

# INDIGENOUS PEOPLES' LAND: THE CASE OF BEDOUIN

## LAND IN ISRAEL

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## INTRODUCTION

This article is based on my presentation at California Western International Law Journal’s Symposium on “Indigenous Communities in the Modern Economy: The Struggle for Land Rights in Israel and the United States.” My presentation focused on the Bedouin land rights issue in Israel. Based on the current legal situation, litigating Bedouin land cases in the national courts will not result in recognition of Bedouin land rights. This article proposes customary law as the basis for recognizing Bedouin land rights. Therefore, this article presents and analyzes similar cases around the world, mainly in Australia, Canada, South Africa, and Nicaragua to seek a solution for indigenous land rights.

## I. BACKGROUND

The Bedouin in the Negev—a desert region occupying nearly 4,700 square miles—are Palestinian Arab citizens of the State of Israel.<sup>1</sup> They are the indigenous inhabitants of the Negev.<sup>2</sup> There are 1.8 million

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1. *Negev Desert Region, Israel*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Negev> (last visited Nov. 16, 2018).

2. See Morad Elsana, *The Role of the Judiciary in Dispossessing Indigenous Peoples’ Land: The Bedouin Case in Israel*, 34 J. JURIS. 333, 348-49 (2017) [hereinafter *Role of the Judiciary*].

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Palestinian Arabs in Israel, constituting twenty percent of Israel's population.<sup>3</sup> The Bedouin population is about 230,000 which makes up approximately twelve percent of the Palestinian Arab citizens of Israel.<sup>4</sup> Half of the Bedouin of the Negev live in seventeen recognized townships and the other half live in thirty-five unrecognized villages.<sup>5</sup>

## II. LAND EXPROPRIATION

Land has been the center of State policy toward the Negev Bedouin; a policy that continues discriminating and depriving the Bedouin people of their basic rights. Therefore, land expropriation has been a central component of the State of Israel's policy toward the Bedouin. Interestingly, the state's policy toward the Bedouin is epitomized in the following quotation from Moshe Dayan, who was at the time in charge of the Department of Agriculture:

We should transform the Bedouin into an urban proletariat in industry, services, construction and agriculture. 88% of the Israeli populations are not farmers; let the Bedouins be like them. Indeed, this would be a radical move which means that the Bedouin would not live in this land with his herds but would become an urban person who comes home in the afternoon and put his slippers on . . . the children would go to school with their hair properly combed. This would be a revolution, but it may be fixed within two generations. Without coercion but with government direction . . . this phenomenon of the Bedouins will disappear. Moshe Dayan, Haaretz interview, 31 July 1963.<sup>6</sup>

This quote directly highlights the government's intent in erasing any trace of Bedouin tradition or culture—Israel's state policy would have the Bedouin completely assimilate.

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3. Press Release, Israel Central Bureau of Statistics, Population of Israel on the Eve of 2018 - 8.8 Million (Dec. 31, 2017) (on file with author).

4. Elsana, *Role of Judiciary*, *supra* note 2, at 337.

5. Morad Elsana, *The Dispossession and Recognition of Indigenous Peoples' Land Rights-The Case of Bedouin in Israel*, AM. UNIV. 43, 49 (2013) [hereinafter *Dispossession and Recognition*].

6. Ronen Shamir, *Suspended in Space: Bedouins under the Law of Israel*, 30 LAW & SOC. REV. 231, 231-57 (1996).

Israel's first Prime Minister, David Ben Gurion, wrote to his eleven-year-old son before the birth of the Jewish state: "Negev land is reserved for Jewish citizens whenever and wherever they want. We must expel the Arabs and take their place."<sup>7</sup>

According to a British mandate list, Bedouins occupied about 12,600,000 dunams<sup>8</sup> in the Negev in 1937.<sup>9</sup> Today the Bedouin struggle to avoid eviction from the remaining 240,000 dunams left to them.<sup>10</sup> Although Bedouin land rights and tribal boundaries were respected by Ottoman and British authorities, and the subsequent British Mandate authorities, Israel rejects any land rights for the Negev Bedouin.

During the 1948 Arab-Israeli War, approximately eighty to ninety percent of the Bedouins were driven out of their villages.<sup>11</sup> From the 70,000 to 90,000 Bedouin population in the late 1940s, by 1951, fewer than 13,000 Bedouins remained.<sup>12</sup> As late as 1953, the United Nations reported the expulsion of approximately 7,000 Bedouin into adjacent areas of Jordan, Egyptian-occupied Gaza, and the Sinai.<sup>13</sup>

After the 1948 war, the State placed the Bedouin (like the rest of the Palestinian Arabs) under martial law for about eighteen years, until 1966.<sup>14</sup> During that time the State's military leadership began to initiate

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7. Abu Saad, *The Palestinian Bedouin in the Negev*, in NUR MASALHA, CATASTROPHE REMEMBERED: PALESTINE, ISRAEL AND THE INTERNAL REFUGEES: ESSAYS IN MEMORY OF EDWARD W. SAID 113, 120 (2005).

