Palestinians in the West Bank, including the Bedouin. In a legal sense, all relevant Jordanian laws applied to West Bank Bedouin just as they did to others who were Jordanian citizens after 1948. However, it is noteworthy that laws at the time did not grant Jordanian citizens social and economic rights such as the right to housing, to healthcare, etc. (Fischbach, NRC.)

As for land ownership in the West Bank, under Ottoman and Jordanian law, individuals who cultivated Mawat land could purchase it from the state and consequently obtain usufructuary rights to it. Sales of Mawat land would usually occur during land settlement operations (the British commenced land settlement operations in the West Bank in 1928 and the Jordanians in 1952). The purpose of the settlement operation of 1952 was to determine once and for all the ownership and other rights to lands in each village. It should be stressed that such land was registered to the state only if there were no pre-existing claims to the land. If there were such claims, the government recognized them as prescriptive ownership rights and granted usufructuary rights to the cultivator working the land in return for payment of a fee (Id).

Once Mawat land was registered, the classification of the land changed from 'Mawat' to 'Miri' (Bimkom, 2008). Thus, the Jordanian government's practice was to sell Mawat land to those using it, rather than keeping hold of it and/or evicting people living on it, because the state treasury would receive the price of the land and subsequent registration fees and taxes. It is unclear, however, whether or not the land in question could include non-cultivated and/or non-cultivable portions. In other words, it seems that mere inhabitancy was not enough to acquire rights to the land.

During Jordanian land settlement operations, settlement officers generally registered cultivated Mawat land that they encountered to the person(s) cultivating it, who were responsible for paying for the land in installments. In a 1955 report, Jordanian Director of Lands and Survey Muhammad Isma`il confirmed this, noting the following about the disposal of state lands to nomadic Bedouin during land settlement operations: “[p]ermission is given to nomadic tribes to open and revive the lands they want provided that no tribe shall encroach on a land assigned to another tribe in accordance with the old divisions agreed upon amongst them” (Fischbach, NRC). Land settlement processes ended such practices by surveying and registering parcels of land in the names of specific individuals and registering large areas of uncultivable land in the name of the state. Further noteworthy is the wide scope of permissible evidence in the settlement process (and in subsequent appeals before the Land Settlement Court), including: documentary evidence, oral evidence, and traditional rights.<sup>8</sup>

Let us now turn our focus to Jordanian policies concerning the Bedouins’ right to pasture, movement and the use of land. In the first half of the 1950s, the Jordanian government attempted to move Palestinian refugees living close to the cease-fire lines with Israel away from those borders for security reasons. Since some refugees were crossing the lines back into Israeli territory, the Jordanian government feared this could lead to Israeli reprisal raids. This policy was directed at all refugees, not just Bedouin. Not all refugees complied, however. Additionally, the head of the Jordanian Arab Legion, Lt.-Gen. John B. Glubb, tried to convince some Bedouin tribes in particular to leave the West Bank altogether and accept land on the East Bank. The ultimate decision of whether or not to accept this offer rested with the head shaykh of each tribe. Once again, not all complied. Some chose to stay in the West Bank, including close to the cease-fire lines (Plascov, 1981, p. 78-79). All in all, research conducted by Michal R. Fischbach (NRC) found no Jordanian policies prohibiting Bedouin from moving from one location to another with their flocks, etc.<sup>9</sup> Apart from security reasons, the Jordanian government did not carry out forced sedentarization of the Bedouin.

Another Jordanian government policy vis-à-vis the Bedouin (although not dealing with their specific ability to move about) was to conclude agreements with UNRWA to provide animals and fodder to Bedouin refugee families in order to assist them economically. These agreements concerned Bedouin families who resided on state land and included assessments done by UNRWA to find grazing lands which could be made available for the use of the families (UNRWA, 1956).

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<sup>8</sup> Article 14(2) of the Land Settlement Law permits the Land Settlement Court to admit evidence that would be inadmissible in civil courts (e.g. oral or written evidence of unofficial sales and tax receipts).

<sup>9</sup> In a written report concluding a census conducted in 1961, the Bedouin movements in the West Bank are described without making any reference to such movements being “illegal” or undesirable.

## **1967-present**

By 1967, only a third of the lands in the West Bank were registered with the Lands Registrar as part of land settlements initiated by the mandatory authorities and subsequently by the Jordanian Crown (Bimkom, 2008). Shortly after occupying the West Bank, the Israeli military commander issued a military order prohibiting the completion of land settlement in the West Bank [(Military Order 291, Order Concerning Settlement of Disputes Over Land and Water (December 19, 1968)]. The freezing of land settlements left two-thirds of the West Bank lands unregistered.

