Land Settlement in the Negev in International Law Perspective[1]

By Dr. Alexandre (Sandy) Kedar[2]

I am going to discuss – from the perspective of international law – the status of the Arab Bedouins' rights to the lands they occupy and use in Israel. This perspective is important and of increasing influence, as is evident from the opinion of the International Court of Justice regarding the separation fence/wall. Further, international law affects the de-legitimating discourse on the status of the Arab Bedouin, and has a potential influence on the Israeli legal system and on possible processes of compromise or mediation, if and when such processes commence.

My look at international law focuses on the following:

- The principle of equality, in general, and its application regarding the rights to housing and land, in particular;
- The issue of internally-displaced persons;
- The rights of indigenous peoples.

I should note at the outset that not all norms of international law relevant to the status of Arab Bedouin land have a binding power. Some principles are not binding even at the international level, some only bind states that are parties to conventions or agreements that establish the norms (such as Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the International Labour Organization) and some, even if binding at the international level, are not binding in domestic law.

However, some of these norms codify fundamental principles that are binding on all countries. Also, although not formally binding in Israeli domestic law, these norms can and should guide legal institutions and officials and serve as a source of inspiration for them. This indirect application is particularly evident in common law systems, where supreme courts have great power in creating law. Furthermore, if these judges and officials interpret the law in a manner that is inconsistent with these norms, the state and its courts might find themselves breaching international law.

Australia's Supreme Court, for example, relied on international law in reaching its famous decision in *Mabo*, in which it rejected the *terra nullius* theory according to which Australia was an "empty land" prior to colonization. In the judgment, Justice Brennan held that the common law should be construed pursuant to the current norms of Australian society and in accordance with accepted norms of international law.

The Relevant Norms of International Law

General

In examining the status of Arab Bedouin land under international law, we must first look to the fundamental principles and norms of international law as set forth in the Universal Declaration of Human Rights and in the relevant conventions, particularly the provisions which enshrine the right to equality and the prohibition on discrimination. We must also examine the relevant conventions that can aid us in understanding the legal status of the Arab Bedouin, including the

[1] This text is a summary of remarks delivered at Adalah's conference, "Planning, Control and the Law in the Naqab", held on 6 December 2004 in Beer el-Sabe (Beer Sheva). Dr. Kedar spoke on a panel entitled "Between Politics, Law and Society."

[2] Senior Lecturer, Faculty of Law, University of Haifa and the Israeli Association for Distributive Justice.

principles relating to internally-displaced persons and natives, and the relevant international and regional documents and norms.

The Right to Equality and the Prohibition on Discrimination

The right to equal treatment is a pillar of international law. This right is especially powerful when the unequal treatment is based on a "suspect class," that is, excessive harm to a population which displays immutable or nearly immutable characteristics (such as race or religion) and when history shows that the unequal treatment was used, and possibly is used at the present time as well, as a means to increase the disparity in exercising rights or as a means to breach human rights systematically.

The right to equality and the prohibition on discrimination are paramount international norms. The UN Charter states that the goal of the United Nations is, *inter alia*, to promote, "Respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

This fundamental norm also appears in various international and regional instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination, and the Universal Declaration of Human Rights.

The right to equality is also infringed when "suspicious" use is made of group membership as a criterion for providing social benefits, and in cases in which the relevant criterion is perceived as neutral, but its application creates discriminatory results. For example, allocation of land rights in the Negev, particularly the granting of the right to live in suburbs and on individually-owned farms to Jews only, grossly violates, in my opinion, the principle of equality set forth in international law.

The International Convention on the Suppression and Punishment of the Crime of Apartheid also prohibits discrimination. Article 2 of the Convention, which sets forth the acts that are considered apartheid, states that the crime of apartheid includes policies and practices similar to those that were carried out in South Africa, including:

> Any legislative measures and other measures calculated to prevent a racial group or groups [meaning a group distinguished on the grounds of nationality, religion, and the like – S.K.] from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including… the right to freedom of movement and residence…

In addition, the Convention prohibits any measures designed to divide the population along racial lines through the creation of separate areas for this group, or to expropriate land belonging to the racial group.