8. A dunam is about a quarter acre.

9. PENNY MADDRELL, THE BEDOUIN OF THE NEGEV 5 (Minority Rights Group Rep. No.81 1990).

10. *Arab Ass'n for Hum. Rts. Fact-Sheet on the Naqab (Negev)*, COALITION AGAINST ISRAELI APARTHEID, <https://www.caiaweb.org/old-site/files/AAHRA-negev.factsheet.pdf> (last visited Nov. 16, 2018).

11. See Elsana, *Role of the Judiciary*, *supra* note 2, at 338. This point is very controversial. Whether the departure was or was not voluntary depends on the affiliation of the historian. Many non-Zionist scholars (such as Elan Pappé and Palestinian scholars) insist that the Bedouin (as part of the Palestinians) were forced to leave their villages, while Zionist scholars and the official view of the State of Israel claim that the Bedouin left by their free will.

12. Jonathan Cook, *Bedouin in the Negev Face New "Transfer,"* MIDDLE EAST RESEARCH AND INFO. PROJECT (May 10, 2003), <https://www.merip.org/mero/mero051003>.

13. *Id.*

14. See Ghazi Falah, *How Israel Controls the Bedouin in Israel*, 14 J. OF PALESTINE STUD. 35, 41 (1985); see Rudolfo Stavenhagen & Ahmad Amara, *International Law of Indigenous Peoples and the Naqab Bedouin Arabs*, in

plans for the Negev Bedouin. Some of these plans included forcing Bedouins to settle in a very small area in the Negev.<sup>15</sup> Under this policy, the State rounded up the remaining Bedouin in an enclosure area called the *Siyag*.<sup>16</sup> During this period, the State also enacted several laws to dispossess the Bedouin of their lands.<sup>17</sup>

#### A. Sedentarization Policy and Land Expropriation

In the decades following the 1948 war, Israel sought “sedentarization,” forcing Bedouins away from their traditional lifestyles as farmers. Israeli governments worked relentlessly to make the Bedouin “disappear.”<sup>18</sup> The Bedouin who had not been evicted or fled during the War were “transferred” in the 1950s, either to the center of the country or to the “*Siyag* zone.” Those who were transferred to the center of the country went to the towns of Lod and Ramleh, where many worked as low-wage manual laborers. The “*Siyag* zone” consisted of a small area close to the town of Be’er Sheva, in the northern Negev.<sup>19</sup>

Since the mid-1960s, the State has classified Bedouin villages in the Negev as “scattered” communities or tribes and pressured the inhabitants to give up their traditional lifestyles as farmers and shepherds. The State has offered to move the Bedouin from their villages to one of seven townships created in the 1970s.<sup>20</sup> Half of the Bedouin in the Negev now live in these townships, where they languish at the bottom of every socio-economic index. Since moving the Bedouin, Israel has enacted several laws to dispossess the Bedouin of their traditional lands. In addition, they are unable to build or develop

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INDIGENOUS (IN)JUSTICE: HUM. RTS L. AND BEDOUIN ARABS IN THE NAQAB/NEGEV 182 (Ahmad Amara et al. eds., 2013).

15. See generally Arnon Medzini, *Bedouin Settlement Policy in Israel: Success or Failure?*, HORIZONS IN GEOGRAPHY, 37, 38 (2012); see SHLOMO SWIRSKI & YAEL HASSON, INVISIBLE CITIZENS: ISRAEL GOV'T POL'Y TOWARD THE NEGEV BEDOUIN 16 (2006).

16. *Id.* at 16-17. “*Siyag*” is a Hebrew word meaning fence.

17. See George Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV., 467, 520-21 (1994).

18. Cook, *supra* note 12, at ¶ 6.

19. See SWIRSKI AND HASSON, *supra* note 15, at 17.

20. See *id.* at 52.

their new communities in any way—their homes are subject to demolition on a daily basis.<sup>21</sup>

This policy's purpose was to concentrate the Bedouin in small townships and make their traditional lands available for settlement programs—exclusively for Jews. Further, the policy aims to domesticate the indigenous Bedouin and create a cheap source of labor for the Jewish economy.<sup>22</sup> The process of urbanization into townships has been forced on the Bedouin in a manner insensitive to their culture and traditional livelihood. Consequently, tensions have been very high between the State and the Bedouin regarding land ownership.