Between 1967 and 1979, military orders were used to provide land primarily for the establishment of military bases, but also for civilian settlements (e.g., Kiryat Arba, Matityahu, Beit El, Jordan Valley settlements). This was done through requisition orders for military purposes.<sup>10</sup> The establishment of settlements by requisition orders was justified based on the claim that the settlements were intended to serve predominantly a security function.

The extensive use of military requisition orders ended in 1979 following the HCJ ruling in the Elon Moreh ruling (HCJ 390/79 Izat Mohammed Mustafa Sweikat and 16 Others v Government of Israel et al.). As opposed to previous cases, the HCJ accepted the petitioners' argument that the requisition of their land for the purpose of establishing the Elon Moreh settlement was illegal, since its primary purpose was civilian, not security. The Elon Moreh ruling had a dramatic impact on Israeli settlement policy, bringing to an end the use of military requisition orders for the purpose of settlement establishment. (Requisition orders were nonetheless continued to be issued for purposes defined as security-related.)

While continuing to build settlements on the basis of requisition orders issued prior to the said ruling, Israel sought new legal avenues to ensure land reserves for the settlements. The legal foundation for such a move was found in the declaration of 'state land' pursuant to the Ottoman Land law from 1858. Since this law is still good law in Jordan, its implementation does not entail a change to the laws applying in the West Bank.

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<sup>10</sup> In this regard, the establishment of the Ma'ale Adumim settlement stands out because, although the majority of the lands on which the settlement and its adjunct industrial areas were expropriated before 1979, the procedure implanted was not requisition for military needs, but expropriation proper. The essential difference between requisition and expropriation relates to their validity over time: "Requisition of land is temporary: the requisition order itself is valid for a limited time, but may be extended. The requisition does not change ownership of the land, which remains in the hands of the Palestinian owners, but they temporarily lose the right to use it. The state also offers payment for the use of the land. In other words, the landowner is forced to "lease" the land to the state. Expropriation, on the other hand, is permanent: ownership switches from the individual Palestinian to the state forever. In this case, too, the state offers the owner payment for the land, but he/she may refuse to accept the payment. Indeed, for political and other reasons, in most cases, Palestinians whose land has been expropriated or requisitioned by Israel refuse compensation." (Bimkom/B'tselem, 2009, pp. 10-11).

Yet its wide interpretation, to the detriment of the protected persons, arguably runs counter to the occupying power's duties under Article 43 of the 1907 Hague Regulations.

Most of the declaration of lands as 'state lands' were made on Miri land (which, as aforementioned, is a category that also encompasses uncultivated lands, as long as they lie in a radius of 2.5 kms from a village's built-up area). In comparison to the interpretation given by the British and Jordanian governments to the conditions under which ownership to Miri land may be acquired, the Israeli interpretation is narrower. For example, the demand of continuous cultivation: pursuant to the Ottoman Land Code (Article 78), ownership of Miri land can be acquired by 10 years' cultivation of the land throughout which the state did not object to the use. The code does not define the nature of cultivation required to attain ownership. The British Mandatory Supreme Court ruled that a farmer who cultivated Miri land for 10 years and then ceased cultivating it did not lose the ownership rights he had acquired in the parcel, even if he did not register it on his name in the land registry. This interpretation was applied in the West Bank also during the period of Jordanian rule. Israel adopted a different interpretation, according to which unregistered Miri land which had been cultivated for 10 years or more, after which cultivation stopped, was government property and could be declared as state land (Btselem, 2012). The requirement of continuous cultivation is at odds with Bedouin practice and totally artificial given that their traditional of life is nomadic.

Another example concerns the nature and scope of cultivation required to be granted ownership, a matter open to interpretation since it too is undefined in the Ottoman Land Code. The British Mandatory Supreme Court ruled that in a rocky parcel of Miri land, cultivation of pockets of fertile land scattered here and there grants the farmer ownership rights in the entire parcel – an interpretation applied by the Jordanians as well. According to the Israeli interpretation, however, a person who claimed rights in rocky land must prove cultivation of at least 50% of the entire parcel. If the pockets of land under cultivation are less than 50%, the entire parcel is deemed state land, leaving the farmer with no rights (Id).