The general prohibition on discrimination is accompanied by specific norms that prohibit discrimination in access to land. Discrimination in access to public land is prohibited by international conventions ratified by the State of Israel and by other international instruments. These instruments set clear legal standards prohibiting discrimination and the separate allocation of housing rights based on membership of an ethnic group or on national identity. For example, the Universal Declaration of Human Rights states that everyone has the right to freedom of movement and residence within his or her country and the right to adequate housing. The International Covenant on Civil and Political Rights states that every person lawfully in the state has the right to freedom of movement and the freedom to choose his or her

place of residence. Numerous international declarations emphasize the importance of equal access to housing and land rights.

Many common law states, such as the United States and England, implement these legal norms on private landowners as well, and prohibit discrimination in access to residence and land on national-identity or ethnic grounds even where the land is privately owned.

The Law Regarding Internally-Displaced Persons

I believe that most Arab Bedouin, i.e. the Bedouin who were removed from their normal residence and moved to the Savag Zone (an area in the northern Negev), come within the category of internally-displaced persons. Unlike the definition of a refugee, which is binding, there are apparently no binding international instruments which define who is an internally-displaced person. However, there are many instruments that deal with the subject, and some of them are accepted as a codification and application of binding international norms.

One of the important instruments in this group is the draft Declaration of International Law Principles on Internally Displaced Persons adopted by the International Law Association (ILA) in 2000. Article 1 of the declaration proposes a definition of internally-displaced persons, as follows:

> Persons or groups of persons who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflicts, internal strife or systematic violations of human rights, and who have not crossed an internationally recognized State border.

The ILA proposal states that internally-displaced persons are to receive in their new places the general protections found in international conventions, including, *inter alia*, equality and freedom from discrimination and property rights. The document also states that internally-displaced persons shall be entitled to the same rights given to citizens of the state, and to the additional rights which are given to refugees, foreigners, and stateless persons. In this context, it should be noted that the main difficulty in implementing the rights of internally-displaced persons results from the fact that the government responsible for caring for them is also responsible for their displacement, or, at the least, concurs in their displacement.

Article 4 of the draft calls for total freedom of movement, as well as freedom from arbitrary displacement. It also prohibits persons from being displaced from their existing place of residence (to which they were displaced when the events took place) in a manner that discriminates against them on grounds of nationality, race, and so forth. The article also provides that measures designed to effectuate a demographic change in a particular area, as in the case of ethnic cleansing, are forbidden.

Applying these principles to the Arab Bedouin who were displaced from their place of residence and taken to the Sayag Zone, we see that displacing the Arab Bedouin from their current residences and concentrating them in the Arab Bedouin towns contravenes the ILA's declaration.

Article 5 of the declaration states that all internally-displaced persons have the right to return to their homes and their places of residence at the conclusion of the events that brought about their displacement. Article 9 provides that internally-displaced persons have the right to have their property returned to them or to receive compensation for it, as well as for their other losses. According to the draft proposal, the state is primarily responsible for the internally-displaced persons. This statement is of great importance, for when we come to discuss the measures to be taken, we must concentrate on Israeli domestic law and on the conduct of the state and of Israeli society.

International Norms Relating to Indigenous Peoples

Are the Arab Bedouin an Indigenous People?

The term "natives" or "indigenous peoples" is used to classify a broad group of communities found in the world. It refers to nomadic tribes that cross international borders with the change of season, to dispersed groups that are a minority in the state in which they live, and to groups that still possess their land. In the absence of an exact, agreed-upon definition of the term, an effort has been made in recent years to clarify it. The UN has been especially active in this effort. In this context, the famous definition by Martinez Cobo was proposed. It included four primary elements: historical continuity or existence prior to the founding of the new state; separate cultural characteristics; lack of domination; and self-determination as a separate group. In 1995, the UN Working Group on Indigenous Populations drafted four principles in the same spirit, which must be applied when describing indigenous peoples:

1. Prior presence and prior use of the specific territory;
2. Continuity of cultural difference, which can include language, social organization, religion, spiritual values, methods of production, laws, and institutions;
3. Self-identity and identification by the state's institutions as a separate collective;
4. Attempts to displace, dispossess, exclude, or discriminate against them, whether or not these actions are ongoing.

Clearly, the Arab Bedouin, as part of the Palestinian population in Israel, are a minority group. Some argue that all Palestinians in Israel are an indigenous group. In any event, it seems to me that, if we applied the tests mentioned above, the Arab Bedouin fall within the definition of indigenous peoples.