As part of this policy, Israel has refused to recognize the Bedouin villages and their historical land rights. This refusal is highlighted by Israel's policy of house demolition and crop destruction, which forces Bedouins to leave their villages.<sup>23</sup> As a result of this policy, about 40,000 Bedouin houses in the Negev are labeled as illegal houses and subject to a constant threat of demolition.<sup>24</sup> This forces most villagers to live in tents or metal shacks that are far from adequate housing structures.<sup>25</sup>

### *B. House Demolitions*

House demolitions and evictions are among the insidious methods the State has been using to pressure the Bedouin to leave their traditional villages and move to the townships.<sup>26</sup> The Planning and Construction Law of 1965 permits the State to designate all traditional Bedouin village housing as illegal buildings and therefore subject to

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21. *Id.* at 59, 68, 78.

22. *Id.* at 15-17.

23. See generally Ben Fargeon & Michal Rotem, *Enforcing Distress: House Demolition Policy in the Bedouin Community in the Negev*, NEGEV COEXISTENCE F. FOR CIV. EQUALITY 32 (June 2016), [https://www.dukium.org/wp-content/uploads/2016/06/HDR\\_2016\\_ENG-1.pdf](https://www.dukium.org/wp-content/uploads/2016/06/HDR_2016_ENG-1.pdf).

24. Hezki Ezra, *New Negev Town Plan Kiboshed by Illegal Bedouins*, ARUTZ SHEVA (Nov. 26, 2015).

25. See Alexandre Capron and Sarra Grira, *The Beginning of the End for Israel's Negev Bedouin Culture?*, THE OBSERVERS (June 17, 2013), <http://observers.france24.com/en/20130717-end-israel-negev-bedouin-culture>.

26. Fargeon & Rotem, *supra* note 24, at 32.

demolition.<sup>27</sup> To speed up the abovementioned sedentarization process, the government created the Markovitz Commission on unlicensed buildings in 1986, which recommended the demolition of 6,601 Bedouin homes in the Negev.<sup>28</sup> Subsequent governments have maintained this policy. Consequently, when a new construction is built and discovered, the owner is served with an administrative order to demolish the house.<sup>29</sup> If the owner fails to do so, he is criminally prosecuted for constructing an unlicensed building.<sup>30</sup>

This policy turns homeowners into criminal defendants and makes the Bedouin history of land ownership irrelevant. Following the Markovitz Commission recommendation, Defendants are penalized with exceptionally high fines, equal to double the illegal house's value.<sup>31</sup> Adding insult to dehumanizing injury, the Bedouin are made to pay the costs of the demolition of their homes.<sup>32</sup> After demolition, the State does not provide any resources or alternative housing.<sup>33</sup> Bedouins do not receive any social help, and the families are left without any shelter. Contrary to the most basic standards of human decency, most of the houses were demolished without giving people even the time to remove their furniture and belongings.

According to the Israeli Interior Ministry in 2004, the government designated about 42,000 houses in the Negev for demolition—all belonging to the Bedouin people.<sup>34</sup> For example, in 2016, Israeli authorities demolished more than 1,000 Bedouin houses.<sup>35</sup> Hundreds of house demolition cases are currently being prosecuted or pending in

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27. *Id.* at 7-8.

28. *Arab Association for Human Rights Fact-Sheet on the Naqab (Negev)*, *supra* note 10.

29. *Id.*

30. Planning and Building Law, 5725-1965, SH NO. 467, p. 381-82 art. 204, 205, 206, 207, 238a. (ISR.).

31. *See id.* at art. 48.

32. *See id.* at art. 218.

33. *See generally id.*

34. Silvia Boarini, *In Pictures: Bedouin Face Israeli Demolitions*, AL JAZEERA (May 9, 2014), <https://www.aljazeera.com/indepth/inpictures/2014/03/pictures-bedouin-face-israeli—2014325125550140624.html>.

35. *See Record of House Demolitions and Crop Destruction - 2016*, NEGEV COEXISTENCE F. FOR CIV. EQUALITY, <https://www.dukium.org/record-house-demolitions-crop-destruction-2016/> (last visited Sept. 10, 2018).

courts. These figures do not include those houses demolished by the owners themselves, after being threatened by the authorities.

### *C. Economy and Government*

On an economic level, Bedouins living in recognized townships are poor and deprived of basic services. However, Bedouins living in unrecognized villages face even greater hardship; they are poorer, denied all forms of basic services and infrastructure, and are unable to build or develop their communities.<sup>36</sup> Several reports show that recognized Bedouin towns ranked lowest on Israel's socio-economic scale.<sup>37</sup> For instance, family income in Bedouin towns is less than half of an average family in the nearest Jewish city, Be'er Sheva.<sup>38</sup> Moreover, as a stark example of how Bedouins are deprived services, Bedouin towns are allocated only twenty-five to fifty percent of the amount of water allocated to Jewish towns.<sup>39</sup> Bedouin towns contain more pupils per classroom than Jewish towns and have fewer paved roads.<sup>40</sup> Overall, Israeli government agencies provide the Bedouin with wholly inadequate services when compared to the services given to Jewish towns.