Finally – and this point is particularly relevant to the Bedouin – under the Ottoman Land Code, public land (Metruka) is defined as (i) land that serves the entire public (for example: roads), and (ii) land designated for a specific group, e.g., grazing land used by a certain village for many years. The British Mandatory Supreme Court ruled that in order to establish collective rights in the land, residents of the relevant village need to prove no more than the fact that they used the land for grazing over years. Many of the declarations made by Israel were based on the opposite logic, namely, on the claim that the said public land was not cultivated, but only used for grazing (Id).

In conclusion, although the lands laws applying to the West Bank have remained, for the most part, intact, their interpretation and implementation underwent significant changes which collide head-on with Bedouin migration patterns, favoring instead Israeli security and political interests.

### **III. UNDERMINING TENURE SECURITY : POLICY AND PRACTICE**

The forced displacement of the Bedouin communities in the West Bank from their present locations entails a wide array of practices and policies discussed below, which undermine their tenure security and run counter to the purpose of the protections afforded by IHL.

As Bedouin rights to tenure or land usage in the West Bank were registered by the Jordanian authorities only in limited areas during the land settlement process in 1952, they were left for the most part unprotected at the time of the Israeli occupation: they had been displaced from their traditional lands in the Negev/Naqab, but had not formally been granted any rights to tenure security on the land to which they had been displaced. Any claims they may have had to a right to live and/or build on public land which they had been using and grazing their herds was not accepted by the Israeli regime. Jordanian practice, which allowed the Bedouin to reside on and build on the land without evictions, in tacit acknowledgment of their right to land usage, was not taken into account. Without such status it was near impossible for the Bedouin to be granted building permits under Israel's selective interpretation of pre-existing Jordanian, British and Ottoman laws and practice. Bedouin attachment to the land, but lack of attachment to the intricacies of land administration, thus left them exposed and vulnerable again.

#### **III.i. DEMOLITIONS AS SANCTIONS FOR ILLEGAL BUILDING**

The number of building permits granted annually for Palestinian villages is negligible, especially when compared to the rate of demolition orders issued.<sup>11</sup> Being aware of this, applications are submitted (if at all) usually after the said building has been erected and the Israel Civil Administration (ICA)<sup>12</sup> has begun pursuing enforcement measures. Demolition orders affect not only Palestinians villages in Area C, but also those villages located in portions of Area B which are completely surrounded by C. Over the past 20 years,

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<sup>11</sup> Between the years 1972-2005, the approval rate of building permits for the Palestinian population in the West Bank decreased from 97% to 6.9%, and the number of applications decreased 2,199 to 189. Between 2014 and 2016 Palestinians requested 1,253 building permits in Area C – 440 in 2014, 385 in 2015 and 428 in 2016. Only 53 of these requests were approved. In 2014 only nine building permits were issued, in 2015, seven, while in 2016 there was a steep increase, and a total of 37 permits were issued through June. During that same period, 2,141 demolition orders were given for Palestinian structures in Area C – 832 in 2014, 875 in 2015, and through June of this year, 434. Less than half of these orders, 983, have been carried out so far. Nevertheless, on average, 18 Palestinian structures are demolished for every one that receives approval. (Bimkom, 2008, pp. 10-11); <http://www.haaretz.com/israel-news/premium-1.761306> (Dec 27, 2016)

<sup>12</sup> The Israeli Civil Administration is the governing body that operates in the West Bank. It was established by the government of Israel in 1981, in order to carry out practical bureaucratic functions within the occupied territories.

due to natural growth, these Palestinian villages had nowhere to expand but into adjacent lands in Area C. Yet, because the owners were unable to obtain building permits from the ICA, these houses (estimated at 11,000) are considered illegal and subject to demolition orders (Shatzberg, 2016).

In general, the ICA 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. The demolition of Bedouin homes in Area C (and the homes of other Palestinian communities) is, thus, justified under the prerogative of maintaining law and order and preventing construction without an Israeli issued building permit.

According to OCHA data, Palestinian Bedouin and herding communities were specifically targeted in a wave of demolitions carried out recently, during September-October 2016 (OCHA, the Monthly Humanitarian Bulletin, 2016). Furthermore, Haaretz reported that in the first week of 2017, 12 tin and wood shacks – including eight used for living purposes – were demolished in two Bedouin communities from the Jahalin tribe; three shacks in Bir al-Maskub; and nine in Wadi Sneysel. In total, 84 people, 68 of whom are children, lost the roofs over their heads within just a few hours (Hass, Haaretz).