Review of International Law on Indigenous Peoples

In recent years, the preservation of the special culture of indigenous people has advanced, largely as a result of an international indigenous peoples movement.

The special protection afforded to indigenous peoples in international law and by international organizations began rather late. The most meaningful development has been the adoption of Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, by the International Labour Organization ("ILO Convention 169"), and the UN Draft Declaration on the Rights of Indigenous Peoples.

ILO Convention 169 was adopted in 1989 and took effect in 1991. To date, seventeen states have ratified the Convention, among them states with large numbers of indigenous people, such as countries in South America and Scandinavia. The Convention characterizes indigenous people similarly to the way that Cobo did. It recognizes the aspirations of indigenous peoples to control their institutions, their way of life and economic development, and their identity in the countries in which they live. The Convention obligates the states to develop, in coordination with the indigenous people, systems and institutions designed to protect their rights. It also states that indigenous people shall be entitled to equal treatment in regards to all human rights and liberties, and that special measures shall be taken to preserve the indigenous peoples, their institutions, property, culture, and environment. These measures are not to be taken against the will of the indigenous peoples themselves. The indigenous people shall have the right to set the development priorities that affect their lives, beliefs, institutions, and land that they possess or use. The Convention further provides that they shall also take part in formulating plans for national or regional development which directly affect them.

The part of the Convention that is most relevant to our matter is Part II, which deals with land. Article 13 emphasizes the importance of land and territory to indigenous peoples. The article makes it clear that "lands" include the concept of "territories," which covers the "total environment of the areas which the peoples concerned occupy or otherwise use."

The Convention states that the rights of ownership and possession of the peoples concerned over the lands they traditionally occupy shall be recognized. In addition, where appropriate, measures shall be taken to safeguard their rights to use lands not exclusively occupied by them, but to which they traditionally had access for their subsistence and traditional activities. Special attention shall be paid in this respect, the Convention continues, to the situation of nomadic peoples and shifting cultivators.

The Convention states that the governments shall take the necessary steps to identify these lands and to guarantee effective protection of their ownership and possession. The Convention further requires that adequate procedures shall be established within the national legal system to resolve the land claims of the indigenous people. The Convention also sets forth the right of indigenous peoples to the natural resources pertaining to their lands, including the right to "participate in the use, management, and conservation of these resources." The Convention states firmly that, other than in exceptional cases, indigenous people are not to be relocated from the land which they occupy. Where the relocation of indigenous peoples is considered necessary as an exceptional measure, the relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, the relocation shall take place only following appropriate procedures established by laws and regulations, including public inquiries, which provide the opportunity for the effective representation of the indigenous peoples. In such cases, the indigenous peoples shall have the right to return to their traditional lands as soon as the reason for their relocation no longer exists. Where they cannot be returned, they shall be provided, in all possible cases, with lands of quality and legal status at least equal to the lands they previously occupied, and which are suitable for providing for their present needs and future development, and, in addition, with compensation where necessary. The Convention also states that the procedures established by the indigenous people for the transfer of land rights shall be respected, and that the national agrarian programs shall ensure for the indigenous people's treatment equivalent to that accorded to other sectors of the state's population.

In 1994, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopted a Draft Declaration on the Rights of Indigenous Peoples. The Declaration emphasizes the right of indigenous people to freedom from discrimination of any kind. Article 2 of the Declaration states that indigenous individuals and peoples are free and equal. Article 7 states that they have the collective right not to be subjected to "ethnocide and cultural genocide," including any action that has the aim or effect of dispossessing them of their lands, territories, or resources (Sub-article (b)), or any form of population transfer that has the aim or effect of violating or undermining any of their rights (Sub-article (c)). Article 10 states that indigenous peoples shall not be forcibly removed from their lands or territories. They are not to be relocated without their free and informed consent, and then only after agreement is reached on just and fair compensation and, where possible, with the option of return. Indigenous peoples have the right to special protection in periods of armed conflict, and it is forbidden to force indigenous individuals from their lands or territories, or to relocate them to special centers for military purposes.