The striking differences in the respective treatment of Jews and Bedouins prompts suspicion that the policy is deliberately discriminatory. For example, even recently, only seven out of the eighteen Bedouin towns gained the opportunity to elect their local representatives—the remaining eleven towns still have government appointed councils. Somewhat encouragingly, the last two Israeli

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36. See generally Suleiman Abu-Bader & Daniel Gottlieb, *Poverty, Education and Employment in the Arab-Bedouin Society: A Comparative View* (SOC'Y FOR THE STUDY OF ECON. INEQUALITY, Working Paper No. 137, 2009), <http://ideas.repec.org/p/inq/inqwps/ecineq2009-137.html> ("The poorest group according to the poverty incidence is that of the Bedouin in non-recognized villages.").

37. See SWIRSKI & HASSON, *supra* note 15, at 59.

38. See Arik Rudnitzky & Thabet Abu Ras, *The Bedouin Population in the Negev: Social, Demographic and Economic Factors*, THE ABRAHAM FUND INITIATIVE, at 31 (2012).

39. Harvey Lithwick, *Making the Bedouin Towns Work*, THE CTR. FOR SOC. POL'Y STUD. IN ISRAEL 4-5 (June 2002); see also Abu-Bader & Gottlieb, *supra* note 37, at 4.

40. See SWIRSKI & HASSON, *supra* note 15, at 57.



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governments have created programs to improve the Bedouin's situation. However, the fact remains that Bedouins living in Jewish regional councils like Bni-Shimon and Ramat-Hovav<sup>41</sup> are still precluded from participating in local elections.<sup>42</sup>

### III. DISPOSSESSION OF BEDOUINS FROM THEIR LAND

Since the establishment of the State of Israel in 1948, the government has systematically dispossessed Bedouins of their lands. The entire State government has executed and supported this process, but most activity has been conducted on three levels: (a) the executive, (b) the legislative, and (c) the judicial.

#### A. Executive Level

On the executive level, the State employed several administrative methods to dispossess Bedouins of their land. The executive branch routinely employed traditional methods such as: (1) evicting the Bedouin from their land to neighboring states, (2) displacing the remaining Bedouin from their land to other parts of the State, and (3) concentrating Bedouins in a small area called the *Siyag*.

In addition to the large amount of land confiscated or dispossessed, the "eviction and concentration" policy also affected the legal status of Bedouin land.<sup>43</sup> The policy enabled additional state acts to separate the Bedouin from their land and confiscate it. The state justified the policy by declaring the land as *mawat* land—as unpossessed, or unused, by the land owners for a long enough time.

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41. Bni-Shimon and Ramat-Hovav are Jewish regional councils that include many Bedouin populations who live in villages located in the jurisdictional area of these councils. However, despite living in the regional councils, the Bedouin are deprived of their basic rights since they are not considered residents of the councils. See Rudnitzky & Abu Ras, *supra* note 38, at 16.

42. See generally Shlomo Swirski, *Current Plans for Developing the Negev: A Critical Perspective*, ADVA CENTER, at 4 (2007).

43. Elsana, *Dispossession and Recognition*, *supra* note 5, at 43 (such acts of dispossession and concentration disconnected the Bedouin from their land, enabling the application of some laws that deny land rights for those who are not in a physical possession of their land).

### *B. Legislative Level*

On the legislative level, the State enacted several laws that also dispossessed Bedouins of their land. Two noteworthy laws are the Land Settlement Ordinance of 1969 and The Negev Land Acquisition (Peace Treaty with Egypt) of 1980.<sup>44</sup>

The Land Settlement Ordinance of 1969 is considered the most important one for Bedouin land rights. Not only did the ordinance dispossess many Bedouin of their land, but it also created a special legal regime with a specific process for land-title settlement.<sup>45</sup> For example, procedurally, the ordinance transforms the status of Bedouin land from “owned land” to “claimed land,” and the Bedouin from “owners of their land” to “claimants of land.”<sup>46</sup> Although only procedural, these changes tremendously affect Bedouin land rights because they shift the burden of proof from the State to the Bedouin.<sup>47</sup>

The Negev Land Acquisition of 1980 is another statute that dispossesses Bedouins of their land.<sup>48</sup> This law was specifically enacted to authorize the State of Israel to evict the Bedouin from their traditional villages in Tal-Almalah and to confiscate their land.<sup>49</sup> In addition, the law established a new discriminatory system of compensation, which the State has used since 1980 to evict Bedouin land claimants.<sup>50</sup>

### *C. Judicial Level*

On the judicial level, research shows the Bedouin cannot use the judicial system to defend their land rights.<sup>51</sup> Instead, the judiciary has followed the will of the political leadership—a leadership opposing Bedouin land rights. As a result of a complex and corrupt judiciary

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44. *Arab Ass'n for Hum. Rts. Fact-Sheet on the Naqab (Negev)*, *supra* note 10.