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". 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. Boutruche & Sassoli (2014, p.9) have noted that the unique context of a protracted occupation should moreover be taken into account 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 (Id., 27-31). They further noted that the Israeli planning and building regulations are themselves discriminatory, disproportionately applied and in violation of international law. As noted by Bothe (2015, p.5-6), "the enforcement of a law which violates international law cannot be lawful".

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 for housing, 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, 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 (NRC, 2015, p.20).

The destruction of Bedouin homes or property, even if built without a permit, also constitutes a violation of Article 53 of the Fourth Geneva Convention (‘prohibited destruction’). According to Article 53, any destruction by the occupying power of real or personal property belonging individually or collectively to private persons is prohibited, “except where such destruction is rendered absolutely necessary by military operations.” 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, subsequent to ICRC’s Commentary on Fourth Geneva Convention (Geneva, 1958, art 53.), “try to interpret the clause in a reasonable manner: whenever it is felt essential to resort to destruction, the occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done.” The occupying power is thus obliged to follow the principle of proportionality, which protects against bad faith circumvention of the protection of private property. The fact that Israel, as the occupying power, makes no provision for the regularization of the status of the Bedouin in their present location, can be interpreted as disproportionate. However, as aforementioned, the demolition of homes and confiscation of properties is not carried out for military purposes nor is it justified by the ICA as such.

### **III.ii. CULTURALLY INAPPROPRIATE RELOCATION PLANS**

In July 2011, the ICA indicated its intention to relocate approximately 27,000 Bedouin and herding Palestinians communities living in Area C throughout the Jerusalem periphery, Jordan Valley and South Hebron Hills to three relocation sites located in the West Bank:

- Al Jabal (located in the Jerusalem periphery) into which 2000 people have already been relocated in several waves during the 1990s and there are additional plans—which have already been approved—to move additional 20 communities, comprising 2,300 persons. However, as a result of petitions filed against the plan by the Jahalin community, due among other to environmental and health safety concerns (the proximity of the site to Jerusalem’s principal dump), objections can now be submitted.
- Tel Nweima (located near Jericho) is the biggest relocation site, planned to host around 12,500 Bedouin. Originally, the plan was intended for the Rashaida people who live in the immediate area. Yet it was later decided to expand the plan and concentrate within it most of the Bedouin

communities of the central West Bank who belong to other tribes (Kaabneh and Jahalin), thus creating a large town comprised of more than 2,200 housing units, built in high density. In late 2014, dozens of members of the Rashaida, Kaabneh and Jahalin tribes filed objections to the plan arguing that it ignores the basic characteristics of Bedouin society and tries to force them into the model of a community settlement, which is inappropriate for Bedouin culture. Following petitions filed to the HCJ by the communities, arguing, among others, that the plan was drawn out without consulting the affected communities, construction of the site has been put on hold pending final judgment.

- Fasayil (located in the Jordan valley) is planned to host 1,200 Bedouin. This site is — for the time being— not being further promoted.

Building on experience from the relocation to Al Jabal (a case study assessed jointly by UNRWA and Bimkom, 2013), the forced transfer of the West Bank Bedouin into densely populated sites is likely to entail a devastating blow to their economic and social viability in its current form. Due, among others to limited availability of grazing land at the designated sites, the majority will most likely be unable to maintain traditional sources of livelihood. Lack of space also exacerbates tensions between groups or tribes 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 (Id, 34).<sup>13</sup> Indeed, as all cultures, Bedouin culture evolves and changes in relation to the culture and context around it. However, even in face of changes to nomadic lifestyles, tribal and family ties have not disintegrated – a factor which, for example, was not given due consideration in the composition of the Tel Nweima site.<sup>14</sup>

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 centers to provide access to basic health, water, education and other services. 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 and Bimkom (2013, p.42).

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<sup>13</sup> Previous instances of forcible transfer have particularly 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 (UNRWA and Bimkom, 2013, pp. 33, 39).

<sup>14</sup> In this respect a key objection that was raised is that the logic behind the planning does not fit the model of Bedouin settlements. Thus, for example, a distinction made in the plan between residential and agriculture lands does not reflect the Bedouin ‘mixed’, or ‘combined’ land usage, according to which the cattle stalls are located near the residential structures. Furthermore, the residential areas are planned to accommodate the needs of a community split up into nuclear family units, whereas the Bedouin family units are much bigger and include not only the nuclear family but also grown-up children and their families.

### **III.iii. LACK OF SUBSTANTIVE COMMUNITY PARTICIPATION IN PLANNING**

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.