Part VI of the Declaration deals with the rights of indigenous peoples to land. Article 25 states their right to maintain and strengthen their spiritual and material relationship with the lands, territories, waters, and other resources that they have traditionally owned or otherwise occupied or used. Article 26 states that indigenous peoples have the right to own, develop, control, and use the lands and territories, including the total environment that they have traditionally owned or otherwise occupied or used. This article also includes the right to the full recognition of their laws, traditions, and customs, land-tenure systems and institutions related to these lands, and

places an obligation on the states to prevent any violation of these rights. Article 27 states that indigenous peoples have the right to the restitution of the lands, territories, and resources that they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where restitution is not possible, the indigenous peoples have the right to just and fair compensation. Unless otherwise agreed upon by the indigenous peoples, compensation shall take the form of lands and territories equal in quality, size, and legal status. Military activities shall not take place on their lands and territories, unless they have agreed. States have the obligation to ensure that hazardous materials are not stored on their lands and territories. Article 30 states the right of indigenous peoples to determine priorities and strategies for the development or use of their lands and territories.

Although the above rights are set forth in a draft document, here, too, as in the case of internally-displaced persons, the argument can be made that many of its provisions comprise a codification of existing rules and not new legislation.

Application of International Law Norms in Israeli Law

I believe that if the State of Israel chooses to apply international law norms, the Supreme Court has the legal tools to do so. The Basic Law: Human Dignity and Liberty sets forth the right to human dignity. This right obviously incorporates within it respect for the rights of persons like the Arab Bedouin. More specifically, the case law also provides a basis for this claim. For example, in *Qadan*, the Supreme Court of Israel held:

> Equality is one of the fundamental values of the State of Israel. Every authority in Israel – and at their head the State of Israel, its authorities and its employees – must treat individuals in the state equally… The state's obligation to treat people equally covers all its acts. It applies, then, also to the allocation of state lands. (H.C, 6698/95, *Qadan v. Israel Lands Administration,* P.D. 54 (1) 258, 272-274, paragraphs 21,23.)

Also relevant is the Supreme Court's judgment in *Sheikh Hadash* (H.C. 3939/99, 244/00 *Sheikh Hadash Society (The Eastern Democratic Rainbow) v. Minister of National Infrastructure,* P.D. 56 (6) 25, 71-72, paragraphs 38-39), where the Court held:

> The Israel Lands Administration is the public's trustee in administering the state's lands. It must administer them by safeguarding the public's interest in the land, including preserving the land for the benefit of the entire public, including the need to refrain from granting unjustifiable land benefits to others. As is the case with every administrative body, the Israel Lands Administration must act fairly, in accordance with relevant considerations, and in an egalitarian manner, giving equal opportunity to the entire public. One of the general purposes of every administrative body is to treat everyone equally. The same is true in establishing, and implementing, a policy of land allocation.
>
> These remarks raise the value of achieving distributive justice in the allocation of land by the Israel Lands Administration. The relevance of this value lies in the social and just distribution of resources, social and others. The obligation to weigh considerations of distributive justice is an integral part of the power of an administrative authority that has the power to decide on the allocation of limited resources. This obligation has been expressed in numerous judgments of this court in cases dealing with discrimination, freedom of occupation, and equality of opportunity in their various and sundry forms, but the prior case law did not explicitly use this term.

> These remarks indicate that distributive justice is a value of substantial import, to which every administrative agency must give proper weight in every decision that it makes regarding the distribution of public resources. These remarks are especially significant in the case before us. The Israel Lands Administration is responsible for all the lands of Israel. It is impossible to exaggerate the importance of this asset, and of the importance of its fair and proper distribution and allocation. Decisions that are the subject of the petitions before us have great consequences on the distribution of a limited resource, and this value is of great import. There is a great public interest that resources of this kind be allocated by the state, or by agencies acting on its behalf, in a fair, just, and reasonable manner.

To sum up, Israeli law has the tools to apply the relevant international norms to the case of the Arab Bedouin. By means of principles such as human dignity, equality, and distributive justice, it is possible to interpret and create rules of law that will strengthen the Arab Bedouins' status relating to the land they possess, and give meaningful consideration to their interests. The question is: Will the Israeli officials engaged in making Israeli law – the legislator and makers of bylaws (such as the Board of Israel Lands Administration), the courts, and administrative and law-enforcement officials – do it? Or, what in my view is a better venue, will the State and the Arab Bedouin enter into negotiations to implement these norms?