45. *Elsana, Dispossession and Recognition*, *supra* note 5, at 57.

46. *Id.* at 60.

47. Procedural changes can impact substantive rights. *See generally* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010).

48. Ghazi Falah, *Israeli State Policy toward Bedouin Sedentarization in the Negev*, 18 J. OF PALESTINE STUDIES 71, 80 (1989).

49. *Id.*

50. *Id.*

51. *See generally* *Elsana, Dispossession and Recognition*, *supra* note 5, at 95.

process, the Bedouin face many obstacles in prevailing with their land disputes. For instance, courts have refused to recognize Bedouin land rights based on Bedouin customary law.<sup>52</sup> Procedurally, courts have rejected traditional Bedouin evidence<sup>53</sup> and have instead required unobtainable evidence, such as proof of their land use dating back to the 1930s.

Bedouins have found the only way for courts to recognize their land ownership under Israeli law is by following the State law through its legal system and attempting to prove they have revived *mawat* land.<sup>54</sup> Here, the Bedouin's main challenge has been to prove their land ownership according to a different legal system and culture of land use. Namely, Israeli courts require land ownership proof based on western permanent settlement farming rather than on grazing, which is traditionally how Bedouins used their land.<sup>55</sup>

Israeli courts have established requirements that render it impossible for Bedouins to gain legal recognition of their land rights.<sup>56</sup> This conclusion is shared by many legal scholars, including Professor David Kretzmer, but first and foremost by the Israeli Supreme Court Justice, Abraham Halima. Justice Halima, in *Salim Alhawashelah v. State of Israel*, wrote the definitive decision regarding Bedouin land rights in 1984.<sup>57</sup>

### *1. The Alhawashelah Precedent in the High Court*

In *Alhawashelah*, Bedouin Alhawashelah tribe members claimed they owned the land in dispute. The State countered that Bedouin land

52. Elsana, *Dispossession and Recognition*, *supra* note 5, at 55.

53. *Id.* at 19 (courts rejected evidence such as traditional land ownership contracts, and other documents called *Sanadat* that prove their land rights).

54. *Id.* at 71 (*mawat* land is defined as “a land that is remote from an inhabited place, not possessed or inhabited by anybody”).

55. Tawfiq S. Rangwala, *Inadequate Housing, Israel, and the Bedouin of the Negev*, 42 OSGOODE HALL L.J. 415, 440 (2004) (stating “[a]lthough Israeli courts recognized that Bedouin had been living on the lands, they would not recognize tents as settlements. Furthermore, the courts denied that pastoralism as practiced by the Bedouin constituted ‘working’ the land.”); Stavenhagen and Amara, *supra* note 14, at 86 (Israeli courts required a higher standard of proof for demonstrating cultivation).

56. Elsana, *Role of the Judiciary*, *supra* note 2, at 356 (citing CA 218/74 *Salim Alhawashelah v. State of Israel* 38(3)PD 141 (1974) (Isr.)).

57. Elsana, *Dispossession and Recognition*, *supra* note 5, at 68.

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was *mawat* land under the Ottoman Land Code of 1858, which defined *mawat* land as “land that is remote from an inhabited place, not allocated or possessed by anybody.”<sup>58</sup> To win their case and acquire land ownership rights, Bedouins had to prove they had “revived *mawat* land,”<sup>59</sup> and that they had obtained permission to do so from the Ottoman or the British Mandate authorities.<sup>60</sup> Ultimately, the Court accepted the State’s arguments and decided that Alhawashelah land was *mawat* land; therefore, rejecting the Bedouin’s claims and denying their appeal.<sup>61</sup> All subsequent Bedouin land cases followed the *Alhawashelah* precedent.<sup>62</sup> To this day, the Bedouin have not won a single land claim case.

From an international human rights perspective, the *Alhawashelah* decision is a travesty of justice—denying ancestral land rights to all Bedouins.

## IV. PROTECTION OF INDIGENOUS LAND UNDER INTERNATIONAL LAW

International law protects indigenous peoples’ land rights under: (1) the International Labor Organization No. 169 (ILO);<sup>63</sup> (2) the International Covenant on Civil and Political Rights (ICCPR);<sup>64</sup> and (3) the International Convention on the Elimination of All Forms of Racial

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58. *Id.* at 71.