However, 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. In this respect, it should be stressed that ‘force’ has been interpreted as including 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” (Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of the Crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 6 July 2000, p. 11.).

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. Such an environment vitiates any ‘informed consent’. 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.

Nevertheless, it is noteworthy that, in his speech in the Permanent Forum for Indigenous Issues in New York in 2011, Mohammed Al-Kurshan, the representative of the West Bank Bedouin, 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” (UNRWA, 2011).

The decision to forcibly transfer the Bedouin, in violation of principles of IHL, is not a decision the Israeli authorities can lawfully make. Therefore, 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*.

#### **III.iv. LACK OF ADEQUATE INFRASTRUCTURE IN CURRENT LOCATIONS AND IMPEDIMENTS TO HUMANITARIAN ASSISTANCE**

The authorities' lack of planning and authorization of development within the Bedouin communities' current locations, led to a situation in which most of the Bedouin communities suffer from a lack of proper infrastructure. As a result, residents are often compelled to find alternative solutions independently, at their own expense, such as carrying water over long distances with their own devices, or using generators for the provision of electricity. Residents hook up to the electrical system or to the water supply in nearby Palestinian localities, or independently dig cesspits near their living areas. The Bedouin localities in the East Jerusalem periphery, for example, are not connected to public transportation services. Their only access is via dirt roads, making difficult the commute to places of employment and educational institutions. Even in Bedouin localities where public transportation passes nearby on a main road, residents are unable to make use of it, since stopping along the roads is prohibited.

In an occupied territory, the occupying power has the primary responsibility to meet the needs of the protected persons under its effective control. Yet, due to the dire living conditions of the Bedouin communities, which are not adequately taken care of, the Bedouin receive various forms of humanitarian assistance from the humanitarian community. While stepping in to fill in this gap, humanitarian organizations and donor states have recently documented an increasing number of cases in which Israeli authorities have seized or confiscated property related to humanitarian aid, especially tents, water tankers, trucks, and construction materials and equipment from various Bedouin communities in Area C of the West Bank (The Guardian, 2016). Such seizure and confiscation orders are issued in pursuance to the local planning laws which prohibit any commencement of construction in Area C without obtaining a permit in advance is illegal.

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. This has been interpreted as setting out a "duty to agree to humanitarian assistance being delivered to this population and, respectively, to grant access to outside actors offering such assistance" (OCHA, 2016). While humanitarian operations are subject to the consent of the occupying power, consent may not be withheld for arbitrary reasons. Consent is withheld arbitrarily if (i) it is withheld in circumstances that result in the violation by a state of its obligations under international law with respect to the civilian population

in question; or (ii) the withholding of consent violates the principles of necessity and proportionality; or (iii) consent is withheld in a manner that is unreasonable, unjust, lacking in predictability or that is otherwise inappropriate (Id).

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, which, as has been demonstrated, is in high demand. Experts, including Boutruche & Sassoli (2014, p.36), consider that the destruction of such humanitarian facilities (including shelter, water cisterns and so forth) may constitute a breach of the Fourth Geneva Convention.

Bringing this section to an end, the key practices and policies discussed contribute and are means to forcibly transfer the Bedouin communities in Area C from their present rural locations into more urbanized concentrated sites in proximity to Area B. The IHL protection of paramount relevance to the Bedouin communities is, in this respect, the prohibition of individual or mass forcible transfers of protected persons (Article 49 of the Fourth Geneva Convention). 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 (Id, 43) contend that such acts meet the elements of forcible transfer and thus constitute a grave breach of the Fourth Geneva Convention. As aforementioned, the term ‘force’ included in Article 49 was interpreted as including not only physical force but also the taking advantage of a coercive environment. The transfer to the Al-Jabal area is additionally in violation of Article 49 since it was not carried out as a temporary measure of evacuation in the context of active hostilities nearby.

IHRL also imposes positive obligations on the occupying power to ensure tenure security in the context of belligerent occupation. These include: the right to adequate housing (incorporated in several international instruments, e.g. Article 11 (1) of the ICESCR, Article 17 of the ICCPR); freedom of movement and the right to choose residence (Article 12 of the ICCPR); and protection from forced eviction (interpreted by the committee on ESCR, in its General Comment 7, as included in Article 11(1) of the ICESCR).