59. To revive Mawat land means to turn it into productive and usable land, usually through consistent use. *See* Elsana, *Role of the Judiciary*, *supra* note 2, at 350 n.85.

60. SWIRSKI & HASSON, *supra* note 15, at 13-14.

61. *Id.* at 26-27.

62. *Id.*

63. Indigenous Peoples Tribal Convention art. 5, Sept. 5, 1991, I.L.O No. C169; *see* S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT’L & COMP. L. 1, 7 (1991).

64. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, (Dec. 16, 1966). The Covenant on Civil and Political Rights (ICCPR) includes several important provisions that protect, although indirectly, the land rights of indigenous peoples. Namely, articles 17, 23, and 27 of the Covenant have proven to protect land rights in several cases; *see generally* Martin Scheinin, *Indigenous Peoples’ Land Rights Under the International Covenant on Civil and Political Rights*, ABORIGINAL POL’Y RES. CONSORTIUM INT’L, 1-18 (2004).

Discrimination (ICERD).<sup>65</sup> However, the Bedouin cannot benefit from these protections because Israeli courts do not recognize the applicability of these international laws.<sup>66</sup>

*A. The Limitations of International Human Rights Law in Israel*

As the Bedouins discovered, there are many limitations in applying international human rights laws to and within Israel. For instance, “Individual communications” under the ICCPR’s First Optional Protocol<sup>67</sup> and the ability to make complaints to the CERD are not available to the Bedouin.<sup>68</sup> Further, Israel has not ratified the ILO Convention No. 169, which is the main international means of vouchsafing indigenous people’s rights.<sup>69</sup>

Additionally, Israel is not a member of any regional system designed to safeguard human rights, such as the European system (embodied in the European Convention on Human Rights) or the Inter-

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65. G.A. Res. 2106 (XX) Annex, International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965). The Convention on the Elimination of All Forms of Racial Discrimination (CERD) also includes provisions that protect indigenous social, economic, and cultural rights. The Convention may consider individual complaints of state parties who recognize the competence of the Committee on the Elimination of Racial Discrimination under Article 14 of the Convention, making it an effective and practical method for rights recognition. Further, the fact that racial discrimination is one of the main causes of marginalization and rights deprivation of indigenous communities makes the Convention very relevant to their struggle. Lorenzo Nesti, *Mapuche-Pehuenche and the Ralco Dam on the Biobio River: The Challenge of Protecting Indigenous Land Rights*, 9 INT’L J. ON MINORITY & GROUP RTS. 1, 37 (2002).

66. Elsana, *Dispossession and Recognition*, *supra* note 5, at 9, 123.

67. The First Optional Protocol to the ICCPR authorizes the Human Rights Committee to receive complaints from individuals in countries that are party to the ICCPR that have signed the First Optional Protocol. *See generally* G.A. Res. 2200A (XXI), The Optional Protocol to the International Covenant on Civil and Political Rights (Mar. 23, 1976); S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 253 (2004) (discussing individual communication generally).

68. They are not available either because Israel is not party to the relevant convention, such as the ILO Convention, or because it has restricted the use of such procedures by making reservations to certain provisions, such as Israel’s reservation from the First Optional Protocol of the ICCPR, or by abstaining from making the Special Declaration recognizing the competence of CERD. *See* Elsana, *Dispossession and Recognition*, *supra* note 5, at 126-27.

69. *Id.* at 127-28.

American Human Rights System. Thus, there is little, if any, international protection of Bedouin human rights in Israel, which means international protection of Bedouin land rights is virtually nonexistent.

*B. The Bedouin Situation and the Need for a Different Approach*

As mentioned above, Bedouin litigation experience and the opinions of leading legal scholars like Justice Halima and Kretzmer demonstrate that further judicial action by the Bedouin would prove futile. Israeli courts will never recognize Bedouin land rights.<sup>70</sup>

Considering the failure of both Israeli national law and international law to protect Bedouin land rights, this article proposes alternative solutions for facilitating Bedouin land recognition in Israel by comparing the application of customary law to indigenous peoples around the globe.

It is well-known that disputes over indigenous peoples' land rights are not unique to the Bedouin in Israel. Many studies show the issue is common in many parts of the world, especially in places where colonial powers encountered indigenous peoples.<sup>71</sup> Among the prominent examples are the United States, Canada, Australia, New Zealand, and Nicaragua.

Unlike Israel, many countries have established ways of recognizing indigenous land rights. For instance, New Zealand, Canada, and Australia have established administrative and legal mechanisms, including committees and tribunals, to address the issue.<sup>72</sup> In recent decades, the courts of these countries have published several precedent-setting judgments recognizing indigenous land rights.<sup>73</sup>

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70. See generally MADDRELL, *supra* note 9, at 8.

71. Birgitte Feiring, *Indigenous Peoples' Rights to Lands, Territories, and Resources*, INTERNATIONAL LAND COALITION 43 (2009) (<http://www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf>).

72. See, e.g., *Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages*, HUM. RTS. WATCH 104-105 (2008), <https://www.hrw.org/reports/2008/iopt0308/iopt0308webwcover.pdf>.

73. See *id.*

### 1. *New Zealand and Australia*

In 1975, the New Zealand Parliament established a permanent council and a special court for the land of the Maori People (Waitangi Tribunal).<sup>74</sup> This mechanism settled many land claims filed by indigenous people and returned many lands to their original Maori owners.<sup>75</sup> In some cases, where the state could not return the land, the court ordered the government to pay compensation to the indigenous Maori.<sup>76</sup>

In Australia, after a long struggle by the Meriam aboriginal people, in the famous precedent of *Mabo v. Queensland*,<sup>77</sup> the High Court recognized the indigenous peoples' land ownership and possession.<sup>78</sup>

### 2. *Canada*

In 1991, following the protests of indigenous Canadians, the government appointed a committee to examine the indigenous peoples' rights. In 1996, the Commission published a report<sup>79</sup> recommending sweeping legislative changes establishing new institutions and creating additional resources to redistribute land and reconstruct the governments of indigenous peoples. In *Delgamuukw v. British Columbia*, the court accepted indigenous peoples' ownership claims as to several areas covering 58,000 square kilometers in northwest British Columbia.<sup>80</sup>

While these examples show that many countries solved similar indigenous peoples' land rights issues, their importance lies in the various ways they solved these land disputes. This article examines

74. Alan Ward, *The Treaty of Waitangi in New Zealand Law and Politics*, 92 JOURNAL DE LA SOCIÉTÉ DES OCÉANISTES 89, 89-91 (1991).

75. *Treaty of Waitangi: Treaty Timeline – Treaty Events Since 1950*, NEW ZEALAND HIST., <https://nzhistory.govt.nz/politics/treaty/treaty-timeline/treaty-events-1950> (last updated May 17, 2017).

76. *Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages*, *supra* note 72, at 104-105.

77. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 5 (Austl.).

78. Elsana, *Dispossession and Recognition*, *supra* note 5, at 46.

79. *Highlights from the Report of the Royal Commission on Aboriginal Peoples*, Canada.ca (1996), <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637>.

80. *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (Can.).

these dominant methods of securing indigenous people's rights recognition in land disputes.

### *C. An Approach Based on Customary Law*

There are several approaches to recognize indigenous rights. One dominant approach—based on customary law—is becoming common in many countries around the world. For example, in Latin America “[m]any . . . countries are accepting the premise that traditional legal systems have a rightful place within the modern state.”<sup>81</sup>

As Tobin notes, “[t]he widespread recognition of native title demonstrate[s] a clear state practice of recognizing customary law as the basis for the identification and adjudication of IP land rights.”<sup>82</sup> In this regard, John Borrows adds, “[t]hese designations illustrate that Canadian law dealing with Aboriginal peoples draws upon First Nations law in giving meaning to the content of Aboriginal rights.”<sup>83</sup>

In Australia, the recognition of indigenous rights also relied on customary law. In *Mabo v. Queensland*, the court relied on indigenous customary law to recognize a source for indigenous property rights.<sup>84</sup> There, the court created a new legal doctrine in property law called Native Title.<sup>85</sup> Notably, the new doctrine of Native Title—which is primarily based on land rights under indigenous customary law—the Australian court was able to recognize the indigenous peoples' land rights that they enjoyed prior to the discovery of Australia.<sup>86</sup> The *Mabo*

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81. MICHÈLE SCHMIEGELOW & HENRIK SCHMIEGELOW, INSTITUTIONAL COMPETITION BETWEEN COMMON L. AND CIV. L.: THEORY AND POL'Y 241 (2014).

82. BRENDAN TOBIN, INDIGENOUS PEOPLES, CUSTOMARY L. AND HUM. RTS. – WHY LIVING L. MATTERS 113 (2014).

83. John Borrows, *With or Without You: First Nations Law (in Canada)*, 41 MCGILL L. J. 629, 636 (1996).

84. See generally Noel Pearson, *The Concept of Native Title at Common Law*, AUSTRALIAN HUM. REV. (Mar. 1997).

85. Although some land rights were recognized in a few states in Australia prior to *Mabo* (No. 2), the decision introduced for the first time judicial recognition of Aboriginal land rights. See Garth Nettheim, *Mabo and Legal Pluralism: The Australian Aboriginal Justice Experience in LEGAL PLURALISM AND THE COLONIAL LEGACY* 103, 106 (Kayleen M. Hazlehurst ed. 1995).