#### **IV. RECOMMENDATIONS**

Land governance is traditionally perceived as a development activity, aimed at achieving long-term stability and permanent resolutions. The choice between humanitarian and development responses, however, may be misleading as factors related to the usage and administration of land cannot be divorced from the broader humanitarian conflict. The goal of achieving long-term stability may, on its face, seem to be in tension with

the temporal nature of occupation. However, in addition to the particularities of the occupier's obligations in a prolonged occupation, usage right (as distinct from ownership rights, which only a sovereign can confer) can be governed by the occupying power, until final determination of ownership is resolved by the future sovereign. Accordingly, the following are recommendations for steps that can and should be taken primarily by the occupying power, but also – to the extent possible – by the Palestinian Authority (PA) and by the international community.

#### Recognition of Tenure and Usage Rights in Present Locations

Israel, as the temporary administrator of Area C, is required to take into account the specificities of Bedouin communities and their relationship with the land on which they settle or which they use. This entails, first and foremost, that the implementation and interpretation of the Ottoman land laws in the West Bank be guided primarily by the needs of the Palestinian and Bedouin population. 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, pursuant to the Ottoman land law. Israel is required to continue the implementation of the laws in the same way, subject to amendments that may be required to ensure the wellbeing of the protected persons in a protracted occupation or to secure military necessity defined strictly.

Moreover, the Bedouin's ancestral way of life must be taken into account when applying IHL and IHRL norms. The recognition and development of the rights of indigenous peoples (UNGA, 2007, Article 26 (1)-(2)) suggests that for communities such as Bedouins too, a broader understanding of land rights, beyond the mere question of ownership is necessary, which considers land usage. Accordingly, master plans should be made to secure Bedouin tenure and usage rights and allow the Bedouin communities to remain in their present location, until the PA assumes effective governance of Area C, as envisioned in the Oslo accords,<sup>15</sup> and a political solution is concluded. This would require the facilitation of building permits for Bedouin communities in their existing locations, securing access to services such as water, electricity, health care and education, as well as allocation of land for pasture. The call for secure tenure in their present locations does not imply the forfeit of rights that the Bedouins, as refugees or IDPs, are granted under international human rights instruments.

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<sup>15</sup> In this regard it should be mentioned that, subsequent to Article 47 of the Fourth Geneva Convention, protected persons in the occupied territory, shall not be deprived of the benefits of the convention by any agreement concluded between the authorities of the occupied territories and the Occupying Power. The Oslo accords are to be interpreted in light of this provision.

### Participation in Decision-Making and Planning

The right to participate 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. 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. Accordingly, mechanisms for community participation in planning, which were provided by Jordanian planning laws, should be reinstated. In this framework, the Bedouin should be actively involved in zoning planning which accommodate for their sustainable development in their present location. In line with the Pinheiro Principles (2005, para. 37), such involvement must include appropriate notice, effective dissemination, timeliness and opportunities for legal challenge and appeal.

Whilst the PA is constrained in the action it can take to directly support the Bedouin in Area C, it is also a duty bearer under international law in relation to matters within its control and jurisdiction. Having recently acceded to a number of human rights treaties, including the ICCPR, the ICESCR, and 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. Within these limits, initiatives that could be taken by the PA include support for Bedouin representative associations, mainstreaming Bedouin issues throughout PA decision making, emphasizing the cultural value of Bedouin traditions within Palestinian society, or establishing a Bedouin interests section with a PA ministry (NRC, 2015, p. 12).

### Enable Unobstructed Provision of Humanitarian Assistance

As aforementioned, the Bedouin communities in the West Bank are among the most vulnerable communities, suffering from restricted access to municipal services, medical and educational facilities, water, electricity, public transportation and roads. Furthermore, residential structures and cisterns which are constructed by the communities in response to the lack of services are considered illegal under local planning laws and are consequently subject to demolitions.

Israel, as the occupying power, is required to comply with its obligations under IHL and IHRL to provide for the wellbeing of the protected persons and to respect private property by allowing the provision of humanitarian relief and securing the beneficiaries' ability to make use of it without the fear of it being subject to seizure, confiscation and demolition orders. Access to humanitarian legal assistance, which provides the Bedouin communities with information and counseling concerning the international standards

of protection to which they are entitled to and the legal avenues they can pursue to protect their rights, should also remain unimpeded.

#### Enforcement of International Law as a Joint Undertaking/Third State Responsibility

As demonstrated, the practices and policies implemented by Israel not only pose serious obstacles to the realization of the right to tenure security of the Bedouin in the West Bank, but also entail violations of IHL and IHRL. 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 emphasized 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. Accordingly, third States are under the obligation to ensure respect for the Geneva Conventions and of peremptory norms of international law.

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