86. PETER H. RUSSELL, RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM 257 (2006).



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decision recognized the Aboriginal customary law as legitimate and regarded Aboriginal customary law as a legal source of land rights.<sup>87</sup>

### *1. The Richtersveld Case in South Africa*

Recognizing customary law as a basis for indigenous rights has become a global phenomenon.<sup>88</sup> Many countries have adopted this approach in recognizing indigenous peoples' land rights. For example, in South Africa, courts relied on the customary law of the local community to recognize traditional land rights.<sup>89</sup> In the well-known decision *Richtersveld Community v. Alexkor Ltd*, the court accepted the community's appeal based on interests under customary law.<sup>90</sup> The court also decided the Richtersveld community had land rights based on their customary law.<sup>91</sup> The court added that "an interest in land held under a system of indigenous law is thus expressly recognized as a 'right in land,' whether or not it was recognized by civil law as a legal right."<sup>92</sup>

### *2. The Mayagna (Sumo) Awas Tingni Community Case in Nicaragua*

In 2001, *Mayagna (Sumo) Awas Tingni v. Nicaragua*, the Inter-American Court of Human Rights recognized indigenous land rights according to their customary law.<sup>93</sup> The case establishes indigenous

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87. Jérémie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L. Q. 583, 591 (2007). See generally Nettheim, *supra* note 85, at 106.

88. JÉRÉMIE GILBERT, *INDIGENOUS PEOPLES' LAND RTS. UNDER INT'L L.: FROM VICTIMS TO ACTORS* 66 (1st ed. 2006).

89. See Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 BERKELEY J. INT'L L. 62-110 (2003).

90. Yvette Trahan, *The Richtersveld Community & Others v. Alexkor Ltd.: Declaration of a "Right in Land" Through a Customary Law Interest Sets Stage for Introduction of Aboriginal Title into South African Legal System*, 12 TUL. J. INT'L & COMP. L. 565, 567 (2004).

91. *Id.*

92. *Richtersveld Cmty. & Others v. Alexkor Ltd. & Another*, Case No. 488/01, BCLR, Supreme Court of Appeal, ¶ 9 (Mar. 24, 2003).

93. S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist*

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peoples' customary law as a necessary basis for the recognition of indigenous rights on the international level (regional-international level).<sup>94</sup> There, the court acknowledged indigenous peoples' rights mainly based on customary law.<sup>95</sup>

The court further ruled that the right to property also included indigenous peoples' land rights and the protection of their traditional land.<sup>96</sup> The court also noted that under Article 21 of the American Convention on Human Rights<sup>97</sup> the right to property also includes property rights held collectively by indigenous groups under customary law.<sup>98</sup> Accordingly, this decision also recognizes customary law of the *Mayagna (Sumo) Awas Tingni* as a source of land rights.<sup>99</sup>

## CONCLUSION

Ultimately, these cases—around the world—show a clear practice of recognizing indigenous land rights through or based on customary law. Moreover, the common denominator for recognizing indigenous rights—in all cases—is according to indigenous peoples' customary law. Courts from countries around the world have recognized indigenous rights according to specific indigenous peoples' customary laws.

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*Trend*, COLO. J. OF INT'L ENVTL. L. & POL'Y, 237, 252 (2005), <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2181&context=articles>; Elsana, *Dispossession and Recognition*, *supra* note 5, at 188.

94. Jennifer A. Amiot, *Environment, Equality, and Indigenous Peoples' Land Rights in the Inter-American Human Rights System: Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, 32 ENVTL. L. 873, 878-79 (2002).

95. Anaya, *supra* note 93, at 253.

96. *Id.*

97. Organization of American States, American Convention on Human Rights, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

98. The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79, ¶ 164 (2001).

99. See Organization of American States, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources*, Inter-Am. Comm'n H.R., ODA/Ser.L./V/II., doc. 56/09, ch. V-VI (Dec. 30, 2009), <https://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf>; Andres E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, 16 AM. U. INT'L L. REV. 269-313 (2001); *Off the Map: Land and Housing Rights Violations in Israel's Unrecognized Bedouin Villages*, *supra* note 72, at 104-05.

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Although history provides little doubt that the search for Bedouin land rights in Israeli law or in Ottoman law will not succeed, Bedouin land rights can plausibly be found in Bedouin customary law. Thus, by recognizing these land rights established through Bedouin customary law, the State of Israel—like other countries—can find a basis for granting true recognition of Bedouin traditional land rights.